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Teresa Godwin Phelps

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NO PLACE TO GO, NO STORY TO TELL: THE MISSING NARRATIVES OF THE SANCTUARY MOVEMENT

TERESA GODWIN PHELPS*

The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹

NARRATIVE AND THE LAW

The term narrative jurisprudence is becoming common parlance among legal scholars, and as any term becomes widely used, it begins to take on different meanings. Narrative jurisprudence may be used theoretically, as a way of describing what law is. Robert Cover exemplifies this approach in his well-known article *Nomos and Narrative* in which he writes that "law and narrative are inseparably related."² By this he means that legal rules and legal institutions are inevitably located in a narrative which gives those rules and institutions meaning. Thus, in discussing the nature of law, one must resort to the narrative in which that law is located. Robin West sees narrative as a way of expanding one's vision and of better coming to see the moral significance of legal theory.³ She applies this approach directly to fictional narratives, using them as images of life against which legal theory must be tested for validity. Narratives thus embody human situations that measure the truthfulness of what we say about the law.⁴ Legal theory, furthermore, depends upon narrative in that aspirational legal theorists frequently create fictional utopian communities, complete with characters, to depict the possibilities inherent in an alternative legal system.⁵

Tom Shaffer sees narrative jurisprudence as encompassing both theory and pedagogy and posits that narrative fictions make clear to us that law is not merely theory, but has impact on people's lives. He claims that we

* Associate Professor of Law, University of Notre Dame Law School. University of Notre Dame (B.A., 1973; M.A., 1975; Ph.D., 1980); Yale Law School (M.S.L., 1989). I am grateful to Rosemary Burke, my research assistant, for excellent help on this article:

1. O. W. HOLMES, *THE COMMON LAW* 5 (Little, Brown & Co. 1963).

2. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 5 (1983).

3. West, *Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. REV.* 145, 209 (1985).

4. See West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *HARV. L. REV.* 384 (1985).

5. West cites Bruce Ackerman's *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) and Ronald Dworkin's *TAKING RIGHTS SERIOUSLY* (1977) as examples. See West, *supra* note 3, at 146 n.3.

learn to become good lawyers and good people by reading stories about good and bad lawyers and by measuring our imagined conduct against theirs.⁶ For him, stories are ways of teaching professional responsibility and of critiquing lawyers' moral conduct. I, too, have claimed that "narrative helps to initiate us into our place in the law, whether as citizens or as lawyers,"⁷ that stories are wellsprings from which we nourish and ennoble our own lives.

Narrative jurisprudence seen in these ways serves to teach us about the law and about ourselves,⁸ or it serves to help us explain our theories to each other and to critique theories of law.⁹ Yet law and narrative are related in other ways that have received less attention: the relationship of narrative to *doing* and *changing* the law, not theory at all but practice. How does storytelling figure in the day-to-day practice of the law? If our legal rules are located in a narrative, whose narrative is it? How might those rules be changed, especially if alternative stories are silenced by the very rules they seek to change? For example, if a battered woman kills her abuser and tries to plead self-defense, she may well find that the rules governing that plea are embedded in a male narrative, a story of two men of equal size confronting each other in an alley. Thus she has to demonstrate imminence, equal force, and attempted retreat. Because her story is radically different from the one that gave rise to the rules, she may well find the plea beyond her reach.¹⁰ And she might be prevented from telling her story at all because it does not fit into the official version of self-defense. Until such unofficial stories are heard and privileged, the traditional narrative retains its hegemony in the law. Whether or not a judge allows the woman's story to be told, and perhaps validated by a meta-story provided by expert testimony about other women like her, may well determine the outcome of her trial.

Narrative thus constructs both social and legal meaning. The narrative that gave rise to an act may determine whether an act of killing an abusive spouse is murder or a tragic, but noncriminal, ending to an uncontrolled domestic situation. Narrative looks first to the dominant social order and superscribes on it the alternative social order; one is not more or less "real" than the other. This is the power of narrative in the law. It does not ask either/or; it allows for oppositions and a multitude of voices. It makes room for dialogue and in the midst of the dialogue, transformation of legal meaning can occur.

6. See T. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985).

7. Phelps, *Narratives of Disobedience: Breaking/Changing the Law*, 40 J. LEGAL EDUC. 133, 136 (1990).

8. For the pedagogical uses of narrative in the law, see 40 J. LEGAL EDUC. 1 (1990) for a symposium on the Pedagogy of Narrative.

9. For discussions of the theoretical uses of law and narrative, see the symposium on Legal Storytelling at 87 MICH. L. REV. 2073 (1989).

10. See Phelps, *Stories of Women in Self-Defense*, 2 YALE J. OF LAW AND FEMINISM 189 (1989).

The role of storytelling in the trial process was the subject of a study conducted by W. Lance Bennett and Martha Feldman, in which they concluded that the criminal trial is organized around storytelling. "Stories," they write, "are everyday communication devices that create interpretive contexts for social action. In isolation from social context, behaviors or actions are ambiguous."¹¹ Their study demonstrates that if defendants are not allowed to tell their stories because of procedural devices or if defendants' stories are not among those shared by their listeners, then injustice may result because the defendants are not believed.¹² These legal stories are reconstructions of "what really happened," and the party doing the telling, who controls the frame of the story, has a significant advantage over the other participants in the trial. This is especially true if the storytelling is controlled to the extent that only one story is told; dialogue is shut down and the legal status quo remains.

Another way that narrative is related to the law is through its role in bringing about change in the law. If legal rules and institutions are embedded in narratives, then it will not be until the limitations of the narratives are exposed that laws can be changed. Sometimes the only means by which the underlying narratives are unmasked is by breaking the law, telling the story of the law breaking and its underlying rationale, and challenging the "official" story with a new one that has been silenced or unknown. Thus narrative and civil disobedience are interlocked. This notion of narrative and the law is associated, I think, with Robert Cover's description of law as a bridge that connects reality to alterity, our actual legal system to an imagined future world. If law is separated from narrative and reduced to a system of rules, procedures, or syllogisms, it is stripped of its transformative powers and becomes, instead, an instrument of oppression.¹³

This article is about these connections of narrative to doing and changing the law. The article first argues that narrative is inescapably part of any effective act of civil disobedience that seeks to change the law. Beyond that, the article demonstrates that narrative is essential to judging acts of disobedience to the law. To judge we must understand, and to understand we must have context, the story in which the act is embedded. As an example I discuss the Tucson Sanctuary Movement,¹⁴ in which a struggle over who controlled the narrative, both before and during the trial, is part of the

11. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM 7* (1981).

12. *Id.* at 177.

13. See Cover, *supra* note 2; Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1985); Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

14. A great deal has been written about the Sanctuary Movement, but nothing so far has analyzed the events in Tucson from the standpoint of narrative jurisprudence. For other discussions of the Movement, see I. BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985); A. CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988); M. DAVIDSON, *CONVICTIONS OF THE HEART: JIM CORBETT AND THE SANCTUARY MOVEMENT* (1988); R. GOLDEN & M. MCCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* (1986).

untold story. The role of narrative (and lack of it) takes center stage in that legal drama.

NARRATIVE AND CIVIL DISOBEDIENCE

The lawbreaking that we call civil disobedience can take a number of forms. It may be a symbolic act undertaken to call attention to a law or government practice believed to be unjust. Denting nuclear weapons, throwing blood on draft records, blocking entrance to the Pentagon, and sitting in at a government official's office all exemplify symbolic acts of civil disobedience. The laws broken are generally those prohibiting trespass on or damage to government property, not the laws to which the lawbreakers object. The act of lawbreaking, then, is incidental to the unjust law or practice; since its purpose is to call attention to something, it explicitly depends on narrative. When the story of the symbolic act is told (as it will be by the participants and the press), the story of the unjust law must also be told and other citizens may respond to that narrative. The official story thereby is challenged and made vulnerable by a competing narrative.

Another form that civil disobedience may take is also symbolic but it shares a nexus with the law or practice believed unjust: Thoreau's refusal to pay a poll tax to support a government that waged war against Mexico is an example. The law he was breaking—paying taxes—was not what he wished changed, but there was a direct relationship between the two in that his taxes went toward supporting the war. While this kind of act may be self-satisfying (and indeed some Americans quietly refused to pay taxes during the Vietnam conflict), it has no impact on the law or practice unless its story is told. Thoreau knew this and his essay "Civil Disobedience" told the story of his lawbreaking so that others might follow his example or in other ways protest the war. In a similar fashion, Martin Luther King, Jr.'s violation of the Birmingham injunction prohibiting parading was only peripherally related to the system of segregation he wished changed. His arrest and incarceration in Birmingham Jail would have failed to have the necessary impact had he not written his "Letter From Birmingham City Jail" and had the media not seen fit to give it wide coverage. His act of defiance, with his story of it and his reasons for doing it, merged into a potent weapon against segregation and the brutal police tactics enlisted to enforce it.¹⁵

A third form of civil disobedience involves actually breaking the law wished changed. Rosa Parks' refusal to sit in the back of the bus in Montgomery represents this form. Sometimes it may become symbolic as well as direct, such as in Rosa Parks' case, in which that particular law *and* all the Jim Crow laws of Alabama were the eventual target. Once more, though, Rosa Parks' act would have been just another futile act of

15. See T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 803-04 (1988).

defiance to an unjust law had the story not been told. The Montgomery NAACP saw to this first by persuading Parks to fight the charge and thereby attract media attention, and second by beginning a widespread publicity campaign of its own.¹⁶

A fourth form of civil disobedience¹⁷ involves a covert breaking of the law in order to help those placed in danger by a government law or practice. Operators of the Underground Railroad quietly broke the fugitive slave laws to assist slaves in escaping, hiding from authorities, and finding places to live in freedom. The very secrecy was crucial to its operation, as abolitionists fought on other more public fronts to end slavery. The Underground Railroad, for all the necessary humanitarian work it accomplished, was not intended to change the law and thus had a piecemeal, band-aid quality to it. It was lawbreaking without an accompanying narrative and thereby not effective in the evolution of the law.

This is the situation in which the Tucson sanctuary workers operated until 1982. Until that time they had quietly assisted refugees from Central America to enter the United States and to find homes and work, with or without the official sanction of the United States Immigration and Naturalization Service. This kind of lawbreaking, however, suffers from the very secrecy it engenders.¹⁸ The underlying law or practice remains unchanged unless the lawbreakers come out and tell the story of what they are doing and why.

THE TUCSON SANCTUARY STORY

In March, 1982, the Sanctuary Movement in Tucson, Arizona moved from the fourth form of civil disobedience, covert humanitarian lawbreaking, to the third form, lawbreaking with an accompanying narrative designed

16. *Id.* at 128-42.

17. Some would argue that only public acts of breaking the law are properly called civil disobedience. John Rawls defines civil disobedience as a "public, non-violent, and conscientious act contrary to law usually done with the intent to bring about a change in the policies or laws of the government." Rawls, *The Justification of Civil Disobedience*, in *REVOLUTION AND THE RULE OF LAW* 36 (E. Kent ed. 1971). I prefer to see civil disobedience as breaking a law believed to be unjust, thus defining it according to the motive behind it rather than by its public or private nature. See, e.g., Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929 (1984). In this way, those who break unjust laws and do not seek publicity or punishment may call their acts civil disobedience.

18. *But see* Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J. OF LAW AND THE HUMANITIES 381, 382 (1990), in which she writes:

But this failure [to have ameliorating effect on immigration policies and practices] does not mean that these [sanctuary] efforts were only significant as stop-gap or band-aid measures. Sanctuary participation taught people about certain political, religious, and legal realities from which they formed new perceptions about their world, their responsibility, and possibilities for action.

Id. I can agree with this in that what I call the fourth form of civil disobedience—covert humanitarian aid—prepares its participants for the third form—open political confrontation. Indeed Pirie sees the Sanctuary Movement's shift from private to public as a move from purely religious to political action. *Id.*

to change the law. Before then it had operated much like the Underground Railroad.¹⁹ The sanctuary movement was conceived by the Reverend John Fife of the Southside United Presbyterian Church in Tucson and Jim Corbett, a retired Quaker Rancher.²⁰ In May 1981, a friend of Corbett's had picked up a Salvadoran refugee hitchhiker. The Border Patrol had stopped Corbett's friend and arrested the Salvadoran. The following day, Corbett had his first contact with the Border Patrol and the Immigration and Naturalization Service (INS), both of which refused to give him any information about the detainee. Using subterfuge, Corbett was able to obtain the name of the detainee and his location. He arrived at the Santa Cruz County Jail with the appropriate forms, was asked to wait for a long time, and finally learned that the Border Patrol had removed the detainee "20 or 30 minutes ago. They're gone."²¹

At about the same time, the Tucson Ecumenical Council (TEC) created a task force on Central America to respond to the needs of Central Americans entering the country. The task force began by raising bail to bond aliens out of detention and to assist with legal fees. After raising close to one million dollars, the TEC began to realize that bonding out was ineffective.²²

The turning point for Corbett came in late June when he escorted three men into the INS office in Tucson for the purpose of filing for asylum. All three men were arrested, and bond was set at an unprecedented \$3000.²³ Corbett had come to realize that using the legal system would nearly invariably result in deportation of Central Americans.²⁴ Giving up on the

19. The Sanctuary Movement's similarity to the Underground Railroad has been widely recognized. Perhaps the most notable comparison appears in what can only be seen as a kind of Freudian slip in the Ninth Circuit opinion upholding the convictions. Judge Hall wrote, "[a]ppellants were convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the border with Arizona." *United States v. Aguilar*, 883 F.2d 662, 666 (9th Cir. 1989).

20. I. BAU, *supra* note 14, at 10.

21. M. DAVIDSON, *supra* note 14, at 12-22; *see also* A. CRITTENDEN, *supra* note 14, at 28-30.

22. I. BAU, *supra* note 14, at 10.

23. A. CRITTENDEN, *supra* note 14, at 52-54.

24. Although 1980 Refugee Act was designed to offer a wide range of humanitarian responses to refugee crisis situations and to strip immigration policies of ideological bias, post Act figures belie these intentions. In 1983, for example, 78% of the Russian, 64% of the Ethiopian, 53% of the Afghan, and 44% of the Romanian cases decided received asylum. For those fleeing non-Communist countries, asylum was far less likely: 11% of the Philippine, 12% of the Pakistani, 2% of the Haitian, 2% of the Guatemalan, and 3% of the Salvadoran cases received favorable decisions. *See* Rodino, *A Symposium on the Sanctuary Movement: Introduction*, 15 HOFSTRA L. REV. 1, 2-3 (1986). The government regularly regards refugees from most Central American countries (Nicaragua is a notable exception) as economic refugees and thus ineligible for asylum under the 1980 Act. For both sides of the discussion about the implementation of the 1980 Act, *see* SANCTUARY: CHALLENGE TO THE CHURCHES (M. H. Thomas ed. 1986). *See also* A. CRITTENDEN, *supra* note 14, at 18, in which she states that 90% of the 2 million refugees admitted outside of normal immigration procedures since World War II were from Communist countries. She also provides admissions statistics covering a number of years. *Id.* at 20-21.

INS, he began to help Central Americans enter the United States without government sanction.

In late October, Corbett received a letter from the Reverend John Wagner, director of the Lutheran Social Services of Southern California, describing an event at a Los Angeles church. INS officers had pursued a man into the church and taken him away. After church representatives protested, INS officers agreed not to pursue those who had entered a church, hospital, or school. Wagner proposed that the agreement recognized church as sanctuary.²⁵ The very word "sanctuary," rooted in long biblical tradition, implies that a religious practice trumps the civil law; that those who would offer sanctuary are not breaking the law but are instead presenting an acceptable alternative to those in need.²⁶ Corbett suggested the idea of using churches as sanctuary to the TEC task force, and Fife volunteered to speak to the members of his congregation for the purpose of creating sanctuary at Southside.²⁷

At its annual meeting in January, 1982, Southside decided to declare public sanctuary. Joining it were five churches in the San Francisco Bay area, and three other churches.²⁸ The date for the declaration was set for March 24, 1982, the second anniversary of the assassination of Archbishop Oscar Romero of El Salvador. On the day before the declaration, Fife sent a letter to Attorney General William French Smith, with copies to A. Melvin McDonald, United States Attorney, Arizona; William Johnston, Immigration Service, Tucson; and Leon Ring, Border Patrol, Tucson, which said:

We are writing to inform you that Southside United Presbyterian Church will publicly violate the Immigration and Naturalization Act, Section 274 (A). . . .

We take this action because we believe the current policy and practice of the United States Government with regard to Central American refugees is illegal and immoral. We believe our govern-

25. M. DAVIDSON, *supra* note 14, at 66-67.

26. The biblical basis for sanctuary is *Numbers* 35:6-34, establishing cities of refuge for "manslayers" who killed without intent. While in the city of refuge, the individual was protected from the vengeance of the next-of-kin of the person slain. If the fugitive left the city of refuge, he lost its protection. In the earliest Anglo-Saxon legal code, a distinction between the church's peace and the king's peace was established. The king's peace was a protection granted by the king to any free man, but the church's peace was a protection granted by the church and attached to sacred places. The penalty for violating the church's peace was double the violation of the king's peace. The first express grant of asylum appears in 887, allowing asylum in a monastery for three days and penalties for anyone who violated the sanctuary of the Church. By the fourteenth century, the person who sought sanctuary was seeking protection from prosecution, rather than personal vengeance by family members. The fugitive had a choice of submitting to trial or abjuring the realm. Sanctuary protection lasted at least forty days during which time the fugitive could make his decision. If he decided to leave the country, the protection followed him to the borders. For an overview of the history of sanctuary, see I. Bau, *supra* note 14, at 124-71.

27. M. DAVIDSON, *supra* note 14, at 67.

28. *Id.* at 68; A. CRITTENDEN, *supra* note 14, at 69.

ment is in violation of the 1980 Refugee Act and international law by continuing to arrest, detain, and forcibly return refugees to the terror, persecution, and murder in El Salvador and Guatemala. . . .²⁹

By going public, the sanctuary workers began to tell the story of what they had been doing since the summer of 1981.³⁰ As a result, they soon were joined by many other congregations and began to receive the support of religious leaders throughout the country.³¹ And they knew just what they were doing: Jim Corbett said that they had gone public because "we had all become aware that a full-scale holocaust was going on in Central America, and by keeping the operation clandestine we were doing exactly what the government wanted us to do—keep it hidden, keeping the issue out of the public view."³² Leaders of the movement began to encourage interviews by the news media and even allowed television cameras to follow them as they transported refugees.³³ Only by presenting a competing narrative that exposed the ideological bias in the implementation of the 1980 Refugee Act and the conditions in Central America could the sanctuary movement hope to change the law. *What* they did was only a small part of the story; *why* they did it was the crucial part.

Even after the public declaration, the government was slow to act, still seeing the sanctuary movement as less than "a serious threat to enforcement efforts . . . when viewed in its overall context."³⁴ Moreover, the government was aware that arrests would only bring more publicity to the movement, and the story told would be controlled by the sanctuary workers themselves. The drama of their arrests and trials would give their story a widespread, and perhaps sympathetic, audience. To effectively undercut the sanctuary movement, the government had not only to use the criminal law to stop individuals from their activities, but also had to grab control of the story that was being told. The former without the latter would only cause more harm to law enforcement efforts, and would, in fact, play into the hands of the sanctuary movement. The more the sanctuary workers could publicize their activities, the more they could draw attention to the unjust implementation of the 1980 Refugee Act, and others might rally to the cause, demanding change.

29. A. CRITTENDEN, *supra* note 14, at 74.

30. R. GOLDEN & M. MCCONNELL, *supra* note 14, at 48.

31. *Id.* at 6.

32. *Id.* at 47.

33. *Trial Pitting U.S. Against Sanctuary Movement*, L.A. Times, Nov. 18, 1985, at 10, col. 1; see also *United States v. Aguilar*, 883 F.2d 662, 668 (9th Cir. 1989). Stories about the movement were featured in PEOPLE, U.S. NEWS AND WORLD REPORT and on 60 Minutes. See M. DAVIDSON, *supra* note 14, at 111 (describing PEOPLE magazine story).

34. Memorandum from Dean B. Thatcher, Intelligence Agent, to Robert D. McCord, Chief Patrol Agent; James Rayburn, Criminal Investigator; William Glenn, Regional Intelligence Western Region; John Camp, Central Office Intelligence Central Office (Jan. 4, 1983) (quoted in Colbert, *The Motion in Limine: Trial Without Jury*, 15 HOFSTRA L. REV. 5, 43 n.203 (1986)). Despite its apparent inactivity, however, the INS opened a file on the sanctuary movement just two days after the public declaration. L.A. Times, *supra* note 33.

Two years after the public declaration, in March 1984, the government risked playing into the movement's hands and issued indictments against several sanctuary workers in Texas.³⁵ The indicted sanctuary workers exploited the opportunity to attract media coverage and held a press conference. John Elder, one of the arrested, said: "As a member of the sanctuary community . . . I am proud to be able to live my life in a way that allows my own alleged criminal actions to illuminate our nation's shameful policies."³⁶ Another, Stacy Merkt, said: "What motivates me to help people and to work for justice is my belief in a God of life and love. I have seen. I have heard. I don't need five hundred thousand more refugees to convince me that we act illegally when we deport refugees."³⁷

This narrative of civil disobedience was clearly controlled by the sanctuary workers. Those that the government preferred to call "undocumented aliens" were renamed "refugees," a critical renaming that could reconstruct legal meaning under the 1980 Act.³⁸ "Refugees" received asylum; undocumented "aliens" were deported. The definition, however, can only come from the story of what the conditions are in the person's homeland and

35. Stacey Lynn Merkt was a worker at Casa Oscar Romero in San Benito, Texas, an organization providing food, shelter and assistance to Central Americans. She was arrested in February, 1984, and at trial was found guilty of conspiring to transport and move, and transporting and moving, two illegal aliens within the United States. Her conviction was reversed and remanded on appeal based on an improper jury instruction. *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985), *cert. denied*, 480 U.S. 946 (1987). John B. Elder, director of Casa Oscar Romero, was arrested in March 1984 after Border Patrol agents witnessed three Salvadorans leaving Elders's vehicle in front of the local bus station. He was accused of unlawfully transporting undocumented aliens. Several motions to dismiss were filed, based on free exercise of religion, domestic and international law, selective prosecution, and estoppel. The District Court denied all motions to dismiss. *United States v. Elder*, 601 F. Supp. 1574 (S.D. Tex. 1985). In a trial by jury, Elder was acquitted. *See* A. Crittenden, *supra* note 14, at 252 n.*. Both Elder and Merkt were again indicted in December 1984 for illegally transporting undocumented aliens. Elder was convicted of two counts of conspiracy, two counts of bringing in and landing illegal aliens, in violation of 8 U.S.C. § 1324(a)(1), and two counts of transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2). *United States v. Merkt*, 794 F.2d 950, 953 (5th Cir. 1986). Although Merkt was indicted on one conspiracy count and two transportation counts, she was convicted on the conspiracy count alone. *Id.* at 954. On appeal to the Fifth Circuit, the convictions were affirmed. *Id.* at 965. Elder served 133 days of a 150 day sentence in a half-way house. Merkt served her time, while pregnant, in Texas. A. CRITTENDEN, *supra* note 14, at 252 n.*.

36. R. GOLDEN & M. McCONNELL, *supra* note 14, at 74.

37. *Id.* at 73.

38. The 1980 Refugee Act was intended to bring United States law into conformity with the 1967 United Nations Protocol to which the United States became a signatory in 1968. The Protocol defined "refugee" as a person who has a "well-founded fear of being persecuted" based on "race, religion, nationality, membership in a particular social group or political opinion." *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 MICH. J. LAW REFORM 243, 246 (1984). Between 1968 and 1980, this standard was not used uniformly; courts sometimes used it and at other times reverted to the earlier "clear probability of persecution" standard. During this time, the Attorney General used his parole power to admit 7,150 refugees from non-Communist countries and 608,385 from Communist countries. *Id.* at 248.

what he or she has suffered there. The new story inverted the civil order by depicting the government's deportations as illegal and the movement's work as a lawful and necessary response to unjust government policies, answering the call of God. This is precisely the power of narratives that chronicle acts of civil disobedience; they are meant to invert the order, to redefine lawful and unlawful, and to determine the names by which things are called. They are meant to bring about a change in the law by rallying others to the cause and to expose the unjust law or practices that should be changed.

The strategy was working, at least in part, by attracting others to the movement, although INS policies remained the same. By January 1985, nearly two hundred churches in eleven cities had publicly declared sanctuary,³⁹ and sanctuary workers were openly defying the law. If the government was to do anything about the sanctuary movement, it had to move. But the government faced a dilemma: on the one hand, further arrests and trials would only serve the movement's interests by attracting more publicity and giving those on trial a stage on which to present their claims that they were acting lawfully and that the INS, in keeping with the foreign policy aspirations of the Reagan administration, was unlawfully implementing the terms of the 1980 Refugee Act. On the other hand, if the government continued to look the other way in the face of the sanctuary movement's open defiance of the law, respect for the law would be undermined to the extent that it would be rendered impotent. The worst case scenario would be arrests that attracted the media and provided a platform for the sanctuary story to be told, a trial that furthered these ends, *and* acquittals that would give official citizen sanction to the sanctuary movement. The order would not then be *represented* as inverted; it would be inverted. The government's hands were tied unless it could find a way to seize control of the story.

TAKING CONTROL OF THE STORY

On January 14, 1985, sixteen⁴⁰ people were indicted, charged under 8 U.S.C. section 1324 for engaging in a conspiracy to violate immigration statutes. With the sealed indictment, the government filed a motion in limine and a supporting memorandum of law in which the government asked the trial court not to allow the admission of four defenses: defenses based upon international law, freedom of religion, the law of necessity, and lack of specific criminal intent.⁴¹ After nine months in which both sides filed

39. Kemper, *Convicted of the Gospel*, SOJOURNER, July 1986, at 14.

40. Of the original sixteen, eleven stood trial and eight were convicted. Colbert, *supra* note 34, at 6 n.1.

41. The motion in limine did much else besides silencing the defense. It effectively shifted the burden of proving guilt from the prosecution to the defense before the trial began. In essence the defense team had to lay out its strategy before trial and convince the court that it should be permitted to use the defenses. This curtailed the defendants' right to remain silent, to be free from self-incrimination, and to insist that the prosecution bear the burden of proving guilt. Colbert, *supra* note 34, at 69-76. Professor Colbert's excellent article thoroughly discusses

additional memoranda and engaged in extensive discovery, United States District Judge Earl H. Carroll granted the motion, making it clear that he considered the trial to be an "alien-smuggling case."⁴² The government thus effectively circumscribed the bounds of the story that could be told at trial: the story that was left to be heard by the jury characterized the events in Tucson as the activities of "nothing more than an alien smuggling ring."⁴³ And the government was not reticent about its tactics, stating that it did not want the trial turned "into an evaluation by the jury of competing horror stories."⁴⁴ Nor did it want the foreign policy of the Reagan Administration put on trial, stating that its main concern was that the trial not be "convert[ed] . . . into a political stage to advance the defendants' symposium on Central American conflicts."⁴⁵ By using a rule of procedure, the government silenced all but the story it wished to tell and reinverted the order upset by the publicity surrounding the sanctuary movement. "Refugees" were once again "aliens," and no evidence that would suggest otherwise could be heard. The sanctuary workers had always claimed that they had acted lawfully and that the INS was acting unlawfully by manipulating the terms of the 1980 Refugee Act and ignoring the requirements of international law. By seizing charge of the story, the government shut down that claim by disallowing evidence that would show government malfeasance. It controlled the names by which people and events were known.

On October 28, 1985, the District Court summarized its rulings:

1. No evidence will be received offered in support of or in opposition to the wisdom of any government policy or regarding any political question respecting a foreign country.
2. No evidence will be received offered to demonstrate that there was or is civil strife, lawlessness or danger to civilians in any foreign country.
3. No evidence will be received offered to establish good or bad motive on the part of a defendant or defendants.
4. No evidence of religious beliefs will be received as a defense to the charges in the indictment.
5. No evidence will be received offered to prove either necessity or duress on the part of any defendant for the surreptitious entry of an alien into the United States.⁴⁶

these effects of the motion in limine and as well provides a history of the previous uses of the motion. He concludes that the exclusion of entire defenses is not the proper use of a motion in limine at a criminal trial. *Id.* at 76.

42. L.A. Times, *supra* note 33.

43. Colbert, *supra* note 34, at 52 n.247.

44. *Id.* at 52 n.251.

45. Memorandum in Response to Defendants' Motion to Strike the Government's Motion in Limine, United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Mar. 29, 1985) (cited in Colbert, *supra* note 34, at 51).

46. United States v. Aguilar, No. Cr. 85-008-PHX-EHC (D. Ariz. Oct. 28, 1985) (cited in Colbert, *supra* note 34, at 54, n.270).

The court also excluded evidence as to the defendants' belief that the aliens involved were refugees and the defendants' understanding of the immigration laws of the United States.⁴⁷ These, then, are the stories that were silenced: the government's policy toward Central American aliens, the conditions in El Salvador and Guatemala, the defendants' motives and religious beliefs, the defendants' understanding of the 1980 Refugee Act, and the defendants' understanding of the immigration laws of the United States.

Piece by piece, the opportunities to give context to the defendants' acts were removed by the motion in limine. If the defendants could not offer testimony about the INS's implementation of the 1980 Refugee Act, which tended to treat all Central Americans as economic migrants⁴⁸ eligible only for deportation, and they could not testify as to their own understanding of the 1980 Act and international law, they could not establish their basic premise—one known to the authorities since the 1982 letter from the Southside congregation to William French Smith—that the government, not the defendants, was violating the law. They had lost the means by which they might invert the order.

If the defendants could not offer testimony, general or specific, about the conditions that drove the Central Americans northward, they could not change the designation "alien" to the designation "refugee." To be entitled, in fact, to that designation, one must show a "well-founded fear of persecution." To show that, one must be able to tell the story of the persecution. If they could not testify about their motives or religious beliefs, the "why" of their acts was removed, leaving only the bare, seemingly illegal, "what." Law was stripped of narrative and reduced to syllogism. By shutting down any dialogue concerning these issues, the government hoped to deprive the defendants of the means by which the law might be transformed. Law may be transformed through dialogue, where competing representation of truth challenge each other. In the absence of dialogue, with the silencing of anyone's "word," dominating conditions are maintained and change curtailed.⁴⁹

Don Reno, special assistant Attorney General who was prosecuting the case, fully knew the implications of the motion; he intended to isolate the defendants' actions from any context that would give them meaning. He had been a criminal defense lawyer for years before he changed sides and he knew that the way to vindicate criminals was to give context to their actions.⁵⁰ Throughout the trial, he, with the full compliance of Judge Carroll,

47. *Id.*

48. This attitude was handed down from Washington. In April 1985, the United States Senate Judiciary Committee held hearings as to whether Salvadorans could be granted extended voluntary departure, a process that would allow them to stay in the United States indefinitely. The official government position was stated by Elliott Abrams, then Assistant Secretary of State for Human Rights and Humanitarian Affairs: Salvadorans fled to the United States for economic reasons, not because of political persecution. M. DAVIDSON, *supra* note 14, at 99.

49. See P. FREIRE, *PEDAGOGY OF THE OPPRESSED* (1968) at 77ff.

50. A. CRITTENDEN, *supra* note 14, at 218-19.

completely controlled what words were used and what stories were told. In his opening statement to the jury, Reno carefully kept religion out of the courtroom, "even to the extent of referring to Sister Darlene Nicgorski, a Phoenix nun, as Miss Nicgorski."⁵¹ He described the work of the sanctuary movement as a "criminal enterprise," that brought illegal aliens into the country and provided them with disguises and false documents.⁵² He named the TEC task force a "three-tiered smuggling conspiracy" and Socorro Aguilar's house a "drop house, in alien-smuggling parlance."⁵³ When the defense attorneys asked Judge Carroll for an opportunity to recharacterize events and people, he would not allow it, saying it went to motive, an argument expressly disallowed by the motion in limine.

One of the Salvadorans helped by two of the defendants, Alejandro Rodriguez, was arrested out of the sanctuary church in Rochester, New York, where he and his family were living. He was required to testify for the prosecution, specifically identifying Aguilar and Conger, the two who had helped him. He, like many others, had been named an "illegal alien unindicted co-conspirator."⁵⁴ If he refused to testify, he would be deported. When he was called to the witness stand, the judge immediately labelled him a hostile witness, allowing the prosecution to ask leading questions. Any attempt he made to explain why he fled El Salvador was stricken from the record. The judge would allow "political persecution" but not "torture." He could express "concern for his safety" but was not allowed to talk about death squads or murdered relatives.

Finally the defense asked that Rodriguez be allowed to tell his story out of the jury's hearing. After the jury left the courtroom, the court and the courtroom audience heard Rodriguez's story. He was an El Salvadoran of some economic means, who owned a house and a farm, who was a labor organizer, who had been arrested without charges and tortured for fifteen days. After six months in prison, he was released after a North American business associate inquired about him. When he returned to his house, he found a death squad waiting for him. He fled to Mexico where he was later joined by his wife and children. He took his family with him, he testified, because "in El Salvador, they murder three-month old babies. They rape girls that are five, six, seven years old. Their vengeance would have been their kidnapping, raping, or murdering my children."⁵⁵

The defense lawyers pleaded with the judge to allow Rodriguez to tell his story to the jury. "Otherwise," they said, "you rob him of his story and rob the jury of the chance to know the truth." "I have that discretion under the law," Carroll commented, and denied the request.⁵⁶

51. L.A. Times, *supra* note 33, at 10.

52. *Id.*

53. M. DAVIDSON, *SANCTUARY: A JOURNEY* 135-37 (1987). For other stories that were all or partially silenced, see M. DAVIDSON, *supra* note 14, at 125-28.

54. *Id.* at 94.

55. *Id.* at 125.

56. J. McDANIEL, *SANCTUARY: A JOURNEY* 135-37 (1987). For other stories that were all or partially silenced, see M. DAVIDSON, *supra* note 14, at 125-28.

When the prosecution completed its case, the defense rested without calling a single witness.⁵⁷ While the motives may have been mixed,⁵⁸ the basic feeling was that Judge Carroll had made it clear that he would not allow them to present their case. Fife put it succinctly: "The Bible says, when there is no opportunity to speak for the truth, then stand silent."⁵⁹ They felt that an incomplete story could not be the truth.

On May 1, 1986, the jury returned its verdict: guilty on eighteen of the thirty counts that Reno had given them.⁶⁰ Despite the widespread sympathetic publicity that the trial had generated for the sanctuary movement, the government won the battle over guilt; its strategy of silencing stories had been temporarily victorious.

CONCLUSION

Although I began by showing the fragmented nature of what we call narrative jurisprudence, the end of my story must return to the similarities. All narratives associated with the law— whether they be theoretical, pedagogical, or practical—allow us to compare what is with what can be and to compare what we know with what we do not know. Like the theoretical and pedagogical versions of narrative jurisprudence, narratives about doing and changing the law are a bridge from reality to alterity, or from what we think is real to a new version of reality. Without hearing new narratives, we cannot hope to change the law; our imagined worlds remain beyond our reach.

The real tragedy in Tucson is not the guilty verdicts, but that our government had to resort to silencing stories to get them. The government's strategy won a small and temporary victory, for nothing can finally halt storytelling. The new narrative superimposed upon the story of the sanctuary

57. The defense had taken every opportunity to get as much in during cross-examination as Judge Carroll would allow. Bits and pieces of stories of conditions in El Salvador and of the INS detention process in the United States had managed to slip in. See M. DAVIDSON, *supra* note 14, at 115-46.

58. Some defense attorneys believed that the prosecution had not proved its case and that presenting a defense could give Reno an opportunity to say even more. M. DAVIDSON, *supra* note 14, at 143.

59. *Id.* at 144.

60. Eight of the defendants were convicted of violating various sections of 8 U.S.C. § 1324 including conspiracy, harboring aliens, unlawful transportation of aliens, aiding and abetting unlawful entry of aliens. *United States v. Aguilar*, 883 F.2d 662, 666-67 (9th Cir. 1989). On appeal, the defendant-appellants raised the issues argued in the motion in limine. In upholding the convictions, the court held, *inter alia*, a mistake of law defense was not available based on the defendants' misunderstanding of the aliens legal status, a necessity defense was not available based on allegations that the INS frustrated the defendants' attempts to establish legal status for the aliens, a First Amendment defense was not available because religious motivation is irrelevant to the intention of furthering an alien's illegal presence. *Id.* at 673, 690, 687. The court in its opinion consistently characterized the Central Americans as "aliens," language that was critical to its decision. It disallowed any testimony or evidence that may have challenged this characterization.

movement and the story of the trial in Tucson is the story of the motion in limine and of the government's misuse of it. Perhaps this new story will finally move us to action. This is the difference between narrative and logic; stories change people's minds. "We need words in law to learn the sins as well as the glories of the past, to give voice to current conflicts, and to retell and recreate our own myths."⁶¹ So, too, do we need stories.

ANOTHER CONCLUSION

The government was right to fear stories. The stories that the "undocumented aliens" were telling people in churches around the country about what had happened to them in El Salvador were beginning to move people's hearts and minds, beginning, perhaps, to make us call our government to account. I had hoped to write this article about narrative and the law in an unbiased fashion; I tried, unsuccessfully it turns out, not to take sides. In doing the necessary background research for this article, I read many stories told by Central Americans. The government was right to fear stories. I will never be the same.

61. Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 873 (1986).

