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‘Freedom from Seizure’: Law and Asylum in Conflict

Simon Alexander Behrman

PhD Thesis

Birkbeck, University of London

DECLARATION

The work presented in this thesis is my own:

Simon Behrman

ABSTRACT

The central argument of this thesis is that law and asylum are fundamentally incompatible. In contrast to the standard claim that the coming of refugee law has been key in guaranteeing a space of protection for refugees, I argue that law has been instrumental in eliminating spaces of protection, not just from one's persecutors, but also from the biopolitical grasp of sovereign power.

This thesis is presented in three parts. First I examine the genealogy of asylum. By uncovering certain fundamental aspects of its construction, namely its concern with defining space rather than people, and its role as a space of resistance or otherness to sovereign law, I demonstrate that asylum has historically been antagonistic to law, and vice versa. In the second part, I look briefly at the development of international refugee law, and in doing so present a counter-history to the idea that this process was about restricting the caprice of states in relation to the admission of refugees and was grounded in humanitarian concern. Instead, I argue that refugee law was constructed precisely to ensure the effective management of large movements of forced migrants. Finally, in the third part of the thesis, I treat the US Sanctuary Movement (1981-1991) as a concentrated example of what happens when the old tradition of asylum confronts modern refugee law. Here many of the themes of parts one and two are revisited, but with the added twist that now the ideology of refugee law serves to hegemonise and undermine the practice of asylum/sanctuary from within.

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Dedicated to the memory of Bernard Behrman (1931-2013).

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Researching and writing this thesis has been one of the most difficult things I have ever had to do. Perhaps the hardest part has been the isolation. To complete such a task without the support of formal teaching, classes, structured given tasks and a community of students working on the same subject has been the real challenge. Nonetheless it is far from being the truth that what follows could have been achieved under my own steam alone. Instead I have been the recipient of much generous support and help from a number of people.

First, I am immensely grateful to my thesis supervisors, Thanos Zartaloudis and Patricia Tuitt. Without Thanos' encouragement I would never have embarked on a PhD or an academic career. Indeed, I would not otherwise have thought myself capable of doing either. In addition, Thanos taught me refugee law at both undergraduate and graduate level. He was and is a kindly but critical (in the best and multiple senses of that term) teacher. Throughout the writing of this thesis his comments and questions have been pointed but always thoughtful and helpful. Patricia has also been very supportive of my work from the beginning. In addition, her writings have been a continuing source of inspiration for me. Her ground-breaking book *False Images: Law's Construction of the Refugee* gave me 'permission', if you like, to develop my own highly critical approach to refugee law. In spite of her heavy workload as head of the Law School at Birkbeck, she has always been available to discuss and make suggestions on my thesis. In addition, every supervision meeting was held over a delicious meal at a restaurant, to which she treated me. There aren't many PhD students who get that perk from their supervisors! Both Thanos and Patricia have been exemplary supervisors in that they have consistently guided my work, yet given me the independence to argue my point of view and to pursue my own lines of enquiry.

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The section of this thesis on the Sanctuary Movement is based on research carried out at the John W Kluge Center at the Library of Congress in Washington DC. This was made possible by additional funding jointly from the AHRC and the Kluge Center. In particular I must record my sincere thanks to Mary Lou Reker at the Kluge Center. When my travel arrangements were upset at the last moment (ironically due to immigration issues), she was immensely supportive and helped organise things so that I could begin my residency at a later date. In addition to that, it transpired during my stay there that she had been an active participant in sanctuary for a Vietnam War draft-resister in the early 1970s. Her description of that event was inspiring. She also gave me very useful advice on pursuing certain sources of material on those events.

During my time in the US I was also able to consult a number of archives containing primary materials on the Sanctuary Movement. My sincere thanks go to the staff and volunteers at the Dumbarton Methodist Church, Washington DC; History Library, US Citizenship and Immigration Services, Washington DC; First United Methodist Church of Germantown, Philadelphia; Swarthmore College Peace Collection, Philadelphia; Graduate Theological Union Archives, Berkeley; and the library of the Wisconsin Historical Society, Madison.

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I was halfway through writing this thesis when my father died. It is one of my greatest regrets that he did not live long enough to read it and to offer his own critical comments. He was himself an exile, having originally left his native South Africa in the late 1950s to pursue graduate studies in England. When increased repression of the anti-apartheid movement, of which my dad was an active member, culminated in the infamous Rivonia trials, he found himself unable to return to South Africa for the next three decades. So at various moments he was, in the jargon, an economic migrant, a refugee *sur place* and an exile. The fact that he was never firmly categorised as one or any of these things was largely down to the politics and the conditions that prevailed then, before immigration and refugee law became as restrictive and obsessed with categorisation as it has. Thanks to him I grew up surrounded by politics and his comrades, many of whom had become refugees. That experience, perhaps more than anything else, has been the most important education I have ever had. My dad, as well as being a loving father, was also one of my best teachers, and my hero. This thesis is dedicated to his memory.

THESIS INTRODUCTION

The Problem

This thesis arose out of a question that occurred to me when I began to study refugee law at undergraduate and then again at graduate level: what has caused the place of the refugee in everyday discourse to fall so low in recent years? The standard answer provided by academics and activists has been framed as one of a gradual diminution of the legal rights and protections afforded the refugee. There was, it is claimed, a Golden Age of refugee protection inaugurated by the 1951 Refugee Convention¹ and the 1967 Protocol², and lasting until the 1980s.³ Over this period the Convention set in place an evolving system of international and domestic law that offered increased protection and legal rights for refugees. However, so this narrative continues, over the last 20 years refugees have had their rights to material support and legal representation increasingly restricted. In addition, their basic civil rights have been infringed as a result of the increased use of administrative detention and deportation. Further, the growing securitisation of asylum policy at both the UK and EU level has

1 *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, 189.

2 *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, 606.

3 Shami Chakrabarti, 'Rights and Rhetoric: The Politics of Asylum and Human Rights Culture in the United Kingdom' (2005) 32 *Journal of Law and Society* 131; Andrew I Schoenholtz and Hamutal Bernstein, 'Improving Immigration Adjudications Through Competent Counsel' (2008) 21 *Georgetown Journal of Legal Ethics* 55; Danièle Joly, 'A new asylum regime in Europe' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University 1999); Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto 2012).

been a mechanism for legitimising this stripping away of legal rights.⁴ In short, the failure has been one of a weakening of the law governing the protection of refugees.⁵

Yet there are two key problems with this narrative. First, while it is true that the discourse on refugees has become uglier and uglier (characterisations of bogus subjects, terrorists, criminals etc.),⁶ and it is also true that the changes in the law which have introduced detention on a large scale and restricted access to material benefits have made claiming asylum an ever more arduous task, this period has also seen significant extensions in the legal recognition of the rights of refugees. For example, in the UK the 1993 Asylum and Immigration Appeals Act gave asylum-seekers, for the first time, a statutory right to appeal against a denial of refugee status. The 1998 Human Rights Act has allowed a greater scope for resisting deportation on the basis of the principle of *non-refoulement* contained in Article 33 of the 1951 Convention.⁷ In addition, the courts have in recent years extended the scope for claiming refugee status to cover persecution on grounds of gender and sexuality.⁸ At the EU level, the 2004 and 2011 Qualification Directives have instituted guaranteed minimum standards for refugees across the union.⁹ On a global scale the principle of

4 Prakash Shah, 'Taking the 'political' out of asylum: the legal containment of refugees' political activism' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University 1999).

5 Guy Goodwin-Gill, 'Refugee identity and protection's fading prospect' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University 1999).

6 Farhad Dalal, 'The hatred of asylum seekers' (2005) 4 *Mediactive* 21.

7 e.g. *R (Q and Others) v Secretary of State for the Home Department* [2003] EWCA Civ 364.

8 e.g. *Shah and Islam v Secretary of State for the Home Department* [1999] 2 AC 629; *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; *HJ (Iran) and HT (Cameroon)* [2010] UKSC 31.

9 Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9.

non-refoulement has been linked increasingly to positive obligations on states to prevent fundamental human rights violations, such as torture or the threat to life.¹⁰

Some commentators, notably Matthew E Price, have argued that the expansion of the scope of asylum, as described above, has diluted the meaning of asylum.¹¹ Price concludes that this apparent liberalisation of asylum over recent years has prompted states to respond with the kind of draconian treatment of refugees that we are so used to now. However, the second major problem with the standard narrative, one which Price fails to recognise, is that it wrongly asserts that certain phenomena such as mass detention of refugees, and a focus on control and security over assistance and protection, are of such recent vintage. In fact, forced encampments of refugees date back to the Boer War. They were also in existence during the late 1930s when the French government herded people fleeing Franco's victorious forces into wire-bordered detention centres on the beaches of southern France.¹² Camps were also a feature in the treatment of Displaced Persons (DPs) at the end of the Second World War. The obsession with measuring and controlling refugee movements, of judging the quality of people presenting themselves as refugees requiring asylum, have their origins in the late 18th and 19th centuries.¹³ In short, looking simply at legal developments concerning refugees over the last couple of decades does not give us a clear rationale for the degradation of the refugee, a process which appears to have been gestating over a far longer period.

10 e.g. *Soering v United Kingdom* (1989) Series A No. 161; *Chahal v United Kingdom* (1997) 23 EHRR 413.

11 Matthew E Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University 2009).

12 Louis Stein, *Beyond Death and Exile: The Spanish Republicans in France, 1939-1955* (Harvard University 1979) 49.

13 cf Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d'asile XIXe -XXe siècles* (Hachette 1998).

What This Thesis Does

Therefore, the following questions arose for me, and are the ones that guide this thesis:

- I. What exactly has been the impact of law upon asylum?
- II. Does the claim that contemporary refugee law maintains and protects the principle of asylum hold up to scrutiny?
- III. Given that my working hypothesis is that refugee law has had a negative impact on the principle of protection¹⁴ embodied within asylum and that, therefore, question II should be answered in the negative, are these the inevitable consequences of the meeting between law and asylum? If so, why?

In order to answer these questions satisfactorily, it is necessary to interrogate what exactly has formed the basis of asylum historically. In particular, I have attempted to uncover those points at which law and asylum have encountered each other, and what the outcome of those meetings have been. In order to challenge the narrative that asserts that contemporary refugee law is grounded in humanitarian concerns and the principle of protection for the refugee, it has also been necessary to uncover the threads that, woven together, have created the fabric of the current legal regime of asylum. This has resulted in an extensive discussion of the history of asylum and refugee law that begins with the Bible and Ancient Greece and ends with the 1951 Convention and even more recent national legislation such as the US Refugee Act of 1980. I make no apologies for attempting a discussion of this scope. It is precisely the

14 Guy Goodwin-Gill has argued that the principle of protection has at least two aspects, one legal and one political. The legal basis is related to the refugee's 'status, rights and interests in other countries'; the political context relies on 'presentation to governments...[on the basis of] the requisite measures of assistance and the necessary solutions to be found'. See Guy Goodwin-Gill, 'The Language of Protection' (1989) 1 *International Journal of Refugee Law* 6, 7. As will become evident in this thesis, my view is that the principle of protection owes much more to the political rather than the legal element. Indeed, there appears something immanent to law, which in fact undermines the principle of protection at the political level.

myopia of almost all discussions of refugee law, which look no further back than its most recent manifestations, typically the 1951 Convention and its precursors following the First World War, which I believe has led to a set of false assumptions, namely that refugee law follows the groove of asylum, and that its foundations are humanitarian in nature. By taking the (much) longer view, I believe that a clearer perspective on the question can be reached.

In the course of my research on these histories I have drawn upon essentially two distinct sets of sources: classical and medieval histories of asylum, and modern historians of refugee law. While both these fields have been prolific in their output, almost never do they engage with each other, and when they do it is in brief and relatively superficial ways. One way in which this thesis breaks new ground is in bringing these two discourses together, and in doing so providing a much better perspective of the relationship between law and asylum than has hitherto been achieved. For the classical and medieval historians the story of asylum comes to an end somewhere around the 16th and 17th centuries. At one level they are correct. I share their conclusions that the coming of the modern state and law obliterated a tradition that had existed almost as far back as recorded history. However, they do not then address the question of the legitimacy of contemporary refugee law's claim to embody that tradition. Equally, and perhaps more surprisingly, writers in the field of refugee law, and indeed of refugee studies more generally, fail to look back beyond modernity or even beyond the 20th century. There are a few exceptions, but even they tend to deal with a relatively narrow scope, or reference a pre-modern history in only barely more than synoptic terms.¹⁵ Moreover, what is also generally lacking in the literature is a critical approach to the question of refugee law. There is certainly plenty of excellent work which has critiqued the *specific* regime of refugee law that has evolved since the 1951 Convention,¹⁶ but very little which has addressed the wider

15 e.g. *ibid*; Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume One and Volume Two* (AW Sijthoff 1966, 1972); Dallal Stevens, *UK Law and Asylum Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004); Philip Marfleet, *Refugees in a Global Era* (Palgrave Macmillan 2006).

16 e.g. Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto 1996); Jerzy Sztucki, 'Who is a refugee? The Convention definition: universal or obsolete?' in Frances

question of whether or not the very category of ‘refugee law’ is itself problematic. By attempting to deal head-on with that issue, again this thesis has something new to offer in the field of refugee studies and law.

While it is true that asylum as a widespread and established practice came to an end with the dawn of modernity, it is inaccurate to state that it came to a complete halt, for repeatedly, if sporadically, asylum – or sanctuary, as it often known – has been practised by religious, political or community activists as a grassroots effort to provide protection to people in need. For example, following the restoration of the English monarchy in the 1660s, regicides found sanctuary amongst colonists in New England; during the Second World War almost the entire town of Le Chambon in southern France organised to hide and protect people threatened by the Nazi occupiers. More recently, movements of *sans-papiers* in France and Belgium have challenged the law by claiming spaces of sanctuary for various categories of irregular migrants.¹⁷ I have chosen for the final part of this thesis to examine in detail one such example: the US Sanctuary Movement of the 1980s. This was certainly one of the largest and most sustained examples of asylum/sanctuary in the modern era; it also provides a fascinating example of both the conflict and the interpenetration of law, particularly refugee law, and the historical tradition of asylum. As such it provides an

Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University 1999); BS Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23 *Refugee Survey Quarterly* 55; Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn 2005); Thanos Zartaloudis, ‘Asylum, Refugee and Immigration Law Studies: A Critical Supplement’ in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Nijhoff 2013).

17 There is a wealth of literature on this topic, the best of which includes Madjiguène Cissé, *The Sans-Papiers: The New Movement of Asylum Seekers and Immigrants Without Papers in France – A Woman Draws the First Lessons* (Crossroads Books 1997); Ababacar Diop, *Dans la peau d'un sans-papiers* (Seuil 1997); Johanna Siméant, *La cause des sans-papiers* (Presses de Sciences Po 1998); Madjiguène Cissé, *Parole de sans-papiers* (La Dispute 1999); Thierry Blin, *Les sans-papiers de Saint-Bernard: Mouvement social et action organisé* (L’Harmattan 2005); Aboubacry Sambou, Jeanne Davy and Hélène Gispert (eds), *Chroniques des Sans-Papiers* (Éditions Syllepse 2008); Thierry Blin, *L’Invention des sans-papiers: Essai sur la démocratie à l’épreuve du faible* (Presses Universitaires de France 2010).

excellent opportunity to test some of my hypotheses on the relationship between those two paradigms. Again, a fairly substantial literature has developed over the years on this movement. These tend to be either partisan accounts from participants in the movement or social anthropology. While this literature often provides in-depth narratives and sophisticated analyses, no-one has yet really explored the complex relationship of this movement both to refugee law *and* to the tradition of sanctuary, both of which are determining influences upon it.¹⁸ This is another gap that I seek to fill in this thesis. In addition, I have brought to bear on this discussion much primary material from the movement (memoranda, letters, minutes of meetings etc.) some of which is both highly illuminating and to which no reference has been made in other published work on the subject.

Methodology

At the outset it is necessary to clarify the position of the author of this thesis. Perhaps the most common approach to academic research is one that is based on a dispassionate investigation of the facts, sources and existing academic work, framed by a hypothesis which will either be proved or disproved in the course of the research. That has most certainly not been the route that I have taken. I have a personal investment in the topic on two levels. First, as the child and grandchild of forced migrants I have an instinctive sympathy for those navigating the system of refugee law that is critiqued in this thesis. Second, over the course of 20 years I have been active myself in a number of anti-deportation campaigns. In short, the impetus for engaging in this research was far from dispassionate or objective. On the contrary, my research questions were driven by a desire to counter what I see as a debilitating reliance on the law by forced migrants and their lawyers and advocates. While I have had one eye on engaging in a discourse with fellow academics, I have had the other focussed on attempting to provide the tools for activists for migrant justice to

¹⁸ Some recent works have begun to explore aspects of these relationships, e.g. on the relationship of the sanctuary movement to law, Randy K Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (UBC Press 2005); on the links between the historic tradition of asylum and contemporary movements, Philip Marfleet, 'Understanding "Sanctuary": Faith and Traditions of Asylum' (2011) 24 *Journal of Refugee Studies* 440.

reorientate their approach to law and refugee law in particular. At the same time I firmly believe that the rigours of academic research – the uncovering of sources; the willingness to challenge ones own preconceptions; depth of analysis; the marshalling of material and arguments in order to make a sustained and original thesis – are also necessary in making an effective challenge to the ‘common sense’ that prevails in everyday discourse. In my experience political activism, on its own, leaves one with little space in which to reflect and examine at this level. Therefore, this thesis is based on what has been termed ‘militant research’, in that it reflects my ‘active and committed participation in the political movement’ which I describe and in which the ‘outcomes of the research are shaped in a way that can serve as a useful tool for the activist group, either to reflect on structure and process, or to assess the success of particular tactics’.¹⁹

This thesis is broadly interdisciplinary. While fundamentally what follows is an argument about law and how the legal discipline has viewed asylum, my thesis draws on scholarship and frameworks from the fields of classical, medieval and modern history, theology, philosophy, social anthropology and refugee studies as well as law. The wide range of research across multiple disciplines is both necessary as a means to fill a lacuna which I believe exists within legal scholarship on the question of asylum, and also aids my argument that the interests of refugees today have been largely negated by an overly legalistic view of the issue. The breadth of research that I have undertaken has indeed thrown up many fascinating and complex insights into the nature of asylum that are obscured when solely focussed on one of these disciplines. The most crucial insight for this thesis is the tension with law that has dogged asylum from antiquity right up to the present day. Equally it has been highly revealing to discover the similarity of the challenges faced by advocates of asylum when faced with attempts to regulate the practice in law, from the Church Fathers in 4th century North Africa to sanctuary activists in the USA during the 1980s. Such a perspective would simply have not been possible without bridging the gaps between such a wide variety of disciplines. On the other hand this type of inter-disciplinarity poses a challenge to the necessary rigour of academic research. There is always a danger in

19 Andrew Ross, ‘Research for Whom?’ in *Militant Research Handbook* (New York University 2013)

crossing over into other disciplines of being a dilettant. To guard against this meant spending long periods reading and researching into the debates within each discipline as it related to my topic, rather than simply picking and choosing my sources. At many key points in this thesis I have therefore presented many of these controversies while at the same time offering my own perspective as a specialist in law and refugee studies. This is most evident in the discussions on theology and historical interpretation found in Part I.

It was not my intention at the outset to cover such a massive swathe of history and disciplines. As already mentioned I began with questions related to the experience of refugees over the past 70 years or so. But as I began to really interrogate the origins of refugee law, and its relationship to the concept of asylum I found myself being drawn back further and further into history. Methodologically this was akin to following a trail of breadcrumbs back out of the forest to a vantage point from which I could then survey the topography of my field of investigation, namely the relationship between law and asylum. Once I had done this, it was then possible to isolate and focus in on certain key moments and themes that had become evident in this research. Very early on it became apparent to me that the end of sanctuary in early modernity and the rise of refugee law a couple of centuries later represented a dichotomy rather than a reconciliation. Central to my hypothesis was that an essential element of protection for the refugee had been lost with this development, and that therefore recovering something from the earlier tradition of asylum could help rehabilitate the principle of protection. One possibility, therefore, was to examine if and how others had already recognised this and had attempted to put it into practice. I was aware of two grassroots movements that had used church sanctuary as a means for challenging refugee law: the US Sanctuary Movement and the Sans-Papiers in France. Originally my intention had been to use both as case studies, and indeed in my research I found that they provided overlapping yet in some respects contrasting answers to the problem of counterposing the practice of church sanctuary to refugee law. I researched both cases simultaneously, and began to realise that there was a problem of both space and scope in including them both. In both cases, although especially with the Sanctuary Movement, the issues were indeed complex and the more I investigated the more I realised that there was much to say that had not already been said about them. To do justice to these movements and the questions that I was

seeking to apply to them would not be possible within the constraints of this thesis. Moreover, as many of the issues I wanted to discuss replicated themselves in both cases I could do justice to my argument by drawing solely on one. Nonetheless I believe that much of the analysis and critique offered in Part III could be applied to the example of the Sans-Papiers.

The breadcrumb-following approach led me from standard university libraries and academic journals to specialist libraries such as the Heythrop College library with its concentration of theological literature, and specialist collections on classical and medieval history housed in the Warburg Institute and the Institute of Classical Studies. Once I had decided to focus on the Sanctuary Movement for the third part of the thesis, I began to look for libraries with the highest concentration of literature on the subject, the best of which was the Library of Congress. With a scholarship that allowed me to spend a five-month residency there I was able to mine all the relevant materials including not just books but also pamphlets and periodicals. In the course of this research it quickly became apparent to me that I was in a position to access archives of the movement located in various places throughout the US. These sources provided contemporary first-hand accounts of debates and discussions within the Sanctuary Movement, as well as nuts-and-bolts information about how it operated on a daily basis. The experience of spending days at a time reading through the minutes of meetings, trial reports, memoranda, letters, annotated draft articles, operational and organisational rules etc. allowed me to get a feel for the dynamics of the movement. This in turn enabled me to develop an understanding of the issues that arose for sanctuary activists which I describe in detail in Part III, along with an immanent critique of many of the ideas and practices that took hold among them. A decision was taken, however, not to pursue primary research in the form of interviews with surviving participants in the movement. Partly this was a question of logistics, but also I wanted to remain immersed within the arguments and decisions that were taken at the time, and to offer my own critique of them. Interviews with participants, done in a methodical way that would do justice to the subjects, would have opened up a whole new set of perspectives that I felt would have muddied the focus of what was already an ambitiously expansive thesis.

Part II, on the development of international refugee law in the 20th century, covers ground on which there is already a substantial literature. For this reason, I made a conscious decision here to go back and take a fresh look both at the primary sources of law that marked the development of this area of law between the world wars, as well as some contemporary academic commentary from this period, both of which have been relatively neglected in more recent scholarship. By so doing I have been able to challenge much of the received wisdom that has built up since then about that development.

The argument of this thesis is framed within a mainly genealogical methodology in which I attempt to uncover the developments of asylum and refugee law. In doing so I try to show, first, that the elements that have underpinned these two phenomena have quite different and, indeed, mutually exclusive foundations; and second, that while asylum delineated a space that did not preclude the refugee as political subject – indeed, it often facilitated it – refugee law works to effectively depoliticise asylum and the refugee subject. A genealogical methodology, as defined by Michel Foucault, is one which seeks to uncover the hidden histories of ideas and practices, of conflicts over meanings, rival paradigms which have sought supremacy at various points, and which attempts to relentlessly historicise rather than accepting a single linear and impliedly inevitable development.²⁰ Law is a prime example of an apparatus that claims to have no history, to have always already existed. Refugee law, which has existed for less than a century, cannot get away with such a conceit. However, it still claims to be founded upon the idea of a single unchanging refugee subject – one who is persecuted for his opinions whether political or religious, or for certain inherent characteristics, and who has moved beyond the borders of their country of origin – and represents the continuation of the tradition of ‘asylum’. What follows in this thesis, therefore, does not claim to be, nor does it aim at, a complete or objective history of asylum or refugee law. Instead it seeks to pinpoint and elucidate competing strands of history, of turning points, of threads dropped and picked up. As Foucault writes:

20 Michel Foucault, ‘Nietzsche, Genealogy, History’ in DF Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University 1977).

The isolation of different points of emergence does not conform to the successive configurations of an identical meaning; rather, they result from substitutions, displacements, disguised conquests, and systematic reversals.²¹

As such, this thesis will challenge the narrative that posits some continuity between asylum and refugee law, presenting instead a set of parallel but antagonistic histories, in which concepts such as ‘asylum’ and ‘refugee’ have been subject to ‘invasions, struggles, plundering, disguises, ploys’.²² In the words of Giorgio Agamben:

It is necessary resolutely to separate the concept of the refugee from that of the ‘Rights of man,’ and to cease considering the right of asylum (which in any case is being drastically restricted in the legislation of the European states) as the conceptual category in which the phenomenon should be impressed.²³

This thesis explains in detail, based on much historical and empirical evidence, why such a break is required.

Preliminary Notes on the Nature of Asylum and Law

The word ‘asylum’ is derived from the Greek *asulon*, meaning ‘without right of seizure’.²⁴ The question which then arises is: freedom from seizure by whom or by what? In broad terms we can say, freedom from seizure by one’s pursuers. Even today asylum for refugees in law can be correctly understood in this way. Even if a refugee is locked up in detention, or confined to a specified dispersal or reception area, they are still beyond the reach of those persecuting them in their home country. However, in its original usage, and in terms of its practice up until the modern age, it meant freedom from seizure by the secular authorities and/or exemption from the law. This notion is the central theme that runs right through this thesis. For law has repeatedly laid claim to the space of asylum, to judgement over who should be granted it, and, most perniciously, it has captured the minds even of those who would be the firmest advocates of asylum, from elements within the medieval church to contemporary

21 *ibid* 151.

22 *ibid* 139.

23 Giorgio Agamben, ‘We Refugees’ (1995) 49 *Symposium* 114, 118.

24 Kirby, Larry Joseph, ‘Sanctuary: The Right of Asylum in the Corpus Iuris Canonici’ (Masters Thesis, Catholic University of America 1986) 1.

refugee activists, by inculcating a way of thinking and acting which replicates the legal paradigm which they are apparently resisting.

My research has led me to share the conclusion reached by others that the nation-state and capitalism have been key elements in the erosion of asylum and the downfall of the refugee.²⁵ Others have also revealed a strong political element to asylum as a historical practice, an aspect that has tended to be covered over in recent years.²⁶ But in my view it has been primarily law that has acted as the vehicle for establishing and normalising the quantification and control of the refugee. Moreover, as we reach further back into history, we find that at various points the legal paradigm has threatened or actually erased the practice of asylum. What is new in the modern period is the universalising grasp of capitalist relations and the totalising effect of the nation-state, along with the biopolitical control over the subject. As such, the idea that law in the form of rights such as those contained in the 1951 Refugee Convention can protect the refugee from the effects of capitalism and the sovereign state is thoroughly misguided. Law is in fact a function of these socio-economic structures and power relations. The problem for the refugee is, in short, not too little but too much law. The argument of this thesis, therefore, rests crucially on a certain understanding of what law is. My approach is to recognise the legal form as one that facilitates the norms of capitalism, through a hollowing out and placing of the subject within a set of paradigms governed by biopolitics and the commodity form. So before I launch into a long and detailed description of the historical confrontation between asylum and law, I will explain how I understand the legal form, and its problematic nature in relation to asylum and the refugee. Many of the themes introduced here will become reference points throughout this thesis.

25 e.g. Hannah Arendt, *The Origins of Totalitarianism* (Schocken 2004); Marfleet, *Refugees in a Global World* (n 10); Zygmunt Bauman, 'Who is seeking asylum – and from what?' (2005) 4 *Mediactive* 90. Atle Grahl-Madsen also makes the point that once states were established based upon 'the principle of the Sovereignty of the People...it was considered necessary to determine as precisely as possible who belonged to "The People" '. Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of Refugee Law' (1966) 3 *Journal of Peace Research* 278, 280.

26 For example, Price (n 11).

Biopolitics

One of the most striking aspects of law's encounters with asylum is the persistent attempt to measure, categorise and control the refugee. Perhaps the best way of understanding this process is through the concept of biopolitics as described by Foucault. He identifies how the focus of sovereign power shifted from being concerned primarily with territory or space to one directed at human beings as objects of sovereign control. On the one hand, the liberal ideology of capitalism insists on 'letting things follow their course:; crises will happen.'²⁷ On the other hand, for the sake of the security of the polity overall, the population must be managed and disciplined in such a way that order remains. For a long time the question of the refugee was intimately bound up with seeking to engage with the circumstances that gave rise to refugee movements in the first place. Hence reception of the Huguenots was framed within a wider struggle against Catholic Europe and, in the 19th century, asylum for republicans and nationalists was underpinned by solidarity against the old monarchies of Austria, Italy etc. Today mass forced migration is rarely addressed at its source – instead it is perceived to be an inevitable outcome of the natural course of things, an unfortunate consequence of market forces, or simply the result of backward uncivilised conditions elsewhere. As Michel Rocard, then Prime Minister of France, stated in 1989: 'We cannot accommodate all the misery of the world' (*Nous ne pouvons pas accueillir toute la misère du monde*). From the point of view of states, the key point is to create the legal and physical borders to prevent that disorder from disrupting the home front. And so, Foucault writes:

[T]he law prohibits and discipline prescribes, but possibly making use of some instruments of prescription and prohibition, to respond to a reality in such a way that this response cancels out the reality to which it responds – nullifies it, or limits, checks, or regulates it.²⁸

Today the apparatus of refugee law prescribes what a refugee is, how she should behave or respond to the circumstances in which she finds herself, for example, leave her home country, present herself and her narrative in good order and with proof etc.

27 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, (Graham Burchell tr, Palgrave Macmillan 2007) 48.

28 *ibid* 47.

Those who fail to do so are then prohibited from being granted asylum. As we shall see in Part II of the thesis, refugee law emerged precisely out of the concern to bring ‘order’ to the ‘chaos’ of mass forced migration. Implicit in Rocard’s statement above is the idea that severe disruption to people’s lives will occur – such is life and the vagaries of economics and politics – but at the point at which the effects reach our borders a legal process to filter and control that phenomenon must be in place.

Further biopolitics is a form of power whose goal is the maintenance of the population, as a singular object, as the source of the state’s wealth. In a dialectical fashion, the management of the population as a singular object requires the most detailed monitoring, measuring and recording of each individual human subject. Hence politics becomes ever more concerned with the person, right down to their physical being, ergo bio-politics. Foucault’s schema would have the various modern apparatuses of power bound together by the principle of governmentality. Whereas biopolitics establishes the norms by which power is exercised, governmentality operates at a somewhat higher level. It is grounded upon the fundamental notion that society can only function under circumstances where the population becomes the object of managerial control.²⁹ Proper government becomes inextricably tied to the ability to enforce security and to enable a proper accounting of the population. The biopolitical paradigm thus becomes the *sine qua non* for sovereign power to operate effectively. So engrained is the presumption that society can only function where subjects are governed, that it is not merely a strategy of power but a way of thinking about the world itself, hence govern-mentality. As we will see later when excavating the origins of modern refugee law, the primary concern driving its development has indeed been precisely to judge the refugee subject, to apply rules and techniques that can efficiently manage their movements, that can construct an objective universal standard of the ‘refugee’ against which each individual forced migrant can be measured.³⁰ Refugees who by their nature as people who cross borders irregularly,

29 *ibid* 108, and generally.

30 Although Foucault is often thought to have relegated law to merely one of the disciplines [cf Alan Hunt and Gary Wickham, *Foucault and Law* (Pluto 1994)] at various points he appears to argue that the key to disciplinary power lies in the judgement of truth v falsity, which in turn is inextricably tied to the legal paradigm, e.g. Michel Foucault, 2002, ‘Truth and Juridical Forms’ in

bringing with them the scars and trauma of violence and instability, trouble the trinity of security, territory, population; they present a challenge to the order of things. This, more than any concern for the refugee or the origins of their plight, has come to predominate in the age of refugee law.

The Security Paradigm/State of Exception

For Giorgio Agamben the ‘state of exception’ which, along with refugee law, has for the first time achieved its most fully developed form over the course of the 20th century, is a key illustration of the way in which biopolitics has become the reigning paradigm of power, for it dissolves any remaining distinction between law and life:

Law that becomes indistinguishable from life in a real state of exception is confronted by life that, in a symmetrical but inverse gesture, is entirely transformed into law.³¹

The refugee is a key instance in Agamben’s conception of this phenomenon. This is because sovereignty is grounded in the notion of those who properly belong within the polis; those who do not, and especially those such as refugees who enter the space of this or that sovereign order irregularly, present a challenge to this nexus, and thus become subjects who must be held at a distance, yet at the same time must fall squarely within the scope of law so as to be controlled and accounted for. This apparent contradiction can be explained in the context of what Agamben identifies as the central feature of the sovereign order today: the state of exception has become increasingly indistinguishable from its supposed antinomy, law. The effect has been that what were once moments of exception have now become the norm. Although Agamben first began discussing this phenomenon in the mid-1990s, our world post-9/11 has arguably confirmed his thesis time and time again. One of the fields in which the state of exception as the norm has become most evident is in regard to the

James D Faubion (ed), *Power: Essential Works of Foucault 1954-1984, Volume Three* (Robert Hurley tr, Penguin 2002); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Graham Burchell tr, Picador 2010) 34-38.

31 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Daniel Heller-Roazen tr, Stanford University Press 1998) 55.

treatment of refugees. The archetype of this grey zone in which law is both absent and also all-encompassing is in the spaces of refugee camps, off-shore detention centres and the like that have become the standard means by which to manage refugee movements across the globe over recent decades, long predating the ‘war on terror’.

According to Agamben the sovereign state of exception is one where the law is in ‘*force* but does not *signify*’.³² He goes on to describe the contemporary scene as one where:

Everywhere on earth men live today in the ban of a law and a tradition that are maintained solely as the ‘zero point’ of its own content, and that include men within them in the form of a pure relation of abandonment.³³

High on the list of subjects of this form of abandonment must be found refugees. Yet, I would argue, this emptiness of content with the law, epitomised in our reigning state of exception, necessarily leaves open a space for the law to be applied or decided in some concrete manner. I would also question Agamben’s argument that in the state of exception the law relinquishes completely the force of application in favour of abandonment. Rather, the law is left open as a pure form of force, the content of which must be filled by reference to something outside itself. This external reference can be a number of things – economics, politics, religion etc. In refugee law, the 1951 Convention bestows certain rights and duties on states and refugees. But the definite content of the provision – who is a genuine asylum-seeker/refugee? – requires a reference to political and religious frameworks in order to determine whether or not the person has been persecuted for political or religious reasons, as stipulated in Article 1(A). And yet, law obscures this subjective contestable aspect through its claim to universality as mere form. Abandonment suggests being simply left outside of the law. But if I understand Agamben correctly, there is no genuine ‘outside the law’ in a state of exception. Thus abandonment can be experienced as such – refugees, for example, being left outside of the protection of human rights, civil law etc. – but the state of exception in fact leaves no-one outside, as law collapses into life and vice versa. So, while refugees are stripped of rights and denied access to legal

³² *ibid* 51.

³³ *ibid*.

representation, they are not expelled from the realm of law: quite the opposite, in fact. In order for the refugee ‘problem’ to be managed effectively, they must become ever more subjected to law. In the discussion of the evolution of international refugee law in Part II, this theme will be evidenced in a more concrete manner.

The Erasure of the Political

The erasure of distinctions between law and life has a further effect: the subsuming of political questions by legal judgement. Alain Badiou has identified the problem by which a spurious ethics of universalism and humanitarianism, codified in law, has denied its own origins and precludes a space for contesting the norms that result from this framework. He writes:

The Law (human rights, etc.) is always *already there*. It regulates judgements and opinions concerning the evil that happens in some variable elsewhere. But there is no question of reconsidering the foundation of this ‘Law’, of going right back to the conservative identity that sustains it.³⁴

Instead, we need to assert against a totalising and universalising ethics the primacy of politics, of contestability, of what Jacques Rancière calls ‘dissensus’, where the part of society that has no part asserts its right to be against those who would deny them their place in that society.³⁵ Indeed, when we come to look at the long history of asylum in Part I of this thesis, it becomes clear that solidarity stemming from partisan positions has been an essential and often determining aspect of its practice, and crucial in guaranteeing asylum worthy of the name for refugees. It was what set the stage for the asylum offered to the Greeks of antiquity fleeing from this or that city-state order, for the early Christians sheltering people involved in resistance to Rome, of a theologically-informed alternative to legal space in the Middle Ages, of safety for the partisans in various ideological schisms from the Reformation to the revolutions of the 20th century. But what becomes clearer as the thesis progresses is the way in which law operates to close down the political space that asylum facilitates. The Sanctuary Movement – discussed in Part III – illustrates the attempt to reopen such a

34 Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (Peter Hallward tr, Verso 2001) 33.

35 Jacques Rancière, *Disagreement: Politics and Philosophy* (University of Minnesota, 1999) 9.

space, but also the effective closing down of that space once the movement begins adopting legal criteria to select refugees ‘worthy’ of being granted sanctuary.

Rancière poses politics as ‘dissensus’ against the notion of politics as the commonality of a *polis* that in reality is riven by disparities of wealth and power.³⁶ Just as Marx polemicised against abstract universal rights as forms that concealed and perpetuated real inequalities, so Rancière identifies a similar process at work in our contemporary concept of politics.³⁷ The ‘political’ as commonly understood today becomes the means by which states come to speak ‘for the people’ and identify its goals as synonymous with the people; consensus thus becomes the guiding principle. Dissensus, however, is a politics concerned ‘with what can be argued, the presence or absence of a common object between X and Y’.³⁸ Rancière identifies those who are victims of injustice, those who are excluded, amongst whom we can of course include the refugee, as that part of society which has ‘no part in anything’. He goes on to argue that,

it is through the existence of this part of those who have no part, of this nothing that is all, that the community exists as a political community – that is, as divided by a fundamental dispute, by a dispute to do with the counting of the community’s parts even more than of their ‘rights’.³⁹

The reality of this dispute, one that is irreconcilable under conditions where society is divided by class, race, citizens/foreigners, indeed by any form of privilege or oppressive power, is obscured by talk of equality under the law and of politics as the coming together of subjects whose interests cannot in fact be reconciled; the typical form of this type of politics is humanitarianism. Real politics only ‘exists when the natural order of domination is interrupted by the institution of a part of those who have no part’.⁴⁰ Thus, between the demand for protection by the refugee and the response of the putative host community there cannot be any finality, for politics ‘is the sphere of

36 *ibid* generally.

37 Karl Marx, ‘On the Jewish Question’ in *Early Writings* (Rodney Livingstone and Gregor Benton trs, Penguin 1975).

38 Rancière (n 35) xii.

39 *ibid* 9.

40 *ibid* 11.

activity of a common that can only ever be contentious, the relationship between parts that are only parties...whose sum never equals the whole'.⁴¹ So for the refugee to make a claim for a place within the *polis* is not the same as seeking some kind of superficial consensus amongst the various parts of the host community. Rather it is a claim to establish themselves as being at least a part within that *polis*. In the discussion of the US Sanctuary Movement in Part III, one of the key themes that emerges is the tension between those who recognise that asylum is fundamentally geared towards the political, as a site of contestation with sovereign power, and those who wish to shoehorn asylum into a depoliticised humanitarianism. This latter group, moreover, in seeking a legitimising universalism, find themselves pulled towards accepting the restrictive practices of refugee law, indeed going so far as to perform many of the more obnoxious aspects of the law themselves.

Capitalism and Law

Zygmunt Bauman's concept of refugees as waste suggests a similar way of understanding refugee law as a mechanism for the ever-greater control and management of the subject, and of the effective management of population as a source of the nation's wealth.⁴² Waste is an inevitable product of capitalism, a problem growing exponentially as the search for profit chases the bourgeoisie across the globe in the search for new markets.⁴³ Bauman is right that the characterisation of asylum-seekers as 'waste' accurately reflects the dominant discourse, one that sees forced migrants as a burden on the 'public interest', a cost without benefit. It might be thought that to be conceived of as 'waste' is antithetical to qualification as a legal subject with rights, particularly the right of access to justice – except that waste must be disposed of in an orderly way if it is not to pollute and thus disrupt 'normal' life. Patricia Tuitt describes the 1951 Convention and other instruments of international refugee law as operating 'at [their] inception' to reduce 'the external costs of refugee-producing phenomena'; refugee law thus operates 'as a mechanism within which such

41 *ibid* 14.

42 Bauman (n 25)

43 Karl Marx, 'The Communist Manifesto' in *Capital, The Communist Manifesto and other writings* (Max Eastman [ed and tr], The Modern Library 1959) 321.

costs can be spread, distributed or shifted to other states.’⁴⁴ These costs can be counted in pure financial terms. Indeed, much of the discourse today which seeks to argue for ever further reductions in the right to protection is couched precisely in this language.⁴⁵ In retrospect, perhaps the ‘Golden Age’ of refugee protection in the decades following the Second World War was more a function of the long economic boom together with the politics of the Cold War, than the coming of refugee law.⁴⁶ States in a period of plenty were able to pay the ‘cost’ of refugees, and in a period of post-war reconstruction in Europe and a labour shortage, newcomers were always useful.⁴⁷ Also, politically, refugees from the ‘other side’ carried with them significant propaganda value. Therefore, insofar as there was a post-war Golden Age of refugeehood, it was primarily a result of political economy, not law. Moreover, in the context of a generalised labour shortage in the West, refugee law as a valve for relieving the economic pressure on states was superfluous. This explains why in many states the reception of refugees continued to operate on a relatively informal or discretionary basis throughout the years of the post-war boom. In France, for example, irregular migration was effectively encouraged by the state as a way dealing with a persistent labour shortage during the *trente glorieuses*. But if we go a little deeper into the relationship between capitalism and law, we find that the legal form

44 Tuitt (n 16) 7.

45 e.g. the UK government’s rationale for fast-tracking asylum applications and expanding detention of asylum-seekers as being driven at least partly by cost-effectiveness. *Controlling our borders: Making migration work for Britain - Five year strategy for asylum and immigration* (2005), available at

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/251091/6472.pdf>

accessed 28 January 2015; equally the current Australian government’s policy known as *Operation Sovereign Borders*, which increases the military operation to prevent refugee arrivals by sea is heavily backed by reference to the cost of ‘managing illegal boat arrivals’. *The Coalition’s Operation Sovereign Borders Policy* – July 2013, available at

<[lpaweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf](http://paweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf)> accessed 28 January 2015.

46 Joly (n 3). Although Joly argues that Article 33, the principle of *non-refoulement* is the exception to this, the one right in the Convention addressed directly to refugees, rather than to states.

47 Marfleet (n 15) 172-4.

necessarily produces subjects based on the norms of commodity exchange. It is here that the work of Evgeny Pashukanis becomes key.

Pashukanis argues that just as the relations of capital are formed around the commodity, which becomes such only when it enters into relations with another in the form of exchange, so also law essentially grows out of the inter-relationships between subjects who barter their respective bundles of rights.⁴⁸ And so concepts of agency that are central to commodity exchange *ipso facto* become those that define agency in law. For Pashukanis, therefore, the bearer of rights is not prior to the law, nor is he the product of law or the liberal state. Instead, the legal subject is the necessary outgrowth of the commodity owner:

At the same time...that the product of labour becomes a commodity and a bearer of a value, man acquires the capacity to be a legal subject and a bearer of rights.⁴⁹

The legal subject is nothing more than an abstraction from real human beings already alienated, through the process of capitalist production, from their relationship to nature, and their fellow human beings. In this the reification of commodity production, and of legalism, serve one and the same function: to facilitate relations of capital. The ruthless calculation of value, the necessity for strict rules in the marketplace, egoistic competition between individuals, the primacy of relationships based on contract represent in short, a social form saturated in the 'icy water of egotistical calculation'.⁵⁰

While law is obviously not specific to societies based on commodity exchange, it reaches its highest and most generalised form under such a system. The universal claim of law leads to what Bernard Edelman has described as an 'anthropological illusion', in 'which the law has in its belief that it holds an eternal discourse on eternal man. In this way, the law [takes] on its true dimensions. It [fills] the political space...it [sanctions] political power in order to sanctify private

48 Evgeny B Pashukanis, *Marxism and Law: A General Theory* (Barbara Einhorn tr, Pluto 1989).

49 *ibid* 112.

50 Marx (n 43) 323.

property.’⁵¹ It follows, then, that in order to transcend the subjectivity imposed by the law/capital nexus, one must break the bounds of law and reclaim a space for a politics that lies beyond. Of course this brings us back to some of the concerns expressed by Badiou and Rancière, and the problems that are identified in the discussion of the US Sanctuary Movement in Part III.

The legal subject for Pashukanis functions in a dehumanising way, not merely by reducing the individual to a commodity owner, but in the same way that capital eyes up every resource or product, so too law insists on measuring, categorising and defining the subject. Here one can see a correlation with the biopolitical paradigm identified by Foucault, where the focus of power is on the person rather than territory or space more generally. Indeed, one of the major paradigm shifts identified in this thesis between the tradition of asylum and refugee law is from a concern with spaces of protection to a concern with the character and person of the refugee. The price of legal subjectivity is a categorisation lacking the human dimension. Instead, we are faced with a subject who ‘attains the significance of a mathematical point, a centre in which a certain number of rights is concentrated’,⁵² or put another way, ‘a unit of displacement’.⁵³

The imposition of tropes of bourgeois subjectivity can be seen in refugee law in other ways too: for example, in the fact that claims must be based on the *individual* experience of persecution. The refugee is forced to perform a type of agency judged on the basis of choice: choosing to adhere to or proselytise a political or religious belief, choosing to cross a border, choosing to make a claim etc. Political violence that does not fit the ‘rational’ or ‘enlightened’ norms of liberal democracy – anarchism, Islamism, or any struggle which does not seek state power or whose

51 Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (Elizabeth Kingdom tr, Routledge & Kegan Paul 1979) 22.

52 Pashukanis (n 48) 115.

53 Guy Goodwin-Gill, ‘Refugee identity and protection’s fading prospect’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University 1999) 246.

organisational form is disparate – is not considered political.⁵⁴ In all these ways the prism of law filters out so many of the complexities of the refugee experience. An inverse relationship exists between the legal and political space open to refugees to make their claim for asylum; while one opens out, the other closes.

A common feature found in all these perspectives – the biopolitical management of population, the collapsing of life into law, the subsuming of the political, the refugee as waste, the commodity-form of law – is the impulse to colonise and hegemonise to the exclusion of other methods of defining the subject. Two alternatives which have been edged out by law and which have a central place in the historical narrative of asylum are religion and politics. The crises faced by the refugee today is thus not only the immediate cause of her flight, nor just the arduous nature of moving across borders and claiming asylum, but the fact that there is no escape from the law which seeks to subjectivise her in the way in which I have described. In short, the refugee is no longer able *not* to be a legal subject.

Working Hypothesis

What I hope to have demonstrated so far is that the narrative which argues for more legal rights for the refugee misses the essential reason for their degraded place in society over recent years. This is not to say that they, their lawyers and those who campaign on their behalf should not demand that refugees should have this or that legal right: the right not to be imprisoned or deported, the right of access to housing and other means of support, are necessary and sorely lacking for many forced migrants today. But making demands *of* law is not the same thing as demanding recognition *by* law; seeking the latter entails placing oneself in a reciprocal relationship with a structural form which has systematically stripped the refugee of their role as a complex active subject. The price has been the depoliticisation of both the refugee subject and the question of asylum itself. For forced migrants, it is not

54 For a detailed discussion of how bourgeois notions of agency find their expression in refugee law, see Simon Behrman, ‘Accidents, Agency and Asylum: Constructing the Refugee Subject’ (2014) 25 *Law and Critique* 249.

legal subjectivity which needs reclaiming but political subjectivity – the ability to assert one’s own identity and needs in ways which do not fit the paradigm of nation-state-capital, a construct which gains its normative power through law. Globally today there is, in truth, no real space of asylum as it had previously existed, only an unbroken sphere of law. And the further the law reaches into the space of refugeehood, the more refugees as human beings are being erased by it. This violence is a problem immanent to the legal form itself. It therefore cannot be a question of a better or fairer system of refugee law. The imperium of law and the space of asylum cannot co-exist. This key point should, I hope, become increasingly evident over the course of this thesis.

Thesis Plan

Parts I and II offer a critical historical examination of the relationship between law and asylum. Part I presents a genealogy of asylum from antiquity through to the early modern period. Chapter One outlines the criteria for asylum found in the Bible, and as such provides us with a starting point for the uncovering of the Western tradition of asylum. Many of the citations from the Bible discussed here would later become totems for the Sanctuary Movement discussed in Part III. Chapter Two looks at various aspects of the practice of asylum in Ancient Greece, culminating in the institution that lies at the etymological root of the concept: *asylia*. Chapter Three is focussed on Ancient Rome. Here we find a classic example of the clash between a hegemonic legal rationality and asylum leading to the eclipse of the latter. In Chapter Four, I examine the rebirth of asylum in the context of the battles between the early Christian Church and the weakening Roman Empire. Chapter Five provides the basic outlines of sanctuary in England from the 7th century through to the 17th century: one of the longest, if not the longest, unbroken example of the practice of asylum, or sanctuary as it was known then. Finally, Chapter Six discusses and analyses the long decline of medieval sanctuary. Here, I challenge the dominant view which posits the end of sanctuary as a result of the triumph of the secular state over the Church. Instead I argue that in fact there was a great deal of solidarity between the canon and the civil lawyers in this process; the real schism was between a vanishing theological approach to sanctuary and the resurgence of legal rationality, both within as well as without the Church. Three themes are most evident in this first part of the thesis: first,

an ethics of asylum grounded in political and religious ‘truths’ in the sense described by Badiou, as a scene of contestation based on fidelity to ideas of liberty or justice; second, the extent to which law and asylum were repeatedly in direct conflict with one another (indeed, the guardians of asylum more often than not saw their role precisely as one of holding the law of secular authorities at bay); and third, that in the pre-modern period the concern was more with the space of asylum rather than with the person who occupied it. As legal systems became more and more developed from Solon to Rome and onto the canon lawyers, a latent biopolitical concern within law over the asylum-seeker became increasingly pronounced. With the coming of age of the modern nation-state, alongside a growing hegemony of the legal form, the historical practice of asylum is gradually erased. This is evident in the first laws on asylum in the late Roman Empire which insisted on testing, along with other criteria, the genuineness of the conversion to Christianity by Jews seeking sanctuary in churches, and labelling those who failed to pass this test as unworthy of asylum. It is present also in an innovation of canon law from the 11th century onwards, the *casus excepti*, a series of categories which increasingly came to define in strict terms who was prohibited from church sanctuary. This tendency of law becomes far more pronounced and a dominant feature in modernity.

Part II picks up the story with the evolution of international refugee law following the First World War in Chapter Seven, and with the post-Second World War process that led to the creation of the 1951 Convention in Chapter Eight. This is ground that has been gone over many times by other scholars. However, again I challenge the dominant narrative that international refugee law was guided principally by humanitarian concerns. Moreover, by presenting this history in light of the earlier discussion of asylum, it becomes apparent the extent to which refugee law is a break from that tradition, not its continuation as is sometimes argued or assumed. What becomes evident in this traversal of the development of international refugee law is how the triumph of law leads over time to the depoliticisation of the refugee subject as they become ever more objectified through the lens of legal definition and managerial control. The latent biopolitical focus on the individual, evident in earlier legal regimes of asylum, becomes all-encompassing in the era of international refugee law. What also becomes clear in these chapters is that the driving concerns in this

process are fundamentally related to control of population flows rather than concern for the refugee.

Part III presents a narrative and analysis of the US Sanctuary Movement 1981-1992. Centred on churches and other faith groups, this was one of the largest grassroots movements in the US since the Second World War, involving tens of thousands of people. The aim of the movement was to enable many of the refugees fleeing the brutal wars in Central America during the 1980s to overcome restrictive measures denying them asylum in the US. Of particular relevance to my thesis is that the Sanctuary Movement presents a contemporary encounter between the ancient practice of sanctuary and modern refugee law. The story is both inspiring and salutary. On the one hand, the movement demonstrated the potential for breaching many of the ideological underpinnings of state sovereignty and border control. On the other hand, we also witness how the hegemony of the legal paradigm led to many of the most obnoxious elements of refugee law becoming incubated within a movement that attempted to resist it. Chapter Nine outlines the rise of this movement. Chapter Ten describes a number of facets: how the movement organised, the various groups that made up the movement, and the differing ideologies that inspired it and created tensions within it. Chapter Eleven analyses what was perhaps the major turning point in the Sanctuary Movement: the Arizona trial of leading activists in 1985-86. Many of the issues surrounding the vexed relationship between sanctuary and law, in particular how fealty to the latter compromises the former, and the subsuming of the political, are brought out in this discussion. Chapter Twelve critically reflects on the movement as a whole, and on some of the literature around it. In particular, I focus on the extent to which the movement troubled existing subjectivities, the ideological pull of law, and, again, on the evacuation of the political by law.

PART I

A GENEALOGY OF ASYLUM

Introduction

*'SANCTUARY. A place of refuge where the process of the law cannot be executed.'*¹

Refugee law is a 20th-century phenomenon. The legal category of refugee, as distinct from citizen, resident alien, etc. is a novelty of late modernity. There is, however, ample evidence for the existence of exiles and sanctuaries dating to very early recorded history. From extradition treaties agreed between the ancient Hittites and Egyptians more than 12 centuries before Jesus Christ,² to Biblical sanctuary cities along the Jordan river, the Greek *asylia*, Romulus' fabled sanctuary on the Palatine, the early Church, and medieval sanctuaries, there is a more or less unbroken tradition of safe spaces for those fleeing persecution of one sort or another. At the close of the 15th century, in a court case concerned with a violation of sanctuary, the right of asylum was pleaded for as one which reached back to the Old Testament and Romulus.³ There is evidence that sanctuary cities described in the Book of Numbers influenced the creation of sanctuaries set up in various English towns in the 1540s.⁴ But this stream is all but submerged during the period of the rise of the nation-state, capitalism and the hegemony of law from the 16th century onwards. Mere trickles of this tradition are only just visible by the end of the 19th century, before disappearing altogether.

While this thesis focuses on what might be termed the Western tradition of asylum, there is certainly evidence of it as an ancient practice throughout the world.

1 John Bouvier, *Bouvier's Law Dictionary: Volume II* (Francis Rawle ed, rev edn, Boston Book Co 1897).

2 W Gunther Plaut, *Asylum: A Moral Dilemma* (Praeger 1995) 36.

3 JH Baker, 'The English Law of Sanctuary' (1990) 2 *Ecclesiastical Law Journal* 8, 10.

4 Teresa Field, 'Biblical Influences on the Medieval and Early Modern English Law of Sanctuary' (1991) 2 *Ecclesiastical Law Journal* 222.

There is some evidence – vague, it must be said – of asylum in India and China before the Christian era.⁵ Some have argued that the Southern African philosophy of *Ubuntu*, which emphasises a collective approach to human rights and which focusses on the needs of the most vulnerable in society, contains a principle of hospitality to the stranger above and beyond the notion of asylum as commonly understood in the Global North.⁶ Islam has a particularly rich tradition of asylum that both dovetails with and goes beyond that of the Judeo-Christian one that dominates in the West. Indeed, the Islamic tradition of sanctuary has much in common with that of Judaism and Christianity, and the concept of hospitality to the person fleeing danger (*hijrah*) is taken from similar notions in the Old and New testaments.⁷ Just as Judaism and Christianity have exilic narratives at the core of their founding texts, so too Islam dates its birth to the exile of the Prophet Mohammad to Medina.⁸ Following his conquest of Mecca Muhammad declared two sites as sanctuaries for those who had opposed him.⁹ As we will see, Christianity inherited much of its tradition of sanctuary from the pagan practices that preceded it. Equally Islam also continued older traditions of asylum from the Arab civilisations that existed prior to the 7th Century.¹⁰ However, Khadija Elmadmad makes the interesting point that what distinguishes Islam from the other monotheistic religions is that the former never codified asylum into law.¹¹ Perhaps this might be why, as Elmadmad describes, the Islamic tradition on asylum has tended to be more comprehensive and all-embracing than its rivals. For example, the Quran places a duty on Muslims to offer asylum to all, regardless of

5 M Cherif Bassiouni, *International Extradition and World Public Order* (AW Sijthoff 1974) 88.

6 JY Mokgoro, 'Ubuntu, the Consitution and the Rights of Non-Citizens' (2010) 21 *Stellenbosch Law Review* 221.

7 Khadija Elmadmad, 'Asylum in Islam and Modern Refugee Law' (2008) 27 *Refugee Survey Quarterly*, 51, 52-53.

8 *ibid* 53.

9 Bassiouni (n 5) 87.

10 *ibid* 55. Ghassan Maârout Arnaout, *Asylum in the Arab-Islamic Tradition* (UNHCR 1987).

11 Elmadmad (n 7) 53.

whether or not they are co-religionists, whereas Christianity and Judaism have tended to be more sectarian and restrictive in their approach.¹²

When the ancient tradition of asylum re-emerges during the post-Second World War period, it is qualitatively different. Rather than regulating spaces of refuge, it defines the person and movements of the refugee; the tradition of sanctuary as a space within the polis, yet where the writ of the sovereign power does not run, is turned inside out. Instead, sanctuary involves moving beyond the borders of the polis altogether – only, of course, to be forced to seek protection from another polis, another law. The literatures on the ancient practices of sanctuary and asylum on the one hand, and contemporary refugee law on the other, are vast. Yet very rarely are the two ever discussed together. What I hope to show is that, ancient though it is, asylum has always had to fight a battle of survival against law. Following the French Revolution, the Convention abolished all sanctuaries by declaring, ‘The right of asylum is being abolished in France, for it’s now the law being the asylum of all people.’¹³ The dominant ideology of modernity, of autonomous and equal subjects before the law is often invoked to denounce sanctuary as a relic of a ‘barbaric’ past, ill-suited to our ‘civilised’ societies today.¹⁴ Yet, as we shall see, the treatment of petty criminals, traitors, subversives and other ‘undesirables’ was frequently more

12 *ibid* 54. Ahmed Abou-El Wafa, *The Right to Asylum between Islamic Shari’ah and International Refugee Law A Comparative Study* (UNHCR 2009) 43.

13 Quoted in Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Indiana University 1994) 144.

14 e.g. Arthur Stanley, *Historical Memorials of Westminster Abbey* (John Murray 1886) 414; Thomas John de’ Mazzinghi, *Sanctuaries* (Halden & Son 1887) 101; Norman Trenholme, ‘The Right of Sanctuary in England: A Study in Institutional History’ (1903) 1 *University of Missouri Studies* 1, 96; Isobel D Thornley, ‘The Destruction of Sanctuary’ in RW Seton-Watson (ed), *Tudor Studies* (Longmans 1924) 185; Elizabeth Howard West, ‘The Right of Asylum in New Mexico in the Seventeenth and Eighteenth Centuries’ (1928) 8 *The Hispanic American Historical Review* 357, 359; Pierre Timbal Duclaux de Martin, *Le Droit d’Asile* (Librarie du Recueil Sirey 1939) 453; Jorge L Carro, ‘Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?’ (1986) 54 *University of Cincinnati Law Review* 747, 767.

humane and more contested than is the case with today's asylum-seekers. Moreover, it is precisely the loss of spaces within the polis, yet without the grasp of the sovereign power, that has led us to the complete hegemony of the law. It would not be true to say that asylum has mainly, or indeed ever, been a place without sovereign authority. The priesthood, whether pagan or monotheistic, or the local lord, have always asserted sovereign power of the space either on their own terms or on the basis of dogma, but rarely have they asserted such power over the asylees themselves. For sure there were rules about use of the space of asylum and conduct within it, but this tended to be guided either by respect for the sacred space, i.e. not impinging upon the altar, or for practical reasons, i.e. not carrying weapons. A test for admission was either perfunctory or non-existent. In this sense, asylum remained for most of the period under discussion as a place free from seizure by the legal paradigm, one founded upon a rigid delineation and judgement of the subject. What follows is not, and does not aim to be, an exhaustive discussion of the topic of history of asylum: that would require several volumes at least, and indeed the many elements are well covered in the available literature, which I have drawn upon here. Instead I have focussed on certain texts and moments in which asylum is defined, and on highlighting encounters between law and asylum.

1

Biblical Traditions

Notions of exile and asylum are a foundation stone of Western culture. In his pioneering study of international refugee law, Atle Grahl-Madsen asserts: ‘The history of refugees goes as far back as the known history of mankind itself’, citing the expulsion of Adam and Eve as its originary moment.¹ Exile is indeed central to the narrative of the Old Testament from the Fall, through to the wanderings of Jacob as described in Genesis, the Jewish diaspora and the exodus of the Israelites from Egypt and the Babylonian exile.² There are repeated instances of calls for the protection of refugees, such as in Deuteronomy:

You shall not turn over to his master a slave who seeks refuge with you from his master. He shall live with you in any place he may choose among the settlements in your midst, wherever he pleases; you must not ill-treat him.³

W Gunther Plaut argues that this passage is a precursor to the principle of *non-refoulement*.⁴ It was also used as inspiration and justification for the Underground

1 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume One* (AW Sijthoff 1966) 9.

2 Robert P Carroll, ‘Exile! What Exile? Deportation and the Discourses of Diaspora’ in Lester L Grabbe (ed), *Leading Captivity Captive: ‘The Exile’ as History and Ideology* (Sheffield Academic Press 1998) 63.

3 Deuteronomy 23:16-17.

Railroad, the movement which helped slaves from the US South to escape and seek sanctuary in the North during the 19th century.⁵ But also note how this injunction is not conditional. It has the openness characteristic of ‘hospitality’,⁶ whereas *non-refoulement* in contemporary law is a qualified right.⁷ The command in Exodus, ‘Do not oppress the stranger, for you know the feeling of the stranger, having yourselves been strangers in the land of Egypt’, is testament to the powerful hold over the Israelites that the pain of exile left behind.⁸ As Charles S Milligan highlights, this injunction is,

not qualified by saying ‘worthy’, ‘deserving’, or ‘ideologically pure’ refugees. The question of their deserving this or your consideration of convenience is not addressed. It is because of their need and because of your own indebtedness to a heritage of folk in need who found opportunity and livelihood that this command is announced...[the]burden of justification lies with denying hospitality.⁹

So central is the theme of Israelite exile to Old Testament theology that scholars, referring to the early 6th-century mass deportation of Jews from the Kingdom of Judah to Babylon, divide Biblical history into ‘pre-exilic’ and ‘post-exilic’ periods.¹⁰ Beyond the biblical sources there is considerable empirical evidence that the

4 W Gunther Plaut, *Asylum: A Moral Dilemma* (Praeger 1995) 18.

5 *ibid.*

6 cf Jacques Derrida and Anne Dufourmantelle, *Of Hospitality* (Rachel Bowlby tr, Stanford University Press 2000).

7 It only applies to the most serious potential human rights violations, typically threat to ‘life and liberty’, only prohibits deportation to the place where such threats are likely to materialise but does not guarantee any particular place of asylum, and is qualified in the 1951 Convention by any perceived threats to national or public security by the individual concerned, e.g. Article 33(2).

8 Exodus 23:9. This call is repeated in similar terms in Leviticus 19:33-34, Exodus 22:21, and Deuteronomy 10:19 and 24:17-18.

9 Charles S Milligan, ‘Ethical Aspects of Refugee Issues and U.S. Policy’ in Ved P Nanda (ed), *Refugee Law and Policy: International and U.S. Responses* (Greenwood Press 1989) 169.

10 Lester L Grabbe, ‘Introduction’ in Lester L Grabbe (ed), *Leading Captivity Captive: ‘The Exile’ as History and Ideology* (Sheffield Academic Press 1998) 11.

Babylonian exile is based on real events involving mass forced migration.¹¹ The available evidence suggests that this refugee community remained in exile for around a hundred years, before the return was completed.¹² In any case, even if one wishes to disregard the Bible as containing any reliable evidence of historical events, the importance of exile to the ancient culture that gave us the text is indisputable; it was ‘not just made up for theological purposes’.¹³ As Robert P Carroll argues:

[E]xile is a biblical trope and, whether it may be treated as an event in the real socio-economic historical world outside the text or not, it should be treated as a fundamental element in the cultural poetics of biblical discourses. It may have historical referents, but it is as a root metaphor that it contributes most to the biblical narrative.¹⁴

According to another theologian, the Bible ‘can be read as a tapestry woven of immigration stories and immigration related themes. Most of the Bible came into its present form through the work of authors and editors who were immigrants – usually exiles and refugees – in search of spiritual and theological language to talk about what it means to live as strangers in a strange land.’¹⁵

11 Bob Becking, ‘Ezra’s Re-enactment of the Exile’ in Lester L Grabbe (ed), *Leading Captivity Captive: ‘The Exile’ as History and Ideology* (Sheffield Academic Press 1998) 42; Peter R Ackroyd, *Exile and Restoration*, (Westminster Press 1968) 232.

12 Becking (n 11) 45.

13 Lester L Grabbe, ‘“The Exile” under the Theodolite: Historiography as Triangulation’ in Lester L Grabbe (ed), *Leading Captivity Captive: ‘The Exile’ as History and Ideology* (Sheffield Academic Press 1998) 100. Although Hans M Barstad cogently argues that we should treat the Old Testament just like any other text from ancient history – it should not be treated as gospel, it offers only a particular view of events, and it was written often with propagandistic motives – yet just as with other sources from the period it should be drawn upon as a valuable source of information about life and the beliefs that people held at during that period. Hans M Barstad, ‘The Strange Fear of the Bible: Some Reflections on the “Bibliophobia” in Recent Israelite Historiography’ in Lester L Grabbe (ed), *Leading Captivity Captive: ‘The Exile’ as History and Ideology* (Sheffield Academic Press 1998).

14 Carroll (n 2) 65.

15 Ben Daniel, *Neighbor: Christian Encounters with ‘Illegal’ Immigration* (Westminster John Knox Press 2010) 16.

In addition to the passages quoted above, Moshe Greenberg identifies a biblical right of asylum in three places in the Old Testament: Exodus 21:12-14; Numbers 35:9-34; and Deuteronomy 19:1-13. The last of these, however, simply repeats the provisions described in the other two. Greenberg argues that these parts of the Bible demonstrate an obvious ‘humanitarian purpose’, which is to obviate the need for vigilantism.¹⁶ But if we take each of these passages in turn it is not quite that simple. So in Exodus it says:

He that smiteth a man, so that he die, shall be surely put to death. And if a man lie not in wait, but God deliver *him* into his hand; then I will appoint thee a place whither he shall flee. But if a man come presumptuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die.

In other words, a distinction is made between the murderer and the manslaughterer. However, this passage is taken from an extended exposition of God’s law and the punishments to be meted out for a breach. What is important about this reference to a proto-asylum is that it is presented as an exception from the law; the suppliant will be free from seizure or the various penalties to which the rest of Exodus 21 is devoted. Yet the distinction between who is and who is not worthy of asylum is made here in the context of a legal code, as distinct from the calls to hospitality cited earlier.

Chapter 35 of Numbers refers to six cities, three on either side of the River Jordan, which were to be places of refuge from vengeance for those who have committed a non-intentional homicide, as referred to in Exodus above. These cities either replaced or were in addition to many small asylums attached to local temples, and were not restricted just to the Israelites: ‘These six cities shall be a refuge, both for the children of Israel, and for the stranger’.¹⁷ A trial would be held in the locale where the death had occurred in order to determine that the killing had indeed been accidental. Those found to be guilty of having killed with intent were taken from the cities and handed over to the family of their victim so ‘the revenger of blood himself slay the murderer’.¹⁸ If, however, they were found to be not guilty of

16 Moshe Greenberg, ‘The Biblical Conception of Asylum’ (1959) 78 *Journal of Biblical Literature* 125, 125.

17 Greenberg (n 16) 126, 129; Numbers 35:15.

18 Numbers 36:19.

murder, the fugitive would then have to remain within the city of sanctuary until the death of the High Priest.¹⁹ The reasoning behind this was that the death of the High Priest signified the required blood sacrifice for the original death at the hands of the suppliant.²⁰ Alternatively sanctuary could be found within a temple, where asylum would be conferred on any fugitive who grasped the ‘horns of the altar’.²¹ Although this Biblical reference also implies that King Solomon violated this provision,²² nonetheless, in principle, it was a violation of a space beyond the rightful authority of the king, yet located within his kingdom. These two distinct types of sanctuary – cities and temples, each with their own peculiar yet closely linked foundations – were a feature of asylum not only in Biblical times, but were also present, as we shall see, in Ancient Greece and again in Medieval Europe. Equally, we find a distinction between spaces which existed outside the law, such as temples, which operated on the basis of hospitality, and spaces of asylum, which operated within the scope of a legal code. The latter imposed a degree of judgement on the worthiness of the suppliant as against a set of objective criteria, e.g. whether or not the homicide of which they were guilty was intentional or unintentional.

Thus there are two possible, although radically different, ways of interpreting the Biblical origins of asylum. One interpretation of biblical sanctuary is that it arose as a palliative among societies where victims, or their relatives, were legally permitted to exact blood vengeance upon the killer.²³ The fugitive was prohibited from buying his way out of sanctuary, and his stay there was therefore considered more accurately as banishment.²⁴ In this sense, residing within the sanctuary cities

19 It is not clear whether this was the High Priest of the sanctuary city or that of the area where the killing had taken place. Presumably, if this involved the High Priest of the sanctuary city, it would have been akin to a regular amnesty for the refugees.

20 Teresa Field, ‘Biblical Influences on the Medieval and Early Modern English Law of Sanctuary’ (1991) 2 *Ecclesiastical Law Journal* 222, 223; Greenberg (n 16) 130.

21 1 Kings 1:50.

22 ‘So King Solomon sent, and they brought him down from the altar’. 1 Kings 1:53.

23 Jorge L. Carro, ‘Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?’ (1986) 54 *University of Cincinnati Law Review* 747, 749.

24 Greenberg (n 16) 129.

was a matter of punishment as well as one of redemption; these places possessed ‘at once the attributes of a prison and an asylum’.²⁵ Thomas Mazzinghi comments: ‘The privilege of asylum amongst the Israelites appears in all its aspects as a support to the pursuit of justice, and as a means of erecting a more perfect system of law.’²⁶ These asylums might also have served the purpose of keeping these fugitive Israelites within the bosom of Judaism and prevent them joining the pagans beyond, and thus being separated from God.²⁷ Yet the case of an individual seeking sanctuary at the temple altar, referred to in Kings 1:50, involves not a homicide but simply a failed attempt to inherit the throne. In contrast, the call of Exodus 23:9, repeated in a number of places elsewhere in the Old Testament, for openness to the exiled stranger, and the injunction in Deuteronomy 23:16-17 to host escaped slaves, which appears to condone sanctuary for law-breakers, suggest a more open and less legalistic approach to asylum.

Equally, the New Testament contains a number of passages that insist upon obeying the secular authorities and their law.²⁸ Famously, Jesus is reported to have said, ‘Render to Caesar the things that are Caesar’s, and to God the things that are God’s.’²⁹ Yet the context in which Jesus said this was one in which he was trying to avoid an attempt to entrap him into making a seditious statement. Moreover, as the Presbyterian minister and author, Ben Daniel writes, ‘both apostles [Peter and Paul, who called for obedience to the law] were martyred without recanting their Christianity, their deaths mandated by the laws of the state of that time’.³⁰ This suggests a healthy disrespect, or at least disregard, for the law. There is a link between an ‘important Christian tradition in which Christians have found it necessary to break the law – to render to God what belongs to God, even if it means withholding from Caesar what Caesar claims’, from the early Christians who defied Roman law, Protestants who refused to accept Catholic teachings and practices in the late medieval period, to those involved in harbouring escaped slaves in the US South or

25 *ibid* 131.

26 Thomas John de’ Mazzinghi, *Sanctuaries* (Halden & Son 1887) 85.

27 *ibid*; Greenberg (n 16) 128.

28 For example Romans 13:1-5; 1 Peter 2:13-17.

29 Mark 12:17. The same words are also reported in Matthew 22:21 and Luke 20:25.

30 Daniel (n 15) 42.

Jews during the Second World War, right through to the Sanctuary Movement to aid Central American refugees in the 1980s.³¹ In short, in the way of the Bible, its pronouncements upon asylum are contradictory: on the one hand an unconditional openness to the stranger in distress; on the other hand, asylum constructed, regulated and restricted according to law. And, of course, who is to say what is genuinely Caesar's or God's? In the context of the violation of modern immigration controls, Ben Daniel makes the point that perhaps 'the border is merely a construction invented by Caesar at the expense of what belongs to God'.³² So, perhaps the two very different understandings of asylum that form the basis of this thesis's investigation were both present in Biblical times, or perhaps they represent two historical stages of the practice later conflated by the authors of the Old Testament. One obvious reason for the distinction is that the call for hospitality relates to the stranger, while the legal form of asylum deals with criminals. Nonetheless, what is at stake here is the broader question of spaces of safety, and on that question we find two very different conceptions: one that exists within the realm of law and one without. There is nothing in the Bible to suggest a direct conflict or tension between the two, but this is certainly very evident in the more secularly reported history of asylum from Ancient Greece onwards.

31 *ibid* 45.

32 *ibid* 49.

2

Ancient Greece

We find in Greek mythology a call to hospitality similar to that found in the Old Testament. The surname of Zeus, King of the Gods, was Xenios, which is derived from *xenos* (stranger/alien). This suggests, according to Gunther Plaut, that ‘hospitality...was a divine command and its breach was considered a sin.’¹ Indeed, in Greek mythology many of the gods and heroes including the Cyclopes, Rhea (the mother of Zeus) and Io were all at one time forced into exile.² Some legends have it that the first asylum in Greece originated with Dodonaeus, an oracle of Jupiter who ordered that Mars Hill, upon which sat the Areopagus, as well as the altars of the goddesses, were to be refuges. Another claim is that the original asylum was created by the Heraclidae as a refuge for those fleeing from oppressive fathers.³ In any case there was clearly a religious duty dating back to pre-Homeric times ‘not to give up a suppliant to his pursuers and to earn his gratitude.’⁴ In short, narratives of exile and refuge were as much a part of the pagan culture of Ancient Greece as they were for the Israelites.

A more prosaic set of origins for asylum is described by Henri Francotte in his discussion of the curious institution of the *proxenia*, which evolved from the later

1 W Gunther Plaut, *Asylum: A Moral Dilemma* (Praeger 1995) 29.

2 Paul Tabori, *The Anatomy of Exile: A Semantic and Historical Study* (Harrap 1972) 45.

3 Thomas John de’ Mazzinghi, *Sanctuaries* (Halden & Son 1887) 6.

4 Elemér Balogh, *Political Refugees in Ancient Greece* (Witwatersrand University 1943) 53.

stages of the Archaic Period as Greece emerged into its high classical phase. Up until then, during the long state of ‘barbarism’ in which Greece had languished, there was a custom of what Francotte describes as ‘*hospitalité privée*’, whereby citizens owed a duty of hospitality to others within the polis in cases where the law offered no protection.⁵ However, for strangers no such protection was forthcoming unless they happened upon a particularly welcoming citizen. The stranger was thus often at the mercy of the first citizen he encountered. The key point is that this type of proto-asylum was conceived of as a practice beyond the scope of the law, and based on a sense of duty guided by custom and/or a subjective impulse to assist one who was in need. But as Francotte points out, with the coming of the Classical Age and the increasing level of interaction between the various cities, this ad hoc arrangement was no longer adequate for the times. In particular, with the onset of perpetual wars during the 5th century BC, the exile/refugee became a widespread phenomenon. As a result, the figure of the *proxenos* arose. He would be a citizen responsible for acting as mediator between the city and another particular state, e.g. representing Athens vis-à-vis Sparta. But the *proxenos* was also responsible for welcoming and looking after the interests of any strangers arriving from that city.⁶ Although more formalised, this still bears many of the characteristics of hospitality; there does not seem to be any categorisation as to *who* should receive protection.

In terms of specific recorded instances of asylum, we begin with a failed coup at Athens in 632 BC.⁷ The leader of the rebellion, Cylon, along with some of his allies, sought refuge in the Temple of Athena on the Acropolis. They had to be persuaded to leave by the archon Megacles with the promise that their lives would be spared. In other words, custom and religious belief decreed that they could not be removed by force of arms. Some accounts describe the refugees leaving the temple with a rope tied to the statue of the goddess, suggesting a belief that the merest physical connection with the temple from the outside granted a form of protection. It was only when the rope snapped, or perhaps was deliberately cut, that Megacles allowed many of his supporters to set upon and kill the suppliants. Although Cylon’s

5 Henri Francotte, *Mélanges de Droit Public Grec* (Honoré Champion 1910) 171.

6 *ibid.*

7 This story is recounted in Plutarch’s essay on ‘Solon’. Plutarch, *The Rise and Fall of Athens* (Ian Scott-Kilvert tr, Penguin 1960) 52.

attempted coup had not received much popular support, Megacles was heaped with opprobrium by his fellow Athenians for violating the principle of asylum: ‘He had polluted himself and his clan [the Alcmaeonids] by violating the right of asylum’.⁸ The entire family were for a time exiled from the city, along with the dug-up bones of the clan’s ancestors.⁹ Two hundred years later Pericles, an Alcmaeonid, was taunted for being part of a ‘polluted’ clan.¹⁰ Such was the power of asylum as a belief and as an institution during the immediate pre-classical period. It is notable that this recorded instance of asylum, as a place exempt from the civil power, occurs shortly before the coming of Solon’s reforms and the birth of law in the modern sense. It is perhaps telling that, following the coming of a properly juridical order, this is the only such example of asylum as a space within the territory of a secular authority that is recorded in Greece for almost 400 years.

On becoming archon, Solon instituted an amnesty for all Athenian refugees.¹¹ Well, almost all: those convicted of murder, manslaughter and the attempt to set up a tyranny were excluded. Elemér Balogh comments that this was evidence of a ‘socio-political’ measure designed to ‘win back all the really useful citizens’ who had earlier fled, and by implication to continue to keep out those considered undesirable.¹² There were three classes of person who were granted citizenship under Solon’s law: exiles, permanent settlers and ‘benefactors of the state’.¹³ This was in contrast to the pre-Solonian period when citizenship was granted freely, particularly to those Greeks who had been exiled from other Greek states and were permanently resident in Athens. However, Solon’s law allowed citizenship *only* to exiles permanently resident in Athens and to those who came ‘to practise a trade’.¹⁴ Hence, Solon’s law represented

8 Balogh (n 4) 6.

9 Plutarch (n 7) 53.

10 Thucydides, *History of the Peloponnesian War* (Rex Warner tr, Penguin 1972) 110.

11 Plutarch (n 7) 61.

12 Balogh (n 4) 58.

13 Albert Billheimer, ‘Naturalization in Athenian Law and Practice’ (PhD Thesis, Princeton University 1922) 24.

14 Plutarch (n 7) 67. Plutarch reports claims that Solon felt that only those who had been exiled from their home country could be trusted to remain loyal to their new home.

a narrowing of the 'circle of eligible persons'.¹⁵ Cynthia Patterson suggests instead that this law was negative, i.e. it did not allow *other* sorts of foreigners access to citizenship.¹⁶ Whatever the precise effects of the law, the key point in this instance is that the formation of a legal code involved categorising and restricting the right of strangers to enter the sovereign space.

Following Solon, the stories of refuge and asylum fall into two main categories, both of which are governed by principles of political solidarity. First, the accommodation of fellow citizens or those from allied states in wartime; the reception in Athens of those from the Attican countryside fleeing the advancing Spartan army at the beginning of the Peloponnesian War is one such example.¹⁷ The second type of refugee was the political or military leader who had fallen out of favour amongst his own people, and who had therefore fled to another city-state for safety. Balogh writes of these cases: 'The exiled usually had no difficulty in finding refuge with neighbouring states, who very often were the enemies of the exiling one'.¹⁸ Perhaps the most striking example of this is Alcibiades, the Athenian *strategos* who, following the debacle of the Sicilian campaign, fled to the arch-enemy Sparta. After subsequently falling out with the Spartans, he then sought refuge in Persia, the historic enemy of all Hellas. It was only when his faction in Athens returned to power that he was able to return, and again serve as *strategos*.¹⁹ In the case of Themistocles, who also fled into exile to Persia, Balogh comments: 'Only with the hereditary enemy could the outlaw find safety.'²⁰ Thus the political element of asylum remained key in Athens during the 4th century BC when refugees were only granted citizenship by the general assembly of the *demos*, 'when the persons concerned had been especially helpful to Athens and when their banishment was the result of their pro-Athenian

15 Billheimer (n 13) 26. Billheimer suggests that there is evidence that this circle was widened to include those engaged in 'permanent settlement to practice a trade'. Billheimer (n 13) 28.

16 Cynthia Patterson, *Pericles' Citizenship Law of 451-50 B.C.* (The Ayer Company 1981) 18-19.

17 Thucydides (n 10) 135.

18 Elemér Balogh, 'World Peace and the Refugee Problem' (1949) 75 *The Hague Academy of International Law* 363, 379-380.

19 His remarkable career is described by both Thucydides (n 10) Books Six-Eight and Plutarch (n 7) 245-285.

20 Balogh, *Political Refugees* (n 4) 22.

attitude.²¹ The key point in all these instances of refuge is that they are primarily about political alliances and solidarity, and not about legal categories of asylum or of the refugee. These may indeed have been the most viable criteria for claiming asylum, following Solon's confining of formal asylum within legal parameters.

Concept of 'Nation' in Ancient Greece

The first fully developed system that we know of, with the possible exception of the Biblical six cities, that created and organised spaces to which a person could seek protection from their pursuers comes from the Hellenistic period. I discuss in some detail below the development of the institution of *asylia*. However, throughout the Classical period (510-323 BC) and for much of the early Hellenistic period (323-31 BC) the question of asylum was inseparable from the political rivalries between states and the question of status within the various city-states. As such, the discussion of the treatment of refugees during this period necessitates also explaining and clarifying some aspects of citizenship and the polis as understood by the Greeks of antiquity.

Ancient Greece was not really a nation, certainly not in the way we understand the concept. For the Greeks the *polis* – the city-state – was the nation, not Greece as a whole.²² The strength of identification with the city-state is demonstrated by the example of the Plataeans. Following their defeat by Sparta in 427 BC they were granted asylum and citizenship in Athens. Yet they returned to their ancestral home in 386 BC, and after having been expelled again 13 years later by the Thebans, returned once again in 338 BC.²³ Their attachment over many generations was not to Greece, nor to their allies, but to the specific city they came from. Alliances between Greek states were therefore considered to be between independent sovereign entities. Wars between them were not described as 'civil wars'. That term was applied to political struggles between various factions within the city-states. In the domestic context, therefore, there was no distinction 'drawn between Greeks from another city and any

21 *ibid* 51.

22 FW Walbank, 'The Problem of Greek Nationality' in Thomas Harrison (ed), *Greeks and Barbarians* (Edinburgh University 2002) 239.

23 *ibid* 243.

other foreigners.’²⁴ Or as Robert Browning puts it: ‘For a Greek of the 5th century BC ... the primary focus of a man’s identity was his city...For him the Other was a citizen of some other city, who was different from himself, and fundamentally different.’²⁵

There is, however, contradictory evidence which does show strong elements of a shared identity between the various Greek polities. As FW Walbank writes: ‘The root of the trouble in most discussion of nationality in Greece lies in too static an interpretation of the concept of a nation and in the attempt to establish too rigid a parallel with the modern world.’²⁶ The problem is compounded by ambiguities in translation. Although *barbaroi*, a term habitually applied, for example, to the Persians and the Scythians, is often translated as ‘foreigner’, the Athenians also frequently referred to other Greeks as *xenoi* which can also be translated as ‘foreigner’.²⁷ If we were to attempt a modern analogy for Hellas it might be more apt to cite the European Union – a collection of sovereign states with separate identities, but with certain shared cultural values – rather than, for example, the United States – a federated nation-state. Yet, again, this parallel is limited in offering us a proper view on the allusive concept of nation in Ancient Greece. Rey Koslowski argues that in fact the various city-states of Greece interacted on at least two levels: with each other, and together as the Greek world vis-à-vis their major rival Persia. Moreover, the composition of the populations of Greece would have been much more ethnically diverse than we tend to imagine, the result of fluid movement of individuals and populations over time.²⁸ In any case, it seems safe to say that refugees from one Greek city seeking sanctuary in another would probably have been considered foreigners in some sense. Nonetheless they were received on the basis of some kind of political solidarity, e.g. members of an allied state, or representatives of a certain political

24 *ibid* 245.

25 Robert Browning, 2002, ‘Greeks and Others: From Antiquity to the Renaissance’ in Thomas Harrison (ed), *Greeks and Barbarians*, (Edinburgh University 2002) 258.

26 Walbank (n 22) 249.

27 Thucydides (n 10) 37. Translator’s footnote no. 3.

28 Rey Koslowski, ‘Human Migration and the Conceptualization of Pre-Modern World Politics’ (2002) 46 *International Studies Quarterly* 375, 384.

faction (oligarchs, democrats etc.). There seems little, if any, evidence of a legal process for admission of aliens into the territory of city-states.

Aliens and the Polis in Ancient Greece

It would also be a mistake for us to transpose backwards our understanding of citizenship. Today Article 15 of the Universal Declaration of Human Rights, plus the widely respected right of *jus soli*, means that citizenship is usually something one has from birth. But for the Ancient Greeks, citizenship was a highly prized status that had to be earned by all those who held it, and equally could be stripped from those considered unworthy. In the Case of Neaera, Apollodorus argues that ‘Athenian citizenship [is] a gift that only the demos [can] confer on those who [are] eminently worthy.’²⁹ Indeed, Apollodorus himself is an example of the possibilities open to those seeking citizenship in Athens. He was ‘the son of a slave, but his family had won Athenian citizenship the old-fashioned way: they had earned it by spending enormous sums of money on the city’s behalf.’³⁰ Athenians were not born citizens, but were instead only admitted in late adolescence to citizenship after a series of procedures and trials that ended with the *dokimasia* (scrutiny).³¹ Notoriously, according to Plutarch, the Spartans would abandon any infant displaying signs of physical or mental inferiority to death by exposure.³² And all Spartan boys from the age of seven years were removed from their families and subjected to a rigorous training before being granted citizenship. As is well known, citizenship in Ancient Greece also excluded all women and slaves. Therefore, in practice, only a small minority of the city-state were citizens, and they were expected to have earned it irrespective of where they had been born.

According to Cynthia Patterson, until the mid-5th century BC citizenship rules in Athens lay largely within the traditional structures of the family and the tribe

29 Virginia Hunter, ‘Status Distinctions in Athenian Law’ in Virginia Hunter and Jonathan Edmondson (eds), *Law and Social Status in Classical Athens* (OUP 2000) 21.

30 Debra Hamel, *Trying Neaira: The True Story of a Courtesan’s Life in Ancient Greece* (Yale University 2003) 136.

31 Bruce G Robertson, ‘Scrutiny of New Citizens at Athens’ in Virginia Hunter and Jonathan Edmondson (eds), *Law and Social Status in Classical Athens* (OUP 2000).

32 Plutarch, *Plutarch on Sparta* (Richard JA Talbert tr, Penguin 1988) 27.

(*deme*). However, from around 450 BC the Athenian state ‘began to take a direct role in setting criteria for its membership’.³³ Aristotle claims that Pericles’ citizenship law of 450-51 BC, which epitomised this development, was a response to a large increase in the number of citizens at around this time.³⁴ Historical research has shown that the citizen population of Athens grew by as much as 50 per cent in the two decades up to 450 BC. In addition, the fact that the Plataeans in 429 BC and the Samians in 405 BC were granted Athenian citizenship *en masse*, certainly suggests that such an increase was possible around this time.³⁵ In both cases citizenship was extended to defeated comrades in the Peloponnesian War who had had to flee their homes. For Patterson, Pericles’ citizenship law must be understood in the context of Athens’ rise to dominance amongst the Greeks, and with it the ‘formation of a cohesive, imperial city ... [with the concomitant] emergence of a public status of being an Athenian’.³⁶ In other words, with the rise of an imperial sovereignty came an increasing concern with defining citizenship, and membership of the polis.

Nevertheless, there was ‘no positive evidence of the application of the law for exiles in post-Solonian times’, i.e. after 519 BC.³⁷ A law from this period stated “that it be *not* permitted to make anyone an Athenian *unless* he shall be worthy to become a citizen on account of his good services to the state.” Thus, Albert Billheimer comments, ‘obviously an exile...as such, could not be granted citizenship, but only [one]...who had proven himself a friend of the Athenian state’.³⁸ The post-Solonian ‘motive of the grant [of citizenship] was purely political’ and was a matter of pure self-interest, e.g. it was for services rendered to the Athenian state.³⁹ In summary, as apparently generous as asylum in Athens was, it was a result not of a law as such, but of political alliances and demonstrations of loyalty and worth to the Athenian state.

33 Patterson (n 16) 28.

34 Aristotle, *The Athenian Constitution*, (P Rhodes tr, Penguin 1984) 70.

35 Patterson (n 16) 68-71.

36 Cynthia Patterson, ‘The Hospitality of Athenian Justice: The Metic in Court’ in Virginia Hunter and Jonathan Edmondson (eds), *Law and Social Status in Classical Athens* (OUP 2000) 115.

37 Billheimer (n 13) 65.

38 *ibid* 66-67.

39 *ibid* 70,109.

Billheimer makes the point, in relation to Astykrates who was exiled by the Amphictyonic Council in 363 BC, that the offering of asylum and citizenship in Athens was fundamentally political: 'It was not the *fact* that [he] was an exile which enlisted the support of the Athenians, but the *reason* for which he had been exiled'.⁴⁰

But as the political struggles declined, to be replaced by a series of attempts to create a monarchical sovereign unity from the time of Alexander onwards, so the process of receiving refugees became increasingly juridified. On and off throughout the 4th and 3rd centuries BC there was a practice of putting decrees of citizenship to a public vote, with a quorate of 6000 citizens.⁴¹ Originally the full process of granting citizenship was as follows: 1) Enactment of the grant; 2) Enrolment of the new citizen; 3) Public vote; 4) Judicial scrutiny. However, by the end of the 3rd century BC this was changed to: 1) Enactment of the grant; 2) Judicial scrutiny; 3) Enrolment. In other words, with the crumbling away of the democracy and political contestation, the public were excluded and the judiciary assumed a greater importance through scrutinising the application before the enrolment could take place.

Exile in Ancient Greece

Exile, whether in the form of proscription, banishment for life or the acceptance of voluntary self-exile, was an ancient method of punishment which, according to Balogh, had its roots in the tribal laws of the Ionians, Aeolians and Dorians who founded Ancient Greek civilisation.⁴² Banishment was not only a punishment for the individual, but also brought shame and pollution (*miasma*) upon the family and its descendants. But with the harshness of this punishment came the origins of the Greek asylum, for, as Balogh describes:

Both in life and after death the outcast was for ever unfortunate, burdened, together with all his descendants, with a terrible curse, till the end of time. The only way for him to find a certain amount of protection was to flee to certain acknowledged temples or graves or to the hearth of a family holding, or crowned with woollen threads wound around branches of trees or bushes, the

40 *ibid* 64.

41 *ibid* 13-14.

42 *ibid* 1.

so-called *ἵκετηρία*, and to wait there until the community to which the temple or the hearth belonged would promise him protection or expel him.⁴³

The refugee would then undergo certain unspecified religious ceremonies by the host community confirming his or her refugee status.⁴⁴ Much as we might want to speculate on the juridical nature, or otherwise, of this process, the lack of evidence would make this pure speculation. Any number of criteria could have been used to decide on whether or not to admit the suppliant into the community.

The precariousness of the status of the exile in a status-obsessed society is evident in Xenophon's classic account of the army of the Ten Thousand, *The Persian Expedition* or *Anabasis*. This army of mercenaries included many exiles, not least Xenophon himself. Following their escape from Persia, the Ten Thousand were disparaged by the Spartan Governor of Byzantium, Cleander as 'public enemies...no [Greek] city was to receive them'. Xenophon then quotes his response to the army: 'We are not even looked upon as on a level with our fellow countrymen, and are shut out of their cities.'⁴⁵ When Cleander is shortly afterwards replaced as Governor by Aristarchus, many of the exiles left in the city are sold into slavery. In contrast to their shoddy treatment by their erstwhile Greek compatriots, the exile army is given refuge by the 'barbarian' King of Thrace, Sleuthes who promises them not only refuge but that they will be received as 'brothers and table companions'.⁴⁶ Again, the fluidity of belonging in Ancient Greece is evident here, as is the centrality of political judgement over and above 'national' origins.

The Peloponnesian War in the latter half of the 5th century BC caused an unprecedented movement of populations, with a number of cities emptied and repopulated over the course of the war. As Thucydides remarked: 'never had there been so many exiles'.⁴⁷ In passing it should be noted that this is but one example that disproves the often-stated argument that refugee law was necessary in the 20th century due to the novelty of mass exoduses. Generally, however, throughout the

43 *ibid* 2.

44 *ibid* 42.

45 Xenophon, *The Persian Expedition* (Rex Warner tr, Penguin 1972) 291-292.

46 *ibid* 312.

47 Thucydides (n 10) 48.

Golden Age of Athens the number of exiles was small, for 'it was apparently regarded as important not to deprive the state of its citizens by the expulsion of less important adherents of a party.'⁴⁸

The Corinthian League and the Threat to Asylum

Whereas during the age of classical democracy in Athens during the 5th century BC, banishment, in the form of ostracism, was mainly targeted at individuals who were perceived as having risen too high above the rest of the citizenry, in the following century after the decay of Athenian democracy and the beginning of the Hellenistic period it was whole groups who were again more commonly the victims of banishment and outlawry.⁴⁹ With the setting up of the Corinthian League in 338 BC – the nearest Ancient Greece ever came to achieving a unified state – a new and devastating restriction on refugees was agreed in its founding charter, a part of which states:

It is forbidden that political refugees from one of the cities that have taken part in the general peace should make war upon a city that also shares in the peace; but if this nevertheless should happen, the city to which they belong shall be excluded from the federation.⁵⁰

48 Balogh, *Political Refugees*, (n 4) 19. On the other hand, another particularly famous form of exile in Ancient Greece designed specifically to deal with allegedly over-powerful or dominating political figures was *ostracism*, which operated for a brief period in the 5th century BC. Any citizen who was considered a threat due to their over-abundance of power and/or wealth could, by a majority vote, be expelled from the city for a period of ten years. According to Pomeroy et al. it should be seen as having been an alternative to the previous habit of expelling whole family groups, such as in the case of the Alcmaeonids. Ostracism, instead, involved the 'less sweeping exile of a [single] feared individual'. Sarah B Pomeroy and others, *Ancient Greece: A Political, Social and Cultural History* (OUP 1999)

191. The process involved was that any citizen who received a majority of votes, with a minimum of 6000 votes, was then given ten days before they had to go into exile. However, they retained all their civic rights and ownership of property. Balogh, *Political Refugees*, (n 4) 15. Such notable figures as Aristides, Cimon and Themistocles were all at one time ostracised.

49 Balogh, *Political Refugees*, (n 4) 32.

50 Quoted in *ibid* 38.

As Balogh comments:

We find in this treaty for the first time a really fundamental and revolutionary innovation. It became almost impossible in the Corinthian League to overthrow a constitution from outside, as had often happened before.⁵¹

The attempt to establish a unified state, bound by a common law, necessitated the foreclosure of political resistance and an attack on the principle of asylum. As we saw with the restrictions on citizenship in Athens in the later Classical period, so again with the attempts to found a unified sovereignty comes the effective eradication of political asylum from within its borders. This may have been, as Balogh states, a novelty at the time, but this will become, as we shall see throughout this thesis, a repeated pattern.⁵² The Corinthian League was, however, short-lived, collapsing in 322 BC after just 16 years of existence, and its draconian laws on refugees perished with it.

In summary, we find that during the period of Classical and Hellenistic Greece, the reception of refugees went through various peaks and troughs, regulated mainly by questions of political solidarity and loyalty. The rise of sovereign orders, along with various attempts to legalise this process, had the inevitable effect of restricting and corrupting the reception of the ‘stranger’ fleeing for safety. On many occasions, either as individuals or as groups, refugees were granted full citizenship. But even where they were not, they were integrated into the fabric of society as active participants in the local economy, and with significant legal rights. Nevertheless, it is clear from a speech by Demosthenes that the absolute right of the refugee to safety from their pursuers in their place of exile was a well-respected and honoured custom throughout Greece from the earliest times to at least the middle of the 4th century

⁵¹ *ibid* 38.

⁵² One significant and positive event for political exiles occurred just a decade or so after the founding of the league. In 324 BC Alexander the Great was beseeched by up to 20,000 refugees at the Olympic Games, that they be able to return to their cities. He agreed to this, declaring ‘we were not responsible for your exile, but we will be responsible for your return’. *ibid* 68. Whether or not this was merely a bit of cynical politicking by him, the fact is that he saw some political capital in bestowing his magnanimity on the exiles.

BC.⁵³ Indeed, in many cases, as metics they rose to be some of the richest and most prominent members of the city-state. Insofar as their status was complicated in relationship to the rest of the community, this must be seen against the background of a form of citizenship that was fluid, restricted and jealously guarded even towards the native-born. But apart from an obscure reference to a pre-Solonian method of receiving refugees, we have yet to encounter any systematic or generalised practice of asylum beyond the granting of citizenship or meticship (what we might, today, call the right of permanent residency). But as Greece entered its long decline between the death of Alexander and the Roman conquest, endless wars and decaying sovereignties gave rise to an institution that gave us the word ‘asylum’.

Asyilia

As an institution, *asyilia* develops in the Greek world from around the beginning of the 3rd century BC.⁵⁴ In the period of struggles and wars between Alexander’s successors, certain towns and cities were decreed to be ‘sacred and inviolable’, earning the epithet, *asyilia*, literally *a* (not) *sylia* (subject to seizure).⁵⁵ In *Asyilia: Territorial Inviolability in the Hellenistic World*, Kent J Rigsby has put together a comprehensive survey of the evidence for all places deemed ‘inviolable’ in the Hellenistic world from the 3rd century BC to the early 1st century AD. They were places deemed neutral as between the rival Greek states. As ‘sacred and inviolable’ spaces, they were off limits to any military attack from other Greeks. *Asyilia* were also exempted from paying certain taxes to authorities that at various times sought to extend their control over territories. One example is the city and country of Alabanda, which was granted *asyilia* around 202 BC by Antiochus III. In his decree, Antiochus sums up the benefits of *asyilia* by emphasising ‘peace and tax relief’ as the effects of the grant.⁵⁶

53 Demosthenes, *Against Aristocrates* (JH Vince tr, Heinemann 1935) 237-239.

54 Pierre Timbal Duclaux de Martin, *Le Droit d’Asile* (Librarie du Recueil Sirey 1939) 18.

55 Michael C Scott, ‘Asyilia’ in Roger S Bagnall and others (eds), *The Encyclopedia of Ancient History* (Wiley–Blackwell 2012).

56 Kent J Rigsby, *Asyilia: Territorial Inviolability in the Hellenistic World* (University of California 1996) 333.

Although the benefits of *asylia* were rather prosaic, they were founded upon religious belief. Claims for *asylia* were commonly made on the basis of some link with a particular god. They might be the site of oracles, or of shrines to some deity. Often *asylia* was granted on the promise that the town concerned would host Pan-Hellenic games, which were of course religious festivals. For example, Magnesia attempted to gain recognition of *asylia* in 221/220 BC by offering to host a competition for the Greeks of Asia. This application was ignored and they made a new claim some ten years later, this time offering to host quadrennial Pan-Hellenic games; only then was *asylia* granted to them.⁵⁷

The granting of *asylia* to a particular city, temple etc. was bestowed by a recognised Pan-Hellenic authority such as the Amphytronic Council at Delphi, by kings, or they were granted by a series of states after lobbying by those places wishing to claim the status of *asylia*. Originally *asylia* was granted to representatives of the Amphietyonic Council travelling to meetings around the Greek world. It was also used to cover those travelling to Pan-Hellenic festivals.⁵⁸ These people were immune from being interfered with during their travels. Thus we find in *asylia* the origins of an aspect of asylum that would be fundamental right through to the late middle ages, one we will encounter many times: immunity or freedom from seizure. The first known grant of *asylia* for a city, rather than just a temple, is Smyrna in the 240s BC. An oracle was received from Apollo, demanding honour to the goddess Aphrodite, whose temple lay in Smyrna. Following this, King Seleucus II declared Smyrna to be ‘inviolable’ and exempt from paying tribute. Seleucus also wrote a letter asking the rest of the Greek world to join him in recognising *asylia* at Smyrna. Ambassadors then toured the Greek world, using the oracle and the letter from Seleucus, asking for recognition of *asylia*.⁵⁹ The process of granting *asylia*

57 *ibid* 180. There is some dispute over the fact that in the surviving responses to the second Magnesian campaign not all other states *explicitly* recognise *asylia*. But Rigsby suggests several quite mundane reasons for this, which do not necessarily mean that *asylia* was not in fact granted, e.g. careless writing of the decrees, the previous granting of *asylia* by those city states, or the subsuming of *asylia* into grants to Magnesia in terms of ‘what they request, in keeping with the oracle’. *ibid* 182-3.

58 *ibid* 108.

59 *ibid* 95.

demonstrates its function as one of diplomacy between the various Greek city-states.⁶⁰ So, to make a claim for *asylia* was effectively to declare neutrality in the many internecine wars of the Greeks.

Thus far *asylia* is defined mainly in terms of a set of benefits or a sense of reverence accorded to a specific place. Their role was not primarily one of refuge. Nonetheless their inviolable status, along with the notion of spiritual protection given by the relevant deity, meant that they were often used as places of asylum, as we would understand it. According to legend Apollo received refugees at Delphi such as Orestes and Ion.⁶¹ This legend undoubtedly contributed to the enormous veneration held by all Greeks for this particular temple. The Temple of Artemis at Ephesus was one of the most famous *asylia* in Greece.⁶² It was, possibly, founded by the Amazons who took refuge there. There is no surviving evidence for the original grant of *asylia* for this great temple. We only have confirmation of its sacred and inviolable nature from the Romans. Rigsby suggests the possibility that the ‘Ephesians invoked older traditions about refuge to persuade the Romans that the Artemisium was an asylum’.⁶³ The legend of Artemis portrayed her as a protector of refugees, and there were many stories found in both historical and mythical accounts of fugitives seeking sanctuary in her temple. In the only surviving work of Achilles Tatius, he sets a scene in this Temple ‘of an elaborate proceeding to determine whether a suppliant had just claim on the goddess’s protection.’⁶⁴ This juridical process of admittance is anomalous, however, and may be because Tatius is writing many centuries later from the perspective of the Roman Empire at its height: a period and a place obsessed with legal procedure.

We also possess a number of recorded instances of popular reverence for *asylia* as places of refuge. For example, when royal agents seized a fugitive from the temple of Demeter in Alexandria, the local population protested.⁶⁵ As early as 242 BC

60 *ibid* 4-5.

61 *ibid* 44.

62 Mazzinghi (n 3) 6.

63 Rigsby (n 77) 385-386.

64 *ibid* 386-387. The work of Tatius is *The Adventures of Leucippe and Clitophon*.

65 Polybius, *The Histories: Volume Four* (WR Patton tr, Heinemann 1925) 533-534.

King Leonidas and his daughter took refuge in the temple of Athena Chalcioecus, remaining there in safety until new ephors took office.⁶⁶ In around 170 BC a Jewish High Priest, Onias, sought refuge in the temple of Apollo at Antioch. He was lured outside and killed on the orders of Antiochus IV, which again led to a major outcry in the city.⁶⁷ The fact that Onias had to be enticed from sanctuary before being seized shows that even kings were hesitant to violate the temples. It is also worth noting that even though this was a pagan space, reverence for asylum could extend sanctuary to a Jew. In 168 BC King Perseus of Macedonia sought refuge in the temple at Samothrace. The Romans, besieging the temple, demanded the surrender of the king, but did not seize him themselves. Here again a powerful force, the Romans, was forced to respect the inviolability of the temple as a refuge. Perseus later surrendered to the Romans of his own volition.⁶⁸ One historian expresses it as follows: 'If the refugee was not always protected by the asylum, in Greece the asylum was always under the protection of the people's faith.'⁶⁹

There is, therefore, significant evidence of *asylia* as refuge. As widespread and as available as *asylia* was to refugees, what was involved was the transfer of an ancient custom/right of asylum which belonged to the fugitives themselves, which was then transmogrified into a right bestowed upon the cities and towns of *asylia* to offer sanctuary to them.⁷⁰ This was a product, Gunther Plaut argues, of attempts by the amalgam of Greek states to create some stability in the midst of almost perpetual warfare. More bluntly, Norman Trenholme notes: 'It is said that in time of war the Greek asylums were crowded with supplicants, while in time of peace they were often deserted.'⁷¹ William C Ryan asserts that 'this was the principle purpose of asylum in classical times: to save the lives of those defeated in war'⁷²; whereas for Bulmerincq,

66 Plutarch (n 32) 62-63.

67 Rigsby (n 77) 497.

68 *ibid* 397-398.

69 Henri Wallon, *Du droit d'asile* (E-J Bailly 1837) 26.

70 Plaut (n 1) 37-38; Timbal (n 75) 17.

71 Norman Trenholme, 'The Right of Sanctuary in England: A Study in Institutional History' (1903) 1 *University of Missouri Studies* 1, 5.

72 William C Ryan, 'The Historical Case for Sanctuary' (1987) 29 *Journal of Church and State* 209, 213.

‘A feeling of humanity gave birth to the Asyla of the Greeks’. ⁷³ Rigsby’s exhaustive study of the institution leads him to conclude:

Our inscriptions leave no doubt that these declarations [of *asylia*] were first and foremost a religious gesture, increasing the honor of the god. In strict logic, they do not seem necessary: all temples were supposed to be inviolable, and for a city the option of military neutrality was always there, without the need of someone else’s declaration.⁷⁴

The answer to this conundrum, Rigsby suggests, is that a juridical process stepped in to perform what had once been a spiritual or communal sense of duty. One could see this as a positive parallel with modern refugee law, upholding human rights in a world of total wars and genocide. Yet the transfer of the right from the refugee to the place of refuge had unfortunate implications. In terms of places of sanctuary for refugees, the Greek *asylia* were, in certain respects, quite restrictive:

In practice...escaping to a temple was not enough for a fugitive from the law: the god or the god’s priest could refuse him...Commonly, one who took refuge in a temple was required by the temple to undergo a kind of trial to determine whether his flight was ‘just’.⁷⁵

Moreover the Romans, in their attacks on the *asylia*, exploited the juridical paradigm, already latent in the system of *asylia*. If a place was inviolable mainly due to a legal grant, rather than divinely ordained, then it could equally be revoked under secular authority. Following the revolt of Mithridates against the occupation, the Romans moved to strip many of the *asylia* of their inviolable status. After many years of violating the sanctuary, the Romans finally revoked the Temple of Artemis of its sacred and inviolable status in 88 BC. Stories about supposed ‘lawless behaviour’ in the temple ‘entered Roman legal lore as a grave objection to the right of asylum’.⁷⁶ The city of Miletus’ grant of *asylia* was also removed by the Romans around the same time, after they had supported Mithridates’ rebellion. Instead the sacred and inviolable status was restricted to the precinct of the temple within the city. This dovetails with the general Roman thinking on *asylum*, that it applied only to places of religious

73 August Bulmering, *Das Asylrecht in seiner geschichtlichen Entwicklung* (Martin Sandig 1853), paraphrased in Mazzinghi (n 3) 108.

74 Rigsby (n 77) 14.

75 *ibid* 10.

76 *ibid* 393.

worship, and not to cities, towns etc.⁷⁷ At this stage the Romans moved only to reduce *asylia* to temples and other places of religious veneration. One can speculate that this was either because it was all that was necessary to establish complete sovereign authority over Greece or because, in the wake of Mithridates' rebellion, attempting to attack the status of the most revered sites of the Greeks would have been a provocation too far. However, a century later even the temples would have to submit themselves to a juridical process in order to maintain their historical role as asylums, places inviolable in which individuals would be free from seizure.

The 19th-century historian of asylum, August von Bulmerincq, echoes the prejudices of the Romans when he writes:

More generally in Greece however, the characteristic was the perpetuation of a state of lawlessness, by the consecration of a caprice, and the protection of crime, so their law of Asylum hurt the law itself, and they even sought to justify it; whereas the more enlightened amongst them, where society had attained higher development, as at Athens, recognized the misuse and sought to limit it. Abolish it they dared not; for it was a divine law.⁷⁸

While Bulmerincq is guilty of grossly telescoping the history of *asylia* in Ancient Greece, this passage is more instructive in shedding light on a particularly legalistic view of asylum, one that we will repeatedly encounter in the history of asylum, and of its treatment by historians: namely, that it is a product of backward or primitive societies, an institution to be overcome with the dawn of a rule of law. For Bulmerincq, the Romans' emasculation of *asylia* represented through their 'general system of jurisprudence...a higher development'.⁷⁹ Or, as Rigsby suggests: 'It may be that what truly undermined the ancient Greek usage of religious refuge was the availability of more reliable alternatives: the layered system of the Roman Empire and the spread of Roman citizenship with its peculiar advantages and protections.'⁸⁰ This sense of the superiority of law over asylum was certainly one adhered to by the Romans themselves as they proceeded to all but eradicate the *asylia* and the concept of sanctuary from the civil authority.

77 *ibid* 177.

78 Bulmerincq (n 94), paraphrased in Mazzinghi (n 3) 108.

79 *ibid* 110.

80 Rigsby (n 77) 586.

3

Rome

Rome was a society whose self-identity was famously defined by its attachment to law. Perhaps no other society prior to the modern age was so bound by a legal structure and rationality. The notion of a unitary sovereign order and the rule of law all but excluded the possibility of asylum as it had been understood before then. With the conquest of Greece in the 2nd century BC, and particularly following the quelling of Mithridates' rebellion a century later, the *asylia* were increasingly restricted by the Romans. Another century later and the Emperor Tiberius enacted legislation that effectively regulated them out of existence. The Roman period witnesses the effective erasure of asylum by law; the legal paradigm of Rome simply could not accommodate the existence of spaces beyond the authority of the state and its law. As Pierre Timbal notes: 'The rigorous justice of Rome, inspired by the principle of the public interest, could not allow for *asyla*', which would have entailed a failure to punish the guilty. The republican ideology of Rome was founded upon the idea of a state based upon a system of laws, perfected through legislation that would 'assure the complete security of all its citizens'.¹ We can see the extent to which the concept of asylum was completely alien to the Romans in the fact that they did not possess a word for it. Instead, they were forced to use various circumlocutions or borrow words from the Greek.² The re-emergence of asylum, or sanctuary as it would become known, was as

¹ Pierre Timbal Duclaux de Martin, *Le Droit d'Asile* (Librarie du Recueil Sirey 1939) 25-26.

² *ibid* 26.

a form of resistance to Roman rule. Thus the story told in this chapter is of a concentrated battle between law and asylum in two phases. The first takes place in the context of the rise of the Empire and the consequent destruction of asylum; the second occurs around four centuries later as the Western Empire crumbles, and so asylum once more has a space in which to take root. But first, as with the Greeks, it is useful to clarify how the Romans understood certain concepts intimately tied with asylum, such as citizenship and exile.

Roman Citizenship

The Romans appear to have been both more inclusive and more jealous than the Greeks in their framing of the citizen and the outsider. The concept of the *ius gentium* embraced all free persons, whether Roman or not. In AD 212, Roman citizenship was extended to all free persons throughout the Empire, effectively making Roman law equally and universally applicable as far as its writ ran.³ Many modern champions of the ‘civilised’ Roman Empire have been forced to face ‘an embarrassment of huge proportions’ due to the fact that the Romans had a far more fluid concept of citizenship than we do, enfranchising foreigners and admitting freed slaves as members of the citizen body.⁴ The basis of legal subjectivity for free persons was *domicilium*. The Digest of Justinian defines this as, ‘the place which a man does not leave unless something calls him away, when he leaves which he is said to travel, and when he returns to which he has ceased travelling’.⁵ Insofar as a man was free and had resources, *domicilium* was a ‘matter for his own choice’.⁶ It was a more important factor in the eye of the law than where the legal subject was originally from (*origo*). H F Jolowicz writes:

[E]ven in the latest phase of the Civil Law it is domicile which is important. The substitution of nationality as the criterion of personal law in many modern systems is due to ideas which can find no basis in the Roman texts.⁷

3 HF Jolowicz, *Roman Foundations of Modern Law* (Clarendon Press 1957) 38-39.

4 Emma Dench, *Romulus’ Asylum: Roman Identities from the Age of Alexander to the Age of Hadrian* (OUP 2005) 5.

5 Alan Watson (tr), *The Digest of Justinian* (University of Pennsylvania 1985) 50.16.203.

6 Jolowicz (n 3) 41.

7 *ibid* 42-43.

But at the same time the Romans were immensely self-conscious about the question of status and of the benefits of citizenship. This grew out of the same attachment to legal formality and the supposed equality and freedom guaranteed by the legal status enjoyed by all citizens. Thus to be a non-citizen was truly to be unworthy, backward and uncivilised. It follows that a claim to a generalised system of legal rights obviated the need or indeed the desirability for asylum, an institution that was based precisely on the assumption of an exception beyond the law and sovereign authority, or which was extended to aliens. It is unsurprising, therefore, that:

In reality, the immunity of sacred space from the law was not Roman usage, and no temple can in fact be found providing suppliants legal inviolability. Indeed, *provocatio* [the right of appeal] should in principle make asylum unnecessary, at least for Roman citizens.⁸

Only a very few instances of refuge within temples or sanctuary at the foot of the Emperor's statue are recorded within the Roman Empire.⁹ Overall, and insofar as asylum existed within the Roman Empire, it 'took little or no account of religious sentiment when it came into conflict with the punishment of criminals.'¹⁰ In other words, where it did exist, asylum was to be subordinated to the law.

The Roman Law of Exile

Originally, *exsilium*, from which the term 'exile' derives, was an informal part of Roman criminal procedure. A citizen under indictment for a capital crime could escape to another territory beyond the writ of Roman law before conviction and the pronouncing of sentence, which would of course be execution; many of the Republic Roman magistrates tolerated this form of voluntary exile.¹¹ However, it is not possible

8 Kent J Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (University of California 1996) 574.

9 *ibid* 586.

10 Jorge L Carro, 'Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?' (1986) 54 *University of Cincinnati Law Review* 747, 752.

11 Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (OUP 1970) 112.

to tell if this informal application of exile was allowed only to the lower classes in society, or whether it extended to all.¹² Peter Garnsey writes:

Exile was an alternative to what was still more unpleasant – either execution or penalties of a servile character [such as being sent to the mines]...the officials who administered criminal justice in the extraordinary courts of the Empire normally deported and relegated offenders of high status and found harsher punishments for criminals from the lower ranks of society.¹³

The question as to whether or not the exile then lost his Roman citizenship is also vague. It is possible that he only lost it in the event of adopting the citizenship of the place to which he had fled.¹⁴ However, in the closing decades of the Republic, *exsilium* grew into a formal legal institution. Magistrates were ‘strictly ordered to allow the condemned person time to escape before executing the capital sentence’. Moreover, following the accused’s escape, a decree would be issued by a high magistrate that formally stripped him of all legal rights. If he were to return he would be liable to death at the hands of anyone with impunity, a *homo sacer*.¹⁵ The evolution of exile from being merely an ‘escape route’ to having something approaching a statutory footing entailed dividing the punishment into two forms: *relegatio* and *deportatio*.

Relegatio was negative in that it was purely about expulsion from the city or province, but within the Empire. *Relegatio* could be either temporary or permanent. Often the *relegationis* was condemned to reside only within a specified town or province. Perhaps the most famous *relegationis* was Ovid, who was banished to a miserable existence in a provincial town by the Black Sea.¹⁶ However, even where *relegatio* was for life it did not involve loss of citizenship or civil rights such as owning property or making a will.¹⁷ *Relegatio* was sometimes used as a method of

12 *ibid* 122

13 *ibid* 121. See also JA Crook, *Law and Life of Rome* (Thames and Hudson 1967) 272, and under the definition of ‘*exsilium*’ in Nicholas GL Hammond and HH Scullard (eds), *Oxford Classical Dictionary* (OUP 1970).

14 Paul Tabori *The Anatomy of Exile : A Semantic and Historical Study* (Harrap 1972) 62.

15 ‘*exsillium*’ in *Oxford Classical Dictionary* (n 13).

16 Ovid, *The Poems of Exile: ‘Tristia’, ‘Epistulae ex Ponto’ and ‘Ibis’* (Penguin, 1994).

17 Garnsey (n11) 116.

banishing certain undesirable people such as ‘actors, Jews, philosophers...soothsayers, astrologers and simply gangs of youths’, many of them ‘enemies of order [who] would have been low in rank.’¹⁸

Deportatio was more severe, as it involved stripping the convict of citizenship and often the confiscation of property.¹⁹ Generally this was applied in the severest crimes such as treason, murder and arson.²⁰ This form of banishment was introduced under Tiberius, the emperor who would also be responsible for the final destruction of the *asylia*. *Deportatio* effectively ‘made [one] a foreigner’.²¹ And it was this, the severest level of banishment, sometimes also referred to as *interdictio aqua et igni* or *aquae et ignis interdictio*,²² which turned the citizen into a *homo sacer*, as the convict could, on re-entering Roman territory, be killed with impunity.²³ As Paul Tabori argues, *deportatio* became a useful means of expelling not just mere criminals, but political subversives and others deemed a threat to the state. One example of this was when Tiberius had 4000 freedmen expelled for ‘Jewish or Egyptian superstitious practices’.²⁴ A short time later, many of the early Christians were sentenced to exile. And in AD 17 the senate launched a purge of astrologers, those of them who were citizens were exiled, while the foreigners were executed. ‘Citizens, then, might secure a milder penalty than aliens for the same offence.’²⁵

In sum, belonging and banishment under the Romans was a highly regulated and stratified affair. But of course these questions reflect a clear binary: distinguishing between who can remain within the *polis* and who cannot. What we have not yet encountered is asylum as a space within the *polis*. For the Romans, it appears, such a thing was only conceivable in metaphorical or mythical terms.

18 *ibid* 119.

19 Crook (n 13) 272-273.

20 Tabori (n 14) 61.

21 Jolowicz (n 3) 146.

22 This deprivation of fire and water, sometimes also included that of shelter (*tecti*). Tabori (n 14) 61.

23 Garnsey (n 11) 112.

24 Tabori (n 14) 62.

25 Garnsey (n 11) 261.

Asylum in the Roman Imagination

In 42 BC, two years after the assassination of Julius Caesar, the Roman Senate ordered a temple to be built in the Forum, dedicated to his cult. The Temple of Divus Julius was an asylum open to all seeking refuge.²⁶ This was unique, as we know of no other instance where the central power of either the Republic or the Empire created or licensed a new asylum.²⁷ There was just one problem with this temple of refuge, located in the heart of the city, open to all without prejudice. It was built with a huge wall surrounding it and thus it was, in all practical terms, inaccessible. As Cassius Dio put it, the temple ‘had inviolability in name only’.²⁸ And so a pastiche of asylum was created in place of the real thing.

While the Divus Julius was a real temple with a fake claim to sanctuary, its inspiration was a genuinely open, if mythical, asylum – a myth, nonetheless, that ‘is certainly one of the noblest that survives from classical antiquity’.²⁹ The famed sanctuary of Romulus on the Capitolium, whose function was to accumulate the founding population of Rome, was largely made up of runaway slaves and criminals. This space remained, as Plutarch described it, ‘a place of refuge for fugitives, which they called the Temple of the Asylaeon God. Here they received all that came...declaring that they were directed by the oracle of Apollo to preserve the asylum from all violation’.³⁰ Rigsby points out the problematic aspect of Romulus’ asylum for Roman concepts of space and law:

In Rome, sacred space supplied no precedent or analogy for the right of sanctuary – hence the lack of a Latin word for this function...this place [the asylum on the Capitolium] ‘between two groves’ seems rather conceived of as negative space, no-man’s land, subject to no law.³¹

26 Cassius Dio, *Dio’s Roman History: Volume 5* (Earnest Cary tr, Heinemann 1969) 155.

27 Dench (n 4) 17.

28 Dio (n 26) 155.

29 Dench (n 4) 2.

30 Plutarch, *Plutarch’s Lives* (John Langhorne and William Langhorne trs, William Tegg 1862) 16.

31 Rigsby (n 8) 577.

Dench argues that the myth of Romulus' asylum was problematic for the Romans: having a tale of mixed races and criminals as the founding myth of Rome conflicted with the high-flown and noble claim of Roman civilisation.³² The aristocratic Cicero once casually referred to these refugees as the 'crap of Romulus'.³³ For criminals and vagabonds to be founders of Rome would also have offended against the Romans' pride in their society of laws and due process. Juvenal mocked the obsession amongst the Roman upper classes for attempting to trace their ancestry as far back as possible. They would, he pointed out, end up discovering their origins amongst the dregs of society who made up the arrivals at Romulus' asylum.³⁴ It is certainly understandable therefore, that arguments amongst Roman historians about the nature of Romulus' asylum should persist well into the time of the Empire. For example, Dionysius of Halicarnassus' description is worth quoting for the light it sheds on the prejudices during the early period of the Roman Empire:

[F]inding that many of the cities in Italy were very badly governed, both by tyrannies and by oligarchies, [Romulus] undertook to welcome and attract to himself the fugitives from these cities, who were very numerous, paying no regard either to their calamities or to their fortunes, provided only they were free men...but he invented a specious pretext for his course, making it appear that he was showing honour to a god.³⁵

Note first the nobility Dionysius attaches to the asylum by painting the fugitives in the colours of political refugees, fleeing backward dictatorships for 'civilised' Rome. And then there is his rationalist disparaging of any religious basis of asylum. Livy's description of the refugees as 'rag-tag-and-bobtail' is far more dismissive and condescending. He also attempts to explain away the ignoble founding of Rome as of a piece with the founding of many other cities at the time who would 'shark up a lot of homeless and destitute folk and pretend that they were "born of earth" ' to be

32 Dench (n 4) 16.

33 Cicero, *Letters to Atticus: Volume One* (DR Shackleton Bailey tr, Harvard University 1999) 133. Shackleton Bailey translates the phrase '*Romuli faece*' as 'Romulus' cesspool'. But Dench's rendering, which I have used here, conveys a greater sense, I think, of Cicero's attitude to the original inhabitants of Rome. Dench (n 4) 16.

34 Juvenal, *The Sixteen Satires* (Peter Green tr, 3rd edn, Penguin 1998) 69-70.

35 Dionysius of Halicarnassus, *The Roman Antiquities of Dionysius of Halicarnassus: Volume One* (Earnest Cary tr, Heinemann 1937) 355.

founders of the new city.³⁶ As far back as the late Roman Republic a distinction was being made between deserving political fugitives versus unworthy economic migrants.

Rome and the Greek *Asyilia*

From fake temples and troublesome myth we turn to the actual history of Rome's engagement with asylum in the form of the *asyilia* inherited from the Greeks. With the triumph of the Roman over the Greek world, *asyilia* was latinised into *asylum*. The word 'asylum' first appears during the reign of Augustus, a period which saw a great interest in antiquarianism and foreign words in Roman literature. Thus the Romans would have been keenly aware of the fact that 'asylum' came from the Greeks.³⁷ The Romans understood asylum to mean a space within the *polis* where the writ of civil law did not run: a space of non-law to which fugitives could escape. For the Greeks, however, *asyilia* meant a neutral space existing between the various polities, not within them. This, of course, reflected the patchwork nature of sovereignty in Ancient Greece. For the Romans, whose state was unified and centralised and based upon what we would recognise as a 'rule of law', such spaces were either inconceivable or simply could not be tolerated. It is no wonder that the Romans were 'uneasy' about asylum.³⁸ A similar resistance to exemptions from the writ of secular law holds today in modern Western states. The sacredness of holy places and their separation from the secular law was a feature of the Church in the medieval period, as we shall see, but this distinction was abolished by the modern state, as it was by the Romans some 15 centuries earlier.

First, and in an *ad hoc* manner, the Romans simply violated *asyilia* and removed suppliants. But this was risky, as it frequently provoked a popular reaction to

36 Livy, *The Early History of Rome* (Aubrey de Selincourt tr, Penguin 1971) 42. Cicero, with the exception of the casual remark made in a letter to a friend that is quoted above, when describing the founding of Rome either just mentions the refugees in passing [Cicero, *De Oratore: Volume One* (EW Sutton tr, Heinemann 1942) 27-29, or fails to refer to them at all [Cicero, *De Res Publica, De Legibus* (Clinton Walker Keyes tr, Heinemann 1928) 115-123.

37 Dench (n 4) 16. See also Livy, *Rome and the Mediterranean* (Henry Bettenson tr, Penguin 1976) 231.

38 Rigsby (n 8) 417.

what was perceived by the locals as sacrilege. Any attempt at simply abolishing a privilege with ancient roots might well have caused an even worse reaction. Therefore, instead, the Romans progressively starved the institution of *asylia* through legal regulation and restrictions. Rigsby notes: ‘The Greek people claimed no authority concerning whether some temple might receive refugees, but the Roman government did.’³⁹ They began by dispensing with places of *asylia* and refuge based solely on custom rather than any formal grant. As early as the 2nd century BC the Romans acknowledged *only* the temple at Delphi as *asylia* and not the surrounding city and country. At this stage the Romans were already ‘groping toward the application of their own notion of an asylum’, one that was far more restrictive, and more symbolic than real.⁴⁰

Then, in AD 22, the Emperor Tiberius ordered a review of all Greek *asylia*.⁴¹ They had to reapply to the Roman authorities for their ‘inviolable’ status by providing proof of the original grant and/or evidence of divine associations, often an impossible task; on this basis about 70% of the applications were rejected by Rome. In addition, the Romans instituted what *they* conceived of as asylum on the same principle as that already applied to Delphi: restricted solely to temples, and not to cities or towns. Also, henceforth the Romans granted no new asylums. The practice and institution of asylum was therefore not exactly prohibited by law, merely regulated by law slowly out of existence. Within two centuries *asylia/asylum* had all but vanished in the Roman world. Anne Ducloux writes: ‘[F]rom Tiberius to Antoninus Pius, [the Empire] had endeavoured to erase, progressively, those places of asylum that had been rooted within the recently conquered Greek world.’⁴² Tacitus describes the review of AD 22 as ensuring public order. In this, his description of the problem of asylum is similar to that of Strabo discussing Ephesus.⁴³ It is worth quoting Tacitus at length here, because it is the only source that we have for this legal vandalism of *asylia*; it also gives us a valuable insight into the Roman prejudice towards asylum,

39 *ibid* 22.

40 *ibid* 49.

41 Tacitus, *The Annales of Imperial Rome* (Michael Grant tr, Penguin 1973) 148-149, 164.

42 Anne Ducloux, *Ad ecclesiam confugere: Naissance du droit d’asile dans les églises* (De Boccard 1994) 254.

43 Rigsby (n 8) 580.

one which was to be closely mirrored 1500 years later with the abolition of Church Sanctuary in Western Europe:

In Greek cities criminals were increasingly escaping punishment owing to over-lavish rights of sanctuary. Delinquent slaves filled temples. Asylum was granted indiscriminately – to debtors escaping their creditors, even to men suspected of capital offences. Protecting religious observance, these communities were protecting crime itself; and interventions provoked outbreaks which no authority could control. So the cities were requested to submit their charters and their representatives to investigation at Rome. Some cities then voluntarily abandoned their unfounded claims. Many however persisted, on the strength of ancient religious myths or their services to Rome. It was a splendid sight, that day, to see the senate investigating privileges conferred by its ancestors, treaties with allies, edicts of kings who had reigned before Rome was a power, even divine cults; and it was free, as of old, to confirm or amend.⁴⁴

A further two centuries later a ‘right of asylum’ would appear in Roman law. This, as we will see in the next chapter, was in response to resistance to the decaying Empire, and a reflection of the growing power of the Christian church. While many scholars have considered Hellenistic *asylia* as refracted back through this Roman ‘right of asylum’, Rigsby points out that:

Tacitus leaves no doubt about the substance, logic, and legal source of the [Roman] privilege: it was the ‘right of asylum’ of a temple, immunity of sacred space from civil law, and it was granted by that sovereign who controlled the city.⁴⁵

The key distinction is that the Romans saw asylum not as the result of something above or beyond the sovereign power, but as a privilege granted by it. This legalistic view of asylum has far more in common with the modern concept of the right of asylum as essentially vested in the state – that is, its right to grant asylum – rather than the tradition of the Bible and the Greeks which saw asylum as spiritually ordained and thus *supra legem*.

44 Tacitus (n 41) 148.

45 Rigsby (n 8) 286.

4

The Early Church

Introduction

The resurrection – the word is apt in this context – of asylum comes with the rise of the Christian Church and the terminal crisis of the Roman Empire that took hold in the 4th century AD. These two phenomena are closely linked. Examples of refusal to pay taxes, assassinations of local officials of the Empire and other forms of sabotage proliferated, and increasingly the perpetrators of these acts then sought refuge and protection in churches. With the integration of the Christian Church and the Roman state following the adoption of Christianity as the state religion during the closing decades of the century, it became necessary that the rules concerning the ‘taking of sanctuary had to be sorted out’.¹ But it would be a mistake to assume that this was a natural process, pre-determined by the prevailing socio-political circumstances. The establishment of church asylum, an institution that would last for over a millennium, was a product of struggle by a significant proportion of the population, led by Church fathers such as St. Augustine, St. Ambrose and St. John Chrysostom, who called upon Christians to defend their churches as sanctuaries from those, including the Roman authorities, who attempted to remove suppliants. The Roman statutes of 21 November 419 and 23 March 431 have long been considered the earliest laws on the right of

¹ Jill Harris, *Law and Empire in Late Antiquity* (Cambridge University 1999) 151.

asylum, and as such mark the origins of asylum in the modern sense. But this is not quite true. There was a growing movement from the people and from the Christian Church in various parts of the Empire, which only later culminated in these two seminal laws.²

In early Christianity, all of its sacred places of worship were places of asylum. This is in contrast to the religious places of the Greeks, only some of which were deemed to be refuges. Ducloux holds that the granting of asylum for the Greeks was primarily one of ‘political opportunism’.³ I suspect that she is focussing rather too narrowly on the later institution of *asylia*, and, as such, misses on its strong religious origins in places such as Delphi. Nonetheless, I think she has a point. As we saw earlier, asylum in the broader sense played an important political role in the various interstate and civil wars of the 5th and 4th centuries BC. But it would also be incorrect to say that the Church conceived of asylum purely in religious terms, to the exclusion of politics. The assertion of Church supremacy against the secular Roman law was, of course, by its nature a political stance. In any case, to try and draw too rigid a distinction between religion and politics in any context is a fruitless task. However, Ducloux is undoubtedly correct in how she conceives of the relationship between asylum and law during the twilight of the Empire:

What emerges clearly is that law did not give birth to the right of asylum... it was regarded by all as a religious principle higher than the secular law, a kind of right born of a divine spirit.⁴

The right of asylum already existed for the Church as something granted by God, irrespective of the domain of temporal law. The principle of asylum in the Christian Church was founded upon the idea that the refugee could pay penitence in the house of God.⁵ The laws promulgated in 419 and 431 were, therefore, not about *granting* the right of asylum in Church spaces, rather it was a matter of fixing ‘the necessary legal penalties to ensure its respect by everyone, and, with the aim of protecting the purity

2 Anne Ducloux, *Ad ecclesiam confugere: Naissance du droit d’asile dans les églises* (De Boccard 1994) 6.

3 *ibid* 7.

4 *ibid*.

5 *ibid* 59.

of the sanctuary but also to ameliorate the conditions of life for the refugees'.⁶ By contrast, the granting of *asylia* in Greece was not guaranteed by any legislative text, 'its only value was religious',⁷ and, I would add, political. So long as the religious superstructure of belief held, the inviolability of asylum was respected. With the subsuming of Greece into the Roman Empire, so the edifice that underpinned asylum collapsed. From the moment Christianity became the state religion in 380, the customary right of asylum took on a greater significance for non-Christians such as Jews and Pagans: 'For them the juridical consequences of a custom, where traditionally all customs had the force of law so long as they were not *contra legem*, was invested with great importance.'⁸ This, no doubt, gave an impetus to conversion. Thus, it was in the interests of the Church to fight for the inviolability of its places of sanctuary so as to prove in practice that the house of God was able to offer all the divine protection that such a place was meant to provide. This perhaps demonstrates the value of law in protecting asylum. But when examined in detail, the role of law will be seen as, on balance, negative.

Early Christian Theology and Asylum

One of the reasons for the perseverance of the institution of asylum, in spite of its almost complete erasure following the Tiberian laws of AD 22, is that ordinary people would have continued to look for places to seek protection from cruel masters and the severities of the law. Now, however, they looked to the new temples that were replacing the old pagan ones: the Christian churches.⁹ It was through this continuous popular usage that the institution was able to be reborn from the 4th century onwards.¹⁰ We have the testimony of St. Ambrose, St. Gregory Nazianzen and Ammianus Marcellinus that there existed from the 4th century the practice of seeking

6 *ibid* 8-9.

7 *ibid* 110.

8 *ibid* 87.

9 William C Ryan, 'The Historical Case for Sanctuary' (1987) 29 *Journal of Church and State* 209, 216. Often this was literally the case, with old pagan places of worship being appropriated by the church.

10 Ducloux (n 2) 254.

asylum in churches.¹¹ According to J Charles Cox, Constantine's Edict of Toleration in 303 would have likely begun the process of Churches being widely recognised as places of asylum.¹² Surviving evidence shows that during the first three quarters of the 4th century, asylum existed as a religious principle adhered to by many Christians. This is all in the century before the laws of 419 and 431. There is also an obscure reference to a 10-year-old boy seeking refuge in a church in the town of Pavia, possibly in 326 and thus making it the earliest evidence for the Christian Church as a place of asylum. For Ducloux, the evidence is too vague and, in places, too contradictory to accurately date this event, or to ascertain the exact nature of his reception in the church.¹³ The source of this story, Sulpicius Severus, does not, in any case, refer to the boy as having been granted shelter in *a* church, but instead in *the* Church (*confugit ad Ecclesiam*), in contrast to the widely used phrase for asylum in the following decades: *ad ecclesiam confugere* (to seek refuge in a church). In other words, the boy may have come under the protection of the institution rather than a specific place.¹⁴ Nevertheless, this demonstrates that already the church was viewed as offering shelter from the secular world around it.

At the Council of Sardica in 343, the Church leaders turned the notion of the mercy of the Church into a positive obligation on the clerics. The eighth canon issued by the council stated that those suffering from some injustice, or sentenced to exile, could seek refuge in the 'mercy of the Church'.¹⁵ This could have been a purely spiritual form of refuge as perhaps was the case with the boy of Pavia. However, this canon was interpreted by many local priests as meaning that legal penalties could not be carried out until the church had had a chance to consider the case for mercy. In this was born a popular practice of seeking physical refuge in a church so as to claim mercy, and to gain succour for so long as it took for the request to be considered. As a result, the law's hand was expected to be stayed until the Church had made its

11 André Vauchez, Barrie Dobson and Michael Lapidge (eds), *Encyclopedia of the Middle Ages: Volume Two* (James Clark & Co. 2000) 126.

12 J Charles Cox, *The Sanctuaries and Sanctuary Seekers of Mediaeval England* (George Allen & Sons 1911) 2.

13 Ducloux (n 2) 23.

14 *ibid* 24-25.

15 *ibid* 27, 32.

judgement.¹⁶ Ducloux suggests that the practice of seeking mercy from the Church was already something of a popular practice encouraged by certain local churches. The aim was to prevent punishment that would result in the loss of life or limb. This intercession was at least partly driven by the early Christian Church's opposition in principle to the 'shedding of blood'.¹⁷ Clerics therefore took it upon themselves to act as 'ambassadors of mercy before the throne of justice'.¹⁸ It is for this reason, Timbal argues, that asylum was effectively 'recreated through the practice of intercession by the clerics'.¹⁹ In particular, the clerics could rest their practice on theological grounds, the prophets of the Old Testament and Jesus in the New Testament having all acted as intermediaries between the faithful and their god.²⁰ John P Sexton, in discussing Anglo-Saxon church sanctuary, places the same emphasis on intercession as 'a balm to sooth the sting of institutional justice'.²¹ As such, there developed the idea of a separate jurisdiction before which the imperial law was made to pause. And indeed, reverence for the Church as a place of divine sanctuary and refuge extended later to the 'barbarians' as they took over territory formerly belonging to Rome. Theodoric I, for example, commuted the sentence of a man convicted of homicide from death to exile, solely on the basis that the condemned man had sought sanctuary in a church. Indeed, it became a law under the Visigoths that those who gained asylum in a church would have their death sentence commuted.²²

16 *ibid* 31-32.

17 Shoemaker, citing Mommsen, points out that intercession was also a feature of Roman penal law. Following conviction by a magistrate, the guilty could seek *intercessio* from another magistrate to mitigate their sentence. Karl Blaine Shoemaker, *Sanctuary Law: Changing Conceptions of Wrongdoing and Punishment in Medieval European Law* (PhD Thesis, University of California, Berkeley 2001) 60-61. However, the crisis of the Empire reduced the scope of such leniency.

18 Norman Trenholme, 'The Right of Sanctuary in England: A Study in Institutional History' (1903) 1 *University of Missouri Studies* 1, 8.

19 Pierre Timbal Duclaux de Martin, *Le Droit d'Asile* (Librarie du Recueil Sirey 1939) 32.

20 *ibid* 36.

21 John P Sexton 'Saint's Law: Anglo-Saxon Sanctuary Protection in the *Translatio et Meracula S. Swithuni*' (2006) 23 *Florilegium* 61, 78.

22 Ducloux (n 2) 88.

It was only in the last two decades of the 4th century, particularly after the final establishment of Christianity as the state religion in 380, that the seeking of asylum in churches evolved from being merely an *ad hoc* tool into a custom adhered to by the popular, and increasingly Christianised, will.²³ It would also have guaranteed the respect from the secular authorities necessary for the principle of intercession to work.²⁴ Moreover, mass popular support for resistance to imperial agents was increasingly widespread and so attempts by the authorities to remove refugees from churches often provoked riots. An attempt in 399 by the consul Eutropius to enact a law banning recognition of church asylum was defeated: testimony to the growing power of the Church. In an ironic twist, shortly afterwards Eutropius was himself forced to seek asylum in the church of St John Chrysostom at Constantinople after his fall from power.²⁵ Chrysostom attempted to intercede on his behalf, but on this occasion his intervention was unsuccessful and Eutropius was executed. This was likely due to popular hatred towards this notoriously corrupt consul.

The phrase used by the early Christians for asylum was *ad ecclesiam confugere* (to seek refuge in a church). It was this term – or variants of it – which was used in the imperial legislation that came later.²⁶ The complete avoidance of any mention of terms such as ‘asylum’ or ‘*asylia*’ was almost certainly due to the prejudice held by the Romans towards the old Greek institution, and by the Church towards a relic of paganism; but also, as the bishops were well aware, they could not guarantee the inviolability that the term ‘asylum’ denoted. Thus they always referred instead to the ‘seeking of refuge’, in Latin *confugere* or in Greek *kataphugein*.²⁷

23 *ibid* 60.

24 Timbal (n 19) 43.

25 *ibid* 71; William S Thurman ‘A Law of Justinian concerning the Right of Asylum’ (1969) 100 *Transactions of the American Philological Association* 593, 595.

26 The Imperial constitution of 18 October 392 refers to *confugiendum ad ecclesias*; that of 17 June 397 describes refugees as *ad ecclesias confugientes*. See Ducloux (n 2) 15.

27 Ducloux (n 2) 33-34.

The Struggle between Christian Mercy and Law

Under pressure, the imperial authorities sought to repeat Tiberius' trick of recognising in law the institution of asylum, and in so doing defining it and legislating it out of existence. The first statute to actually refer to asylum (*confugiendum ad ecclesias*) is that of 18 October 392. Here, the law decreed that those fleeing debts owed to the state would not be allowed to seek refuge in churches, unless the bishop was prepared to make good the money owed.²⁸ This is likely to have been an attempt to clamp down on tax avoidance, a common form of resistance to the authorities at the time. Moreover, as Cox points out, this law was only 'done in order to explain and regulate a privilege already recognised and well established'.²⁹ There is no mention of other categories of refugees other than public debtors. Therefore, on the principle that 'all that is not prohibited is permitted', it is possible that the imperial authorities might have tolerated all other types of refugees. Yet, as Ducloux points out: 'the belief that the temple of God is inviolable and sacred is not yet sufficiently rooted for the emperor to adhere to it without restrictions.'³⁰ And indeed, this law must be seen in the context of other legislation enacted by Theodosius I just seven months previously, which introduced severe punishments for magistrates who failed to ensure that those convicted of the most serious crimes were not punished.³¹ At a time of intense crisis for the Empire, Theodosius was trading off limited recognition of asylum for stability through obedience to the law. In 398 a new law barred those guilty of capital crimes, along with public debtors, from claiming asylum. Another law, enacted a year earlier, was more pernicious in its effects, closing off asylum to Jews who had opportunistically converted to Christianity so as to take advantage of asylum in churches. One of the effects of this law was that it 'transformed bishops into inquisitors', by putting the onus on them to enquire of all who sought sanctuary if they were 'genuine' Christians, or if they were 'illegal' refugees.³² At the same time, the law now placed a burden upon the suppliant to prove that they were genuine converts. The resonance for our own time with its discourses of 'illegal', 'genuine' or

28 *ibid* 57.

29 Cox (n 12) 3.

30 Ducloux (n 2) 59.

31 Law of 13 March 392; Timbal (n 19) 61.

32 Ducloux (n 2) 63.

‘bogus’ refugees is inescapable. Moreover, it turned the custodians of the asylum, the clerics, into its gatekeepers. This was resisted by some of the leading bishops of the time, notably Augustine of Hippo.

Ducloux describes St. Augustine as the ‘theoretician’ of asylum in the early Church.³³ In one of his sermons he declares that the church is a ‘common refuge’, open to all to seek sanctuary. He speaks of three kinds of refugees: ‘the unjust who flee the just, or the just who flee the unjust, or the unjust fleeing the unjust.’ He goes on to argue that it is not for the Church to distinguish which is which. If ‘we had wanted that the guilty could be removed from [the church], then it would not be a place to which the innocent would flee... Thus, it is better that the guilty should have shelter in the church than the innocent should be snatched from it.’³⁴ As Ducloux argues, Augustine was appealing to his flock that at any time one of them might require asylum. If they were to demand judgement on those who sought sanctuary today, what would happen when they would be judged by others as worthy or not of being granted asylum?³⁵ Augustine’s declaration that asylum was open to all was a rejection of the laws of the last decade of the 4th century, which sought to distinguish between deserving and undeserving fugitives.³⁶ It was also, in my opinion, a rejection of law as a method of regulating the asylum. Instead of laws demarcating the deserving from the undeserving refugee, it appears that Augustine was in favour of the church as the City of God, to be open to all, an approach much more in tune with hospitality than law.³⁷ Augustine’s view was that no matter how heinous the crime committed, or how far from the church’s teachings the fugitive was, Christians must always love the sinner, and recognise their duty to help them avoid eternal damnation in the hereafter.³⁸ In this, he was following the words of St. Paul. In an extraordinary passage in his first letter to the Corinthians, Paul condemns those Christians who would seek justice through the law.³⁹ They should, he insists, leave it to God to pass

33 *ibid* 170.

34 Quoted in *ibid* 172-173.

35 *ibid* 181.

36 *ibid* 182.

37 Augustine, *The City of God* (Henry Bettenson tr, Penguin 1984) Book 1.

38 Timbal (n 19) 47.

39 I Corinthians 6.

judgement on a person's character. In everyday matters of conflict he advises seeking an honest broker from within the community 'who will be able to decide between his brethren'.⁴⁰

So, by the close of the 4th century asylum had re-emerged, first as a practice and then as custom based on belief in divine authority, in the context of a rapidly waning secular authority. As such, the imperial law could no longer ignore or deny such a right; rather, it attempted on several occasions to regulate and normalise asylum by restricting its application. Yet during this period imperial agents seeking out fugitives frequently violated churches. The inviolability of asylum, an idea gaining momentum within the Church and among the populace, was not yet an established fact. However, during the final decade of the 4th century, according to Ducloux, 'the violation of the sacred refuge is increasingly felt to be a form of sacrilege'.⁴¹ For Timbal, the combination of respect for the sacred space of the church together with the already established practice of clerical intercession, created a viable institution of asylum for the first time in the Roman world in spite of, not because of, the law.⁴²

The question then arises as to how a custom could arise that trumped the law. This would have been a particularly difficult problem in the context of an authority as legalistic as the Roman Empire. But, as Ducloux shows, asylum was not an 'ordinary custom'.⁴³ It had the force of popular will symbiotically reinforced by the claim by certain bishops that the sanctuary of the church was also the will of God. Thus, the custom of asylum began to have the force of 'a right *supra legem*, which cannot be contradicted by temporal law'.⁴⁴ Furthermore, the church possessed the legitimacy of being the established religion. Ducloux, summarising the first couple of decades of the 5th century, argues that it was due to the propagation of the right of asylum to all by charismatic bishops such as St. Augustine and others that popular belief and practice developed. Eventually, 'the legislature had no choice. It *had* to regulate the

40 I Corinthians 6:5.

41 Ducloux (n 2) 85.

42 Timbal (n 19) 55.

43 Ducloux (n 2) 91.

44 *ibid.*

conditions for the application of the right of asylum to conform to the rules established by the Fathers of the Church.’⁴⁵

There are examples from the early decades of the 5th century to show how widespread respect for church asylum had become. In 408 Stilicon, a Roman governor accused of collaboration with the Visigoths, was hunted down by the authorities and took asylum in a church in Ravenna. Imperial soldiers entered the church and assured the bishop that the Emperor Honorius would not have him killed. Stilicon then left the church. Once outside, the soldiers announced to him that he had been condemned to death for crimes against the state, and he was taken away under arrest to his execution. Although by deceit the suppliant had been lured outside of the place of sanctuary, Honorius, as a Christian, ‘could neither ignore the religious basis nor the custom of asylum.’⁴⁶ Thus, Stilicon could not be killed or arrested in the church itself. To do so would have ‘provoked popular anger that would be certain to manifest itself if the asylum had been openly violated.’⁴⁷ Ducloux suggests that ‘the imperial agents hesitated to execute an act which appeared to them to be sacrilegious.’⁴⁸ During the sack of Rome two years later, Alaric respected the churches as inviolable places of refuge, and the refugees within them, both pagan and Christian, were not seized. Could this have been based on political calculation?⁴⁹ In other words, could even a ‘barbarian’ leader have realised that violating the asylum would be a step too far? Might he have feared provoking too great a response from the populace and Christians in Rome and elsewhere? We simply do not know, but the fact remains that the roots of asylum were sufficiently strong that even a new occupying power was forced to respect it. And in yet another instance, in 411-412, Bishop Synesius of Cyrene felt confident enough to launch a public attack on the Roman governor of Libya, citing, amongst other things, the posting up of ‘edicts to the doors of the church illegally denying suppliants the right of sanctuary’.⁵⁰ But perhaps the decisive turning point came in 419 when large numbers of people in

45 *ibid* 205 (emphasis in original).

46 *ibid* 120.

47 *ibid*.

48 Timbal (n 19) 74.

49 Ducloux (n 2) 134.

50 Harris (n 1) 156.

Carthage sought refuge in the churches there, as a result of widespread refusals to pay taxes and the assassination of a despised and corrupt tax official. For several months they refused to come out, and they were supported by the local bishop, Augustine. Further, as Ducloux puts it:

The custom of asylum had become so implanted in their attitudes that, despite the gravity of their crimes, the African authorities made no attempt to seize the fugitives...the time had come for the legislature to decide officially if the churches constituted places where the temporal law remained suspended.⁵¹

These events, therefore, forced the enactment in the Western Empire on 21 November 419 of what was the first law to grant the right of asylum. This law was followed by similar legislation in 431, which applied to the Eastern Empire. These laws made the violation of asylum a criminal offence. Whereas the laws of 392 and 398 explicitly defined who could *not* gain asylum, these laws, in particular the one of 431, were ‘sufficiently vague to include all possible categories of refugees as benefiting from asylum.’⁵² In addition, whereas custom had restricted the asylum to the space within the walls of the building (that is the sacred space of the church) so as to prevent any refugees being apprehended from the outside, the law of 419 extended the space of the asylum to a perimeter 50 paces (75 metres) beyond the church. And in 450 Roman law extended the boundaries of the asylum as far as the perimeter of the ‘churchyard or precincts, including the houses of bishops and clergy, cloisters, courts, and cemeteries.’⁵³ This allowed the refugees access to fresh air and daylight. However, the law, in recognising and bringing asylum within its domain, had also ‘defined the conditions for its application.’⁵⁴ The effect of extending the space of asylum by law was also to extend the sacred space of the church. At a stroke the church gained in power and status via the law’s extension of its sacred domain beyond the church building itself. At this stage, a comingling of law and asylum had certainly some immediate benefits for both the Church and those who sought asylum within its precincts. There were also factors at work which facilitated a greater control by the Church authorities over church space itself. For example, the law of 431 made

51 Ducloux (n 2) 163.

52 *ibid* 226.

53 Cox (n 12) 3.

54 Ducloux (n 2) 207.

clear that the enlargement of the space of asylum also meant that there was sufficient room so that refugees would be able to obey the ban on defiling the sacred altar.

The laws of 419 and 431 also sought to regulate the behaviour of the refugees within the sanctuary. Although they placed no restrictions on who could seek asylum, the laws instructed on refugee behaviour and where they could reside within the sanctuary. The law of 431 prohibited the carrying of arms into the sanctuary, demanding that the refugee place all faith in the divine power of the Church to protect them. To carry arms for protection was thus a demonstration of a lack of faith on the part of the refugee, and therefore made them unworthy of gaining asylum.⁵⁵ Thus, even this most liberal of asylum laws defines, orders and restricts. Yet until 419-420 the safety of the asylum remained a matter of chance. The question of whether refugees would remain safe there depended upon various things, not the least of which was the support of the local population and the bishop.⁵⁶ But there is no evidence to establish whether or not the imposition of a law vitiated the need for political or popular support. The Church was led, through its partnership with law, to play a role in controlling and policing asylum according to the legal paradigm. So also, in 431, the Council of Ephesus issued its own decree delimiting the spaces *within* a church which could be deemed sanctuaries. The net of effect of these laws is described by Harris: 'The result...was a set of regulations which, taken as a group, laid greater stress on restrictions imposed on the privilege than on the importance of the right as a refuge'.⁵⁷

Of course, once the law establishes its right to control an institution or practice, even on the most benign terms, it legitimises its rights to then later alter the terms on a more restrictive basis. An example of this occurred just a year after the liberal legislation of 431. The law of 28 March 432 'considerably reduced' access to sanctuary for slaves.⁵⁸ This law instructed that the slave's master had to be notified where he had taken asylum, but the master was then obliged to guarantee that the

⁵⁵ *ibid* 228.

⁵⁶ *ibid* 163.

⁵⁷ Harris (n 1) 151.

⁵⁸ Ducloux (n 2) 164.

slave would not suffer ‘afflictive punishment’ on being returned to him.⁵⁹ However, the master was permitted to use force if necessary to remove his slave and take him back. Ducloux points out the contradiction that, on the one hand, refugees – especially slaves – were prohibited from carrying arms into the church, yet on the other hand the master was permitted by the law of 432 to use arms to remove his slave if necessary. In short, according to Ducloux, the principles of asylum open to all in the law of 431 were ‘mocked’ (*bafoués*) by the law passed a year later.⁶⁰

The Church struggled to marry its commitment to asylum available to all who were prepared to accept Christ, while at the same time respecting the institution of slavery as an example of property rights. Paragraph 9 of the law of 28 February 466 made clear that, as a slave was the property of his master, for him to run away was a form of theft. This law clearly followed in the same spirit of that of 432.⁶¹ The compromise devised by the Council of Orange in 511 was that flight to sanctuary could not vitiate the rights of ownership, but it was up to the clergy rather than the slave owners or the secular authorities to decide on the terms of the slave’s access to sanctuary or their expulsion from it.⁶² In other words, the Church had internalised the juridical process, rather than continuing to resist, as Augustine had done, its secular form.

The Transmission of Church Asylum into the Middle Ages

Ducloux argues that, as a custom, the principle of sanctuary was remarkably inclusive, allowing the guilty as well as the innocent, Christians as well as Jews and pagans, to use the church as a place of safety.⁶³ The Roman governments in both east and west were forced to recognise asylum in law in a series of pieces of legislation beginning in the late 4th century and culminating in the seminal laws of 419 and 431. Therefore to say, as Lauwers does, that ‘the Roman law was a Christian law’ is to

59 Jorge L. Carro, ‘Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?’ (1986) 54 *University of Cincinnati Law Review* 747, 752.

60 Ducloux (n 2) 242.

61 *ibid* 243.

62 Thomas John de’ Mazzinghi, *Sanctuaries* (Halden & Son 1887) 90.

63 Ducloux (n 2) 174.

miss the point that Christian faith, theology and custom were at several points in direct conflict with the law.⁶⁴ Nevertheless, as Rome was forced to bend to the will of the Church, its laws were heavily coloured by Christian concepts. What the Justinian Code defines as a sacred space protected from incursion simply follows from the Christian idea that all, whether saint or sinner, had the right of asylum within the church's perimeters.⁶⁵ However, by the time of Justinian, the law regulating church asylum required that all refugees had to be registered and formally declare their reasons for seeking asylum.⁶⁶ Moreover, clerics were legally bound to receive legal summonses directed at any fugitives remaining within the sanctuary.⁶⁷ The Justinian Code also prohibited murderers, adulterers, rapists, heretics and those guilty of *lèse majesté* from the right of sanctuary.⁶⁸ In Novel 17 of the year 535, Justinian justified this exclusion on the basis that 'the security of the holy precincts is accorded not to those who commit injustice but to those who are the victims of injustice'.⁶⁹ Once again we have law distinguishing between the deserving and the undeserving based on 'objective' criteria. As William S Thurman states: 'Imperial regulations and exceptions affecting asylum became so numerous that its availability was greatly diminished.'⁷⁰ The attempt by Justinian to re-establish order within and to defeat enemies without came partly at the expense of asylum.⁷¹ Nonetheless, and this is a crucial point, just as in Greece, violators of asylum were liable to 'popular odium' and the perception that they had 'pollut[ed] themselves'.⁷² As such, asylum was a valuable tool in at least staying the hand of the pursuer, whether private or state. The Church continued to assert and extend the right of sanctuary. In 441 the Council of Orange ruled that no-one seeking sanctuary was to be surrendered; the Synod of Orleans in

64 Michel Lauwers, 'Le cimetière dans le Moyen Age latin: Lieu sacré, saint et religieux' (1999) 54 *Annales* 1047, 1056.

65 *ibid.*

66 Alan Watson (tr), *The Digest of Justinian* (University of Pennsylvania 1985) 1.12.6.10.

67 *ibid* 1.12.6.1-2.

68 Cox (n 12) 4; Timbal (n 19) 92.

69 Novel 17.7 and 37 [535], cited in RJ Macrides, 'Killing, Asylum, and the Law in Byzantium' (1988) 63 *Speculum* 509, 510.

70 Thurman (n 25) 595.

71 Timbal (n 19) 89.

72 Thurman (n 25) 596.

511 proclaimed the right of asylum, and extended the space of sanctuary to the Bishop's residence as well as to 35 paces beyond the its walls.⁷³

The restrictiveness of the Justinian Code is evidenced with problems in Byzantium regarding asylum. There was an apparent contradiction between the law of Justinian, prohibiting murderers from taking asylum in churches, and the grant that he gave to the Hagia Sophia in Constantinople which allowed murderers asylum in that particular church. As a result of this anomaly, Church leaders exerted pressure on Constantine VII some four centuries later to adopt a more liberal law regarding asylum. Constantine's compromise was to allow those who had committed intentional murders the right of asylum on condition that they had voluntarily gone to the church to confess their crime.⁷⁴ Effectively, by the latter half of the 12th century the Hagia Sophia had assumed jurisdiction over the treatment of murderers, and by extension over much of the dispensation of criminal justice.⁷⁵ The Church justified this on the basis that secular punishments were insufficient to expiate the sin of the suppliant. Only confession and 'the conscientious observance of penitential acts' were enough to redress the sinful act in the eyes of God.⁷⁶ But in the 12th-century Emperor Manuel I decreed that the law be restored to the original Justinian formula: that asylum be only available for the 'innocent', that is, those whose crime was not intentional.⁷⁷ On the other hand, as RJ Macrides shows, certain clerics had always kept to the more restrictive criteria of Justinian when judging asylum claims, whereas others were more liberal and followed Constantine VII's ruling.⁷⁸

Macrides paints a picture of a weak central authority where laws were regularly promulgated and with equal regularity were ignored. As a result, when accused persons fell into the hands of the civil authorities, they were often the victims of rough or overzealous punishment, particularly if they were poor or powerless. In

73 Henri Coursier, 'Restauration du droit d'asile' (1950) 32 *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge* 909, 909; Cox (n 12) 4.

74 Macrides (n 69) 511.

75 *ibid* 514.

76 *ibid* 534.

77 *ibid* 513.

78 *ibid* 532.

short, for many accused perpetrators of crime, intentional in nature or not, whether they were guilty or innocent, ‘If they fell into [the hands of the civil authority] they were finished, but with the church they had a future.’⁷⁹ But the Justinian Code, if followed to the letter, would have effectively erased any possibility for those at or near the bottom of society to mitigate the harsh punishments of the medieval world. In the West, on the other hand, where, commensurate with the decline of state authority, the power of the Church increased, ecclesiastical protection was a valuable commodity and ensured that the institution of sanctuary grew from strength to strength.

But the reach of the Digest of Justinian was to be long. A thousand years after its creation, the secular authorities, in their successful struggle to suppress church sanctuary, would invoke it repeatedly.⁸⁰ Yet the Justinian Code came too late to influence the already developing legal codes of the Anglo-Saxon and Frankish societies in the West. For them, the earlier Theodosian Code, containing the more liberal legislation of 419 and 431, provided the template for asylum.⁸¹ And so it was these laws that formed the model on which asylum law was based within Western Christendom throughout the 5th and 6th centuries.⁸² In particular, the constitution of 431 was incorporated into the Breviary of Alaric II of 506, which was instrumental in preserving much of Roman law in Western Europe into the middle ages.⁸³ Indeed, sanctuary was known and practiced not only by the Visigoths but also many other tribes throughout the Teutonic world.⁸⁴ In 620 Pope Boniface V declared that the privilege of sanctuary was ‘valid throughout Christendom’.⁸⁵ But the Church very early on confirmed the Theodosian Code, during the time of Pope Leo I (440-461).

79 *ibid* 538.

80 Timbal (n 19) 92.

81 Schoemaker (n 17). See also Timbal (n 19) 96-137, for a detailed exposition of this development.

82 Ducloux (n 2) 258.

83 Lauwers (n 64) 1057.

84 Karl Blaine Shoemaker, *Sanctuary and Crime in the Middle Ages 400-1500* (Fordham University 2011) 57.

85 Stephen Pope, ‘Sanctuary: The Legal Institution in England’ (1987) 10 *University of Puget Sound Law Review* 677, 680.

This Code prohibited public debtors – those who had in some way financially defrauded the state – from taking asylum.⁸⁶ Yet the provision was added that it would be for the Church to examine those seeking asylum and to judge whether or not they would be granted sanctuary.⁸⁷ In this way, the Church again ignored St. Augustine's warnings on clerics becoming judges. Yet, while the transmission of asylum into the Middle Ages owed something to its incorporation into late Roman law, for much of the period in the West from the 6th until the 11th century, while secular law withered on the vine, sanctuary was a more or less autonomous institution. Indeed, as Timbal argues, it was precisely in the context of the 'crumbling' (*émiettement*) of secular authority that asylum enjoyed a significantly expansive development.⁸⁸ The extent to which the practice of asylum/sanctuary broke free of the legal paradigm during those six centuries is evidenced by the struggle that was waged by the new class of lawyers from the 12th century onwards, in order to re-establish the legal framework of this ancient and persistent tradition.

86 Cox (n 12) 4.

87 Carro (n 59) 753.

88 Timbal (n19) 95.

5

Sanctuary in England

Elements of Sanctuary

Ecclesiastical asylum existed throughout Western Europe during the Middle Ages.¹ But perhaps the longest unbroken tradition of asylum in recorded history is that of England, which began, at the latest, in the 6th century and lasted around 1,100 years until the early 17th century.² It has been estimated that by the 13th century there were around 30,000 sanctuaries of various sorts throughout the Norman kingdom of England and Northern France.³ Some medieval chroniclers claim that the right of sanctuary dates from as early as the 2nd century when, according to legend, King

1 Pierre Timbal Duclaux de Martin, *Le Droit d'Asile* (Librarie du Recueil Sirey 1939) 226; Karl Blaine Shoemaker, *Sanctuary Law: Changing Conceptions of Wrongdoing and Punishment in Medieval European Law* (PhD Thesis, University of California, Berkeley 2001) 2.

2 Sanctuary also existed in Wales, Scotland and Ireland. See J Charles Cox, *The Sanctuaries and Sanctuary Seekers of Mediaeval England* (George Allen & Sons 1911) chapter 15. In Wales, the laws of Hywel Dda dating from the 10th century refer to sanctuaries. Curiously, these describe fleeing to sanctuary as 'a legal act of disobedience'. At least some of the Welsh sanctuaries were very large. One at Amroth encompassed an area of 50 acres. *ibid* 309.

3 William Chester, Jordan, 'A Fresh Look at Medieval Sanctuary' in Ruth Mazo Karras, Joel Kaye and E Ann Matter (eds), *Law and the Illicit in Medieval Europe* (University of Pennsylvania 2008) 18-19.

Lucius introduced Christianity to this country.⁴ Even if this story is merely the stuff of myth, Cox suggests that it is at least ‘highly probable’ that church asylum was practised during the closing decades of the Roman occupation, which ended in 410.⁵ However, the first recorded evidence of asylum in England dates from the very end of the 6th century. Following his conversion to Christianity around 597, King Ethelbert of Kent drew up the earliest surviving Anglo-Saxon laws, the first of which establishes the inviolability of churches.⁶ The punishment for breach of church peace (*frith*, *fryth* or *gryth*) was to be double that for breach of the king’s peace.⁷ These Germanic terms, *fryth* and *gryth*, appear to share an etymological root as a term for ‘wood’. The Saxons often declared certain woods to be sacred and, therefore, places of sanctuary.⁸ Indeed, Tacitus in his *Germania* describes the Teutons’ holding sacred various woods.⁹ The recognition of woods as sacred, and thus as places of sanctuary, can also be found in Ancient Greece and Rome.¹⁰ Throughout the Anglo-Saxon period there were two kinds of peace to be kept: the peace of the king and the peace of the Church, the latter contemporaneously referred to as Church *fryth* or *gryth*. The king’s peace was *de jure* but it was the Church’s peace which was effectively *de facto*. This is because fugitives relied mainly on church rather than king’s peace.¹¹ Presumably, this was due to the Church’s superior power and command of respect during this period.

In 680 King Ine of Wessex enacted a legal code which includes the following article:

4 Norman Trenholme, ‘The Right of Sanctuary in England: A Study in Institutional History’ (1903) 1 *University of Missouri Studies* 1, 10.

5 Cox (n 2) 5.

6 See AWB Simpson, ‘The Laws of Ethelbert’ in Morris S Arnold and others (eds), *On the Laws and Customs of England* (University of North Carolina 1981) for a detailed and subtle evaluation of the place of Ethelbert’s laws in English legal history, and in particular their relationship to the early church and Roman law.

7 Thomas John de’ Mazzinghi, *Sanctuaries* (Halden & Son 1887) 11; Cox (n 2) 6.

8 Mazzinghi (n 7) 7.

9 Tacitus, *Germania* (JB Rives tr, Clarendon Press 1999) 80-81.

10 Timbal (n 1) 19; Dionysius of Halicarnassus, *The Roman Antiquities of Dionysius of Halicarnassus: Volume One* (Earnest Cary tr, Heinemann 1937) 355.

11 Trenholme (n 4) 13.

If anyone be guilty of death, and he flee to a church, let him have his life, and make *bot* (satisfaction or fine) as the law may direct him. If anyone put his hide in peril [i.e. commit a crime punishable by flogging], and flee to a church, be the scourging forgiven him.¹²

Jorge L Carro would have Ine's sanctuary laws 'work[ing] in conjunction with a legal compensation system to protect the accused from the custom of bloodfeud'.¹³ But this would be to project onto this period of English history a developed system of legal relations that it simply did not possess. Instead, the Christian reverence for the saints and holy relics played the key role in upholding spaces of sanctuary. The decisive influence upon the development of sanctuary in the north of England, for example, was the cult of St. Cuthbert. A 7th-century monk and Bishop of Lindisfarne, he reportedly stated on his deathbed that he wished his tomb to be a place of refuge for others. In the face of the Viking invasion of Lindisfarne, his remains were moved to various places on the mainland before being interred at Durham. In the late 9th century it was claimed that a vision of the saint had appeared calling for the entire area lying between the rivers Tyne and Wear to be granted by the Northumbrian king as a sanctuary for all, including homicides, for a period of 37 days.¹⁴ The strength of belief in the shrine of St. Cuthbert led to tales being told as late as the 12th century of even wild beasts respecting the sanctuary precinct.¹⁵ The records at Durham list the place of origin for most of the sanctuary-seekers. Large numbers arrived from places very far from Durham, including London, Essex, Surrey and Somerset. Many of these will have fled there because of the generous scope of sanctuary afforded at Durham. But, in addition, a number of fugitives came from Yorkshire, close to the sanctuary of Beverley, whose privileges 'were greater than any other sanctuary in the kingdom'.¹⁶ One can surmise that, in those cases, the only reason to go to Durham would be the enormous reverence for the cult of St. Cuthbert as a guarantor of asylum. The

12 Quoted in Cox (n 2) 7.

13 Jorge L Carro, 'Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?' (1986) 54 *University of Cincinnati Law Review* 747, 754.

14 Cox (n 2) 96.

15 *ibid* 103.

16 *ibid* 118.

association with saints, particularly with relics connected to them, was often a cornerstone of places of sanctuary, in much the same way as the Greek *asylia*.¹⁷

A 12th-century clerk, Garnier of Pont-Sainte-Maxence, referring to the circumstances of Thomas à Becket's murder, states that, on seeing his assailants approaching, Becket made his way to the vicinity of Canterbury's holy relics as that alone would save him from his would-be murderers.¹⁸ At Winchester the sanctuary was linked to tales of St. Swithun's protection of criminals, slaves and other fugitives. 'In the resulting confrontations between the harshness of legal punishment and Swithun's merciful intercession, Swithun is placed in opposition to the zealous promulgation and enforcement of law that characterised late Anglo-Saxon England.'¹⁹ As late as the mid-15th century, a monk at Westminster defended the offer of sanctuary to debtors because of the presence of holy relics within the sanctuary precinct, as this gave them the authority to defend and protect those in poverty who were 'unable to wield the tools of influence in a corrupt judicial system'.²⁰ Thus sanctuary was predicated on being separate from, and perhaps actually antagonistic to, the law. Justice was grounded in a theological rather than a legal framework, for it was based on being able to rescue men's souls, which would be lost forever if the temporal law succeeded in executing criminals. Placing oneself in sanctuary would not have been seen, therefore, as escaping the consequences of one's actions, but was a way of facing up to them and repairing one's relationship with God. As John P

17 The great sanctuaries that arose in France around the same time were associated with important saints, including St Martin de Tours, St Denis de Paris, St Aignan d'Orléans, St Médard de Soissons, St Marcel de Châlons, St Germain d'Auxerre, St Hilaire de Poitiers, St Martial de Limoges and St Sernin de Toulouse. Timbal (n 1) 128.

18 Cited Dawn Marie Hayes, *Body and Sacred Space in Medieval Europe, 1100-1389* (Routledge 2003) 21.

19 John P Sexton, 'Saint's Law: Anglo-Saxon Sanctuary Protection in the *Translatio et Miracula S. Swithuni*' (2006) 23 *Florilegium* 61, 62.

20 Shannon McSheffrey, 'Sanctuary and the Legal Topography of Pre-Reformation London' (2009) 27 *Law and History Review* 483, 513.

Sexton writes: 'The privileges and protections of the church were commensurate with the respect due to God and his immediate subordinates, the saints.'²¹

Alfred the Great promulgated another set of laws in 887 which begin to give a more detailed picture of the practice of church sanctuary. Three articles of this code mention church *frith*, within which it is stated that those claiming asylum were allowed to remain in sanctuary for up to seven days or, in special cases, up to thirty days. Again, special penalties for violation of church sanctuary are mentioned.²² Alfred also explicitly cited the biblical sanctuary cities as a source for his laws.²³ These laws mark a significant development, for they were a secular intervention in the evolution of sanctuary. The king was not only granting sanctuary but also laying down some of the basic procedures for its operation.²⁴ The insistence on the inviolability of the church can be found in the laws of King Athelstan in 930, King Ethelred in 1014, and Ethelred's successor King Cnut. During the period of up to 30 days in which the suppliant was in sanctuary, the clergy would act as negotiators between the fugitive and his pursuers. This could result in *wergeld* redemption or debt slavery where the suppliant placed himself in service to his pursuer for a certain time.²⁵ Again, we see the crucial role in interceding that was adopted by the clergy, and which provided a practical role and thus respect for the institution of sanctuary. On the other hand, the intervention of the law involved placing restrictions on the practice by limiting the amount of time that could be spent in sanctuary, and formalising the procedures in such a way that eventually the suppliant would be forced to fulfil his legal responsibilities.

During an invasion by the Danes in the 10th century, during which Abingdon Abbey in Oxfordshire was destroyed, the sanctuary of Culham which was attached to

21 Sexton (n 19) 62.

22 Cox (n 2) 7.

23 Karl Blaine Shoemaker, *Sanctuary and Crime in the Middle Ages 400-1500* (Fordham University 2011) 55.

24 William C Ryan, 'The Historical Case for Sanctuary' (1987) 29 *Journal of Church and State* 209, 218.

25 Stephen Pope, 'Sanctuary: The Legal Institution in England' (1987) 10 *University of Puget Sound Law Review* 677, 682.

the abbey was left untouched. It is reasonable to speculate, as Cox does, that this was out of respect for the sanctuary rights it possessed.²⁶ Certainly by the time of the Norman invasion the principle and practice of seeking asylum in a church was well established. But we also have a recorded instance of a quite disturbing violation of sanctuary. On St Brice's Day (13 November) 1002, a pogrom against the Danes in England was ordered by Ethelred. Some Danes took sanctuary in St Frideswide monastery in Oxford. The response of the rioters was to burn the entire monastery down, killing all who had sought safety within it. According to Trenholme, however, this was a very rare example of the violation of sanctuary during the Anglo-Saxon period.²⁷

William the Conqueror's laws contained within the *Textus Roffensis* make no mention of sanctuary. But they do contain a chapter confirming the Anglo-Saxon laws, which presumably included the right of church sanctuary.²⁸ Moreover, William was responsible for the building of Battle Abbey and the conferring upon it of significant immunities. The Abbey was given absolute control over all land within a mile and a half of its centre. This entire space, spreading over three miles in diameter, was deemed a sanctuary where 'any person guilty of theft, manslaughter, or any other crime... [could] take refuge...receive no injury, but depart entirely free.'²⁹ But the immunities afforded were even more generous than this. The Abbot had the right to pardon anyone convicted of a capital offence that he should meet anywhere within the realm.³⁰ As such, the immunity was not restricted just to the large precinct of the Abbey itself. Moreover, the Abbey was allowed to hold its own court and to have full jurisdiction in the execution of justice within its precincts.

26 Cox (n 2) 206.

27 Trenholme (n 4) 16.

28 Cox (n 2) 9.

29 *ibid* 196-197.

30 There is at least one recorded instance of this privilege being exercised. '[In] 1364 the abbot of Battle (Robert de Bello) going towards London, met a felon condemned to the gallows in the king's marshalsea, and in virtue of his prerogative, liberated him from death. And although the king and other magistrates took much offence at the act, yet, upon plea, he had his charter confirmed.' Lower's *Battle Abbey Chronicle*, 204, quoted in Cox (n 2) 197.

But Battle Abbey, as generous as its grant was, was not an exception. It was part of a class of sanctuaries which operated on different terms from that of regular church sanctuary. These were known as chartered sanctuaries. All consecrated churches automatically possessed the right of sanctuary which gave suppliants the right to remain there for a certain number of days, on performance of certain formalities and for certain crimes. Certainly no legal proof was required for these sanctuaries because of their general character.³¹ But in addition the king could, and did, confer on certain places a wider set of immunities beyond that of the churches. Most of the time these places were themselves consecrated spaces, but occasionally they were not. These chartered sanctuaries existed before the Norman invasion, including those at Beverley, Durham and Westminster;³² the one at St Martin le Grand, located ‘in the very bowels’ of the city of London,³³ had proof of charter from William the Conqueror, although it is likely it possessed this status from even earlier.³⁴ The sanctuary at Beverley extended for a circumference of a mile and a half, with no less than six boundaries located at various distances within it, from the outer boundary at its edge through to the sixth which encompassed the high altar of the church itself. A similar system of boundaries existed for the chartered sanctuary at Hexham. The penalties for violating the sanctuary increased with each boundary crossed. So, a fine of £8 (an enormous sum for the 10th century) was levied for violating the outer boundary, while forcibly removing a suppliant from within the fifth boundary incurred a penalty of £144; violating sanctuary within the sixth and holiest boundary was deemed to be an offence for which no monetary payment was sufficient (*botalaus*), the penalty for which was instead death.³⁵ The reasons given for this last and drastic penalty were three-fold: contempt for the Reserved Sacrament, for the Lord’s Table, and, most of all, for the sacred remains of St. John of Beverley contained within. Just as with St. Cuthbert in Durham, the presence of saintly relics was of crucial importance to the sacredness of sanctuary. These chartered sanctuaries

31 JH Baker, ‘The English Law of Sanctuary’ (1990) 2 *Ecclesiastical Law Journal* 8, 9.

32 Cox (n 2) 6, 50, 126. The others were Abingdon, Armethwaite, Beaulieu, Colchester, Derby, Dover, Hexham, Lancaster, St Mary Le Bow, St Martin le Grand, Merton Priory, Northampton, Norwich, Ripon, Ramsey, Wells, Winchester, and York. Shoemaker (n 1) 214, footnote 223.

33 Duke of Buckingham, quoted in Cox (n 2) 66.

34 *ibid* 80.

35 *ibid* 126-127.

were examples of spaces in which the church's peace and the king's peace overlapped. It is possible to speculate that perhaps the granting of these immunities by the king was an attempt to associate himself with the greater purchase afforded by those claimed by the church. In any case, the spaces claimed by the chartered sanctuaries in some cases extended over huge areas. A letter addressed to Thomas Cromwell in 1534 refers to 'two great sanctuaries in Yorkshire... [that] have a least one hundred miles compass'.³⁶

In an echo of the ancient right of sanctuary at the foot of statues of deities or emperors in Ancient Greece and Rome, King Athelstan's grant of sanctuary status at Beverley (early 10th century) decreed that anyone merely touching one of the boundary crosses of the precinct was immune from the law; the penalty for violating this was excommunication.³⁷ Dawn Marie Hayes describes the magical aspect of the theology that underpinned this kind of reverence: 'In the Middle Ages any person, place or object that came into contact with a source of sacredness had the opportunity to appropriate its energy.'³⁸ In some cases, just reaching the door of the church and grasping the knocker was sufficient to place one in sanctuary.³⁹ The right of sanctuary merely through touching a cross that had been erected by the church along the roads was recognised by the Council of Clermont in 1095.⁴⁰ Medieval sanctuary even extended, in parts of Europe, to plows and plowmen. This was due to the absolute importance of food production, and to the relative vulnerability of plowmen who often worked isolated in the fields some distance from their home.⁴¹ This practice is recorded as lasting from at least the late 11th to the late 14th centuries, and shows the extent to which immunities existed that fell even outside the religious sphere.

Whereas ordinary church sanctuary came within the church's peace, the chartered sanctuary came under the protection of the king's peace. Yet once these

³⁶ Trenholme (n 4) 59.

³⁷ Cox (n 2) 143.

³⁸ Hayes (n 18) 5.

³⁹ Baker (n 31) 9.

⁴⁰ Timbal (n 1) 202.

⁴¹ James H Morey, 'Plows, Laws, and Sanctuary in Medieval England and in the Wakefield "Mactacio Abel"' (1998) 95 *Studies in Philology* 41, 44-45.

charters had been granted the extent of their independence from the king was such that, as late as 1474, Edward IV was forced to *request* the archdeacon of Westminster to deal with certain ‘abominable vices’ that had been committed within its precincts. The king was evidently not able to impose order directly in this corner of his kingdom. From around the beginning of the 15th century, complaints began to be made officially to the crown that the chartered sanctuaries, particularly that of St Martin le Grand, had become effectively ‘nests of corruption’, where criminals were allowed to live with impunity not only from the crime for which they had sought sanctuary, but also from on-going acts committed while they were there. One complaint made in 1403 alleged that stolen goods were being brought to St Martin le Grand from all over London to be fenced.⁴² And yet, although the king would listen to these complaints, no action was taken. However, some of the chartered sanctuaries such as Beaulieu, St John of Colchester and at Abingdon were ordered to provide proof of their franchise, which apparently they were able to do.⁴³ Here we see an attempt to repeat the strategy of Tiberius: asking for the impossible-to-produce evidence of the original grants of *asylia*. But this time their immunities proved too strong for the secular authority to countenance any violation. In short, chartered sanctuaries were spaces where the king’s writ did not run. The question this begs is why the king would grant such immunities in the first place. The simple and most common answer is that the secular authorities were just too weak in the face of competing sources of power. But the reality was somewhat more complicated.

Configuring Church Space

In her study of sacred spaces during the Middle Ages, Dawn Marie Hayes argues that such spaces were configured through a specifically Christian understanding of the link between sacred space and the reverence for the Christian body.⁴⁴ Emile Durkheim’s description of a world scrupulously delineated between the sacred and the profane does not fit either the worldview or the practice of medieval European peoples. For them ‘the physical world was at one and the same time sacred and profane – sacred as

42 3 Parliamentary Roll, 503b. 4 Henry 4, cited in Mazzainghi (n 7) 45; Cox (n 2) 80-81.

43 Ryan (n 24) 223.

44 Hayes (n 18).

God's creation, profane as a place of human exile'.⁴⁵ This dialectical unity was further reinforced with the figure of Christ as both human and divine. Therefore the modern attempt to exclude the everyday and the profane from sacred spaces is one that does not fit the medieval period.⁴⁶

On the other hand, the importance of church buildings was that they provided safe spaces in a world in which the forces of good and evil were both present and in constant war with one another.⁴⁷ Medieval sanctuary was mostly attached to consecrated space, which could include not only the church itself, but also cemeteries, monasteries and sometimes the residences of clergy. Consecration of space meant the effective divorcing of it from the world around it. As the 13th-century canonist Guillaume Durandus put it, consecration 'appropriates the material church to God...in consecration it is endowed and becomes the proper spouse of Christ, which it is a sacrilege to violate adulterously for it ceases to be a place of demons...';⁴⁸ or, as the 9th-century Archbishop Hincmar of Reims wrote: 'Christ is the head...of the Church, which is the body of Christ'.⁴⁹ One can see why violation of church sanctuary would have been held to be as sacrilegious as it was. The right of church sanctuary was thus nothing more than the 'legal acknowledgement of the specialness of sacred places'.⁵⁰

Yet at the same time the unity of space, which recognised that in a world in which both God and Satan were ever-present there could never be a strict division between the sacred and the profane, allowed churches – the dominant presence in almost every town and city – to perform a multiplicity of functions: lodging for pilgrims, trading of goods, social exchange, and of course sanctuary, as well as the liturgy. The later effort to cleave the Church from the rest of society also affected how the nature of church space was perceived. As Hayes shows in the case of Chartres Cathedral and elsewhere, from about the mid-14th century there was a growing

45 *ibid* xxi.

46 *ibid* xxi.

47 *ibid* 5.

48 Quoted in *ibid* 12.

49 Michel Lauwers, 'Le cimetière dans le Moyen Age latin: Lieu sacré, saint et religieux' (1999).

54 *Annales* 1047, 1050.

50 Hayes (n 18) 19.

tendency within the Church to 'de-laicize' consecrated space.⁵¹ In doing so, the Church laid the basis for the expulsion of all practices which involved the presence of non-clergy for any purpose other than receiving religious instruction or blessing. This led more generally to the strict separation between the sacred and the mundane that has become a hallmark of modernity. The church building thus became more alienated as a public space, less open to all as a protection from the violence and uncertainty that lay outside. The Protestant Reformation speeded up this process by devaluing the church and the clergy as *the* mediators with God, which in turn also led to a decline in respect for church space.⁵² This then became a factor undermining the ideological underpinnings of sanctuary.

Immunities

Barbara H Rosenwein places medieval asylum within the framework of the more general context of immunities.⁵³ These were widespread during the period, and could apply to private lands and buildings as well as churches. Usually they allowed exemptions from taxes and/or incursions by the king's agents. In this respect, immunities resemble the *asylia* of Ancient Greece. For most historians, immunities demonstrated the weakness of medieval kings and states. But Rosenwein argues that the granting of immunities was fundamentally about defining spaces within the realm, and of '[accommodating] political power to a new sensibility about religious space.'⁵⁴ Because grants were solely within the king's gift, their very existence was in fact testimony to his power. This power demonstrated three things: 'first, it is a declaration of self-control; second, it is an affirmation of royal control over public agents and their jurisdiction; third, it is an announcement of control over the configuration of space.'⁵⁵

51 *ibid* 69.

52 *ibid* 99-100.

53 Barbara H Rosenwein, *Negotiating Space: Power, Restraint, and the Privileges of Immunity in Early Medieval Europe* (Manchester University 1999). See also RH Helmholz, *The Ius Commune in England: Four Studies* (OUP 2001).

54 Rosenwein (n 54) 212.

55 *ibid* 7.

Sanctuary, like other immunities, might also have been ‘a practical tool...used to help keep the peace’.⁵⁶ This is evidenced by the development of some of the chartered sanctuaries in which the king sought to associate his *de jure* peace with that of the church’s more concrete *de facto* immunity. This would have been especially important for the post-Conquest kings as they sought to establish, with some difficulty, their legitimacy as sovereign rulers over the land. In reference to this period, Trenholme notes: ‘It was to harmonize [the] right of churches to afford personal protection with the right of the state to punish offenders that certain definite rules of procedure came in to being.’⁵⁷ This would lead to a greater paraphernalia of oaths, regulations and restrictions on the use of sanctuary, which will be discussed further below.

In the early medieval period, kings might also have extended immunities so as to offer more effective protection against raids. Such was the case with Charlemagne’s grandson, Louis the German, who issued a *sub regia immunitatis* in 847 for the protection of churches within his realm.⁵⁸ But space, or spacialisation, was also closely linked to the maintenance of social stability. The sacred space of the church was, in the Middle Ages, a pole of security for small and isolated communities. Without respect for sacred space, church protection would have been meaningless.⁵⁹ One immunity, of a completely secular nature, which stands out is that of Chester. The Earls of Chester claimed an immunity, dating back possibly to the reign of Edward II or earlier, which covered the entire county. Because of this they were able to offer sanctuary to fugitives, and allowed them to live anywhere within the county indefinitely. This sanctuary was open to all including, remarkably, Jews and heretics, who according to canon law were excluded from sanctuary.⁶⁰ There was self-interest involved here, for the Earls charged a fee for anyone seeking sanctuary and, where the sanctuary-seekers died intestate, all their goods were bequeathed to the Earl. This immunity was abolished during the reign of Henry IV, with all existing

56 Pope (n 25) 681.

57 Trenholme (n 4) 22.

58 Timbal (n 1) 151.

59 Lauwers (n 50) 1049.

60 Mazzinghi (n 7) 77. John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (Routledge and Kegan Paul, and University of Toronto 1973) 106.

sanctuary men and women in Chester forced to leave the country in a process known as abjuring the realm, a practice that is described below.⁶¹

Nonetheless, the example of Chester allows us a window on a world in which sovereignty had a far more dispersed character than we are used to in the modern world. The fact is that not only churches or even whole towns but, indeed, whole swathes of the country, could be both part of the king's realm, yet beyond the writ of his law. The immunity enjoyed by the country of Chester was shared by other earldoms such as those of Hoole Heath, Overmarsh and Rudheath, as well as Tynedale, Redesdale, the marcher lordships of Wales, and the so-called 'palatine counties' such as Durham and Lancashire. According to John Bellamy: 'To live [in these places] was as effective as fleeing to a foreign land'.⁶² In continental Europe, sanctuary towns were also widespread.⁶³ From at least the middle of the 11th century, sanctuary villages were set up in south-western France. In each case a ceremony presided over by local clergy, bishops and abbots involved the placing of crosses in the ground, signifying the boundaries of the sanctuary.⁶⁴ These villages were often set up in the middle of forests, and were open to all seeking refuge. Possibly, following the example of Romulus, they were created as forms of defence through rapid population increases, particularly in border areas such as the Pyrenees.⁶⁵ There were similar sanctuary villages in Normandy and Catalonia.⁶⁶ But with the encroachment of feudal relations and feudal power, these sanctuaries were all but extinguished a century later.⁶⁷ However, elsewhere the right of asylum and general immunities enjoyed by the churches led, from c. 7th century, to the founding and growth of villages in the areas next to them.⁶⁸ In addition, we have one example, although it seems likely that there would have been others, where the right of sanctuary was

61 Trenholme (n 4) 85-86; Mazzinghi (n 7) 16-17.

62 Bellamy (n 61) 106.

63 Kathryn L Reyerson, 'Flight from Prosecution: The Search for Religious Asylum in Medieval Montpellier' (1992) 17 *French Historical Studies* 603, 604.

64 Paul Ourliac, 'Les villages de la region toulousaine: au XIIe siècle' (1949) 4 *Annales* 268, 269.

65 *ibid* 270.

66 *ibid* 271.

67 *ibid* 277.

68 Timbal (n 1) 170.

claimed on the basis of a claim to municipal freedom. Trenholme describes this claim made by the town of Bury St. Edmonds as late as 1327: ‘the right of sanctuary was much prized by the burgesses as being a right and privilege belonging to the people and not merely to the Church and under ecclesiastical control’.⁶⁹ In short, the politics of medieval Europe were a collage of separate and overlapping, complementary and conflicting sovereignties.

Another type of immunity, which existed for a short time and could have received fugitives and offered them safety, was within the residences and offices of ambassadors. This privilege was abolished in Rome by the Pope in 1682. Where the supreme ecclesiastical authority led, secular sovereigns followed. One after another other European states followed suit to the point that, by the mid-18th century, embassies as sanctuaries were effectively abolished⁷⁰ – although this tradition has, in recent times, been resurrected in a number of famous cases.⁷¹

Archbishop Pecham, in a letter written in November 1289, justified the church’s immunities as follows:

To the crown belongs not only severity and rigor of justice, but still more mercy and pity. By which Holy Church, by the king’s will, saves evildoers by sanctuary, by orders, and by the religious habit, as appears in the north country, where murderers, after their crime, betake themselves as converts to the great abbeys of the Cistercians and are safe.⁷²

The Cistercian monasteries prided themselves upon welcoming all converts, regardless of their crime. The fugitive, in return, pledged ‘to lifelong labour for the good of the convent’.⁷³ The real point, as Pecham states, is two-fold. First, it reinforces Rosenwein’s point that the granting of immunities was as much about asserting the monarch’s power as it was about ceding jurisdiction to a powerful

69 Trenholme (n 4) 87.

70 Mazzinghi (n 7) 92-93.

71 Charles Crawford, ‘Embassy Confrontations and Diplomatic Asylum’ (2009) 18 December *Diplomat*

<www.diplomatmagazine.com/index.php?option=com_content&view=article&id=161&Itemid=
accessed 24 January 2015.

72 Quoted in Cox (n 2) 191.

73 *ibid.*

Church. Second, the value of sanctuary as a means of winning converts to the Church, and of enforcing penitence upon sinners, and thus ensuring the Christian order, outweighed any scruples about the deleterious effect it may have upon the temporal law.

Immunities effectively created ‘a patchwork quilt of legal jurisdictions’ even within the heart of the capital city.⁷⁴ The 15th-century dean of St Martin Le Grand, Richard Caudray, described his sanctuary as ‘in and yet not of the city’.⁷⁵ The borders for these immunities were sometime vague. As McSheffrey shows in the case of St Martin’s, the dividing lines, instead of being marked by sturdy walls, could be identified simply by certain customs as to where the sanctuary men habitually walked or drank,⁷⁶ and the boundary was easily crossed in either direction, with many citizens coming and going to either buy goods from the sanctuary men or to sell various supplies to them.⁷⁷ The fact that a pub, which was outside the sanctuary precinct, had a back room which lay over the boundary and was therefore frequented by sanctuary-men, and that even a house was split so that one half was within the precinct and the other outside it, is testimony to the often haphazard and malleable nature of the boundaries of sanctuary, and of immunities in general. But it also points to the fact that spaces of sanctuary were often as much defined by custom and practice as by law.

Procedure

It is clear from many sources that people could, and did, spend years living in the chartered sanctuaries. A record from 1532, very shortly before the suppression of these sanctuaries, shows that 50 sanctuary men and women were residing within Westminster for ‘life’, with one of them having lived there already for 20 years. These included fugitives responsible for murder, robbery, debt and sacrilege.⁷⁸ The details varied between the different chartered sanctuaries; at Beverley, sanctuary was

74 McSheffrey (n 20) 484.

75 Quoted in *ibid* 487.

76 *ibid* 488.

77 *ibid* 494.

78 Cox (n 2) 72.

granted for 30 days, during which the canons of the church endeavoured to secure a pardon for the fugitive or other similar settlement with his pursuers. After this time the suppliant was escorted to the boundary and handed over to the coroner. Any individual was allowed to seek sanctuary at Beverley up to three times. On the third occasion he had to submit to a lifetime of service to the church, always remaining within the parish. However, a 12th-century chronicler alludes to the fact that anyone guilty of a serious offence involving loss of life or limb was granted the right to lifetime sanctuary at the first claim. RH Helmholz writes: 'This fit the assumption of the canon law, since the purpose of its law of immunity was limited to saving the sanctuary seeker's life and limb.'⁷⁹ Thus, a lifetime term of sanctuary was possible there. Of these lifetime sanctuary-men at Beverley, records dating from the period 1478-1539 show there to be an average of eight new entrants each year. This does not include the many others who would have sought sanctuary for limited periods. At Beverley there was even an absolute prohibition on coroners, sheriffs or any other secular official entering the church precincts in matters pertaining to sanctuary.⁸⁰

At Durham Cathedral there were always at least two people in place by the north door of the church waiting to receive fugitives seeking sanctuary at any time of the day or night. The sanctuary-seeker was to rap using the large door knockers, and he would be immediately received and would then take the oath of sanctuary. He would be given a black tunic adorned with a yellow cross so that 'every one might see that there was a prelige graunted by God and Sancte Cuthbert':⁸¹ again, evidence of the spiritual basis of sanctuary. Once a fugitive had been admitted to an ordinary church sanctuary, the four neighbouring parishes were duty bound to provide watchers to keep guard on the church. This was to ensure that the suppliant did not escape, and once the 40 days were passed, to ensure that no food or water could be passed to him. As Cox notes, this no doubt placed a certain burden on local communities whenever someone sought sanctuary within their local church.⁸² Of course, a question naturally arises: what happened to fugitives once the allotted sanctuary time was up? If they had simply been handed over to their pursuers, this

⁷⁹ Helmholz (n 54) 58.

⁸⁰ Cox (n 2) 134-136.

⁸¹ *Rites of Durham* (1593), quoted in Cox (n 2) 119.

⁸² Cox (n 2) 238.

would have come into conflict with some of the basic principles of sanctuary such as preventing blood-letting or the application of harsh laws. The remedy available to suppliants in such circumstances was known as *abjuratio regni* (abjuration of the realm). Essentially this involved the individual agreeing to leave the kingdom altogether, and to never return. Were they to come back, they would not have the protection of the law, but could be killed with impunity. In short, once they abjured the realm they were civilly dead. Like those condemned to *exsilium* in Rome, they were an example of the *homo sacer*.⁸³

Popular Support for Sanctuary

Referring to the great chartered sanctuary at Durham, Cox writes: ‘So great was the general reverence for sanctuary, that in the enormous majority of cases the fugitive was absolutely safe as soon as he passed the churchyard gates’.⁸⁴ In response to demands from the sheriffs for restricting the rights of the chartered sanctuaries, Henry VI stated that the populace were likely to be highly supportive of the sanctuaries given the numbers who had sought protection there for debts and other crimes.⁸⁵ At Durham, surviving records show that a minimum of six people sought sanctuary there every year, mostly homicides, although the actual figure is likely to have been much higher.⁸⁶ Beverley, with its reputation as the premier sanctuary in England, received over just one 60-year period fugitives from every county in the country – from Devon to Northumberland – with the exception of just four.⁸⁷ In Staffordshire, one of the least populous counties in England, 20 people sought sanctuary in a single year (1271). As Mazzinghi notes, if one were to extrapolate from that number throughout the entire country (and bearing in mind the total size of the population, between 4 million and 6 million),⁸⁸ a significant number of people took sanctuary each year.⁸⁹

83 For a detailed discussion of the practice of abjuring the realm, see André Réville, ‘L’“Abjuratio Regni” ’ (1892) 50 *Revue Historique* 1.

84 Cox (n 2) 125.

85 *ibid* 85.

86 *ibid* 107.

87 *ibid* 142.

88 Julie Jefferies, *The U.K. population: past, present and future* (Office of National Statistics 2005) 2.

Indeed, the total number seeking sanctuary either in churches and chartered sanctuaries is estimated to have averaged around 1,000 per year.⁹⁰

Most of those who sought sanctuary came from the poorer sections of society.⁹¹ This would accord with Macrides' point in relation to Byzantium: in general, the rich and powerful would have nothing to fear from the law or from private vengeance.⁹² Surviving records from the sanctuary at Durham note only a small proportion of the suppliants' occupations. Of those that are noted, most (about 60 per cent) are labourers, peasants and artisans. Over a period of 60 years, just one knight and four 'gentlemen' are listed as having sought sanctuary.⁹³ Moreover, when one considers that the overwhelming number of sanctuary-seekers who did not have their occupations recorded would have come from the lower orders of society, then these numbers are put into even starker relief. A similar record covering almost exactly the same period at Beverley gives similar proportions: some 69 labourers and poor peasants as compared with 36 'gentlemen' and yeomen.⁹⁴ There is only a handful of recorded cases of women taking sanctuary. This may have been largely due to the greater difficulty they faced in getting away from the supervision of their fathers and husbands; their overall lack of independence is also likely to have been a contributing factor. However, a fascinating example of how sanctuary could work to a woman's advantage is evidenced by a case in 1225, in which an un-named woman made a false claim to having committed a felony just so that she could legitimately leave her husband by seeking sanctuary and then abjuring the realm. In other words sanctuary could lay the basis, in Trenholme's words, for a 'mediaeval method of divorce'.⁹⁵

One indication of popular reverence for sanctuary involves the scandal of William de Lay from 1279. Having sought sanctuary at the Church of St Philip and St

89 Mazzinghi (n 7) 41.

90 Pope (n 25) 677, footnote 2.

91 Trenholme (n 4) 66-67.

92 cf above at Chapter 4 (n 79).

93 Cox (n 2) 108-109.

94 *ibid* 137.

95 Trenholme (n 4) 69.

James in Bristol, he was forcibly dragged out by the constables and summarily beheaded. Part of the constables' defence was that de Lay had been a known petty criminal, often in prison. Yet, even so, the punishment meted out to the violators of sanctuary involved public scourging and being forced to join the crusades. But what is most striking about this incident is that, following de Lay's reburial within the consecrated ground of the church in which he had taken sanctuary, many local people began to treat his grave as they would that of a saint, regarding him as a martyr.⁹⁶ In the large chartered sanctuaries, so integrated within the economic and social fabric of the town were the sanctuary men and women, that even after the dissolution of the monastery of Beaulieu, local citizens petitioned Thomas Cromwell for the abbey's immunities to be extended. Peter Iver Kaufman writes: 'Integration with guiltless neighbours seems to have been the rule and isolation the exception.'⁹⁷ Where sanctuary-seekers were part of the community, they tended not to be seen as outsiders, nor as dangerous to others.

A major exception to the general respect and reverence for sanctuary is found in the attitude of Londoners to the great chartered sanctuary of St Martin le Grand. From the beginning of the 14th century, regular complaints were made to the authorities, both ecclesiastical and secular, about the 'satellites of Satan', as the sanctuary men were known in the city.⁹⁸ The complaints seemed largely based on the apparent impunity enjoyed by criminals carrying out their trade and living their lives with their families within the large precincts of St Martin le Grand. There were also reports that they would, on occasion, leave the sanctuary to commit further crimes, only to return and remain safe within the walls of the sanctuary. Shannon McSheffrey has identified most of those living in sanctuary at St Martin le Grand as probably being foreign artisans.⁹⁹ And she suggests that many of them may have been there, not because they were criminal fugitives, but because, excluded from the guilds, it was a way for them to engage in trade legitimately.¹⁰⁰ One wonders if the persistent

96 Cox (n 2) 246.

97 Peter Iver Kaufman, 'Henry VII and Sanctuary' (1984) 53 *Church History* 465, 467.

98 Isobel Thornley, 'Sanctuary in Medieval London' (1932) 38 *Journal of the British Archaeological Association* 293, 298.

99 McSheffrey (n 20) 484.

100 *ibid* 494.

hatred and venom directed at the sanctuary men there was largely due to xenophobia, given that there appears to be little evidence of similar levels of resentment about other sanctuaries, including St Martin le Grand's London twin sanctuary at Westminster. Anti-foreigner prejudice is also evidenced by the fact that the alien traders in St Martin le Grand were often the victims of raids by the city sheriffs for breaking the law against foreigners engaging in trade.¹⁰¹ The infamous and xenophobic violence of the Evil May Day riot of 1517 was focussed on those living within St Martin le Grand.¹⁰² Indeed, it was precisely the arrival of large numbers of Protestant refugees following the Reformation who took up residence within the liberties and monasteries that led Henry VIII to consider the first legislation to restrict and control activities within the precincts.¹⁰³

Violations of Sanctuary

In spite of the strength of church sanctuary as an institution throughout the mediaeval period, there were often violations. I have already mentioned the gross violation that took place at St Frideswide's in Oxford, but perhaps the most famous example is that of St Thomas à Becket's murder in his own cathedral at Canterbury as he made his way to vespers. Although, of course, this was not a case of asylum, it was a blatant example of violation of church *fryth* by the sovereign. It was also suggested by the chronicler Henry Knighton that one of the causes of conflict between the archbishop and the king was Becket's resistance to Henry II's attempts to restrict the right of church sanctuary.¹⁰⁴ The widespread outrage at the 'threefold violation of sacred person, place, and time' led to both Becket's swift canonisation and King Henry II's public act of penance for his murder.¹⁰⁵ Becket's murder, so Isobel Thornley claims, hobbled Henry II's desire to end the practice of the liberties of the chartered

101 *ibid* 489.

102 *ibid* 491, 504.

103 Roger Kershaw and Mark Pearsall, *Immigrants and Aliens: A guide to sources on UK immigration and citizenship* (2nd edn, The National Archives 2004) 89.

104 Cox (n 2) 35.

105 Hayes (n 18) 21.

sanctuaries, due to public backlash it caused.¹⁰⁶ As Cox puts it, this is but one example where ‘the whole course of events was completely changed, and dynasties shaken by violations of sanctuary’.¹⁰⁷

Another archbishop, this time of York, was hunted down and removed from sanctuary by agents of Richard I (The Lionhearted) for his disobedience. This was in spite of the fact that this archbishop, Geoffrey, was the brother of the king. The Bishop of Ely, who was the king’s chancellor and the chief violator of Geoffrey’s sanctuary, was promptly forced to go into exile himself due to the outrage accompanying the violation.¹⁰⁸ During the twilight years of the 12th century an insurgent movement, led by William Fitz Osbert, known as ‘Longbeard’, rose up against a proposed poll-tax. Some 52,000 of London’s poor were mobilised, threatening the men of property. Fitz Osbert was hunted down, and managed to take refuge in the church of St Mary le Bow; the then Archbishop of Canterbury, Hubert Walter, who was also the Chief Justiciar of England, came down squarely on the side of the aldermen, demanding that he leave. Fitz Osbert refused, but the archbishop ordered his own church to be burned down for the purpose of ‘smoking out’ the fugitive. It appears that, in defence of the established order, the senior clergy were even prepared to violate church sanctuary. As Mazzinghi argues, the ‘gravity of the crisis’ was such as to provoke the clergy to this extreme position – although the accusation that Fitz Osbert was a heretic might have also loaded the scales against him.¹⁰⁹ Fitz Osbert was captured and executed but, just two years later, Walter was forced to resign as justiciar, partly due to complaints made to the Pope about his blatant violation of sanctuary in that case.¹¹⁰ However, over the next century there were many instances where the king was forced to restore fugitives to sanctuaries from which they had been forcibly seized, sometimes by the king’s own agents. On at

106 Isobel D Thornley, ‘The Destruction of Sanctuary’ in RW Seton-Watson (ed), *Tudor Studies* (Longmans 1924) 184.

107 Cox (n 2) 34.

108 *ibid* 38.

109 Mazzinghi (n 7) 77.

110 Cox (n 2) 40; Mazzinghi (n 7) 76-77.

least one occasion, in 1334, the Mayor of London and his officials were forced to pay penance for their removal of fugitives from sanctuary.¹¹¹

One notable incident, in 1378, involved an escaped prisoner from the Tower of London who sought refuge in the chartered sanctuary at Westminster. The guards from the Tower pursued and then cut him down within the precincts of the sanctuary. Such was the outrage at such a violation that all religious rites at Westminster Abbey were cancelled for four months and ‘sittings of Parliament were suspended lest they should be contaminated by assembling near the scene of the outrage’.¹¹² Ten years later a clerk charged with treason took sanctuary in Westminster and, despite repeated demands from both Houses of Parliament, he was not given up to the secular authorities.¹¹³ The absolute right of all, regardless of who they were or what their alleged crime, to take sanctuary at Westminster and the other chartered sanctuaries was reaffirmed in that same year (1388) by Richard II.¹¹⁴ However, the fact that just five years later the chartered sanctuary at Culham had to present documentary proof to Parliament that it enjoyed the same rights as Westminster suggests that the extent of their privileges were constantly being challenged throughout this period. As late as the Wars of the Roses partisans of both sides at various times took sanctuary, and by and large this was respected by their enemies in victory.¹¹⁵ Indeed, it was the

111 Thornley (n 98) ‘Sanctuary in Medieval London’, 297.

112 Cox (n 2) 52.

113 Cox (n 2) 54.

114 Cox (n 2) 56.

115 Many Lancastrians had taken sanctuary at Beaulieu. Mazzinghi (n 7) 51. These were what today we would call ‘political refugees’. The boy-king Edward V was actually born in Westminster sanctuary where his mother had taken refuge after the fall of the House of York in 1470. Another sanctuary-seeker, John Morton, ended up as Henry VII’s Archbishop of Canterbury. McSheffrey (n 20) 498. Henry Tudor, who would begin in earnest the first attacks on sanctuary as King Henry VII, took refuge in St Malo in 1479. Timbal (n 1) 177. The two major sanctuaries in London – Westminster and St Martin le Grand – were ‘full of the adherents of Edward IV’. Thornley (n 95) ‘Sanctuary in Medieval London’, 314. Some years later, Richard III had roads to Westminster as well as access to it from the Thames blocked so as to prevent supporters of Edward V from seeking sanctuary there, and thus easing his own path to the crown. See Cox (n 2) 59-60. Yet it is telling that here again the pursuers see themselves barred from violating the sanctuary, even in such volatile and chaotic times.

continued presence in sanctuaries, especially within the capital, which allowed each faction to regroup and effectively counter-attack. As Thornley notes, Wycliffe's warnings of a century earlier that the privileges of sanctuary, granted by the monarch, could be used to undermine his realm were coming true.¹¹⁶ What all this suggests is that, whatever the reasons behind the original grant of chartered status, their continued existence signified a real weakness in the sovereign order.

One point on which violation of sanctuary was most definitely not an issue was in cases where the alleged crime was committed within the sanctuary precinct itself. For example, in a case dating from 1321 a woman killed the clerk of the church of All Saints by London Wall within the church precinct, and then claimed sanctuary within the same. The Bishop of London declared this use of sanctuary invalid; she was removed and later hung without, it appears, much controversy.¹¹⁷

It was at the height of the civil wars of the late 15th century that Richard III's key advisor, the Duke of Buckingham, condemned the sanctuaries, but in doing so expressed accurately a crucial aspect of their existence:

A Sanctuary serueth alwayes to defend the body of that man that sandeth in danger abroad, not of great hurt onely, but also of lawfull hurt; for against unlawfull harmes neuer Pope nor King intended to Priuiledge any one place, for that Priuiledge hath euery place: knoweth any man any place, wherein it is lawfull for one man to doe another wrong? ... *but where a man is by lawfull meaner in peril, there needeth he the tuition of some speciall priuiledge*, which is the onely ground & cause of all Sanctuaries.¹¹⁸

Buckingham hits the mark in identifying sanctuary as being about protection *from* the law, not a function of the law itself. But the modern claim of law, that it is synonymous with justice, finds its germ in Buckingham's speech. It is telling, therefore, that it dates from the eve of the Tudor period, one where the claim of sovereign power reinforced by a unified and decisive force of law would usher in law's modern imperium.

116 Thornley (n 95) 'Sanctuary in Medieval London', 315. However, on one occasion Edward IV had 20 of his Lancastrian enemies dragged out of sanctuary and summarily beheaded. Mazzinghi (n 7) 82-83.

117 Cox (n 2) 230.

118 Quoted in *ibid* 66-67 (emphasis added).

6

Decline of Sanctuary

It is common to date the end of sanctuary from around the 16th century, with the establishment of the supremacy of the secular sovereign under the Tudors. This is not wholly wrong, but it does ignore the long gestation of law that preceded these seminal events, and its role in undermining sanctuary and laying the basis for its destruction. Law did not, Athena-like, suddenly appear at a moment of genesis for modernity, whether that be the Papal Revolution, the Tudor period, or the French Revolution. Instead there was a long process from germination to complete hegemony. Indeed, as I will show in Part II, in relation to the refugee this process was not complete until the 1951 Convention, and perhaps even later with its incorporation into various domestic legal regimes over recent decades. In addition, although there had long been hostility toward sanctuary from the crown, eliminating it was not merely a case of will. We saw in the previous chapter how in the late 12th century there was a series of attacks upon sanctuary: in 1164 when Henry II restricted church sanctuary to 40 days; in 1170 the murder of Becket in Canterbury Cathedral; in 1191 the seizure of the Archbishop of York from sanctuary in Dover by agents of Richard I; and in 1196 the smoking-out of Fitz Osbert from St Mary le Bow. And yet sanctuary was to continue for several centuries more, with kings frequently forced to respect the practice. Thornley, a leading historian of medieval sanctuary, states that as late as the 15th

century the strength of sanctuary was such that efforts to restrict it were in vain.¹ In the West, law re-emerged from the late 11th century onwards, but the time for its hegemony was not yet ripe. Its gestation period lasted centuries, and this chapter tells that story as it related to sanctuary. As we will see, it is precisely at that historical moment in England when the various elements of modernity begin to fall into place – that is, with the Tudor period – that the death-knell for sanctuary is finally sounded.

The Rise of Canon Law

One of the pre-eminent historians of the Western legal tradition, Harold J Berman has located the rebirth of law in the West during the late 11th and early 12th centuries, a period known as the Papal Revolution.² This was a time in which the Papacy sought to establish a firm authority over the Church throughout Europe: a break from the much greater autonomy enjoyed by monasteries and clerics hitherto. It was during this time that the term ‘canon law’ (*jus canonicum*) was coined. In the early mediaeval period, church and secular authority were so intertwined and inseparable that one cannot speak of a separate thing as law, nor of legal professionals, nor courts etc. until around the late 11th century.³ So, for example, King Ine’s council, which promulgated some of the founding laws of sanctuary in England, had a majority comprised of bishops. As Stephen Pope writes: ‘[the] ends of both ecclesiastical and secular governments were indistinct...the care of men’s souls was clearly a governmental as well as an ecclesiastical concern’.⁴ The legal paradigm, insofar as its presence was felt, had no life separate from faith, and indeed appears in respect of sanctuary to have been subordinate to theological considerations.

The Papal Revolution represented an attempt by the Pope to establish complete hegemony over the various elements of the Church spread out across

1 Isobel D Thornley, ‘Sanctuary in Medieval London’ (1932) 38 *Journal of the British Archaeological Association* 293, 315.

2 Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University 1983).

3 *ibid* 76; William C Ryan, ‘The Historical Case for Sanctuary’ (1987) 29 *Journal of Church and State* 209, 215.

4 Stephen Pope, ‘Sanctuary: The Legal Institution in England’ (1987) 10 *University of Puget Sound Law Review* 677, 681.

Europe. Part of this strategy was that the Papacy sought to create a clearer division between itself and the secular powers; by disentangling the clergy from their ties with kings and emperors, the Pope could bring them under more direct control from Rome. The development of civil and canon law became a means by which the relationship between these two increasingly autonomous sectors could be regulated. Gratian's *Concordance of Discordant Canons*, which Berman refers to as the first comprehensive legal treatise, appeared in the mid-12th century, and around the same time we see the publication of a set of legal rules for magistrates in Provence.⁵ Gratian's work would end up as the first volume of the *Corpus Juris Canonici* as codified in the 16th century. In 1234, the Church issued its first collection of canon law.⁶ Fifty years later a French crown official compiled customary law from around the kingdom into the *Coutumes de Beauvaisis*.⁷ Even Roman law had never had quite the same character as this, 'as a coherent whole, an integrated system, a "body"'.⁸ Justinian's *Corpus*, by contrast, had been a collection of commentaries and other sources dating back over centuries. In fact, the term '*corpus juris*' is absent from Justinian. It was, instead, the name given to the collection when it was rediscovered in the 11th century.⁹ Evidence, perhaps, of the growing influence of the law was that 'every notable pope from 1159 to 1303 was a lawyer'.¹⁰

In addition to claiming for itself a more comprehensive and integrated character, by regulating the relationship between the Church and secular power, the law began to establish itself as something separate from and above both theology and politics; it became the thing that 'binds the state itself'.¹¹ Pashukanis makes a similar point, locating the rise of law's hegemony in its role as a third party standing above a set of conflicting interests. Pashukanis, however, sees this development in relation to

5 Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (William B Eerdmans Publishing 2000) 27; Michael E Tigar, *Law and the Rise of Capitalism* (Monthly Review Press 2000) 39.

6 Berman (n 5) *Faith and Order*, 44.

7 Tigar (n 5) 39.

8 Berman (n 5) *Faith and Order*, 27.

9 *ibid* 27.

10 RW Southern, *Western Society and the Church in the Middle Ages* (Penguin 1970) 131.

11 Berman (n 5) *Faith and Order*, 27.

the regulation of commercial activity in the emerging market towns.¹² It could be argued that the same phenomenon is being identified by both Berman and Pashukanis, except the former sees it in its higher stage, while the latter recognises the phenomenon as it permeates into daily life. Certainly Berman is at one with Pashukanis and with the Marxist legal historian, Michael E Tigar, in seeing the rise of law as tied to the rise of commodity exchange during the 11th and 12th centuries.

It is around this time we find many debates amongst canon lawyers about several practical issues, some of which were described towards the end of the last chapter. For example, this was a period that saw an ideological battle between the Franciscans and the canon lawyers, with the lawyers deploying sophist arguments around questions over consumption of food and clothing to defeat the theological rejection of property by followers of St Francis.¹³ In relation to sanctuary, the canon lawyers argued over such questions as whether asylum should be denied to those who planned crimes from within the church, but gave orders for them to be carried out by associates on the outside, or whether someone who committed a crime in one church could then claim asylum in another.¹⁴ As we have already seen in the chartered sanctuaries, within which fugitives could spend years, or even lifetimes, it was possible for them to continue to engage in criminal transactions with those outside. But whereas St Martin le Grand had a bad reputation in this respect, this was not the general rule.¹⁵ Thus the canonists' concerns were only relevant to, at best, marginal

12 Evgeny B Pashukanis, *Marxism and Law: A General Theory* (Barbara Einhorn tr, Pluto 1989) 135-136.

13 Giorgio Agamben, *De la très haute pauvreté: Règles et forme de vie* (Joël Gayraud tr, Bibliothèque Rivages 2011) Part III.

14 RH Helmholz, *The Ius Commune in England: Four Studies* (OUP 2001) 55.

15 Indeed, St Martin le Grand was full of artisans who carried out a legitimate trade in goods, often of high quality, from within the sanctuary. A number of sanctuary men there had premises which had a door or window that faced out of the precinct as shop fronts for them to sell their goods. Shannon McSheffrey, 'Sanctuary and the Legal Topography of Pre-Reformation London' (2009) 27 *Law and History Review* 483, 489 and generally. In Beverley, where the sanctuary precinct covered the whole town, the sanctuary men and women were allowed to engage in whatever trade or profession they wished, including the right to join guilds. J Charles Cox, *The Sanctuaries and Sanctuary Seekers of Mediaeval England* (George Allen & Sons 1911) 144. They

cases of sanctuary. What appears to have been of greater concern was that law should be universal and possess supreme authority. It was these arguments that would later add grist to the mill for the secular authorities whose agenda became the complete destruction of sanctuary.

A theological development of a dualistic conception of power, with the Church autonomous in the sacred sphere, and the monarch possessing absolute power in temporal matters developed and was codified by St Thomas Aquinas in his *Scriptum super Sententiis*.¹⁶ This strengthened the power of the church as a separate and legitimate body within a society that was fast developing a much more systematic and centralised form of sovereign power. But it also laid the foundations for an argument that would become increasingly prevalent over the next two centuries: sanctuary, by granting immunity – at least for a time – to those who had breached the king's peace, served to undermine and encroach upon secular law and order. This was the logic that led from mere separation of the two spheres of authority to, in the Tudor period, the one destroying the other. However, between the 12th and the 15th centuries, while the secular and ecclesiastical realms divided, there remained a great deal of intellectual solidarity between the civil and canon lawyers.¹⁷

The Undermining of Sanctuary by Canon Law

As discussed in the previous chapter, the principle of ecclesiastical immunity was one of the key elements that sustained the church as a place of sanctuary into the Middle Ages.¹⁸ Rosenwein writes:

In the late [Roman] Empire asylum and immunity were entirely separate concepts. Nevertheless, the law of asylum was an important precedent for later

were also free to live anywhere they wished within the town. As such, they formed an integral and integrated part of the community.

16 Pope (n 4) 683.

17 For the continuous overlapping of understandings of sovereign authority between these two spheres, see Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University 1957).

18 Helmholz (n 14).

immunities because it prohibited state agents from entering church precincts to apprehend a refugee.¹⁹

It should be noted that church sanctuary was not rooted in a subjective right of asylum, but was a function of the rights and obligations of clergy to offer protection and intercession on behalf of the suppliant.²⁰ However, from the turn of the second millennium onwards the inviolability of the church became a tricky problem, with the resurgence of the state and organised polities, and their separation from the Church. Specifically, the problem arose as to what extent the canon law of sanctuary could effectively negate the growing body of temporal law. Could not the right of asylum effectively give people immunity from temporal law *in toto*? Helmholz gives a fascinating account of the theological debates within the Church over this question. Some of the conclusions allowed for some accommodation with the temporal law on this point, and eventually opened the door for the effective emasculation of the right of asylum. The role of canon law was crucial, as in the medieval period Roman law on sanctuary played ‘a secondary role’ to it.²¹ However, that is not to say that the Church did not appropriate aspects of Roman law when it suited it:

[P]arts of the Roman law filled gaps in the canon law. No canon law excluded Jews from sanctuary, for example. However, Roman law did, and the canon law embraced it as a worthy addition to the *casus excepti*.²²

Beginning in the 12th century with Gratian’s inauguration of a systematic canon law, the Church lawyers would ensure the ‘intellectual preparation’ necessary for the eventual destruction of sanctuary.²³ Following agitation by the canon lawyer Hostiensis in 1281, Pope Martin IV declared Jews to be ‘unworthy’ of sanctuary – a

19 Barbara H Rosenwein, *Negotiating Space: Power, Restraint, and the Privileges of Immunity in Early Medieval Europe* (Manchester University 1999) 37.

20 Pierre Timbal Duclaux de Martin, *Le Droit d’Asile* (Librarie du Recueil Sirey 1939) 158, 161; Karl Blaine Shoemaker, *Sanctuary and Crime in the Middle Ages 400-1500* (Fordham University 2011) 20; Helmholz (n 14) 28.

21 Helmholz (n 14) 37.

22 *ibid* 38. The reference to Roman law can be found in Justinian, Alan Watson (tr), *The Digest of Justinian* (University of Pennsylvania 1985) 1.12(15).1.

23 Shoemaker (n 20) 154.

ruling confirmed 30 years later by Pope John XXII.²⁴ Helmholz, along with others, rejects the argument put forward by historians of asylum throughout the last two centuries who pitched the Church as the absolute defenders of sanctuary against the secular abolitionists. Instead, the development of canon law was the medium through which church sanctuary could be restricted and then delegitimised.²⁵ In short, the two wings of medieval law, canon and secular, complemented each other in respect of sanctuary. 'The common law coincided with the canon law in its principles and in most of the ways it worked in practice.'²⁶ Indeed, Helmholz argues that, in fact, in contrast to canon law, it was the common law 'that encouraged the broader availability of sanctuary during the Middle Ages.'²⁷ As sanctuary headed for its denouement in the 15th and 16th centuries, it was the combined canon and Roman law of the *ius commune* which provided the source for 'some of the ideas expressed by common lawyers in describing their own law of sanctuary or arguing for its restriction'.²⁸

Helmholz schematises the canon law on asylum into three separate categories: immunity of churches, treatment of refugees, and the *casus excepti*.²⁹ The first of these, church immunity, was about ensuring the physical protection of the church and of creating a separation from the world around it. From the late 11th century onwards this principle would have suited the Church in its attempt to create a structural distance from secular power. If the principle of church immunity was relatively straightforward, the treatment of the refugees themselves was far more problematic. To harbour criminals would be a violation of canon law and the prohibition against the Church becoming a 'den of thieves'. The compromise was to ensure that those who had sought sanctuary in a church would not face execution or mutilation, but would nevertheless face some sort of punishment. In practice, this meant that the fugitive would have to make amends to his or her victim, usually in monetary terms.³⁰

24 Timbal (n 20) 19.

25 Helmholz (n 14) 74. Rosenwein (n 19) and Schoemaker (n 20) make the same argument.

26 Helmholz (n 14) 69.

27 *ibid* 22.

28 *ibid* 73.

29 *ibid* 25-37.

30 *ibid* 30-31.

The third category of canon law that dealt with sanctuary was, crucially, concerned with who should be prohibited from the protection of the Church. The *casus excepti* are classic examples of the legal paradigm: defining the subject of rights. They consisted of a series of categories of people deemed unworthy of sanctuary and thus prohibited from access. The *casus excepti* first appeared in the 11th century; thus they lay at the base of canon law, and continued to expand in scope all the way up to the 19th century, in principle as part of maintaining ‘public order’.³¹ They reflect backwards to the laws of the late Roman Empire that attempted to restrict access to sanctuary, and forwards to the modern law of asylum that sets objective criteria for the undeserving asylum-seeker. It was the legal category of *casus excepti* that was central to the undermining of sanctuary.

The canon lawyers carried on an unending debate on the *casus excepti*. On the one hand, there were those who took the position that one had to first prove one’s piety and loyalty to the Catholic Church in order to claim sanctuary. This logic would also place those who had been excommunicated – who, in principle, were not allowed to enter a church anyway – or those put under a secular ban within the category of those who could be forcibly and legitimately removed from sanctuary. Yet, on the other hand, as many theologians held, if one were to exclude suppliants who lacked piety, then that could easily exclude the majority of Christians whose main motive for seeking sanctuary was a self-interested desire to avoid secular punishment.³² Helmholz asserts that canon law, ‘like many ancient systems of asylum...welcomed only entrants from its own circle of belief.’³³ However, the Israelites did not exclude non-Jews who lived amongst them from the Biblical sanctuary cities.³⁴ And Helmholz’s assertion also ignores Augustine’s plea that sanctuary be available to all, and the fact that, on many occasions, outsiders were indeed welcomed. Examples of this are the Jewish High Priest Onias who was welcomed at the Temple of Apollo, and the many pagans who were sheltered by the early Christians from the might of Rome. Moreover, as JH Baker argues, since in fact ‘sanctuary was not a personal privilege, but a privilege attaching to a sanctified place, it was in theory available to

31 Timbal (n 20) 210.

32 Helmholz (n 14) 50.

33 *ibid.*

34 Timbal (n 20) 11. The biblical references are Numbers 35:15; Joshua 20:9.

Jews and infidels as well as Christians'.³⁵ However, in place of this non-sectarian theological tradition came a juridical process. And Timbal succinctly describes the effect of juridical rationality on the practice of asylum:

While the classical law of the Church asserted the principle of asylum as open to all, with rare exceptions, the jurists took the opposite position. When an individual invokes the right of asylum...he must be asked if he is Catholic or not. If he is not, he is excluded. If he is, then one has to determine if his wrong was committed in the church – meaning he would not have the right of asylum – or outside of the church. If the latter, and if he is a serf then he will not be admitted unless he can demonstrate [that he is fleeing the threat] of serious cruelty; otherwise he is to be returned to his master who must take an oath [not to harm his serf].³⁶

Yet in spite of canon law restricting sanctuary to certain classes of people, there is actually little evidence that bishops, in practice, attempted to exclude those who fell within the *casus excepti*, suggesting a split between the lawyers and the theologians within the Church on the question of sanctuary. In fact, there were many instances where the clergy, together with many of the local population, fought pitched battles to defend refugees in sanctuary from being seized by royal agents.³⁷ During the 13th century Hostiensis felt compelled to rebuke bishops for extending sanctuary to those who fell outside of the protection of canon law. And as late as the 15th century, the bishop of Noyon in France challenged the king's procurer who had ordered that those subjected to a secular ban, or who were otherwise enemies of the state, were excluded from the right of asylum. The bishop based his opposition on the precedent of the Biblical sanctuary cities which made no such distinction.³⁸ No evidence has been found in bishops' registers for any kind of formal procedure to test whether or not sanctuary seekers had a right to asylum before entering the church. In the great sanctuaries, however, there does seem to have been some kind of perfunctory ceremony, involving the suppliant taking some form of oath, although again this appears to have been more a formality than something substantively procedural. Helmholz writes: 'The English bishops appear, on balance, not to have wished to limit

35 JH Baker, 'The English Law of Sanctuary' (1990) 2 *Ecclesiastical Law Journal* 8, 8.

36 Timbal (n 20) 266.

37 *ibid* 396-397.

38 *ibid* 357.

the claim of fugitives to ecclesiastical immunity, even though it would have been consistent with the canon law to have done so.³⁹

The clergy were faced with the dilemma that systematically excluding those who fell within the *casus excepti* conflicted with the principle of clerical tenderness (*lenitas*) towards suppliants. To get around this, some could simply take a *laissez faire* attitude while allowing the secular authorities to play the ‘active role’ in actually removing them from sanctuary.⁴⁰ At the same time the secular agents were able to rely more and more on the canon law’s ever-growing class of *casus excepti* as justification for violating church sanctuary and forcibly removing fugitives.⁴¹

Thus it would not be correct to say that ‘the Church’ was in favour of restricting access to sanctuary only to pious Christians, but rather it was the Church lawyers who were anxious to limit and restrict the right of asylum, while clergy appeared to stick more closely to a more open approach. Helmholz argues that bishops felt able to violate the canon law on the *casus excepti* because the common law, being more expansive in its approach, tended to ignore them.⁴² Perhaps, but this begs the question as to why the common law would be so generous, and also why the bishops felt confident enough to defy the not inconsiderable power of the Church hierarchy. In my opinion, this could only have been a result of popular support and reverence for more open access to sanctuary, many examples of which I discussed in the previous chapter. The numbers fleeing to sanctuary annually, and the ever-present possibility that anyone may need to take advantage of sanctuary themselves, probably helped ensure this popular endorsement of sanctuary, at least for a time.

The Coming of the Modern State and the Destruction of Sanctuary

Several centuries of canon law creating prohibition after prohibition on certain classes of people allowed to take sanctuary, and legitimising the removal by state agents of persons belonging to those groups, had taken its toll by the 15th century. Popular support for sanctuary appears not to have been as wide or, at least, as active as it once

39 Helmholz (n 14) 63-64.

40 Timbal (n 20) 222.

41 *ibid* 384.

42 Helmholz (n 14) 70.

was. The secular authorities were also now emboldened to make more aggressive attacks on sanctuary, often using the principle of the *casus excepti* as a starting point. The time was also ripe, in that the Tudors, emerging victorious from the long civil war between the houses of Lancaster and York, sought to impose stability and authority with the creation of the modern state. Partly as a result of the trauma of this long war, the Tudors were anxious to close off spaces outside of the sovereign authority of the crown which might threaten the existing settlement.⁴³ With the coming of the modern state in England a new way of ‘conceptualizing, organizing, and controlling space’ was inaugurated.⁴⁴ As with the Romans, the Tudors were concerned to establish a centralised and uniform source of power. As a result, the right of sanctuary was greatly reduced. The general shift away from immunities was part of a process in which the king’s agents were granted far greater leeway to enter private property. And indeed, over the next two centuries, ‘the occasions for search and seizure “proliferated from three to fifteen categories” ’.⁴⁵

A turning point in English law was the case of *Rex v Sir Humphrey Stafford* [1486].⁴⁶ Stafford was a Yorkist who, following defeat at Bosworth Field, attempted a rebellion against Henry VII. With the failure of this uprising Stafford fled to the chartered sanctuary at Culham in Oxford, only to be dragged out and taken to the Tower of London to await execution. He pleaded that his right of sanctuary had been violated and that he should be returned whence he had been seized by the king’s men. The court demanded from the Abbot of Culham proofs of the original grant of sanctuary. This he could not do, so Stafford lost his claim and was duly executed. There are clear echoes here of the Tiberian attack on *asylia* through the imposition of a requirement of legal proof of possession of immunity. The case of *Stafford* was undoubtedly a blow against the old chartered sanctuaries, as many of their privileges dated so far back that documentation would be hard to provide. From now on the sovereign would apply the law as forcefully as possible to deny political enemies

43 Cox (n 15) 319.

44 Rosenwein (n 19) 207.

45 Ibid, citing William J Cuddihy.

46 1 Henry 7 ff 22-24, pl 15 [1486].

sanctuary, and increasingly the rights of sovereign command would edge out the immunities and other competing spaces of authority.⁴⁷

From 1487 onwards Henry VII was able to secure papal bulls authorising the removal from sanctuary of those who had left the place of sanctuary to commit further crimes, and of those who owed debts to the state. This followed an earlier ruling almost 40 years previously by Pope Pius II, granting the city of Antwerp the right to remove murderers from sanctuary.⁴⁸ The effect of these initial papal bulls was the gradual exclusion of public debtors until, by 1562, canon jurisprudence excluded all who owed such debts from asylum.⁴⁹ Further, these bulls allowed creditors to seize any property owned by sanctuary-men, and bestowed the power on the king to provide his own guards to watch from within the sanctuary anyone accused of treason.⁵⁰ One man, William Oldhall, who took sanctuary at St Martin le Grand, complained that this measure effectively turned the asylum into a prison. Indeed, this may have been a deliberate goal of early Tudor penology.⁵¹

A further key stage in the decline of sanctuary came in 1516 in the notorious case of *Rex v Savage*,⁵² involving the brutal murder of a justice of the peace, and the murderer's subsequent resort to sanctuary.⁵³ The assailant, Savage, was then forcibly removed from the sanctuary and placed in the Tower of London to await trial for murder. Such was the scandal surrounding the violation of sanctuary in addition to the original crime that the case was heard in the presence of Henry VIII himself along with 'a swarm of bishops, canonists and other ecclesiastics, and all the judges'. The case report goes on to note that: 'Many mischiefs were rehearsed which had been

47 Ryan (n 3) 225; Isobel D Thornley, 'The Destruction of Sanctuary' in RW Seton-Watson (ed), *Tudor Studies* (Longmans 1924) 185.

48 Helmholz (n 14) 48.

49 Timbal (n 20) 369.

50 Thomas John de' Mazzinghi, *Sanctuaries* (Halden & Son 1887) 15.

51 Peter Iver Kaufman, 'Henry VII and Sanctuary' (1984) 53 *Church History* 465, 474.

52 *Rex v Savage*, 72 ER 365 [1516].

53 Baker (n 35) 12. See EW Ives, 'Crime, Sanctuary, and Royal Authority under Henry VIII: The Exemplary Sufferings of the Savage Family' in Morris S Arnold and others (eds), *On the Laws and Customs of England* (University of North Carolina 1981) for a fascinating in-depth discussion of the historical and political context of this case.

done in time past and which increased from day to day because of the Sanctuaries of Westminster and St. John's etc. and what remedy and redress could be provided was the principle reason why the King was there in his royal person that day'.⁵⁴ The earlier case of *Stafford* was cited, but in this case the chartered sanctuary in question, St John's in Clerkenwell, was able to provide the necessary proofs of its privilege. Eventually, after the case had dragged on for several years, Savage withdrew his claim regarding the violation of sanctuary. One reason why his claim was withdrawn became evident when Chief Justice Fineux made his subsequent ruling, for Fineux made new law by stating that the original proofs were no longer sufficient. Instead, evidence of use as a sanctuary 'time out of mind', i.e. before 1189, also had to be established in order to show that sanctuary could be granted for more than the standard 40 days. He went on to state that indefinite sanctuary 'is a thing so derogatory to Justice and contrary to the common good of the Realm that it is not sufferable by the law'.⁵⁵ And in this case, it was denied. EW Ives suggests that the forcible removal of Savage from St John's might have been part of a deliberate plan by the crown lawyers to use it as a test case for further restricting the right of sanctuary.⁵⁶ One outcome of this case, which presages the coming split with the Papacy, was that it was decided in the Star Chamber that a sanctuary could not be created by a pope. Instead, it could only be granted by the king, with the pope relegated to simply confirming the grant.⁵⁷ But most tellingly, it was the canon law that was also invoked – the fugitive was deemed to fall within the *casus excepti* – in order to exclude Savage from sanctuary.⁵⁸ Here is but one explicit example of the secular law relying on its canon equivalent as part of the campaign to dismantle sanctuary.

A period of sustained attacks upon sanctuary began in 1530 when Henry VIII passed an Act banning abjurors from leaving the realm,⁵⁹ although, prior to this, legislation had been passed decreeing that all who chose to abjure the realm were to

54 Cited in Ives (n 53) 300.

55 *ibid* 298-299.

56 *ibid* 300-301.

57 Baker (n 35) 12.

58 Helmholz (n 14) 77.

59 22 Henry 8, c 14.

have the thumb of their right hand branded with the letter 'A', 'to the intent that he might be better known among the King's subjects to have abjured'.⁶⁰ Under the new Act, those who wished to abjure the realm were instead to choose a sanctuary within England to which they would remain for the rest of their life. Following this, Henry banned anyone accused of high treason from sanctuary altogether.⁶¹ And then, in a piece of legislation designed to humiliate and stigmatise those in sanctuary, a further Act was passed making it compulsory for all sanctuary-men to wear a 20-inch square badge identifying themselves as such.⁶²

A petition was sent to Thomas Cromwell, Henry VIII's chief minister, in 1534 complaining that the chartered sanctuaries were undermining royal justice and reducing revenues due the king.⁶³ Two years later Cromwell, in surviving notes he made for his audiences with the king, wrote of the need to seek 'the utter destruction of sanctuaries'.⁶⁴ That same year an uprising in the north of England, known as the Pilgrimage of Grace, directed itself against Henry's general policy towards the Church and, in particular, his changes to the laws of sanctuary.⁶⁵ Thornley argues that this rebellion was, in effect, an attempt by the North to recover its ancient liberties.⁶⁶ Following the accession of Edward VI, there was an attempt at Beverley to resurrect the right of sanctuary there.⁶⁷ This was swiftly suppressed, only for a further attempt to re-establish sanctuary after the accession of the Catholic Queen Mary in 1553, with the final abolition of the sanctuary following the end of her reign. This suggests a continuing belief and attachment to the principle of sanctuary some years after their effective suppression by Henry VIII, not to mention resistance to the attempt at the suppression itself.

60 21 Henry 8, c 2.

61 26 Henry 8, c 13 and 28 Henry 8, c 7.

62 27 Henry 8, c 19.

63 Norman Trenholme, 'The Right of Sanctuary in England: A Study in Institutional History' (1903) 1 *University of Missouri Studies* 1, 59.

64 Cox (n 15) 322.

65 *ibid* 323-324.

66 Thornley (n 47) 'Destruction of Sanctuary', 203.

67 Cox (n 15) 147.

In 1540 Henry VIII passed an Act that finally abolished all the chartered sanctuaries.⁶⁸ However, ordinary sanctuary was still permitted solely within the boundaries of churches and churchyards. But even there, all of those accused of the most serious crimes – homicide, rape, theft, treason, etc. – were excluded. It is estimated that following the Act of 1540 and the dissolution of the monasteries the number of sanctuaries in England was reduced to around half their previous number.⁶⁹ At Beaulieu the clergy pleaded with Thomas Cromwell for the right of those sanctuary men who were there at the time to be allowed to remain with their wives and children for the remainder of their lives, on condition that no others were henceforth admitted. This request was apparently acceded to.⁷⁰ To replace the chartered sanctuaries, the Act stipulated that eight towns were to serve as secular and crown-controlled replacements. These initially included Wells, Westminster, Northampton, Norwich, York, Derby, Launceston and Manchester.⁷¹ It is possible, even likely, that this statute was influenced by the Old Testament sanctuary cities by the Jordan.⁷² Other examples from this time of secular asylum cities/towns can be found amongst the Flemish and Germans.⁷³ Sanctuary towns also existed in the Netherlands until 1795, and in Denmark one sanctuary town contained thousands of fugitives until as late as 1827.⁷⁴ The burden of state regulation and supervision of those seeking sanctuary in these towns, the fact that they could offer asylum for little other than private debt, plus the strict limitation of only 20 sanctuary men and women at any time, made these new sanctuaries a mere shadow of their predecessors.⁷⁵ And indeed, all of them, with the exception of Westminster, fell quickly into complete desuetude, only to be unceremoniously abolished altogether just 60 years later.⁷⁶

68 32 Henry 8, c 12.

69 Trenholme (n 63) 30-31.

70 Cox (n 15) 188.

71 *ibid* 326.

72 Mazinghi (n 50) 83-84.

73 Mazinghi (n 50) 85.

74 Wayne A Logan, 'Criminal Law Sanctuaries' (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 321, 369.

75 Thornley (n 47) 'Destruction of Sanctuary', 204.

76 1 James I, c 25.

An addendum on the creation of these new sanctuary cities provides an interesting glimpse into a way of thinking that was perhaps new then, but which has today become ubiquitous in the discourse on asylum: security and economic burden. Manchester petitioned Henry VIII against its designation as a sanctuary city. The reasons given were that an influx of destitute sanctuary-seekers would depress the local economy of the cloth and cotton trade, and in addition Manchester had no city walls, nor a mayor, sheriff or bailiff to ensure public order. Henry acceded to the Mancunian request and moved the sanctuary to Chester, which had little or no trade but did have the necessary security apparatus, e.g. a gaol, mayor and bailiff – although, following protests from Chester, the sanctuary was eventually moved to Stafford.⁷⁷ With a modern attempt to impose universal law and sovereign power came some peculiarly modern prejudices about asylum and asylum-seekers, namely that they represented an economic cost and/or a security risk. With James I's Act abolishing these sanctuary cities the tradition of sanctuary in England, having survived for over 1000 years, came to an end.⁷⁸

If sanctuary has 'its root in a sentiment...that a peculiar sacredness attaches to particular places', then once such a sanctified approach was removed, sanctuaries were liable to exposure to the ruthless calculating approach of modern rationalism.⁷⁹ At no point during its long history would church sanctuary have been able to withstand determined physical attacks by secular authorities.⁸⁰ What preserved their immunity in practice was the reverence and respect in which they were held by the society around them from top to bottom. Baker states that by the early 17th century, public opinion had shifted so that it 'would not stand' for an institution such as sanctuary.⁸¹ But as we saw earlier, the church itself began the process of undermining sanctuary via canon law several centuries previously. Once again, as in Greece and Rome previously, the rot set in once sanctuary/asylum was reconfigured within a legal paradigm.

77 Trenholme (n 63) 88.

78 21 James I, c 28.

79 Mazzinghi (n 50) 1. See also Dawn Marie Hayes, *Body and Sacred Space in Medieval Europe, 1100-1389* (Routledge 2003); Rosenwein (n 19).

80 Baker (n 35) 8.

81 *ibid* 13.

The Twilight of Sanctuary

In 1563 the Council of Trent issued a call for a return to the 'due reverence' for ecclesiastical immunity. This was a last gasp of such a notion. Certainly in England the legislation of Henry VIII and then James I abolished sanctuary as a plea in a court of law, but, as Ryan points out, it did not declare the institution itself as illegal: 'Thus, merely the procedural, rather than the substantive right, was abolished.'⁸² This would explain how various sanctuaries, mostly for debt, were able to survive in places such as Holyrood, the Southwark Mint and Whitefriars until late into the 18th and 19th centuries. 'Early modern London had various neighbourhoods that served as debtors' asylums, from which the instruments of public authority were excluded.'⁸³ The last of these were abolished only in the 1720s.⁸⁴ The 'counties palatine' – those which possessed historical immunities from the king – such as Chester, Durham and Lancashire retained some of their immunities into the 18th century.⁸⁵ In Scotland debtors could seek sanctuary right up until 1880 when imprisonment for debt was abolished, thus making the right of sanctuary superfluous. This was probably the last example of the ancient right of sanctuary in the British Isles.⁸⁶

The medieval European institution of sanctuary found its way as far afield as New Mexico in the 17th century, via the Spanish *conquistadors*.⁸⁷ It survived there until the late 19th century when it too was abolished.⁸⁸ Even in the wake of uprisings by Native Americans, those accused of sedition and rebellion who sought church sanctuary were left unmolested by the colonial authorities.⁸⁹ The historian of these sanctuaries, Elizabeth Howard West, reaches a conclusion on their decline that chimes

⁸² Ryan (n 3) 229.

⁸³ Kent J Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (University of California 1996) 2.

⁸⁴ Paul Haagen, 'Imprisonment for Debt in England and Wales' (PhD Thesis, Princeton University 1986) 270-311.

⁸⁵ Ryan (n 3) 229; Thornley (n 47) 'Destruction of Sanctuary', 184.

⁸⁶ Trenholme (n 63) 92-93.

⁸⁷ Elizabeth Howard West, 'The Right of Asylum in New Mexico in the Seventeenth and Eighteenth Centuries' (1928) 8 *Hispanic American Historical Review* 357, 361.

⁸⁸ *ibid* 362.

⁸⁹ See, for example, the case of Juan de Tafoya in *ibid* 369-371.

with her European counterparts: ‘Naturally as the civil courts became stronger, the practice lost in efficacy and was bound in the natural course of events to disappear.’⁹⁰

As the modern state was forged throughout Europe and beyond, the last remnants of sanctuary were erased. In France, although a *droit d’asile* was severely limited in 1539, just a year before Henry VIII’s seminal Act in England, it was only finally abolished during the French Revolution.⁹¹ Sanctuary was severely truncated in Spain during the restoration of absolute monarchy from the early 19th century onwards.⁹² Sanctuary was abolished in Austria in 1776; Silesia in 1743; Tuscany in 1769; Prussia in 1794; Franconia in 1799; Baden in 1803; Wurtemberg in 1804; Rome in 1815; Saxe-Weimar in 1823 and Saxony in 1827.⁹³ Sanctuary cities survived in Holland until 1798 and in Denmark until 1827.⁹⁴ The Vatican signed concordats with Austria in 1855 and Ecuador in 1862 which stated that the right of asylum could be vitiated in the interests of ‘justice’ and ‘public security’.⁹⁵ Such was the almost complete erasure of asylum by the turn of the 20th century, that in a standard textbook on international law published in 1906, James Bassett Moore could spend over a hundred pages discussing the question of a possible right of asylum solely in terms of a right vested in states within their diplomatic missions abroad. Moore’s conclusion was therefore that: ‘The word asylum has in its legal relations become to a great extent metaphorical.’⁹⁶ Thirty years later Timbal identifies the right of asylum persisting only in places ‘at a certain level of civilisation’, namely in parts of Asia and

90 *ibid* 391.

91 Henri Coursier, ‘Restauration du droit d’asile’ (1950) 32 *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge* 909, 910; Trenholme (n 63) 97. See also Kathryn L Reyerson, ‘Flight from Prosecution: The Search for Religious Asylum in Medieval Montpellier’ (1992) 17 *French Historical Studies* 603, 623-624.

92 West (n 87) 361.

93 Timbal (n 20) 449; James Bassett Moore, *A Digest of International Law: Volume II* (US Government Printing Office 1906) 767.

94 Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Indiana University 1994) 144-145.

95 Timbal (n 20) 451.

96 Moore (n 93) 755.

Africa.⁹⁷ There, as in Europe, the right was associated with temples, woods, shrines etc. In Persia it survived until the early 20th century but, following the establishment of a constitutional government, asylum 'lost its importance' and was eventually abolished a few years later.⁹⁸ Typically perhaps, the Catholic Church only finally admitted the obvious long after the question had become moot, when in 1983 a revision of the canon law finally dropped any reference whatsoever to sanctuary.⁹⁹

The Historical Judgement on Sanctuary

Most historians writing over the last three centuries have concurred with the lawyers of the late Middle Ages, arguing that sanctuary had its place during 'barbarous times' and a 'low state of civilisation', as 'mitigating the cruelties of a cruel age', but was obsolete or even offensive under a modern rule of law.¹⁰⁰ In *Memorials of Westminster Abbey* (1865) the then Dean of the Abbey and Professor of Ecclesiastical History at Oxford, Arthur Stanley, wrote a classic statement on how modernity perceived sanctuary:

The (chartered) sanctuaries of mediaeval Christendom may have been necessary remedies for a barbarous state of society, but when the barbarism, of which they formed part, disappeared, they became almost unmixed evils.¹⁰¹

Cesare Beccaria captures the peculiarly modern concern that multiple sites of sovereign authority undermined a civilised way of being in his seminal work, *On Crimes and Punishments*, published in 1764:

Within the borders of a country there should be no place independent of its laws [and] to multiply such places of asylum is to create so many small sovereignties...where laws have no say.¹⁰²

97 Timbal (n 20) 455.

98 *ibid* 457.

99 Jorge L Carro, 'Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?' (1986) 54 *University of Cincinnati Law Review* 747, 767.

100 Mazzinghi (n 50) 101; Trenholme (n 63) 96; Timbal (n 20) 453; West (n 87) 359.

101 Arthur Stanley, *Historical Memorials of Westminster Abbey* (John Murray 1886) 414.

Carro, marshalling his arguments against the US Sanctuary Movement's defiance of the law during the 1980s – the subject of Part III of this thesis – suggests that the abolition of sanctuary was a necessary pre-condition for modern individual rights and the extrication of sovereign authority from the grip of the Church. He then goes on to quote the Fifth Amendment to the US Constitution, a classic statement of absolute confidence in the efficacy of the liberal rule of law and property rights as the sole guarantors of justice.¹⁰³ This together with a more direct claim made by the French revolutionaries – 'The right of asylum is being abolished in France, for it's now the law being the asylum of all people' – demonstrates law's claim to an all-encompassing imperium, a feature of the modern state, which cannot abide the principles on which sanctuary has historically stood: a space of otherness to the authority of law and sovereign power.¹⁰⁴

Thornley describes Henry VIII's destruction of the sanctuaries as one of 'level[ing] liberties to make a foundation for liberty'.¹⁰⁵ This is in spite of her showing the utter cynicism of Henry's attacks on sanctuary. But for her, the fate of sanctuaries was already sealed by the coming break with Rome, and its attendant anti-clericalism. In addition, these privileges were casualties of modernity's 'inevitable' process of sweeping away all jurisdictions which stood outside the sovereign authority.¹⁰⁶ Along similar lines, Pope argues that the key determining issue in the abolition of sanctuary was simply that the king could no longer tolerate a 'foreign authority' within his realm.¹⁰⁷ However, McSheffrey challenges these conclusions by pointing to contemporary evidence showing that almost up to their dissolution the chartered sanctuaries operated on the basis of lively, functional and accepted practices, even if they were sometimes controversial.¹⁰⁸ Moreover, most people at the time would have seen no inherent problem with the Church giving sanctuary to

102 Cesare Beccaria, *On Crimes and Punishments and Other Writings* (Aaron Thomas ed, Aaron Thomas and Jeremy Parzen trs, University of Toronto 2008) 92.

103 Carro (n 99) 767.

104 Quoted in Bianchi (n 94) 144.

105 Thornley (n 47) 'Destruction of Sanctuary', 185.

106 *ibid* 200.

107 Pope (n 4) 697.

108 McSheffrey (n 15) 493 and generally.

criminals, as this fit with common notions of Christian mercy, charity and the possibility of redemption.¹⁰⁹

Almost alone amongst historians of sanctuary, Mazinghi admits the limitations of law and the crucial role that sanctuary did, and potentially could have, in mitigating its flaws. For him, the inherent ‘generality’ of law makes ‘every system or code of laws’ imperfect; ‘Immunities suppose the law deficient, and the right to sanctuary was such [an] immunity’.¹¹⁰ As such, a more well-rounded approach, more respectful of the specific circumstances in each case, was lost with the destruction of sanctuary under the Tudors,¹¹¹ although in a weak statement of qualification Mazinghi suggests that, over time, as law became a ‘less imperfect’ system, so the institution of sanctuary necessarily went into decline.¹¹² The question as to how this should be if ‘every system or code of laws’ is imperfect is, of course, not resolved. Writing just a few years ago, William Chester Jordan posits that sanctuary mainly served the purpose that plea-bargaining does today: as a means to temper the harshness of the law. As such, its popularity in its day and its continued resonance down to the present, including the US Sanctuary Movement of the 1980s, was largely due to its major effect: that ‘it saved lives’.¹¹³ Yet plea-bargaining is an integral and well-accepted part of the legal system; sanctuary never has been. Karl Blaine Shoemaker rightly identifies most of these historians as displaying ‘an acute feeling of their superiority over legal practices of the earlier age’.¹¹⁴ However, as we survey the treatment of refugees by law under modernity – the subject of the next section of this thesis – as compared to earlier epochs, it should become clear that such a sense of superiority is misplaced.

109 *ibid* 509.

110 Mazinghi (n 50) 100.

111 *ibid* 106.

112 *ibid* 101.

113 William Chester Jordan, ‘A Fresh Look at Medieval Sanctuary’ in Ruth Mazo Karras, Joel Kaye and E Ann Matter (eds), *Law and the Illicit in Medieval Europe* (University of Pennsylvania 2008) 31-32.

114 Karl Blaine Shoemaker, *Sanctuary Law: Changing Conceptions of Wrongdoing and Punishment in Medieval European Law* (PhD Thesis, University of California, Berkeley 2001) 17.

Conclusion

There are a few essential points that can be taken from this traversal of several thousand years of asylum/sanctuary. First, and most importantly for this thesis, asylum has repeatedly come into conflict with law. Whether it was Solon's attempts at a comprehensive legal code, the Tiberian 'reform' or the re-emergence of law in the latter half of the Middle Ages, at each juncture asylum found itself bound to such an extent that it either ceased to exist outright or was slowly marginalised out of existence. The one exception was the legalisation of church sanctuary in the closing decades of the Western Roman Empire. But here the failure of law to stamp out asylum was largely due to the collapse of the legal order that immediately followed. The reasons for this inverse relationship between asylum and law are tied to a second conclusion that we can draw from this history. Asylum consistently arose as a space that existed beyond that of law and the state.

Asylum, understood in its original meaning, has generally been interpreted as freedom from seizure from one's pursuers. Certainly this is one very important aspect, which survives into our contemporary law of asylum. But for the Greeks, the *asylia* had this characteristic *because* they possessed a more general concept of 'freedom from seizure': they were places beyond the control of any state or its law, whether of their fellow Greeks or the occupying Romans. In the case of the Romans, for whom a unitary political and legal authority was paramount, the *asylia* could not be allowed to survive. The Roman Empire can thus be bookended in its confrontation with asylum/sanctuary: at its height the former extinguished the latter, at its nadir Rome

found itself unable to hold the line against the Church and those who sought succour within its walls. It is precisely during the epoch that followed, which saw the most profound retreat in the West of law and the state, that sanctuary was able to flourish to perhaps its fullest extent.

Atle Grahl-Madsen writes:

Throughout history sovereigns have maintained the right to decide whether a refugee shall be given shelter, be ordered to leave the territory, or be handed over outright to the ruler whom he has tried to escape.¹

And yet, as we have seen, it has not always been so straightforward. Sovereigns have frequently had to defer to religious or other authorities on such matters, even when the ruler from whom the refugee has fled has been that particular sovereign. In describing the genealogy of asylum there is one aspect that appears strikingly different from the system of refugee law today. Almost without exception, what we have discovered have been spaces which in one way or another stood beyond the reach of the sovereign power. Today, in contrast, refugee law is about the movement from one sovereign order to another, but never about escaping it altogether. Indeed, one of the central hypotheses of my research is that it is the practice of recognising the refugee almost exclusively in terms of the law, which has landed the refugee in the degraded existence that he now experiences most of the time. This theme will become most evident in Part II on modern refugee law, and Part III on the US Sanctuary Movement. In a sense the concept of sanctuary has been turned inside out; instead of a space within, yet without, we now have a space that is without (of the country of origin), yet inescapably within (the law). Instead of space, refugee law is centrally concerned with defining the contours of the refugee subject himself. This biopolitical concern with the measuring and controlling of the subject is evidently latent in law, for it appears in the first laws of asylum from the end of the Roman Empire that restricted sanctuary to certain classes of persons such as public debtors and ‘bogus’ converts to Christianity. A similar paradigm is at work in the canon law’s *casus excepti*, which too concerns itself with the character of the refugee subject.

¹ Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume One* (AW Sijthoff 1966) 9.

A final conclusion we can draw is that, while the integrity of asylum has never been absolute, the question of political, religious or social solidarity with its ideals have been indispensable to its functioning, much more so than law. Sanctuary in England was more or less abolished in 1623. Yet just 60 years later, one of the largest ever movements of refugees into England took place with the arrival of the Huguenots. In relation to the current population of the UK, the equivalent proportion of refugee arrivals today would number over 1.5 million people. Yet the absence of law was no barrier to asylum. Grahl-Madsen argues that the sequence of events – the effective expulsion of the French Protestants and their reception in England, Germany, Holland etc – represents the origins of the ‘modern European tradition of asylum’.² Insofar as it does, it can be understood not necessarily as founding a right of individuals to asylum, but rather of states to grant asylum, for the essential act here was the freedom of receiving states to welcome unwanted subjects of sending states without having to incur the hostility of the latter; the individual refugee was merely a beneficiary of this right.³ Philip Marfleet reflects on the transformation from the ancient practice of sanctuary, abolished by James I in 1623, and its resurrection in a new guise some 60 years later:

The idea of protection remained but the practice of providing security had changed profoundly. The territory of the national state now defined the boundaries of refuge: the state itself had in effect been sacralised and provided space within which fugitives might find protection. They must be aliens, however: subjects of another state authority and ready to submit themselves to English Law.⁴

The space of asylum in this modern conception was not outside sovereign control. Indeed, it was only at the invitation of the Crown, no doubt encouraged by popular feeling, that the Huguenots were admitted. However, this right of the state remained discretionary and thus open to political influence and pressure. Again, throughout most of the 19th century, Britain had no laws restricting entry to the country, and in fact became known as a haven for refugees. Indeed, one attempt by Palmerston’s

2 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume Two* (AW Sijthoff 1972) 8.

3 *ibid* 7.

4 Philip Marfleet, ‘Understanding “Sanctuary”: Faith and Traditions of Asylum’ (2011) 24 *Journal of Refugee Studies* 440, 448.

administration in 1858 to enact a very minor restriction on refugees led to mass popular resistance and the fall of the government.⁵ And yet today, in spite of the panoply of international and domestic laws supposedly guaranteeing the right of asylum, lack of sympathy or support has rendered it increasingly meaningless. In other words, the more law has come to concern itself with asylum, the less space there has been for the political element.

As has been apparent over the preceding chapters, there have been many alterations and variations of asylum in the course of the last few thousand years. But a common thread throughout has been fidelity to a greater or lesser extent to the etymology of ‘asylum’ – freedom from seizure. Milligan makes the point that the history of legal sanctions in respect of sanctuary in the pre-modern world is overwhelmingly in respect of violations of sanctuary.⁶ By contrast, today the reverse is true: the force of law is directed against those who would either seek or offer sanctuary outside of the sovereign order.

5 Bernard Porter, *The Refugee Question in Mid-Victorian Politics* (Cambridge University 1979) 196-199.

6 Charles S Milligan, ‘Ethical Aspects of Refugee Issues and U.S. Policy’ in Ved P Nanda (ed), *Refugee Law and Policy: International and U.S. Responses* (Greenwood Press 1989) 175.

PART II

THE COMING OF REFUGEE LAW

Introduction

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger.¹

In the preceding chapters we have explored the genealogy of asylum and found that, as a concept, it has been repeatedly in conflict with law. If Volker Türk and Frances Nicholson, writing under the auspices of the UNHCR itself, are correct that the 1951 Convention is the embodiment of this tradition then it would seem as if somehow modern refugee law has managed to square asylum into the legal circle. Yet the fallaciousness of this argument can be demonstrated by examining the origins and development of this body of law. Whereas the roots of asylum lie in ‘freedom from seizure’ by sovereign power, and solidarity with the refugee, the impetus for the development of refugee law has instead been the preservation and strengthening of sovereign right. Part II provides a relatively brief exposition of this development. What should become clear, however, is the striking difference of this process, and the concerns that dominate it, from that which governed the evolution of asylum. In particular it is noticeable the extent to which refugee law from the beginning has had a biopolitical focus on identifying, measuring and judging the refugee; its primary concern has been to control and manage movement.

¹ Volker Türk and Frances Nicholson, ‘Refugee protection in international law: an overall perspective’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University 2003) 3.

James C Hathaway opens his discussion of the origins of international refugee law by laying out the common-sense definition of a refugee: ‘a person compelled to flee his State of origin or residence due to political troubles, persecution, famine or natural disaster’.² Certainly this is far broader than any legal definition that we have had, for it includes economic refugees (victims of famine) as well as victims of natural disasters. However, it remains restricted to those fleeing across borders. The refugee of modernity is indeed inextricably tied to the question of the state. This is another clear divide from the tradition of asylum, which made no distinction on this question. In fact, most asylees of the past were from the local area or from within the state in which asylum was sought. The Ancient Greek *asylia* or church sanctuary would therefore not have fitted within the contemporary notion of asylum. Emmanuel Le Roy Ladurie, in his detailed and revealing picture of life in 13th and 14th century southern France, *Montaillou*, describes how Cathar refugees from the Church’s inquisition moved with ease across the Pyrenees and back again, often as part of the annual transhumance, as well as further afield to Valencia, Majorca, Lombardy and Sicily.³ As both Patricia Tuitt and Caren Kaplan have discussed, the question of movement as determinative of the refugee is highly contingent, particularly in the modern context.⁴ And of course, the tens of millions of IDPs today are testament to the restrictiveness of that particular aspect of the refugee definition. But for roughly the first four centuries of the modern nation-state until 1920, ‘there was little concern to delimit the scope of the refugee definition’.⁵ As Terje Einarsen points out, ‘persecuted people before the 20th century often simply moved to new countries or

2 James C Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’ (1984) 33 *International and Comparative Law Quarterly* 348, 348.

3 Emmanuel Le Roy Ladurie, *Montaillou: Cathars and Catholics in a French Village 1294-1324* (Barbara Bray tr, Penguin 1980) 187, 195, 238, 246, 286.

4 Patricia Tuitt, ‘Rethinking the refugee concept’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University 1999); Caren Kaplan, *Questions of Travel: Postmodern Discourses of Displacement* (Duke University 1996).

5 Hathaway (n 2) 348.

even new continents without many immigration restrictions'.⁶ Erskine May, in his *Constitutional History of England*, writes:

The Crown indeed had claimed the right of ordering aliens to withdraw from the realm: but this prerogative had not been exercised since the reign of Elizabeth (viz. in 1571, 1574 and 1575). From that period, through civil wars and revolutions, a disputed succession, and treasonable plots against the state, no foreigners had been disturbed.⁷

Although the term 'refugee' had been in use since the days of the Huguenots, in the 19th century 'refugee' still tended to refer just to that one phenomenon. French and English dictionaries continued to define 'refugees' in such a way, and German dictionaries only contained the French word *réfugié*, again referring only to the Huguenots; it was only after the First World War, around the time of the first instruments of international refugee law, that *flüchtling* came into use designating refugees in general.⁸

The Modern Law of Asylum as the Right of States

The founding theorists of international law laid out certain key principles in relation to asylum, which have remained at the heart of refugee law today. Hugo Grotius sought asylum in France and was one of the first modern jurists to call for a right of asylum to be recognised in international law.⁹ Yet he qualified this by denying such a right to the undeserving, namely those guilty of having done something 'injurious to human society or to other men'.¹⁰ Christian Wolff sets out a natural law by which 'in primitive society any man is allowed to dwell anywhere in the world', whilst on the other hand considering the right of the sovereign to decide

6 Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 43.

7 Quoted in DW Greig, 'The Protection of Refugees and Customary International Law' (1978) 8 *Australian Year Book of International Law* 108, 120.

8 Michael R Marrus, *The Unwanted: European Refugees from the First World War Through the Cold War* (Temple University 2002) 9.

9 Hugo Grotius, *The Law of War and Peace* (Francis W Kelsey tr, Bobbs-Merrill 1962) ii.2.XVI.

10 *ibid* ii.21.V.

‘whether or not he desires to receive an outsider into his state’.¹¹ On balance, the right of the state in civilised society must be preferred: ‘if admittance is refused, that must be endured’.¹² Samuel von Pufendorf believed that it was a matter exclusively for the state to decide whether or not it was in its own interests to allow entry for the refugee in question.¹³ And Emmerich de Vattel perhaps expressed the problem from the point of states most clearly when he wrote:

[I]f in the abstract this right is a necessary and perfect one...it is only an imperfect one relative to each individual country; for...every Nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble...By reason of its natural liberty it is for each Nation to decide whether it is or is not in apposition to receive an alien. Hence an exile has no absolute right to choose a country at will and settle himself there as he pleases.¹⁴

Grahl-Madsen writes that both Grotius and Vattel, although arguing from quite different standpoints, recognised a “right of asylum” for the individual, but it was undoubtedly what Vattel called an “imperfect right”, meaning that the corresponding obligation depends upon the judgement of him who owes it’.¹⁵ This may be so, but if the individual right of asylum is imperfect, then the classic authors on international law are much clearer in asserting a far more ‘perfect’ and secure right of asylum when understood as that which belongs to the state. Grahl-Madsen recognises this when citing Vattel: a state is ‘free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation’.¹⁶ Léopold Bolesta-Koziebrodzki has pointed out that the right of asylum is founded upon the inherent right of the state to territorial integrity and the right to admit into its domain whomever it so wishes,¹⁷ whereas in *Réfugiés et Sans-Papiers: La République face au droit d’asile* Gérard Noiriel

11 Christian Wolff, *Jus Gentium Methodo Scientifica Pettractatum: Volume Two* (Joseph Horace Drake [trans], Clarendon Press 1934) s.147, 148.

12 *ibid* 148.

13 Quoted in Einarsen (n 6) 42.

14 Quoted in Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume Two* (AW Sijthoff 1972) 14.

15 *ibid* 16.

16 *ibid*.

17 Léopold Bolesta-Koziebrodzki, *Le Droit d’asile*, (AW Sythoff 1962) 79.

identifies the modern principle of state sovereignty as the link between the destruction of the ancient sanctuaries and the modern law of asylum:

From the beginning of the 16th century, the right of asylum became the prerogative of royal power. It presupposed the sovereignty of the refugee's state of origin (the principle of territorial plenitude excluding the possibility of the domestic spaces which had constituted the religious refuges of earlier centuries) and the sovereignty of the state of reception (which alone decided whether or not to receive the exile). The right of asylum was therefore a consequence and not a limitation of the principle of sovereignty.¹⁸

Henri Coursier describes very well the transformation following the French Revolution:

With the new regime, the right of asylum ceases to be a right which the person can claim, relying on the principles of humanity as being above the law of the State, to become instead a right which, while it operates in the interests of the individual on the basis of humanitarian norms, is one that the state asserts for itself.¹⁹

Put another way, Richard J Fruchterman has written that the birth of the modern age brought with it 'a shift away from the idea that the individual had a right to territorial asylum and toward the concept that it was solely the right of the State to grant or deny territorial asylum'.²⁰ In the original draft of the 1951 Convention, what is now paragraph four of the Preamble referred to the 'right of asylum' and the consequent burden it placed on states of refuge. During the *travaux préparatoires* concern was expressed by a number of delegates at this wording. But the President of the conference reassured them that the right being described was that of the state to grant asylum, not of the individual who benefits from it.²¹ Indeed, Noiriel makes the case that the right of asylum, in legal terms, has always contained within itself the

18 Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d'asile XIXe -XXe siècles* (Hachette 1998) 20, footnote 1.

19 Henri Coursier, 'Restauration du droit d'asile' (1950) 32 *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge* 909, 911.

20 Richard L Fruchterman, 'Asylum : Theory and Practice' (1972) 26 *Judge Advocate General Journal* 169, 171.

21 Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With A Commentary by Dr Paul Weiss* (Cambridge University 1995) 30. The final draft, to clarify the point, refers to the 'grant of asylum'.

contradiction between the principles of national sovereignty and the ‘rights of man’.²² He sheds light on a crucial difference between the reception of refugees under the *ancien regime* and that which emerged following the French Revolution. During the earlier period the reception of refugees was not an area in which the state had a particularly strong role. Instead the reception and support of refugees was decided within local communities, guilds and the like, with the active participation of the refugees themselves in reconstituting their social lives within the host community. By contrast, following the Revolution the state began to assume the sole role in managing and regulating the reception of refugees. This was the inevitable result of the modern ideology of power organised vertically and centralised in the state.²³ For much of the 19th century the logic of asylum in France remained closer to the norms of the *ancien regime* than to modernity.²⁴ Granting asylum had been a common practice under the monarchy throughout the 18th century, particularly for Catholics fleeing repression in the Protestant countries. However, the role of royal power was not to determine who should or should not be granted asylum, but rather was to decide on the distribution of public monies to support the asylees. It was only with the advent of the republican idea of the indissolubility between state and people that it became the business of the state to cast its eyes upon the person of the refugee.²⁵ Yet for much of the 19th century, just as in broader terms France continued to wrestle with a forward-looking republicanism constrained by repeated throwbacks to the old society, so too an encroaching biopolitical paradigm only gradually edged out the more open practice of asylum that had hitherto existed. Already in 1797, for example, at the height of the Thermidorian reaction, a law was passed allowing for the expulsion of aliens whose continued presence was considered likely to upset ‘*l’ordre et la tranquillité publique*’.²⁶

In France and elsewhere the advent of the modern nation-state reframed asylum as a species of immigration policy, with a focus on the need to account for and manage the movements of population flows. This was not a sudden development, but

22 Noiriel (n 18) 19-20 and generally.

23 *ibid* 45.

24 *ibid* 32.

25 *ibid* 35.

26 *Loi relative aux passports, No. 1502, 28 Vendémiaire An VI* (19 October 1797), Article 7.

one that gestated over the course of the 19th and into the early 20th century, culminating in the rapid spread of border controls, and the equally rapid spread of refugee law that resulted from those controls in the years surrounding World War One. The concerns which drove this process were dominated by two elements of the biopolitical paradigm: the effective management of population as a source of wealth, and the use of a security discourse to control and monitor population flows. Furthermore, a managerial rather than a political framework increasingly came to dominate asylum policy. The argument of the following chapters is that far from international refugee law acting as a break on this phenomenon, it regularised and normalised it. As such, the standard narrative of the birth of international refugee law needs to be challenged. By looking at the evolution of asylum and immigration law in the national context in the century prior to the birth of international refugee law we will be able to witness how it flowed from these developments rather than challenged them.

It was the Montagnard Constitution of 24 June 1793 that proclaimed for the first time in modern law the right of asylum. Article 120 declared that the French Nation ‘serves as a place of refuge for all who, on account of liberty, are banished from their native country. These it refuses to deliver up to tyrants.’ Yet already the legal right is circumscribed: flight on grounds of political or religious persecution alone defines those as worthy of asylum. Moreover, we find here too a distinction drawn between those who are fleeing due to their adherence to liberal democratic principles and others less deserving. Thus some of the key frameworks of the modern legal definition of the refugee are present at its inception. It is often claimed that the 1793 legislation was merely a secular updating of the ancient custom of sanctuary.²⁷ But, as we have already seen, that tradition had a quite different character, based on different criteria and conceived of as spaces beyond the realm of sovereign power and law. Moreover, as generous as it was, this Constitution, although endorsed overwhelmingly by a referendum based on universal male suffrage, was suspended by the Convention on the grounds that the emergency war situation made its implementation impossible for the time being. In fact, following the Thermidorian Reaction of the following year, it was effectively abolished. This early attempt at a

27 Janine Ponty, *L’immigration dans les textes: France, 1789-2002* (Belin 2003) 13; Noiriel (n 18) 307.

relatively generous refugee law fell victim to the emerging security paradigm. Thus this often quoted instrument of refugee law was never actually in force. Nonetheless, Article 120 does reflect the earlier tradition in being more openly political, an aspect that would be denied or covered over by later refugee law.

The UK effectively had no border controls right up until the seminal 1905 *Aliens Act*.²⁸ Bernard Porter has described the period prior to that as being one where ‘asylum was maintained not by law, but by the absence of laws’.²⁹ Indeed, prior to the 18th Century there was very little legislation regulating entry, settlement or even the grant of citizenship.³⁰ Dallal Stevens summarises asylum policy at this time as having been based on the recognition of ‘genuine suffering, religious affinity and politics’.³¹ In 1708 the Act for Naturalisation of Foreign Protestants, introduced as a response to the huge numbers of Huguenot arrivals in the previous decades, actually relaxed what controls existed. The provisions of the Act required the refugee only to offer proof that they had taken the sacrament in a Protestant or Reformed church in the preceding three months.³² However, Parliament was clear in laying out its motives for such openness, which expresses clearly one of the key aspects of Foucault’s biopolitical paradigm: ‘the increase of people is a means of advancing the wealth and strength of a nation’.³³ This Act was repealed just three years later, with Parliament declaring that it had since become apparent that the new arrivals had contributed to ‘the discouragement of natural-born subjects and to the detriment of the trade and wealth thereof’.³⁴ The issue of asylum would return to the UK in the context of a perceived national security threat in the years following the French Revolution.

28 *Aliens Act* 1905, 5 Edward VII c. 12.

29 Bernard Porter, *The Refugee Question in Mid-Victorian Politics* (Cambridge University 1979) 3; See also Noiriel (n 18) 307, footnote 1.

30 Roger Kershaw and Mark Pearsall, *Immigrants and Aliens: A guide to sources on UK immigration and citizenship, 2nd Edition* (National Archives 2004) 8.

31 Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet and Maxwell 2004) 7.

32 Kershaw and Pearsall (n 30) 9.

33 7 Ann c.5.

34 10 Ann c.5.

The Emerging Security Paradigm – Stage One: Fallout From the French Revolution

The political instability unleashed by the events of 1789 and the Napoleonic Wars, led to some legislative controls in the 1790s. The Aliens Acts of 1793 and 1798 made it mandatory for all immigrants to register on arrival at ports of entry.³⁵ These registration documents contained their names, occupations, ranks and addresses, and had to be lodged with the local authorities, usually in the form of the local justices of the peace. This system, in turn, made possible for the first time a systematic collection of data by the government. For example, in 1797 the government issued a directive to local authorities calling for the reporting of all aliens who had arrived in the previous five years. The reporting of aliens was also extended under the legislation to householders who gave lodgings to these foreigners. Moreover, all aliens had to apply for passports should they wish to leave London, and faced restrictions as to where they could live outside the capital. In order to manage the huge growth in the control and management of immigrants, a whole new government department was set up: the Aliens Office. One of the primary goals of this new department was to ascertain from local authorities the character of any and all aliens.³⁶ In a precursor of things to come these pieces of legislation, enacted as an emergency response to war conditions in the wake of the French Revolution, ended up having a far longer life beyond the emergency situation. So, for example, Vaughan Bevan writes of the 1793 Act:

The Act's real importance lay in the fact that so many of the features of modern control appeared within it e.g. entry via designated ports, licences to enter, a central system of record keeping including reports of hoteliers, control on internal movement by passports and an unfettered and expeditious power of removal.³⁷

In addition, the overall picture is one that sees the yoking together of national security fears with the arrival of refugees, another leading trope of modernity that continues to dominate the issue of asylum today. This aspect becomes most evident in the 1798 Act, which sought to toughen the restrictions imposed by the Act of 1793, specifically

35 *Aliens Act* 1793, 33 George III c. 21; *Aliens Act* 1798, 38 George III c.50.

36 Kershaw and Pearsall (n 30) 45.

37 Vaughan Bevan, *The Development of British Immigration Law* (Croon Helm 1986) 60.

targeting asylum-seekers: ‘Refuge and Asylum which...have been granted to persons flying from the oppression and tyranny exercised in France...may...be abused by persons coming to this Kingdom for purposes dangerous to the interests and safety thereof’.³⁸ Amongst other things this Act also made it compulsory for aliens to produce their licence of residence to the local magistrates on demand,³⁹ and allowed indefinite detention of any alien deemed to be a ‘dangerous person’.⁴⁰ These measures, so familiar to us in the present scene of refugee law, are creatures of early modernity, and not such recent developments as is commonly supposed.

These provisions were repealed following Napoleon’s defeat in 1814, only to be reintroduced a year later. Then in 1816 a further Act was passed.⁴¹ This contained many of the original provisions of the earlier acts, only this time the register of aliens was to be compiled and kept by central government rather than by local authorities. This legislation only applied to new arrivals and not to those already in the UK. However, in 1826 the Aliens Registration Act extended such controls over already settled immigrants.⁴² It required all aliens to register with the government giving their personal details within 14 days of the passing of the Act. Following this they were then required to report their address to the Aliens Office every six months. This Act was later repealed and replaced by a new Act in 1836, which abolished many of the more onerous requirements such as registration with the Aliens Office.⁴³ Indeed, the main provision that remained, for an initial declaration on arrival in port, was hardly enforced. In 1842, for example, some 11,600 aliens arrived in the UK, with only 6000 registering. In some areas the proportions were even lower; in Hull 794 arrived and just one registered, while in Liverpool no lists were kept at all.⁴⁴ A Select Committee report in 1843 noted that: ‘it is very generally disregarded by Foreigners and it is never enforced by the authorities’.⁴⁵ There are a few possible reasons why the

38 *Aliens Act* 1798, 38 George III c.50.

39 *ibid* s.15.

40 *ibid* s.16.

41 *Regulations of Aliens Act* 1816, 56 George III c. 86.

42 *Regulations of Aliens Act* 1826, 7 George IV c. 46.

43 *Aliens Act* 1836, 6 & 7 William IV c. 11.

44 Kershaw and Pearsall (n 30) 49.

45 Cited in Bevan (n 37) 64.

draconian approach to asylum and immigration should have apparently abated by the 1830s. The war fever and concomitant fears for national security of the preceding decades had receded. Bevan argues that the marked liberalisation of immigration controls in mid-19th century Britain was largely down to Victorian self-confidence, and a recognition that immigrants provided ‘vitality...to an already energetic population’.⁴⁶ Equally, it has been argued that the prevailing sentiment of laissez-faire made the idea of state controls *per se* unpalatable.⁴⁷ In essence, while immigration policy was fairly liberal in the UK, it was a function of the priorities and ideology of the state at the time.

With a mass immigration of Poles in 1830 France began to number its asylees in the thousands rather than the hundreds, and within a decade there were some 30,000 refugees residing in France.⁴⁸ There was widespread political solidarity with the Polish exiles amongst the population. As a result a great many committees and support groups sprang up to welcome and support their integration into local communities.⁴⁹ By this time the Republic had been replaced by the restoration of the Bourbon monarchy, and the arguments for granting asylum rested on the tradition of hospitality under the *ancien regime*. But the logic of biopolitical law remained a consistent thread. On the basis of preserving public order, laws were passed in 1832 and 1834 giving the state the power to assign places of residence to the exiles on pain of arrest and deportation.⁵⁰ Janine Ponty suggests that these laws were partly in response to demands from other governments to move various of the refugees in France farther from the border, and to more isolated places in order to prevent them being able to remain in regular contact with subversives who had remained in their countries. One such request, for example, involved a demand by Metternich regarding Giuseppe Mazzini.⁵¹ Grahl-Madsen points out that the 1832 law was the first to

46 *ibid* 64.

47 *ibid* 65; Paul Foot, *Immigration and Race in British Politics* (Penguin 1965) 83; Porter (n 29) 93-4.

48 Noiriel (n 18) 37; Ponty (n 26) 27.

49 Noiriel (n 18) 63-64.

50 *Loi relative aux Etrangers réfugiés qui résideront en France, 21 avril 1832, Art.1; Circulaire du ministre de l'Intérieur adressée aux préfets, 5 septembre 1834.*

51 Ponty (n 26) 28.

‘institute “internal measures” in lieu of expulsion’.⁵² In other words, it created the legal framework under which the sovereign order extended its grip over the refugee rather than merely abandoning them. The discussions in the National Assembly at this time again reflected, only in stronger terms, the concerns of the rights of the nation-state in relation to the granting of asylum. The law of 1832 indeed gave the government the right to expel refugees ‘if it judged their presence as likely to disturb law and order’.⁵³ Nonetheless the Minister still claimed that the offering of asylum was based on ‘conscience’ and not a ‘system’.⁵⁴ So at this stage the logic of asylum was facing both ways: forwards to the modern rights of the nation-state, and backwards to the arbitrary and sentimental norms of the *ancien regime*.

Along with the growing claim of the state to the regulation of asylum and a concern with the burden of financing support for asylees, so also began a concern with determining the ‘genuineness’ of the refugees. In 1832 Francois Guizot, a leading statesman of the period, called on the government to give assurances that refugees being granted public assistance had been ‘really compelled to leave their countries as a result of political events’ and were not ‘vagabonds’, criminals or merely ‘unfortunates’.⁵⁵ Indeed, the question of who was legitimately a refugee dominated discussions in the National Assembly on the 1832 legislation.⁵⁶ Yet it remained the case for some time that the law was imposed only very rarely.⁵⁷ In the five years after the law of 1832, just four refugees out of a total of 13,000 were actually expelled.⁵⁸ In general, as Catherine Wihtol de Wenden has pointed out, state controls on immigration in general were so lax that it was not clear to anyone, even to the authorities, until the middle of the 19th century just how many non-nationals

52 Grahl-Madsen (n 14) 21.

53 *Loi relative aux Etrangers réfugiés qui résideront en France, 21 avril 1832, Art.2.*

54 Noiriel (n 18) 40.

55 *ibid* 42.

56 Ponty (n 26) 26.

57 Michael Marrus, *The Unwanted: European Refugees in the 20th Century* (Temple University 2002) 16.

58 Noiriel (n 18) 62.

resided in France.⁵⁹ For example, it was only in 1851 that nationality of residents became a measurement in the census. Nonetheless, Noiriel argues that this period marks the beginning of a paradigm whereby the 'French state imposes its law from the outset on those [refugees] whom it receives (*qu'il accueille*)'.⁶⁰

A major shift in French immigration policy came with the move away from the Napoleonic focus on the *jus sanguinis* towards a policy of *jus soli* after 1851. Although this opened up the possibility of citizenship to a wider class of persons, this shift in policy also represented a 'nationalisation' and juridification of the issue, for it made the border the determining aspect in the granting of citizenship. The impetus for this was grounded in the realities of France's transformation into an industrialised country in need of an influx of labour rather 'than for any idealistic concerns about liberty, equality and commitment to the land of asylum'.⁶¹ A particularly draconian piece of legislation of this period is the law of 3 December 1849, enacted in the wake of Louis Bonaparte's counter-revolution. This gave the Minister of the Interior the right to order the deportation of any alien.⁶² On the other hand determination of immigration status and support remained somewhat open. Noiriel has analysed in detail the archives of communications between refugees and local and national administration during the middle of the 19th century. What is most notable, compared to today, is the directness of appeal couched as it was in terms of claims to Christian charity and sympathy. This was largely due to the wide measure of discretion in the process of granting relief, and the absence of abstract criteria.⁶³ As such, claims for assistance were always contestable. It was also testimony to the holdover from an earlier age in which Christian mercy and charity held sway. The result was that the coldness of a more formal bureaucratic and legal process was much less than it would

59 Catherine Wihtol de Wenden, *Les immigrés et la politique: cent cinquante ans d'évolution* (Sciences Po 1988) 18.

60 Gérard Noiriel, *Le Creuset français. Histoire de l'immigration XIXe – XXe siècle* (Seuil 1988) 335.

61 Maxim Silverman, *Deconstructing the Nation: Immigration, Racism, and Citizenship in Modern France* (Routledge 1992) 146-147.

62 *Loi du 3 décembre 1849 sur la naturalisation et le séjour des étrangers en France*, Art. 7.

63 Noiriel (n 18) 60-61.

later be. Moreover, there was less mediation between the experiences and needs of the refugee and the authorities granting assistance.

The US Experience

Many of the same issues that drove the development of asylum and immigration policy in Europe have their echoes in the US during the same period. Erika Lee summarises her historical study of US immigration policy by noting how across the developed world the legal framework for refugee admissions has been deployed as a key plank in the control of immigration.⁶⁴ The US is, of course, known as a nation of immigrants, in particular of refugees. The pilgrims fleeing religious intolerance in the 17th and 18th centuries have achieved immortality as founders of what was later to become the first modern liberal republic. And yet, within the first decade of the republic's founding, anti-alien sentiment was rife and Congress enacted its first immigration controls. Although this had already been presaged in Article 1, Section 8 of the US Constitution (1787), which amongst other things granted the Federal government the power to 'establish an uniform Rule of Naturalization'. First came the 1790 Naturalization Act, which on the one hand granted citizenship to all 'free white persons' who had resided in the US for a minimum of two years, while at the same time explicitly excluding people of colour, whether African-Americans or Native Americans.⁶⁵ Although this Act dealt only with the grant of citizenship and not entry into the country *per se*, Lee argues that this effectively marked the beginning of the US government's 'gatekeeping function', decades before the first systematic immigration controls some 80 years later.⁶⁶ The Alien Act 1798 gave the President the power to deport any non-citizens 'as he shall judge dangerous to the peace and safety of the United States'.⁶⁷ Already in 1801, in his presidential inauguration address, Thomas Jefferson lamented these early immigration controls with special reference to the plight of refugees:

64 Erika Lee, 'A Nation of Immigrants and a Gatekeeping Nation: American Immigration Law and Policy, 1875-Present' in Reed Ueda (ed), *A Companion to American Immigration* (Blackwell Publishing 2006) 29.

65 *An Act to Establish an Uniform Rule of Naturalization, March 26, 1790*, [First Congress, Sess. II, Ch.3. 1790]

66 Lee (n 66) 9.

67 Section 1, *An Act Concerning Aliens, June 25, 1798* [Fifth Congress, Sess. 2. Ch. 54. 1798]

And shall we refuse to the unhappy fugitives from distress that hospitality which savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum in this globe? ⁶⁸

The 1798 Act was to be the last set of federal immigration controls until 1875. However, in the 1830s the US had its first real test in receiving large numbers of refugees. In common with France, the US became one of the main destinations for Poles fleeing Russian repression. They were welcomed as ambassadors of the republican ideal escaping Old World absolutism. In common with the political dynamics of Victorian Britain and the Cold War a century later, great ideological battles opened up the space of asylum. An act was passed in May 1834 granting 500 acres of land to each Polish refugee at the minimum price of \$1.25 per acre, specifying that the land in question would be in Illinois and Michigan.⁶⁹ Political solidarity was married to a desire to see an influx of White Europeans who could cultivate the large expanse of land in the Mid-West. States in that part of the country positively encouraged immigration so as to spur population growth.⁷⁰ Indeed, economic concerns were at the forefront when in the following year there were attempts to force the exiles to both live on and cultivate these gifts of land. The biopolitical concern with managing population as a source of wealth is particularly evident here. Nevertheless there were no controls on the actual entry into the country of refugees, either for the Poles or the many German liberals who arrived following the defeat of the 1848 revolutions.⁷¹ The federal government, in fact, played little role in processing immigrants at all; this was left primarily to the states. E.P. Hutchinson points out that immigration controls were so negligible throughout much of the 19th century that ‘the question of differential treatment for refugees did not really arise except when public opinion and sympathy were aroused as in the case of the Polish exiles’.⁷² And in that case, the effect of public opinion was to give *added* assistance to the refugees. One reason for the US’s generosity during this period, which has echoes

68 Cited in EP Hutchinson, *Legislative History of American Immigration Policy 1798-1965* (University of Pennsylvania 1981) 17

69 *ibid* 24.

70 Lee (n 66) 9.

71 Hutchinson (n 70) 522.

72 *ibid* 523.

in Victorian Britain's motives for its hospitality, might have been because the arrival of refugees from the Old World 'reinforced the American sense of the superiority of their own government and political institutions', which would have had significant purchase at a time when the country was still a relatively weak and fledgling state.⁷³

The point at which immigration controls began to really tighten came with the arrivals of large numbers of Chinese immigrant workers in the 1860s and 1870s. A series of restrictions on their entry culminated in the notorious Chinese Exclusion Act 1882, at first a temporary piece of legislation, but eventually made permanent and not repealed until 1943.⁷⁴ Of course, one of the key motivations behind these measures was a barely concealed racism. However, these new laws had a far wider resonance. As Lee writes, they:

set in motion new bureaucracies, modes, and technologies of immigration regulation, such as federal immigration officials who inspected and processed newly arriving foreigners, government-issued identity and residence documents, such as U.S. passports and "green cards", and further regulations such as illegal immigration and deportation policies.⁷⁵

Previously when the US had needed immigrant labour, in particular relying on Chinese labour to build the Transcontinental Railway, immigration had been encouraged.⁷⁶ But with the completion of work on the railway and with economic depression, there was a complete reversal of policy, both in terms of the Chinese Exclusion Act and the Immigration Act introduced later the same year.⁷⁷ Other factors were also at work too. Between 1880-1920, 23.5 million immigrants, many of them refugees, arrived in the US. This huge number of new arrivals, and their multi-ethnic makeup, led to an 'explosive xenophobic reaction based on racial and religious prejudice, fears of radicalism, and class conflict'.⁷⁸ This came at the same time as a new national identity was being forged which tied the question of immigration to sovereignty; the authority of the state was becoming in the US, as well as elsewhere,

73 *ibid.*

74 *Chinese Exclusion Act of 1882*, 126 (22 Stat. 58).

75 Lee (n 66) 11.

76 Robert Koulish, *Immigration and American Democracy: Subverting the Rule of Law* (Routledge 2010) 31-32.

77 *Chinese Exclusion Act of 1882*, 126 (22 Stat. 58); *Immigration Act of 1882*, 376 (22 Stat. 214).

78 Lee (n 66) 10.

measured by the extent of border control. Moreover, post-Civil War the federal government was immensely strengthened and was thus able to deploy its much greater administrative muscle to manage and control immigration into the vast continental US.⁷⁹

One Chinese worker, Chae Chan Ping, challenged his exclusion under the 1882 Act, having lived and worked in the country for 12 years. The Supreme Court in its ruling on his case declared:

That the Government of the United States, through the action of the legislative department can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.⁸⁰

Until then, the question of admission had mainly been one for the individual states depending on the port of entry.⁸¹ It is only during this period, as with the UK and France, that the national state begins to centralise and formalise immigration controls. For certain refugees, however, there remained some level of protection. For example, in an echo of the common exception to extradition agreements, the compulsory deportation of foreign criminals mandated under the Immigration Act 1882 exempted those convicted of a political offence.⁸² This exemption was strengthened by the 1891 Immigration Act, which made it clear that political offences might be so, even if the state from which the refugee had fled claimed the offence committed to have been simply a common crime.⁸³ The 1891 Act, through the creation of the Bureau of Immigration, also vested sole control of immigration matters in the federal government, thus marking yet another stage in the centralisation of border controls, and the effective tying together of state sovereignty with immigration policy.⁸⁴ Writing in 1939 Louis Adamic observed that US immigration policy could be divided into four periods: 1) The period of colonisation prior to 1783; 2) More or less ‘free

79 *ibid.*

80 *Chae Chan Ping v. United States* [1889] 130 U.S. 581, per Justice Field.

81 Koulish (n 78) 128.

82 Section 4, *Immigration Act of 1882*, 376 (22 Stat. 214).

83 Section 1, *Immigration Act of 1891*, 551 (26 Stat. 1084).

84 Section 7, *Immigration Act of 1891*, 551 (26 Stat. 1084).

immigration' from 1783-1830; 3) controls over immigration operating at the level of the states; and finally, 4) the period of federal controls over immigration beginning in 1882.⁸⁵ Adamic comments that the latter period is 'likely to continue indefinitely'; 75 years later his prediction appears to have been confirmed.

Asylum and the Political Subject

Victorian Britain was not as liberal on immigration and asylum as is commonly assumed. Yes, it is true that legislation remained largely weak on the question, and it is a frequently remarked upon fact that not a single foreigner was deported by the authorities throughout the period. But it is also true that the state regularly sought to impose greater restrictions. What held it back most of the time was popular opposition to increased controls, born partly as a result of sympathy for the wave of political refugees from Poland, Hungary, France and Italy, and a proud self-image of the UK as a bulwark of liberalism against the backward semi-feudal regimes of the continent.⁸⁶ However, in response to the outbreak of revolution across Europe in 1848, the government, citing claims of possible domestic insurrectionary activities, introduced a Bill that allowed for the removal of aliens in the interests of the 'preservation of the peace and tranquillity of the realm'.⁸⁷ Political instability at home as well as abroad gave an impetus (or possibly an excuse) for a renewed attempt at controls. It is significant that this Bill was announced just the day after one of the largest Chartist demonstrations.⁸⁸ The Bill became law, but the provisions for deportation were never acted upon and the Act lapsed after two years. Palmerston's government then introduced a *Conspiracy to Murder Bill* in 1858 seeking *inter alia* to increase the penalty for this offence from two years to life imprisonment and, of particular relevance for refugees, to extend the scope of the offence to cover conspiracies to commit murder abroad.⁸⁹ This last point was in direct response to the 'Orsini Plot' that had been revealed just a few weeks before the Bill was introduced in Parliament. The Italian nationalist Felice Orsini, who had taken asylum in the UK,

⁸⁵ Louis Adamic, *America and the Refugee* (Public Affairs Committee 1939) 6.

⁸⁶ Porter (n 29) 124.

⁸⁷ *Aliens Act* 1848, 11 Victoria c.20.

⁸⁸ Bevan (n 37) 65 footnote 95

⁸⁹ Porter (n 29) 176.

had assembled bombs there that were later used in an assassination attempt upon Louis Napoleon. The perceived attack on political refugees contained in this Bill provoked rapid and widespread resistance, including petitions to Parliament and mass demonstrations. In quick succession the Bill was abandoned and Palmerston's government collapsed. Then in 1870 came the *Extradition Act*, Section 3 of which effectively defined a *bona fide* refugee solely on the grounds of political persecution.⁹⁰ Even the scope of this 'political offence exception' in extradition proceedings was severely circumscribed in the cases of *Re: Castioni* [1891] and *Re: Meunier* [1894], which respectively excluded from this exception people who had instigated violent political acts outside of an already existing conflict, and anarchists.⁹¹

So, in truth, in almost every decade from the 1830s through to the 1890s, the British state sought greater controls over immigration, largely in response to the claimed threat posed by political events abroad. It was instead popular opinion and agitation, coupled with an overarching ideology that posited the UK as the home of liberty amidst a Europe dominated by backward authoritarian regimes that kept the doors open. However, with the gradual spread of the modern liberal state in Italy, Germany and France and beyond, so this latter element held diminished value in political discourse. Cedric Thornberry identified a key element in the transformation of official attitudes post-1870:

The succession to power of the bourgeois liberal refugee marked the demise of the romantic image of the alien as a popular British hero. In his stead appeared a more sinister alien figure – saturnine and be-bombed – socialist, communist or anarchist. This was the new political deviant, and, an internationalist rather than a nationalist, he was stigmatised as the “enemy of all government”. When Balfour in 1905 irreligiously said that the only right of asylum Britain had traditionally recognised was to let in people with whom we agreed he may have overstated his case – but there was a substantial grain of truth in what he said.⁹²

Paul Foot makes a similar point, contrasting the openness of the UK to refugees such as Mazzini and Garibaldi who were seen by the British ruling class as ‘fighting the

⁹⁰ *Extradition Act* 1870, 33 & 34 Victoria c.52.

⁹¹ *Re: Castioni* [1891] 1 Q.B. 149; *Re: Meunier* [1894] 2 Q.B. 415

⁹² Cedric Thornberry, *The Stranger at the Gate: A Study of the Law on Aliens and Commonwealth Citizens* (The Fabian Society 1964) 3.

same struggle...against feudalism and reaction', and in defence of liberal values.⁹³ But when in the latter half of the century refugees bore the new revolutionary politics of socialism and anarchism, which were not in support of free trade and capitalism, but against it, then the refugee-as-hero was transformed into the refugee-as-threat.⁹⁴ Foot comments that the Liberals in Parliament 'favoured all political offenders with whose politics they agreed', and paints this as 'cynicism'.⁹⁵ But it could be looked at another way, as simply yet further testimony to the fact that, by definition, a judgement on giving asylum to political offenders involves, to some degree at least, viewing their political motives and practice as legitimate, and that as such asylum is contingent upon a subjective view of the refugee's motives. Certainly this was the basis on which the Huguenots had been received; and going much further back was also reflected in the sanctuary given by the Church to those resisting the Romans during the twilight of the Empire, and even further back to the granting of asylum to various leading political and military figures in Ancient Greece.

By the 1890s the US, like European states, saw anarchism as the big political threat. An attempt was made in 1894 to pass a Bill through Congress that sought *inter alia* to exclude anarchists from being granted asylum as political refugees. In addition, if anarchist aliens were convicted of a common crime in the US, they could be deported.⁹⁶ The Bill failed, but it was a harbinger of things to come. By the turn of the century the panic over anarchism, closely tied to whipped-up concerns over immigration came to a head following the assassination of President William McKinley by the anarchist Leon Czolgosz. Although Czolgosz was born in the US he was the child of Polish immigrants. On taking up office following the assassination, President Theodore Roosevelt made it clear that new controls targeting anarchist aliens would be pursued, as part of a package of comprehensive immigration controls:

I earnestly recommend to the Congress that in the exercise of its wise discretion it should take into consideration the coming to this country of anarchists or persons professing principles hostile to all government...They

93 Foot (n 49) 84-85.

94 *ibid* 84.

95 *ibid* 85.

96 Hutchinson (n 70) 112-113.

and those like them should be kept out of this country; and if found here they should be promptly deported to the country whence they came.⁹⁷

In the UK the case of *Re: Meunier* [1894] targeted ‘anarchists’, and from then on a growing legal distinction was drawn between desirable and undesirable categories of refugees.⁹⁸ Yet the development of immigration controls was initially a slow process that progressed in fits and starts. In 1889 a House of Commons Select Committee reported that controls were not necessary as the numbers of aliens in Britain was ‘not large enough to cause alarm’. However, the Committee also ‘contemplated the possibility of such legislation becoming necessary in the future’.⁹⁹ From around this time an anti-immigrant faction began to cohere within Parliament, driven by fear of ‘anarchism’, and a large dose of anti-Semitism. In 1894 and 1898 there were attempts to introduce legislation to control the influx of mainly Jewish refugees from Eastern Europe, although neither made it to the statute book.¹⁰⁰ Pressure from the reactionaries eventually led the government to set up a Royal Commission on the Aliens Question. The key recommendation of the Commission was that a distinction should be made between ‘desirable’ and ‘undesirable’ immigrants. In this, the Commission was heavily influenced by the recent advent of controls on a similar basis in Canada, South Africa and the United States.¹⁰¹ Moreover, the Commission argued that the power to decide on this question should reside with immigration officers at the ports of entry.¹⁰² In other words, the decision on whom to admit should be moved to the administrative sphere and depoliticised.

The Report was delivered in the middle of 1903. By the following year the Conservative government had a Bill described in the King’s Speech as intended to deal with ‘the evils consequent on the entry of destitute aliens’.¹⁰³ At the same time the right-wing periodical, *National Review* claimed that ‘the so-called right of asylum’

97 Cited in *ibid* 127.

98 *Re: Meunier* [1894] 2 Q.B. 415

99 Quoted in Foot (n 49) 86.

100 Bevan (n 37) 67.

101 *ibid* 69-70.

102 Foot (n 49) 91.

103 Quoted in *ibid* 93.

had made the country ‘the happy hunting-ground of foreign anarchists and assassins’.¹⁰⁴ The Liberal opposition submitted an amendment that, while accepting the case for controls to limit poor people entering the country unchecked, would ensure ‘the retention of the principle of asylum for the victims of persecution’.¹⁰⁵ We find here already the circumscribing of asylum solely on grounds of persecution. But also the fundamental distinction between the deserving and the undeserving immigrant is accepted, even by those wary of immigration controls. In the face of attacks on asylum and what had hitherto been effective open borders, defenders of refugees crossed the Rubicon by making a claim for ‘good’ or ‘genuine’ refugees, distinguishing them from subversive or burdensome arrivals.

Due to concerted opposition to the Bill, it eventually fell. But the government brought forward a new Bill, which ended up on the statute books as the *Aliens Act* 1905, the first comprehensive legislation in the UK on immigration controls.¹⁰⁶ Although it was not as severe as the failed Bill of the previous year, it enshrined the principle in law of restricting the flow of undesirable immigrants. For example entry on those who arrived by ship containing more than 20 third-class passengers was subject to controls. Moreover, inspection was only required for those in steerage i.e. all those not travelling first class.¹⁰⁷ It thus demarcated the line between a poor immigrant mass on the one hand and well-heeled émigrés and travellers on the other. It further created a distinction between immigration and asylum, by stating that the latter was an ancient right to be preserved. Although the principle of asylum continued in theory to be respected, refugees would now find themselves having to be sieved through ever more extensive border controls. As such, they would have to justify themselves as genuine refugees, and over time the principle of control would apply equally to them. This was evident at the outset. According to section 8(4) of the Act, the Home Secretary had absolute discretion in determining whether or not, for the purposes of extradition, the refugee was covered by the political exception or not.

104 Quoted in David Glover, *Literature, Immigration, and Diaspora in Fin-de-Siècle England: A Cultural History of the 1905 Aliens Act* (Cambridge University 2012) 169.

105 Quoted in Foot (n 49) 94.

106 *Aliens Act* 1905, 5 Edward VII c. 12.

107 Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (OUP 1978) 98.

Crucially, refugees had, for the first time, to prove to the Immigration Board that they were genuine refugees.¹⁰⁸ A year after the passage of the Act the Home Secretary of the new more sympathetic Liberal government felt compelled to issue a circular to the Immigration Boards, ‘expressing concern at the rigid application of the Act and hoping that the benefit of the doubt would be given to those alleging persecution and who were thus seeking refugee status’.¹⁰⁹ However, this entreaty appears to have had little or no effect. From 505 people admitted as refugees in 1906, the figure fell to 43 in 1907, and just five by 1910.¹¹⁰

Stevens writes that in relation to asylum the impact of the 1905 Act was that it ‘established an administrative and legal framework for deciding refugee cases’.¹¹¹ For Knox and Kushner the 1905 Act ‘undermined’ the notion of ‘free entry for refugees’.¹¹² In the Privy Council case of *A.G. for Canada v. Cain*, heard just one year after the passing of the 1905 Act, Lord Atkinson clearly expressed the new legal paradigm attached to immigration, one which clearly echoed the reasoning in the *Chae Chan Ping* case in the US two decades earlier:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.¹¹³

Insofar as the principle of asylum was upheld, debates and discussion around the Act had implanted the notion that asylum was a privilege granted by the state, rather than a right belonging to the refugee. For example, during the debate on the second reading of the Bill, the Prime Minister, Arthur Balfour attempted to resist the claim of an inalienable right of asylum by arguing that, ‘who is to be added to its community from outside, and under what conditions...is a final and indestructible right of every free

108 Glover (n 106) 5; Marrus (n 59) 37.

109 Bevan (n 37) 72.

110 Glover (n 106) 165.

111 Stevens (n 31) 42.

112 Tony Kushner and Katherine Knox, *Refugees in the Age of Genocide* (Frank Cass 1999) 29.

113 *A.G. for Canada v. Cain* [1906] AC 542, at 546 per Lord Atkinson.

community'.¹¹⁴ Balfour repeated the sentiment in his winding-up speech on the third reading, arguing that the principle of 'hospitality' that underlie asylum was a mere 'virtue' that was otherwise not 'obligatory upon individuals or upon nations'.¹¹⁵

The Emerging Security Paradigm – Stage Two: World War One

Severe economic crisis, and a series of violent conflicts between French and foreign workers provided the background to what Wihtol de Wenden describes as 'the beginning of the institutionalisation of immigration' in the early years of the 20th century up to World War I.¹¹⁶ With the outbreak of war a decree was issued demanding that all aliens residing in France report to the local police with immediate effect.¹¹⁷ In 1917 identity cards for foreign residents were inaugurated.¹¹⁸ As we will see in the case of the UK and USA too, World War I and its aftermath gave an impetus to a significant securitisation of asylum and immigration policy. Indeed, this period arguably marks a key stage in the evolution of the paradigm of the state of exception as the norm in general, and as regards immigration policy.

The outbreak of World War One in 1914 led to another qualitative shift in UK immigration law, following on from the 1905 Act. On 5 August the Aliens Restrictions Bill was introduced by the government. Its stated aim was 'in time of war or imminent national danger or great emergency to impose restrictions on aliens'.¹¹⁹ Further it would grant powers to the Home Secretary to prohibit aliens to enter or to deport them, and it required that all aliens in the country had to register with the police.¹²⁰ The Bill was passed through all its parliamentary stages within a single day. During the truncated 'debate' just one voice, that of the Labour MP Sir William Byles, was raised questioning the time limit of these 'dangerous powers'. He was shouted down from all sides of the House, and the Home Secretary assured him that the

114 Glover (n 106) 143.

115 *ibid.*

116 Wihtol de Wenden (n 61) 28.

117 *ibid.* 29.

118 *Décret du 2 avril 1917 portant création d'une carte d'identité à l'usage des étrangers.*

119 *Aliens Restriction Act 1914*, 4 & 5 George 5. c.12.

120 Foot (n 49) 101.

measures would end with the conclusion of the war.¹²¹ The wide scope allowed under the rubric of ‘national danger’ and ‘great emergency’ meant that, in fact, this legislation remained in force for almost 60 years until the *Immigration Act* 1971 replaced it.¹²² The state of exception as the norm was now in place in relation to all aliens including refugees, as the reserved provision for refugees contained in the 1905 Act was erased under the new Act. Over half a century later in the *Soblen* case the Court of Appeal held that the powers of the 1914 Act, as amended by the 1919 Act, to refuse admission to asylum-seekers, were indeed applicable even in peacetime.¹²³ Writing in 1963, Thornberry accurately states: ‘The “emergency” of 1914 has never fully receded’.¹²⁴ And as Stevens notes, as a result of this wartime legislation, ‘refugees and asylum seekers reverted to the status of “alien” and were no longer viewed as warranting exceptional treatment’.¹²⁵ The point is that once the law had assumed the right to decided on categories of ‘refugee’, ‘immigrant’, ‘illegal alien’ etc., it retained the prerogative to alter or subsume these categories into one another. The outbreak of war simply presented itself as an opportune time to exercise this prerogative.

The Belgian refugees, some 260,000 of them, who arrived in the early months of the war were perhaps the first to feel the effects of this new legislative paradigm. They were generally welcomed, and it appears that little was done to ascertain whether they were ‘genuine’ refugees fleeing persecution.¹²⁶ However, one of the reasons we can be fairly precise on their numbers was that for the first time a central government register was compiled of all of their details. Many of them were kept in camps, although at this stage the camps were self-administered by the refugees themselves.¹²⁷ With the end of the war, however, the government was anxious to assure Parliament that ‘pure Belgian refugees...are as rapidly as possible being

121 *ibid.*

122 *Immigration Act* 1971, c 77. The provisions of the 1914 Act were made permanent by the *Aliens Restriction (Amendment) Act* 1919, 9 & 10 George 5. c 92.

123 *R. v Governor of Brixton Prison Ex p. Soblen* (No.2) [1963] 2 Q.B. 243.

124 Thornberry (n 94) 415.

125 Stevens (n 31) 54.

126 *ibid* 44.

127 Kershaw and Pearsall (n 30) 27.

returned to their own country'.¹²⁸ Then in 1920 came the Aliens Order, which effectively reintroduced many of the controls on immigrants already in the country that had been present in the Napoleonic legislation e.g. presentation of immigration papers to the police on demand, registration by hoteliers of alien guests etc.¹²⁹ According to one commentator, by the time of the arrival of large numbers of Jewish refugees in the 1930s, the 'principle and tradition of asylum were not so sacrosanct but had to be measured against the economic and social effects of large-scale immigration'.¹³⁰

In the US the *Naturalization Act of 1906* was passed, which amongst other things excluded arrivals reliant on public welfare.¹³¹ There was a provision that exempted from this prohibition those 'seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds'. An amendment had inserted the word 'solely', thus making it clear that a high bar had to be reached for the test of deserving refugees.¹³² The *Immigration Act of 1917* created a legal bar on a broad range of perceived subversives entering the country.¹³³ It also introduced a literacy test for the first time.¹³⁴ In 1921 the US introduced the quota system for immigration. The *Emergency Quota Act* defied its nomenclature with the quota

128 Home Secretary speaking in the debate on the 1919 Aliens Bill, quoted in Stevens (n 31) 53.

129 Bevan (n 37) 73.

130 *ibid* 74.

131 *Naturalization Act of 1906* (34 Stat. 596).

132 Hutchinson (n 70) 141.

133 'The following classes of aliens shall be excluded from admission into the United States...anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or all forms of law, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property; persons who are affiliated with any organization entertaining and teaching disbelief in or opposition to organized government, or who advocate or teach the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who advocate or teach the unlawful destruction of property'. S.3, *Immigration Act of 1917* 301 (39 Stat. 874).

134 *ibid*.

system remaining the key plank of immigration policy to this day.¹³⁵ There was an attempt to include within the class of exceptions refugees fleeing religious persecution, but this amendment failed.¹³⁶ As such, refugees were included within the quota of admissions, so once that had been filled no-one, not even refugees from that country, could gain admittance.¹³⁷ Two years later, Congress was faced with the plight of the Armenian refugees, far exceeding the quota restrictions. A Bill was proposed specifically to aid them, entitled *The Near East Refugee Act*, yet this failed to pass.¹³⁸ The overall effect of this plethora of border controls was that the number of immigrants to the US fell from 23.5 million in the period 1880-1920 to less than 6 million in the years 1920-1965.¹³⁹

From National to International Refugee Law

Given the development of laws concerning refugees within the national context, it should not be surprising that international refugee law, instead of being the institutional expression of humanitarian concern for the refugee, has revealed itself to be ‘a basis for rationalizing the decisions of states to refuse protection’.¹⁴⁰ In answer to those who would maintain that international law represents some kind of higher authority descending from the heavens to mitigate the power of the nation-state, Hathaway puts his finger on the critical point when he writes that international law ‘must be agreed to by, rather than imposed upon, states’.¹⁴¹ More specifically, Fruchterman is correct to point out that:

The... [1951] Convention is not in derogation of the State-supremacy doctrine, but is rather a voluntary undertaking by the signatories to provide assistance to refugees. The States still retain full authority to grant or deny asylum to

135 *Emergency Quota Act of 1921* 67-5 (42 Stat. 5).

136 Hutchinson (n 70) 178.

137 John Hope Simpson, *Refugees: Preliminary Report of a Survey* (Royal Institute of International Affairs 1938) 164.

138 Hutchinson (n 70) 184.

139 Lee (n 66) 12.

140 James C Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harvard International Law Journal* 129, 130.

141 *ibid* 134.

persons who do not qualify as refugees as that word is used in the Convention.¹⁴²

The current system of international refugee law as one whose origins are rooted in the perceived need to ‘govern disruptions of regulated international migration in accordance with the interests of states’ is a prime example of this truism.¹⁴³

And yet in Europe and North America for a long time there was no clear categorisation in law between different classes of immigrants, including refugees. One was either admitted or not, and if one was, then usually it was a relatively simple matter to establish permanent residence or to get citizenship in the country of choice. In an illuminating study, Reiko Karatani has shown how, at the level of international legal regimes, there was little or no distinction made between refugees and migrants generally, until the immediate post-Second World War period.¹⁴⁴ Refugee law only later grew out of a general concern amongst states to control borders and reassert their rights to decide on who could enter their territories. Immigration control and asylum are inextricably bound together in the modern period. Indeed, the concerns and paradigms employed for refugees were essentially the same as those for overall immigration control. As Guy Goodwin-Gill writes:

Refugee law...developed alongside immigration control and the rise, or entrenchment of the nation-state. Coerced and other uncontrolled population movements challenge that aspect of sovereignty subsumed within the principle of community and self-determination. Refugee law – the identification and selection of a limited class of persons in need who are to be considered worthy of protection and assistance – meets halfway or less the challenge of the inevitable.¹⁴⁵

John Hope Simpson makes the point that mass forced migration is not a modern phenomenon. However, the modern refugee phenomenon *is* indelibly bound up with the conditions of a world of border controls, for refugees ‘have found themselves in a world in which free migration has ceased, and the pandemic condition of national exclusiveness, which has caused their departure from their own country, militates

142 Fruchterman (n 20) 177.

143 Hathaway (n 142) 133.

144 Reiko Karatani, ‘How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins’ (2005) 17 *International Journal of Refugee Law* 517.

145 Guy Goodwin-Gill cited in Hathaway (n 142) 133, footnote 20.

their absorption in any other.’¹⁴⁶ It is in the period since the First World War, with its rapid development of border controls, which has marked a sea-change in the condition of the modern refugee. From the evidence of my own research I would agree with that view, except that it is important to add that the seeds of that shift were planted decades earlier. As we have seen, a security paradigm has been evident since at least the end of the 18th century, and many of the concerns and prejudices about deserving and undeserving refugees were already present during the 19th century. I have focussed on the UK, France and the UK, but similar processes were at work in Holland and Switzerland and elsewhere.¹⁴⁷ Noiriel argues that by the end of the 19th century the hegemony of the nation-state had ‘rendered impossible’ any notion of social life ‘not founded upon the principle of nationality’.¹⁴⁸ As such, it increasingly became necessary to determine, in law, the status of those outside their country of nationality, and further to establish a set of further sub-categories such as immigrants and refugees. The institution of a permanent and widespread regime of passports and immigration controls following the ‘emergency’ measures of the First World War contributed to the situation described by Egidio Reale, where refugees had become the ‘excommunicated of the world; they live *extra legem*’.¹⁴⁹ What follows is an attempt to sketch out how the regime of international refugee law has been framed within the biopolitical framework of management and security through a developing legal categorisation of the refugee. These chapters make no claim to a comprehensive treatment of the subject – such a thing would require a whole thesis in itself. My aim is simply to challenge the dominant narrative which presents international refugee law as primarily a species of human rights law, and instead to present this body of law as mainly an apparatus of control, following along many of the lines laid out by states over the century or more preceding it.

146 Simpson (n 139) 2.

147 Noiriel (n 18) 93.

148 *ibid* 22-23.

149 Quoted in *ibid* 101.

The Evolution of International Refugee Law

Introduction

According to Noiriel, across the Western world from the First World War onwards a new paradigm emerged in the control of immigration. Everyone becomes a ‘*demandeur*’, one who seeks something such as a job or the right of residence within the country.¹ In order to have such a request processed and decided upon, the individual must offer proof to the authorities of their identity and their rights. But it is the state that determines the criteria and the level of such proofs. This paradigm, inaugurated along with the introduction of ID cards and the standard use of passports, became the form applied to the control of refugee admissions during the interwar period.² Simpson, writing in 1938, stated that:

Any alien finds himself in a network of legal and administrative restrictions almost all of which are [First World] War, or post-War creations...It is scarcely an exaggeration to say that the alien in a legal sense is a creature of

1 Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d’asile XIXe-XXe siècles* (Hachette 1998) 192.

2 *ibid.*

the post-War world, and to meet some of his more urgent needs a complex scheme of arrangements has been elaborated.³

Indeed, elsewhere Simpson reflects on how, prior to the First World War, he had travelled extensively without ever needing to possess a passport.⁴ By contrast, Leon Trotsky could lament his situation 12 years after the war, as an exile on a ‘planet without a visa’.⁵ Beyond these individuals, refugees on a mass scale were facing similar crises as they were shunted from border to border. And it was during this period that certain terms such as ‘undesirables’ and ‘false refugees’ became widespread.⁶ It was also during this period that control of population movement was reframed, at least partly, through the development of international legal definitions of those moving across borders. In the 1920s refugees were ‘for the first time ever, defined in legal terms’.⁷ In addition to the evolving definition of refugee, in 1924 the Rome International Convention ‘proposed the first precise definition of an “emigrant” and an “immigrant”’.⁸

It is not hard to see how the paradigm that Noriel identifies fits too the structure of international refugee law, particularly as it has developed since the 1951 Convention. It is this paradigm that lays the basis for the justification of all liberal democracies in rejecting asylum-seekers: if one cannot furnish sufficient proof, then

3 John Hope Simpson, *Refugees: Preliminary Report of a Survey* (Royal Institute of International Affairs 1938) 99.

4 John Hope Simpson, ‘The Refugee Problem’ (1938) 17 *International Affairs* 607, 607. The writer Norman Angell described similar experiences as a traveller in the 1890s, cited in Michael R Marrus, *The Unwanted: European Refugees from the First World War Through the Cold War* (Temple University 2002) 92.

5 Leon Trotsky, *My Life: An Attempt at an Autobiography* (Penguin 1975). The quote is taken from the title of chapter 45.

6 Noiriél, *Réfugiés et sans-papiers* (n 1) 226.

7 Andreas Zimmermann and Claudia Mahler, ‘Article 1 A, para. 2 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 302.

8 Gérard Noiriél, *Le creuset française : Histoire de l’immigration XIXe-XXe siècles* (Seuil 1988) 115. ‘An emigrant is considered to be one who leaves their country with the aim of seeking work...An immigrant is considered to be a foreigner who arrives in a country in search of work there and who has the express or presumed intention to settle in a permanent manner there.’

asylum is denied.⁹ The power relationship is that of a suppliant before the state which alone decides on the criteria for admission and protection. The key point, however, is that the development of international refugee law places the refugee as the object of the relation rather a subject involved in making it. This in turn has transformed the discourse on the refugee from a ‘person with problems’ into being the ‘problem’ itself.¹⁰

Re-Establishing Order

International refugee law has its origins in the chaotic conditions following the First World War. In particular the huge numbers of people forced to flee as a result of the Russian Revolution and the breakup of the Ottoman Empire demanded some kind of response. In 1926 the number of refugees in Europe was estimated to be around 9.5 million.¹¹ The first initiative was the creation by the League of Nations of the office of High Commissioner for Refugees, with the Norwegian Fridtjof Nansen appointed to the role. He in turn created the Nansen Passport system, based on a temporary document issued to refugees in order to allow them at least some limited travel in exile. However, one had either to be Armenian or Russian to qualify as a recipient of this document. For the Armenians, and other minorities of the former Ottoman Empire, they had possessed citizenship of a state that no longer existed. In the case of the White Russians, they had been stripped of their Russian nationality by the Bolshevik government in 1921. The Russian refugees had an ambiguous legal status for a few years, as most other states did not recognise the Soviet government. But by the end of the 1920s this was no longer the case. In contrast to the Russians, the Italian government of Mussolini decided against revoking the nationality of the large number of its political exiles, partly, at least, because the renewal of passports to the exiles helped facilitate continued surveillance over their movements.¹² Because these Italian refugees therefore did not formerly fall outside of a state/individual relationship, they were not covered under the Nansen system. Hathaway describes this period as one in which ‘refugees were defined in largely *juridical* terms’, so as to

9 Noiriel, *Réfugiés et sans-papiers* (n 1) 313.

10 Barbara Harrell-Bond, ‘Camps: Literature Review’, (1998) 2 *Forced Migration Review* 22, 22.

11 Marrus (n 4) 51.

12 Simpson (n 3) 56.

remedy the fact that a mass of stateless persons in Europe was creating ‘a malfunction in the international legal system’,¹³ while Claudena Skran suggests that, as well as assisting some refugees to travel, the Nansen Passport ‘would help governments to count and monitor their refugee populations’.¹⁴ Noiriél argues that the relative ease with which the Nansen Passport was instituted in the years after the First World War was possible only because European states believed that it would facilitate the mass repatriation of refugees caused by the war and the revolutionary upheavals in Russia.¹⁵ In short, the Nansen Passport system was primarily about stabilising, monitoring and controlling the movement of refugees. Insofar as it had a humanitarian effect in facilitating greater ease of movement to refugees who would otherwise have been without travel documents, this was a secondary aim. Moreover, such a scheme was only necessary because of the plethora of border controls that had become the norm across Europe over the preceding decades.

The first explicit definition of a refugee in international law occurs in the 1926 Arrangement agreed by 39 states. This treaty was intended to formalise the status of the Russians and Armenians, who, it was now clear, would not be able to return to their homelands anytime soon. In the Arrangement refugees were defined as:

Russian: Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.

Armenian: Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.¹⁶

13 James C Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’ (1984) 33 *International and Comparative Law Quarterly* 348, 349, 358.

14 Claudena Skran, ‘Historical Development of International Refugee Law’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 7.

15 Noiriél, *Réfugiés et sans-papiers* (n 1) 106.

16 League of Nations, *Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees*, 12 May 1926, League of Nations, Treaty Series Vol. LXXXIX, No. 2004, point 2.

Skran argues that this definition rested on the assumption that the refugee problem was tied to the lack of a link between themselves and a nation-state. This legal ‘black hole’ led the League of Nations to take a ‘juridical approach’ to the refugee question.¹⁷ Two years later the 1928 Arrangement on Russian and Armenian Refugees, drawn up by Nansen, gave the High Commissioner powers, in tandem with national governments, to regulate and adjudicate on the quality of claimants for refugee status. These included the following:

- (a) Certifying the identity and the position of the refugees;
- (b) Certifying their family position and civil status, in so far as these are based on documents issued or action taken in the refugees' country of origin;
- (c) Testifying to the regularity, validity, and conformity with the previous law of their country of origin, of documents issued in such country;
- (d) Certifying the signature of refugees and copies and translations of documents drawn up in their own language;
- (e) Testifying before the authorities of the country to the good character and conduct of the individual refugee, to his previous record, to his professional qualifications and to his university or academic standing;
- (f) Recommending the individual refugee to the competent authority, particularly with a view to his obtaining visas, permits to reside in the country, admission to schools, libraries, etc.¹⁸

At first glance we might recognise a humanitarian impulse; essentially the High Commissioner would act as an advocate for the refugees vis-à-vis national governments. However, if we think more carefully about the implications of these provisions then two much less positive aspects also present themselves. First, in order to have the High Commissioner act on their behalf, the refugees would have to provide to him all the necessary proofs of their *bona fides*. Second, it places the refugees in a passive, almost infantile, position in which they need to be spoken for, and to have someone act as a guarantor as to their identity.

¹⁷ Skran (n 14) 9.

¹⁸ League of Nations, *Arrangement Relating to the Legal Status of Russian and Armenian Refugees*, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005, resolution 2.

First attempts at establishing a system of international refugee law

These *ad hoc* and ‘rudimentary’¹⁹ arrangements of the 1920s were followed by more formal and far-reaching attempts to create a system of international refugee law with the 1933 Convention, and a further international agreement at Evian in 1938.²⁰ But the process of developing these various instruments was governed not by universal principles or a guiding concept of who a refugee was, but rather again on an *ad hoc* basis as the need arose. Indeed, it is arguable that, until the 1967 Protocol removed the temporal and geographical limitations in the 1951 Convention, refugee definitions were to a greater or lesser extent related to specific circumstances or groups of refugees.

The 1933 Convention was the first legally-binding international treaty on asylum, and would form the basis for the 1951 Convention.²¹ A major impetus for the creation of the 1933 Convention was to put in place a framework of international law that could deal with refugees beyond the anticipated lifetime of the Nansen Office.²² But, again, in the definition it gave of a refugee it remained highly specific. Only Russians, Armenians and a few other small groups such as Christian minorities from the former Ottoman Empire were included. The plight of those forced to flee the new Nazi government in Germany was completely ignored, in spite of some 50,000 refugees fleeing the country in the early part of that year.²³ The 1933 Convention also allowed signatories to derogate from all aspects except for one: Chapter XI, General Provisions.²⁴ By the outbreak of the Second World War, however, only eight countries had formally adopted the Convention, and many of them had derogated

19 Paul Weis, ‘The International Protection of Refugees’ (1954) 48 *The American Journal of International Law* 193, 194.

20 League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations Treaty Series, Vol. CLIX No. 3663; League of Nations, *Convention Concerning the Status of Refugees Coming From Germany*, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461.

21 Skran (n 14) 14.

22 Simpson (n 4) 86. In 1931 The League of Nations had stipulated 31 December 1938 as the date by which the Nansen Office’s work would cease.

23 Simpson (n 4) 59; Skran (n 14) 18.

24 Skran (n 4) 24.

from some of the most important provisions such as Article 3 on *non-refoulement*.²⁵ This was the first enunciation of this principle, which has since become a critical aspect of international refugee law. However, states could still expel refugees for 'reasons of national security or public order'.²⁶ The UK made a reservation to Article 3 stating that 'public order' could include criminal or 'moral' issues.²⁷ Similar exclusion clauses were later included in the 1936 Arrangement and in Article 5 of the 1938 Evian Convention.²⁸

Over 400,000 refugees fled the Nazis from 1933 until the outbreak of war. Because governments were very wary of giving them asylum, the Nansen system was not extended to them, but rather a separate legal structure was created to deal with these refugees.²⁹ Also, initially member states at the League were concerned should any of its activities be seen to infringe on the internal affairs of Germany.³⁰ As a result, when a High Commissioner was appointed specifically to deal with the plight of refugees coming from Germany, the office was deliberately kept at organisational arm's length from the League, and all funds for it had to come from private sources.³¹ In frustration at the resistance amongst states to respond adequately to the refugee crisis instigated by the Nazi regime, the first High Commissioner, James G McDonald, felt himself compelled to resign in December 1935. In his resignation letter he made it clear the question of the refugees was of a political rather than a merely legal or humanitarian nature. He wrote:

[I]t will not be enough to continue the activities on behalf of those who flee from the Reich. Efforts must be made to remove or mitigate the *causes* which create German refugees.³²

25 *ibid* 24-25.

26 1933 Convention (n 20) Article 3.

27 R Yewdall Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 *British Year Book of International Law* 98, 105, footnote 3.

28 Simpson (n 4) 106.

29 Skran (n 14) 26.

30 Simpson (n 4) 87.

31 *ibid* 87.

32 Quoted in Jennings (n 27) 110 (emphasis added).

In the same year, Norway had put a resolution forward to the League that a permanent organisation of the League should be established to assist all refugees, but this was rejected.³³

In 1936 another ad hoc agreement, the Provisional Arrangement Concerning the Status of Refugees Coming from Germany, was drafted. Article 1 of that agreement established that,

the term 'refugee coming from Germany' shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established in law or in fact he or she does not enjoy the protection of the Government of the Reich.³⁴

As Skran points out, this definition shares with earlier ones a concern with those whose relations with their state of nationality has broken down.³⁵ It is also, again, highly specific in relation to the group of refugees concerned. By 1938 it was clear that there needed to be a more significant response to the exodus of Jews fleeing Nazi Germany. The matter became even more urgent following the annexation of Austria in March of that year. So, at the instigation of the US government, a meeting was convened at Evian in July. Although the Evian conference has gone down in history as one of the more shameful episodes in the closing of doors by Western countries to the Jewish refugees, it did result in a new convention specifically to deal with assisting them.³⁶ Article 1 built on the definition contained in the earlier Article 1 of the 1936 Provisional Agreement by defining 'refugees coming from Germany' as:

- a) Persons possessing or having possessed German nationality and not possessing any other nationality who are *proved* not to enjoy, in law or in fact, the protection of the German Government;
- b) Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are *proved* not to enjoy, in law or in fact, the protection of the German Government.

33 Simpson (n 4) 89.

34 League of Nations, *Provisional Arrangement Concerning the Status of Refugees Coming From Germany*, 4 July 1936, League of Nations Treaty Series, Vol. CLXXI, No. 3952, Article 1.

35 Skran (n 14) 27.

36 The extent of the shabby attitude of state delegations' towards refugees and indeed the whole purported task of the conference is well described in Marrus (n 4) 171.

2. Persons who leave Germany *for reasons of purely personal convenience* are not included in this definition.³⁷

Two things are most striking about this definition. First, it is the first time that an international agreement insists on proof that the person being helped is a refugee as so defined. We have here the inauguration of a key aspect of contemporary refugee law, namely that assistance is conditional upon the offering of proof by the refugee that they fit the juridical definition of a refugee. In addition, the second clause, excluding those who have left Germany ‘for reasons of purely personal convenience’ also represents the first time in international law that a group is specifically excluded from protection. Skran writes: ‘This clause makes a distinction inherent in refugee law as a whole – that refugees were a separate, special, and deserving category of international law.’³⁸ I would add to that, that it also assumes such a distinction is clear and can be expressed in law without in fact denying protection to those who need it. One can easily imagine Germans, Jewish or otherwise, who having felt merely harassed or uncomfortable living under the Nazi regime, had chosen for reasons of ‘personal convenience’ to move elsewhere. The concept of ‘personal convenience’ is certainly not an objective one. But what such a clause does is not simply to make a distinction between two objectively pre-determined groups, it also necessarily involves a level of suspicion or scepticism about all claims for protection, for it becomes necessary to judge all as to whether or not they are ‘genuine’ refugees or merely migrants for personal convenience. It is therefore easy to accept Loescher’s claim that ‘the term *economic refugees* was first used to describe Jews leaving Germany in the 1930s; they were referred to as the *Wirtschaftsemigranten*’.³⁹

As Skran notes, neither the 1933 nor the 1938 Conventions guaranteed any right of asylum.⁴⁰ The earlier arrangements of the 1920s dealt with people who had already found asylum, but who required travel documents and some guarantees of their personal status in their countries of refuge. But the problem faced by the Jews fleeing Nazi Germany was their inability to secure entry to countries of refuge in the

37 1938 Convention (n 20) Article 1.

38 Skran (n 14) 31.

39 Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 17.

40 Skran (n 14) 34.

first place. Prior to the Holocaust this was never resolved at the level of law. Many Jewish and other refugees from Nazi Germany did in fact find sanctuary, but this was facilitated through political means, either by Governments taking a policy decision, or through pressure exerted by groups agitating in their support, such as with the petitions and collections in the UK mentioned earlier. One practical outcome of the Evian Conference was the setting up of the Inter-Governmental Committee on Refugees (IGCR). This body issued its own definition of refugees coming from Germany as those who had fled their country of origin on account 'of their political opinions, religious beliefs and racial origin'.⁴¹ This definition of a refugee was 'innovative' as it 'focused on personalised criteria' of belief, opinion or origins to 'evaluate the merits of claims to refugee status', and 'further signalled a new, more individualistic approach to defining refugeehood'.⁴²

It can therefore be said that 'the interwar years...helped to establish refugees as a special category of migrant'.⁴³ For most commentators at the time and since, this was a sign of progress as it appeared to create special privileges for refugees in the context of closing borders and more stringent measures on entry. Certainly in the context of the specific needs of the refugees fleeing Nazi Germany, and with hindsight refracted back through the Holocaust, such a view is understandable. However, in the light of over 60 years' experience of solid legal regimes at both international and domestic level that specifically categorise the refugee as distinct from other types of migrant, such a positive spin on these interwar developments are at least questionable. Moreover, much of the detail of the legal provisions discussed so far in this chapter suggests a far greater concern even at the time with control of the refugee rather than assistance or protection.

Writing in 1938, Louise W Holborn, later to be the official historian of UNHCR, accurately identified the key problem from the point of view of nation-states:

Disorganized groups of refugees are more difficult...to deal with than are organized groups, even if the latter are larger in number. A clearly defined status for refugees would aid efforts to make refugee status transitory in character and would facilitate settlement. If coupled with adequate technical

41 *ibid.*

42 Hathaway (n 13) 371; Skran (n 14) 34.

43 Skran (n 14) 36.

organization, refugees would be under more direct control than at present, and the possibility of subversive political activity against governments responsible for their exile would be greatly lessened. The political complications often connected with aiding refugees would be practically eliminated also, particularly if the local offices concerned with refugees were qualified to decide which people fell within the accepted definition of ‘refugee’.⁴⁴

Here, in essence, is revealed the cynical approach that was evidently current in the pre-war period: the focus of refugee law was to be on managing refugees, rather than assisting them. At around the same time another commentator, R Yewdall Jennings, made a similar point: that for there to be an effective legal system governing refugees the ‘first step’ would have to be ‘a definition of the term “refugee”’. The definition he offers is one who has lost the protection of their state, and for whom therefore, ‘the link between him and international law’ has broken down.⁴⁵ Also writing in 1938, although from perhaps a less cynical perspective, Simpson, as part of his survey into the refugee crisis in Europe, argued that refugee assistance had been hobbled by political partisanship.⁴⁶ Specifically, he criticises as ‘political sectionalism’ attempts made by refugees themselves to add to the refugee program of the League an anti-fascist aim in order to address the root cause of refugee problems. Instead, Simpson proposes that refugee assistance be made, as far as possible, a technical procedure. Repeatedly then, the concerns on the refugee question expressed by leading commentators – ones, moreover, who tended to be sympathetic to the plight of the refugees – at the close of this first period of the development of international refugee law, are all to do with controlling, managing and depoliticising asylum, their solution being to make it more a juridical and administrative affair.

Post-1945

During the Second World War the first step towards the creation of a global refugee relief organisation was created and voluntarily placed itself, curiously enough, under the direct control of the military Supreme Commander of Allied Forces.⁴⁷ And they appeared most concerned not for the welfare of the refugees, but rather for the

44 Louise W Holborn, ‘The Legal Status of Political Refugees 1920-1938’ (1938) 32 *American Journal of International Law* 680, 703.

45 Jennings (n 27) 99.

46 Simpson (n 3) 97.

47 Noiriel, *Réfugiés et sans-papiers* (n 1) 120; Marrus (n 4) 319.

disruption that might be caused by ‘uncontrolled self-repatriation of displaced persons who might form themselves into roving bands of vengeful pillaging looters on trek to their homes’.⁴⁸ Following the end of the war, many former Nazi concentration camps were turned into ‘Assembly Centres’ for refugees. Liisa H Malkki argues that it was in these centres that the bureaucratic monitoring and documenting of refugees was first initiated, out of which the ‘postwar figure of the modern refugee largely took shape’.⁴⁹ As we saw in previous chapters, this practice was already being developed in the 19th century in various domestic regimes, although certainly this period marks a key stage in relation to international law and the refugee. Malkki continues:

The legal apparatus that has developed [since 1945] has been of formative importance in the orders of knowledge in which ‘the refugee’ makes its appearance, and in practice, this legal apparatus tends to take the contemporary order of sovereign nation-states as given.⁵⁰

A result of this system of refugee law that has developed since 1945 has been the ‘leaching-out’ of the politics that lays behind refugee movements; this depoliticisation has in turn become pervasive amongst the various humanitarian and policy organisations concerned with refugees today.⁵¹ In addition, the initial placing of the military in control suggested that with an emerging Cold War, European security and reconstruction became of vital importance. Therefore, ‘addressing the refugee crisis became a geopolitical imperative’, whereas in the specific US context, ‘foreign policy interests dictated that the United States take some responsibility for resettling war refugees.’⁵² However, as Mae M Ngai notes, no consideration was given to the many Asian refugees created as a result of the war in the Pacific; at this time, of course, this

48 Supreme Headquarters Allied Expeditionary Force (SHAEF) Plan, quoted in Liisa H Malkki, ‘Refugees and Exile: From “Refugee Studies” to the Natural Order of Things’ (1995) 24 *Annual Review of Anthropology* 495, 499. Similar sentiments were expressed by General Patton in language that was only slightly more offensive, describing DPs as ‘locusts’ who needed to be kept behind barbed wire. Marrus (n 4) 322.

49 Malkki (n 48) 500.

50 *ibid* 502.

51 *ibid* 505.

52 Mae M Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University 2004) 235-6.

region was not considered to be a significant arena of conflict between the US and the USSR.

In the initial post-Second World War period the distinction between refugees and what were known as ‘surplus workers’ was unclear, with many of the former being lumped in with the latter. Rieko Karatani argues that the emerging refugee regime essentially reflected the concerns of states that this ‘surplus population’ not endanger post-war political stability and economic recovery.⁵³ The inter-war conventions on refugees suffered from the general weakness of international law. But after the Second World War and the strengthening of international legal institutions, states became even more concerned to restrict as much as possible the admission of refugees. Thus much of the discussions on the various instruments of international law, culminating in the 1951 Convention, were dominated by state representatives emphasising defence of national interests and the need for a strict codification in law of the category of refugee.⁵⁴ In June 1946, for example, the French delegate to the UN remarked that the question of the refugee definition was far from being a merely academic one. A broad definition, he argued, such as the one proposed initially by the UK, would lead to a potential difference in the number of refugees entitled to protection ranging from 200,000 to 1 million.⁵⁵ In the following month the United Nations Relief and Rehabilitation Administration (UNRRA), which had been set up in 1943 to manage aid and resettlement for refugees, compelled those seeking refugee status to provide ‘concrete evidence’ of persecution.⁵⁶ Thus states and international bodies were quickly fastening on to the notion that a formal legal definition of the refugee would assist in controlling population movements.

The International Refugee Organisation (IRO) was set up in 1946 as a successor to UNRRA. The replacement of UNRRA with the IRO was driven in large part by Cold War politics. The US, along with its allies, considered the former to have pro-Soviet sympathies, and therefore led efforts in the UN to replace it with a more

53 Reiko Karatani, ‘How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins’ (2005) 17 *International Journal of Refugee Law* 517, 519.

54 Noiriel, *Réfugiés et sans-papiers* (n 1) 121.

55 *ibid* 123.

56 Hathaway (n 13) 373.

Western-controlled body. Loescher and Scanlan write: 'By taking these steps, the Truman administration converted the refugee issue into an aspect of the emerging Cold War, and thus provided a new basis for [domestic] conservative support which was only marginally related to traditional [refugee supporting] interest group politics.'⁵⁷ Ostensibly the creation of the IRO was mainly concerned with encouraging and facilitating resettlement of those who felt unable to return to their countries of origin. This was a reaction to Soviet attempts to have their citizens forcibly returned, many of who had been displaced and interned by the Germans during the war.

The IRO also introduced or reinforced prior concepts that would become key elements of the definition of the refugee in the post-war period. The Preamble of the IRO's Constitution makes repeated reference to 'genuine refugees and displaced persons'.⁵⁸ Annex 1 then lists those worthy (or not) of being refugees, creating categories of those considered to be 'unworthy of international protection and assistance'.⁵⁹ In the main this referred to former Nazis or their collaborators.⁶⁰ Also specifically excluded are economic migrants.⁶¹ The IRO Constitution further excluded from the remit of protection those who:

- (a) have participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization;
- (b) have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin.⁶²

⁵⁷ Gil Loescher and John A Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (The Free Press 1986) 14-15.

⁵⁸ United Nations, *Constitution of the International Refugee Organisation* (IRO) A/RES/62 (1), 15 December 1946, Preamble (emphasis added).

⁵⁹ Hathaway (n 13) 376.

⁶⁰ IRO (n 58) Annex 1, Art. 1(c).

⁶¹ *ibid* Art. 1(e).

⁶² *ibid* Sec.D, II (6).

At a time when national liberation movements were beginning to flare up with intensity in India, Algeria, Indochina and elsewhere, this must be understood as a means to shore up the integrity of the imperial states of Europe. Thus the refugee policy not just of the US, but of the UN, became even more a tool reinforcing the sovereign rights of states and for mediating the geo-political rivalries between them, rather than a humanitarian goal of protection.

Critical to the undermining of the refugee and the shoring up of states' rights was the combination of an international system of refugee law, a set of norms together with the retention by states of refugee status determination procedures. Thus states were able to apply an international set of norms, with all the authority that that carried, via a screening procedure over which they would have control.⁶³ Hathaway identifies three different approaches to the refugee problem between the wars: juridical, social and individual. Yet in spite of the varying approaches, he concludes that each turn was determined by the perceived needs of states.⁶⁴ From 1938 onwards a key element appears that would form the basis of refugee law in the second half of the 20th century and beyond: the emphasis on the refugee establishing proof of their persecution; both UNRRA and its successor organisation, the IRO, 'insisted on concrete evidence' from the refugee that would back up their claim for refugee status.⁶⁵ Along with an individualist approach to determining who was deserving of assistance came a set of objective criteria for judging the 'genuine' refugee.

63 James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 144.

64 Hathaway, 'Evolution of Refugee Status' (n 13) 380.

65 Hathaway, 'Reconsideration' (n 63) 139. OFPRA refers to this period as inaugurating 'individual eligibility' as the basis for granting refugee status, as if this was a good thing. OFPRA, *De la Grande guerre aux guerres sans nom : une histoire de l'OFPRA* (OFPRA no date) 10.

8

The 1951 Convention

In the genealogy of 'the refugee' one such moment [in its development] can be located in post-World War II Europe... 'the refugee' as a specific social category and legal problem of global dimensions did not exist in its full modern form before this period... The standardizing, globalizing processes of the immediate postwar years occurred, importantly, in the institutional domain of refugee settlement and refugee camp administration, and in the emerging legal domain of refugee law... Through these processes, the modern, postwar refugee emerged as a knowable, nameable figure and as an object of social-scientific knowledge.¹

Asked 'What is a refugee?' an eminent international lawyer once answered: 'It is a person who satisfies the criteria laid down in Article 1 of the Refugee Convention'.²

As the central instrument of international refugee law, the 1951 Convention is the subject of much discussion in the general literature. This chapter is focussed on completing the narrative of international refugee law's birth, by discussing the preoccupations that were instrumental in its drafting. Once again, the story we are told, of the 1951 Convention as fundamentally a humanitarian document, is betrayed by the evidence. Instead the biopolitical framework identified by Malkki in the above quote was finally fully realised. To argue, as some continue to do, that the 1951 Convention

1 Liisa H Malkki, 'Refugees and Exile: From "Refugee Studies" to the Natural Order of Things' (1995) 24 *Annual Review of Anthropology* 495, 497-498.

2 Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of Refugee Law' (1966) 3 *Journal of Peace Research* 278, 278.

can best be understood as a species of human rights law is therefore mistaken.³ The 1951 Convention represents the final conquest of asylum by law, in which the former is all but erased by the latter.

Asylum as the Right of States

Frank Krenz, a former member of the Legal Division of the UNHCR, makes the claim that the ancient institution of asylum had always been a function of territorial sovereignty, when in fact, as we have seen, for much of its history asylum/sanctuary had actually concerned spaces beyond sovereign-state territory.⁴ Krenz then goes on to offer us a heroic description of the post-war evolution of refugee law:

From [the end of the Second World War] onward the concept of ‘Freedom of Movement’ gained impetus, and rebellion took place against the supremacy of State sovereignty in matters relating to the release of subjects or the admission of aliens.⁵

Sadly, this rather overblown description does not fit the reality of what happened then. The state-centred concept of asylum that arose in the 17th century remained. A leading textbook on international law, in an edition published in 1948, stated:

the so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping persecution in some other State should grant these things.⁶

In more positive terms, the prevailing view at the time on the law of asylum is best summed up in the description offered by the Institute of International Law in 1950: ‘Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.’⁷ It further declared that the state has the right to expel the asylee, that such an expulsion might

3 e.g. Ralf Alleweldt, ‘Preamble to the 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 233.

4 Frank E Krenz, ‘The Refugee as a Subject of International Law’ (1966) 15 *International and Comparative Law Quarterly* 90, 91.

5 *ibid* 90.

6 *Oppenheim’s International Law* (7th edn), cited in Vaughan Bevan, *The Development of British Immigration Law* (Croom Helm 1986) 214.

7 Institut De Droit International, *L’asile en droit international public*, (Bath 1950) Article 1.

be impossible if other states refused to accept them, and that in situations involving mass refugee flows, it was up to states to best manage these on the basis of ‘the most equitable way of sharing between their respective territories’.⁸ Nowhere does this declaration on international law, by one of the leading authorities in the field, refer to the rights of the refugee. In other words, in the year before the adoption of the 1951 Convention, a leading body of international jurists identified the right of asylum as fundamentally vested in the putative host state, not the refugee herself. In discussing the same description given by the Institute of International Law, Grahl-Madsen makes the point that asylum can be understood within the framework of the ‘territorial supremacy and integrity of States...in the sense that [the refugee] is no longer subject to (lawful) seizure by the authorities of the country from which he has fled’,⁹ i.e. the territorial integrity of the country of asylum must be respected vis-à-vis the state seeking custody of the asylee. Felice Morgenstern writing on the eve of the 1951 Convention, concurs:

‘There is an undisputed rule of international law to the effect that every state has exclusive control over the individuals on its territory...A competence to grant asylum thus derives directly from the territorial sovereignty of states.’¹⁰

This was also the view of the higher courts in Germany, Switzerland and the USA in rulings dating from 1900, 1921 and 1940 respectively.¹¹ And insofar as the rights of states are limited in their right to grant asylum, it is in relation to the rights of other states, for example in cases where extradition is being sought for non-political crimes.¹² Although writing before the final draft of the 1951 Convention, Morgenstern was in a position to reflect on the discussions that led to Article 14 of the Universal Declaration on Human Rights. The original draft read: ‘Everyone has the right to seek and *to be granted*, in other countries, asylum from persecution’ (emphasis added). This draft was vehemently opposed by a number of states on the grounds that it

8 Institut De Droit International, *L’asile en droit international public* (Bath 1950) Article 2.

9 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume Two* (AW Sijthoff 1972) 4.

10 Felice Morgenstern, ‘The Right of Asylum’ (1949) 26 *British Yearbook of International Law* 327, 327.

11 *ibid* 335.

12 *ibid* 330.

infringed upon the sovereign right of states to control entrance to their territory.¹³ Australia, for example, insisted that the Declaration could not refer to any duties on states in respect of asylum. So the final draft replaced the phrase ‘to be granted’ with the rather more ambiguous ‘to enjoy’. Morgenstern described, aptly perhaps, this final version of Article 14 as ‘flippant’.¹⁴ Further, Noiriel argues that the 1951 Convention was only acceded to by so many states, and has therefore succeeded over the past 60 years in becoming an established part of international law, precisely because it preserves the prerogatives of the nation-state to be the final arbiter of who can or cannot enter its territory.¹⁵ Indeed, the mechanism of individualisation and control, the techniques involved in determining eligibility and the veracity of the claim for asylum, form the foundation without which a law of asylum could not exist within the context of a world hegemonised by the nation-state.¹⁶

The Drafting of the 1951 Convention

Drafting of the 1951 Convention began in early 1946. Loescher argues that for Western governments the negotiations were mainly about ‘limiting their legal obligations to refugees’.¹⁷ Discussions on the refugee definition were perhaps the most extensive of the entire process, with over 500 pages of official documents devoted to it alone.¹⁸ There were many drafts of the refugee definition, and arguments over the exact wording lasted right up until the end of the drafting process five years later. The definition eventually agreed entailed ‘substantial limitations’ on who would be included, leaving out internally displaced persons, economic refugees, people made stateless for reasons not related to persecution, those fleeing general situations

13 UN Doc A/C 3/285, Rev 1.

14 Morgenstern (n 10) 337.

15 Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d’asile XIXe -XXe siècles* (Hachette 1998) 151.

16 *ibid* 152.

17 Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 57.

18 Terge Einarsen, ‘Drafting History of the 1951 Convention and the 1967 Protocol’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 49.

of violence or war, and those fleeing natural or ecological disasters.¹⁹ An innovation of the 1951 Convention definition was the insistence on ‘persecution’ as cause of the refugee’s flight, although the term had been ‘in the air’, having previously been used by both UNRRA and the Allied military in reference to the refugees at the end of the war.²⁰ The term is also present in Article 14 of the UN Declaration on Human Rights. It has sometimes been suggested that ‘persecution’ was also intended to be directed specifically towards people fleeing communist states, and thus was adopted for opportunist reasons at the height of the Cold War.²¹

Stephanie Schmahl, citing the French and Italian delegates to the Conference of Plenipotentiaries that drafted the 1951 Convention, describes the concern of European states as being to create a legal regime ‘primarily designed to create secure conditions such as would facilitate the sharing of the refugee burden.’²² There appears to have been a trade-off in the negotiations over Article 1 of the 1951 Convention, the ‘key’ to the system of rights for refugees under international law’.²³ In return for a settled universal definition of a refugee, the temporal and geographical limitations (relating to events in Europe prior to 1951) had to be put in place.²⁴ The French delegation, following concerns expressed within the French government that they would have to receive too many refugees, successfully insisted on these restrictions being included in the final draft.²⁵ The US delegation, among others, objected to a universal definition as it would force states to sign a ‘blank check’. The US delegate, Henkin, pointed to the numbers of Palestinian refugees and of those who had fled as a result of Indian Partition as examples of why a more specific definition was necessary. The Italian delegate, Del Drago, expressed horror at the idea that European nations

19 *ibid* 52.

20 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume One* (AW Sijthoff 1966) 189.

21 Loescher (n 17) 57.

22 Stephanie Schmahl, ‘Article 1B 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 469.

23 Einarsen (n 18) 40.

24 *ibid* 55.

25 Noiriel (n 15) 144.

would have to accept refugees as a result of national movements in the East.²⁶ The Israeli delegate, Robinson, made the curious argument that people fleeing natural disasters could not be included because ‘fires, floods, earthquakes or volcanic eruptions’ did not differentiate ‘between their victims on the grounds of race, religion or political opinion’. Robinson also made it explicit that ‘persecution’ meant that anyone merely fleeing a war situation would also be excluded.²⁷ It was left to the Pakistani delegate, Brohi, to express his government’s opposition to a refugee convention that excluded all non-Europeans, such as the millions who suffered as a result of Partition.²⁸ It is therefore clear that the Convention refugee has its origins not in concern for refugees *per se*, but rather as part of a compromise intended to assuage the concerns of states that they would be inundated with masses of unwanted asylum-seekers. In particular, the Western bias of the Convention is obvious in statements such as the following made in 1966 by UNHCR:

The limitation did not give rise to any particular problem when the 1951 Convention was first adopted, since at that time the 1951 Convention extended in practice to all known groups of refugees.²⁹

This claim is highly disingenuous, as it ignores at least three other major refugee crises of the time: the largest forced migration in world history involving some 14.5 million people who crossed the borders following the partition of India and Pakistan in 1947; the 800,000 Palestinians forced from their homes by the Zionists in the following year; and the refugees created by the outbreak of war on the Korean peninsula in 1950. For geopolitical reasons to do with the Cold War, the UN, at the behest of Western states, was prepared to set up specific agencies to assist the Palestinians and Koreans, but those in the Indian sub-continent were denied aid, in spite of repeated requests from India and Pakistan.³⁰ Moreover, even the ‘universality’ of the definition, absent the temporal and geographical limitations, was clearly intended to exclude whole swathes of refugees, namely those fleeing general violence or natural disasters.

26 Einarsen (n 18) 60.

27 *ibid* 61-62.

28 *ibid* 57.

29 UNHCR, UN Doc A/AC.96/346 (1966), para.2.

30 Loescher (n 17) 62.

Writing in 1954, Paul Weis observed that both the discussions that led to the setting up of the IRO and then later the UNHCR demonstrated a ‘keenness’ amongst states to delimit the scope of people who would be assisted and given asylum.³¹ In addition to the exclusive nature of the definition, the 1951 Convention ended up with a cessation clause – Article 1C – a novelty in international refugee law. Further, during the negotiations states insisted on retaining the right to exclude refugees on the basis of national security and public safety whom they considered ‘unworthy or undesirable’,³² something which found expression in Article 1F and Article 33(2). In discussions on Article 31 of the Convention, which ostensibly grants some leniency to refugees who illegally enter the putative host state, the Secretariat, in proposing the draft, begin their commentary by stating categorically: ‘The sovereign right of a State to remove or keep from its territory foreigners regarded as undesirable cannot be challenged.’ Further, the Secretariat raised the issue of the refugee ‘caught between two sovereign orders’, but in the context not of the suffering of the refugee, but rather that they might end up leading ‘the life of an outlaw and may in the end become a public danger’.³³

Until the 1946 IRO Constitution and the 1951 Convention, refugee definitions in the various international agreements had always been based on the group approach. However, from 1946 onwards the individualized approach became institutionalized.³⁴ Schmahl suggests that one of the reasons for this shift was that, prior to the war, international law did not recognise individuals as subjects.³⁵ During that period the key question was of the ‘breakdown in the international legal order’ due to the large numbers of people whose relationship to their home state, or indeed any state, had

31 Paul Weis, ‘The International Protection of Refugees’ (1954) 48 *The American Journal of International Law* 193, 208.

32 James C Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harvard International Law Journal* 129, 172.

33 Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With A Commentary by Dr Paul Weiss* (Cambridge University 1995) 202.

34 Andreas Zimmermann and Claudia Mahler, ‘Article 1 A, para. 2 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 299; Schmahl (n 22) 253.

35 Schmahl (n 22) 253.

been dissolved.³⁶ Schmahl further argues that until 1935 this juridical approach held sway, but from then until the outbreak of war there was a shift towards a more ‘social’ approach that saw refugees as ‘helpless casualties of broadly-based social or political occurrences’.³⁷ But Schmahl, along with others, also sees in this latter stage the beginnings of a new stage in international refugee law in which there was increasing focus upon the individual refugee and the questions of establishing the veracity of their claim for assistance, and whether their character and circumstances made them deserving of asylum.³⁸ This is certainly evident in the novel emphases on proof and exclusions in the 1936 Agreement and the 1938 Convention discussed in the last chapter. The import of the phrase, ‘Has been considered a refugee’ contained in Article 1A, para. 1, is that the claimant ‘must have been recognized by a competent municipal or international authority as a refugee in accordance with [the pre-war instruments]’.³⁹ According to both UNHCR and the higher courts in Germany, this meant that even had someone, for example an Armenian or Russian, qualified for assistance under those arrangements or Conventions, if they had not by that point, or subsequently been actually determined by any authority to be a ‘refugee’, then they would not be covered by the 1951 Convention. This, more than almost anything else, sums up the narrowness of the 1951 scope in relation to whom it would assist, compared to what had existed prior to this period in the development of international refugee law. It also illuminates the increased juridical nature of the refugee definition, and the manner in which refugees would now be forced to ‘labour towards the law’. The negotiations that led to the 1951 Convention are probably best summed up by an NGO observer of them. He ironically noted that the discussions:

had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like a menu at an expensive restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances.⁴⁰

36 *ibid* 254.

37 *ibid*.

38 *ibid* 255.

39 *ibid* 260-261.

40 Quoted in Hathaway (n 32) 145.

Defining and Controlling the Refugee Subject

Unlike many other signatories of the 1951 Convention, France moved swiftly to implement it into domestic law. Within months the law of 27 July 1952 incorporated into the domestic legal regime the definition of a refugee contained in Article 1A of the 1951 Convention.⁴¹ This law also created the *Office Français de Protection des Réfugiés et Apatrides* (OFPRA) in order to manage the implementation of refugee admissions and to ascertain refugee status on the terms of the Convention. This legislation therefore led to the principle of the right of asylum in France being definitively ‘subordinated to establishing proof of persecution’.⁴² The emphasis on establishing proof of identity led quickly to OFPRA relying heavily on the police and police methods. For example, the authorities began to screen Spaniards arriving over the Pyrenees, distinguishing between Convention refugees and economic migrants, and issuing ‘eligibility certificates’ to those deemed to be genuine refugees according to the definition in Article 1A.⁴³ In its account of its own history, OFPRA states that the focus on judging the eligibility of the applicant is crucial, for ‘the credibility of the narrative, its coherence and its accuracy, comes down to the question of proof’.⁴⁴ In addition, the semi-autonomous refugee groups to aid Armenians, Russians and Spaniards, which had hitherto played the leading role in settling refugees, were effectively subsumed into this new administrative apparatus.⁴⁵ Similar practices resulted from the introduction of the 1951 Convention elsewhere. Almost immediately after the Convention came into force, states began to use it as a means to restrict the entry of those seeking asylum. West Germany, for example, set up a ‘recognition procedure’ based in Nuremburg, which assessed the ‘refugee quality’ of applicants against the definition in Article 1A. In Italy, those entering the country illegally were held in ‘collecting centres’ where they would be assessed as to ‘refugee

41 Article 2, Loi n° 52-893 du 25 juillet 1952 relative au droit d'asile.

42 Noiriel (n 15) 200.

43 Weis, ‘International Protection’ (n 31) 196.

44 OFPRA, *De la Grande guerre aux guerres sans nom : une histoire de l'OFPRA* (OFPRA no date) 17.

45 In 1945 an office, similar to those that had been set up in the 1920s to aid Armenian and Russian refugees, had been created for the Spanish exiles. *ibid* 9.

quality' before being released.⁴⁶ The logic of control that guided the process leading up to the 1951 Convention led to the creation in a number of countries, including France, Germany and Italy, of 'eligibility certificates' for refugees, without which they could not get work, or access other forms of material assistance. The eligibility in question again related to the Convention definition. The burdensome apparatus of screening procedures, surveillance and detention that is so ubiquitous today is not a betrayal of the spirit of the 1951 Convention, but rather is an expression of it.

Although the 1967 Protocol removed the temporal and geographic limitations of the 1951 Convention, the restrictive definition of a refugee as one fleeing their home state for reasons of persecution on grounds of the denial of social or political rights remained. Indeed, it was strengthened, due to the fact that this definition now assumed a global and indefinite character: that is, it completed the gesture towards universality. As a result, the overwhelming majority of contemporary forced migrants from the Global South, fleeing conditions of civil war, natural disasters and economic hardship, are placed outside this 'universal' refugee construct.⁴⁷ The process used for getting the 1967 Protocol through the UN was designed precisely to prevent any wider political discussion on the question of the scope of protection and the question of the refugee definition; it is why the Protocol was drafted in a plain technical way, and why it makes no explicit reference to the 1951 Convention.⁴⁸ As Hathaway writes:

The refugee definition established by the Protocol has enabled authorities in developed states to avoid the provision of adequate protection to Third World asylum claimants while escaping the political embarrassment entailed by use of an overtly Eurocentric refugee policy.⁴⁹

Frédéric Tiberghien points out that the very fact of creating a definition of a refugee in law in turn creates the distinction between 'true' and 'false' refugees. The refugee determination procedure, ostensibly necessary to police this distinction, can also end up as a mechanism for making subjective judgements on whether or not the refugee is worthy of being granted asylum.⁵⁰ BS Chimni critiques the 1951 Convention when he

46 Weis, 'International Protection' (n 31) 216.

47 Hathaway (n 32) 162.

48 *ibid* 163-164.

49 *ibid* 164.

50 Frédéric Tiberghien, *La protection des réfugiés en France* (2nd edn, Économica 1988) 57.

writes that its ‘objectivism tends...to substitute the subjective perceptions of the State authorities for the experiences of the refugee’.⁵¹ In summary, all those aspects of international refugee law, as expressed primarily by the 1951 Convention, that are claimed to be positives – objectivism, universality, and most of all, legality – turn out on closer inspection to be key ingredients in the diminution of the refugee subject, and the placing of him under even greater control and management by states and the international legal order. We are a long way indeed from asylum as a space in which the refugee can enjoy freedom from seizure.

There have of course been many developments since the 1951 Convention and the 1967 Protocol, most notably the OAU Convention,⁵² the Cartagena Declaration,⁵³ the Common European Asylum Policy,⁵⁴ the massive expansion of UNHCR’s activities and the proliferation of NGOs in everything from running camps to providing assistance in host communities and giving legal advice to asylum-seekers. Many of these developments have acknowledged some of the limitations of the existing legal framework and have sought to fill gaps e.g. the absence of a requirement for persecution in the OAU and Cartagena documents, and provision of minimum standards of life through the EU Qualification Directive⁵⁵ and the activities of NGOs. Some scholars, notably Barbara Harrell-Bond, have described how UNHCR and other NGOs organisations have in fact facilitated the process of

51 BS Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23 *Refugee Survey Quarterly* 55, 62.

52 Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* 1969, 1001 UNTS 45.

53 *Cartagena Declaration on Refugees* 1984.

54 European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

55 European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

maintaining refugees as passive recipients of aid, and subjects of control.⁵⁶ And indeed, the humanitarian bent of these activities, with its concomitant papering over of the political, as discussed in the thesis introduction in relation to the work of Rancière and Badiou, further reinforce the narrowness and passivity of the refugee subject as delineated by law. So, while refugee law has developed in certain respects since the 1951 Convention, the framework of asylum remains bound within the belief in an objective test for who is and is not deserving of being granted access to it, along with a depoliticised refugee subject as delineated by law. In Part III we will see the extent to which this remains the case in relation to the US Sanctuary Movement.

⁵⁶ Barbara Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (OUP 1986); Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn 2005); Jacob Stevens, 'Prisons of the Stateless' (2006) 42 *New Left Review* 53.

Conclusion

If the contemporary ‘right of asylum’ is fundamentally the right of the state to give shelter to fugitives on its territory, then it is at least doubtful that asylum as understood in the classical sense – as freedom from seizure by sovereign power – exists today. The right of asylum today therefore does not necessarily possess any objective free-standing characteristics, such as those based on faith and political solidarity, as it is a function of sovereignty itself. Contemporary asylum is therefore a legal fiction: the refugee has no protection from seizure by the host state, either literally, as is brutally self-evident in the global archipelago of detention centres and the like, or figuratively, in the sense of being forced into forms of subjectivisation and control via the process of refugee status determination and legal categorisation. Instead, freedom from seizure by the refugee’s pursuers in the sending state is merely a consequence of the sovereign rights of the host states, not any rights borne by the refugee. Writing in 1938, Simpson was able to get to the heart of the matter on the question of a ‘right of asylum’:

[A refugee] has no ‘rights’, both because as an alien he can have no complete rights against a sovereign state, and because legal rights originate from a sovereignty and as refugee he has no sovereign to endow him with or enforce his rights. He has no ‘right’ of asylum; it is a contradiction in terms. Asylum is a privilege conferred by a state, not a condition inherent in the individual. So far as it has a technical meaning in international practice the ‘right of asylum’ refers to the custom of not allowing the extradition of a person for a purely

political offence. In a non-technical sense it is merely an impressive way of describing the wrong of exclusion.¹

The political offence exception to which Simpson refers is today being gradually eroded almost to extinction.² But even there, extradition is based upon the legal relations between states, of their rights and duties, rather than those of the refugee. Then there is the principle of *non-refoulement*, which some claim has become the kernel of a right of asylum. Although, this principle only prevents a state from deporting a refugee back to where they would face persecution, it does not prevent that state from deporting them elsewhere or placing severe restrictions on their freedom where no other state wishes to receive them.³ Again, if we understand asylum in the classic sense of freedom of seizure, or sanctuary as a place of safety and security in which one can continue to live as normal a life as possible, then the systematic detention across the world of unwanted refugees who cannot be extradited for whatever reason negates the essence of asylum/sanctuary. And yet, Simpson's diagnosis of the problem remains. So long as there are nation-states and legal sovereigns over territory then there will be refugees, and there cannot be any meaningful 'right of asylum'. So, then, what is the nature of contemporary refugee law if not to provide a framework of asylum in the proper sense? It is, as has been shown in the preceding chapters, the legal framework for the control of movements of forced migrants, the re-imposition of order upon a world disordered by wars and revolution, and the management of the refugee 'burden' between nation-states. Or as Hathaway writes: 'Refugee law has historically been valued by states because it is a

1 John Hope Simpson, *Refugees: Preliminary Report of a Survey* (Royal Institute of International Affairs 1938) 100.

2 Simon Behrman, 'Accidents, Agency and Asylum: Constructing the Refugee Subject' (2014) 25 *Law and Critique* 249, 254-255.

3 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume Two* (AW Sijthoff 1972) 94. The recent history in the UK, Australia and elsewhere of detention centres and control orders for such individuals demonstrates the paucity of the principle of *non-refoulement* when stripped to its essentials.

politically and socially acceptable way to maximise border control in the face of recurrent involuntary migration'.⁴

Writing in 1972, Grahl-Madsen notes that much consideration was then being given amongst scholars as to the development of a 'binding international instrument guaranteeing the individual a right to be granted asylum, should he be in need of it'.⁵ A conference convened by the UN in 1977 to draft such a convention collapsed as states made it clear that in order to grant such a right, the legal definition would have to be made far more restrictive than even that contained in the 1951 Convention.⁶ Almost 40 years later we are no closer to such an instrument, and arguably much farther away. Indeed such a prospect may be akin to the proverbial pot of gold at the end of the rainbow, at least in a world dominated by the nation-state and law. Grahl-Madsen perhaps hits the nail on the head when, in reference to the possibility of the existence of a right of asylum of the individual, he writes:

If a State owes such a duty on the international plane, the subject of the corresponding right need not be the individual concerned. Actually...it is more likely that it would be one or more other States...to whom the duty is owed. A 'right of asylum' for the individual would then in strict terms mean the possibility for an individual to claim the benefit of a rule of international law in force between two or more proper subjects of international law, to the effect that in given circumstances asylum shall be granted.⁷

In other words, insofar as forced migrants receive some benefit from refugee law they are residual ones stemming from legal relations between states. As Grahl-Madsen writes elsewhere, the 'right of a State to grant asylum flows from its territorial integrity, which is a pillar of international law'.⁸

The flip side of refugee law operating as a function of the administrative management of refugee movements between states has been the draining away of the

4 James C Hathaway, 'Why Refugee Law Still Matters' (2007) 8 *Melbourne Journal of International Law* 89, 99-100.

5 Grahl-Madsen (n 3) 22.

6 Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 140; Margaret Dyer Chamberlain, 'The Mass Migration of Refugees and International Law' (1983) 7 *The Fletcher Forum of World Affairs* 93, 100.

7 Grahl-Madsen (n 3) 80.

8 Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell 1980) 23.

political subjectivity of the refugee herself. A central thesis in Noiriel's history of refugee law in France is that the organic social relationships within communities, which had hitherto been the basis on which refugees had been received and assisted, were undermined and dissolved over the course of the century after 1789. In their place came the system of abstract legal categories and relationships imposed from above. This development was critical in the historic downfall of the refugee and the concept of asylum.⁹ Throughout most of the 19th century, the question of the refugee was still mainly a political one. But from around 1880 until the First World War, the question became increasingly one that surrounded the rights and duties of states in relation to extradition requests. But it was the 'emergency' measures taken during the First World War – closure of borders, imposition of compulsory ID cards and passports etc – that reframed the whole question of asylum.¹⁰ A key difference between the 19th and 20th century paradigms of asylum was that earlier asylum had not been a right granted by the state. Thus the question of receiving the refugee was always contingent, and therefore always open and subject to open argument and pleas, including from the refugees themselves. Evidence gleaned from a comparison between correspondence between refugees and the French authorities in the 19th and 20th centuries suggests that, whereas previously refugees pled on the basis of their political beliefs and activities, today they plead on the basis of persecution: from agent to victim. In the earlier period refugees appealed to sentiment and solidarity, whereas today they appeal to the reason of the judge or bureaucrat.¹¹ The refugee has thus become depoliticised and de-subjectivised as an active subject in the circumstances that have made them refugees. The appeal to reason is fraught with the problem that it is a concept that claims for itself objective truth, but which in reality is decided upon certain prejudices and beliefs. Solidarity and sentiment make no pretence to being objective or universal concepts. Reason is law; solidarity and sentiment are the stuff of politics and the contestable.

Aside from the occasional comment, such as that from Türk and Nicholson that appears at the beginning of this part of the thesis, and in spite of the common-

9 Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d'asile XIXe -XXe siècles* (Hachette 1998).

10 *ibid* 180.

11 *ibid* 274-290.

sense idea that the law of asylum that exists today is somehow the continuation of the ancient practice described in Part I, it is striking that almost no writers that I am aware of attempt to argue in detail for such a link. The only commentator who does so is Grahl-Madsen in his ground-breaking *The Status of Refugees in International Law*, published in the late 1960s and early 1970s. But even here, the attempt to make such a link is tenuous at best, and given in only the broadest of brushstrokes. In any case Grahl-Madsen puts far greater stress and detail on the origins of refugee law within the framework of the classic model, from Grotius and Vattel onwards, of public international law as the law of states.¹² Alternatively, writers on the historical tradition of asylum approach the subject as of antiquarian interest. This is partly because many of them, although not all, are classical scholars. The point is that they are describing an institution or practice that has little or no visible existence in the modern world. This, I have been arguing throughout this thesis, is not in spite of the existence of a law of asylum, but because of it. Much more recently Marfleet has written on the contemporary relevance of the ancient tradition of asylum.¹³ For him its resonance is found not in law, but in resistance movements against the law, notably the US Sanctuary Movement. In the next and final part of this thesis, I develop that point in greater detail, but also draw out the lessons of that movement in terms of the confrontation between the legal paradigm of asylum (what by now should be clearly a contradiction in terms) and the historical practice informed by theological and political considerations.

12 Grahl-Madsen, *Status of Refugees* (n 3) 3-15.

13 Marfleet, Philip, 'Understanding "Sanctuary": Faith and Traditions of Asylum' (2011) 24 *Journal of Refugee Studies* 440.

PART III

THE SANCTUARY MOVEMENT

Introduction

Born in superstition, bred by religious dogma, and nurtured by the vanity of fifteenth- and sixteenth-century diplomats, asylum, the illegitimate child of law, refuses either to die or fade away.¹

In exploring the development of both asylum and refugee law, it has been evident that they each spring from very different sources and are governed by different sets of norms. Sanctuary is grounded in religious and political notions of justice and redemption. In the case of refugee law, its more recent appearance on the scene has mainly been the result of concerns with the rights of states to control movement across borders and the biopolitical management of population within the sovereign terrain. Some key themes that have emerged have been the following. First, that law and asylum have been uneasy in each other's company; indeed, there have been repeated conflicts between the two. What appears to be a fundamental incompatibility has shown itself in the fact that asylum has tended to flourish in periods when legal structures have been relatively weak (post-Classical Greece, late Imperial Rome and Medieval Europe) and has been eclipsed during periods of resurgent sovereign power and the re-establishment of law (early Imperial Rome, early Modern Europe). Another major theme that has emerged has been the way in which certain contestable notions of justice that have surrounded asylum have been superseded by the claimed objectivity of refugee law, the latter precluding contestation at any substantive level. Linked to this development has been the question of judgement over the person seeking sanctuary/asylum. Prior to the modern age the weight of regulation, such as it

¹ Richard L Fruchterman, 'Asylum : Theory and Practice' (1972) 26 *Judge Advocate General Journal* 169, 169.

was, fell on determining the space of sanctuary, whereas today the eye of the law falls overwhelmingly upon the person of the refugee.

At this point a number of questions flow from this investigation: is asylum, as historically understood, any longer possible? What advantages, if any, would asylum today offer to the refugee in contrast to refugee law? What are the implications for law if such a resurgence of asylum were to occur? Some of the answers to these questions are revealed in this part of the thesis: an exploration of the US Sanctuary Movement 1981-1991 and its relationship to law. Here we find an attempted resurrection of the ancient practice of sanctuary, perhaps in its most sustained form in the Western world since the decline of church sanctuary in the 16th and 17th centuries. It is also the first time since then that we find sanctuary being used as a direct form of resistance against the sovereign power. Perhaps most interestingly, the Sanctuary Movement transcends certain key distinctions between the asylum of old and its contemporary more secular setting. So, on the one hand, it adopted the ancient practice of using church space as a sanctuary beyond the writ of law, but it also spread beyond this to the use of private homes, community centres, university campuses, and even to embrace the notion of sanctuary cities and states. Thus sanctuary burst the bounds of the sacred and spread throughout society.² Also whereas much of the earlier tradition of asylum was concerned only with the domestic – asylees fleeing within the realm to a church or shrine – the Sanctuary Movement facilitated the crossing of borders. In short, the movement reconfigured the notion of asylum as ‘freedom from seizure’ from the clutches of both the state of origin and the state of asylum.

A further unique aspect of the Sanctuary Movement that distinguishes it from earlier forms of asylum is that in this instance sanctuary confronts not simply law, but more specifically a developed system of refugee law, which claims to be based on

2 It is worth noting here that sacralisation functions to cleave aspects of life away from the everyday, ‘removed from the free use...of men’. Thus to break the bounds of the sacred through profanation is a form of resistance to such reification of objects, practices, spaces etc. Giorgio Agamben, ‘In Praise of Profanation’ in *Profanations* (Jeff Fort tr, Zone Books 2007) 73 and generally.

protection of the refugee. As will become apparent, this fact led to much confusion and disorientation amongst Sanctuary Movement activists. Churches once again became spaces of protection from the forces of secular law. And yet, equally, aspects of juridical thinking, of legal processes, indeed of refugee law itself, found their way into the practice of sanctuary. This forces us to deal with the question of whether the power of legal ideology has infected and sullied the practice of asylum, even where it arises outside of the law, turning it into a pale shadow of its former self. Perhaps we are faced with the prospect of there being no space for a sustained alternative to law in dealing with the refugee question today? The hegemony of law eventually brought within its orbit many of the activists in this movement. In doing so, it not only corrupted much of the sanctuary tradition, but it turned ‘sanctuary’ in many instances into an adjunct of the law rather than a challenge to it.

9

Birth of a Movement

Introduction

Although the long tradition of asylum that we explored in Part I withered from early modernity onwards, it would be incorrect to say that it ever completely died out. There was the case of two of the signatories of the death warrant for Charles I who fled to New Haven following the Restoration, and were given asylum in the church there.¹ Another story is told of a homicide taking sanctuary in a church in Malta in about 1807. While the outcome of this incident is not known, Malta at that time still possessed a legal right of church sanctuary, which had survived the British occupation of the island.² Much more recently, in Europe during the Second World War, many churches and the communities around them gave sanctuary to those fleeing occupying forces. The most famous of these was in Le Chambon in France.³ In the late 1970s a movement arose in Holland in which churches gave sanctuary to immigrants and refugees threatened with deportation as a result of increasingly harsh immigration measures from the government.⁴ When a Turkish refugee, Kemal Altun, committed

1 Rollin G Osterweis, *Three Centuries of New Haven* (Yale University 1964) 55-64.

2 Thomas John de' Mazzinghi, *Sanctuaries* (Halden & Son 1887) 4.

3 See Philip Paul Hallie, *Lest Innocent Blood Be Shed: The Story of the Village of Le Chambon, and How Goodness Happened There* (Harper and Row 1979) for an absorbing account of this inspiring story. Robert McAfee Brown references Le Chambon at a rally for the Sanctuary Movement. Transcript of speech given on 23 March 1986 (GSSC).

4 *Sanctuary – The Congregation as a Refuge: Report of the international workshop, held under the auspices of the Council of Churches in the Netherlands and the Human Rights Desk of the*

suicide by leaping out of the window in a courtroom in Berlin in 1983 a sanctuary movement developed in that city too.⁵ And perhaps most famously, beginning in the summer of 1996 the *Sans-Papiers* have repeatedly sought sanctuary in churches in France in protest against harsh treatment and deportation orders.⁶

At one level, the idea of the church as a sacred space into which sovereign power could only tread with sensitivity has continued almost unabated. More specifically, at certain historical moments this notion legitimated a process by which those fleeing the secular law could find shelter and protection. Such is the case in mid-19th century USA, where the Underground Railroad that spirited escaped slaves to freedom in the North used many churches as stops along the way.⁷ A century later draft resisters fleeing from federal authorities in the US during the Vietnam War were given asylum in churches as well as on university campuses.⁸ In both these cases refugee law was absent from the scene. In the case of the Underground Railroad, refugee law was non-existent. In the case of the draft resisters, refugee law, while firmly established, had no relevance to the specific situation; the sanctuary-seekers had neither crossed a border, nor were they claiming persecution *per se*.⁹ But both

National Council of Christian Churches in the United States of America – 26-30 August 1986 (Kerk en Wereld 1986).

5 Steve Cohen, *From the Jews to the Tamils: Britain's mistreatment of refugees* (South Manchester Law Centre 1988) 44-5.

6 cf Thesis Introduction (n 13).

7 The work of Wilbur Siebert is very revealing on the subject and benefits from being based on first-hand accounts of the movement given to him in the late 19th century. See Wilbur H Siebert, 'A Quaker Section of the Underground Railroad in Northern Ohio' (1930) 39 *Ohio Archaeological and Historical Quarterly* 53; Wilbur H Siebert, *The Mysteries of Ohio's Underground Railroads* (Long's College Book Company 1951); Wilbur H Siebert, *The Underground Railroad: From Slavery to Freedom: A Comprehensive History* (Dover Publications 2006).

8 J Dennis Willigan, 'Sanctuary: A Communitarian Form of Counter-Culture' (1970) 25 *Union Seminary Quarterly Review* 517; Michael S Foley, 'Sanctuary! A Bridge Between Civilian and GI Protest Against the Vietnam War' in Marilyn B Young and Robert Buzzanco (eds), *A Companion to the Vietnam War* (Blackwell Publishers 2002).

9 Renée Goldsmith-Kasinsky, *Refugees from Militarism: Draft-Age Americans in Canada* (Transaction Books 1976) provides an interesting contemporary account of those who crossed into

these movements, along with the much older tradition of asylum, heavily influenced the Sanctuary Movement of the 1980s, which is the subject of this part of the thesis. Indeed, some of the leading figures in sanctuary for Vietnam War draft-resisters such as The Revd William Sloane Coffin and The Revd Gustav Schultz would later play key roles in the Sanctuary Movement a decade later.¹⁰ However, it is perhaps worth noting here that the sanctuary movement during the Vietnam War saw itself as quite clearly in opposition to the law and sovereign order. Coffin, for example, says: ‘The underlying rationale for church sanctuary was theological and political rather than legal...there was no claim to any legal recognition of the privilege. Indeed, it was precisely the illegality of the act – an act of civil disobedience – that gave the concept of sanctuary its symbolic power as a confrontation with an unjust and illogical war.’¹¹ Another activist at the time identified the kernel of what sanctuary had always been, and the role it played for the movement then: ‘“Sanctuary” has always meant a “holy place”, a place in some way independent of the state’s sovereignty.’¹² Perhaps this is indicative of a time when social orders were being challenged across the globe, and in

Canada to avoid the draft or, in the case of deserters, to evade the Military Police. Although they were in effect seeking and were granted asylum, refugee law appears to have played little or no part. Instead their reception remained primarily a question of politics, even though the numbers involved were substantial. Goldsmith-Kasinsky estimates around 30,000 to 40,000 Americans took sanctuary in Canada at this time (5). At least some of those who had previously taken sanctuary in churches in the US to resist the draft later fled across the Canadian border to seek sanctuary there too (45-46).

10 The link made by some of those who had been involved in both movements was that both cases involved people having to leave their homes against their will due to war, whether to resist fighting in one or to escape one, e.g. ‘Sanctuary for Salvadorans’, draft typed mimeographed document, 1 October 1982, 6 (GSSC). At the outset of the Sanctuary Movement activists explicitly identified themselves within this tradition, stretching from the late Roman era through medieval church sanctuary, the Underground Railroad and the anti-Vietnam War movement, e.g. ‘Historical and Theological Basis for Sanctuary’, undated [early 1982?], unsigned typed mimeographed document (CRTFCAR).

11 Quoted in Samuel T Francis, *Smuggling Revolution: The Sanctuary Movement in America* (Capital Research Center 1986) 42. The same point is made by James H Walsh and Mary Ellen O’Neill, ‘Sanctuary: A Legal Privilege or Act of Civil Disobedience?’ (1987) 61 *Florida Bar Journal* 11, 14.

12 W Evan Golder, ‘War Resister’s Sanctuary’, *U.S. Catholic* (November 1972) 34.

which therefore the concept of asylum as freedom from seizure by law and the state held great purchase. The dichotomy between law and sanctuary would be much less clear in the Sanctuary Movement a decade later, when the sovereign order, particularly in the West, had re-established its poise and authority.

Portent in the Desert

In the summer of 1980, three Salvadorans were discovered by the US Border Patrol in the Sonoran Desert, an unforgiving terrain that straddles the border between Mexico and Arizona. They were barely alive, having spent days wondering lost without food and water. Over the next few days the rest of the party who had crossed the border together were found, 27 in total. Of these, 13 were dead, including women and children. The survivors were treated in hospital, where local priests and journalists visited them. The story they told was horrific. Having fled as refugees from an increasingly brutal conflict in El Salvador, they had got lost in the desert, and had been reduced to drinking perfume and urine in order to survive. In their final hours, the women and girls had been sexually assaulted by their ‘coyotes’, the guides who, for money, escorted migrants illegally across the Mexico–US border. Then they described the horrors they had fled in El Salvador, of death squads, torture, and mutilated bodies in the streets. Just a few months earlier Archbishop Oscar Romero had been assassinated by men associated with the government, while conducting Mass in the capital, San Salvador. His crime had been to speak out against the growing scale of the atrocities being committed daily in broad daylight by the government and its allies. A corrupt government and a civil war had been tearing the country apart for years. But little of this had been reported in the US. The silence had much to do with the fact that the government of El Salvador, as corrupt and murderous as it was, was also a key Cold War ally of the US.

The group who had ended up stranded in the Sonoran Desert were victims both of the government they had fled, but also of the Cold War priorities of the country in which they sought asylum. The US had for many years been operating a quota system for refugees, which was openly biased towards those fleeing Communist

governments.¹³ Refugees from countries ruled by right wing governments, on the other hand, had far fewer quota places. During the period 1945-1990, some 2 million refugees were given asylum in the US. And of these, around 90 per cent came from Communist countries.¹⁴ In the 1980s refugees from Iran, Cuba and Nicaragua continued to find entry into the US relatively straightforward, whereas those escaping the regimes of allies such as Haiti, El Salvador and Guatemala were routinely refused asylum and deported. However, just three months before the tragedy in the Sonoran Desert, US law changed with the coming into effect of the 1980 Refugee Act.

The 1980 Refugee Act

It is frequently argued that the purpose of the 1980 Refugee Act, which formally abolished preferential treatment for refugees from countries in the Communist sphere and for the first time incorporated the 1951 Convention into domestic law, was to facilitate a more humanitarian and less political procedure for granting asylum.¹⁵ As we shall see, this was certainly the line of sections of the Sanctuary Movement. Indeed, my argument is that this view ended up severely compromising the movement's commitment to asylum. However, a humanitarian focus was clearly not the Act's effect, and arguably was not what lay behind its formation. The large number of refugee arrivals in the late 1970s provoked much debate in Congress about how to restrict the numbers of refugees entering the country.¹⁶ And throughout the 1970s there had been various attempts to pass legislation to create a more statutory framework for adjudicating asylum claims and controlling refugee arrivals.¹⁷ While the 1980 Act eliminated the 'seventh preference', which had privileged refugees coming from Communist countries, by adopting the 1951 Convention's definition of a

13 This was most clearly evident in the 'Seventh Preference' contained in s.3(7), *Immigration and Nationality Act of 1965*, 89-236 (79 USC 911).

14 Ann Crittenden, *Sanctuary: A Story of American Conscience and the Law in Collision* (Weidenfeld & Nicolson 1988) 18.

15 e.g. Deborah E Anker, and Michael H Posner, 'The Forty Year Crisis: A Legislative History of the Refugee Act of 1980' (1981) 19 *San Diego Law Review* 9.

16 Erika Lee, 'A Nation of Immigrants and a Gatekeeping Nation: American Immigration Law and Policy' in Reed Ueda (ed), *A Companion to American Immigration* (Blackwell Publishing 2006) 22.

17 Anker and Posner (n 15) 20.

refugee, it also ‘destroyed the former presumption that all those fleeing Communist lands were in fact refugees’.¹⁸ Thus this group of refugees would now also be forced to prove themselves worthy of asylum, along with all other claimants. The Act also instituted the first delineation in law of a refugee, taken of course from Article 1A of the 1951 Convention. Indeed, rival bills had actually offered a wider definition including those fleeing natural disasters and armed conflict, yet these all failed.¹⁹ In addition, many in Congress had decried the extensive use of the parole power exercised by the Executive to allow whole groups of refugees in at various times. This was a discretionary power that had been used repeatedly since the Eisenhower administration to allow in hundreds of thousands of Hungarians, Soviet Jews, Vietnamese, Cambodians and Laotians over and above the statutory quota restrictions.²⁰ The 1980 Act finally closed this loophole too.

It is perhaps in this context that the process that led to the 1980 Act can best be understood, not primarily as a humanitarian gesture, but rather as a mechanism for a more controlled and less ‘politicised’ refugee admissions procedure. The combination of an overtly political asylum paradigm, grounded in the ideology of the US as the home of freedom and human rights, together with wide executive discretion in granting admission, meant that every refugee crisis led to political agitation in favour of their admission, whether it was Hungarians, Cubans, Haitians, Chileans or Vietnamese – although, of course, the executive operated a far more restrictive policy of paroling refugees from regimes friendly to the US, such as Chile and Haiti, than from Communist countries.²¹ Bill Ong Hing has noted that ‘a major catalyst for the new refugee law was a disturbing anxiety felt by some members of Congress that thousands of Southeast Asians would destabilize many communities’.²² Although the 1980 Act is usually associated with the haloed name of the liberal Senator Edward

18 Gil Loescher and John A Scanlan, *Calculated Kindness: Refugees and America’s Half-Open Door, 1945 to the Present* (The Free Press 1986) 155.

19 Anker and Posner (n 15) 22.

20 Lee (n 16) 22; Ira J Kurzban, ‘A Critical Analysis of Refugee Law’ (1982) 36 *University of Miami Law Review* 865, 872.

21 Kurzban (n 20) 872.

22 Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy 1850-1990* (Stanford University 1993) 127.

Kennedy, it was co-sponsored by one of the most reactionary senators of the time, Strom Thurmond, known mainly for his racism and hostility to Civil Rights. Ong Hing goes on to argue that the ‘emphasis on “humanitarianism”...clouds other political motivations such as the desire to limit refugee admissions’.²³ Peter H Schuck explains further the motivations that lay behind the Act:

By the end of the [1970s], the [Congressional] committees’ leaders could mobilize support for a new refugee admissions system. They envisioned a process that would be more predictable, manageable, and consultative, that would enhance Congress’s policy influence, and that would limit the administration’s parole power. The Refugee Act...was the result of this vision.²⁴

Many of those in Congress who were especially hostile to the arrival of large numbers of Vietnamese refugees linked the issue with the problem of the parole power. One such congressman, Representative Joshua Eilberg, specifically argued that parole was being used to flout the restrictions imposed under the 1965 Act.²⁵ In total, between 1975 and 1979 some 300,000 refugees were allowed into the US under parole powers.²⁶ One of the key provisions of the 1980 Act was that it ended the wide discretionary powers of the executive to parole unlimited numbers of refugees into the country. So Section 212 of the Act severely restricts the parole power:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest *with respect to that particular alien* require that the alien be paroled into the United States rather than be admitted as a refugee...

Note the emphasis on an individualistic determination and the ‘public interest’ as a key criterion. In addition, the Act reaffirmed that the burden of proof rested with the claimant for asylum.²⁷

The numbers of refugees admitted into the US fell from an average of 100,000 per year between 1975 and 1980 to around 50,000 in the years following the passage

23 Lee (n 16) 23.

24 Peter H Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (Westview Press 1998) 101.

25 Loescher and Scanlan (n 18) 153.

26 *ibid.*

27 Kurzban (n 20) 874, 876 footnote 67.

of the Refugee Act.²⁸ The potential for the 1951 Convention, as passed into law by the 1980 Act, to be an effective means for a cool and legalistic blanket refusal of claims can be seen in the following statement by Stephen E Palmer, President Carter's Deputy Assistant Secretary for Human Rights and Humanitarian Affairs, defending the large-scale refusal of asylum to Haitians:

Determination of a particular asylum claim...is not a general referendum on human rights in the home country...Instead, we must apply a narrow and clearly focused standard established by treaty and by U.S. statutes. The question in passing on an asylum application is this: Does this particular individual have a 'well-founded fear of persecution' based on race, religion, nationality, membership in a particular social group or political opinion if he or she were to return to the home country?²⁹

In the months following the passing of the 1980 Act, one of the largest arrivals of refugees into the US took place with the Mariel boatlift of over 100,000 Cubans to Florida. In order to assuage concerns, the Carter administration declared that all arrivals would be screened for their correspondence to the 1951 Convention standard of a refugee. However, the large and concentrated numbers made this impractical. In addition, the government refused to classify them as refugees, because to do so would 'reward illegal entry' and would thus set a 'dangerous precedent' for the future control of refugee arrivals.³⁰

As we shall see, the attempt to depoliticise asylum was at one level unsuccessful. The Sanctuary Movement was perhaps the largest and most politicised pro-refugee movement in US history. Yet at another deeper level the Act achieved its purpose in two ways. First, in confronting the Sanctuary Movement, the government was able to shield itself with the claim, on very similar terms to that of the Carter administration official quoted above, that the practice of refugee admissions was a purely legal and bureaucratic one. Indeed, it is striking how the arguments put forward by the liberal Carter administration and the hard-right Reagan administration are almost the same, both deploying the mantra of the 1951 Convention as reflected in the 1980 Act. Second, and more insidiously, the humanitarian claims of the Act led many in the Sanctuary Movement to have illusions that the problem was not the Act,

28 Lee (n 16) 23.

29 Quoted on Loescher and Scanlan (n 18) 179.

30 *ibid* 185.

but the failure of the government to abide by it. This in turn, led the movement into practices that owed more to the paradigm of border control than to political liberation.

Some argue that the Reagan administration's continued preference for refugees from Communist countries was a betrayal of the 1980 Act.³¹ This was also the view of many in the Sanctuary Movement. However, one could equally argue that the Reagan administration was simply better able to obscure its political preferences behind the mask of a more 'objective' legal standard.³² Moreover, it could also be argued that many, perhaps most, of those who crossed from Central America into the US, did not *sensu stricto* fit the definition of refugee contained in the 1951 Convention and the 1980 Act. This, too, would lead some in the Sanctuary Movement to make dubious distinctions and engage in some offensive practices, which are discussed in the following chapters. In the two decades since the end of the Sanctuary Movement, it is clear that the dominant discourse involving refugees has indeed become more legalistic and set in terms of border control and the 'problem' of undocumented migrants. Writing in 1996, Norman and Naomi Zucker described refugee policy as having become 'an exercise in alchemy: how to transform refugees into immigrants, immigrants who can be controlled, regulated, and above all, chosen'.³³ Subsuming the question of asylum into a legal framework has been key to achieving this policy objective.

As was to become increasingly clear over the months and years following the introduction of the 1980 Act, in practice the Immigration and Naturalization Service (INS) were routinely dismissing refugee claims from people fleeing regimes allied with the US, while continuing to be more liberal in granting refugee status to those arriving from Communist countries. For the survivors from the Sonoran Desert, in spite of their testimonies, and of the overwhelming evidence of violence and persecution in El Salvador, the Refugee Act appeared to offer little help. In the following year just two Salvadorans were granted refugee status by the US

31 e.g. *ibid.*

32 This is the argument put forward by Ann Crittenden and Ira J Kurzban, although Kurzban attributes this to the residual executive power in the 1980 Act to designate refugee quotas. Crittenden (n 14) 22; Kurzban (n 20) 881.

33 Norman L Zucker and Naomi Flink Zucker, *Desperate Crossings: Seeking Refuge in America* (ME Sharpe 1996) 6-7.

government, while 154 claims were rejected. The year after, in 1982, 61 Salvadorans were given asylum, 994 were rejected and a backlog of 22,314 was awaiting a decision.³⁴ What had changed was that now the politics of asylum were being obscured behind the legal ‘objectivity’ of the new system inaugurated by the 1980 Act.

After recovering sufficiently, the survivors from the Sonoran Desert were taken from hospital by INS agents and put on planes back to El Salvador. In an ironic twist, the date on which the refugees were first discovered in the desert was 4 July, the anniversary of the US’s own break with a tyrannical government. However, these refugees were but among the first of what would become a mass arrival of forced migrants from the region. In the period 1980-1983 between 1 million and 1.5 million people were forced to flee the spiralling violence in Guatemala and Nicaragua as well as El Salvador. Of these, roughly 500,000 came to the US.³⁵ This figure represented a number roughly equal to that of the Vietnamese refugees who came to the US in the late 1970s; but whereas the latter had been received with relative openness as fugitives from a Communist regime recently at war with the US, as far as the Central Americans were concerned, the gates would be closed. Between June 1981 and March 1991, 2.8 per cent of Salvadoran applicants were granted asylum, whereas the equivalent numbers were 74.5 per cent for Soviets, 69 per cent Chinese and 61 per cent Iranians.³⁶ Zucker and Zucker put their finger on the key point when they write: ‘Salvadorans confronted a wall far more impenetrable than an inept bureaucracy and doctrinaire policy makers. That wall was the refugee law itself and the definition on which it is based.’³⁷

Arizona Activists Get Organised

The shocking discovery of the refugees in the desert led to widespread media coverage. Local activists in Tucson, Arizona, where the survivors had been taken to

34 Crittenden (n 14) 98.

35 *ibid* xvi.

36 Zucker and Zucker (n 33) 85.

37 *ibid* 89.

hospital, went to visit them, listened to their testimonies both of events in El Salvador and of their ill-fated attempt to seek asylum in the US. The deportations were so swift that little could be done to help them. However, people in Tucson and elsewhere had now been alerted to the reality of what was going on in El Salvador. The city had a tradition of helping refugees from Latin America, beginning in the 1970s when people fleeing the Pinochet coup in Chile were assisted and sponsored by a network based around local churches.³⁸ Gary MacEoin, who would later become a central figure in the Sanctuary Movement, suggested that this experience laid the basis of that movement by bringing the Anglo and Latino communities together on the basis of 'community concern and response'.³⁹ The Revd John Fife, pastor of the poor Anglo-Latino Southside Presbyterian Church, who would also become one of the leading figures in the movement, stated that the experience of engaging in the struggles of the 1970s was a 'hell of a training program for when the refugees started showing up' a decade later.⁴⁰ Fife then began to research what was happening in Central America. He and Father Richard Elford, a local Catholic priest, then began organising a weekly vigil for Central America outside the Federal Building in Tucson.⁴¹

Beginning in 1979, the Manzo Area Council, a Tucson NGO providing mainly legal assistance to undocumented immigrants, began receiving the first refugees from Central America. They early on linked up with the Tucson Ecumenical Council (TEC) to form a Religious Task Force on Central America to assist the refugees. The TEC comprised 65 Protestant and Catholic churches. They all had a history of involvement

38 Other churches around the country had similar recent histories of helping and sheltering refugees. For example, the United Baptist Church in Seattle, one of the major hubs of the Sanctuary Movement, had assisted Angolan and Laotian refugees in the 1970s. House of Representatives, *Break-ins at Sanctuary Churches and Organizations Opposed to Administration Policy in Central America*, Hearing: February 19 and 20, 1987 (Serial No. 42) Washington DC: US Government Printing Office, 48.

39 Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (University of Minnesota Press 1995) 15.

40 Quoted in Crittenden (n 14) 11.

41 Robert Tomsho, *The American Sanctuary Movement* (Texas Monthly Press 1987) 24.

in social issues and campaigns such as arms control.⁴² Cunningham writes: ‘This alliance between church and legal agencies had a defining effect on the Sanctuary movement, particularly as the Tucson churches attempted to give Sanctuary a legal basis.’⁴³ Initially help for the refugees consisted mainly of legal assistance, translation services, moral support and charitable donations. At this stage, the major problem appeared to lie in events in Central America, and not so much with the question of the treatment of the refugees once they reached the US.

It took another scandal – one, however, on a much more minor scale – to fully awaken local activists to the routine treatment of refugee arrivals in the US. In May 1981 a local rancher, Jim Dudley, picked up a hitchhiker on the highway heading north up to Tucson from the Mexican border.⁴⁴ As the two men talked it became apparent that the hitchhiker was Salvadoran, and had recently fled his country and crossed the border into the US. He had already been caught and deported once before by the Border Patrol.⁴⁵ Soon Dudley was pulled over by the Border Patrol. The hitchhiker just had time to ask Dudley to help him before the Border Patrol asked for ID and promptly took the Salvadoran away. Dudley, feeling bewildered and disturbed by what had just happened, went immediately to see his friend, a fellow rancher, Jim Corbett. As well as being a rancher, Corbett was a Quaker, a sometime philosopher, and had a history as a political activist in the anti-Vietnam War movement and in various union struggles going back to the 1960s.⁴⁶ The following morning, Corbett awoke still thinking about the Salvadoran hitchhiker his friend had picked up. So he phoned the local INS office, and with some mild deception managed to elicit the necessary information.⁴⁷ Corbett went to the detention centre where the man was being held, armed with refugee status claim forms he had picked up from the Manzo Area Council. After being kept waiting for a long time, Corbett was then informed by

42 Miriam Davidson, *Convictions of the Heart: Jim Corbett and the Sanctuary Movement*, (University of Arizona Press 1988) 27.

43 Cunningham (n 42) 18.

44 The following series of events is described in detail in Crittenden (n 14) 28-31.

45 Tomsho (n 44) 9.

46 Crittenden (n 14) 37-8.

47 He announced himself with an authoritative voice as ‘Jim Corbett’, which happened to also be the name of a recent mayor of Tucson.

a guard at the detention centre that while he had been waiting, the Salvadoran had been taken and deported over the border to Mexico. After a row with the officer in charge, Corbett left angry and determined to do something. The events surrounding the tragedy in the Sonoran Desert the year before, coupled with Corbett's experience with the INS less than a year later, made it clear that not only were atrocities being committed in El Salvador, but the US government were also routinely deporting the refugees fleeing those atrocities. Eight days later Corbett wrote in a letter to his fellow Quakers: 'Speaking only for myself, I can see that if Central American refugees' rights to political asylum are decisively rejected by the US government or if the US legal system insists on ransom that exceeds our ability to pay, active resistance will be the only alternative to abandoning the refugees to their fate.'⁴⁸ So at the very beginning Corbett appeared to be prepared to break the law, yet he also had the idea that the law itself was not the problem; the refugees had rights: it was the authorities who were not upholding them.

A month later the Religious Task Force on Central America met and came up with a strategy to raise as much money as possible to bail out refugees being held at El Centro, one of the largest detention centres in the SouthWestern United States.⁴⁹ An African-American church in Watts, Los Angeles, was amongst those offering shelter to those bailed out of El Centro.⁵⁰ But this strategy ran into the sand, as the courts, realising what was happening and also aware of the quickly growing exodus of refugees from Central America into the US, began to substantially raise bond money to extortionate levels. With released refugees frequently and understandably skipping bail in order to evade the INS, the Tucson activists were unable to continue raising sufficient money for bail.

Meanwhile Corbett had begun taking in refugees at his ranch, giving them sanctuary there, allowing them to avoid the INS before moving on to stay with their friends or relatives elsewhere in the US. When there was no room left at his place,

48 Letter dated 12 May 1981, quoted in Elna L Otter and Dorothy F Pine (eds), *The Sanctuary Experience: Voices of the Community* (Aventine Press 2004) 31.

49 Crittenden (n 14) 42-43.

50 *ibid* 47.

Corbett managed to get various friends to put others up at their houses. After filling up his own house and those of his friends, Corbett asked Fife to offer his church to take in more.⁵¹ Fife, after consulting others in the church, agreed. Southside Church decided to give sanctuary to refugees in late 1981 and it was done on a more-or-less ad hoc basis. Up to 25 refugees could be accommodated there. A studio apartment had been fitted out at the back of the church, and refugees would stay there or in the Sunday school rooms. According to Fife, it was Corbett who initially convinced him to break from a purely legalistic approach to helping the refugees, on the basis that the first principle was to adapt to the needs of the refugees rather than following legal rules. Whereas Southside Church had hitherto only housed refugees who had been bonded out of detention, Corbett asked Fife if they would also put up undocumented refugees, such as those he was already accommodating in his own house.⁵² Once Southside had begun housing undocumented refugees in the church, Fife took to introducing new arrivals at the Sunday service and telling their stories, and each time challenging the congregation: 'Your government says that these people are illegal aliens. It is your civic duty when you know about their status to turn them in to INS. What do you think the faith requires of you?' After the services members of the congregation would often take the refugees home for dinner, and subsequently invite them to continue their sanctuary in their homes. Soon members of the congregation were also involved in transporting refugees who had illegally crossed from the border up to Tucson.⁵³ At this stage, no distinction was being made between 'legal' and 'illegal' refugees.

Corbett had begun organising to help refugees over the border through a goat-milking cooperative he had helped set up. '*Los Cabrerros Andantes*' (The goatherds errant) was made up of people who knew the wild Mexican/Arizona border well. As Corbett would later comment: 'Errantry shifted from goat herding to refugee aid.'⁵⁴ Once the group expanded into the Tucson refugee support group (Trsg), hundreds of

51 Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Paulist Press 1985) 11.

52 'Conspiracy of Compassion', *Sojourners* (March 1985) 16-17.

53 *ibid* 17; Tomsho (n 44) 25.

54 Jim Corbett, *Goatwalking* (Penguin 1992) 137.

local residents were involved helping refugees get across the border and hosting them in their homes.⁵⁵ The volunteers included housewives who would ferry refugee children pretending that they were their own, and two women in their 70s and 80s who would transport refugees in their camper van.⁵⁶ Following a trip by Corbett to Mexico in late 1981, one final strand of what would become the Sanctuary Movement was put in place. He discovered many churches in Chiapas just over the border from Guatemala were already giving sanctuary to refugees from there and from El Salvador, involving the offer of housing, food, finding jobs, and assisting them to get past checkpoints. During this visit the groundwork was laid for the stretch of 'underground railroad' from Chiapas up to the Mexican-US border.⁵⁷ Later this was joined up with a network of churches and private houses throughout the US too.

Facing Up to the Law

In November 1981, a federal prosecutor warned a member of the Manzo Area Council that the government was aware of what Corbett, Fife et al were doing in bringing people across the border, and that if they did not cease there would be prosecutions. It was during a discussion amongst activists to discuss this threat, that Fife recalled the historic concept of church sanctuary, and proposed setting one up for the refugees. According to Fife in an interview in 1990, the idea to declare public sanctuary was in direct response to the threat of prosecution by the INS. By going public their intention was to 'beat 'em to the punch', in other words to ensure that when an indictment and a subsequent trial came it could not simply be presented as an act of law-breaking, but would also have to deal with issues raised by the refugees and their treatment by the Border Patrol and INS.⁵⁸ A decision to go public with

55 The Trsg gave their group a lowercase acronym to symbolise the non-hierarchical nature of their group organisation.

56 Corbett (n 57) 137.

57 Davidson (n 45) 62-63. For a moving and evocative description, along with photographs, of the conditions in El Salvador and the experiences of refugees moving across the border through Mexico and into the US assisted by the underground railroad and the sanctuary movement, see Dale Maharidge, and Michael Williamson (photos), 'Escape from El Salvador', *The Sacramento Bee*, a five-part series that ran from 26 to 30 August 1984.

58 Cunningham (n 42) 31.

sanctuary was also partially driven by concern not to just wait and be arrested and treated as ‘just another bunch of “coyotes”’.⁵⁹ Fife volunteered to take up the idea with his church.⁶⁰ The response of the church council was to study the history of sanctuary and the existing law on assisting refugees.⁶¹ As part of this study, law professors from the University of Arizona were invited to brief them on the possible consequences of setting up a sanctuary. It was confirmed that there was no legal basis in the US for church sanctuary. They would be liable for sentences of up to five years in jail and a \$2000 fine for harbouring illegal aliens. Yet in spite of this the council recommended that the church declare sanctuary. When put to the whole congregation in January 1982 it was endorsed by 59, with just two voting against and four abstaining. In his presentation to the congregation in favour of sanctuary, Fife had quoted the Old Testament injunctions to provide sanctuary.⁶² At first, the offering of sanctuary was based on the Augustinian mode, with Fife declaring: ‘We do not check Green Cards at the door; we meet people’s needs. We will provide hospitality at this church to anyone who needs it.’⁶³ At the beginning, therefore, it was about ‘hospitality’ and human need, not law or legal definitions.

Although it was, of course, true that there was no law which mandated churches, or any other spaces, as sanctuaries exempt from the writ of sovereign law, an incident that had recently taken place in Los Angeles certainly suggested that the government recognised the difficulties in forcibly entering what for many people remained the sacred space of a church. INS officers had chased a man suspected of being an illegal immigrant into a church in the city. They followed him in and arrested him. This caused a backlash within the local community and media. In October 1981, following this incident, an order was given by the local INS Director stating that their officers would no longer enter churches to make arrests. On the basis of this order the Lutheran Social Services of Southern California put out a call for the

59 Christian Smith, *Resisting Reagan: The U.S. Central America Peace Movement* (University of Chicago 1996) 66.

60 Tomsho (n 44) 26.

61 Crittenden (n 14) 66.

62 *ibid* 58.

63 Quoted in *ibid* 57. See also Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Westview Press 1993) 29.

resurrection of churches as sanctuaries for refugees.⁶⁴ Its director, The Revd John Wagner, in a letter to fellow refugee activists argued: ‘This order, in essence, is saying the church is a sanctuary, but it is not established in law’.⁶⁵ At a meeting of the TEC, Fife recalled this letter and those at the meeting began to realise that public sanctuary could also serve to raise consciousness amongst others about the plight of refugees, just as it had for them. Fife volunteered to ask his church to make the first declaration. At the congregational meeting to discuss the issue, two young African-American women spoke about the Underground Railroad and how it had sheltered their ancestors from slavery.⁶⁶ Tellingly perhaps, the only group within this milieu who were wary of declaring sanctuary were the lawyers in the Manzo Area Council, who feared the consequences for their legal work with the refugees.⁶⁷ It was decided to make the public declaration of sanctuary on 24 March 1982, the second anniversary of the assassination of the Salvadoran Archbishop Oscar Romero.⁶⁸

Meanwhile in Northern California, and completely independently from the Tucson group, The Revd Gus Schultz, one of the leaders of the sanctuary movement for Vietnam War resisters, suggested to his fellow Bay Area ministers that they revive sanctuary to help the many Central American refugees who were arriving in their area.⁶⁹ The INS order following the church invasion in Los Angeles was a major spur to action for them too. These ministers formed the East Bay Sanctuary Covenant, and in November 1981 the first sanctuary at St. John’s Presbyterian gave sanctuary to a Salvadoran family. But there was no publicity, as the family didn’t want the attention.⁷⁰ However, Schultz’s church, University Lutheran Chapel, voted soon after to pick up again the role it had played during the Vietnam War as a public sanctuary. The East Bay Sanctuary Covenant later responded to the call put out by Southside Church in Tucson to make a declaration as a public sanctuary on 24 March. Three

64 Crittenden (n 14) 64.

65 Letter from The Revd John H Wagner Jr, 22 October 1981 (GSSC)

66 Davidson (n 45) 67.

67 Crittenden (n 14) 65.

68 Tomsho (n 44) 27.

69 *ibid* 28; Cunningham (n 42) 29; Gustav H Schultz, ‘Schultz on Sanctuary’, *East Bay Times* (6 February 1985).

70 Tomsho (n 44) 29.

Salvadorans, including one of the survivors from the tragedy in the Sonoran desert in July 1980, were the first to take sanctuary at University Lutheran Church on 24 March.⁷¹ In all, six churches declared sanctuary on that day. Aside from Southside in Tucson, the others included Arlington Street Church in Boston, which had offered sanctuary to Vietnam War draft resisters in 1968, as well as churches in upstate New York, Berkeley, Cleveland, Washington DC and Los Angeles.⁷² According to one Tucson activist: 'It wasn't an overwhelming response, but it was better than going out in the cold completely naked.'⁷³

71 *ibid* 30.

72 Tucson Ecumenical Council memo to Churches, Organizations and Individuals Involved in the Sanctuary Action Scheduled for 24 March 1982, 11 March 1982 (CRTFCAR)

73 Crittenden (n 14) 69.

Aspects of the Sanctuary Movement

Declaration of Sanctuary

On 24 March 1982, on a cold sunny morning in Tucson, Arizona, Southside Presbyterian Church publically declared itself as a sanctuary for refugees. For the occasion, the front of this small, shabby Anglo-Latino church was draped with two huge banners. The first read '*La Migra No Profana El Sanctuario*' (INS, Don't Profane the Sanctuary), the second read '*Este es El Sanctuario de Dios Para Los Oprimidos de Centro America*' (This is a Sanctuary of God for the Oppressed of Central America). It was clear from the beginning that the Sanctuary Movement had a 'profound identification with [the] ancient tradition of sanctuary'.¹ When asked three years later how the Sanctuary Movement got started, Jim Corbett replied: 'You'll have to consult Exodus on that.'² It is also clear from the slogans chosen for this

1 Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Paulist Press 1985) 124.

2 'Conspiracy of Compassion', *Sojourners* (March 1985) 15. This article, a joint interview with Jim Corbett, John Fife, Stacy Merkt and Phil Willis-Conger, provides a detailed description from leading participants about the origins of the movement. Elsewhere, the mainstream media also made the same links with the tradition of sanctuary stretching back to antiquity, e.g. 'Offered Sanctuary: Scores of U.S. Churches Take In Illegal Aliens Who Flee Guatemala and El Salvador', *Wall Street Journal* (21 June 1984) 26.

public declaration that they saw sanctuary as not universal but directed at the ‘oppressed’. It was therefore very much a political statement. In their contemporary account of the movement, Renny Golden and Michael McConnell, two leading activists from Chicago reference antiquity, medieval canon and English law and the Underground Railroad, as part of the sanctuary tradition that informed movement for Central American refugees.³ Later on adherence to that tradition was underlined in an annual ‘Freedom Seder’ in Tucson that became a calendar event for the Sanctuary Movement. This was hosted by the Temple Emanu-El for the refugees as ‘a remembrance of Passover that weaves the present experience of refugees and sanctuary congregations into an awareness of more than three millennia of exile, oppression, and liberation.’⁴

In front of the banners sat a group of people around a table, ready to address the press. Fife chaired the proceedings. He said that his congregation had decided ‘after Bible study, prayer and agonizing reflection that they could not remain faithful to the God of the Exodus and prophets and do anything less. It was for us a question of faith.’⁵ Again, at the beginning of the Sanctuary Movement there was no talk of upholding the supposed principles of refugee law. Indeed, on the same day as making their public declaration of sanctuary, Southside Church sent a letter to the US Attorney General, in which they stated:

We are writing to inform you that Southside United Presbyterian Church will publically violate the Immigration Nationality Act 274(a). We have declared the Church as a ‘sanctuary’ for undocumented refugees. The current administration of U.S. law prohibits us from sheltering these refugees of Central America. Therefore, we believe that administration of the law to be immoral as well as illegal.⁶

3 Renny Golden and Michael McConnell, *Sanctuary: The New Underground Railroad* (Orbis Books 1986) 15.

4 Jim Corbett, *Goatwalking* (Penguin 1992) 157.

5 Quoted in Patrick Allitt, *Religion in America Since 1945: A History* (Columbia University Press 2003) 176.

6 Letter to US Attorney General William French Smith from Southside Presbyterian Church, 23 March 1982, quoted in *Basta!* (January 1985) 25. (*Basta!* was the semi-regular newsletter of the Chicago Religious Task Force on Central America.)

There is a curious, and apparently contradictory, aspect to this statement. On the one hand, it makes it quite clear that the church is knowingly intending to break the law, yet at the same time accuses the government of acting illegally. The precise nature of the government's illegal act is left unspecified. But it does suggest already that the nascent movement was attempting to seek some legal legitimacy for their actions, even while declaring themselves to be acting outside the law.

The INS undercover agent who attended the public declaration reported to his superiors: 'It seems that this movement is more political than religious but that a ploy is going to be Border Patrol "baiting" by that group in order to demonstrate to the public that the US government via it's [sic] jack-booted Gestapo Border Patrol Agents think nothing of breaking down the doors of their churches to drag Jesus Christ out to be tortured and murdered. I believe that all political implications should be considered before any further action is taken toward this group.'⁷ Even allowing for the crude and hyperbolic nature of this report, it is evident that indeed the movement's aim was political, that it was largely formed by people who had long histories of involvement in anti-war, trade union and other left-wing movements and were therefore predisposed to be hostile to the Reagan administration, and sympathetic to the refugees escaping the regimes of US allies in the Cold War. At this very early stage Corbett, who would later take an aggressively legalistic stance against the more 'political' wing of the movement, could describe the role of sanctuary as part of a political strategy to defeat US imperialism in Central America, and as such sets up sanctuary against the sovereign order:

The military regimes of El Salvador, Guatemala, and a number of other Latin American countries are simply the middle managers of U.S. domination...military terrorism as practiced by the national security state is *the* political instrument for maintaining established patterns of ownership and rule in Latin America. The terror pursues Salvadoran and Guatemalan refugees up through Mexico and into the U.S., where they are hunted down, hidden from public awareness, and shipped back by the tens of thousands. Both here and there, it is the same terror and a single process. We here in the U.S. are in the best position to stop it.⁸

⁷ Quoted in Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (University of Minnesota Press 1995) 33-4.

⁸ Undated [1982?] letter from Jim Corbett (GSSC).

Following the public declaration on 24 March, Southside was inundated with requests from refugees. Fife recalled, 'We discovered refugees we didn't even know existed in Tucson, let alone all along the border.'⁹ Thus public sanctuary enabled the hidden refugees and the community to connect. David Matas comments: 'The public declaration of sanctuary... [made] the source of help visible, it also made the problems refugees face visible...Publicity also meant making sanctuary a mass movement.'¹⁰ Thus going public was itself a political act. There was also a moral imperative in making sanctuary public: 'Publicity was a proclamation that they were doing what they believed to be right. Secrecy meant silence not only about their own activities but also about the violations of human rights they were trying to prevent.'¹¹ In any case, the huge and swift growth in the demands on the Tucson activists led them to seek out allies who could help share the burden and develop and co-ordinate the movement across the country. And this is when the Chicago Religious Task Force on Central America (CRTFCA) became involved.

Chicago Religious Task Force on Central America

The CRTFCA had been founded in January 1981 in response to the recent rape and murder of four US nuns by right wing paramilitaries in El Salvador, around the same time that sanctuary was getting off the ground in Tucson. It had been set up by a group of political activists based in a variety of local churches in Chicago. Their aims included raising awareness of the conditions of that war and of the dictatorships being imposed on the people of Central America, opposing the US government's support for repressive regimes in the region, and building solidarity for Central Americans both in their countries and those who had fled as refugees to the US. In the autumn of 1982, as the numbers of refugees arriving across the border snowballed and the existing sanctuary activists in Arizona struggled to cope, Corbett and Fife approached the CRTFCA for help in assisting the refugees and in establishing a nationwide network of sanctuaries. The CRTFCA agreed, and almost immediately Wellington Avenue

9 Robert Tomsho, *The American Sanctuary Movement* (Texas Monthly Press 1987) 87.

10 David Matas, *The Sanctuary Trial* (University of Manitoba 1989) 49.

11 *ibid.*

Church of Christ in Chicago declared itself a sanctuary.¹² The CRTFCA took on the role of national coordinator of sanctuary, and within two years helped set up additional sanctuaries across the US, including churches, synagogues and Quaker groups.¹³ The CRTFCA's Statement of Faith made clear the way in which they saw sanctuary as one part of drawing out political connections between various sources of injustice:

The sanctuary movement seeks to uncover and name the connections between the U.S. government and the Salvadoran death squads, and the connection between U.S. business interests and the denial of human and economic rights of the vast majority of people. We believe that to stop short of this is to betray the Central American people and the refugees we now harbor.¹⁴

The CRTFCA 'refined the concept of public sanctuary, in which church-sponsored refugees agreed to tell their story to the public over and over again'.¹⁵ This emphasis on getting refugees to speak publically gave them a voice as well as a more active role in sanctuary, and created a human story that allowed others to identify with them. The CRTFCA outlined the basis of their engagement with the Sanctuary Movement on the basis of political mobilisation, and incorporated the issue of the refugees within a broader political context that gave rise to the causes of their flight in the first place:

If we are able to keep the clear focus in the sanctuary project that the most important part of the refugee support work is to end U.S. aid to El Salvador and Guatemala so that we stop creating more refugees and that the refugees in the USA can return to their homeland, then all of our direct action and legislative action can be seen as a part of the refugee support work; i.e., a part of the sanctuary project.¹⁶

They also attempted to ground their theology within an avowedly political stance:

12 Ann Crittenden, *Sanctuary: A Story of American Conscience and the Law in Collision* (Weidenfeld & Nicolson 1988) 88.

13 *ibid* 90.

14 Quoted in Allitt (n 5) 177-8.

15 Crittenden (n 12) 90.

16 'Working Paper: Sanctuary Project as CRTF Central Organizing Tool', no date [1983?] (CRTFCAR) 4.

From the earliest times, sanctuary has had a deeply religio-political significance. It is a recognition of the moral limits of a civil order and the ultimacy of the divine claim on human allegiance...sanctuary is a faithful response to the liberating God who calls us into solidarity with the oppressed.¹⁷

Christian Smith describes the impact of the CRTFCA joining the movement:

The movement's identity began to evolve. Sanctuary began as a movement of hospitality that aimed to provide for the humanitarian needs of vulnerable refugees. But Sanctuary quickly became more than that. It grew into a *political* movement that sought to end the human oppression generated by the U.S.-sponsored war in Central America...heightened grassroots political awareness and the spread of Sanctuary fuelled each other.¹⁸

While it is certainly true that the CRTFCA injected a militant attitude into the nascent movement, as has already been made clear the movement was already political at its inception. Smith, writing in 1996, is refracting his analysis back through a damaging split in the movement, in which the activists based in Tucson would later accuse the CRTFCA of politicising the movement. This will be discussed in greater detail later. However, at the outset everyone seemed to be on the same page in conceptualising sanctuary as having a political edge. Corbett's early view has already been quoted above. Also, in a section on sanctuary as part of a guide for activists involved in assisting refugees from Central America, written in late 1982 and jointly prepared by the CRTFCA and the TEC, the political aspect of sanctuary is again made quite clear:

Sanctuary offers a concrete and direct way to challenge the inhuman policy of the U.S. government in Central America and of the INS, as well as providing a direct service to the refugees created as a result of these policies.¹⁹

17 'Historical and Theological Basis for Sanctuary', undated [1982/early 1983?], unsigned typed mimeographed document (CRTFCAR).

18 Christian Smith, *Resisting Reagan: The U.S. Central America Peace Movement* (University of Chicago 1996) 69.

19 *Seeking Safe Haven: A Congregational Guide to Helping Central American Refugees in the United States* (American Friends Service Committee, Church World Service Immigration and Refugee Program, Inter-Religious Task Force on El Salvador and Central America, and Lutheran Immigration and Refugee Service 1982) 64.

The Movement Grows

During their first year Southside alone organised sanctuary for an astonishing 1,600 refugees.²⁰ Although just six churches had declared sanctuary on 24 March, the movement spread rapidly. Wellington Avenue Church in Chicago declared itself a sanctuary in July 1982. It had previously given sanctuary to protestors fleeing the police riot during the Democratic Convention in 1968.²¹ A further 85 churches in Chicago publically supported Wellington Avenue Church's declaration.²² In total, by the end of 1982, 15 churches had declared sanctuary, with another 150 churches supporting refugees in various ways, such as raising money, providing food, clothes etc.²³ In addition to the public declarations, the underground railroad developed, linking together churches, private homes and other spaces all the way from the Mexico–Guatemala border north across the US–Mexico border and then throughout the US and up into Canada.²⁴ The mass media continued to take an interest in the growing movement, culminating in December when CBS's *60 Minutes* broadcast a report on the movement to millions of viewers. By the end of 1982 the Sanctuary Movement was 'by any measure...tiny. But it was beginning to irritate the colossal United States government.'²⁵ According to the CRFTCA's newsletter, *Basta!*, by early 1983 around 20,000 people had been involved 'in open defiance of U.S. immigration law'.²⁶ And by the end of that year some 1000 congregations had publically supported the Sanctuary Movement, and a new sanctuary was being set up at a rate of at least one each week. More than 20,000 copies of the CRTFCA's handbook had been distributed, running into its fourth printing in less than a year.²⁷

20 Smith (n 18) 68; Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Paulist Press 1985) 12.

21 Tomsho (n 9) 86.

22 Matas (n 10) ix.

23 Crittenden (n 12) 100.

24 *ibid* 79.

25 *ibid* 100.

26 *Basta!* (February 1983) 1.

27 *Basta!* (December 1983) 2.

At the end of February 1983, less than a year after the public declaration, the Tucson Ecumenical Council (TEC) agreed that its employees could engage in actively assisting refugees to reach sanctuary churches. In effect, the Tucson churches were endorsing and paying for refugees to be smuggled illegally across the border. Indeed, border crossings soon became a major aspect of the movement's activities. This alone was a brave act, and one which directly challenged sovereign control over migration and asylum. It was, therefore, also the aspect of the movement that most antagonised the state authorities, and would form the basis of prosecutions of leading activists over the coming years.

By 1984 the number of sanctuaries had mushroomed to number around 3000. In addition to churches of various denominations, these included synagogues, Trappist monasteries, private homes in Nebraska, farms in Iowa, and Native American reservations.²⁸ The number of public sanctuaries – those that made public declarations to the media and openly mobilised support – had grown to 45, with a further 600 'co-conspiring' congregations providing various levels of support, such as raising money or supplying food, clothing etc.²⁹ Yarnold suggests that the actual number of sanctuaries might have been higher than that reported, as some churches may have not wanted to be seen to be linked to the wider movement.³⁰ The movement also had an influence internationally, generalising the issue of sanctuary beyond the specific circumstances of Central America. Activists in Britain, Norway, Holland, France, Belgium, Switzerland, Italy, West Germany and Australia were inspired by

28 Golden and McConnell (n 3) 52-53. In relation to the recent history of Native Americans and sanctuary, it is worth noting here that even before the birth of the Sanctuary Movement, there were some examples of sanctuary on reservations being used as part of resistance against the federal government, e.g. 'Dennis Banks at the Six Nations', *Pacifica Radio* (January 1983), Sound Recording, Library of Congress, RYA 3947.

29 Crittenden (n 12) 139-140.

30 Barbara M Yarnold, *Refugees Without Refuge: Formation and Failed Implementation of U.S. Political Asylum Policy in the 1980's* (University Press of America 1990) 211.

the movement in the US in their own efforts to offer sanctuary to asylum seekers and other irregular migrants from various parts of the world.³¹

All the major Protestant denominations in the US, except for the Evangelicals, endorsed sanctuary, and many Catholic bishops had also endorsed it.³² Indeed, the Archbishop of Milwaukee, Rembert Weakland, gave sanctuary to eight Salvadoran refugees in his official residence.³³ The Union of American Hebrew Congregations and the Central Confederation of American Rabbis also came out in support of the movement.³⁴ The profile of sanctuary was such that it found a resonance in some surprising places. For example, life prisoners at Rahway State Prison in New Jersey, who had watched TV news footage of a family arriving at sanctuary at Rutgers University Chapel, managed to organise for a truckload of toys that they had been tasked with repairing to be donated to refugee children living in sanctuary.³⁵ At its height the Sanctuary Movement's network extended to 34 states, including conservative areas such as the Deep South and parts of the Midwest.³⁶ From 1980 to 1991 almost one million refugees from Central America entered the US, most of them

31 Elizabeth G Ferris, 'The Churches, Refugees, and Politics' in Gil Loescher & Laila Monahan (eds), *Refugees and International Relations* (OUP 1989) 172; Randy K Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (UBC Press 2005) 4.

32 Miriam Davidson, *Convictions of the Heart: Jim Corbett and the Sanctuary Movement*, (University of Arizona Press 1988) 84.

33 Allitt (n 5) 177.

34 Robin Lorentzen, *Women in the Sanctuary Movement* (Temple University 1991) 29.

35 Golden and McConnell (n 3) 134.

36 Lorentzen (n 34) 14. Evidence of the movement's implantation in the Deep South can be found in 'Guatemalan credits life to sanctuary movement', *Baton Rouge Morning Advocate* (8 June 1985) 10A. In the CRTFCA archive there are letters from farmers in remote parts of the country and close to the Canadian border offering assistance in hiding and transporting refugees as part of the underground railroad, e.g. letters from Anne and Eric Nordell, and Dora Marin to the CRTFCA in 1984 (CRTFCAR). In one district in Ohio which had voted Republican solidly for the previous 40 years there were four churches offering sanctuary to refugees who had entered the country illegally. Most of these had no prior history as activist churches. Indeed, one of them had censured a previous pastor for marching with Martin Luther King in the early 1960s. 'Offered Sanctuary: Scores of U.S. Churches Take In Illegal Aliens Who Flee Guatemala and El Salvador', *Wall Street Journal* (21 June 1984) 26.

illegally.³⁷ It is likely that a significant number of those were either directly or indirectly helped by the Sanctuary Movement. Thus it would not be an exaggeration to say that the impact and spread of the Sanctuary Movement has few equals in US history, and that it posed a very real challenge for the government at the time. The INS archive suggests that they took the threat of the Sanctuary Movement seriously, with regular memoranda discussing the issue and the circulation of various news stories reporting on the movement. For example, at the end of 1985, in the midst of the high-profile trial of leading sanctuary activists taking place in Arizona, the INS distributed a detailed refutation of the movement to every newspaper in the western US – except for Arizona, so as not to prejudice the trial there.³⁸ The scale of the challenge provoked the INS into making panicked claims that the movement was acting as a ‘Trojan Horse’ for communist agitation, and was responsible for the possible infiltration of ‘drug dealers, burglars and other assorted undesirables’.³⁹

Another aspect of the movement that was developed was the concept of ‘sanctuary cities’. During the Vietnam War, Berkeley City Council had passed a resolution to this effect, but it had not been replicated elsewhere. But as part of the Sanctuary Movement during the 1980s, more than 50 cities in the US passed ‘sanctuary city’ legislation that prohibited any municipal resources or employees from being utilised to enforce federal immigration laws. Some went even further by barring all municipal employees from enquiring as to someone’s citizenship status.⁴⁰ As Jean McDonald points out: ‘These changes in municipal policy were not simply “granted” by municipalities; rather, these transformations were hard-won by (im)migrants, refugees and their allies through research, networking, advocacy and political

37 Deena Guzder, *Divine Rebels: American Christian Activists for Social Justice* (Lawrence Hill 2011) 101; Lorentzen (n 34) 11.

38 Memorandum WRPIO 7110/2.1-C, 22 November 1985 (INSA).

39 INS News Release, ‘INS Warns of Los Angeles Sanctuary Proposal Impacts’, 26 November 1985 (INSA) 1, 4.

40 Jean McDonald, ‘Building a sanctuary city: municipal migrant rights in the city of Toronto’ in Peter Nyers and Kim Rygiel (eds), *Citizenship, Migrant Activism and the Politics of Movement* (Routledge 2012) 131.

action.’⁴¹ This is an example of what McDonald calls ‘regularization from below’.⁴² She then explains some of the practical effects of this movement:

[It enables] a higher quality of life for all members of our city’s communities. This movement does this by disrupting immigration laws that seek to create legal distinctions between human beings in crude attempts to reframe certain groups of people as having less or no access to political, legal or social rights.⁴³

This represented a gesture towards realising Badiou’s slogan: ‘everyone here is from here’. But more immediately, it avowedly challenges the legal categorisations that distinguish refugees from other migrants, ‘genuine’ v ‘false’ refugees etc. As Todd Howland and Richard Garcia note in their survey of the sanctuary city declarations, 45 per cent of them explicitly stated that city services would be provided to refugees ‘regardless of how the federal government classifies them’.⁴⁴ In those cases it is clear that at least some attempt was being made to challenge the legal categorisation of refugees. For the others, not making this point explicit at least preserved some ambiguity on the question.

The Practice of Sanctuary

As already mentioned in the previous chapter, ‘border work’ began in a rather informal way with a co-operative of goat-herders, who knew the border well, assisting refugees to cross. But over time this became a much more central part of the movement’s work with many other activists in the border states of Arizona and Texas taking part. It also became more dangerous as a cat-and-mouse game developed between the activists and the Border Patrol. Indeed, the later trials of members of the Sanctuary Movement were based on charges relating to these illegal border crossings. Members of the Sanctuary Movement would travel just over the border into Mexico

41 *ibid* 131.

42 *ibid* 139.

43 *ibid* 143.

44 Todd Howland and Richard Garcia, ‘The Refugee Crisis and the Law: The “City Sanctuary” Response’, in Ved P Nanda (ed), *Refugee Law and Policy: International and U.S. Responses* (Greenwood Press 1989) 192.

for a pre-arranged meeting with groups of refugees seeking help. They would be given instructions on where to cross the border, usually a bit of fence that was easily navigable (ie broken or easily climbed) and which was at certain times out of view of the Border Patrol. The refugees might also be given information about churches or private homes over the border to which they could seek further help or sanctuary. Often they would then be transported onwards to sanctuary in Tucson or elsewhere in the US.

As Corbett perceived it, the real problem for Central Americans fleeing violence was that, at the US border, the Mexican informal, church-based system of protection and transportation collapsed. What was required was a ‘border ministry’ – a strategy of action that would safely move Central Americans into the United States where they could contact a lawyer and apply for asylum. In an open letter to fellow Quakers written in July 1981, Corbett detailed treatment of Central Americans by the INS and began to formulate a theology of an ‘underground’ based on the notion of hospitality to strangers and incorporating elements of Latin American liberation theology, particularly the concept of *comunidades de base*. Corbett’s letter also contained possibly the first reference in the movement’s history to ‘sanctuary’. In typical Quaker fashion, he treated sanctuary not as a historical and legal institution but as a community activity (what he referred to as a church) whose members are gathered around a commitment to (or ‘solidarity’ with) the dispossessed and the poor.⁴⁵

A further element to border work was added following the opening up of a legal loophole. In 1984 a sanctuary activist in Texas, Stacey Lynn Merkt, was arrested, charged and convicted transporting illegal aliens. The Fifth Circuit Court of Appeals reversed her conviction on the grounds claimed by her lawyers that she was taking them to get legal assistance on making a claim for asylum. Their ruling stated: ‘By definition, a person intending to assist an alien in obtaining legal status is not acting “in furtherance of” the alien’s illegal presence in this country.’⁴⁶ The Fifth Circuit’s judgement opened the way to a clever strategy employed by the Tucson

45 Cunningham (n 7) 27.

46 *United States v Merkt*, 764 F.2d 266 (5th Cir, 18 June 1985), quoted in Corbett (n 4) 173.

activists. Before all border runs the Trsg would send a letter to the INS informing them that they were assisting asylum claimants to get legal advice on making those claims. On a number of occasions the Border Patrol had to release sanctuary activists caught transporting refugees from the border once they were shown copies of these letters.⁴⁷ However, this tactic proved controversial with fellow activists in the movement, as it led towards a greater collaboration with the law enforcement agencies. Indeed, as we shall see, the logic of this practice led some activists to quite openly see themselves as an adjunct to the INS. In any case this loophole was closed by the Immigration Reform and Control Act 1986, which made it an offence to assist aliens to enter by any other method than inspection at a port of entry.⁴⁸

Once the refugees were assisted over the border, the next stage in the work of sanctuary was arranging a place for them to stay. Most of the refugees who were helped into the US chose to live anonymously in the cities. But around one in twenty of them were prepared to go into 'public sanctuary'. Those who chose the latter were coached by Sister Darlene Nicgorski into how to deliver their testimonies and to appear at press conferences. Nicgorski was a nun who had lived and worked with displaced people in Guatemala for a number of years, spoke fluent Spanish and had since become involved with the Sanctuary Movement in Arizona. The refugees were then matched up with a church that was willing to receive them and were sent there, via the underground railroad of homes and churches.⁴⁹ The refugees were often difficult for the sanctuary churches to accommodate: many of them were traumatised, some were alcoholic, and some of the men displayed chauvinistic behaviour. Many churches requested refugees 'the way they might select a new pet dog': there were requests for refugees who were non-smokers or vegetarians, those who were 'Indians' or Salvadorans, with older children or younger ones or none at all. One church requested a refugee with carpentry skills.⁵⁰ So for many of the churches – especially those in more conservative, prosperous areas – a patronising, charitable attitude, along with many of the prejudices of 'good' v 'bad' refugees, remained. Corbett's response

47 Corbett (n 4) 175-6.

48 *ibid* 178.

49 Crittenden (n 12) 119.

50 *ibid* 120.

to those sanctuaries which complained about the refugees being too rough around the edges was apt and to the point: ‘We never promised we would send them the Holy Family, only the people.’⁵¹

Whilst many churches engaged in long and anguished discussions before deciding to offer sanctuary, which was then inaugurated with a press conference or some other public demonstration, in some cases sanctuary occurred on an almost *ad hoc* basis, and with no fanfare or at all. In one such case a church received a request by a priest in the local Hispanic community to take in a family of refugees. Without time for formal consultation, the family was brought over that same night and was welcomed by members of the congregation. Those members of the church who were there then proceeded to gather various things for the family such as clothes and food from others in the community. And because there was concern about the possible attitudes of the more conservative members of the church, the sanctuary activists did not reveal to the whole congregation the fact that the family did not have legal status.⁵² Indeed the decisions by churches and synagogues on whether or not to offer sanctuary led to splits and people leaving one church or temple for another, depending on their beliefs over the issue.⁵³ Churches and synagogues that endorsed sanctuary tended to have less hierarchical structures than others, much more like ‘base community’ (*comunidad de base*) churches.⁵⁴ In this way a political ‘dissensus’ cut across faith lines.

Testimonies

All refugees who chose to take ‘public sanctuary’, and even many of the ones who did not, were encouraged to deliver testimonies on their experiences, in particular on the causes of their flight. These testimonies were delivered to congregations, those that had already given sanctuary and those who were considering it. The testimonies also featured prominently in press conferences and other public declarations of sanctuary.

51 Quoted in Golden and McConnell (n 3) 55.

52 Lorentzen (n34) 62-4.

53 *ibid* 29-30.

54 *ibid* 32.

The purpose was two-fold: to educate people about the realities of events in Central America that were too often obscured by the government and the mainstream media, and to help persuade more congregations and individuals to get involved in sanctuary. Without a doubt the testimonies were often powerful, and did much to drive the movement forward.⁵⁵ One sanctuary activist recalled:

The Sanctuary refugees actually brought the war in Central America *here* to the U.S. The refugees told their dreadful stories...This human contact helped move anyone with a conscience, even people not previously politicized, to become active. This helped escalate the movement.⁵⁶

Christian Smith illustrates how for many activists the testimonies were absolutely central as a tool for mobilizing people. Even translators brought in who had little interest in politics became activists after being exposed to the refugees and their stories.⁵⁷ One Salvadoran refugee commented: ‘Once these people listen to us, I believe that they are not going to be the same anymore.’⁵⁸

William Westerman was able to identify six discrete sections of the standard testimony: ‘(1) introduction and background, (2) life and activity in the home country, (3) persecution, (4) escape, (5) exile, and (6) analysis and call to action.’⁵⁹ But for the refugees to be able to engage many of their audience of North Americans the testimony had to push narratives evoking sympathy rather than politics: ‘That meant concentrating on human, anecdotal narrative and removing political commentary that could be construed as inflammatory or accusatory,’⁶⁰ for political testimony could be experienced by North American audiences as ‘threatening’.⁶¹ Paulo Friere has written:

55 William Westerman, ‘Central American Refugee Testimonies and Performed Life Histories in the Sanctuary Movement’ in Rina Benmayor and Andor Skotnes (eds), *Migration and Identity: International Yearbook of Oral History and Life Stories, Volume III* (OUP 1994) 170.

56 Smith (n 18) 152.

57 *ibid.*

58 Quoted in Westerman (n 56) 169.

59 *ibid* 170.

60 *ibid* 171.

61 *ibid* 179.

[The] oppressor is solidary with the oppressed only when he stops regarding the oppressed as an abstract category and sees them as persons who have been unjustly dealt with, deprived of their voice, cheated in the sale of their labor – when he stops making pious, sentimental, and individualistic gestures and risks an act of love.⁶²

For Westerman, testimony was a way of turning the refugees into something more than abstractions through a fourfold process: 1) by speaking as a political act in criticising the injustice that forced them to flee; 2) by attempting to turn their religious beliefs into a platform for action; 3) by ‘creat[ing] solidarity between the refugees’ and their listeners; 4) by enabling the refugees to turn a traumatic event into a tool for galvanizing themselves and others into action to attempt to right the injustice.⁶³ Westerman expands on this: ‘Testimony is about people rising from a condition of being victims, objects of history, and taking charge of their history, becoming subjects, actors in it. History no longer makes them; they make it, write it, speak it.’⁶⁴ Renny Golden and Michael McConnell express succinctly the effect of the refugees’ testimony as public witness: ‘Sanctuary, at its best, has not been a place to hide in, but a platform to speak out from’.⁶⁵

However, the refugees would often get tired of giving their testimonies repeatedly at church after church, and would withdraw from it after a while. Many also felt a disconnection between what they were describing and the response they received. One refugee explained: ‘Commonly we talk to 30 or 50 people. Almost every time, we feel like we are living again what we are telling. For us it is telling the life. We think there is going to be great impact, but then people are really quiet.’⁶⁶ Crittenden also provides an insightful critique of the testimonies, or more particularly of what was expected of them by many in the movement:

The refugees headed for public sanctuary not only had to be fairly stable and adaptable but had to be able to speak effectively before an audience and with

62 Quoted in *ibid* 175-6.

63 *ibid* 176.

64 *ibid* 177.

65 Quoted in Rael Jean and Erich Isaac, ‘The Sanctuary Movement and the Jews’, *Midstream* (May 1986) 8.

66 Tomsho (n 9) 37-38.

the press...Above all, they had to have a ‘good story’, one that described the horrors of life in their country in a politically sophisticated, persuasive way...In many ways, then, the screening of refugees for public sanctuary – as distinct from the prior screening for assistance into the United States – became a mirror image of the government’s screening of aliens for admission into the United States.⁶⁷

The Pull towards Law

In the very earliest days of sanctuary in Tucson, before the threat that they would be prosecuted if they continued helping refugees cross the border, sanctuary activists took little notice of the legal definition of a refugee. The letter sent by Fife to the US Attorney General just before the public declaration in March 1982 referred to their intention to ‘publically violate’ the law. Reflecting on the Sanctuary Movement some 20 years after its demise, Fife described its origins:

When we started hearing stories from these refugees, I thought, ‘Hey, we can’t just sit here and do nothing...We can’t just let our Central American brothers and sisters die.’ So, we started meeting them in Mexico and walking them through the desert into this country and giving them a place to stay. We didn’t even really care much about the authorities, although they sure cared a lot about us.⁶⁸

Just like some of Corbett’s own comments early on in the movement, there was no care given to distinguishing between genuine and bogus refugees, nor any apparent concern to uphold the law. According to Fife, the origins of ditching the language of civil disobedience and law-breaking lay in a phone call he received early on from a human rights lawyer who told them:

You are doing more harm to human rights and refugee law than anyone else I know. Listen carefully! You are not doing civil disobedience. Civil disobedience is [publically] violating a bad law, and assuming the consequences, in order to change an unjust law. We don’t want to change U.S. refugee law. It conforms to international standards. The problem is that the

67 Crittenden (n 12) 120.

68 Ananda Rose, *Showdown in the Sonoran Desert: Religion, Law, and the Immigration Controversy* (OUP 2012) 29.

government is violating our own refugee law. The government is doing civil disobedience.⁶⁹

The extent to which this one phone call was decisive is debatable. In my view, as I discuss in Chapter Twelve, the more general pressures towards establishing a legitimate basis, as commonly understood, for sanctuary, coupled with the damaging effect on morale of a series of prosecutions in 1984/5, were the most important influences in this respect. Indeed, around the same time as this phone call, following the threat by the local prosecutor, there was a feeling that, if the activists were going to be arrested, they would be better able to defend themselves if they could show they were only helping those who, according to law, had a right to asylum. However, the logic implicit in this lawyer's advice, and the belief in the inherent rightness of refugee law would, within a relatively short time, lead many of the activists in Tucson and elsewhere to perform the law on refugees, rather than resist it, as they had done hitherto.

One member of the Sanctuary Movement in Tucson recalled the effect of this shift in focus, namely that through her work in the movement she had learnt 'the difference between a refugee and a "refugee"'. Before, I'd thought of a refugee as someone who is seeking shelter, but after working with the Central Americans, I became aware that it's a legal status.'⁷⁰ According to Crittenden, Corbett had not engaged in screening the refugees at first, for he was not interested in 'hair-splitting' between those who were fleeing because of persecution or from war conditions in general. Corbett had, of course, pioneered the practice of assisting refugees to cross the border illegally.⁷¹

So, beginning in 1983, the screening process was put in place. This involved sanctuary activists travelling to where the refugees were waiting in Mexico and interviewing them there in the manner of officials adjudicating asylum claims. They

⁶⁹ Quoted in *ibid* 30.

⁷⁰ Quoted in Susan Bibler Coutin, 'Enacting Law through Social Practice: Sanctuary as a Form of Resistance' in Mindie Lazarus-Black and Susan F Hirsch (eds), *Contested States: Law, Hegemony and Resistance* (Routledge 1994) 287.

⁷¹ Matas (n 10) 47.

would then return to Tucson and the group would discuss the case and decide whether or not they would be given sanctuary.⁷² Some of the tests appeared somewhat oblique. One, for example, involved asking the refugees if they would be prepared to spend up to a year in jail in the US, which was the penalty if they were caught crossing the border illegally. If they answered ‘yes’, they were deemed to be genuinely afraid of returning to their home countries, and thus possessed a well-founded fear of persecution. However, if they demurred and instead said that they would be prepared to return to their countries and try to cross at another time, then they were not considered to be genuine refugees.⁷³ Thus, rather than cleaving to the Augustinian approach with which they began, they were instead adopting the practices decreed by the law of 397 and criticised by Augustine – of, effectively, turning the custodians of sanctuary into its inquisitors. Of course the key point is that, had a legal definition not been current at the time, both in terms of the 1951 Convention and the 1980 Refugee Act, it is doubtful that Corbett and others in Tucson would have employed such practices at all, for there would have been no legal yardstick by which to ascertain the quality of the refugees. This is but the most obvious example of how refugee law serves to undermine the practice of sanctuary.

The hold of legal ideas and, in particular, of the legal category of refugee was evident not just in Tucson, but elsewhere too. For example, one church in the Midwest spent 13 months in discussion before finally deciding to become a sanctuary. The details of how agreement was reached and on what basis are revealing of the kinds of discussions that would have taken place across the movement. A member of the committee, tasked with coming up with a draft statement, said: ‘I can only support a program which is truly interested in helping others. I cannot support a program which uses the church to make a political statement.’⁷⁴ The first draft, therefore, stated that the church took no position on the US government’s policy on Central America, and that all people had the right to live free from torture and persecution.

72 Crittenden (n 12) 119.

73 *ibid* 123.

74 Nelle G Slater, ‘A Case Study of Offering Hospitality: Choosing to be a Sanctuary Church’ in Nelle G Slater (ed), *Tensions Between Citizenship and Discipleship: A Case Study* (Pilgrim Press 1989) 5.

However it also concluded with the following: ‘We also believe that as Christians we cannot turn our back on those who have come to us for protection from brutality. Acting on those beliefs, we at The Church of the Covenant⁷⁵ will give sanctuary to any refugee from persecution *whether or not they are termed so by the United States government.*’ The committee, after a ‘tense discussion’, insisted that the drafter change the statement and the final sentence was altered to, ‘Acting on these beliefs, we at The Church of the Covenant will give sanctuary *to any refugee who comes to us in need.*’⁷⁶ In a curious way the second draft was both softer and harder in its departure from law. On the one hand, the explicit reference to ignoring the decision of the government on whether someone was a refugee or not was dropped. Yet on the other hand, the broadening of defining a refugee from someone fleeing ‘persecution’ to one in ‘need’ is a break from the legal definition of the refugee. It is not clear what precisely the argument was in the committee over the draft rewrite or to what extent they were aware of the legal definition of the refugee. In any case, later on, due to pressure from the more conservative members of the committee, a document entitled ‘Refugee Issue’ was drawn up which began by stating the Christian duty to help the oppressed and those in need, but also included two clauses re-stating the law in relation to the 1980 Refugee Act and the 1951 Convention. It also claims sanctuary as something that is part of the ‘Judeo-Christian tradition and is recognized in common law’.⁷⁷ When this resolution was put before the congregation, those opposed argued: ‘With all due respect to the moral and human rights issues involved in the question of “sanctuary” for refugees from El Salvador and Guatemala, it must be pointed out that these refugees are considered illegal aliens by the immigration authorities and the State Department.’⁷⁸ Eventually the congregation voted by 151 to 91 in favour of the resolution and to offer sanctuary.⁷⁹ Walter Brueggemann identifies the apoliticism that underpinned these discussions:

The decision of the Church of the Covenant to act as a sanctuary was a bold act of evangelical obedience and compassion...But it was also understood in a

⁷⁵ This name is a pseudonym.

⁷⁶ Slater (n 76) 5-6.

⁷⁷ *ibid* 11-13.

⁷⁸ *ibid* 14-15.

⁷⁹ *ibid* 17.

way that tended to preclude any political interpretation. The capacity to embrace a religious act and preclude a political understanding embodies a certain sense of biblical authority.⁸⁰

What becomes apparent in these discussions is a tension between a more open theological approach, and a more restrictive legal one. The Gordian Knot could be have been cut through a more political understanding of sanctuary, such as that taken by the CRTFCA, but instead an attempt was made to somehow see legitimacy flowing from Judeo-Christian theology, common law and international refugee law together. But as we have seen, these streams each have, in fact, very distinct and in some cases antagonistic relationships to one another.

The tendency towards an apolitical humanitarian approach could also reinforce notions of the refugee subject as passive victim. For example, at Dumbarton United Methodist Church in Washington DC, America Sosa, who was well known amongst the refugees as a leading activist for their rights, was welcomed into the church and spent three nights there as a symbolic act before moving into a private home. Subsequently she was able to move to her own apartment in a predominantly Hispanic area of DC, with the congregation paying her a subsidy of \$800 per month to live on. However, it soon became clear that Sosa ‘was not interested in getting a job or supporting herself’. Instead, she was insistent upon continuing her activism as a member of a Salvadoran organisation called COMADRES, which involved travelling around the US agitating for people to pressure the Salvadoran government to stop the war and to respect human rights. This apparently caused concern amongst the congregation: ‘She was thus far more than a refugee the church had expected to shelter’. Only ‘after much soul searching and with some misgivings, the congregation decided to continue its support [for her].’⁸¹ In other words, they were happy to support her as a charitable case, but not to assist her in maintaining her political commitments, her political subjectivity. It is telling that they believed she was ‘far

80 Walter Brueggemann, ‘Textuality in the Church’ in Nelle G Slater (ed), *Tensions Between Citizenship and Discipleship: A Case Study* (Pilgrim Press 1989) 48.

81 Francis Stevens, ‘Irresistible Visions’ in Jane Donovan (ed), *Many Witnesses: A History of Dumbarton United Methodist Church 1772-1990* (Dumbarton United Methodist Church 1998) 421.

more than a refugee', i.e. they weren't prepared for a person more multi-dimensional than that: a fully-rounded human being.

The Split in the Movement

The emerging split within the Sanctuary Movement between its 'Tucson' and 'Chicago' wings became apparent very early on. In 1983 the TEC wrote to the CRTFCA: 'We provide sanctuary to the persecuted, regardless of the political origins of their persecution or of their usefulness in promoting preconceived purposes.'⁸² The CRTFCA responded:

You reduce the multidimensional process of solidarity to apolitical humanitarian band-aids rather than expanding it to include all that comes from choosing the side of the oppressed...During the rise of the Third Reich, Dietrich Bonhoeffer said that the church must of course bind up the victims being crushed beneath the wheel, but there comes a time when the church must be the stick put in the spokes to stop the wheel from crushing the people.⁸³

And indeed, the movement not only helped the refugees but also did much to raise awareness of the US government's own culpability in causing refugees to flee in the first place. One of the effects of this political approach is that it provides an answer to the dilemma posed by governments and epitomised by Rocard in his statement, referred to in the thesis introduction, that we are unable to accept the 'misery of the world'.

Golden and McConnell, partisans of the 'Chicago' wing of the movement, identify the split between Tucson and Chicago as basically that of 'charity or liberation'.⁸⁴ Others have described the split as between 'a national grassroots resettlement effort, and a national network of antiwar activists'.⁸⁵ Robin Lorentzen, on the other hand, based on her extensive interviews with activists involved in the movement, downplays the divide between 'political' and 'humanitarian' factions:

⁸² Davidson (n 32) 82.

⁸³ *ibid* 83.

⁸⁴ Golden & McConnell (n 3) 177.

⁸⁵ Lorentzen (n 34) 16.

While the actual differences between the Tucson and Chicago movements are arguable, each of the two orientations does appear to have characterized the movement at different times. In its natural history the political tended to become its end; the humanitarian, its means. As one woman noted, ‘At first people just wanted to help those refugees here. After a while, they began bringing them in clandestinely.’ Perhaps initially an expressly humanitarian act, sanctuary became more intentionally political in response to government and media attention. The movement’s growing politicization refutes the notion that participants had either a humanitarian or a political orientation exclusively.⁸⁶

What Lorentzen has identified is the way in which sooner or later sanctuary, by coming up against the law, would become more self-evidently political. Perhaps another way of understanding the split is as one between people who recognised this and embraced the political and by doing so recognised the primacy of politics over law, and those who feared that politics would somehow contaminate the humanitarian aims of the movement. The latter view sought recourse in a paradigm that offered the same kind of universalising and objective approach as humanitarianism: law. As such, I think the split can be seen overall as one involving a divergence between legal and political ways of thinking.

86 Lorentzen (n 34) 55.

The Sanctuary Movement on Trial

On 10 January 1985 a Federal Grand Jury indicted 16 Sanctuary Movement activists, including John Fife, Jim Corbett and Darlene Nicgorski. In addition, on the same day raids were carried out across the country and 60 refugees who had been assisted by the movement were arrested as unindicted co-conspirators.¹ The accused were charged with a variety of offences under the Immigration and Nationality Act 1952, including assisting aliens to enter the country, transporting aliens, ‘concealing, harbouring or shielding aliens’, and encouraging aliens to enter the country illegally.² They were all also charged with conspiracy. The ensuing trial, which became known as the Sanctuary Trial, began in October 1985 and ended seven months later. There had been smaller-scale prosecutions of individual activists the year before, in Texas and Arizona, but this trial was on an altogether bigger scale and became a *cause célèbre*, with its proceedings reported nationally and internationally. This chapter will critically examine how the defendants and their lawyers approached the trial and the legal strategy to be deployed. The trial presents a concentrated example of how adherence to the law generally, not just to refugee law specifically, had a debilitating effect on the defence of sanctuary – for if sanctuary is fundamentally about operating

1 David Matas, *The Sanctuary Trial* (University of Manitoba 1989) 51.

2 *ibid* 67.

outside or against the law, restricting a defence within an exclusively legal framework is, I would suggest, bound to failure.

Immediately following the indictments the defendants put out a collective statement:

After the Second World War, our government committed itself by law never again to expel or return refugees to any country where they would face persecution...Consequently, providing sanctuary for refugees is not an act of civil disobedience. Rather, the need to provide sanctuary for refugees demonstrates that, in its violations of human rights both here and abroad, the present administration lacks legitimacy.³

Their position follows three steps. First, law, and refugee law in particular, guarantees the right of asylum to refugees. Second, sanctuary is necessary as that right has been denied by the US government. Therefore, third, it is the US government, rather than the Sanctuary Movement, that is acting illegally and thus lacks legitimacy. The starting point is erroneous for, as we have seen, there is no right of asylum in law that is vested in refugees themselves. It also relies on a typically romanticised view of international refugee law. Further, the defendants hold to the line that assisting people to cross an international border into the US by evading the authorities is not an illegal act, when in fact it violates the pre-eminent right of sovereign powers to determine who can or cannot enter its territory. More specifically, it was in most cases certainly a violation of the Immigration and Nationality Act 1952. The more general point was made by the judge in the Sanctuary Trial in relation to an ironic twist that occurred during pre-trial hearings. Following the kidnapping of one of the Salvadoran President's daughters, his family was flown to the US on a specially-chartered plane to be given asylum. When this was raised in court by the defence as an example of the gross inconsistency in how asylum was being granted, the judge replied that there were 'powers reserved...to the political branch' that were not exercisable by individuals.⁴ The final point in the defendants' collective statement, however, is correct insofar as the Sanctuary Movement had successfully begun to rival the

3 Jim Corbett, *Goatwalking* (Penguin 1992) 169-170.

4 Cited in Ann Crittenden, *Sanctuary: A Story of American Conscience and the Law in Collision* (Weidenfeld & Nicolson 1988) 243-4.

government in terms of legitimacy in relation to the right of providing sanctuary for Central American refugees. However, it is my argument that on the question of legality, the government had certainly the far stronger case. Moreover, the available evidence suggests that the driving factor in the movement's legitimacy was not its adherence or otherwise to legality, but rather its moral and political stance. Consistently in press conferences, liturgical celebrations of sanctuary, the public testimonies of refugees, media reports etc members of the movement stressed not legal but moral, theological and political justification for their actions.

The Question of Trial Strategy

Arguments amongst sanctuary activists about what attitude to take in court predated the indictments by six months. With a growing split in the movement precisely over the question of whether to adopt a more humanitarian/legalistic or political strategy in general, a meeting to discuss these disagreements plus other issues was convened in Tucson in June 1984. Present were key figures in the movement from around the country. In this discussion, held in the shadow of the first sanctuary prosecutions of activists in Arizona and Texas, much of it dealt with legal issues and what attitude to take when indictments occurred. The lawyers present at this meeting were asked to leave the room for this part of the discussion, indicating perhaps that it was felt there was a need to discuss legal strategy without being hidebound by legal rules. In a segment to discuss the question of what it means to 'win' in court, three principles were agreed:

1. to uphold [one's] personal integrity ...
2. to raise the issues of Central American refugees and U.S. immigration and foreign policies to the public eye
3. to build the Sanctuary Movement.⁵

The lawyers were then allowed back into the meeting, where they laid out possible legal defences such as religious belief, reliance on international and/or domestic refugee law, duress/necessity and selective prosecution.⁶ In the event, in the

5 Minutes of Meeting of Sanctuary Churches, Tucson, Arizona, 20-21 June 1984 (GSSC) 4.

6 *ibid* 5.

Sanctuary Trial the judge prohibited all those defences save the last one. As such, point two in the agreed principles above – arguably the most important of the three – became practically impossible in that trial, certainly by respecting the rules and procedure of the court. Amongst the issues listed as dividing those present was whether or not the Sanctuary Movement was acting legally or illegally and whether the movement was political or religious.⁷ In the discussion on legality, those arguing that the movement was legal, acknowledged that confronting the ‘constituted authorities’ made the movement effectively illegal, but claimed that it was nevertheless seeking to uphold the law as it was helping ‘bonafide [*sic*] refugees’, not ‘illegal aliens’. Moreover, some expressed the concern that accepting illegality would harm potential legal defences. For the other side: ‘The issue is justice, not legality’, and ‘We musn’t [*sic*] use the law and our lawfulness as the excuse for why we do this’.⁸ Evident in these discussions is the way in which the artificial legal construct of the refugee has burrowed its way deep into the consciousness of some of these activists in making the distinction between good legal refugees and ‘illegal aliens’. Those opposed to the ‘legal’ position recognised the danger in collapsing the notions of legality and justice. This was precisely the trap that led the Tucson faction to perform the law on refugees, rather than resist it. Perhaps one could accept the argument that cleaving to legality would at least assist defences in court. It was this position that was followed in the Sanctuary Trial, but it was to fail spectacularly.

The other side of the argument, represented primarily by the CRTFCA, was laid out in detail in the issue of *Basta!* that followed this meeting:

[In] 1982 we decided to break Immigration Law as interpreted by the present U.S. government. We did that then, and we continue to do that now because we refuse to be bound by unjust laws...[W]e go to the court pleading not guilty of crimes against humanity; enter court to defend the rightness of the cause of the poor and oppressed, and to indict the U.S. government...As soon as we step into a court of law, the rituals of the court, and the power of the prosecution have a myriad of ways to tempt us to qualify our message,

⁷ *ibid* 7.

⁸ *ibid* 11.

equivocate the facts, narrow our focus and reduce our effectiveness. We must be determined not to be co-opted or muffled or compromised.⁹

Not only did the CRTFCA position deal head-on with the issue of illegality and the arguments coming from the prosecution, but it offered an accurate prediction of what would happen in the Sanctuary Trial, which did indeed end up as one narrowly focussed on specific facts and technicalities. As an alternative they proposed a political defence, one that did not necessarily respect the parameters of the law or of legal proceedings:

Every trial is a political trial. That cannot be changed. What can be changed is who determines the political framework of the trial. The U.S. government wants to shrink the framework to its smallest possible scope. We seek to widen the framework so that U.S. policy and interpretation of the law is on trial. If we allow the court of law or lawyers to direct the sanctuary movement, we will be letting U.S. law dictate the parameters of our work and the limits of our conscience. We did not allow the law to dictate to us in 1982. We cannot let it do it now. To give law and lawyers power over us would be to break the solidarity we have so carefully created over the last two years, and would, in the end, allow the U.S. government to define what is right and wrong. As Jim Corbett has said, 'Law abiding protest only helps us to live with atrocity.'¹⁰

At the meeting CRTFCA representatives argued that as sanctuary represented a form of civil disobedience, so the trials should be used 'as the occasion for maximising confrontation with the Reagan administration'. However, it appears that no-one else at the meeting agreed with this position.¹¹ The CRFTCA laid out three principle tasks for activists on trial:

- 1) showing clearly and publicly to the North American people that we side with the refugees as refugees not aliens;
- 2) forcefully [denounce] U.S. intervention in Central America because the court is an arena to put U.S. Central American policy on trial;

9 'Political and Legal Position of the Chicago Religious Task Force on Central America', *Basta!* (July 1984) 3.

10 *ibid* 4.

11 Open letter from Jim Corbett, published in *Basta!* (January 1985) 29.

3) utilizing the opportunity to move ahead, to broaden and deepen the sanctuary movement.¹²

There are echoes here of the strategy of ‘rupture’, as defined by the French lawyer, Jacques Vergès:

Rupture traverses the whole structure of the trial. Facts as well as circumstances of the action pass into the background; in the forefront suddenly appears the brutal contestation with the order of the State.¹³

Rupture is a strategy that both recognises the formal structure of the trial, while at the same time redrawing the battle lines between defence and prosecution. The defendant becomes not just an individual, but also a part of a collective, and the court must be forced to justify its right to judge. Rupture fulfils Tony Honoré’s criteria for expressing a ‘right to rebel’ in a way which straddles both formal and non-formal rights.¹⁴ On the one hand, rupture utilises the formal rights of the law – for example, the right to access to the law, the right to a defence. On the other hand, rupture reserves to itself rights grounded in certain political norms – such as self-determination, resistance to oppressive state power. Crucially, it enables defendants to break the bounds imposed by court procedure, and what are likely to be restrictions imposed by biased judges. The Sanctuary Trial, in which the defence would find itself strictly bound by the court into jousting over technicalities, would bring the need for such an option to the fore. Could such a strategy have worked in this trial? The experience of the MOVE trial a few years earlier suggests that it could indeed have been successful.

In the summer of 1981 two leading members of the Black revolutionary MOVE organisation were tried on charges of bomb-making and illegally procuring weapons.¹⁵ Up against a prolonged media campaign that had systematically

12 ‘Political and Legal Position’ (n 9) 3.

13 Jacques Vergès, *De la stratégie judiciaire* (Éditions de Minuit 1968) 86-7.

14 Tony Honoré, ‘The Right to Rebel’ (1988) 8 *Oxford Journal of Legal Studies* 34, 43.

15 MOVE is ‘not an acronym, but a term meaning to move, get active, resist etc.’. Mumia Abu-Jamal, *Jailhouse Lawyers: Prisoners Defending Prisoners v. The U.S.A.* (City Lights Books 2009) 266 footnote 1.

demonised a political movement committed to non-violence (except in self-defence) as terrorists and gangsters, an institutionally-racist Philadelphia police force determined to secure their convictions, a series of former comrades acting as prosecution witnesses and a middle-class, mostly white, jury; the defendants, John and Alphonso Africa, triumphed. They represented themselves in court, yet did so in a highly unorthodox and often disruptive manner. The clinching moment for the defence was John Africa's summing up to the jury. He dealt with the substance of the charges by dismissing them in a few sentences. For the rest of his hour-long speech, he explained the MOVE political philosophy as one committed to peace, internationalism and environmentalism. The terrorism and violence with which they were charged was, he explained, anathema to MOVE's principles. Instead, these were the defining characteristics of the power structure which had persecuted the movement and brought its leaders to court on the basis of a frame-up. In the words of Mumia Abu Jamal, John Africa made the 'middle-class jury vibe with him, an African-American revolutionary, and to see the world from his perspective.'¹⁶ In addition, the presence of MOVE members and supporters inside the Court, individually and collectively calling out the myriad injustices of the trial, gave confidence to the defendants, and provided a continuous and audible rebuttal of the prosecution case for the benefit of the jury. The jury responded with acquittal on all charges. If African-American revolutionaries could deploy such a strategy successfully on charges of extreme violence, with a jury most certainly not of their peers in class or racial terms, it is certainly conceivable that the sanctuary defendants – all of them white or Hispanic, many of them clergy – would have been able to win over a jury over the question of assisting victims of brutal wars in Central America.

Although such a strategy is inherently risky and is only really effective in cases which have a high public profile, it had the potential to be effective in this case due to the widespread press coverage of the trial and of the Sanctuary Movement. In addition, the size of the movement and its support provided the potentially mobilizing force necessary for a strategy of rupture to be effective. This is evident in the galvanising effect of the trial on the movement. For example, on the day the trial began seven churches, plus a synagogue, declared themselves as sanctuaries for

¹⁶ *ibid* 98.

refugees.¹⁷ Donations from across the US, Latin America and Europe for the trial defence fund amounted to over \$1.4 million – \$200,000 more than was needed.¹⁸ A month into the trial the National Convention of Reformed Hebrew Congregation voted ‘by a 2 to 1 majority of 2800 delegates, to urge its 791 congregations to support the Sanctuary Movement’.¹⁹ The number of declared sanctuaries doubled during the course of the trial,²⁰ and even the church of Reagan’s Attorney General featured sermons supporting sanctuary and collections to aid the trial defendants.²¹ Of course, it is not guaranteed that a strategy of rupture would succeed. But it might well have mobilised significant support, raised the profile of the movement and the experiences of the refugees from Central America even higher, and it would have imposed upon the trial the political context denied by both the judge and the prosecution: that instead, a strategy that clung to legal arguments and respected the legal process was directly related to the faith that they had in law, specifically refugee law.

The Restrictions on the Defence

David Matas, a Canadian lawyer specialising in refugee and immigration cases, wrote a detailed report and analysis of the trial on behalf of the International Commission of Jurists. He points out that this was not the first trial of sanctuary activists; there had been at least four others in the preceding years. Of these, two had resulted in convictions and in another the judge had dismissed the case on a technicality. However, in the case of Jack Elder, director of Casa Romero, a shelter for refugees in Texas near to the Mexican border, a jury acquitted him. This was in spite of the fact that the judge in that case, as would be the case in the Tucson trial, prohibited defences based on international law or religious belief. The judge in Elder’s case had argued: ‘Accommodating to religious beliefs would mean no immigration policy at

17 Arizona Sanctuary Defense Fund, ‘Sanctuary Media Packet’, undated, (ASCP) 9.

18 Corbett (n 3) 167.

19 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 5-8 November 1985 (ASCP).

20 Margery Leach, *Sanctuary in Phoenix! A Narrative History of the Valley Religious Task Force on Central America and its Role in the Sanctuary Movement in Phoenix, Arizona from 1981-1998* (Harvest Publications 2008) 15.

21 Crittenden (n 4) 326.

all, since misery is everywhere, and people throughout the planet are worthy of Christian charity'.²² The jury, who took only two hours to reach their verdict, evidently chose to ignore this argument. However, what distinguished the Sanctuary Trial from these others was the sheer scale of government efforts to secure a conviction and the leading profile of the activists who were prosecuted.²³ From the planting of spies in the movement, clandestine taping of conversations, the large number of arrests that accompanied the indictments and the determination of the prosecution during the trial itself, this was on a scale that dwarfed the earlier trials. In testimony, the INS Chief Investigator in the case stated that this had been the first case in his 15-year career in which he had been ordered to Washington DC for meetings, which included the INS Director, and in which he had received regular guidance from the Washington office.²⁴ Whereas in the other cases the defendants had been relatively isolated activists, in Tucson the government had gone for most of the key instigators and leaders of the movement. Matas suggests the reasons why the government was so determined to win this case:

The Sanctuary Movement was a gap in the system. The Sanctuary Movement was giving to refugees the refuge that the United States legal system was denying. The prosecution of the Sanctuary Movement was an attempt to close the gap in the system, to make forcible return more certain and complete – to turn off a safety valve.²⁵

The prosecutor, Don Reno, was clear that if the trial was allowed to address the issues of the US's historic role as a sanctuary for refugees from other countries, or if there was to be a discussion about refugee policy, and the nature of being a refugee, then the prosecution would lose the case before a jury. In other words, if politics was allowed to be discussed in the courtroom, the defendants might be acquitted in spite of having clearly broken the law. And so Reno submitted a motion *in limine*.²⁶ Accepted by the judge, this motion prohibited defences based on international law,

22 Matas (n 2) 52.

23 *ibid* 51.

24 Arizona Sanctuary Defense Fund, 'Congregational Update for the Tucson Sanctuary Trial', 12-15 November 1985 (ASCP).

25 Matas (n 2) 115.

26 Crittenden (n 4) 219.

necessity, or religious or moral belief.²⁷ The judge decreed that such defences were legally irrelevant as they pointed towards the motives of the defendants. At this stage even individuals not associated with the more radical wing of the movement were calling on the defendants to ‘use every possible opportunity to get more of the truth into testimony’, even if it threatened contempt of court rulings, as a way of getting the truth ‘into the heads of the jury’.²⁸

A particularly useful resource in following the various twists and turns of the trial are the weekly updates for sanctuary activists that were prepared by the Arizona Sanctuary Defense Fund. Overall, these reports support the view that the defence ended up spending most of its time getting wrapped up in technical and procedural issues. The granting of the *in limine* motion is reported as having ‘played havoc with the Sanctuary defence strategy’.²⁹ In a motion filed by the defence asking for extra time to prepare their case in light of the *in limine* restrictions, the reports state: ‘There is no justification for the Orders entered, nor for the timing of the Orders. The only conclusion one can draw is that the Court seeks to do maximum damage to the defendants’ case. The defendants are being denied a fair trial.’³⁰ This begs the question as to why they then continued to ‘play by the rules’ for the remaining six months of the trial. Even the media observers appeared shocked at some of the rulings when, for example, in spite of clear evidence that the main prosecution witness had repeatedly committed perjury during his testimony, the judge refused to either dismiss the charges or strike his testimony from the record.³¹

Because the question of whether or not the people helped by the defendants were refugees was deemed to be irrelevant, the judge made a further set of rulings

27 A similar ruling was made by the judge in the earlier case of Stacey Lynn Merkt and Jack Elder. Miriam Davidson, *Convictions of the Heart: Jim Corbett and the Sanctuary Movement*, (University of Arizona Press 1988) 98.

28 Letter from Anne Ewing to Darlene Nicgorski, 27 August 1985 (FUMCOG).

29 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 30 October 1985 (ASCP) 2.

30 *ibid.*

31 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 21-23 January 1986 (ASCP).

banning certain types of testimony and certain words. Those coming from Central America could not be described as ‘refugees’, the preferred nomenclature was ‘aliens’.³² Terms such as ‘tortured’ or ‘killed’, even when used by refugee witnesses, were stricken from the record by the judge.³³ When one of the refugees testified that they had been told by their attorney that only 2 or 3 per cent of Salvadorans were granted asylum, the prosecutor objected and this information was deemed irrelevant to the case and also struck from the record.³⁴ In some cases, testimony by the refugees about their lives and why and how they came to the US was only allowed to be heard in court in the absence of the jury.³⁵ When one of the refugees who was forced to testify was asked to identify one of the defendants as the woman who had given him sanctuary, the defendant concerned stood up and identified herself. The witness then replied: ‘She was the only person that offered me a roof over my head when I was most in need. People told me she had a very good heart. I remember her with much love.’ The prosecutor demanded that this statement again be stricken from the record and the judge obliged.³⁶ Matas argues: ‘What both Reno and Carroll wanted was that the jury should not hear that evidence, for if they did, they might well acquit on what Reno and Carroll considered to be legally irrelevant grounds.’³⁷ In short, if a contest between law and justice in this case could be presented, it was considered likely that the result would be jury nullification, where the jury acquits out of sympathy for the defendants and their acts, even though the jury believes that they in fact broke the law. Indeed, the judge repeatedly warned the defence attorneys that they were guilty of subtly urging the jury to find such a verdict; although nullification is a right of the jury, US law does not allow attorneys to suggest such a result to them. By making this a trial solely on the basis of domestic law, the result was that, whereas the prosecutor could paint the defendants as having bad motives – in his opening statement, Reno declared the case to be a straightforward one of smuggling illegal aliens into the

32 Crittenden (n 4) 271.

33 Davidson (n27) 123.

34 *ibid* 124.

35 Crittenden (n 4) 273.

36 *ibid* 278.

37 Matas (n 2) 70.

country, and even the judge repeatedly referred to the case in these terms too³⁸ – the defence were hamstrung by the preliminary rulings and unable to counter with a narrative based on good motives.³⁹ Moreover, the defence lawyers, with their major lines of argument ruled as inadmissible, were reduced to basing most of their attacks on the prosecution on grounds of technicalities, and thus alienating the jurors.

In the middle of the trial one of the defence lawyers, Ellen Yaroshefsky, admitted the effect of the ruling was that the ‘Tucson sanctuary trial has little to do with the issues of sanctuary.’⁴⁰ This comment was made before the trial had even properly begun, and should therefore have been a point at which the question of a more disruptive strategy – something like rupture, perhaps – should have been considered. Following the verdicts, Nicgorski said: ‘We were tried on immigration technicalities and our attorneys defended us based on those technicalities. It was never about the real truth, it was never a real trial about Sanctuary.’⁴¹ Another defendant, Peggy Hutchinson, made a similar point: ‘It was a trial of immigration technicalities. Sanctuary was not on trial....In reality [the jury] couldn’t have done otherwise. What did they hear about? They heard about technicalities of U.S. law.’⁴² This identifies a key problem with the trial, and is perhaps an implicit criticism of the defence strategy. But of course by the time these comments were made it was too late.

38 Reno, in his opening statement, referred to the ‘Nogales Connection’, an obvious reference to the drug smuggling ring known as the ‘French Connection’. Moreover, he argued that the people being helped by the Sanctuary Movement were often economic migrants and were thus illegitimate refugees. *ibid* 92.

39 *ibid* 73, 108.

40 Ellen Yaroshefsky, ‘The Tucson Trial and its Legal Consequences for Asylum Seekers’ in Lydio F Tomasi (ed), *In Defense of the Alien, Volume IX: Proceedings of the 1986 Annual National Legal Conference on Immigration and Refugee Policy* (Center for Migration Studies 1987) 176.

41 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 1 May 1986 (ASCP) 2.

42 Peggy Hutchinson, ‘Living a Trial By Fire’, *Basta!* (June 1986) 6.

The Obscuring of Sanctuary in the Sanctuary Trial

Matas gives a good précis of how the prosecution succeeded in subverting the essence of the case in favour of a deracinated contest over minutiae:

This contrast between the subtext and the daily reality of the trial was not just a perversity. It was a prosecution strategy. The prosecution attempted to get the jury to focus on the trivial and to ignore the tragic, and it succeeded. Virtually anything tending to show the contextual reality of the situation was excluded as inadmissible. Month after month of insignificant detail, by its sheer volume and by its isolation from context, ended up having a reality for the jury that it would not otherwise have had.⁴³

Effectively the defence, for it to be successful, had to make this a trial about the wars in Central America, about the ethical and theological call to help the refugees, and about the political logic that lay behind the government's refusal to grant asylum in these cases. But for the prosecution it had to be only 'an alien smuggling case'. The logic of the law was on the prosecution's side. Part of the problem was also that the defence tried to contest the facts of the case, rather than adopting a strategy of rupture that challenged the legal basis of the charges themselves.

On the first day of the court proceedings, Judge Carroll remarked of the defendants: '[From] what I read in the paper, everybody says they did it and we are proud we did it.'⁴⁴ Of course the Sanctuary Movement activists freely admitted, in fact publically declared at every opportunity, the acts of which they were accused. But they never admitted 'guilt', they never accepted that what they were doing was wrong. And as much as they could find justifications for what they did on political and ethical grounds, in the eye of the law, it is quite a stretch to argue that they were not in breach of the law. As Matas argues, the effect of submitting to the legal process was apparent in other ways too: 'For an extended period of time, the accused were neither church workers nor volunteers, but nothing other than defendants.'⁴⁵ This was true in practice, for it pulled them away from the work of providing sanctuary, and consumed their lives for much of the 18 months from indictment to

43 Matas (n 2) 76.

44 Quoted in *ibid* 108.

45 *ibid* 117.

sentencing. But it was also true in another sense, for the law had interpellated them as subjects of law forced to defend themselves from criminal charges. As Matas explains:

The Movement had to choose between its own internal logic and the logic of the trial. It chose the logic of the trial. The defense of the accused was a defense of reasonable doubt...From one perspective, this sort of defense was understandable. From another perspective, it was puzzling. It is understandable that any lawyer defending a client against criminal charges would ask that the charge be proved. But it was perplexing that the lawyers for the Sanctuary Movement were asking that the accusations of giving sanctuary be proved...the whole point of the Sanctuary Movement was sanctuary: to provide a refuge that the United States government would not give. By questioning the evidence against the accused, defense counsel appeared to be raising a question about the very existence of the Sanctuary Movement.⁴⁶

In reference to a defence motion to dismiss the charges a couple of months into the trial, the judge suggested that the defendants had actively solicited prosecution by in effect declaring, 'come and get us'. Certainly the public declaration of sanctuary in March 1982 and the letter to the US Attorney General sent at the same time did indeed suggest this. Of course the point was that, at the time, many in the movement took the view that assisting the refugees justified breaking the law, and that therefore openly confronting the law was itself a *modus operandi* of sanctuary. However, in court the defence instead trotted out the line that, in fact, the defendants were acting according to law; it was the government that was breaking it. As such they denied that they were taunting the government, as the judge alleged.⁴⁷ But it is these sorts of exchanges which are likely to have left members of the jury seeing the defendants as slippery and dishonest.

At one point in the trial the defence successfully introduced into evidence the screening procedures of refugees used by the Sanctuary Movement. The hope was that this would 'exculpate' the movement in the eyes of the jury.⁴⁸ But evidently it did not succeed. It was always going to be an uphill struggle to convince the jury that the

46 *ibid* 118.

47 Arizona Sanctuary Defense Fund, 'Congregational Update for the Tucson Sanctuary Trial', 12-15 November 1985 (ASCP).

48 Matas (n 2) 79.

movement were acting more ‘lawfully’ than the government. For, again, on a purely legal basis the prosecution had the better arguments. At one point, for example, Reno gave the court a blunt but effective summary of the sovereign right of states over their borders: ‘Every nation has the absolute power to control its borders, to determine who comes in their country, when they come in, where they come in, how long they are going to be here, what they are going to do, how they are going to support themselves and when they are going to leave.’⁴⁹ And in his summing up to the jury he answered the challenge that somehow the Sanctuary Movement could better enforce the law than the government: ‘The law comes from Congress, not from Southside Presbyterian Church’. ⁵⁰ Judge Carroll made a similar point in rejecting the defence of religious belief, arguing that all citizens have the same obligation to obey the law regardless of their religion.⁵¹ In short, the Sanctuary Movement could not out-law the law.

There was evident confusion amongst the defence as to whether or not to present the activities of the Sanctuary Movement as political. On the one hand, Corbett’s attorney, Stephen Cooper attempted to draw out an argument alleging selective prosecution by telling the court that the only reason for the decision to prosecute the defendants was because they had criticised INS and Reagan administration policies and were exercising their right to freedom of speech in doing so. On the other hand, on the same day, as the Arizona Sanctuary Defense Fund’s trial summary notes:

Judge Carroll attempted to elicit a statement from the defence to the effect that the movement was in fact politically motivated. However, Sanctuary attorneys were quick to point out that primarily religiously inspired activities of Sanctuary workers have coincidentally involved some of them in political

49 Quoted in Susan Bibler Coutin, ‘Enacting Law through Social Practice: Sanctuary as a Form of Resistance’ in Mindie Lazarus-Black and Susan F Hirsch (eds), *Contested States: Law, Hegemony and Resistance* (Routledge 1994) 285. This point was reaffirmed by the Ninth Circuit on appeal, see Robin Johansen and Kathleen Purcell, ‘Government Regulation of Sanctuary Activities’ in James E Wood Jr & Derek Davis (eds), *The Role of Government in Monitoring and Regulating Religion in Public Life* (Baylor University 1993) 168.

50 Crittenden (n 4) 320.

51 Matas (n 2) 70. See also his instructions to the jury as cited in Davidson (n 27) 146.

struggles concerning the rights of refugees and U.S. policy in Central America.⁵²

Still there was a fear of being, or being seen to be, political. Evidently some supporters of the movement in the courtroom felt that the trial was not doing justice to the movement, and took matters into their own hands – literally; at one point someone in the public gallery got up, poured blood over his hands and smeared the courtroom walls with them, declaring that ‘the blood of Central American martyrs is on all of our hands and heads because each of us is our brothers’ and sisters’ keeper’.⁵³

Missed Opportunities

There are a few recorded instances that perhaps suggest what a more aggressive and disruptive defence strategy might have achieved. A refugee, Francisco Nuñez Nieto, who had been helped by the Sanctuary Movement, was on the stand and was having his testimony repeatedly stopped and censored by the prosecution, who were supported by the judge, on the basis that he was breaking the rules on describing the detail of refugee experiences in Central America and at the US border. As the weekly trial report note:

During that exchange and several like it, the jury seemed to be visibly interested in the information that [Judge] Carroll was keeping from them. Nieto, unlike many witnesses who have testified in the case, countered by looking straight at the jury instead of [Prosecutor] Reno or Carroll when he talked.⁵⁴

Later when three sanctuary activists who had been subpoenaed to testify by the prosecution refused to do so, they were charged with contempt of court by the judge and sentenced to house arrest for the duration of the rest of the trial. One of them, Mary Ann Lundy, when being sworn in had said: ‘I refuse to testify on the grounds of

52 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 5-8 November 1985 (ASCP).

53 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 12-15 November 1985 (ASCP).

54 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 28-31 January 1986 (ASCP) 6.

my First Amendment right of freedom of religion and as a Presbyterian elder, I refuse to testify against the community of faith.’⁵⁵ As each one left the courtroom, the defendants, their lawyers and supporters in the public gallery stood up out of respect for their action. The judge then threatened them too with contempt if they continued with their demonstration. By the time the third witness was led out of the court, the lawyers remained seated, ‘apparently reluctant to jeopardize their own standing in the trial’, while the defendants and their supporters continued in defiance of the judge.⁵⁶ The fact that the defendants and their supporters successfully defied a contempt of court threat suggests what might have been possible throughout the trial. This point is underlined by the response of the judge during sentencing. He decreed that the suspended sentences that the defendants would receive would be conditional upon their not associating with anyone involved in sanctuary. After three of the defendants had said that they would refuse to abide by such a condition, the judge backed down and withdrew it.⁵⁷

In his summing up to the jury, one of the defence attorneys, James Brosnahan, famous then and now as an outstanding trial lawyer, began by focussing on the purely technical and evidentiary.⁵⁸ He made great reference to the principle that the burden of proof lay with the prosecution, and that on the charges the evidence was not conclusive enough to banish any reasonable doubt. He proceeded to explain to the jury that for a conviction of transporting aliens, they have to accept that the defendants ‘intentionally induce[d] and encourage[d]’ the refugees, and that they had to commit such offences ‘knowingly’ and ‘willingly’.⁵⁹ But, of course, the Sanctuary Movement *was* helping refugees cross the border, and doing so in full knowledge of the law. Brosnahan does point out that it ‘doesn’t sound like a simple smuggling case, when you invite a television camera to come and photograph the events’, leaving the implication to the jury that there was nothing shady or underhand about the

55 Mary Ann Lundy, ‘You Will Not be Alone’, *Response–Ability* (Winter 1987) 2.

56 Arizona Sanctuary Defense Fund, ‘Congregational Update for the Tucson Sanctuary Trial’, 18-21 February 1986 (ASCP) 2.

57 Ellen Yaroshefsky, ‘Reflections on the Tucson Sanctuary Trial’, *Basta!* (September 1986) 22.

58 James Brosnahan, *Classics of the Courtroom, Volume IX: James Brosnahan’s Summation in United States v Aguilar (The Sanctuary Trial)*, (Professional Education Group, no date).

59 *ibid* 11.

defendants' actions, while not explicitly referring to the existence of a mass political movement.⁶⁰ This type of oblique suggestion was deployed on a number of occasions in his speech. Why didn't the lawyers emphasise the political nature of the movement? Describing the existence of the movement was not forbidden by the *in limine* motion. Lack of awareness of the movement, as some of the jurors later recounted, contributed to their ignorance of the facts of the case, which in turn convinced them to find guilty verdicts. It was not until the very end of his summing up that Brosnahan started making a more coherent and sustained argument about the open and political nature of the defendants' actions, and he was not interrupted by the judge when he did so.⁶¹ On the other hand, there were moments where Brosnahan did try to imply the religious motives that the court had forbidden during the trial:

And what is the common interest [of the defendants]? The Government misses it. For I was hungry and you gave me meat, I was thirsty and you gave me drink, I was a stranger and you took me in...And that is the common interest of every defendant in this room. And it is a proper interest.⁶²

At that point the judge interrupted, instructing the lawyer to stick to 'matters on the record'. Yaroshefsky, during her closing argument, challenged the jury: 'Is there anything here to suggest that the defendants' intent was to further refugees' illegal presence in the U.S.?'⁶³ This is again a dishonest argument, for while the evidence in the trial might have been thin, Yaroshefsky was deploying sophistry, as many of the actions of the defendants were precisely intended to evade the legal processes.

On the one hand, Matas blames the defence strategy on the unjust restrictions placed upon them by the court, which meant that they had no other option.⁶⁴ Yet, on the other hand, it is hard to escape the impression that Matas feels that an alternative way of presenting the defence should at least have been attempted. This is evident in his stinging comments on certain aspects of the defence. For example, by effectively

60 *ibid* 19.

61 *ibid* 67-68.

62 *ibid* 61.

63 Arizona Sanctuary Defense Fund, 'Congregational Update for the Tucson Sanctuary Trial', 8-11 April 1986 (ASCP) 5.

64 *i.e.* Matas (n 2) 118.

denying the existence of the Sanctuary Movement, or suggesting that the actions of the defendants represented, at most, ineffectual or passive support for the refugees, 'the defence trivialized the Sanctuary Movement...held up the Sanctuary Movement to ridicule. The jury took the Sanctuary Movement more seriously than the arguments of defence counsel did. Given the nature of the defence, an acquittal would have been a more damning condemnation of the Sanctuary Movement than a conviction was. For an acquittal would have been a judgement that the Sanctuary Movement was no help to refugees at all, at least in obtaining sanctuary.'⁶⁵ So while Matas acknowledges the restrictions on the defence he also writes:

There was a choice being offered in the Sanctuary Trial...It was a choice to the Sanctuary Movement. It was the choice, not of ignoring refugees or asserting United States government legitimacy, but rather of the Movement ignoring itself or asserting its own legitimacy. The Movement chose to ignore itself, argue reasonable doubt, rather than assert its own legitimacy in the face of the court's rulings.⁶⁶

The emphasis on choice leaves one with the unavoidable impression that, for all the excuses one could make for the defence in the circumstances – and there is no doubt that they were difficult and complex – Matas clearly believes that an alternative political defence was not only possible, but necessary.

A key example of the defence's overly-legalistic and, indeed, perverse strategy was that they called no witnesses of their own, so that not even one of the defendants gave testimony to the court. The concern of the defence was that if they testified they would be caught between, on the one hand, being forbidden by the court from making reference to the motives behind their actions, and on the other hand, the likelihood of the defendants incriminating themselves under cross-examination by the prosecution. As one of the defence lawyers put it: 'We couldn't put our clients on, because the fact is, [they] did do these things that the government accused [them] of.'⁶⁷ However, as Matas points out, the defence did succeed with some of the refugee

⁶⁵ *ibid* 118-119.

⁶⁶ *ibid* 120.

⁶⁷ Mitchell Pacelle, 'Sanctuary Jurors' Dilemma: Law or Justice?' (1986) September, *The American Lawyer* 95, 98. See also the comments of defence attorney Michael Altman in Jay

witnesses in getting some information out to the jury about conditions in Central America and the reasons for their flight.⁶⁸ It is certainly possible that something similar could have been achieved with the defendant's testimony. The effect of Nieto's direct approach to the jury could have been greatly magnified. One of the jurors, David McCrea, afterwards said that he, along with other jurors, had 'sympathized with [the defendants] and didn't agree with the law, but we had to follow the law and had to follow the instructions'. McCrea describes how he was hoping to hear the defendants testify and explain their side, and was very disappointed when the defence rested without calling any witnesses.⁶⁹ So because the defence strategy ended up relying so much on technicalities and sophistry, the jury never got to hear the arguments that at least some of them were hoping to hear in order to acquit the defendants.

It is certainly clear from post-trial interviews with the jurors that the focus on the law to the exclusion of context guaranteed a conviction. Four of the jurors 'stated flatly that, although they followed the law as instructed by the judge, *justice* was not done. Two others questioned the laws on which their votes were based.'⁷⁰ Some of the jurors explained how the restrictions on evidence obscured their view of what the trial was about. With little or no prior knowledge of the Sanctuary Movement, a number of them stated afterwards that they felt they had only 'gotten pieces of a puzzle'.⁷¹ Using the same metaphor, another juror, Denis Davis, recalled feeling himself to be just 'like a piece of a jigsaw puzzle. When we got sworn in and agreed to go by the rules of the court, I started to feel that I was sworn into a game without knowing what the rules were.'⁷² Davis goes on to make the following insightful comment: 'It sounded like one set of valid laws being pitted against another set of valid laws.'⁷³ He also

Mathews, 'Juror Voices Distress Over Sanctuary Defense', *The Washington Post* (3 May 1986) A3.

68 Matas (n 2) 120.

69 'Juror Voices Distress Over Sanctuary Defense', Jay Mathews, *The Washington Post*, 3 May 1986, pA3.

70 Pacelle (n 67) 96.

71 Davidson (n 27) 143.

72 Pacelle (n 67) 96.

73 *ibid* 98.

described his struggle as he grappled with law and justice: ‘It really was a strain for me to face the fact that there really was enough evidence to convict them...that what appeared to be charitable works were against U.S. laws.’⁷⁴ Another juror, Janice Estes, an Evangelical Christian and wife of an army officer, repeatedly said during deliberations: ‘So we’re going to hang these people for helping other people.’⁷⁵ In a curious and, again, insightful, exchange during the deliberations, one juror argued: ‘We can act human in this. We don’t have to follow the law.’⁷⁶ The response from the majority was that, yes, they had to follow the law. Indeed, mere faith without politics was not able to dissuade some from following the law. One juror, Anna Kathleen Browning, said that, had she known about the right of jury nullification, then she would have voted for acquittal, and she believed others would have too. Others also reported than most of them felt real sympathy for the defendants and were looking for any reason to acquit.⁷⁷ So the jury quite clearly saw the case as pitting justice or humanity against the law. Tragically, due to a combination of the court’s restrictions and the failings in the defence, they were not given the opportunity to acquit. In May 1986 all but two of the defendants were found guilty of various charges, and the convicted activists all received sentences suspended for five years.

‘Trial Trauma’

Six months after the end of the trial the CRTFCA, in an internal discussion document, declared the movement to be ‘comatose’, as a result of lack of momentum and failure to significantly alter government policy.⁷⁸ They further suggested that the trial was a turning point in applying conservative pressure on the movement. In particular, they identified a problem with the strategy pursued in the courtroom:

The crowds in the courtroom were well-behaved, not challenging. The defendants were polite in the courtroom, not risking contempt. The lawyers, while contemptuous at times, usually were that way [only] when the jury was

74 *ibid* 100.

75 *ibid*.

76 *ibid* 102.

77 Vince Bielski, ‘Jurors wanted acquittal’, *The Daily Californian* (5 May 1986).

78 ‘State of the Movement’ (draft), January 1987, CRTFCA Discussion Document (CRTFCAR) 1

out of the room. Neither lawyers nor defendants could decide whether they wanted to pursue a straight criminal trial or a political trial...They provided no militant model and we are still suffering the results of that.⁷⁹

Even though the defendants issued statements of defiance following the verdicts, it quickly became apparent that the impact of the trial had been to push sections of the Sanctuary Movement further in the direction of adopting legal procedures and criteria. One leading commentator on the movement writes:

[T]hose returning from the [Sanctuary] trial had been profoundly influenced by court arguments and wished to implement procedures that would underscore the 'legality' of Sanctuary work. Among these was the adoption of the United Nations High Commissioner on Refugees (UNHCR) guidelines regarding refugee determination.⁸⁰

This led to tensions even within Trsg, resulting eventually in a split and the formation of the *El Puente* (The Bridge) group, which allied itself with the CRTFCA network. They continued to use the legal definition of refugee as contained in the 1980 Act, but they refused to use the criteria relating to the amount of time they had spent in Mexico and they did not insist that the refugees make a formal asylum claim, both of which had become conditions for sanctuary imposed by Trsg.⁸¹ Kathe Padilla, one of those who joined *El Puente*, has given a sharp and vivid account of the increasingly slavish adherence to the law that afflicted the movement in Tucson following the trial:

In the beginning, it was rules about how far can you go to the fence, can you cross this way. Do this or that. There were those types of rules around the work...Then it started when we presented cases. And a pattern began to emerge to me and to other people, that there was a high degree of caution. I can tell you some things about people who were turned down by Trsg that really shows that this is true. I called it 'trial trauma'. It looked to me that you had to be a perfect case of a refugee to be passed by Trsg. And there were certain people who came up finally where I said, 'I am sorry. I'm not going to have this person's life on my head. And I am going to help this person.' So I

79 *ibid* 2.

80 Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (University of Minnesota Press 1995) 168.

81 *ibid* 173.

say that due to this trauma of the trial, perhaps, that Trsg became more strict than either the U.S. or Canadian governments.⁸²

A member of Trsg also admitted that, ‘after the indictments, border workers adopted a more restrictive definition of “refugee”’.⁸³ Even prior to the major trial a number of people in Trsg, including some who eventually left to join *El Puente*, were unhappy about the idea of the strategy of the Merkt letters to INS and the insistence on the refugees making a formal asylum claim, as they believed that it ‘placed too much faith in the INS’.⁸⁴ A Trsg Statement Regarding Refugee Assistance, written just four months after the trial ended (19 November 1986), confirmed that they had by this time adopted very strict criteria for helping refugees, along the lines of refugee law. This document asserts that ‘in spite of the...dangers’ many refugees were able to find refuge in Mexico, and that although they had to put up with the ‘abject poverty endemic to Mexico’ they were no longer victims of violence or persecution. Therefore, ‘even *legitimate* refugees’ may have only been coming to the US for ‘primarily economic reasons’.⁸⁵ Many activists, including many of the refugees already in sanctuary, were outraged at what they saw as a discriminatory approach to those seeking sanctuary who were temporarily settled in Mexico and that, as a result, the Trsg were ‘turning away legitimate refugees’.⁸⁶

Nomophilia

The extent of the pull towards legality can be gauged from some of the prolific letters and articles put out at the time by Corbett. As well as having significant and deserved authority within the movement as one of its founders, he also effectively acted as a spokesperson for the ‘Tucson’ view on sanctuary. Having previously accepted the illegality of the practices of sanctuary, and having said repeatedly that abiding or remaining constrained by the law ‘trains us to live with atrocity’, he ended up making

82 *El Puente* member interviewed in ibid 168-9.

83 Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Westview Press 1993) 36.

84 Cunningham (n 80) 169.

85 Quoted in ibid 169-70 (emphasis added).

86 ibid 170.

statements that with little substantive amendment could have been made by representatives of the INS or the government. He criticises those ‘who no longer care whether [or not] those they bring [across the border] are refugees’. The failure to make such a distinction serves to ‘erode rather than promote the international rule of human rights law’.⁸⁷ Elsewhere he quotes the Reagan administration official, Elliott Abrams, approvingly when the latter said: ‘Legally and morally, the distinction between economic migrants and political refugees matters greatly. The United States is legally obligated and morally bound to protect refugees but not to accept for permanent residence every illegal immigrant who reaches our shores.’⁸⁸ Corbett himself then stresses the importance of ‘the distinction between refugees and illegal immigrants’ so as to ensure ‘refugee law’s relevance to the practice of sanctuary.’⁸⁹ What Corbett has done here is to move from a tactical adherence to law, to establishing a principle that sanctuary belongs within the framework of refugee law, not as a challenge to it.

Around the same time Corbett claimed that only 10 per cent of those then arriving from El Salvador and Guatemala were genuine refugees, most instead being merely people fleeing generalised violence.⁹⁰ Moreover, he claimed that most of those arriving were coming ‘primarily because their country’s economy is in shambles’, i.e. they are economic migrants rather than refugees. As such: ‘A shrinking minority of Central Americans arriving at the border now clears the Tucson refugee support group’s screening procedures’.⁹¹ He concluded by setting up the classic notion of the rule of law as a free society holding its government to account.⁹² Therefore, he argued that ‘the practice of sanctuary requires accountability to the legal

87 Jim Corbett, ‘Sanctuary and Revolutionary Struggle’, 21-23 November, 1986, typed mimeographed document (GSSC) 2.

88 *Los Angeles Times* (17 January 1985).

89 Jim Corbett, ‘The State, the Law, and the Sanctuary Covenant’, undated typed mimeographed document (FUMCOG) 1.

90 Corbett, ‘Revolutionary Struggle’ (n 87) 2.

91 *ibid* 3.

92 *ibid* 6.

order.’⁹³ From this general comment Corbett went on to lay out the basis on which sanctuary should be offered to refugees. The refugee had to fit the narrow criteria of refugee law, the INS must always be informed when they were brought across the border, and the INS must be regularly informed of the status of the refugees, e.g. how many applications for asylum had been made, who had emigrated to or sought asylum in another country, who had fallen out of contact etc. In short, sanctuary was to become an adjunct to the INS.

In an extraordinary letter, written as trial proceedings were just getting underway in Phoenix, Corbett, on behalf of the Tsrq, sought joint work with the INS in processing asylum applications. There he wrote:

We recognize that there are also valid administrative concerns about the potential abuse of asylum procedures, so all of us need to explore ways to assure that only those who are truly in need of asylum would be encouraged to apply if affirmative filing were possible at ports of entry. But if we work together on some of these problems we might find some practicable solutions.⁹⁴

The INS responded by agreeing to a meeting in Phoenix – although it is not clear if this ever actually took place – and challenging Corbett’s assertion that INS officers were acting in violation of the law at the Mexican border.⁹⁵ Replying to this letter, Corbett then made the concrete suggestion of informing INS each time sanctuary activists assisted someone over the border, so as to comply with the law as laid down in the 5th Circuit Court’s ruling on Stacy Merck’s appeal. Although he spent several pages detailing abusive acts by INS officers, he also offered suggestions on how sanctuary activists could avoid being ‘frivolous and opportunistic in our use of the asylum process’. This included a commitment to making the legal process of asylum work, and most perniciously focussing on those ‘most [in] need’ rather than those who were ‘using refugee laws to delay deportation’. The aim of sanctuary was therefore to become focussed on the following precept: ‘making the system work

93 Jim Corbett, ‘A Covenant for Sanctuary Services on the Border – Preliminary Discussion Draft’, 12 December 1986, typed mimeographed document (GSSC) 1.

94 Letter from Jim Corbett to Delia Combs, Assistant Commissioner, INS, 23 June 1985 (GSSC).

95 Letter from Delia Combs, Assistant Commissioner, INS to Jim Corbett, 29 July 1985 (GSSC).

must take priority over playing the odds'.⁹⁶ In this extraordinary exchange Corbett would have sanctuary not only commit itself to the law on admitting refugees, but would help police the border by excluding from sanctuary those alleged to be duping the system.

The End of Sanctuary

Just as the movement had mushroomed over a short period, so its decline was equally swift following the debacle of the Sanctuary Trial. By the close of 1986 public sanctuary had fizzled out, as most refugees did not want to take the risk of legal prosecution. So this part of the movement subsequently focused mainly on getting legal representation for refugees for their asylum claims and for helping those who wished to return to resettle in their home towns and villages.⁹⁷ Certainly, by spring 1987 the Trsg was acting effectively as a legal support group rather than as sanctuary *per se*. Although they were still assisting refugees to cross the border illicitly, they were scrupulous about notifying the INS on each occasion before doing so. Moreover, as is clear from a document produced in July 1987, Trsg was subordinating its operations and tactics to legal advice from attorneys.⁹⁸ In late 1987/early 1988 a questionnaire sent to 380 sanctuaries received only 37 replies, and of these only 20 had a refugee in sanctuary and only 11 stated a willingness to take in a new refugee, suggesting perhaps the extent of the movement's decline by then.⁹⁹

Yet, at the same time, some sanctuary groups were not only continuing their activities in response to new waves of refugees, but were also deepening their understanding of forced migration and radicalising their critique of the legal categories in place. A 1987 report from various border groups states that while the numbers of refugees, particularly from El Salvador and Guatemala, were somewhat reduced, there was a significant increase in the numbers coming from Nicaragua and

96 Letter from Jim Corbett to Delia B Combs, Assistant Commissioner, INS, 13 August 1985 (GSSC).

97 Crittenden (n 4) 345.

98 'Annual report on Trsg sanctuary services', 4 July 1987, typed mimeographed document (FUMCOG) 2.

99 National Sanctuary Defense Fund (NSDF) Board Memo, 2 February 1988 (GSSC).

Honduras. In answer to the question of whether or not refugees were being directed towards applying for asylum, the Rio Grande Defense Committee in Texas answered in the negative for, 'To do so would mean that [the refugees] would be arrested immediately.'¹⁰⁰ The San Diego Interfaith Task Force reported that while applying for asylum was an option put to the refugees, and they were offered support in accessing legal advice for that, on the other hand: 'During the last year no asylum cases have been filed from San Diego, mainly due to the nearly impossible chance of success: 0% before appeal, and little on appeal.'¹⁰¹ The Rio Grande Defense Committee demonstrated the extent to which some in the movement had deepened their critique of refugee law and its effects in demarcating 'refugees' from 'illegal aliens':

Congregations also need to remember that some of the most desperate cases needing help are not people who would qualify under the strict UN convention [*sic*] definitions. This is especially true for women who have left their kids back home. People's 'economic' woes are a real driving force in making life decisions. Some people will walk through fire to feed their children. Are we in any way responsible for the prolonged violence and misery in their countries? ... It's past time to be deprecating one kind of immigrant because they're 'only economic'. By giving what is perceived as preferential treatment and attention to one small part of the undocumented population, we could be seen as trying to divide the [Latino] community, and as ignoring the plight of the majority of the undocumented, possibly the most oppressed group there is. By explaining what makes someone a refugee, we should not internalize INS regulations and sound as though we justify the way INS treats the rest of the undocumented.

¹⁰²

In a more low-key manner, the El Paso group make a similar point: 'We operate as a house of hospitality for the homeless poor. We deal with people on an individual basis and try to deal with their individual needs. Each person tends to have a very different personal situation. We tend not to draw distinctions between nationalities.'¹⁰³ However, the combination of the now more or less complete split in the movement, demoralisation and fear following the convictions in the trial, and the almost complete

100 'Border Task Force Report', National Sanctuary Communications Council (NSCC), 1987, typed mimeographed document (CRTFCAR) 2.

101 *ibid* 3.

102 *ibid* 4.

103 *ibid* 5.

subsuming of the Tucson activists into a legal paradigm rendered such insights moot as the movement came to an end.

Critical Reflections on the Sanctuary Movement's Relationship to Law

*The most striking ambivalence in the sanctuary movement is not about religion but about law, or lawfulness. Is the offering of sanctuary to refugees who are not recognised as such by the government an act of disobedience to law or not?*¹

Introduction

What should be reasonably clear so far is the manner in which the Sanctuary Movement attempted to recreate an essential element of the sanctuary tradition: creating spaces beyond the reach of the law and sovereign power. What should also be very evident is the way in which norms derived from the quite different paradigm of refugee law compromised a significant part of the movement in this respect, in their recreating of some of the practices of refugee law within sanctuary such as screening and judging against a spurious set of criteria. Moreover, when it came to the set-piece confrontation with the state in the form of the Sanctuary Trial, the adherence to law proved to be their undoing. Yet another aspect, briefly touched upon in Chapter Ten in relation to the case of America Sosa, and which is closely tied to the

¹ Tom Gerety, 'Sanctuary: A Comment on the Ironic Relation Between Law and Morality' in David A Martin (ed), *Refugee Law in the 1980s: The Ninth Sokol Colloquium on International Law* (Martinus Nijhoff 1986) 160.

acceptance of the limits of the legal paradigm, is the depoliticising of the refugee subject. In this chapter, the final one of this thesis, I would like to focus more critically on these three questions in relation in the context of the Sanctuary Movement: 1) how the movement (re)configured the refugee subject in ways that both challenged and reinforced legal paradigms; 2) the role of law in closing down rather than opening up a space of asylum; and 3) the depoliticising of asylum by law.

Sanctuary Subjects: Activists or Victims

Susan Bibler Coutin argues that the Central Americans who were given sanctuary ‘were in a contested state of being’, i.e. they were challenging their identification as ‘illegal aliens’ and asserting that they were in fact refugees who deserved asylum, and yet they did this by entering the country illegally, thus appropriating the right to declare what is or is not an illegal act or being.² There is certainly some truth to this claim. Indeed, the preparedness of so many of the refugees to tell their stories publically, in testimony to churches or through media appearances, is evidence of this. Activists from the more militantly political wing of the movement saw sanctuary as more than simply a relationship between paternalistic Anglos and needy Latinos. For example, Golden and McConnell describe the movement in the following terms:

Sanctuary is not merely a safe place to hide in but a prophetic platform to speak out from. It is a strategy of action, a plan of struggle. It is a stipulation in the covenant relationship between God and the faithful, and between the faithful and their neighbours.³

By the same token the testimony of Anna, a refugee from Guatemala, also demonstrates the kind of agency that refugees brought to the Sanctuary Movement:

2 Susan Bibler Coutin, ‘Enacting Law through Social Practice: Sanctuary as a Form of Resistance’ in Mindie Lazarus-Black and Susan F Hirsch (eds), *Contested States: Law, Hegemony and Resistance* (Routledge 1994) 283.

3 Renny Golden and Michael McConnell, *Sanctuary: The New Underground Railroad* (Orbis Books 1986) 15.

I made the decision to come [to the United States] because sanctuary was going to help us and because we wanted to keep helping our people by talking to the North American people about the reality of our country.⁴

It was also the case that often the refugees were entirely cognisant and in control of their role within the movement. During one sanctuary conference the refugees insisted that the primary aim of the movement had to be stopping the US involvement in Central America. One of them, Linda from El Salvador, said: 'We want to go back home. We want El Salvador and Guatemala to be sanctuaries.'⁵ This was a sentiment echoed by many other refugees too. So for them sanctuary and politics were inextricably, and understandably, linked. Such was the case with America Sosa. As we saw earlier, in her relationship to her sanctuary church she refused to play the role of being just a refugee, a victim who needed supporting. Instead, she chose to use sanctuary as a 'platform to speak out from'.⁶ And this caused tensions between her and the members of the congregation providing her with sanctuary. Indeed, that whole relationship of 'providers' and 'receivers' often lent an unpleasant paternalistic element to sanctuary. One example of this was a church announcing the arrival of refugees to take sanctuary: '*Our* refugees are coming?'⁷ There was at least one recorded case where a family of refugees felt compelled to leave their sanctuary because of this kind of attitude.⁸ A number of churches placed bans on the consumption of alcohol, supervised phone calls to relatives in Central America to control phone bills, and other seemingly petty restrictions were put in place.⁹ For sure, there were examples of severely traumatised individuals having trouble adjusting, and

4 *ibid* 34.

5 *ibid* 165.

6 It is worth noting a similar point made by an American GI who took sanctuary to resist involvement in the Vietnam War: 'I chose sanctuary so I could make a stand, so I could tell people how servicemen feel about the war'. Michael S Foley, 'Sanctuary! A Bridge Between Civilian and GI Protest Against the Vietnam War' in Marilyn B Young and Robert Buzzanco (eds), *A Companion to the Vietnam War* (Blackwell Publishers 2002) 425.

7 Letter to members of the congregation of First United Methodist Church of Germantown from Virginia Klipstein, 27 July 1984 (FUMCOG) [emphasis added].

8 'Sanctuary Refugees Plan to Leave Burlington', *Burlington Free Press* (2 March 1986).

9 See, for example, 'The Sanctuary Program at Southside United Presbyterian Church, Tucson, Arizona', 6 July 1982, typed mimeographed document (CRTFCAR).

many sanctuaries were operating on tight budgets. However, these types of rules tend to suggest the refugees were seen in general as wayward adolescents, rather than adults who had already shown sufficient wherewithal to escape brutal conditions and make a 1000-mile overland journey to a country in which many of them did not yet speak the language.

Randy Lippert, in a highly sophisticated and insightful investigation, explores how paternalism developed in the context of the Canadian Sanctuary Movement that grew out of its US equivalent during the 1980s. He describes the first public declaration of sanctuary in Canada for 'Raphael', which took place at St Andrew's United Church in Montreal in December 1983:

Raphael had become the object of sovereign power...this was an instance, as Raphael's protectors put it, of 'God's law coming before the government's.' Authorized by this and other 'higher' laws, here a sovereign power began to flow from a much older wellspring of local church and community and then to surge through channels of mass media to become a torrent of spectacle sufficient to attract onlookers, including political authorities in high places.¹⁰

Lippert goes on to cite Foucault's description of 'pastoral power', arguing that 'Raphael became the object of this power and transformed into a needful, silenced "sheep" cared for and watched over by sacrificing "shepherds" '.¹¹ And yet this 'spectacle', as Lippert refers to it, was successful. A few hours after the public declaration the government announced that all deportations to Guatemala would be suspended and that, in spite of breaking immigration laws themselves, the sanctuary activists would not be prosecuted. The price of success here was that the refugee had to perform the role of victim, to be helped by the active subjects of pastoral power. On another occasion a sanctuary activist complained that a new group of refugees were 'much more radical, less conciliatory, and politically much more savvy'. As a result of these characteristics they were told to leave sanctuary.¹² When another refugee in sanctuary left one night and decided to go underground, as her case seemed

10 Randy K Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (UBC Press 2005) 1-2.

11 *ibid* 2.

12 *ibid* 136.

to be going nowhere and she feared the consequences, the response of one of the sanctuary providers was:

I felt a little ripped off ... We were preparing to have them here for [the] long term ... We were prepared to do that ... She decided that no, I don't want to do that, I don't want to wait, let's get out of here ... That was a little disappointment.¹³

But is this a problem in the relationship between the refugee and the sanctuary providers inherent to sanctuary historically, or just to this particular manifestation of it? This is a difficult question to answer because details of the sanctuary subject in the medieval period appear sketchy at best; in antiquity the contours become even more obscured. Instead, most of the historical evidence that we have relates to the question of the space of sanctuary, rather than to the individuals who benefitted from it. One possibility, of course, is that the relative absence of information about the sanctuary-seekers of old is due to their lack of importance as subjects worth commenting upon. However, I think the key point was that the biopolitical paradigm was far less prominent then, and as such the question of sanctuary was not primarily one that concerned the qualities or otherwise of the person in sanctuary. There were often certain rituals and oaths that had to be performed in order to be granted sanctuary, but these appear to have been mostly perfunctory and routine. It was, instead, the sacredness of space, or the intercession of saints or gods, or their earthly representatives, that were of central importance. It is, of course, true that in his last works Foucault identified a biopolitical paradigm reaching back into antiquity based on care of the self and of men's souls.¹⁴ This notion certainly played a part in the tradition of church sanctuary, as its origins lay in the belief that people guilty of crimes could still seek salvation within the church, both as an institution and as a bounded consecrated space. Nevertheless, I have found very little in my research to suggest that the kind of meticulous and perverse construction of a refugee subject that has been pervasive in modernity, and especially in the era of refugee law, existed in earlier times. Aspects of it appear from time to time: the law of 397 which forced

¹³ *ibid* 137.

¹⁴ Michel Foucault, *The Use of Pleasure: The History of Sexuality, Volume II* (Robert Hurley tr, Penguin 1992); Michel Foucault, *The Care of the Self: The History of Sexuality, Volume III* (Robert Hurley tr, Penguin 1990).

priests to judge sanctuary subjects as to the truth of their religious faith, and the canon law's *casus excepti*, are obvious examples. But it was never generalised to anything like the extent that it has become today, with the hegemony of law and the advent of refugee law specifically. The problem, therefore, that Lippert identifies is, I think, specific to the attempt to resurrect sanctuary in the contemporary context, one in which largely, if not solely, through the law the refugee is conceived of as a mere victim, a symptom of disorder, a problem to be managed.

Central to Lippert's analysis of sanctuary is that 'sanctuary is not alien to rationality, sovereign power, and notions of law typically associated with the nation-state but is instead constituted by them'.¹⁵ Sanctuary is, in fact, 'saturated with legal discourse'.¹⁶ Therefore, sanctuary does not represent 'a majestic and eternal conflict' between church and state, rather it is 'a short-lived tension between two historical rationalities of government: the liberal and the pastoral'.¹⁷ While Lippert's analysis is a necessary corrective to the often romanticised picture of sanctuary drawn by commentators and the activists involved, I think his judgement here is overly blunt and ignores many of the tensions that were present and, indeed, opened up by sanctuary historically and in the context of the recent movements. First, as the historical evidence strongly suggests, sanctuary has in fact been a concept repeatedly in conflict with law and sovereign power. Insofar as Lippert correctly identifies a leading tendency in the practice of the modern Sanctuary Movement, I think he covers over the tensions between that tendency and those who represented the more militant and political wing of the movement. Moreover, many of the refugees themselves were able to use sanctuary as a means to engage in political struggle over the causes of their migration and the terms on which they could seek asylum in North America. The problem of paternalism was in fact addressed head-on in the CRTFCA newsletter *Basta!*, in which, among other things, the right of the refugees to nurture and maintain their own culture, and not be expected to assimilate into that of North America, is emphasised. In that issue, one refugee in sanctuary, Carmen Monico, is quoted as saying: 'We are not only receiving, but we are giving, we are active

¹⁵ Lippert (n 10) 14.

¹⁶ *ibid* 20.

¹⁷ *ibid* 14-15.

participants.’¹⁸ In the case of at least one church, the family given sanctuary felt the need to express, by way of a letter to the sanctuary committee of the church, their feelings of resentment at the unbalanced relationship between them and their hosts, between ‘we, the refugees and you the North Americans at home, with all the comfort and confidence that this confers on you, we the helped and you the helpers’.¹⁹ Two years earlier *Basta!* published a series of contributions from various refugees in sanctuary, almost all of whom argued for the movement to be more political, to be more open in taking sides against the dictatorships at home and the US government policy of intervention in the region. One of them, Linda, writes:

Sanctuary is an answer for Salvadorans and Guatemalans because they recognize that we are political refugees and that gives us the opportunity to talk to U.S. people so that they may learn what life for us, Salvadorans, means in terms of: the reasons we had to leave our country; the repression of the government against the Salvadoran people; the reasons why our people are fighting; the consequences of U.S. aid to El Salvador; *the capacity and right we have to decide our own future.*²⁰

There were also many cases of refugees seeking sanctuary who would then later becoming leading activists, and who would then encourage and support others to move up from Mexico and gain sanctuary in the US.²¹ In short, it would be a denial of the refugees’ agency to ignore the fact of their own frequent attempts to challenge the pastoral or paternalistic tendency in the movement that Lippert correctly identifies.

Judith McDaniel offers a view of these tensions from the perspective of a sanctuary activist. She suggests that the meaning of sanctuary lay fundamentally in the way in which it forced those who were living in relatively safe and prosperous countries to challenge their own prejudices, and to experience some of the precarity

18 Marion Malcolm, ‘Overcoming Paternalism in the Sanctuary Movement’, *Basta!* (March 1987) 23.

19 Letter from ‘Joel’ and ‘Gabriella’, June 1987 (FUMCOG).

20 Statement of ‘Linda’ in sanctuary in Tabernacle Church, Philadelphia, *Basta!* (January 1985) 16 [emphasis added].

21 ‘Guatemalan credits life to sanctuary movement’, *Baton Rouge Morning Advocate* (8 June 1985) 10A.

and risk that is the everyday reality of the refugee.²² In other words, sanctuary *can* force the hosts to reflect on their own unacknowledged privileges. Cunningham, too, describes how the illegality of sanctuary could destabilise established subjects of sovereign power:

Participation in Sanctuary often resulted in a reorientation of identities in which traditionally aligned memberships (that of family, church, and nation) were reconstituted. Because of the underground nature of Sanctuary activism, one of the principle kinds of identity to undergo change in Sanctuary was the relationship of the individual to the state.²³

The politics of sanctuary cut across faith lines, leading to splits within congregations, and people switching between churches. It also led to many Americans who were active in the movement questioning their previously-held faith in the government and law. For example, one American sanctuary activist described how:

Once you become aware of oppression in one part of the world, you can make connections in your own back yard. You start seeing it all over. You just become a more critical person.²⁴

Even subjectivities based on already existing modes of resistance were troubled and reconstituted in the course of the movement. At a national sanctuary conference in 1987 a group of North American women expressed their feeling of being dominated by fellow male activists, and therefore proposed that the national steering committee be made up of half women and half men. The Central American women opposed this, with various of them arguing, 'No we won't do it, no gender parity'; 'the only thing that counts is *el pueblo*'; 'we don't care how many women and men – we can work together'; 'whoever has resources should be the basis of participation'; 'we're not into this – this is your struggle', etc.²⁵ Thus a clash developed between working and middle class; between socialism and feminism; class and identity politics. One female

22 Judith McDaniel, *Sanctuary: A Journey* (Firebrand Books 1987) 144.

23 Hilary Cunningham, 'Sanctuary and Sovereignty: Church and State Along the U.S.–Mexico Border' in Derek H Davis (ed), *Church–State Relations and Religious Liberty in Mexico: Historical and Contemporary Perspectives* (Baylor University 2002) 234.

24 Robin Lorentzen, *Women in the Sanctuary Movement* (Temple University 1991) 125.

25 *ibid* 88.

activist described sanctuary as ‘moving beyond’ feminism.²⁶ Another expressed how a certain realisation of the nature of the struggle from the point of view of the refugees set in:

I think when you’re fighting for your life, engaged in life/death situations in a revolution, gender differences break down...They’d look at our demands as a lot of white middle-class foolishness.²⁷

And indeed some of this ‘middle-class foolishness’ came to the fore when a group of sanctuary activists went to visit Central America. Staying in a youth hostel in Nicaragua, a few of them started complaining about sanitary conditions and the lack of access to the ‘five basic food groups’. One of the women in the group put it bluntly: ‘What started out as a gender split became an ideological split surrounding reality versus romance. You romanticize “blessed are the poor, blessed are the hungry”, but you get there and it’s fucking hard to be poor and hungry and listen to stories of killing.’²⁸ Lorentzen comments:

Women’s class-conscious approach may determine whether they ‘work for’ or ‘stand with’ the refugees – a critical distinction between the two orientations. To avoid patronizing those they hope to help, they must give up their own cultural models of organizing and become receptive to the refugees’ models.²⁹

There are elements here of Jacques Derrida’s concept of ‘hospitality’, of an unconditional opening, in which one allows the self to be transformed by the other.³⁰ The notion of hospitality is indeed one we have encountered a number of times over the course of this thesis, albeit in slightly varied forms. It could perhaps be argued, therefore, that a recurrent feature of sanctuary is not so much a reaffirmation of pastoral power, but instead a blurring of the lines between shepherd and sheep. Lippert himself refers to one instance when a conflict arose between sanctuary providers and the refugees when the latter wanted to engage in a hunger strike, thus

26 *ibid* 180.

27 *ibid* 89.

28 *ibid* 111.

29 *ibid* 115.

30 Jacques Derrida and Anne Dufourmantelle, *Of Hospitality* (Rachel Bowlby tr, Stanford University Press 2000) 25.

breaking a rule set by the former that prohibited such actions in sanctuary. The response from the sanctuary providers was unyielding. As Lippert notes:

The prospect of a hunger strike by migrants in sanctuary, the severe threat that such acts posed to migrants' very lives, constituted resistance to the ideal of passive, obedient, pastoral objects in need of others' life-affirming care and guidance *and* resistance to the overlapping exercise of other sovereign powers that demanded 'bare life'.³¹

There were of course objective difficulties to be overcome. For example, 90 per cent of the refugees were *campesinos* who were often unaccustomed to urban life even in their own countries, never mind in a country as different as the US where they did not speak the language. This, together with an often poor level of Spanish among the hosts, led to tensions and to unexpressed resentment. During a meeting of sanctuary activists in Madison, Wisconsin, the hosts and the refugees held separate meetings to discuss issues and then came together in a plenary. There the refugees felt confident enough to raise many issues, such as their feeling of being infantilised and not being allowed enough independence and autonomy by the sanctuary providers.³² The point is that, while paternalism and established tropes of rescuer asylum providers and refugee victims persisted, sanctuary opened up a space in which those notions could be challenged and undermined, not least by the refugees themselves.

Sanctuary, Law and Legitimacy

The starting point in assessing the legal compatibility of sanctuary in the US in the 1980s is to state clearly that no such right existed. To claim that there were spaces, whether religious or secular, that existed beyond the reach of law had no legal basis. The lawyers consulted by Southside Church in the run-up to the first public

31 Lippert (n 10) 86. It is striking how the same dynamic played itself out between the irregular migrants and their supporters in the *sans-papiers* movement in relation to the tactic of the hunger strike, e.g. Johanna Siméant, *La cause des sans-papiers* (Presses de Sciences Po 1998); Thierry Blin, *L'Invention des sans-papiers: Essai sur la démocratie à l'épreuve du faible* (Presses Universitaires de France 2010).

32 Golden and McConnell (n 3) 55.

declaration of sanctuary made that clear.³³ Indeed, the question of sanctuary had been directly addressed 14 years previously by the US Supreme Court in the case of *Warden, Maryland Penitentiary v Hayden* [1967].³⁴ In *obiter* comments, Justice William Douglas made clear that the traditional notion of sanctuary had no place in societies operating under the rule of law:

The right of privacy protected by the Fourth Amendment relates in part of course to the precincts of the home or office. But it does not make them sanctuaries where the law can never reach. There are such places in the world. A mosque in Fez, Morocco, that I have visited, is by custom a sanctuary where any refugee may hide, safe from police intrusion. We have no sanctuaries here.³⁵

Note how he infers that sanctuary only belongs in backward undeveloped countries, a theme which chimes with the prejudices that pervade the modern historiography of ancient sanctuary as discussed in Part I. Following Justice Douglas, the Northern California District Director of INS, David Ilchert, correctly stated the law when he wrote: ‘Some churches have supported ecclesiastical sanctuary, but there is no such legal entity...’³⁶ Moreover, since the right of church sanctuary was expunged from canon law in 1983, ‘any force it adds to the current sanctuary movement’s legal arguments are derived only from its moral force rather than from any concrete legal principle or precedent.’³⁷

33 A legal memorandum prepared for the TEC a few weeks before the public declaration at Southside in March 1982, made it quite clear that offering sanctuary, i.e. harbouring aliens who had not been formally admitted at the border, was illegal. Indeed, the charges that were eventually brought against sanctuary activists in the Arizona trial were those cited in this memo. (Legal Memorandum, 9 March 1982, reproduced in *Sanctuary: A Justice Ministry* (Chicago Religious Task Force on Central America 1986) 29-33.

34 *Warden, Maryland Penitentiary v Hayden*, 387 US 294 (1967). The case dealt with the question of the right of the police to enter a private home to make a search based on suspicion without an arrest warrant. The majority of the court held in certain circumstances this was permitted. Justice Douglas’ comments were part of his dissenting opinion to this decision.

35 *ibid*, *per* Justice Douglas dissenting opinion.

36 Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Paulist Press 1985) 88.

37 *ibid* 92.

Therefore the effectiveness of the Sanctuary Movement, such as it was, rested largely on shifting the political discourse in such a way as to create a space between itself and sovereign law. It was for this reason that, although the government knew about the activities of the Sanctuary Movement in detail almost from the beginning, they held off from applying the full force of the law for several years. Leon Ring, Chief of Border Patrol in Tucson, understood the dynamics and adjusted his strategy accordingly:

This underground railroad – or the various church groups – wanted publicity. They were baiting us to overreact. Therefore, we have deliberately been very low-key. Certain arrests could have taken place if we had wanted to, but we felt that the government would end up looking ridiculous, especially as far as going into church property – anything where the ethics involved would be questioned.³⁸

This policy of non-enforcement, necessitated by a political reality that it did not control, effectively ‘created a twentieth century sanctuary privilege in America’, one that existed in spite of the law, not because of it.³⁹

The more radical political wing of the movement around the CRTFCA was fairly consistent and clear on the essential conflict between sanctuary and law. Perhaps the most militant exposition of the Christian opposition of sanctuary to law in the Sanctuary Movement is given by Golden and McConnell. They point out how slavery and segregation were once legal and are now illegal, and that, moreover, it was ‘protest and resistance’ that changed those laws:

Those in power want to elevate national law to ultimate or sacred status, but that is simply idolatry. Laws are not sacred, justice is. We worship God, not Caesar or the president.⁴⁰

38 *ibid* 89.

39 *ibid*.

40 Golden and McConnell (n 3) 134.

In the month when the federal government came down on the movement with mass arrests, raids and indictments, the following appeared in a January 1985 editorial of *Basta!*:

Sanctuary by its very nature breaks the law and/or current implementation of law. All of us in the Sanctuary Movement have chosen to break the law, not as an end in itself, but to defend the powerless, the Central Americans in the U.S. and those still in their homelands.⁴¹

The tension between sanctuary and law was also not lost on a leading judge, John T Noonan, when he wrote:

Sanctuary is shocking to the secular mind. How can there be any place within the confines of a nation that the law does not operate? How can religion claim a privilege to say it is beyond the law? How can the law stultify itself by acknowledging that in certain places the law ceases to hold sway?⁴²

In a reference to the 19th century Underground Railroad, Noonan goes on to write: 'Here sanctuary was not incorporated into the law to limit the law but operated in bold defiance of the law.'⁴³ Barbara Yarnold, a sympathetic commentator on the Sanctuary Movement, described it as something which 'at its core, [is] an illegal attempt to bypass the legal structures of U.S. immigration law'.⁴⁴ Even if some in the movement believed they were abiding by the spirit and the letter of refugee law, by taking the decisions on entry into the country and the granting of refugee status into their own hands they were coming into direct conflict with sovereign right, a point that was emphasised by the prosecution in the Sanctuary Trial.

At the outset the Sanctuary Movement activists, feeling their way around the problems faced by the refugees, understandably sought to explore every avenue within the law before breaking it. Defending the movement from criticisms that they

41 Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (University of Minnesota Press 1995) 40.

42 Forward by John T Noonan, *Bau* (n 36) 2.

43 *ibid* 3.

44 Barbara M Yarnold, *Refugees Without Refuge: Formation and Failed Implementation of U.S. Political Asylum Policy in the 1980's* (University Press of America 1990) 200.

were reckless law-breakers, Fife said: ‘So if you hear from the INS that what those church people ought to do is try to work within the law first, we did it. And we did it with as much energy and imagination and creativity as we could’.⁴⁵ Among other things, this involved assisting the refugees with asylum claims and bailing them out of detention. Gary MacEoin, reflecting back on the origins of the movement, would say: ‘We began with an absolute belief in the system, a belief in the integrity of the system.’⁴⁶ The power of the ruling ideology, particularly as expressed within legal frameworks, will mean that the vast majority of people moving into a position of resistance will begin in the same place as that described by Fife and MacEoin, with a belief in the law’s capacity to deliver at least some justice. What is troubling is how the ‘Tucson’ faction began with illusions in law, then in the face of its pernicious role in negating asylum adopted a position of resistance to law, only to end up playing a role as adjunct to the laws and enforcement agencies that had provoked them into action in the first place. The desperation on the part of some in the movement to maintain legitimacy by reference to the law ended up reinforcing the law’s demand that the refugee prove their legitimacy as true refugees. And it was this logic that led sections of the movement to replicate the practices of law in screening and policing refugees at the border. As Tom Gerety notes: ‘[T]he sanctuary movement has learned its law quickly, and almost too well. Its legalism seems more thorough, more elaborate, and more urgent than its circumstances require’.⁴⁷ Gerety suggests a reason for this:

‘He became what he beheld,’ wrote Blake. Peaceable movements like sanctuary may turn to legalism because everywhere, in their struggles, legalism is what they encounter. They become like the judges and prosecutors they behold.⁴⁸

Gerety goes on to argue that in every dissenting movement the point at which dissent crosses the line to resist the law is crucial, as it requires the confidence to say: ‘I will

45 Fife quoted in ‘Conspiracy of Compassion’, *Sojourners* (March 1985) 16.

46 Cunningham, *God and Caesar* (n 41) 28.

47 Gerety (n 1) 167-168.

48 *ibid* 171.

not only criticize the law, I will disobey it.’⁴⁹ What is perhaps most dispiriting about a large portion of the Sanctuary Movement is that it crossed that line with much courage and determination, only to end up retreating back over it again.

Early on, after the initial realisation of the limits of the law, there was a healthy attitude to working outside the law. At the time and since, in numerous accounts of the movement Jim Corbett has been portrayed as the leading voice in arguing against politicising sanctuary, and for defending the existing legal framework of refugee law and a commitment to working within it. Certainly from a period shortly before the Sanctuary Trial and onwards, Corbett played this role. But this was not always the case. In 1982, just a couple of months after the public declaration of sanctuary at Southside Church, he acknowledges that giving sanctuary breaches US law, specifically the ban on harbouring illegal aliens under s274 of the 1952 Immigration and Naturalization Act. But he goes on to write that when the state prohibits assisting people ‘fleeing from oppression’ then ‘passive protest merely trains us (and any who may look to us for guidance) to live with atrocity’.⁵⁰ Around the same time he could also write: ‘The oppressed are often betrayed by clergy and congregations who give primary allegiance to the law and order of established powers...’⁵¹ And elsewhere, he remarked: ‘[J]ust as the refugees are outlawed, hunted down, and imprisoned, if we choose to serve them in spirit and truth, we will also be outlawed.’⁵² Thus there was an acknowledgment by Corbett of being forced outside of the law in pursuit of justice. And this was a view held throughout the movement at its early stages and for some time afterwards. When Luther Place Memorial Church in Washington DC declared itself a public sanctuary in March 1983, they included in the liturgy for the occasion references to Jesus breaking the laws of the Pharisees and of

49 *ibid.*

50 ‘Will You Join in Making Your Church a Sanctuary for Refugees’, 31 May 1982, typed mimeographed document (CRTFCAR). This document is unsigned, although it is written in Corbett’s distinctive style, and the correspondence address listed is his home address.

51 Bau (n 36) 14.

52 Golden and McConnell (n 3) 59.

Caesar.⁵³ The pastor of another sanctuary church in Philadelphia announced to the press: 'We're violating a law that in our judgement is unjust and immoral. We're doing this openly.'⁵⁴ Dick Simpson, head of the outreach committee of Wellington Avenue Church in Chicago, which was one of the original churches to declare sanctuary in March 1982, was equally emphatic: 'We are breaking the laws of our government because of a higher moral law ... the need to save the lives and protect the liberty of these refugees.'⁵⁵ And echoing an Augustinian approach to hospitality, The Revd Stephen Lynch, pastor of a sanctuary church in Brooklyn, could say:

There may be the law of immigration law, but there's the law of God ... Our job is to give hospitality and fulfil the law of God and that requires us to receive anyone with hospitality, especially the poor person who has no other recourse. God doesn't recognize legal and illegal; the frontiers aren't God's frontiers.⁵⁶

For many in the campus element of the Sanctuary Movement, such as those involved in the first campus sanctuary at University of California–Riverside, breaking the law was an essential component as they grew to understand that 'while support work can be legal, harbouring refugees legally is an impossibility'. Moreover, they recognised that there was a 'legalistic perspective that existed not just without but also within the movement' that served to hold it back by seeking compromise with the system and the law. And yet for this conservative element within their ranks, this legalistic concern 'evaporated as people began to better understand our efforts'.⁵⁷ As late as November 1984 Fife could say at a sanctuary meeting:

We have no middle ground between collaboration with the U.S. betrayal of faith and resistance to that betrayal. We cannot do both. If we choose to stand with the oppressed, then we will have to run the risks of doing certain acts

53 'Liturgy for an Ecumenical Service of Public Sanctuary', 24 March 1983, typed mimeographed document (LPMC) 5.

54 The Revd Ted Loder, quoted in 'Church Will Defy Feds, Shelter Refugees', *Germantown Courier* (30 May 1984) 1.

55 'Church offers refugees sanctuary', *Chicago Sun Times* (25 July 1982).

56 Sylvia Moreno, 'A Refuge Outside the Law', *Sunday Newsday* (24 July 1983).

57 Lisa Duran, 'Campus Sanctuary', *Nuestra Cosa*, (Winter 1985).

which our government considers illegal...But I remind you, law-abiding protests only train us to live with atrocity.⁵⁸

The only person pushing the legal position at this meeting was A. Bates Butler III, a lawyer from Tucson, and soon to be one of the attorneys representing the defendants in the Arizona trial.⁵⁹

Perhaps the reason that Corbett and others in Tucson increasingly cleaved to the legal framework had more to do with maintaining a certain level of legitimacy. This pull, as we saw in the last chapter, became greater following the verdict in the Sanctuary Trial. Indeed, Corbett would later complain that politicising sanctuary played into the hands of the government's attempts to delegitimise the movement.⁶⁰ He had direct experience of this early on, after he had written: 'When the government itself sponsors the torture of entire peoples and then makes it a felony to shelter those seeking refuge, law-abiding protest merely trains us to live with atrocity.'⁶¹ This was widely quoted by both many in the movement and by the government and INS. As in the quote from Fife above, that last phrase became almost a mantra. Corbett later claimed that this had in fact been a 'carelessly constructed sentence'.⁶² Instead he was only trying to make the point that helping refugees had to be more than a symbolic act. It is hard to accept that gloss on his original statement, particularly as he and others used the same formulation repeatedly.⁶³ Again, it was perhaps his concern with the question of maintaining legitimacy that led him to backtrack. As he himself said,

58 'Future Directions of Sanctuary Movement Discussed at Presbyterian Consultation', typed minutes of consultation meeting, Pacific Palisades, California, 26-28 November 1984, (FUMCOG) 7.

59 *ibid* 8-9.

60 Jim Corbett, *Goatwalking* (Penguin 1992) 161.

61 *ibid* 164.

62 *ibid*, footnote.

63 e.g. James [Jim] Corbett, 'Preliminary Statement Concerning Salvadoran Refugees', *National Council of Churches of Christ Witness to Immigration*, typed mimeographed document, 28-30 January 1982 (CRTFCAR); 'Will You Join in Making Your Church a Sanctuary for Refugees', 31 May 1982, typed mimeographed document (CRTFCAR); comments by John Fife, 'Future Directions of Sanctuary Movement Discussed at Presbyterian Consultation', typed minutes of consultation meeting, Pacific Palisades, California, 26-28 November 1984 (FUMCOG) 7.

he rued the fact that the quote was used repeatedly by the government to delegitimise him and the movement.⁶⁴

However, it seems to me as if the period from early 1984 through to 1985, when the first prosecutions of sanctuary activists began and leading up the climactic Sanctuary Trial in Arizona, marked a change, which saw the Tucson group seeking increasingly to situate their acts within a legal framework. And it was this development that, more than anything else, fomented the split in the movement. According to the CRFTCA, in April 1984 in response to the first arrests of various sanctuary workers, members of the Tucson group urged that the Sanctuary Movement refrain from stating that they have a ‘willingness to break the law but instead say that we are law-abiding and in fulfilment of the law’.⁶⁵ They go on to argue that:

The concern about reprisals if the sanctuary movement we publically [*sic*] state its intentions is a tactical matter. It represents a new development within the sanctuary movement and a change in the position of Tucson. Tucson originally agreed with us that our public position would express a willingness to break laws, while clearly showing that the government is illegally interpreting the U.S. Refugee Act and U.N. Protocol Accords as Refugees [*sic*].⁶⁶

There were two problems with this idea of maintaining legitimacy. First, it did not protect them either from the law itself – most of those who were placed on trial adhered to the more legalistic wing of the movement. Second, by following in the steps of refugee law, they transferred the onus of being ‘legitimate’ from themselves back onto the refugees. This grew out of the mistaken belief that refugee law provided a genuine space for most of those coming from El Salvador or Guatemala to make a successful claim for asylum. But even adopting a faithful reading of refugee law excludes most asylum-seekers.⁶⁷ The recent passing of the 1980 Refugee Act, as we saw in Chapter Nine, had been largely based on a desire by the government to restrict asylum on the basis of the limited definition found in international law. An anti-

64 Corbett (n 60) 164.

65 ‘Some Considerations on Direction for the Sanctuary Movement’, *Basta!* (January 1985) 24.

66 *ibid* 24-25.

67 Simon Behrman, ‘Accidents, Agency and Asylum: Constructing the Refugee Subject’ (2014) 25 *Law and Critique* 249.

immigration pressure group, the Federation for American Immigration Reform (FAIR), made clear in publicity attacking the Sanctuary Movement that they supported the 1980 Refugee Act on the basis that it limited asylum only 'to those who would be singled out for persecution in their home countries'.⁶⁸ In a coolly and, in legal terms, soundly argued demolition of the movement's claim to legality, an associate general counsel with the INS and a law student at the Catholic University in Washington DC write: 'The Refugee Act of 1980 did not create an entitlement to asylum; it created a right to petition for asylum.'⁶⁹ And they conclude: 'Today's sanctuary movement should be recognized for what it is, an act of civil disobedience, rather than a legal principle.'⁷⁰

In their propaganda battle with the Sanctuary Movement, representatives of the government were in fact able to deploy the legal argument to some effect. The INS used the 1951 Convention precisely to delegitimise the refugees, pointing out that, just because they came from war-torn countries, they 'are not considered to be legitimate asylum applicants unless they can substantiate individual persecution', and their claim fails if they cannot show that 'they were in no more jeopardy than others in El Salvador'.⁷¹ Elliott Abrams, at that time the Assistant Secretary of State for Human Rights and Humanitarian Affairs, described the refugees from Central America thus:

They come here for a very good reason. They come here for a better life. They come here for better jobs, but that doesn't entitle them to asylum. Asylum is a very special thing which we give to people who can prove that they have a well-founded fear of persecution.⁷²

68 FAIR [Federation for American Immigration Reform] Legislative Bulletin, 'Extended Voluntary Departure (EVD) for Salvadorans S.377/H.R. 822', in FAIR Sanctuary Information Packet (INSA).

69 James H Walsh and Mary Ellen O'Neill, 'Sanctuary: A Legal Privilege or Act of Civil Disobedience?' (1987) 61 *Florida Bar Journal* 11, 15.

70 *ibid* 16.

71 Harold Ezell (Western Regional Commissioner), 'A Realistic View of the Sanctuary Movement', typed manuscript, no date (INSA) 5.

72 60 *Minutes*, CBS (12 December 1982).

A few years later a spokesperson for the State Department attempted to refute some the claims of the Sanctuary Movement in a letter to the *New York Times*:

It is not enough for the applicant to state that he faces the same conditions that every other citizen faces. [Under the terms of the 1980 Refugee Act we ask] Why are you different from everyone else in your country? How have you been singled out, threatened, imprisoned, tortured, harassed?⁷³

Moreover, the then Deputy General Counsel for the INS echoed these statements and expounded in great detail on the various elements of refugee law to show why most of the Central Americans arriving were not eligible for asylum.⁷⁴ And in a set-piece debate on the Sanctuary Movement between the Director of INS, Alan C Nelson, and William Sloane Coffin, Nelson was able to hide behind a legal-bureaucratic justification for the refusal to grant asylum:

It is not up to me, or Reverend Coffin or sanctuary movement leaders to determine who is a refugee or who is entitled to asylum in the United States. We have a system to make that determination.⁷⁵

Elsewhere, in response to the argument that the US government was deliberately frustrating the asylum applications of people fleeing right-wing regimes, Nelson pointed out that decisions on asylum were not vested solely in government agents, but could be taken through a long and complex appeals process, and thus to accept this criticism one had also to accept a large-scale 'organized conspiracy'.⁷⁶ One cannot completely discount the impact that the government has over the asylum process if they publically insist that a certain country is not persecuting its citizens, and such a bias does not require a conspiracy, rather it is how policy and ideology can percolate

73 Letter from Laura Dietrich, *New York Times* (2 October 1985) A26. The same point is made by right-wing critics of the Sanctuary Movement, e.g. 'The Sanctuary Movement: Revolution Walking Across Our Border', *West Watch* (April/May 1985) 6.

74 Paul Wickham Schmidt, 'Refuge in the United States: The Sanctuary Movement Should Use the Legal System' (1986) 15 *Hofstra Law Review* 79.

75 Alan C Nelson and William Sloane Coffin, 'A Debate on Sanctuary' (1985) 7 *Church & State Abroad* 1, 2.

76 Cited in Samuel T Francis, *Smuggling Revolution: The Sanctuary Movement in America* (Capital Research Center 1986) 39.

into ‘common sense’ assumptions, e.g. that claims of persecution from a certain country are likely to be spurious. However, the real issue here, one that was obscured by the Sanctuary Movement’s reliance upon the legal definition of a refugee, is that it is precisely the legal definition that acts as the conduit for closing the door on asylum for so many people. Therefore, in principle it doesn’t matter how many appeals there are, or how many decision-makers are involved, once the reference point by which the refugee is measured is ‘objective’ and ‘universal’.

In his debate with Coffin, Nelson emphasises that the burden of proof rests with the asylum-seeker and the need for the applicant to prove individual persecution. Coffin’s response begins by explicitly relegating the ‘legal questions surrounding sanctuary’ to the background, in favour of the ‘moral, political and historical aspects of the sanctuary movement’.⁷⁷ He rejects the distinction between economic and political refugees, and acknowledges criticism from Nelson that the Sanctuary Movement did not accord with many aspects of its traditional practice during the Middle Ages, while championing the innovative aspects of the movement such as involving the reassertion of the refugees as active political subjects:

[It] is quite right to say that that this is not standard sanctuary. The sanctuary movement has added features. The churches and synagogues provide food, shelter, clothing *and* a common platform on which both Central and North Americans can stand together to decry the deportation of innocent Salvadorans and Guatemalans.⁷⁸

And yet, Coffin quickly finds himself bending towards the law. The starting point is again the notion that refugee law contains within it some essential element of protection. And so he pleads that the INS ‘administer the law according to humanitarian and legal concerns instead of on the basis of foreign policy considerations’.⁷⁹ From trumpeting the political aspect of the movement, Coffin calls forth the law as a shield to the political aims of the state. Moreover, he gives further ground when he champions the use of screening refugees at the border. When challenged by Nelson and others on why the movement is better qualified than the

77 Nelson and Coffin (n 75) 4.

78 *ibid* 4-5 (emphasis in original).

79 *ibid* 5.

INS to carry out such procedures, he ends up arguing that it takes time to establish whether the 'claimant's story is plausible', and that it is necessary to protect against the 'embarrassment' of having a 'phoney' in sanctuary.⁸⁰ And here it becomes almost impossible to draw a distinction between this position and that of government officials when they say: 'There is no such thing as a "self-appointed refugee"'. Each person who seeks the protection of the United States must *apply* for asylum, and each application is examined on a case-by-case basis.'⁸¹

The Sanctuary Movement as Border Control

Lippert correctly identifies a significant lack in most sanctuary scholarship, namely, the failure to recognise the extent to which the US Sanctuary Movement adopted the framework of the legal refugee determination process through their own selection procedures for admitting refugees into sanctuary.⁸² And yet this aspect was central both to the Tucson faction's claim to legitimacy, and to the eventual split in the movement. The logical endpoint of cleaving to legal legitimacy was for that part of the movement to perceive themselves as, effectively, adjuncts to border control. As Zucker and Zucker note, the Sanctuary Movement 'came to function as a kind of shadow image of the government's refugee programs, screening Central Americans, determining the validity of their claims of persecution, and offering them resettlement assistance'.⁸³ The fact that both economic collapse and political persecution were factors in Central America at the time 'enabled the United States to respond inequitably to the refugees. Following its own dictates, the United States could choose to close one eye and look only through the other'.⁸⁴ Of course, this was only possible because in law there is a distinction between refugees and economic migrants. But as one commentator argues: 'If buses are burned, bridges are blown up and people cannot go to work or school, or if the political turmoil interferes with the means to

80 *ibid* 8.

81 Contribution by Elliott Abrams to 'Sanctuary and the Sanctuary Movement: A Symposium', *This World* (Spring/Summer 1985).

82 Lippert (n 10) 70.

83 Norman L Zucker and Naomi Flink Zucker, *Desperate Crossings: Seeking Refuge in America* (ME Sharpe 1996) 82.

84 *ibid*.

earn a living, it becomes impossible to disentangle political from economic reasons for migrating.’⁸⁵ But the critical point about the break from the legal paradigm which is predicated on sitting in judgment on the refugee is very well expressed by one of the leading activists in the Sanctuary Movement, who was also one of the defendants in the Tucson trial, Darlene Nicgorski: ‘And when all is said and done, I would rather be judged for having helped a refugee than for having defined what one is.’⁸⁶

Bibler Coutin writes that by ‘manipulating the notions and practices’ of immigration law the Sanctuary Movement were able to ‘legitimize their work and, in the process, to create novel notions of citizenship, legal identity, and law’.⁸⁷ The Sanctuary Movement both ‘invoked and redefined’ the discourse around immigration in the US. The latter was achieved by assisting refugees to cross the border to safety and shelter and by giving them a platform to have their stories told. Yet the former was done by forcing the refugees to have their stories judged by members of the movement, and through reinforcing the legal categories of refugee and non-refugee.⁸⁸ Bibler Coutin identifies how merely shifting authority for implementing the law from the state to the ‘community’ does not obviate the power relations involved:

By assuming the authority to interpret law, Sanctuary workers created hierarchies between themselves and Central Americans...[the testimonies provided to the Sanctuary workers either just before or just after their entry into the U.S.] subjected Central Americans to the scrutiny of Sanctuary workers who would define these immigrants’ legal identities and use this knowledge to fuel volunteers own activism. The Sanctuary movement’s oppositional legal practices thus demonstrate the difficulty of drawing on the law’s potential for resistance without simultaneously invoking its capacity to oppress.⁸⁹

85 Cecilia Menjivar, quoted in *ibid.* A similar point is also made in Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 6.

86 Quoted in María Cristina García, ‘“Dangerous Times Call for Risky Responses”: Latino Immigration and Sanctuary, 1981-2001’ in Gastón Espinosa, Virgilio Elizondo and Jesse Miranda (eds), *Latino Religions and Civic Activism in the United States* (OUP 2005) 166.

87 Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Westview Press 1993) 107.

88 *ibid* 108.

89 Bibler Coutin, ‘Enacting Law’ (n 2) 283.

Indeed, as one sanctuary activist in Tucson said with pride: ‘We are better at separating political refugees from economic refugees than the INS is!’⁹⁰

In spite of this, Bibler Coutin argues that it would have been a mistake for the movement to reject a discourse based on law, as ‘it would have abandoned a powerful source of legitimacy and allowed authorities to define the movement’s legal significance’.⁹¹ But as I have argued above, holding on to the discourse of law inevitably meant facilitating the continued suspicion of the legitimacy of refugee claims via the screening process, adopting a managerial approach towards the refugees and disabling the defence in court. Moreover, it can be reasonably questioned whether or not the movement’s legitimacy was really founded upon its adoption of legal categories and practices. It seems to me that the combination of increased awareness of the brutal conditions in El Salvador and Guatemala, the US government’s role in propping up the regimes there, and the visible plight of the refugee arrivals had far greater weight.

Bibler Coutin herself appears unable to reconcile her sophisticated understanding of how legal paradigms reinforce power relationships at the expense of refugees, while at the same time claiming that somehow the operation of the law at a community level can change the nature of that relationship. So she argues that in taking on the task of enacting law, the sanctuary activists ‘continually constituted Central Americans as refugees’ as opposed to economic migrants.⁹² This is not strictly true, as they judged many as being non-refugees, and thus refused to help them cross the border. In any case, while this process labelled many more Central Americans as refugees than the INS were prepared to do, it did not involve ‘manipulating the notions and practices’ of law, nor did it ‘create novel notions of citizenship, legal identity, and law’.⁹³ Instead it served to reinforce existing categories of refugees and illegal aliens, passing judgement on those seeking asylum according to those categories. Corbett would write, for example: ‘concerning the screening, placement,

90 *ibid* 293.

91 Bibler Coutin, *Culture of Protest* (n 87) 108.

92 Quoted in *ibid* 111.

93 *ibid* 107.

and protection of Central American refugees...*the sanctuary network is an emergency alternative to the INS...*⁹⁴ While one can argue that the very act of private citizens appropriating for themselves the right to decide on the legal status of immigrants was itself a radical reimagining of law,⁹⁵ equally it can be perceived as symptomatic of how the ideological hegemony of law has reached even into resistance to it.

The testimonies of some of the border workers give us a sense of how adhering to the legal standard of a refugee in practice, while reconciling this with their religious or ethical beliefs, often caused a real crisis of conscience. One border worker in Tucson expressed her unease with maintaining fealty to the legal distinction between a refugee and an economic migrant:

By adhering to Trsg standards, we're playing a role in trying to change refugee law... [But] what do you do when an economic refugee comes to you and says their children are dying? They're just as dead whether they're economic or political.⁹⁶

Another Tucson activist, Marty Shelton-Jenck, recalled a Trsg meeting at which there was apparently an irreconcilable dispute over whether a refugee family seeking help were really refugees or economic migrants, with Shelton-Jenck himself opposed to helping them. However, someone suggested that they take a break to pray and sit in silence for five minutes, after which the entire group immediately agreed to help the family over the border and into sanctuary. According to Shelton-Jenck, 'That time of silence gave everybody a moment to really think where their hearts and minds really were.'⁹⁷ Another way of looking at this tale is that, once they stepped back from an obsession with the legal definition, they were able to go with their instincts and their hearts. Sometimes, of course, the conflict would resolve itself for activists in favour of the law. A Tucson border worker describes how she went to the border to meet what she thought was going to be a group of seven refugees. Instead there were 25,

94 National Lawyers Guild's Central American Refugee Defense Fund Newsletter, 6 June 1986 (GSSC) [emphasis added].

95 Bibler Coutin, *Culture of Protest* (n 87) 109.

96 *ibid* 114.

97 Marty Shelton-Jenck interviewed in Elna L Otter and Dorothy F Pine (eds), *The Sanctuary Experience: Voices of the Community* (Aventine Press 2004) 307-8.

including starving mothers with their babies. 'And for me, it was a dilemma between the 1980 Refugee Act and Matthew 25. Matthew 25 called me to help all those who are in need.' On deciding that they did not fit the legal definition of a refugee they instead gave them some food, but refused to help them cross the border. 'Crossing them wouldn't help the goal of sanctuary.'⁹⁸ What that goal was, she doesn't say.

In spite of some radical statements that he would later disavow, Corbett's nomophilia was to become increasingly evident over time. After the movement had wound itself down he wrote:

All of us sometimes and some of us most times must be coerced into civility. All of us in civil society need police protection from one another. And, for a nation-state to exist at all, governmental organization must maintain the national borders by repelling attackers, and excluding unauthorized aliens.⁹⁹

He argues for seeing a distinction between obeying the government (often bad) and obeying the law (good). He sees wisdom in the Founding Fathers, and proposes Blackstone's *Commentaries* as a civilizing tool along with the Bible.¹⁰⁰ Corbett was the son of a land-owning lawyer, and in recalling disputes during his childhood between his dad and their neighbours over land and water rights, Corbett asserts: 'Outside the law, there can be neither justice nor rights.'¹⁰¹ So, certainly for one of the leading figures in the movement, adopting legal categories and processes became not mere exigency but a good in itself. But, of course, the movement was not simply a tool of Corbett's, a notion, which to his credit he consistently disavowed. It is important to recognise that, as well as being central to setting up the screening procedures, he had also pioneered helping refugees to cross the border illegally, and with much hard work and courage had been instrumental in laying the tracks of the 'underground railroad' from the Mexico/Guatemala border up to the US. The point is that the sorts of ideas that he expresses are the common sense of society, and they were and are pervasive in relation to refugees. What Corbett clearly expresses are the prejudices which have been inculcated into society over many years by the ideology

98 Bibler Coutin, *Culture of Protest* (n 87) 115.

99 Corbett (n 60) 88.

100 *ibid.*

101 *ibid* 90.

of law, which have come to dominate the field of asylum and which ended up compromising the practice of the Sanctuary Movement.

Lippert, identifies the ‘refugee’s ascendancy throughout the 20th century as an object of government’ through the growth of state control over borders, immigration, and refugee asylum.¹⁰² In the Canadian context, he identifies this development with the country’s signing up in 1969 to the 1951 Refugee Convention and the 1967 Protocol. Crucially, it was a factor of the incorporation into the ‘governmental domain’ of the determination as to who is and who is not a refugee.¹⁰³ As I have argued, the same process was at work in the 1980 Refugee Act in the US. By the 1980s the hegemony of the legal refugee determination process acted as an impetus for the creation of sanctuaries. And yet the hegemonic growth of law in relation to the refugee was also felt in sanctuaries by their ‘heavy reliance’ on legal representation and following the legal process.¹⁰⁴ One of the effects of the growing juridical basis of refugee admittance has been that refugee determination has been moved out of the political sphere into one managed by a ‘non-political’ body that ‘governs at a distance’, a dominant feature of ‘advanced liberalism’.¹⁰⁵ Another writer on Canadian sanctuary, Jean McDonald, reflects on the movement there, and in doing so makes a trenchant critique of its reliance on existing legal categories which is apt in the US context too:

If proponents of the sanctuary movement do not oppose the categorization of people into deserving versus undeserving immigrants and refugees, the offering of sanctuary will not pose a substantial challenge to the immigration system. Instead, sanctuary becomes a space where ‘mistakes’ can be corrected and the legitimacy of the immigration system upheld, albeit indirectly.¹⁰⁶

102 Lippert (n 10) 43.

103 *ibid* 44.

104 *ibid* 49.

105 *ibid* 56.

106 Jean McDonald, ‘Citizenship, Illegality, and Sanctuary’ in Vijay Agnew (ed), *Interrogating Race and Racism* (University of Toronto Press 2007) 123.

Law and the Depoliticising of Sanctuary

One of the arguments for seeking the sort of legitimacy discussed earlier in this chapter was that it was a key element in spreading the movement beyond the usual suspects of radical activists on the coasts and into the US heartland of small conservative towns. But on a number of levels there could be a price paid for accommodating to this conservatism. Karen Lebacqz points out how the discourse employed in one particular Midwestern church departed in a crucial way from that of much of the rest of the movement. Where others talked of sanctuary as solidarity, here ‘Themes of *need, hurt and help*’ were consistent. The paternalism of the congregation was epitomized for Lebacqz by one member who talked of ‘our Christian duty to show compassion for the needs of others who are less fortunate’.¹⁰⁷ Lebacqz suggests that the view of members of the church was that they ‘saw the refugees as victims but declined to “hold them up and parade them around” for political purposes... [to avoid] using their plight to raise political questions’.¹⁰⁸ However, there is a big gap between *using* refugees for political purposes, and *enabling* them to be political actors themselves. As we saw above, for many of the refugees, sanctuary was precisely a means for them to remain or become again political subjects. Although the refugees who were candidates for sanctuary at the church Lebacqz discusses were, according to the associate minister, ‘vote gifts...had good stories...were likable people...pretty verbal’, it was decided not to introduce them to the congregation until just a couple of weeks before the vote. The reason for this was so that the congregation would ‘vote on the question, not on the specific *people*’. In this the church was very different from CRTFCA, for whom it was indeed all about the people.¹⁰⁹ Moreover, there is more than a hint of a patronising attitude to the refugees when valorising them as ‘vote gifts’. This is the sort of subject that belongs to a charitable or humanitarian paradigm where our sympathy is engaged due to their saintly suffering, rather than solidarity

107 Karen Lebacqz, ‘Paul Revere and the Holiday Inn: A Case Study in Hospitality’ in Nelle G Slater (ed), *Tensions Between Citizenship and Discipleship: A Case Study* (Pilgrim Press 1989) 113.

108 *ibid* 114.

109 *ibid* 116-7.

based on their active engagement in resistance. In contrast to this approach, Golden and McConnell describe the concept of ‘conscientization’:

a process of critical reflection at deeper and deeper levels about how human beings live and die in this world. It invariably destroys old assumptions and breaks down mythologies that no longer explain reality because of new information...Encounter refugees, their story, and a more intensive study of the history and present reality of Central America have shaken the dominant worldview of many in the religious community.¹¹⁰

The process of ‘conscientization’ led sanctuary activists to radicalise, first by questioning the US’s involvement in Central America, and then the imperialist ideology that informed it.¹¹¹ In response to those in the movement who argued not to be political for fear of alienating those more conservative elements within the churches and wider society, a Salvadoran Baptist minister, Marta Benavides, said: ‘Our people can’t wait for your religious community to be converted. We are dying. We are at war. And whether you acknowledge it or not, you too are at war and must choose sides.’¹¹² And in answer to the argument that it was important to retain the legitimacy of working within the law and of not being ‘political’, Nicgorski wrote in *Basta!*: ‘We cannot “legitimate” our involvement with refugees – it is impossible. As we begin to walk with them, some of the marginalization, oppression, and repression will come to us’.¹¹³ It is these sorts of positions that foster an understanding of sanctuary as politics rather than humanitarianism or legal interpretation, as dissensus rather than ‘legitimacy’, as solidarity rather than charity.

In practice, the growing determination of the Tucson group to eschew open politics in favour of a strict adherence to the legal definition of a refugee led to some perverse decisions. At one point a refugee who had been a member of ORDEN, a notorious right-wing death squad in El Salvador, was helped by Corbett and given sanctuary. This understandably offended many in the movement, especially those refugees in sanctuary who had fled the terror inflicted by ORDEN. Corbett’s defence

110 Golden and McConnell (n 3) 135.

111 *ibid* 149.

112 *ibid* 171.

113 *Basta!* (January 1985) 23.

was that this woman, along with other members of ORDEN, were suffering persecution and were thus legally refugees.¹¹⁴ Issues around these sorts of refugees were an additional factor in the split amongst the Tucson activists that led to the creation of *El Puente*. One activist described why she agreed with Corbett's argument:

[My] position in the end was that some of them were children and babies, and that the humane thing to do in those circumstances is to help. Because what I realized is that for me, sanctuary isn't political. It isn't Left or Right, it isn't black or white, but instead there's a lot of gray.¹¹⁵

One can certainly understand the humanitarian impulse when members of death squads turned up in desperation with their young children. But the question then is: why not the same attitude when faced with 'children and babies' of economic refugees? It seems to me that one could argue for sanctuary on the sort of Augustinian basis of hospitality to all seeking protection and assistance, or one can recognise a political element which does make distinctions, albeit ones that are based on an honesty regarding one's subjective position and respect for the active subject position of the refugee. The problem with sanctuary relying on legal categories is that it neither opened itself out to all, nor did it did it operate as a space in which refugees could (re)establish themselves as political subjects.

114 Miriam Davidson, *Convictions of the Heart: Jim Corbett and the Sanctuary Movement*, (University of Arizona Press 1988) 131.

115 Bibler Coutin, *Culture of Protest* (n 87) 115.

Conclusion

By claiming space beyond the reach of, and resistant to, sovereign power in which people could seek a place of safety, the US Sanctuary Movement had its roots in the long tradition of asylum discussed in Part I. The movement and its law-breaking aspect were not preconceived but arose out of the needs of the Central American refugees. Thus it was not law-breaking for its own sake, but a practical realisation that sanctuary could not exist in any meaningful way without confronting the law. The retreat of those in Tucson, along with their supporters, into a legalist position was an attempt to somehow theorise and legitimise what they were doing by reference to an apparently benign refugee law. But as we have seen in Part II, refugee law is anything but benign, either in its construction of the refugee subject or in how it treats forced migrants. The failure to recognise that led to a category mistake by those sanctuary activists, which further led them to perform some of the more offensive practices of refugee law such as screening, categorising and controlling refugees according to a narrow definition given by law. In short, while they did much to assist many who would otherwise not have been able to successfully cross the border and get protection, at the same time they reinforced many of the underlying premises which had led to the plight of the refugees at the border in the first place. Thus, when the movement came to an end those paradigms and premises appeared as stable as they had ever been. Moreover, by rejecting a political approach to sanctuary they missed the opportunity, created by those who did adopt a more political stance, to open up the space previously closed down by law, in which the refugees could themselves become active subjects in the movement.

Earlier I cited Zucker and Zucker's point that refugees confronted the 'wall' of 'refugee law...and the definition on which it is based'.¹ We can say that the Sanctuary Movement found themselves too up against that same wall. But instead of attempting to break it down, much of the movement ended up accepting it as an acceptable or even a positive boundary. By the early 1990s leading figures in the CRTFCA were looking back on the Sanctuary Movement as a missed opportunity. One of them, Darlene Gramena, felt that the trial had been the turning point:

It scared people. The movement was on a path but was slowed down by the trial, by the people on trial who took it personal as opposed to public.' She felt that the way in which the defendants proceeded at the trial, by following the rules of the court and engaging their own lawyers, really undermined the unity of the movement ... 'We had greater hopes of [sanctuary] being a social movement and digging deeper. Instead it was one mile wide and only one inch deep.'²

Guzder suggests that the decision to consciously wind down the movement in 1991 was evidence of 'remaining myopically focused on Central American refugees', rather than drawing the wider lessons about law and sovereignty. As a result, the movement 'never harnessed its true potential to radically reform immigration policy'.³ Some churches, however, saw sanctuary as not specific to Central Americans, or even to refugees in general. For example, the University Lutheran Chapel in Berkeley, California, originally offered sanctuary to Vietnam draft resisters and deserters in 1971, then again for Central American refugees in 1982, for US military personnel who refused to be deployed to Honduras in 1988 and, later still, for those being deployed to the Persian Gulf in late 1990.⁴ But this, alas, was a rare exception rather than the rule. Guzder argues that it was the failure of the movement to generalise in such a way that 'created a window' for Bill Clinton in 1996 to sign into law two bills

1 Norman L Zucker and Naomi Flink Zucker, *Desperate Crossings: Seeking Refuge in America* (ME Sharpe 1996) 89.

2 Heidi H Hobbs, *City Hall Goes Abroad: The Foreign Policy of Local Politics* (Sage Publications 1994) 101.

3 Deena Guzder, *Divine Rebels: American Christian Activists for Social Justice* (Lawrence Hill 2011) 117.

4 'Sanctuary: Resolution of University Lutheran Chapel', revised and reaffirmed 25 November 1990, typed mimeographed document (GSSC).

that substantially increased the scope for deporting immigrants including refugees.⁵ From this point onwards attacks on migrants increased, culminating in the construction of the border fence, and a massive deportation programme that has run through the administrations of both George W Bush and Barack Obama.

The New Sanctuary Movement was set up in 2007, as a response to these attacks. However, they explicitly rejected breaking the law. Instead, they aimed merely to ‘provide a public witness’ and to help only those whose case is ‘viable under current law’.⁶ In the same year when an undocumented migrant, under a deportation order, took sanctuary in a church in Simi Valley, California, the protests were not supportive but xenophobic. On a weekly basis assorted anti-immigration activists, including some neo-Nazis, demonstrated outside with signs such as ‘Unchecked immigration, a wildfire that will consume our nation. Stop the invasion’.⁷ The umbrella group that organised the protests, Save Our State, put out a press release which, among other things, attacked: ‘Liliana [who had taken sanctuary], the corrupt church, and the Simi Valley government [as] symbols of the *lawless invasion* and terrorism of our nation.’⁸ Once again, forswearing contestation with law did not protect either the movement or, more importantly, the migrants from being constructed as ‘illegals’. At the time of writing, a new invigorated sanctuary movement appears slowly to be reconfiguring itself in response to one of the highest ever rates of deportations in the US. Because this nascent movement is confronting a phenomenon involving irregular economic migrants – for which there is not even a legal regime claiming humanitarian status, as is the case for refugees – there appears to be a much clearer understanding of the need to confront the law. Indeed, as is demonstrated in a news report on Southside Church in Tucson restarting its sanctuary activity as part of this movement, almost all reference to a legal justification for

5 Guzder (n 3) 117.

6 Nicholas Rademacher, ‘Sanctuary Movement’ in Patrick J Hayes (ed), *The Making of Modern Immigration: An Encyclopedia of People and Ideas* (ABC-CLIO 2012) 677.

7 Ben Daniel, *Neighbor: Christian Encounters with ‘Illegal’ Immigration*, (Westminster John Knox Press 2010) 119.

8 Quoted in *ibid* 120 (emphasis added).

sanctuary is eschewed.⁹ The most recent developments involving an executive order from President Obama granting a limited amnesty – one which, once again, makes a distinction between ‘good’ (law-abiding) and ‘bad’ (those with criminal records) immigrants – will again pose a challenge to sanctuary activists: will they accept these categorisations or not?¹⁰

The limits of ‘sanctuary legalism’ are well drawn out by Gerety when he writes:

I am struck by the irony of sanctuary legalism. A self-consciously religious and moral movement finds its preferred style of argument in law. Even the substance of its arguments comes mostly from law...it is the imagination of law – of better law – that restrains and inspires the radical dissenter.¹¹

Chloé Bregnard Ecoffey, writing within the Swiss context, offers a theological refutation of this nomophilic tendency. She criticises Christian theologians in Switzerland who have attacked the draconian laws against refugees by arguing that upholding the principle of asylum means a reaffirmation of law and sovereign order, in much the same manner as Corbett did in the US Sanctuary Movement. Ecoffey offers an alternative theological view of the subject that draws heavily on Agamben’s call to decouple life from law:

[T]he notion of Human Rights is not biblical, for liberty or life are *gifts* and not *rights*. And this means that human dignity as a gift from God has to be respected *at all costs*, there is no pragmatic or security argument to be

9 ‘Mexican claiming sanctuary in church seeks amnesty’, *Daily Mail* (27 October 2014) <www.dailymail.co.uk/wires/ap/article-2810286/Mexican-claiming-sanctuary-church-seeks-amnesty.html>; ‘The fight for immigration reform in Arizona’, MSNBC (28 October 2014) <www.msnbc.com/all-in/watch/the-fight-for-immigration-reform-349235267957> (Accessed 27 January 2015).

10 ‘Remarks by the President in Address to the Nation on Immigration’ (20 November 2014) <www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (Accessed 27 January 2015).

11 Tom Gerety, ‘Sanctuary: A Comment on the Ironic Relation Between Law and Morality’ in David A Martin (ed), *Refugee Law in the 1980s: The Ninth Sokol Colloquium on International Law* (Martinus Nijhoff 1986) 174.

opposed. Moreover, if life is a gift from God and belongs to him, it can no longer be linked with law nor be the subject of biopolitics.¹²

The failure of the Sanctuary Movement was the failure to recognise the need to make this break.

12 Chloé Bregnard Ecoffey, 'Asylum in Switzerland: a Challenge for the Church' (Masters Thesis, University of Manchester 2007) 29.

THESIS CONCLUSION

What This Thesis Has Done

I began this thesis with a proposition and a set of questions. The proposition was that the existence of refugee law is the problem facing forced migrants, not the solution to the degraded position they find themselves in today. In order to tease out the various issues involved in this rather bald statement, the following questions needed to be answered:

- I. What exactly has been the impact of law upon asylum?
- II. Does the claim that contemporary refugee law maintains and protects the principle of asylum hold up to scrutiny?
- III. Given that my working hypothesis is that refugee law has had a negative impact on the principle of protection embodied within asylum and that, therefore, question II should be answered in the negative, are these the inevitable consequences of the meeting between law and asylum? If so, why?

In Part I, I was able to do two things. By outlining the key elements of asylum as it had been practiced in Ancient Greece, Rome, the early Church and medieval England, I was able to show how it was grounded in the idea of being antagonistic to law, or at the very least maintaining an arms-length relationship to it. In addition, I highlighted the key instances where law had attempted to regulate asylum, and showed from the hazy evidence of Solon's laws, through to the Tiberian reforms, the Roman laws of the late 4th and mid-5th centuries, the canon law's *casus excepti* and the Tudor Reformation how repeatedly the imposition of law compromised or destroyed asylum. So, in answer to the first question that I posed, it appears that the impact of law has

been generally negative. It is important to stress that in all these instances bar that of the Tudors, the law did not aim at outlawing asylum altogether, only to regulate and manage the practice. The point is that the historical record shows that, even then, the effect is toxic for asylum, and for those who would seek protection within it. This suggests, therefore, that the key problem is not crude attempts at prohibition, but rather a more insidious process of defining and constraining.

The critical narrative of the development of refugee law in the 20th century presented in Part II opens with the quote from Türk and Nicholson, which directly answers my second question in the affirmative. However, beginning with the classical writers on international law and their comments on asylum, through to a discussion of the various stages in the evolution of refugee law bookended by the two world wars, it became clear that this was not the case at all. Instead, the primary concerns driving that process was re-establishing order in the midst of mass population upheavals, and of managing and controlling the movements of forced migrants that resulted. To back up this interpretation I examined closely the specific details of provisions in a range of legal instruments from the 1926 Arrangement through to the 1951 Convention. In addition, I relied heavily on the words of participants in these events, and contemporary commentators on them. What emerges clearly from that discussion is a much less romantic and humanitarian impetus towards the development of international refugee law than is generally acknowledged today. Certainly, there appears little to suggest that the phenomena of refugee law, involving the ever-greater monitoring, measuring and controlling of the refugee subject by states, has much in common with asylum, predicated as it was on its distance from sovereign power. So, in contrast to the opinion expressed by Türk and Nicholson, my answer to the second question is clearly no: refugee law fails to maintain or protect the underlying basis of asylum. Indeed, contemporary refugee law goes in completely the opposite direction.

But this still leaves open the question as to whether this failure is simply due to bad laws, and perhaps some other legal configuration could be an improvement or could succeed in framing asylum in a complementary way. In my view the problem is precisely in the whole concept of ‘framing’. Law, by its nature, seeks to define and regulate in universal terms; anything that fits within that picture is legal and thus right

or just, anything that exists beyond that field of vision is then illegal, and lacking legitimacy. Whereas asylum has frequently been about contested spaces and notions of justice, law steps in claiming the final word. The theoretical basis for understanding the nature of law as outlined in the Introduction, drawing upon writers such as Foucault, Agamben, Pashukanis, Badiou and others, goes some way to unpacking why and how law operates in the way it does. Moreover, the themes introduced there, of biopolitics, securitisation, depoliticisation, and the creation of hollowed-out subjects, that are all immanent to, or intimately linked to law, go some way to understanding that law will always impact negatively upon asylum. For asylum has historically been about contested subjectivities, about spaces from which the security forces of the state were excluded. Defining the refugee subject was a feature of the first Roman laws on the question in 392 and 398. Even the extremely liberal laws of 419 and 431 sought to regulate the behaviour of people in asylum. The *casus excepti*, too, sought over several centuries to restrict further and further the category of those deemed worthy of asylum. Public order and security were the declared goals of Tiberius in his laws on the Greek *asylia* as much as it was for Henry VIII when he abolished church sanctuary. And repeatedly, laws on asylum either assisted in or complemented the closing off of political contestation, whether over Roman control of space in conquered Greece, over the punitive taxation and endemic corruption of the late Roman Empire, or over the authority of the nation-state in the late Middle Ages. Finally, the biopolitical and security paradigms can also be seen at work with the abolition of spaces within the nation-state that were without its laws. In a similar way this was evident when the more or less free movement of persons between states that had existed previously was replaced by the panoply of border controls, immigration rules and refugee laws post-First World War.

In Part III all of the aspects described above become telescoped through the lens of the Sanctuary Movement and its relationship to law. Here we find the attempt to recreate spaces beyond the reach of law, and to facilitate the reconfiguration of subjectivities away from the deadening ones imposed by law. The movement challenged the right of law to have the final judgement, and opened up a space, literally and figuratively, in which issues over border control, on who should be granted asylum, on the responsibilities of the host state for the causes of the refugees'

flight, along with many other questions, could be contested. But we also saw how the existence of refugee law compromised the movement too. According to the standard narrative that posits refugee law as primarily concerned with humanitarian protection, the passage of the 1980 Refugee Act should have aided the refugees from Central America and indeed the Sanctuary Movement. For the refugees, it was evident from the pronouncements of administration and INS officials that the bureaucratic procedures and the restrictive provisions contained in the Act, all lifted from the 1951 Convention, actually created a more effective means to bar access to asylum. In fact, the number of refugee admissions fell by half in the period following the Act, in spite of the massive increase in refugee arrivals from Central America during the same period. For the sanctuary activists – at least, a good proportion of them – the effect of refugee law was to lull them into thinking that recourse to law was the solution to the refugees’ predicament, rather than the mechanism that was denying them asylum in the first place. This belief in the idea of good laws being badly implemented or ignored created a logic that led to activists moving almost seamlessly from resisting the law to performing it. Taking my thesis questions as a guide, had these sanctuary activists had an understanding of the historical impact of law on asylum, had they recognised that refugee law in all its various manifestations up to and including the 1951 Convention and the 1980 Refugee Act represented a break from asylum/sanctuary, and had they therefore appreciated the need to maintain a more cynical or opportunistic view of law, then arguably they would have avoided becoming effectively adjuncts to the INS, and could have won their case in court. It could be argued that in the midst of building and sustaining such a mammoth undertaking as the Sanctuary Movement, taking the time and effort to research deeply enough into these questions so as to come to the conclusions I have reached here would have been, at the very least, difficult. It would have required them challenging much of the received wisdom amongst political allies, attorneys and academics. With all due modesty, what I hope to have achieved in this thesis is to help lay the basis for an alternative narrative of the relationship between refugee law and asylum that will guide activists, lawyers, academics and not least forced migrants themselves, to avoid some of the fundamental mistakes made by the Sanctuary Movement.

Questions for Future Research

The research presented in this thesis provides a solid ground on which to investigate further questions. In terms of what these might be, I offer the following. First, the focus here has been mainly on institutions and structures, but the question of subjectivities created by them has taken something of a backseat. Of course, much of the discussion in Part III did concern the various ways in which the refugee subject was shaped, contested and reconfigured in the context of sanctuary. But perhaps at a higher level more could be said about how the refugee subject has been transformed in discourses that range from politics to literature, from the theoretical to the everyday as a result of the impact of refugee law's arrival in the 20th century. Perhaps Edward Said's reflections on how the literature of exile has changed could provide a useful starting point in investigating that question:

Refugees...are a creation of the twentieth-century state. The word 'refugee' has become a political one, suggesting large herds of innocent and bewildered people requiring urgent international assistance, whereas 'exile' carries with it, I think, a touch of solitude and spirituality.¹

In any case, I have already tried elsewhere to stake out some of the theoretical ground for an investigation into the question of how law constructs the refugee subject.²

There is a further gap in the literature which, while not central to my thesis, has become apparent in the course of my research. Histories and commentaries on international refugee law all appear to begin with the Nansen Passports introduced after the First World War. The trauma and chaos following the war are said to have suddenly awoken the world to the need for some kind of system for regulating the movement of forced migrants. And yet, the closing of borders and the introduction of categorisations of and controls over forced migrants precedes the war. Generalised use of passports and immigration controls had already begun in the latter decades of

1 Edward Said, 'Reflections on Exile' in *Reflections on Exile, and Other Literary and Cultural Essays* (Granta 2001) 144.

2 Simon Behrman, 'Legal Subjectivity and the Refugee' (2014) 26 *International Journal of Refugee Law* 1; Simon Behrman, 'Accidents, Agency and Asylum: Constructing the Refugee Subject' (2014) 25 *Law and Critique* 249.

the 19th century. Thus I think that fruitful research, using the same kind of genealogical method I have applied in this thesis, could be deployed to uncover the relationships between those developments in the domestic sphere and the growth of refugee law at the international level. Dallal Stevens has done this to some extent in the UK context in the first four chapters of *UK Asylum Law and Policy: Historical and Contemporary Perspectives*. In a rather dry, though informative, account of US law, *Legislative History of American Immigration Policy 1798-1965*, EP Hutchinson has provided much useful material too. Gérard Noiriel has provided an in-depth study of the question from a French perspective in *Réfugiés et sans-papiers: La République face au droit d'asile*, running from 1789 through to the 1951 Convention and beyond. His conclusions on the impact of refugee law are very similar to mine. But still, perhaps, much more can be said about this relationship.

At a more abstract level, the question of asylum as hospitality could also be explored further. This term has frequently been deployed, not least by those involved in the Sanctuary Movement. It is also a term that has become widely used in critical approaches, as an alternative to the restrictions, incarcerations and other forms of violence that have become a hallmark of asylum policy today.³ I had originally thought that asylum prior to refugee law had operated largely on the principle of hospitality. The hospitality that I had had in mind was that described by Jacques Derrida:

...absolute hospitality should break with the law of hospitality as right or duty, with the 'pact' of hospitality. To put it in different terms, absolute hospitality requires that I open up my home and that I give not only to the foreigner...but to the absolute, unknown, anonymous other...that I let them come, that I let them arrive, and take place in the place I offer them, *without asking of them either reciprocity* (entering into a pact) or even their names. The law of absolute hospitality commands a break with hospitality by right, with law or justice by rights.⁴

3 e.g. Heather Worth, 'Unconditional hospitality: HIV, ethics and the refugee "problem"' (2006) 20 *Bioethics* 223; Adam Ramadan, 'The Guests' Guests: Palestinian Refugees, Lebanese Civilians, and the War of 2006' (2008) 40 *Antipode* 658; Joseph Pugliese, 'The Incommensurability of Law to Justice' (2004) 16 *Law & Literature* 285.

4 Jacques Derrida and Anne Dufourmantelle, *Of Hospitality* (Rachel Bowlby tr, Stanford University Press 2000) 25 [emphasis added].

And yet, in spite of repeated references to this concept at various points in its history, especially by Augustine and by certain activists in the Sanctuary Movement, I could not find any actual instance of its operation. Instead, asylum has always been about judgement and contestability. Guy Goodwin-Gill has written:

Implicit in the ordinary meaning of the word ‘refugee’ lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight.⁵

I would argue that the same implication is present in the word ‘asylum’, for, to offer a space of freedom from seizure, we must accept that the seizing power has no right to the person fleeing from it. Thus, judgement is impossible to avoid. The question then becomes: judgement on what basis? And here is where I believe a great divide between asylum and refugee law lies. Refugee law, as we have seen repeatedly, judges subjects on the basis that they conform to a set of objective criteria. But this is judgement based on dishonesty, first because no-one and no institution can be truly objective in its judgements, and second, because such a universal claim operates precisely to obscure the political in the way that Badiou describes. Asylum, on the other hand, accepts the contested nature of its relationship to law and sovereign power, and therefore makes judgements on the basis of openly held political or religious views. Thus the refugee in law is deprived of recognition as a political subject, whereas in asylum there is, as we saw in the Sanctuary Movement, at least the *potential* for the refugee to engage on the contested terrain of politics. As such, I think approaches which problematise asylum as hospitality in relation to the political as conceived of by thinkers such as Badiou and Rancière could usefully build on my research in this thesis too.

The obvious implication of my work here is that the reception of forced migrants might improve with the dismantling of the regimes of refugee law. Thus, working at a more empirical level, research into how the reception of forced migrants operates today in societies where no such regime is in place could provide useful indications as to whether such a radical step is possible and/or desirable. Most

⁵ Guy Goodwin-Gill, *The Refugee in International Law* (2nd edn, OUP 1996) 3.

obviously, such research would focus on the Indian sub-continent whose states (India, Pakistan, Bangladesh, Sri Lanka) have never ratified the 1951 Convention, and who operate a relatively informal, ad-hoc and overtly political asylum policy. This region is well-covered in refugee studies in the fields of development and social anthropology, but is rarely ever discussed in the field of law. The assumption, perhaps, is that since the region is outside of the legal regime it also lies beyond the scope of the discipline. However, I would suggest, instead, that evidence of how forced migrants are received there, while perhaps not being largely positive, may still have something to teach us, and might contain implicit refutation of the belief in the superiority of law as a means to regulate asylum.

Concluding Thought

Finally, I wish to pose the question as to what should be the attitude of refugees, other activists, and lawyers to asylum and refugee law, based on what we have learnt in this thesis. It is difficult to maintain that the encroaching of refugee law upon asylum has played much if any beneficial role in ameliorating the plight of forced migrants. First and foremost, the attempt to codify who is or is not deserving of asylum, a preoccupation of law through the ages, has only served to impose a set of criteria on 'good' vs 'bad' migrants. If we are to have a system of refugee law, however, then one lesson to be learnt from the tradition of asylum is that insofar as the practice needs to be regulated it should be concerned only with controlling the space of asylum rather than the person of the refugee. By doing the latter we have arrived at the point where the refugee has become an object of suspicion and control. If we take an analogy from another form of assistance for people in difficulty, hospitals have rules about behaviour and conditions within them, but do not insist that putative patients fit a set of objective criteria before entering. Instead, people are treated on the basis of their respective needs.

It must also be evident that the coming of refugee law as a form of protection only became seen as a necessity with the development of border controls, passports, visas etc. The dismantling of those border controls, which would restore the international order to something resembling a system that existed prior to the First World War, would arguably make refugee law superfluous. An open borders policy

might seem rather utopian to many today, yet it effectively operates amongst the 28 states of the European Union. At the time of writing (September 2015) the unfolding tragedy of the Syrians and others arriving into Europe, with Germany taking in 100,000s in just a few weeks, shows that if the political will is there, we are capable, with difficulties to be sure, of ‘accommodating the misery of the world’ without the need for stringent border checks and a contrived determination of who should be allowed entry.

In terms of asylum, we must recognise the difficulties of creating and sustaining such practices in a world so hegemonised by sovereign power and the rule of law. Nonetheless, as the Sanctuary Movement proved, it is at least possible to open up a space in which to contest the terms of refugee reception and in which refugees can reclaim some of their political identity and agency. Thus a meaningful practice of asylum today must follow in the best traditions from the past right up to the Sanctuary Movement and others today. It must be about providing protection without discrimination, about deconstructing the contrived boundaries between refugee, IDP, economic migrant etc. Often refugee advocates argue for a rigid division between asylum and general immigration law, on the basis that asylum is about offering help to people in distress who should not be subject to ordinary border controls. But, as we have seen in this thesis, once such a distinction is drawn then *all* migrants are forced to undergo the strictures of border control, where the refugee wheat can be sorted from the immigrant chaff. In short, refugee law imposes upon forced migrants a set of false distinctions, which do not fit the realities of people’s lives. Is someone fleeing a war zone in order to find a better life and working conditions a refugee or an economic migrant? Is there really a qualitative difference in the need for protection if one’s life is threatened by a persecutor, starvation, climate change, lack of adequate medical care etc.?

Equally, we must be alive to the subtle ways in which the presumptions of refugee law and the pretensions of ‘humanitarianism’ can corrupt the politics and theology of asylum. Yet we face a new problem today, which is that the great ideological schisms that opened up spaces for the contestability of asylum have been reduced to the margins. In our ‘post-political’ age, and without some profound crisis in sovereign order, this space has become ever more severely restricted. Therefore, it

would be wrong to take an abstentionist approach to refugee law; to do so would simply abandon forced migrants completely to the capriciousness of sovereign power. But there is a big difference between an opportunistic approach to law – to use and manipulate it as far as possible in the interests of forced migrants – and a romantic belief that it somehow contains within it the principle of asylum. Doing the latter involves a complete misunderstanding of the nature of both refugee law and asylum, and it places one in a position of adjunct, rather than adversary, to sovereign power. The longer view of asylum and refugee law instead enables us to recognise the irreconcilable conflict between the two. If asylum is to have any meaningful place in our society, then we – forced migrants, advocates, researchers, teachers, commentators, activists – must constantly assert its claim beyond the boundaries of law.

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