COMMENTS

THE LAZARUS EFFECT: COULD FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT RESURRECT ECCLESIASTICAL SANCTUARY?

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I. INTRODUCTION

Imagine that a fugitive on the run from Florida Department of Law Enforcement agents confronts a parish priest in Clearwater and begs for shelter from his pursuers. He claims that he is innocent of the crime for which they accuse him and swears that the agents are pursuing him for personal reasons. He fearfully tells the priest that the agents will kill him if they apprehend him, because he knows something that they do not want released to the media. As the priest and the fugitive speak in hushed tones in front of the altar, a police car screeches to a halt outside the church. The priest bids his charge to wait and steps outside, securing the door behind him. He confronts the officers and tells them not to enter and take the man by force. The priest has given him sanctuary in God's house. Now what happens? Can the officers push the priest aside, break down the church door, and apprehend the fugitive as he cowers in front of the altar? Can the fugitive take refuge inside the church and escape secular justice when he may in fact be guilty of the crime of which the government accuses him? What about the

priest? Does he not have the right to practice his religion, which commands that he help those in need? This Comment will consider these questions.

Notions of the Church[1] as a sanctuary have received a lukewarm response in the United States legal system, despite a history of legal, ecclesiastical sanctuaries from secular justice dating to pre-Christian days elsewhere in the world. The United States Supreme Court addressed the topic only once to date. There, the majority did not even consider ecclesiastical sanctuary an issue, but the dissent did.[2] Attempts to revive the practice (which was popular in medieval England, among other places) failed each time religious claimants raised sanctuary as a defense in the lower courts in the United States[3] despite the fact that the United States Constitution explicitly protects the free exercise of religious belief by American citizens.[4] However, since 1989, free exercise law has changed greatly as the Supreme Court, Congress, and the states have fought over the degree of scrutiny judges must employ to protect free exercise without preventing government from functioning.

In 1990 the United States Supreme Court held in *Employment Division, Department of Human Resources v. Smith*[5] that a state action burdening religious belief was acceptable as long as it was based on a neutral law of general applicability.[6] An outraged Congress was quick to respond, and from 1993 to 1997 the Religious Freedom Restoration Act of 1993 (RFRA) mandated that courts protect, with the strictest possible scrutiny, religious beliefs adversely affected by government action.[7] Though the Court struck

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1. Throughout this Comment, the Author's use of "Church" refers to Christianity and the Catholic Church in particular, with the exception of one specific reference to the Church of England.

2. *Warden v. Hayden*, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting). In *Warden*, a Maryland appellate court overturned a defendant's armed robbery conviction based on a seizure of personal items during a search of his house incident to his arrest immediately following the robbery. *Id.* at 296–298. The United States Supreme Court reversed, finding that the evidence was properly obtained. *Id.* at 298. Justice William O. Douglas dissented on the ground that the evidence seized was personal property subject to protection from warrantless search and seizure, but he stated that the Fourth Amendment did have limits. *Id.* at 320–321 (Douglas, J., dissenting). Specifically referring to the practice of ecclesiastical sanctuary in Moroccan mosques, he wrote, "We have no such sanctuaries here." *Id.* at 321.

3. The most recent example is *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). For a discussion of *Aguilar*, see *infra* notes 93 to 104.

4. U.S. Const. amend. I.

5. 494 U.S. 872 (1990).

6. *Id*. at 879–882.

7. *The Religious Freedom Restoration Act of 1993*, 42 U.S.C. §§ 2000bb–2000bb-4 (1994).

the RFRA down, as applied to the states, shortly thereafter,[8] some states created their own versions.[9] The RFRA's spirit lives on in Florida with the Religious Freedom Restoration Act of 1998 (Florida RFRA), which mandates strict judicial scrutiny where government action adversely affects religious practice and is based on the Florida Constitution rather than on federal law.[10] But the Florida RFRA does more than its federal predecessor, it explicitly applies strict scrutiny to actions motivated by religious belief, resulting in an expansion of free exercise protections.[11] Could this new statute resurrect ecclesiastical sanctuary?

This Comment explores the "Lazarus effect," the Author's term for the continuing cycle of birth, death, and resurrection of ecclesiastical sanctuary.[12] It will analyze the Florida RFRA's possible effect on the hypothetical character who sought ecclesiastical sanctuary from state justice and detail the history of the Anglo-American version of this peculiar tradition, giving an overview of its beginnings in English jurisprudence and its appearances in United States history. Next, this Comment will acquaint the reader with modern free exercise law in the United States as it developed in the latter twentieth century, turning to the advent of religious freedom protection statutes in the states and federal government following *Smith*. It will focus on the Florida RFRA, reviewing the single time, as of this writing, that a court has construed this new statute and

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8. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

9. William W. Bassett, *Religious Organizations and the Law* vol. 1, § 1:8, 1-32.10 to 1-32.11 (West 1999). They are Alabama, Connecticut, Florida, Illinois, and Rhode Island. *Id*. at § 1:8, 1-32.11 n. 4.

10. Fla. Stat. §§ 761.01–761.04 (2000).

11. *Id*. § 761.03(1). Before the Florida RFRA, the prevailing view was that of the United States Supreme Court, which stated as long ago as 1878 that while a government action could not interfere with a religious *belief*, it *could* interfere with an *act* motivated by a religious belief. *Reynolds v. U.S.*, 98 U.S. 145, 166 (1878); *see Smith*, 494 U.S. at 879 (reaffirming *Reynolds*, 98 U.S. at 145). Nothing in the federal version of the RFRA changed that. However, the Florida RFRA defines "exercise of religion" to include acts substantially motivated by religious belief. Fla. Stat. § 761.02(3).

12. The Author likens the cycle of birth, death, and resurrection of ecclesiastical sanctuary to the biblical story of Lazarus of Bethany, who Jesus Christ is said to have raised from the dead.

> And Jesus lifted up his eyes, and said, Father, I thank thee that thou hast heard me.
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> And I knew that thou hearest me always: but because of the people which stand by I said it, that they may believe that thou hast sent me.
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> And when he thus had spoken, he cried with a loud voice, Lazarus, come forth.
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> And he that was dead came forth, bound hand and foot with graveclothes: and his face was bound about with a napkin. Jesus saith unto them, Loose him, and let him go.

John 11:41–44 (King James).

take the position that the Florida RFRA, in light of modern free exercise jurisprudence and religious tradition, could be applied successfully to one who seeks ecclesiastical sanctuary in modern times.

II. ANTECEDENTS: SANCTUARY IN THE ANGLO-AMERICAN TRADITION

A. Where Did Sanctuary Begin?

The Church of England defined the "right" of sanctuary simply as one's "right to take refuge in a church."[13] Ecclesiastical, or church-supported, sanctuary has a long history in the Church, descending from the Jewish tradition of protecting an unintentional killer from the custom of the blood feud, that is, from being legally killed by the deceased's nearest relative for revenge.[14] It was not intended to allow a *real* criminal, such as a murderer, to escape justice in the form of his own death at the hands of his victim's family.[15] The sanctuary privilege was one result of Saxon England's mass conversion to Christianity.[16] Many scholars believe that St. Augustine was responsible for introducing ecclesiastical sanctuary there after he began his missionary work among the Saxons in the sixth century A.D.[17] The Saxon kings adopted the idea, beginning in 597 A.D. with King Æthelberht, who created enhanced penalties for disturbing the peace of the church, its property, or its prelates.[18]

The Saxon kings made ecclesiastical sanctuary an integral part of the English judicial system for many of the same reasons as did the Jews, and incidentally, the Greeks and Romans also had a form of ecclesiastical sanctuary.[19] The blood feud was as prevalent in Saxon England as it was in those prior civilizations.[20] Like the

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13. *A Dictionary of Christian Antiquities* vol. 2, 1840 (William Smith & Samuel Cheetham eds., J.B. Burr Publg. Co. 1880).

14. Jorge L. Carro, *Sanctuary: Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. Cin. L. Rev. 747, 750 (1986).

15. *Id*. at 751.

16. *Id*. at 753.

17. *Id.*

18. *See* Paul Halsall, *Internet Medieval Sourcebook*: *The Laws of Æthelberht* <http://www.fordham.edu/halsall/source/560-975dooms.html> (last modified Jan. 8, 2000) (listing the laws established by King Æthelberht in the days of St. Augustine).

19. *See* Carro, *supra* n. 14, at 751–752 (The Greeks primarily used this divine protection for soldiers escaping from defeat, while the Romans foreshadowed the later Christian use by protecting slaves and criminals.).

20. *Id*. at 751–755.

Greeks and Romans, the Saxons wanted to protect against civil disorder and allow the king's justice time to work.[21] William the Conqueror adopted the then-existing Saxon laws after 1066, and with those laws, he also adopted the sanctuary practice.[22] After his reign, Norman kings continued to support ecclesiastical sanctuary.[23] By the time of King Henry III, English common law allowed a fugitive to take sanctuary anywhere the clergy conducted divine services or in consecrated cemeteries by physically entering the consecrated place.[24] If no consecrated ground existed outside the house of divine worship, the seeker could obtain sanctuary by grasping the church's door handle or knocker.[25] However, as in ancient Jewish, Greek, and Roman practices, English common law sanctuary had its limits. The law denied ecclesiastical sanctuary to non-Christians, and those who took sanctuary admitted their crimes as a condition of the refuge they sought.[26]

By the thirteenth century, the law mandated forty days as an adequate amount of time for the privilege to last.[27] After the time period elapsed, the secular authorities could starve the fugitive out of his sanctuary, and any person giving him food was guilty as an accessory after the fact.[28] When the fugitive's time ended, he could surrender to the secular authorities, attempt to escape and reach another sanctuary (where his time would begin anew), or accept exile, known as "abjuration," from the realm, a practice open to many abuses.[29] Though inconsistent with Church canon law, this version of sanctuary became settled in England, and ecclesiastical authorities accepted it in 1261 A.D.[30] Thus, it became apparent that the liberties of the Church might be immutable, but in practice, the sovereign controlled their extent. The balance of power was swinging away from the Church.

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21. *Id.* at 759.
22. *Id*. at 759–760.
23. *Id*.
24. J.H. Baker, *The English Law of Sanctuary*, 2 Ecclesiastical L.J. 8, 9 (1990).
25. *Id*.
26. Carro, *supra* n. 14, at 761 n. 119.
27. Baker, *supra* n. 24, at 9. The original practice of sanctuary was intended to provide breathing space, to give time for the legal system to work peacefully. Carro, *supra* n. 14, at 760.
28. Baker, *supra* n. 24, at 9.
29. *Id.* However, a person declaring sanctuary admitted his crime. If an abjurer escaped and was apprehended, he was subject to the death penalty. Carro, *supra* n. 14, at 761.
30. Baker, *supra* n. 24, at 9 n. 10.

As time progressed, sanctuary began to apply more often than not to common criminals attempting to use the system to protect illegal activities rather than those in flight from the blood feud. One early abuse was by debtors attempting to flee their creditors, which led to a statute by Edward I allowing for forfeiture of the debtor's properties.[31] By the time the Tudor kings came to power in the late fifteenth century, public opinion was widespread that the Church was openly sheltering criminal activities in defiance of sanctuary's original intention — to apply only to those fleeing vigilante justice.[32] Thanks to this perception among the people, in 1504 King Henry VII successfully petitioned Pope Innocent VIII to allow secular authorities to enter consecrated ground and seize one who committed a new crime against the Crown while under Church protection.[33] The king further limited sanctuary to its earlier purpose of protecting life and limb alone.[34] King Henry VII's successors would finally beat the Church. His son, Henry VIII, broke with Rome and established the Anglican Church.[35] By 1624, Parliament took the final step and abolished sanctuary in England.[36]

B. Lazarus Comes to the United States: Sanctuary as a Movement of Conscience

Formal, organized provision of sanctuary to fugitives has been rare in United States's churches. Its old, formalized practice was unpopular in late-medieval England, and it should come as little surprise that the seventeenth century colonists did not re-establish sanctuary in their brave new world.[37] The early New England colonists were people whose philosophy fused acts of religious conscience and acts of physical labor.[38] These refugees from the

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31. Carro, *supra* n. 14, at 765.
32. Baker, *supra* n. 24, at 11.
33. Carro, *supra* n. 14, at 765.
34. *Id.*
35. Ecclesiastical L. Socy. of Am., *Website for Canon Law in the Anglican Communion, Act of Supremacy 1534 (26 Henry VIII, c. 1)* <http://canonlaw.anglican.org/act.sup.henry8.htm> (last updated Jan. 18, 1999).
36. Baker, *supra* n. 24, at 13.
37. *Id.* at 11. The Massachusetts Bay Colony, for example, was established in Massachusetts in 1628, four years after Parliament abolished sanctuary. Microsoft Corp., *Massachusetts Bay Company* <http://encarta.msn.com/find/Concise.asp?ti=01739000> (accessed Nov. 30, 2000). It was seen as a religious refuge by its first governor. *Id*. The abuses of the sanctuary practice in England would have been a very recent memory for them.
38. J. Dennis Willigan, Student Author, *Sanctuary: A Communitarian Form of Counter-culture*, 25 Union Seminary Q. Rev. 517, 519–520 (1970).

English state religion saw the New World as a religious refuge from the persecutions they had experienced in the home country, and at least one current scholar believes that this is one reason the English settlers did not revive formal ecclesiastical sanctuary in colonial America.[39]

Despite this, anecdotal evidence exists of at least one *informal* provision of ecclesiastical sanctuary by the Puritans occurring in Connecticut during the 1660s.[40] This involved the flight of "two officers of the Cromwellian army" from King Charles II.[41] Though the Puritans did not openly provide Cromwell's men ecclesiastical sanctuary from the king's warrant, the king's men were, for some reason, unable to locate their quarry after the Reverend John Davenport's stirring sermon about refugees to his congregation.[42] The Cromwellians were, in fact, sheltered for the next ten years by the Puritans residing in Massachusetts and Connecticut until they died of natural causes.[43] The Cromwellians received de facto sanctuary; it is certain that the king would not have allowed them to live had they been apprehended.[44] However, the Puritans' act was more an act of civil disobedience to a hated regime than an invocation of ecclesiastical power. This pattern of civil disobedience became the hallmark of the ancient sanctuary privilege's employment by the churches in the United States after the seventeenth century, something of a tradition itself. It will become apparent how very crucial such established traditions are to protect religious freedom under current Florida law.[45]

The first organized provision of sanctuary by American churches to fugitives from secular justice came during the abolitionist movements in the 1850s.[46] The Framers drafted the United States Constitution to allow recovery of escaped slaves.[47] Congress drafted laws to enforce these provisions, and United States Mar-

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39. *Id*. at 520.

40. Ignatius Bau, *This Ground Is Holy: Church Sanctuary and Central American Refugees* 159 (Paulist Press 1985).

41. *Id*.

42. *Id.* Reverend John Davenport's sermon allegedly was on the text of *Isaiah* 16:3, which reads, "Hide the fugitives, do not betray the refugees." *Isaiah* 16:3 (King James).

43. Bau, *supra* n. 40, at 159.

44. *Id*.

45. *Infra* nn. 239–265 and accompanying text.

46. *See generally* Bau, *supra* n. 40 (discussing the history of sanctuary and the abolitionist movement); Willigan, *supra* n. 38 (stating that churches played a major role in concealing fugitive slaves).

47. U.S. Const. art. IV, § 2; Willigan, *supra* n. 38, at 521–522.

shals were delegated to supply the muscle in returning escapees to their taskmasters.[48] Churches throughout the nation became involved in the abolitionist movement, both as sanctuaries for escaped slaves and as centers for anti-slavery activism.[49] Their rhetoric included Biblical text and arguments of conscience, similar to those Reverend Davenport used 200 years before, to justify protecting the escaped slaves despite secular law to the contrary.[50] The federal government responded with arrests and prosecutions of abolitionists and fugitive slaves whenever they were found.[51] The abolitionists foreshadowed later sanctuary movements in the United States by not defending their acts as the free exercise of religious belief, but as acts of conscience against a moral wrong committed by the government, as the Puritans had before them.[52] Reverend William Marsh exemplified this in an 1850 Thanksgiving sermon against the Fugitive Slave Act.

> When government drives out of its sphere, encroaches on the conscience, and enjoins moral wrong, then His word lifts its voice, like a trumpet, in unison with an outraged conscience, and warns us in no uncertain sounds, that we ought to obey God rather than men.[53]

One hundred years later, Reverend Marsh's echoes would call forth new sanctuaries of conscience.

C. Twentieth Century Sanctuary: The Last Hurrah for Sanctuaries of Conscience

One could argue that the abolitionists were successful in provoking a war to end slavery. Certainly, their actions raised tensions between the slave and free states in the 1850s. A new sanctuary movement, coming a hundred years later, perhaps helped *stop* another war by raising public conscience, though it ultimately faded away with the war it helped end. Government defeated yet another sanctuary movement in the 1980s,[54] though its story raises

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48. Willigan, *supra* n. 38, at 521–522.
49. *Id*. at 522.
50. *Id.*
51. *Id.* at 524. In one case, two students received twelve years imprisonment. *Id.*
52. *Id.* at 522. Willigan described the abolitionists' use of documents as diverse as the Declaration of Independence and the Golden Rule to illustrate this point. *Id*.
53. *Id*. at 527.
54. *Infra* nn. 70–105 and accompanying text.

more troubling questions. The latter half of the twentieth century saw a new resurrection of the Lazarus, which is ecclesiastical sanctuary. Over a twenty-year period, beginning in 1967, two similar movements drew upon the abolitionists' experiences to shelter first military deserters and later Central American refugees from government.[55] This period is important because, between 1967 and 1985, American ecclesiastical sanctuary supporters gradually moved from seeing their actions as conscience- motivated civil disobedience to defending them as constitutional free exercise of religious belief.

1. Sanctuary during Vietnam: Not a Legal Force but a Moral Force Alone

It is oddly fitting that the first twentieth century sanctuary movement began in Boston, the scene of an anti-slavery riot in 1854 that resulted in the death of one man and severe damage to the city courthouse.[56] Following the 1854 riot, Boston religious leaders openly called for a revolution to protect their followers' right to resist an evil government's actions and for true Christians to protect escaped slaves as a matter of conscience.[57] One hundred and thirteen years later, 300 draft resisters turned over their draft cards to members of the clergy at the Arlington Street Church, not far from the scene of the 1854 violence.[58] On that day in 1967, Reverend William S. Coffin called for churches to shelter the "most conscientious among [them]," those who would refuse military induction.[59]

From the beginning, the churches that provided sanctuary to draft resisters and military deserters did so as a matter of conscience, in the tradition of the abolitionists and Reverend Davenport's Puritan congregation. Another 1967 sanctuary church in California stated it would provide food and lodging to draft resisters inside the church to dramatize the moral confrontation when the authorities intervened.[60] These churches explicitly disclaimed any

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55. *Infra* nn. 56–105 and accompanying text.

56. Willigan, *supra* n. 38, at 527–528. It seems fitting to the Author that the later call to shelter draft resisters from government action followed in the same place that the earlier calls by religious leaders to fight injustice occurred.

57. *Id.* at 529.

58. *Id.* at 531.

59. *Id*. at 532.

60. *Id.* at 533.

intent to defend their actions by resorting to legal means.[61] In 1968 Victor Jokel of the Arlington Street Church stated that "the invocation of sanctuary can have no legal force"; its force was moral, a force of the conscience.[62] With this statement, Jokel echoed Reverend Marsh's sermon against the Fugitive Slave Act.[63] Sanctuary was once again a way to protest an ungodly government.

Given that the sanctuary churches of 1967 openly admitted their defiance of federal laws, it was only a matter of time before the government did something. It chose to overreact. On May 20, 1968, the Arlington Street Church offered sanctuary to William Chase, an absent-without-leave soldier, and to Robert Talmanson, who had lost his appeal of a conviction for induction refusal.[64] Three days later, the local United States attorney forcibly entered the church with three federal marshals, pushing past its priest and taking Talmanson from the pulpit.[65] Boston police had to extricate the federal officers and their captives from the resulting mob violence with tear gas.[66]

The following month, a similar scene played out in Providence, Rhode Island when Federal Bureau of Investigation agents broke into a church to arrest two people who refused induction and several protesters.[67] In Hawaii a year later, military police forcibly entered two off-post churches to retrieve absent-without-leave servicemen.[68] None of the churches tried to defend their actions legally.[69] Given Jokel's statement and that of the California church, they actually

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61. *Id*. at 533–534.

62. *Id*.

63. *Supra* nn. 52–53 and accompanying text (describing Reverend Marsh's sermon against the Fugitive Slave Act).

64. Willigan, *supra* n. 38, at 533. Induction refusal is a refusal to report to be taken into the armed forces. *Id*. at 533–535. It was a crime under the laws governing the military draft in the 1960s. *Id*.; *supra* nn. 58–59 and accompanying text.

65. Willigan, *supra* n. 38, at 534.

66. *Id.*

67. *Id.* at 535.

68. *Bridges v. Davis*, 443 F.2d 970, 972 (9th Cir. 1971).

69. The Author has, without success, conducted extensive searches in various printed materials and on-line sources in an attempt to locate any record of legal action by the churches to protect their buildings. Given the lack of such actions, *Bridges* merits a closer look. In *Bridges*, three ministers filed suit pursuant to being denied access to prisoners in the Pearl Harbor Naval Base and Kanehoe Bay Marine Air Station installation detention facilities after their involvement in a sanctuary episode. 443 F.2d at 973. The Ninth Circuit affirmed the district court, which upheld the military action. *Id.* at 974. Interestingly, the court mentioned, only in passing, the earlier forced entry by military police into churches located off-post as if this action by military personnel on civilian property was of no consequence. *Id.* at 972.

seemed to welcome violent government intervention as dramatizing what they saw as Vietnam's moral wrongness.

As these examples illustrate, in most cases of church assisted sanctuary during Vietnam, the government merely had to exert force to obtain its immediate goal — capture of the fugitive at any cost. An unanswered question to this day is *why* the government resorted to displays of military and paramilitary force against nonviolent religious protest. It is unclear whether these repeated violations of the Church's declared "moral sanctuaries" affected the conduct of the United States during the war in South Vietnam in any real way. However, given the generally violent backdrop of political events in the United States during Vietnam, one can only speculate that if the churches had stood on their own traditions and appealed to the courts for help, perhaps such extravagant and unnecessary displays of force would have been curtailed.

History intervened with the Vietnam-era sanctuaries, as it had with the abolitionists, before the legal system ever really addressed their legitimacy. After the United States withdrew from South Vietnam, the need for refuge of military deserters and draft protestors died out. With it, the sanctuary churches had a short respite. Its conclusion opens a window into the question of what a legal challenge might have produced had the churches pressed a free exercise claim against the government.

2. Sanctuary for the Central Americans: Setting the Stage for Free Exercise

In the 1970s and early 1980s economic conditions in Central America were deteriorating, with most of the natural resources in the hands of a privileged few.[70] Repressive political regimes were in control of most nations in the region, and they viewed religious and humanitarian groups as subversive.[71] In El Salvador, on March 24, 1980, Salvadoran government forces assassinated the Archbishop of San Salvador[72] while he celebrated Mass.[73] Nine months later, Salvadoran national guardsmen raped and killed four American

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70. Natalie Lile, Student Author, *The Religious Freedom Restoration Act: Could It Have Helped the Sanctuary Movement?*, 11 Geo. Immigr. L.J. 199, 201 (1996).

71. Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* 21 (U. Minn. Press 1995).

72. The Archbishop's name was Oscar Romero. Lile, *supra* n. 70, at 201.

73. *Id*.

churchwomen.[74] Refugees began to flood north to escape the repression and economic decline.[75]

On March 24, 1982, Reverend John Fife celebrated the second anniversary of the Salvadoran Archbishop's assassination by declaring his Arizona church a sanctuary for Central American refugees.[76] He sent a letter to the United States Immigration and Naturalization Service (INS) advising them of the church's action and staged a press conference for the news media.[77] This western sanctuary movement started its work by helping illegal Central American immigrants after the INS arrested them.[78] It went on to assisting the illegal immigrants over the border and sheltering them from immigration authorities.[79] In response, INS officials went from a wary "hands off" policy to an extensive undercover investigation and then to prosecution of the primary participants in the Arizona movement,[80] marking a shift from sanctuary as a movement of conscience back to its historic roots as a divine right.

The place where the western sanctuary movement began would be the place the government chose to fight. Nine months after Reverend Fife's church began sheltering Central American refugees, an influential television news program, Central Broadcasting Station's *60 Minutes*, aired a segment sympathetic to the sanctuary movement.[81] The reporters depicted the federal government, and the INS in particular, as callous and unfeeling, unjustly persecuting women and children.[82] A different organization aired a second program seven months later,[83] depicting the INS unfavorably, condemning the agency, and sympathizing with the work of Jim Corbett, another of the Arizona movement's organizers.[84] According to one contemporary scholar, the INS's western district director, Harold Ezell, "was infuriated."[85] Ezell gave orders to the Phoenix INS office that resulted in the then-existing small-scale inquiry

74. *Id.*
75. *Id*.
76. Bau, *supra* n. 40, at 10.
77. Cunningham, *supra* n. 71, at 32–33.
78. Bau, *supra* n. 40, at 10.
79. *Id.* at 11.
80. Cunningham, *supra* n. 71, at 36–37, 43–45.
81. *Id*. at 36 (citing *60 Minutes* (CBS Dec. 12, 1982) (tv series)).
82. *Id.*
83. *Id.* at 37.
84. *Id.*
85. *Id.*

being expanded into a full-blown undercover investigation of the Arizona churches involved in the sanctuary movement.[86]

The INS first called its operation "The Underground Railroad," which it later changed to "Operation Sojourner," a ninety-day undercover probe to infiltrate the Arizona movement.[87] The INS's role was adversarial, surreptitiously taping conversations between movement members and assisting in the transport of illegal refugees between safe locations.[88] By February 1984 this probe resulted in the arrest of Stacey Lynn Merkt, a prominent worker in the Arizona movement, and John Elder, an operator of a Catholic-supported halfway house in Texas.[89] Merkt received federal probation. By December 1984 she had violated supervision conditions with a new arrest for sanctuary-related activities, and she was resentenced to federal prison.[90] Elder also received a prison term for his sanctuary activities.[91] In January 1985 a federal grand jury handed down a seventy-one count indictment for sixteen more people involved in the Arizona movement, alleging numerous immigration law violations.[92] The stage was set for open confrontation between church and state.

The United States District Court for the District of Arizona proved hostile to both the sanctuary movement's motivations and its planned legal tactics, granting the prosecution's motion in limine to preclude the defendants from asserting that their actions were protected by the free exercise clause.[93] The court ruled that the defendants' actions were not justified by religious belief and, therefore, not protected under the free exercise clause, though it considered the INS to have acted unacceptably.[94] As this action stripped them of their best defense, the defendants were inevitably convicted and sentenced to varying terms of probation.[95] The government's strategy to prosecute the case as one of alien smug-

86. *Id.*
87. *Id*.
88. *Id.* at 37–38.
89. Bau, *supra* n. 40, at 80; Cunningham, *supra* n. 71, at 43.
90. Cunningham, *supra* n. 71, at 43.
91. Bau, *supra* n. 40, at 83. This was later reduced to 150 days in a halfway house. *Id*.
92. Cunningham, *supra* n. 71, at 44.
93. *Aguilar*, 883 F.2d at 671; Cunningham, *supra* n. 71, at 54. This marked the first time that an American church had attempted to claim legal grounds for sanctuary.
94. Cunningham, *supra* n. 71, at 54–55.
95. *Id.* at 61.

gling — no more, no less — had succeeded.[96] The defendants appealed.[97]

Like the trial court, the Ninth Circuit was unpersuaded that provision of sanctuary to the Central American refugees was a defensible free exercise of sincere religious belief.[98] The majority opinion recalled Merkt's trial, remarking that though clergy had testified, it was never suggested that devout Christian belief required participation in sanctuary and that the movement could have worked within the law rather than outside of it.[99] The court held that the government had an overriding interest in policing its borders and that the laws imposing criminal liability on those who would assist illegal immigrants were essential to border control.[100] Less drastic means, the judges reasoned, would not have achieved this purpose.[101] Finally, the Ninth Circuit declared that even if it did heed the defendants' argument that their sincerely held beliefs merited an exemption to immigration laws, the exemption ultimately would extend to such a large number of the Christian faith's followers that it would become unworkable[102] and would end the government's ability to police its borders.[103]

Though a lost cause, *United States v. Aguilar*[104] nonetheless was a watershed moment for ecclesiastical sanctuary. From the mid-seventeenth century until the 1980s, whenever American churches resorted to sheltering refugees from civil authorities, they did so as a way of expressing civil disobedience. Sanctuary ended as a *legal* force in Anglo-American jurisprudence in 1624 by an act of Parliament.[105] However, *Aguilar* signaled a drift by Christian believers back toward the traditional definition of sanctuary as a divine right — one that stemmed from its historical roots as a legally recognized way to mitigate the effect of harsh secular laws and one that was ostensibly protected by the Constitution's guarantee of free exercise of religious belief. Why did the Ninth Circuit not give more weight to the defendants' argument that their protected exercise of religious faith motivated their actions? The answer to that impor-

96. *Id.* at 55.
97. *Aguilar*, 883 F.2d at 671.
98. *Id*. at 694.
99. *Id.*
100. *Id.* at 694–695.
101. *Id.* at 695.
102. *Id.* at 695–696.
103. *Id.* at 696.
104. 883 F.2d 662 (9th Cir. 1989).
105. Baker, *supra* n. 24, at 13.

tant question lies in the web of United States free exercise jurisprudence.

III. FREE EXERCISE JURISPRUDENCE IN THE UNITED STATES: BEFORE 1990

A. Strict Scrutiny and Its Dual Threshold

One cannot understand the Ninth Circuit's decision in *Aguilar* without understanding free exercise law as it stood then. Before 1990, the United States Supreme Court had a test for state actions impinging on free exercise of religion.[106] It was a modified version of the constitutional strict scrutiny test, which provided that once a religious claimant showed a law or government action restricted his free exercise rights, the government had the burden of showing that it had a compelling purpose and its means were the least drastic to achieve that purpose.[107] The government could not get around the least drastic means requirement by calling its action neutral, acting blindly to religion.[108]

However, the Court dramatically altered the test in 1983, implicitly shifting the burden of proof from the government to the free exercise claimant.[109] The advent of the religious freedom protection statutes, and particularly the Florida RFRA after 1990, changed the law once more, placing the burden back on the government.[110] In this Section, the reader will obtain the tools to understand what the strict scrutiny test for free exercise and government conflicts is, where it came from, how a claimant convinced a court to apply the test before 1983, and why that year's change in the law affected *Aguilar* for the worse. As the elements fall into their proper places, it will become clear that the Ninth Circuit's decision in *Aguilar* did not settle the ultimate question of sanctuary's legitimacy in American justice thanks to subsequent changes in free exercise law.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[111] The mean-

106. Laurence H. Tribe, *American Constitutional Law* § 14-13, 1251 (2d ed., Found. Press 1988).
107. *Id*.
108. *Id.* at § 14-13, 1256–1257.
109. *Id.* at § 14-13, 1261.
110. Fla. Stat. §§ 761.01–761.04.
111. U.S. Const. amend. I.

ing of these simple words is among the most highly litigated of constitutional issues. The Supreme Court applied the Free Exercise Clause to the states through the Fourteenth Amendment's Due Process Clause.[112] The Framers intended government not to interfere with, or dictate, religious belief; church and state were, therefore, separated in the First Amendment.[113]

The United States Supreme Court applied the Free Exercise Clause to the states in 1940[114] in *Cantwell v. Connecticut*.[115] This decision culminated a twenty-year development of free exercise jurisprudence as being tied to guarantees of liberty implicit in the Constitution, starting with the Court's dicta in *Meyer v. Nebraska*.[116] In *Meyer*, Justice James McReynolds remarked that "liberty" included the "freedom 'to worship God according to the dictates of [one's] own conscience.'"[117] This view of the Fourteenth Amendment's Due Process Clause fits in well with the Free Exercise Clause's mission to guarantee freedom of conscience by prohibiting government compulsion in matters surrounding "religious belief," a term the Court describes loosely.[118] In fact, in *Thomas v. Review Board of the Indiana Employment Security Division*,[119] the Court stated that a religious belief "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[120] University of San Francisco Law Professor William Bassett described the Court's apparently current answer to the question of what is and what is not religious belief in the following manner:

> [First,] belief that derives from an express foundation of its divine origin; [second,] belief motivating decisions of authorities respecting internal matters in organized religious institutions; and [third,] belief that derives from doctrine respecting ultimate verities among persons belonging to organizations with structure and ministries analogously religious.[121]

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112. Tribe, *supra* n. 106, at § 14-1, 1154.

113. *Id.* Professor Laurence H. Tribe generally refers to this concept as "religious autonomy." *Id*.

114. *Id.* at § 14-2, 1156.

115. 310 U.S. 296 (1940).

116. 262 U.S. 390, 399–400 (1923).

117. Tribe, *supra* n. 106, at § 14-2, 1156 n. 4 (quoting *Meyer*, 262 U.S. at 399).

118. *Id.* at § 14-3, 1160.

119. 450 U.S. 707 (1981).

120. *Id*. at 714.

121. Bassett, *supra* n. 9, at vol. 1, § 1:9, 1-36 to 1-37.

Though the organized Church in *general* would seem to meet these standards, the Ninth Circuit categorized the western sanctuary movement in *Aguilar* as expressly *not* meeting the standard for a belief protected by free exercise.[122] However, the standard is a loose one.

Assuming for the moment that sanctuary *could* fall under the accepted definition of religious belief, thus deserving free exercise protection, to understand *Aguilar* it is necessary to examine free exercise law as it developed between 1940 and 1990. The threshold inquiry for a person seeking protection on free exercise grounds from state action involves the following two prongs: "(1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the state requirement."[123] Prior to 1983, if the claimant made this showing, the burden of proof shifted to the state.[124]

In considering these requirements in the sanctuary context, one should remember that the Free Exercise Clause does not provide absolute protection to a religiously motivated *action*; it only protects religious *belief* absolutely.[125] An example of this can be found in John Elder's case, where his affirmative *act* of sheltering the refugees was not protected by his sincere Christian belief.[126] Regardless of this result, requests for free exercise protection of religiously motivated actions will be scrutinized to ensure the motivating religious belief is sincere.[127]

The United States Supreme Court reviewed this "sincerity of belief" half of the dual threshold[128] in *United States v. Ballard*.[129] In *Ballard*, the defendants represented themselves as divine messengers to solicit money and were convicted of fraud.[130] The jury was not allowed to consider the truth or falsity of the defendants'

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122. 883 F.2d at 694. The court noted the testimony of members of the clergy in the earlier trial of Merkt, "None suggested that devout Christian belief mandates participation in the 'sanctuary movement.'" *Id.* The Ninth Circuit was not persuaded that the Immigration Act unduly burdened the defendants' free exercise rights. *Id*.

123. Tribe, *supra* n. 106, at § 14-12, 1242.

124. *Id*. at § 14-13, 1261. This "dual threshold" evolved between 1940 and 1972. *Id*. at § 14-12, 1242–1246.

125. *Id.* at § 14-12, 1243 (citing *Reynolds*, 98 U.S. at 166).

126. *U.S. v. Elder*, 601 F. Supp. 1574, 1577–1578 (S.D. Tex. 1985).

127. Tribe, *supra* n. 106, at § 14-12, 1242.

128. *Id.* at § 14-12, 1244.

129. 322 U.S. 78 (1944).

130. *Id.* at 79.

religious convictions in making its decision.[131] The trial court expressly withheld the defendants' belief in its charge to the jury.[132] The Supreme Court affirmed the trial court and reversed the court of appeals finding that the verity of the defendants' beliefs should have gone to the jury.[133] Justice William O. Douglas's opinion stated that a judge or a jury cannot determine a religious belief's intrinsic truthfulness, but it can decide from extrinsic evidence whether the defendants sincerely held that belief.[134] In *Ballard*, a great deal of extrinsic evidence existed, both in the fraudulent form-letter testimonials composed by the defendants used in soliciting money and in the fact that the defendants did not call their system of belief a "religion" until being placed on trial.[135] Thus, following *Ballard*, a court reviewing such an allegation of a state burden on religious belief cannot consider the belief's truthfulness, but will limit its inquiry to extrinsic evidence to determine the claimant's sincerity and ensure he is not merely trying to work his will on the state.[136]

The second element in this dual threshold inquiry is its key issue — the burden to the religious believer by the government law or action.[137] The burden and sincerity issues are intertwined closely, because a burden upon the core values of a religious faith poses a far more serious free exercise problem than does a church-state conflict resulting in mere inconvenience to the faithful.[138] The Supreme Court's two most important free exercise decisions before 1990, *Sherbert v. Verner*[139] and *Wisconsin v. Yoder*,[140] illustrate this point. In *Sherbert*, a South Carolina government agency denied unemployment benefits to a Seventh-day Adventist whom her employer had dismissed for refusal to work on Saturday, the Adventists' Sabbath day.[141] In *Yoder*, members of the Old Order Amish faith defied Wisconsin's compulsory school attendance law by not sending their children to public schools after their eighth-grade year.[142] In both

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131. *Id*. at 84.
132. *Id*.
133. *Id.* at 85–86.
134. Tribe, *supra* n. 106, at § 14-12, 1245–1246 (citing *Ballard*, 322 U.S. at 86–87).
135. *Id.* at § 14-12, 1246.
136. *Id.* at § 14-12, 1246 n. 27 (citing *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969), as an example of this limitation).
137. Tribe, *supra* n. 106, at § 14-12, 1246.
138. *Id.*
139. 374 U.S. 398 (1963).
140. 406 U.S. 205 (1972).
141. 374 U.S. at 399.
142. 406 U.S. at 207.

cases, the Supreme Court found that the state actions in question, that is, the administrative action in *Sherbert*[143] and the state law in *Yoder*,[144] adversely impacted central tenets of the respective believers' religious faiths and, therefore, had to fail.[145]

Given the results in both *Sherbert* and *Yoder*, where well-established Christian denominations were concerned, it would seem that how central the questioned belief is to the impacted faith determines how severe the burden is to the religious believer,[146] or maybe not.[147] "A burden might be minimal, and thus outside the protection of the free exercise clause, even though it relates to the central aspect of a religion."[148] Professor Laurence H. Tribe points to *Tony and Susan Alamo Foundation v. Secretary of Labor*[149] as an example of this. There, the Foundation claimed that paying its workers minimum wage, when they worked for food, clothing, and shelter, would violate a core tenet of its employees' religious beliefs.[150] The Supreme Court did not dispute that those beliefs were central to the employees' religion, because significant extrinsic evidence of this was present, but it denied free exercise protection.[151] No significant burden existed to the workers' practice of their faith, because, among other things, they could return their wages to the Foundation if they wished.[152] Thus, sincerity of religious belief and a showing of significant state burden on that belief, are the dual threshold one must cross to open the door to strict scrutiny.[153]

Did the *Aguilar* defendants open the door to strict scrutiny by this logic? Ample proof exists that the defendants held their religious beliefs sincerely.[154] Sanctuary has roots in more than one religious tradition, reaching beyond the foundation of the Christian religion as divine protection.[155] Applying Professor Bassett's test of legitimacy, their belief would first have to derive from divine

143. 374 U.S. at 406.
144. 406 U.S. at 235.
145. Tribe, *supra* n. 106, at § 14-12, 1246–1247.
146. *Id*. at § 14-12 1247.
147. However, it will become clear that centrality itself became a key judicially constructed gatekeeper to the dual threshold with the advent of the RFRA. *Infra* pt. IV(C).
148. Tribe, *supra* n. 106, at § 14-12, 1248.
149. 471 U.S. 290 (1985).
150. Tribe, *supra* n. 106, at § 14-12, 1248.
151. *Id*.
152. *Tony & Susan Alamo Found.*, 471 U.S. at 304.
153. Tribe, *supra* n. 106, at § 14-12, 1248.
154. *Infra* nn. 155–165 and accompanying text.
155. *Supra* pt. II.

origin.[156] The western sanctuary movement claimed that it was following the Biblical directive to help strangers as Christ commanded.[157] It, therefore, would appear to satisfy Professor Bassett's first standard — one expressly deriving from divine origin.[158]

Constantine made sanctuary a de jure right of the Christian church when he legalized Christianity in the fourth century A.D.[159] Further, in the case of the western sanctuary movement, Christian clergymen were primarily responsible for its organization.[160] The Christian version of ecclesiastical sanctuary was even enshrined in Catholic canon law as recently as 1982.[161] These facts would appear to legitimize ecclesiastical sanctuary along Professor Bassett's second standard — that the belief motivated internal decisions of an authority in an organized religious institution.[162]

Additionally, Christianity's most sacred document, the Holy Bible, has many references to sheltering the needy and the refugee.[163] Thus, the western sanctuary movement's assistance of the Central Americans was derived from the Biblical doctrine indicating ultimate truth.[164] At the trial of John Elder, the United States District Court for the Southern District of Texas found that he was sincere in believing that assisting the needy is fundamental to Christianity.[165] Taken together, these factors would appear to meet Professor Bassett's final standard — that the belief derives

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156. *Supra* n. 121 and accompanying text.

157. *Elder*, 601 F. Supp. at 1577. Unlike the Ninth Circuit in *Aguilar*, the *Elder* court held that Elder met the sincerity requirement. *Id*. at 1578.

158. *Supra* n. 121 and accompanying text.

159. Carro, *supra* n. 14, at 752.

160. An example of clergy leadership in the movement was Reverend John Fife. *Supra* pt. II.

161. *Codex Iuris Canonici*, Canon 1179 (1933). The actual Latin text of the *Codex* states "*Ecclesia iure asyli gaudet ita ut rei, qui ad illam confugerint, inde non sint extrahendi, nisi necessitae urgeat, sine assensu Ordinarii, vel saltem rectoria ecclesiae*." *Id*. (emphasis added). Translated, this means that without the Bishop's order, sanctuary seekers were not to be turned over to secular authorities unless the church rector consented. (Translated by the Author with the assistance of her husband, Geoffrey Charles Avalon, and a friend, Reverend Arthur R. Lee, III). This version was updated in 1983, and Canon 1179 was deleted. Bau, *supra* n. 40, at 91. General provisions safeguarding the sanctity of each church do remain. *Id.* at 222 n. 10.

162. *Supra* n. 121 and accompanying text.

163. *Supra* pt. II (particularly Reverend Davenport's sermon from *Isaiah* 16:3 (King James)).

164. *Matthew* 25:41-42 (King James). Jesus warned his followers that ignoring those who needed food or drink or those who were sick or in prison was tantamount to ignoring him and his teachings. *Id*.

165. *Elder*, 601 F. Supp. at 1577–1578. A Catholic Archbishop testified for Elder. *Id*.

from doctrine representing ultimate truth among persons who follow like beliefs.[166] But the Ninth Circuit in *Aguilar* did not apply the dual threshold to the defendants' claim.[167]

The Ninth Circuit's analysis focused on immigration policy as an overriding interest.[168] Where the western movement's free exercise argument could have failed to meet the dual threshold in its key issue — the severity of the burden that immigration law and policy placed upon their sincerely held religious belief — the case could have been disposed of right then at the gateway. In fact, in Part IV, it will be shown that most strict scrutiny claims under the religious freedom protection statutes fail at the dual threshold. But the court preferred to dispose of their claim by applying the strict scrutiny test, *bypassing* the dual threshold entirely.[169] The opinion stated, "We need not determine the degree of scrutiny that properly should be applied to this case. Even applying the most exacting scrutiny, appellants' first amendment claim cannot withstand analysis."[170] To understand why the court felt as it did and why it finally ruled against the western sanctuary movement, one must delve into strict scrutiny itself. On the threshold issues of sincerity and substantial burden, which are crucial to the free exercise analysis, the Ninth Circuit determined that these were not issues in *Aguilar*.[171]

B. The *Sherbert-Yoder* Strict Scrutiny Test and Its Fall from Grace

Before 1990, once a claimant of free exercise protection established that his belief was sincerely held and that a state action substantially burdened its exercise, the burden of proof shifted to the state to show its action was the least drastic means to fulfill a compelling purpose.[172] The Supreme Court set this standard most clearly in 1963 in *Sherbert.*[173] *Sherbert* stood for the proposition that the government could not merely act in a "religion-blind" manner by

166. *Supra* n. 121 and accompanying text.
167. 883 F.2d at 694–696.
168. *Id*. at 696–698.
169. *Id.* at 694–695.
170. *Id.* at 694.
171. *Id*. at 694–696.
172. Tribe, *supra* n. 106, at § 14-13, 1251.
173. *Id*. at § 14-13, 1256. The particulars of this case were discussed *supra* notes 139 to 145 and accompanying text.

taking action without considering the impact of religious belief on that action.[174]

Nine years later, the Court reaffirmed its stand that the government could not turn a blind eye to religion in its enforcement of law in *Yoder*.[175] The majority emphasized that it was dealing with a long-established religious tradition and that enforcing the compulsory education laws would destroy the Amish parents' free exercise of the beliefs descending from that tradition.[176] This would threaten the very existence of the Amish and intolerably burden their faith.[177] *Yoder* represents the height of the compelling interest test's employment prior to the rise of the religious freedom protection statutes, and it was applied in an ideal situation — one in which a facially neutral government action threatened an entire religious belief system.[178] However, within ten years, the *Sherbert-Yoder* test would be unrecognizably diluted. To understand *Aguilar*, one must understand how this change occurred. The subtle difference between federal strict scrutiny for free exercise and government conflicts after 1983 and current Florida law is what could jump-start the Lazarus effect, resurrecting ecclesiastical sanctuary once again.

Ten years after *Yoder*, the Amish were back in court.[179] In *United States v. Lee,*[180] an Old Order Amish employer contested paying Social Security taxes.[181] He was, ironically, a carpenter who employed other members of the Amish faith within his business.[182] He stated that his faith included an obligation to provide for the elderly and needy, and it was, therefore, intrusive to pay taxes to the government for the same services.[183] The Court found that although the claimant's belief was sincere, the government had a compelling interest in Social Security for the welfare of the nation as a whole.[184] The possibility of expanding a free exercise exemption from Social Security taxes to myriad other religious groups made it infeasible.[185] The Ninth Circuit would later employ similar language

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174. Tribe, *supra* n. 106, at § 14-13, 1256.
175. The details of this case were discussed *supra* notes 142 to 145 and accompanying text.
176. *Yoder*, 406 U.S. at 216–218.
177. *Id.*; Tribe, *supra* n. 106, at § 14-13, 1270.
178. Tribe, *supra* n. 106, at § 14-7, 1193.
179. *U.S. v. Lee*, 455 U.S. 252 (1982).
180. 455 U.S. 252 (1982).
181. Tribe, *supra* n. 106, at § 14-13, 1260.
182. *Lee*, 455 U.S. at 254.
183. *Id.* at 255–257.
184. *Id.* at 258–259.
185. *Id.* at 259–260.

to deny the western sanctuary movement its free exercise claim.[186] The *size of the requested exemption*, not the *magnitude of the burden on the claimant*, became the principal concern in a religious freedom dispute after *Lee*; the burden of proof was shifting from government to claimant.

The Court weakened *Sherbert-Yoder* strict scrutiny in *Lee* by first changing the compelling state interest requirement.[187] Originally, it had determined that the relevant inquiry had to be the state's interest in denying the religious exemption, *rather than* the state's interest in maintaining the rule or program.[188] This was a narrow definition for the relevant inquiry.[189] The *Lee* ruling broadened the inquiry, making *both* the state's interest in denying the religious exemption *and* its interest in continuing the relevant rule.[190] Thus, the state's job was far easier after *Lee* than before.

Aguilar provides an example of this. There, the INS wanted to deny the sanctuary movement an exemption to immigration laws, but the Ninth Circuit found that an exemption would overly burden the government in enforcing those laws that were vital to enable the government to control borders.[191] Once again, quantity reigns over quality. As in *Lee*, the possible size of the requested exemption, not

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186. It is instructive to compare the language of *Lee* with that of *Aguilar*. In *Lee*, the Supreme Court said, "[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." 455 U.S. at 259–260. In *Aguilar*, the Ninth Circuit stated, "[A]ppellants identify four religious groups that purportedly require their adherents to engage in sanctuary activity . . . . [Their] combined membership . . . is incalculable. Appellants cannot seriously contend that they demand a limited exception to the immigration laws." 883 F.2d at 696.

187. Tribe, *supra* n. 106, at § 14-13, 1261.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Aguilar*, 883 F.2d at 695–696. The *Aguilar* court did not consider, and the sanctuary movement did not raise, an important principle of pure sanctuary tradition before 1624 — its use as a way to buy time for the legal system to work. This is unfortunate because the point would have provided a counterpoint to the government's assertion that the exemption would destroy its capability to police the borders. Even with the large number of churches participating in the network, their capacity to serve the refugees necessarily would be limited. Once the network of churches was saturated, a case could be made that their participation would slow in the overall movement, thus allowing the government to reassert its control over the borders without restricting the sanctuary churches' activities. The churches would have restricted themselves out of necessity. This argument may have gained traction for the sanctuary movement even under the Ninth Circuit's application of the *Lee* free exercise precedent.

the magnitude of the burden to the sanctuary movement, was the court's chief concern.[192]

Lee eased the state's burden even more by modifying the second part of the *Sherbert-Yoder* test, that the government apply the least restrictive means to achieve its goal.[193] After *Lee*, the rules were different. The claimant could now win only if the accommodation he sought would not unduly interfere with the government's compelling interest.[194] Thus, whether the government was using the least restrictive means was no longer important. The magnitude of the burden placed on the government's compelling interest by the requested exemption effectively replaced that part of the *Sherbert-Yoder* test in federal law. This replacement is crucial. It is the difference between the federal interpretation of free exercise protection before 1990 and how the Florida RFRA operates.

Lee provides an insight into the Ninth Circuit's denial of the western sanctuary movement's free exercise claims. With *Lee* as precedent, the judges were merely applying what was then the law when they evaluated the requested exemption's burden on the government, rather than the burden that the government's action placed on religious freedom. The court first found that the government's interest in policing its borders was most compelling.[195] It chose not to examine the separate charges of smuggling, transporting, and harboring the illegal immigrants individually; rather, it chose to defer to Congress's determination that control of the borders required all three to warrant a criminal penalty.[196] During the *Aguilar* trial, testimony showed that at least one illegal alien crossed the border, because he knew he would receive assistance.[197] The Ninth Circuit found that an attempt to sever the charges and grant an exemption for the sanctuary movement's conduct would weaken the government's ability to control national borders, a weak rationale because the sanctuary churches could not have sustained their activities indefinitely.[198]

This analysis follows the *Lee* precedent closely. Like the Ninth Circuit's view, the free exercise exemption requested by the sanctuary workers in assisting the refugees would consume the

192. *Id*. at 694–696.
193. Tribe, *supra* n. 106, at § 14-13, 1261.
194. *Id.*
195. *Aguilar*, 883 F.2d at 695.
196. *Id.*
197. *Id.*
198. *Id.* at 695–696; *supra* n. 191.

government's compelling interest in border control. The proverbial icing on the cake for the government was the court's determination that an exemption would not be limited in the end, but would ultimately extend to four incalculably large religious denominations, rendering immigration law virtually moot.[199] The government had shown a broadly defined compelling interest and exempting the western movement would interfere unduly with that interest.[200] Thanks to the *Sherbert-Yoder* test's weakening in *Lee*, the Ninth Circuit was right — the sanctuary movement's claims were bound to fail even under strict scrutiny as it stood after *Lee*. Had the original *Sherbert-Yoder* test still been in place, with the burden on government to show that an exemption for the sanctuary churches would have utterly defeated its compelling interest in border control, the outcome might have been different. It would have been difficult for the government to call an absolute prohibition on assisting persons in need the least drastic means to its goal.[201] The government could have allowed the churches to help the refugees and evaluated requests for exemption on a case-by-case basis. As it was, the *Aguilar* court followed precedent, placing the burden on the sanctuary movement to show that the requested free exercise exemption would not unduly burden the government's controlling interest.[202] The sanctuary churches consequently lost.

Aguilar did not settle the larger question of whether ecclesiastical sanctuary could ever be legitimate in the United States. The differences between the sanctuary practice as it evolved in England and the advent of the United States civil disobedience sanctuaries, along with the changes in free exercise law since 1988, mandate that legal scholars hold *Aguilar* to its facts. Shortly after *Aguilar*,

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199. *Aguilar*, 883 F.2d at 696.

200. *See generally* Tribe, *supra* n. 106, at § 14-13, 1261 (discussing the *Lee*-modified compelling interest test). This is how *Lee*-modified "strict" scrutiny *really* worked. Before *Lee*, the *Sherbert-Yoder* test "required the state to show that it was pursuing a compelling interest, *narrowly* defined, and that an exemption would *defeat* that interest." *Id*. (emphasis in original).

201. *See Elder*, 601 F. Supp. at 1577 (discussing sanctuary as an expression of the Christian faith). The court stated that Elder was "a Roman Catholic who feels a charitable Christian commitment, founded in the Gospel, which motivates him to assist those who flee the violence in El Salvador." *Id.* Like Merkt, Elder presented testimony of clergy at trial. *Id*. However, in Elder's case, the clergymen stated that participation in the sanctuary movement, though not required, *could* be an appropriate expression of his faith. *Id*. Though this got him past the threshold, he too failed in the *Lee*-modified version of the *Sherbert-Yoder* test for the same reasons as the Ninth Circuit advanced in *Aguilar*. *Id.* at 1578.

202. 883 F.2d at 694–696.

the *Sherbert-Yoder* test, as it was before *Lee*, would become relevant again, first in federal law, then in Florida particularly.[203]

IV. FREE EXERCISE IN FLORIDA

A. *Sherbert-Yoder* Strict Scrutiny Returns

Before returning to the hypothetical character who seeks ecclesiastical sanctuary in Florida, one must understand how the law of free exercise in Florida was established and its current state. Florida has resurrected *Sherbert-Yoder* strict scrutiny for free exercise conflicts.[204] This Section will follow the development of the Religious Freedom Protection Act of 1998 (Florida RFRA),[205] the law that made the Sunbelt home for an even stronger version of the *Sherbert-Yoder* test.[206]

Between 1972 and 1993, strict scrutiny fell on hard times. First, the Supreme Court terminally weakened the *Sherbert-Yoder* test in *Lee* and then obliterated it entirely six years later when it determined in *Smith* that a state could infringe on religious freedom as long as it did so through a neutral law, generally applicable to all.[207] Congress's riposte was to enshrine the *Sherbert-Yoder* test in federal statutory law by way of the Religious Freedom Restoration Act of 1993 (RFRA).[208] The Court found the RFRA unconstitutional as applied to the states five years later in *City of Boerne v. Flores*,[209] stating that Congress had overstepped its powers by using the Fourteenth Amendment's Enabling Clause to force the judiciary to apply constitutional law's strictest test in free exercise questions.[210] Strict scrutiny was foiled again.

Proponents of the *Sherbert-Yoder* regime found *Flores* bitter medicine. Professor Bassett speaks for many in condemning the decision as the lowest point in federal free exercise jurisprudence.[211] Others believe that the Court failed with *Flores* to safeguard what

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203. *Infra* pt. IV.

204. Fla. Stat. § 761.01.

205. *Id.* §§ 761.01–761.04.

206. *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1281 (S.D. Fla. 1999) (holding that in the Florida RFRA, the Florida legislature clearly intended stronger protections for free exercise than those provided by the federal RFRA).

207. Bassett, *supra* n. 9, at § 1:8, 1-20 to 1-21.

208. 42 U.S.C. §§ 2000bb–2000bb-4.

209. 521 U.S. 507 (1997).

210. Bassett, *supra* n. 9, at § 1:8, 1-30 to 1-31.

211. *Id.* at § 1:8, 1-32.7.

they consider the first and most important American freedom — religious liberty.[212] But all was not lost; the states have constitutional powers of their own.[213] They can protect free exercise just like the federal government can; in fact, they can use stronger protections than the federal law does.[214] This was the course that *Sherbert-Yoder* strict scrutiny's proponents followed. Five states have now chosen to enact their own versions of the federal RFRA under their inherent powers, including Florida.[215] The Florida RFRA,[216] a specific response to *Flores*, was signed into law, effective June 17, 1998.[217]

The Florida RFRA is based not on the free exercise provisions of the United States Constitution, a measure that would probably result in a repeat of *Flores*, but on Article I, Section 3 of Florida's own Constitution, stating in part, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof."[218] Thanks to this, the doctrine of adequate and independent state grounds could insulate a decision of a Florida state court construing the Florida RFRA from United States Supreme Court review.[219]

Florida courts historically have applied this section of the State Constitution in a manner analogous to federal decisions construing the Free Exercise Clause of the United States Constitution, allowing scholars to predict court actions concerning it by reviewing federal decisions.[220] Like its federal inspiration, the Florida RFRA clearly

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212. *Id.* at § 1:8, 1-32.7–1-32.8. Judge John Noonan, Jr. questioned the dedication of the judiciary as a whole to protecting free exercise in a lecture at DePaul University in 1992. *Id.* at § 1:8, 1-32.8 n. 65.

213. *Id.* at § 1:8, 1-32.8.

214. *Id.* at § 1:8, 1-32.7.

215. *Id*. at § 1:8, 1-32.11. The others are Alabama, Connecticut, Illinois, and Rhode Island. *Id.* at § 1:8, 1-32.11 n. 4.

216. Fla. Stat. §§ 761.01–761.04.

217. Fla. Stat. Ann. § 761.01 (West Supp. 1999).

218. Fla. Const. art. I, § 3.

219. Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship between State and Federal Courts*, 63 Tex. L. Rev. 977, 977 (1985). This doctrine, introduced by the Supreme Court in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), holds that the Court will not review a judgment of a state court resting wholly on adequate and independent state grounds. Therefore, a decision by a Florida state court affecting free exercise under the Florida RFRA, which is based on the Florida Constitution, would seem to fall under precisely this doctrine, and the Court may hesitate to intervene.

220. Fla. H. Comm. on Govt. Operations, *Bill Research & Economic Impact Statement, CS/HB 3201*, 1998 Leg. Sess., 2 (Apr. 7, 1998).

intends to turn the free exercise clock back to 1972 within the State of Florida. Its preamble states that

> it is the intent of the Legislature . . . to establish the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to persons whose religious exercise is substantially burdened by government . . . .[221]

This language is very similar to the congressional intent in the federal RFRA, which had as its purpose

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[222]

The Florida legislature clearly sought to establish the original, non-*Lee*-modified *Sherbert-Yoder* compelling interest test as the law of the State of Florida as Congress tried at the federal level.

The Florida RFRA protects the free exercise of religion in classic *Sherbert-Yoder* fashion. It is modeled completely on the federal RFRA, providing that

> (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> (a) Is in furtherance of a compelling governmental interest; and
>
> (b) Is the least restrictive means of furthering that compeling governmental interest.[223]

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221. Fla. Stat. Ann. § 761.01 Hist. & Stat. nn. (citations omitted) (emphasis added).
222. 42 U.S.C. § 2000bb(b)(1)–(2) (citations omitted) (emphasis added).
223. Fla. Stat. § 761.03(1)(a)–(b).

All the requirements of the *Sherbert-Yoder* test are present and accounted for, including the burden half of the dual threshold under prior federal jurisprudence. Therefore, it makes sense to assume that the other half of the federal dual threshold, that the claimant held his belief sincerely, also will apply to decisions under the Florida RFRA.[224] If the claimant crosses the dual threshold, the burden shifts to the state to show "a compelling interest, *narrowly* defined, and that an exemption would *defeat* that interest."[225] In Florida, the free exercise wheel has turned full circle.

B. Applying the Florida RFRA: One Court's Interpretation

Think back to the Introduction, where a Clearwater priest faces Department of Law Enforcement agents at the door of his church who are on a mission to arrest a fugitive who has come to him for help. Understanding the rights of the agents, priest, and fugitive requires reviewing the one time to date when a court construed the law of free exercise after the Florida RFRA[226] and compared it with another case under the similar federal RFRA involving similar circumstances.

The case in question is *Warner v. City of Boca Raton*,[227] decided by the United States District Court for the Southern District of Florida in August 1999. In *Warner*, a city ordinance that mandated horizontal grave markers within a city-managed cemetery for ease of maintenance by city workers barred the plaintiffs from placing vertically oriented markers on graves.[228] The court held that the ordinance was facially neutral, and its framers did not intend to affect religious belief.[229] The plaintiffs challenged the city's decision in federal court based in part on federal causes of action, including the First Amendment and in part the Florida RFRA.[230] The district court independently construed the Florida RFRA in its decision and found that the city's action was within the new law's bounds; the

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224. Text accompanying *supra* nn. 123–127.

225. Tribe, *supra* n. 106, at § 14-13, 1261 (emphasis in original).

226. Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U. Cal. Davis L. Rev. 823, 846 (1999). There is one other case mentioned in that article, a criminal case from Fort Lauderdale that was settled prior to trial. *Id.*

227. 64 F. Supp. 2d 1272 (S.D. Fla. 1999).

228. *Id.* at 1276–1278.

229. *Id.* at 1288.

230. *Id.* at 1279. The associated federal claims would have allowed the plaintiffs to proceed in the Southern District, joining the state law claim and thus avoiding the need for federal question or diversity jurisdiction for their claim under the Florida RFRA.

plaintiffs' claim under the Florida RFRA failed.[231] The case is on appeal, and the Eleventh Circuit has not ruled as of this writing.[232]

If the trial court allowed the plaintiffs to proceed on free exercise grounds past the dual sincere belief and substantial burden threshold to *Sherbert-Yoder* strict scrutiny,[233] the city probably would have lost. The court acknowledged this, stating, "Because the strict scrutiny standard adopted by the Florida legislature is the most rigorous test in constitutional law, few laws would survive its application."[234] The only sure way to defeat a Florida RFRA-based challenge, then, was at the dual threshold, *before* strict scrutiny became an issue. Most cases under the Florida RFRA's federal predecessor failed to show a substantial burden to religious belief.[235] This became the ultimate issue in *Warner* and the reason why the plaintiffs' case failed like so many before it.

Judge Kenneth Ryskamp apparently thought it was important for the city to prevail.[236] He believed that "cemetery anarchy" would result from the plaintiffs' being allowed to ignore the city's regulations, which were intended for consistent cemetery management.[237] Thus, he was motivated to consider his course with great care. One thing he observed was that the Florida RFRA is a much stronger protection of religious liberty than its federal predecessor.[238] The Florida legislature accomplished this by removing an important, judicially inspired component of the federal RFRA.

Congress drafted the *federal* RFRA to allow federal courts to apply it only to beliefs determined to be "compulsory or central" to the claimant's religion.[239] The Florida legislature, on the other hand, specifically defined the term "exercise of religion" to mean "an act . . . substantially motivated by a religious belief," regardless of whether it was "compulsory or central to a larger system of religious belief."[240] This definition goes further than the federal RFRA, which defines the term as "the exercise of religion under the First Amend-

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231. *Id.* at 1287.
232. Reinach, *supra* n. 226, at 846.
233. Remember this places the burden on the state to show compelling interest and least drastic means once the claimant gets through the dual threshold. *Supra* pt. III.
234. *Warner*, 64 F. Supp. 2d at 1283.
235. Bassett, *supra* n. 9, at § 1:8, 1-32.14.
236. *Warner*, 64 F. Supp. 2d at 1283 (discussing the court's concept of "cemetery anarchy").
237. *Id*.
238. *Id.* at 1281.
239. *Id*. *Sherbert* and *Yoder* both fit this interpretation. *Supra* pt. III.
240. Fla. Stat. § 761.02(3).

ment to the Constitution,"[241] leaving the field open for courts to interpret free exercise under *federal* law. However, Judge Ryskamp was unconvinced that the Florida legislature meant what it clearly said — under Florida state law, religiously motivated acts deserve strict scrutiny only *if* the claimant meets the dual threshold first.[242]

The judge accepted the plaintiffs' theory that they sincerely exercised their religious beliefs, which satisfied the first prong of the dual threshold.[243] This left only the substantial burden prong between the court and "cemetery anarchy."[244] In answering this, the court faced the question of whether the plaintiffs' action constituted a religiously motivated act under the Florida RFRA.[245] The plaintiffs relied on the plain language of the Florida RFRA.[246] However, if Judge Ryskamp concurred, he would open the bottle and allow the genie of strict scrutiny to escape, not just here, but in subsequent cases. How could he avoid this result when the federal RFRA's "compulsory or central" safety net did not apply to the new Florida law?

Judge Ryskamp used the federal RFRA's legislative history, and in particular the testimony of United States Representative Stephen Solarz, RFRA's patron in the House, to show that Congress had not intended courts to apply the "compulsory or central" requirement.[247] However, the judge wrote that Representative Solarz's testimony implied a congressional intent for a protected belief to at least reflect some solid tenet or custom of a religious tradition.[248] The judge, therefore, chose to adopt what he viewed as the historically "correct" interpretation of the federal RFRA as the intent of the Florida legislature in drafting the Florida RFRA as well — some tenet of a larger religious belief system must be present to protect a free exercise claim.[249]

Judge Ryskamp further stated that although the legislature had eliminated the "compulsory or central" requirement, the language of the Florida RFRA was clear — its framers intended the protected belief to be more than mere personal preference before the statute

241. 42 U.S.C. § 2000bb-2(4).
242. Fla. Stat. § 761.02(3); *Warner*, 64 F. Supp. 2d at 1281.
243. *Warner*, 64 F. Supp. 2d at 1277 n. 6.
244. *Id.* at 1283.
245. *Id.* at 1281.
246. *Id.*
247. *Id.* at 1282.
248. *Id.*
249. *Id.*

would apply.[250] He then wrote that the plaintiffs' proposed construction of the Florida RFRA would render the statute's "compulsory or central" language void.[251] "If any act motivated by a sincerely held religious belief were protected under the Florida RFRA, then it adds nothing to the meaning of the statute to say that the act need not be compulsory or central to a larger system of religious beliefs."[252]

Given this interpretation, it is apparent that Judge Ryskamp intended to apply a new, though less potent, version of the old, judicially constructed "compulsory or central" requirement to the Florida RFRA despite the statute's clear language. He redrafted the substantial burden half of the dual threshold so that it now required the claimant to "demonstrate a substantial burden on [religious] conduct that, while not necessarily compulsory or central to a larger system of religious beliefs, nevertheless reflects some tenet, practice or custom of a larger system of religious beliefs."[253] In other words, a burden to belief reflecting a purely personal preference, the mirror image of a belief "compulsory or central" to a larger system is not good enough to cross the threshold to strict scrutiny under Judge Ryskamp's standard.[254] Now he had to find a way to dispose of the question of what a religious belief reflecting a personal preference was — thus, one the Florida RFRA would not protect.

The belief's truthfulness was not an option. Even in *Smith*, the Supreme Court had not placed the verity of a religious belief's subject matter within the ambit of a court's discretion.[255] Because the judge was dealing with the direct descendant of the old "compulsory or central" requirement, one can readily understand his (and the plaintiffs') concern here.[256] He kept his inquiry factual; the Supreme Court had allowed such inquiries before.[257] This would prevent him from having to evaluate the religious belief's verity.[258]

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250. *Id.*

251. *Id*. at 1282–1283.

252. *Id.* at 1283.

253. *Id.*

254. *Id*.

255. 494 U.S. at 887. The Court specifically disclaimed any intention to define the parameters of centrality of religious belief. *Id*. That goes back to *Ballard. Supra* pt. III(A).

256. *See Warner*, 64 F. Supp. 2d at 1284 (discussing judicial interpretation of Supreme Court decisions regarding religious faith). The Supreme Court stated that courts do not dictate verity in religious beliefs. *See Smith*, 494 U.S. at 887 (noting that it is not the judiciary's place to question the centrality of a practice or belief).

257. *Warner*, 64 F. Supp. 2d at 1284.

258. *Ballard*, 322 U.S. at 86–87; *Warner*, 64 F. Supp. 2d at 1284; *supra* pt. III(A).

He found refuge in the testimony of experts at trial.[259] Dr. Daniel Pals, former Chair of the Department of Religious Studies at the University of Miami, helped the judge devise a test for what is and what is not a personal preference in religion.[260]

Dr. Pals established four criteria to apply in the court's quest to determine what is and what is not a personal preference.[261] He thought that the court should consider whether the questioned belief

> 1) is asserted or implied in relatively unambiguous terms by an authoritative sacred text; 2) is clearly and consistently affirmed in classic formulations of doctrine and practice; 3) has been observed continuously, or nearly so, throughout the history of the tradition; and 4) is consistently observed in the tradition as we meet it in recent times.[262]

Judge Ryskamp's new "personal preference" element for the substantial burden part of the dual threshold was only marginally weaker than its "compulsory or central" federal predecessor, for

> [i]f a practice meets all four of these criteria, it can be considered central to the religious tradition. If the practice meets one or more of these criteria, it can be considered a tenet, custom or practice of the religious tradition. If the practice meets none of these criteria, it can be considered a matter of purely personal preference regarding religious exercise.[263]

He then found the plaintiffs' desire for vertically oriented grave markers to constitute a personal preference.[264] Although marking graves was a recognized part of Judeo-Christian religious traditions, nothing existed in those traditions *specifically* pointing to vertically oriented markers as an independent tenet, custom, or particular practice of the greater religion.[265]

The court's analysis of the Pals criteria lends itself to a troubling truism, because it is as broad as the statutory definition it tried to narrow. By its own words, all a religious practitioner needs to satisfy the test and cross the substantial burden half of the

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259. *Warner*, 64 F. Supp. 2d at 1285.
260. *Id*.
261. *Id*.
262. *Id*.
263. *Id.*
264. *Id.*
265. *Id.*

dual threshold is a burdened specific tradition followed since the beginning of his religious belief system.[266] If there had been anything in tradition *specifying* vertical markers, the Pals test would have nailed the coffin shut on Judge Ryskamp's attempt to avert tombstone entropy. He has forged a powerful new weapon for the free exercise defender.[267]

With the Pals test added to the body of law that formed around the *Sherbert-Yoder* test from 1963 to 1983 and the law surrounding the federal RFRA during its four years at the top of the free exercise heap, free exercise in the State of Florida is at a height unseen since 1972. Strict scrutiny is back with a vengeance. The district court's persuasive opinion could form the basis for jurisprudence surrounding the new law.[268] If the Pals test is added into the body of Florida free exercise jurisprudence, it could throw the door to Lazarus's tomb wide open and resurrect ecclesiastical sanctuary.

C. The Church as Sanctuary: How Would a Court React under the Federal RFRA?

In the Introduction, all three of the players have rights under the law of free exercise. The agents have the secular law on their side. No court would dispute their compelling interest in obtaining custody of the fugitive. The fugitive has cast his lot with God and asked for protection. If the fugitive is a devout Christian (in this case) and truly believes that the church will protect him, he may have a free exercise right worthy of protection. What about the priest? His religion tells him that he must take in the stranger.[269] In fact, Jesus warned his disciples that the consequences of ignoring such a stranger could include ignoring Jesus himself.

> And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.

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266. *See id*. (discussing the use of the Pals criteria in interpreting the Florida RFRA).

267. As of September 2000, it appears that Florida state courts may be using *Warner* to construe the Florida RFRA in just this way. *See Yasir v. Singletary*, 2000 Fla. App. LEXIS 11781 at *2 (Fla. Dist. App. 5th Sept. 15, 2000) (holding "that prison officials have the right to impose reasonable limitations on institutional uses of changed names, whether the change was religiously motivated or not"). This indicates that the Pals criteria likewise may be persuasive to Florida appellate courts, which could trigger the Lazarus effect in Florida.

268. *Supra* n. 267 (discussing a possible step in this direction).

269. *Matthew* 25:40–43 (King James).

> Then shall he say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels:
>
> For I was an hungred, and ye gave me no meat: I was thirsty, and ye gave me no drink:
>
> I was a stranger, and ye took me not in: naked, and ye clothed me not: sick, and in prison, and ye visited me not.[270]

Whose need will be paramount here? Court decisions in such situations are rare. However, one of the few decisions made within the last five years, *Klemka v. Nichols*,[271] is particularly relevant to this discussion. Combined with the mountain of free exercise jurisprudence, one can discern a solution to the sanctuary problem.

Klemka was filed shortly after the federal RFRA became law, when two children died in a fire in Shamokin, Pennsylvania.[272] Local police and the state attorney decided to divest the mother of her two remaining children and arrest her on charges of reckless endangerment.[273] The police learned that the mother would be present at a memorial service for her two deceased children, and they planned to arrest her following the service.[274] When police officers arrived at the church, they observed two women enter.[275] The officers followed and the pastor confronted them at the church door.[276] They told the pastor what their intention was, and the pastor warned the police not to enter because the service was still in progress.[277] One officer saw the mother sitting in the church foyer.[278] The officer pushed the pastor out of his way, entered the church, and arrested her.[279]

The mother sued under the federal RFRA, alleging that the officers interfered with her participation in the memorial service.[280] The court construed the RFRA, taking notice of prior jurisprudence under the act.

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270. *Id*. (emphasis in original).
271. 943 F. Supp. 470 (M.D. Pa. 1996).
272. *Id.* at 472.
273. *Id.* at 476.
274. *Id.*
275. *Id.*
276. *Id*.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 472.

> Government action substantially burdens religious practices only if it significantly inhibits or constrains "conduct or expression that manifests some central tenet" of an individual's beliefs or "meaningfully" curtails the individual's ability to express adherence to his or her faith; or denies an individual reasonable opportunities to engage in those activities that are fundamental to that individual's religion.[281]

The court continued,

> To establish a *prima facie* case [under the federal RFRA], the plaintiff must demonstrate the existence of these three elements by a preponderance of the evidence. If plaintiff satisfies this threshold requirement, the burden then shifts to the government to demonstrate that the challenged regulation or governmental action furthers a compelling state interest in the least restrictive manner feasible.[282]

As Judge Ryskamp stated in *Warner* four years later, the federal RFRA required the plaintiff to show the centrality of her belief before she could get to strict scrutiny.[283] She failed to show this centrality, and the court found the religious service was over when the police arrived despite the pastor's statement to the contrary.[284] The plaintiff did not try to tell the police otherwise.[285] Further, she did not tell the police that they were interfering with a private prayer vigil or any other religious exercise.[286] Therefore, her removal from the church after the pastor told the police a service was in progress did not interfere with her expression of conduct manifesting a central tenet of her faith.[287]

The Shamokin police followed the same tactics that characterized the police invasions of the 1960s sanctuary churches.[288] One can only wonder what their rush was to take the mother into custody on a relatively minor offense. Could they not have waited for her to finish mourning her dead children and employed less drastic means?

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281. *Id*. at 474 (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995)).
282. *Id.* (citation omitted) (emphasis omitted).
283. 64 F. Supp. 2d at 1282; *Klemka*, 943 F. Supp. at 475.
284. *Klemka*, 943 F. Supp. at 477.
285. *Id*.
286. *Id.*
287. *Id.* at 478.
288. *Id*. at 472 (relating the underlying facts of that case); *supra* nn. 58–69 and accompanying text.

On the face of it, the federal RFRA should have provided the redress that the mother and her priest sought. The state seemingly would have faced an insurmountable burden defending its action as the least drastic means to accomplish its public safety goal. But, like *Warner*, *Klemka* was lost at the dual threshold rather than on the strict scrutiny battlefield.

Like *Warner*, *Klemka* did not address *Sherbert-Yoder* strict scrutiny; instead, it preferred to dispose of its subject via the far easier route of the burden's magnitude. Under the federal RFRA, the centrality requirement proved an effective gatekeeper, as *Klemka* illustrates and as Judge Ryskamp longed for in *Warner*. However, unlike the federal RFRA, the *Florida* RFRA *specifically disclaims* any need for centrality.[289] Under the *Warner* analysis, if the claimant shows that his professed belief reflects an established tenet of a larger system of belief, he proves his substantial burden and thus gets halfway to the *Sherbert-Yoder* test. In reviewing the problem of ecclesiastical sanctuary in the hypothetical from the Introduction, the Author will follow the same route as the distinguished jurists that preceded her.

1. Crossing the (Dual) Threshold to Strict Scrutiny

Let us put the present problem in familiar terms. A confrontation has developed, and, somehow, a friendly attorney has approached a local court with a request for injunctive relief to keep the police out of the church until all parties can come together and resolve the extant free exercise claims. A Florida state court will probably reach for *Warner* and the Pals criteria as persuasive authority to help it determine whether a claim for litigation exists at all. First, the claimant must hold his belief sincerely.[290] Then, under the Pals criteria, the hypothetical sanctuary seeker and/or his priest must meet one of four discrete criteria to establish a burden on that belief. Only then will the court begin to consider ecclesiastical sanctuary as a free exercise issue.[291]

For the priest, the Bible provides ample commands to shelter the stranger in need, which, combined with his vocation, would

289. Fla. Stat. § 761.02.
290. *Supra* n. 198 and accompanying text.
291. *Supra* pt. III.

establish his belief as one that is sincerely held.[292] "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the LORD your God."[293]

> Then shall the King say unto them on his right hand, Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world:
>
> For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in.[294]

Clearly, the best place to block the priest's free exercise claim is in the substantial burden to his religious exercise, not in his sincere belief that his God calls him to act and to shelter the fugitive. State action must burden a religious exercise that, under the Pals criteria, must be "asserted or implied in relatively unambiguous terms by an authoritative sacred text."[295] For the Christian, that would be the Holy Bible.

The Biblical commands to shelter the needy stranger are "clearly and consistently affirmed in classic formulations of doctrine and practice," and have "been observed continuously, or nearly so, throughout the history of the tradition."[296] Further, one only has to go to any Christian church on any given Sunday, particularly during the Christmas season, to hear ministers thunder from the pulpit that these traditions ought to be followed even today; thus, the Biblical injunctions are "consistently observed in the tradition as we meet it in recent times."[297] Summarily taking the fugitive from the priest's care, then, could be a burden to his religious practice that is deserving of strict scrutiny under the Florida RFRA.

But this is precisely the position that *failed* in *Aguilar* — that the religious organization has an obligation, based on Biblical injunctions and protected by the free exercise clause, to help those in need. However, in *Aguilar*, the Ninth Circuit did not address the

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292. *Elder*, 601 F. Supp. at 1577. This was similar to the view the Southern District of Texas took in *Elder*; Elder's mission was supported by the Catholic Church, and the Roman Catholic Bishop of the Diocese of Brownsville testified on Elder's behalf about his sincere beliefs. *Id*.

293. *Leviticus* 19:34 (King James) (emphasis in original).

294. *Matthew* 25:34–35 (King James).

295. *Warner*, 64 F. Supp. 2d at 1285.

296. *Id*.

297. *Id.*

issue of whether federal law burdened the western sanctuary movement's religious practice other than stating it "need not determine the degree of scrutiny that properly should be applied to this case."[298] The court was convinced that the government's case would withstand even the strictest scrutiny, so it chose to go directly to the modified strict scrutiny test as promulgated by the Supreme Court in *Lee*.[299] But *Aguilar* is not the only federal decision construing the dual threshold in the sanctuary context.

In *United States v. Elder*,[300] the Southern District of Texas believed that participation in sanctuary-related activities could be sufficient to meet the initial free exercise burden where immigration law adversely affected free exercise by restricting John Elder from helping Central American refugees.[301] Under original *Sherbert-Yoder* strict scrutiny, which the Florida RFRA mandates, the substantial burden threshold was easier for the free exercise claimant to cross than in 1985 when *Elder* was decided.[302] After the federal RFRA, things tightened up when the belief had to be "compulsory or central" for state action to burden it.[303] But to get in the strict scrutiny door in Florida, the priest only has to show sincere belief in a religious practice that is impacted by state action and then meet one of the four steps of the Pals test to show that the practice reflects a custom of his religion (that is, if the reviewing court accepts Judge Ryskamp's change to the substantial burden prong of *Sherbert-Yoder* strict scrutiny's dual threshold). This is a low bar for a member of the clergy, whose vocation *is* his or her religion. It is apparent that not just one, but all four of the Pals criteria could be met by a priest offering sanctuary. A reviewing court would find it difficult to bar the strict scrutiny door to the priest under the *Warner* version of the dual threshold.

On the other hand, if the free exercise claimant were the fugitive, the court would have a far easier time slamming shut the door to strict scrutiny. It would be much more difficult for the fugitive to show that his belief was sincere and not merely a cynical attempt to avoid the law and escape justice. In *Warner*, the court avoided the greater problem inherent in discussing the plaintiffs'

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298. 883 F.2d at 694.

299. *Id.*

300. 601 F. Supp. 1574 (S.D. Tex. 1985). *Elder* is also discussed at *supra* notes 157, 165, 201, and 292.

301. 601 F. Supp. at 1577.

302. *Supra* pt. III(A).

303. *Warner*, 64 F. Supp. 2d at 1281.

whole system of religious belief by narrowly focusing on the practice of marking graves.[304] A court reviewing a new sanctuary problem merely would need to call upon Judge Ryskamp's wisdom[305] and focus narrowly on sanctuary requests themselves rather than Christian tradition to help those in need, calling sanctuary a form of practice that has been out of the recognized church for centuries. Thus, the court could say that sanctuary is nothing but a personal preference, unprotected by the Florida RFRA, and forego discussing how sincere the fugitive's belief is.

But it may not be that easy to dismiss the fugitive's sincerity. What if the fugitive has been a member of the Church since childhood, and his parents taught him that the church is the place to go when he is in need? If he is inside the sanctuary, practicing his faith, in prayer at the altar when the police arrive, then both *Klemka* and *Warner* might be in his favor. In *Klemka*, the court suggested that if the mother had been actively participating in the service, then the police would have had to wait until she finished before taking her into custody.[306] The same apparently would hold true if she had been in prayer at the altar or if she had requested that the police refrain from taking her into custody then until she had finished her religious observance.[307] Further, sanctuary as a religious practice meets Professor Bassett's criteria for a sincerely held belief.[308]

The fugitive would need to expand on that line of argument when the court considers whether removing him from the church burdens his free exercise of religion. Traditionally, the ancient sanctuary practice limited the place of refuge to consecrated ground; being inside the church buildings, the fugitive could turn this to his advantage.[309] However, the fact that the true sanctuary practice, as opposed to the civil disobedience sanctuaries of the 1960s and 1980s,

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304. *Id.* at 1284.

305. As Judge Ryskamp stated,

> Under the Court's construction of the Florida RFRA, however, courts are not required to interpret and weigh religious doctrine to determine the centrality of a particular practice to a religious tradition. Nor are courts required to determine whether a particular practice is compulsory or prohibited by a religious tradition. Rather, a court's inquiry is extremely limited and purely factual: Does the practice in question reflect some tenet, custom or practice of a larger system of religious beliefs?

Id.

306. 943 F. Supp. at 477–478.

307. *Id.* at 477.

308. *Supra* pt. III(A).

309. Baker, *supra* n. 24, at 9.

is an ancient one could turn the last element of the Pals test, that the practice be current, against him and weaken his claim.[310]

Or could it? In *Warner*, the court construed the Florida RFRA to apply to any case where some justification for the questioned practice was present in the tenets, customs, practices, or traditions of the claimed religion.[311] Relying on the nearly 400-year tradition of churches in the United States sheltering fugitives as an act of civil disobedience, the fugitive could begin to show that sanctuary is not as outmoded of a practice as the court might believe, but a relatively recent one.[312] And even in the civil disobedience movements, part of the plan was to help a stranger in need.[313] Thus, the fugitive could perhaps use the Pals criteria to his advantage. He needs to satisfy only one of the four points to qualify his belief as substantially burdened.[314] Cannot one take Christ's injunction in *Matthew* 25 to shelter the needy stranger[315] from both perspectives; that of the stranger as well as that of Jesus himself? Combined with Biblical injunctions to shelter the needy, of which the Southern District of Texas noted in *Elder*, and an ongoing religious observance, of which the Middle District of Pennsylvania noted in *Klemka*, evidence of the ancient sanctuary practice could bolster the fugitive's claim just enough to trigger strict scrutiny in a sympathetic court.

The Bible teaches that "[w]hosoever shall receive this child in my name receiveth me: and whosoever shall receive me receiveth him that sent me."[316] Like the priest, a sanctuary seeker has ample holy text and religious practice stretching over 400 years in North America to get him over the Pals test if his advocate can convince the court to take notice of it. Once police officers have interrupted the sincere practice of religion, they have imposed on the priest, and possibly the sanctuary seeker, a burden requiring strict scrutiny under the Florida RFRA.

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310. See *supra* notes 14 to 34 and accompanying text for a discussion of medieval sanctuary and *supra* notes 261 to 265 and accompanying text for a discussion of the Pals criteria.

311. 64 F. Supp. 2d at 1284.

312. *Supra* nn. 56–105 and accompanying text (discussing the two United States sanctuary movements of the twentieth century).

313. *See supra* pt. II (stating that historically sanctuary was for protection of those who committed murder while participating in blood feuds).

314. *Warner*, 64 F. Supp. 2d at 1285.

315. *Matthew* 25:42–43 (King James).

316. *Luke* 9:48 (King James).

2. The Holy Grail: Florida's Version of Sherbert-Yoder Strict Scrutiny

Once the free exercise claimant vaults over the dual threshold by proving his sincere religious exercise was burdened by state action, he opens the door to the *Sherbert-Yoder* test, where the burden shifts to the government to show that its action was the least drastic means to satisfy its compelling interest.[317] Can the government show a compelling interest that it can satisfy in no less restrictive fashion than by forcing its way into the church and taking its man?[318] Though strict scrutiny is the most restrictive test in constitutional law,[319] the government can still prevail if its compelling interest rises to that standard.[320]

Aguilar provides the most recent example of strict scrutiny in the sanctuary context, although it came not under traditional *Sherbert-Yoder* strict scrutiny, but under the watered down post-*Lee* version of the test. There, the Ninth Circuit found the government to have met the test's compelling governmental interest part easily; "[t]he proposition that the government has a compelling interest in regulating its border hardly needs testimonial documentation."[321] In addition, a "compelling state interest" is an "interest of 'the highest order.'"[322]

If border control is compelling, so is law enforcement. In *Yoder*, one of the foundations of the Florida RFRA, the United States Supreme Court emphasized that its ruling did not involve a case where any adverse impact "to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[323] From the beginning of modern free exercise jurisprudence in 1940, the Court made it "clear that a State may . . . safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the [free exercise clause]."[324] Thus, the government has a right to safeguard its citizens and the peace and order of the community. In the introductory hypothetical,

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317. Tribe, *supra* n. 106, at § 14-13, 1251.
318. Fla. Stat. § 761.03.
319. *Warner*, 64 F. Supp. 2d at 1283.
320. Tribe, *supra* n. 106, § 14-13, 1251.
321. *Aguilar*, 883 F.2d at 695.
322. Bassett, *supra* n. 9, at § 1:8, 1-32.15.
323. 406 U.S. at 230.
324. *Cantwell*, 310 U.S. at 304.

the government's most powerful argument is that not entering the church will result in a fugitive from justice avoiding a penalty of law, thereby endangering the citizenry as a whole. Given the Supreme Court's pronouncements on the subject of public safety from 1940 onward, this argument will be persuasive in almost any court.[325]

Would an interest of "the highest order" (i.e., peace and order) extend to a physical invasion of a consecrated place by police officers, merely to apprehend a misdemeanant rather than a felon? Perhaps not. In all of the free exercise cases decided against the religious claimant by the United States Supreme Court since 1940, the questioned conduct would have led to weakening of important government programs like the Selective Service, the collection of taxes, or public policies against racial discrimination.[326] Apprehending someone wanted for a petty offense in a needlessly violent way would have severe public relations consequences for the government and would weaken the important law enforcement objective far more than waiting at the door for the offender to give up. Under the Florida RFRA, the court must balance the state's compelling interest against the claimant's burdened religious practice and ensure that the state employs the least restrictive means to accomplish its goal.[327]

The Florida RFRA explicitly defines the phrase "exercise of religion" to mean "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[328] Here, the priest barred the door of his church to the police. Unlike Klemka, this fugitive does not want to come out and give up. He is proclaiming his innocence and resisting what he believes to be unjust. The original practice of sanctuary was intended to provide breathing space, to give time for the legal system to work peacefully.[329] Therefore, the defining question is that of the means. Is an armed invasion of holy ground the least restrictive means? Until recently, United States churches did not look to the legal system to provide an answer to this question, and the result was an armed

325. *See e.g. id*. (finding the argument persuasive).
326. Bassett, *supra* n. 9, at 1:8, 1-32.15.
327. Fla. Stat. § 761.03; *supra* n. 223 and accompanying text.
328. Fla. Stat. § 761.02(3).
329. Carro, *supra* n. 14, at 760.

invasion in more than one case.[330] But the churches, beginning with *Aguilar*, are now looking to the law for their answers.

The law is short of relevant examples illustrating what is and what is *not* the "least restrictive means" in the sanctuary context, but one can look to recent history for just such an example. On December 20, 1989, the United States undertook what was then the largest deployment of United States combat forces since Vietnam.[331] The invasion of the Republic of Panama employed 26,000 soldiers and established the United States's control of the Central American nation in hours.[332] As American soldiers secured the Canal, the United States Southern Command (SouthCom) dispatched special forces to apprehend General Manuel Noriega, the de facto head of state and chief of the notorious Panama Defense Force (PDF).[333] The United States wanted him on cocaine smuggling charges.[334] General Noriega evaded SouthCom's dragnet, taking refuge in the Papal Nunciature, home of Monsignor Jose Sebastian Laboa, the Vatican's chief diplomat in Panama.[335] The man the United States invaded Panama to get had escaped into a religious sanctuary.[336]

Or had he? The 82d Airborne Division reacted fast and sealed the neighborhood.[337] Its three parachute infantry brigades dowsed streetlights and instituted foot patrols around the Nunciature.[338] Its men stopped and searched all cars in and out of the area.[339] Psychological warfare troops bombarded the sanctuary around the clock with rock music.[340] Sleep was impossible, not only for General

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330. *See e.g. Bridges*, 443 F.2d at 972 (Armed policemen entered a church and arrested twelve fugitives who were being kept in the church's sanctuary.).

331. John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians during Operation Just Cause*, 133 Mil. L. Rev. 31, 31 (1991).

332. *Id.* The Author further notes that she was stationed with XVIII Airborne Corps's 503d Military Police Battalion in Panama during the year prior to the invasion and draws on her own recollections for descriptions of the United States Army units involved.

333. Douglas Jehl & Bob Secter, *Invasion: A Web of Surprises; The Fighting in Panama Was No Snap. Citizens Fended for Themselves amid Anarchy. Both Sides Miscalculated*, L.A. Times A1 (Dec. 27, 1989). Unit descriptions are from the Author's recollection of the Panama invasion force.

334. *Id.*

335. Hugh Davies, *Vatican Attacks America over "Pop War" Siege*, Daily Telegraph (London) 1 (Dec. 30, 1989).

336. *Id*.

337. Parkerson, *supra* n. 331, at 129.

338. *Id.*

339. *Id.*

340. *Id*. The music supposedly was intended to prevent electronic interception of negotiations. *Id*.; Davies, *supra* n. 335, at 1.

Noriega (who was known to hate rock music) and his aides, but for the clergy trapped with him.[341]

The Vatican, in the long tradition of ecclesiastical sanctuary, refused to hand Noriega over to SouthCom.[342] The Americans did not want to take him by force, although they had the strength and a compelling reason to do it.[343] The standoff lasted ten days until Monsignor Laboa told General Noriega that he would allow PDF forces into the compound to arrest their former leader if General Noriega did not give himself up.[344] General Noriega surrendered, and the American forces peacefully took their man.[345]

The Vatican's policy in providing General Noriega refuge corresponds, point for point, with the old ecclesiastical sanctuary practice.[346] The Vatican, as in ancient times, intended to provide a temporary refuge.[347] Refuge was no longer necessary once the sanctuary-seeker was not actively in danger.[348] In the ancient English tradition, the lawgivers, likewise, intended sanctuary as a short-term measure to protect those in imminent danger.[349] Does this impact the "least drastic means"?

The Noriega incident is one of the best examples of the *Sherbert-Yoder* compelling interest test's proper effect in action, in spirit, if not in fact. In Panama, if one believes the party line, United States forces were concerned with the repercussions of military action on a *diplomatic* compound, not with the effect of yet another open attack on the clergy by American soldiers as was so often the case in the 1960s.[350] However, United States forces were not so circumspect with *other* diplomatic personnel during their search for

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341. Davies, *supra* n. 335, at 1.

342. Parkerson, *supra* n. 331, at 129.

343. *Id*. at 31; Jehl & Secter, *supra* n. 333, at A1.

344. Parkerson, *supra* n. 331, at 130.

345. *Id.*

346. *Compare* Parkerson, *supra* n. 331, at 131 *with supra* nn. 13–36 and accompanying text (Major Parkerson stated that the Vatican has a policy of providing temporary refuge in "certain circumstances," comparing that to international legal practices regarding political asylum). He fails, however, to take into account that only six years before Operation Just Cause, Catholic canon law was clear that sanctuary was an ecclesiastical remedy, and thus Monsignor Laboa may well have been acting as much from religious conviction as from diplomatic considerations. *Codex Iuris Canonici*, Canon 1179; *supra* n. 161 and accompanying text.

347. Parkerson, *supra* n. 331, at 131.

348. *Id.*

349. Baker, *supra* n. 24, at 9; *supra* pt. I.

350. Parkerson, *supra* n. 331, at 130. Also recall *Bridges*, where military police were not so circumspect. 443 F.2d at 972.

General Noriega. On December 29, 1989, SouthCom forces raided and searched the home of the Nicaraguan Ambassador to Panama, looking for weapons.[351] Its excuse was apparently public safety.[352] When the Americans found rocket-propelled grenades and other weapons, it seemed their suspicions were well founded.[353] Nevertheless, was not the capture of the enemy forces's leader, a criminal wanted for drug trafficking, also a matter of public safety? Could there have been something more motivating SouthCom? Assume for a moment that the Vatican had approached an American court for injunctive relief to stop SouthCom from overrunning their compound. For this argument disregard the problem of constitutional application in a war zone outside the United States.

Applying the dual threshold of pre-1983 *Sherbert-Yoder* strict scrutiny, the Vatican would have to show that the United States, the de facto government in Panama at the time, would burden its free exercise of a sincere religious belief substantially by taking the compound. Given the Vatican's long-standing tradition of providing refuge to those who were in danger,[354] SouthCom's armed intervention would burden that tradition. Further, the sincerity of the Pope's representative in his Christian belief is unlikely to be questioned seriously. Thus, the dual threshold is crossed and the door to strict scrutiny opens. Was the United States government's compelling interest in apprehending Noriega so great that an armed invasion of the Papal Nunciature was the least drastic means to secure him? Obviously it was not, for SouthCom did get its man peacefully.

Returning to the Introduction, the priest gave sanctuary to a fugitive who claims that law enforcement agents are planning to kill him. The priest does not know whether this is true or false. He extends to the fugitive a temporary refuge in the tradition of the Church. Should the police apply overwhelming force to take their man? In such a case, the Florida RFRA inextricably intertwines the question of the least drastic means with the depth of the government's compelling interest. Storming the sanctuary may not be necessary for the agents to achieve their ultimate goal — taking the offender into custody.

Like United States forces in Panama, in this hypothetical, the state has a compelling interest — public safety — in apprehending

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351. Parkerson, *supra* n. 331, at 103.
352. *Id.* at 118.
353. *Id.* at 103.
354. Tribe, *supra* n. 106, at § 14–12, 1243 (citing *Reynolds*, 98 U.S. at 166).

an at-large fugitive from justice. "[A] State may . . . safeguard the peace, good order and comfort of the community"[355] without invading the priest's right to exercise his religion by helping a person in need. Further, the Supreme Court has stated that the free exercise clause protects religious *belief*, but it does not always protect *actions motivated by* religious belief.[356] "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[357] However, where the Florida RFRA is concerned, things are not so clear. The statute explicitly protects not just religious belief, but actions *motivated* by religious belief.[358] As an action motivated by religious belief, ecclesiastical sanctuary has a low bar to jump to get to strict scrutiny under the Florida RFRA.

Given this, the parties will almost certainly center the conflict at first on the magnitude of that compelling governmental interest. The priest will not deny that public safety is a compelling interest in most cases. However, the Florida RFRA inextricably intertwines the degree of the compelling interest with the means the government chooses to employ. Unlike cases arising before 1998, a reviewing Florida court cannot merely brush off the drastic means problem with a general statement like the Ninth Circuit did in *Aguilar*.[359]

Warner, the only case to date construing the Florida RFRA, did not approach the question of strict scrutiny. Instead, the court preferred to dispose of the free exercise problem at the dual threshold. This would force a reviewing court to reach for *Aguilar*, the most recent sanctuary case, as its guide in resolving the strict scrutiny test, along with *Sherbert* and *Yoder*, the Florida RFRA's foundations.

In both *Sherbert* and *Yoder*, the free exercise cases revolved around a government action that was inimical to the continued viability of the entire belief system held by the free exercise claimants.[360] The Ninth Circuit recognized this in *Aguilar* when it

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355. *Cantwell*, 310 U.S. at 304.

356. *Reynolds*, 98 U.S. at 166.

357. *Id*.

358. Fla. Stat. § 761.02(3); *Warner*, 64 F. Supp. 2d at 1283 (noting that the Florida RFRA is stronger than its federal predecessor).

359. 883 F.2d at 695 (simply stating that less drastic means would not have achieved the government's purpose).

360. Tribe, *supra* n. 106, at § 14-13, 1257–1258. Professor Tribe refers to the "drastic" consequences of the government's policy in *Sherbert* and quotes *Yoder* as referring to the "keystone of the Amish faith." *Id.*

referred to *Yoder*, agreeing with the government's assertion that the courts had never applied the *Sherbert-Yoder* test to anything beyond regulatory laws.[361] Based on this, and on the fact that the Supreme Court weakened the *Sherbert-Yoder* test in *Lee*, the *Aguilar* court sided with the government, finding that sanctuary would hinder border control; an unacceptable result.[362] This was the same result the *Elder* court,[363] and later the Fifth Circuit, reached in the combined appeal of Elder and Merkt.[364]

Similar to forcing a Seventh Day Adventist to work on the Sabbath[365] or taking away the right of the Amish to educate their children where they choose,[366] stripping the right of a priest to render aid to someone in distress is inimical to the Christian system of belief. This was probably what the *Aguilar* court meant when it referred to the western sanctuary movement's request for a limited free exercise exemption as unworkable, for it would involve the membership of four Christian denominations whose numbers were "incalculable."[367] This is in line with the *Lee* decision's weakening of strict scrutiny, where an exemption that would interfere unduly with the state's compelling interest would be invalid.[368] However, the Florida RFRA does *not* follow the *Lee* modifications to the *Sherbert-Yoder* regime. The Florida RFRA's stated intent is to establish the unadorned *Sherbert-Yoder* test,[369] specifically applying to *acts* "substantially motivated by a religious belief."[370] This seems directly aimed at the Supreme Court's assertion that the government can regulate religiously motivated actions. Further, *Warner* teaches that one should interpret the Florida RFRA's definition of "free exercise of religion" to mean a belief that "reflects some tenet, practice or custom of a larger system of religious beliefs."[371] Ecclesiastical sanctuary certainly qualifies under this broad definition as a protected belief.

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361. 883 F.2d at 694.
362. *Id.* at 695.
363. 601 F. Supp. at 1578.
364. *U.S. v. Merkt*, 794 F.2d 950, 957 (5th Cir. 1986). This also was the appeal of the Southern District of Texas's opinion in *Elder*. *Id*. at 954 (referring to "[a]ppellants Merkt and Elder").
365. *Sherbert*, 374 U.S. at 399.
366. *Yoder*, 406 U.S. at 207.
367. 883 F.2d at 696.
368. Tribe, *supra* n. 106, at § 14-13, 1261.
369. Fla. Stat. Ann. § 761.01 Hist. & Stat. nn.
370. Fla. Stat. § 761.02(3).
371. 64 F. Supp. 2d at 1281.

Logically, under the Florida RFRA, government action can only infringe upon an *act* reflecting a tenet, practice, or custom of a larger system of religious belief, such as a clergyman's grant of sanctuary in his church, when that action is the least restrictive means of furthering a compelling interest. In a situation such as the introductory hypothetical, the degree of the crime would have to be great to justify an armed invasion of a church as the least drastic means available to the government. This is even more evident when one compares the actions of the United States Army in a combat zone trying to apprehend a fugitive who took refuge on holy ground with the position of our hypothetical fugitive cowering before an altar in Clearwater. Could the police not surround the church and wait for their man like the 82d Airborne so patiently waited for General Noriega?

The purpose of church-sanctioned refuge is time; time for passions to cool, time for justice to work, and time for the danger to pass.[372] Here, sanctuary would provide time for an independent authority to investigate the fugitive's allegations. And if disproved, just as the United States Army and Monsignor Laboa did in Panama when General Noriega surrendered quietly,[373] the priest could likely reason with the fugitive and obtain his surrender too, without loss of life. Contrast this result with a day in 1993 when federal agents sent armored vehicles into another religious compound in Texas, resulting in great loss of life followed by years of legal actions and recriminations.[374] Which is the better course?

Should a member of the clergy find himself or herself confronted with a sanctuary seeker to which the clergy member wishes to extend sanctuary, he or she may have a protected interest under the Florida RFRA that would not have existed under prior law. Moreover, this interest is one that Florida's courts have yet to confront. The unalterable fact is that the Florida RFRA specifically applies strict scrutiny to actions motivated by religious belief, and law enforcement, therefore, should not forcibly enter consecrated grounds without an overriding need to do so.[375] In such a situation, the clergyman or woman should pick up the nearest telephone and have the church attorney run to the state circuit court with a request for a temporary injunction to prevent an invasion of

372. Baker, *supra* n. 24, at 9; *supra* pt. I.

373. *Supra* nn. 344–345 and accompanying text.

374. *U.S. v. Branch*, 91 F.3d 699, 710 (5th Cir. 1996).

375. Fla. Stat. § 761.01–761.04. Given the plain language of the Florida RFRA, it stands to reason that the legislature intended this level of protection for religious expression.

sanctified ground and buy time to resolve the issue. Unlike the western sanctuary movement in *Aguilar*, the true practice of sanctuary, as espoused by the Christian church's largest denomination as recently as 1989 by its actions in Panama, is that the Church will grant refuge to those in *immediate* danger. Tradition also demands that such refuge be temporary, until that immediate danger is past. Ultimately, the state will get its fugitive. However, under the Florida RFRA, it cannot invade sanctified grounds to take him without an overriding reason to do so.

V. CONCLUSION

For thousands of years, houses of worship have had diverse functions. As long ago as the Israel of Old Testament times, they have not only served as places of worship, but also as refuges from the secular law when its harshness could not be abated.[376] Devotees of each of the world's religious faiths daily ask the deity or deities they believe in to intercede for them on Earth. In the years after the death of Jesus Christ, the Church that bears His name has followed in the traditions of those that came before it and offers refuge to those in danger, one of the many ways it intercedes for its faithful. The United States was founded in large part upon Jesus's church, and since the seventeenth century, American churches have not hesitated to stand up and challenge the secular law when that law conflicts with what they believe.

The framers of the United States Constitution recognized the diversity of faith in this nation from the outset and framed the first of the amendments to guarantee the free exercise of any form of religious belief. That provision in the foundation of American law laid another kind of foundation, one for the religious faiths to challenge the secular government when government action impinges on religious exercise. Since the middle of the nineteenth century, the highest of this nation's courts has jousted, first with Congress and now with the states themselves, over the direction the balance should tilt when state and religious interests collide. Laws may be made for the government of actions,[377] as the United States Supreme Court said, but in the latter half of the twentieth century the government of actions repeatedly has chosen to mandate the highest possible scrutiny in cases in which it and religious exercise

376. *Supra* n. 14 and accompanying text.
377. *Reynolds*, 98 U.S. at 166.

collide. In five states today, including Florida, that test is the law.[378] Once a religious practitioner shows that his belief motivates his actions and that government inhibits this in any way, the government assumes the burden to show that it is using the least restrictive means possible to satisfy a compelling interest.

The Christian faith demands that its clergy extend assistance to those in need. The largest Christian denomination specified this in its canon law until 1983 and continues to practice the belief to the present day.[379] Like Lazarus who rose from the tomb, ecclesiastical sanctuary has risen, not once, but several times with varying degrees of success. In seventeenth century America, it survived as a call to civil disobedience against an unjust sovereign. In the latter twentieth century, it began to return to its ancient roots as a religious ministry, and new state laws to guarantee religious freedoms may thus allow the Lazarus that is ecclesiastical sanctuary to rise yet again.

Laws such as the Florida RFRA will force state authorities to consider carefully a repeat of the church invasions of the 1960s when the church makes itself a refuge for a fugitive. Unlike then, churches today are more aware of the law. As evidenced by the western sanctuary movement in *Aguilar*, they are willing to raise free exercise as a defense to religiously motivated actions. The Florida RFRA, unlike current federal law, specifically protects actions motivated by religious beliefs, like a clergyman's grant of ecclesiastical sanctuary. Law enforcement agencies, judges, the clergy, and attorneys should all be aware of this should a new sanctuary movement rise in the State of Florida, as it has so often elsewhere in the past, and employ the Florida RFRA to trigger the Lazarus effect.

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378. Fla. Stat. §§ 761.01–761.04; Bassett, *supra* n. 9, at § 1:8, 1-32.11 n. 4.

379. *Supra* nn. 161, 346 and accompanying text.