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RELIGIOUS FREEDOM IN THE FACE OF HARSH STATE AND LOCAL IMMIGRATION LAWS

*Michael Scaperlanda**

In recent years, the issue of illegal immigration has taken center stage on the American political scene.² In 2005, the House Judiciary Committee estimated that eleven million aliens resided in this country illegally, with another 500,000 moving to the United States annually.³ Two approaches emerged to deal with this tide: an enforcement first model, which the House adopted in the form of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005⁴; and a comprehensive reform model covering enforcement, the regularization of status of many of those here illegally, and the creation of a guest worker program, which the Senate adopted in the form of the Comprehensive Immigration Reform Act of 2006.⁵ Both the 109th Congress and the 110th Congresses failed to arrive at a solution to this problem, which

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2. See, e.g., *500,000 March in L.A. Against Immigration Bill*, WASHINGTON POST, Mar. 26, 2006, at A3; *More Immigrants Take to Streets to Protest Proposed Laws*, FOX NEWS, Apr. 11, 2006, http://www.foxnews.com/printer_friendly_story/0,3566,191142,00.html; see also President George W. Bush, State of the Union Address (Jan. 23, 2007), available at <http://www.whitehouse.gov/stateoftheunion/2007/>. For a recent examination of the underlying economic and racial tensions implicit in the immigration debate, see William Chip/Michael Scaperlanda, *Ethics of Immigration: An Exchange*, First Things 40 (May 2008); and the *Exchange Continued*, First Things (June 2008)(forthcoming).

3. H.R. Rep. No. 109-345, pt. 1, at 45 (2005), available at <http://judiciary.house.gov/media/pdfs/109345.pdf> (citing *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, BACKGROUNDERS, (Ctr. for Immigration Studies, Wash., D.C.), Dec. 2005, at 23).

4. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (1st Sess. 2005).

5. Comprehensive Immigration Reform Act of 2007, S. 2611, 109th Cong. (2d Sess. 2006).

remained a hot button issue through much of 2007. Without a national solution, the state legislatures of forty-six states enacted more than 240 immigration related pieces of legislation.⁶ Oklahoma led the way, enacting House Bill 1804⁷, which the Dallas Morning News referred to as “the nation’s toughest law on illegal immigrants, making it a felony to harbor, transport, shelter or conceal undocumented immigrants.”⁸

Using H.B. 1804 as an example, this paper explores the potential impact of such harsh state laws on the sacramental and charitable life of religious organizations and their members. After examining H.B. 1804, I turn to the responses of various religious organizations and leaders. I conclude by asking two questions: 1) Is the fear generated by H.B. 1804 warranted or is there a narrower reading of the act, which would allow religious organizations to continue to minister to the needs of those unlawfully present and 2) Does Oklahoma’s Religious Freedom Act⁹ exempt those aiding the undocumented in the name of God from the criminal penalties imposed by the act? Other important questions, such as whether H.B.1804 is preempted by federal law, are beyond the scope this essay.¹⁰

6. DIRK HEGEN, NAT'L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (2008), available at <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

7. OKLA. STAT. tit. 21, § 446 (2007).

8. Robert Garrett, *Oklahoma's Crackdown on Illegal Immigration Draws Texas Lawmakers' Interest*, THE DALLAS MORNING NEWS, Feb. 13, 2008, at A1, available at <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/021408dnteximmigra ckdown.39b8412.html>.

9. OKLA. STAT. tit. 51, § 255 (2007).

10. See, e.g., *De Canas v. Bica*, 424 U.S. 351 (1976) (providing a three-prong test to determine whether a federal immigration law preempts state or local laws); *Lozano v. City of Hazelton*, 496 F.Supp.2d 477, 555 (M.D. Pa. 2007) (holding that part of city ordinance was preempted by federal immigration law and that part of local law violated the due process clause of the 14th Amendment). Preemption is a highly relevant topic in the discussion of immigration enforcement on the state and local level. See generally Eric L'Heureux Issadore, *Is Immigration Still Exclusively a Federal Power? A Preemption Analysis of Legislation by Hazelton, Pennsylvania Regulating Illegal Immigration*, 52 VILL. L. REV. 331 (2007); Hector O. Villagra, *Arizona's Proposition 200 and the Supremacy of Federal Law: Elements of Law, Politics, and Faith*, 2 STAN. J. C.R. & C. L. 295 (2006); Daniel Booth, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J. L. & PUB. POL'Y 1063 (2006); Peter J. Spiro, *The States and Immigration In an Era of Demi-Sovereignty*, 35 VA. J. INT'L. L. 121 (1994); Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179 (1994).

I. HOUSE BILL 1804 AND ITS EFFECTS

Concluding that “illegal immigration is causing economic hardship and lawlessness in this state,”¹¹ the Oklahoma legislature passed and Governor Brad Henry signed into law The Oklahoma Taxpayer and Citizen Protection Act of 2007.¹² My remarks focus on Section 3 of the Act:¹³

- A. It shall be unlawful for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law, in furtherance of the illegal presence of the alien in the United States.
- B. It shall be unlawful for any person to conceal, harbor, or shelter from detection any alien in any place within the State of Oklahoma, including any building or means of transportation, knowing or in reckless disregard of the of the fact that the alien has come to, entered, or remained in the United States in violation of law.
- C. Nothing in this section shall be construed so as to prohibit or restrict the provision of any state or local public benefit described in 8. U.S.C., Section 1621(b), or regulated public health services provided by a private charity using private funds.
- D. Any person violating the provisions of subsections A or B of this section shall, upon conviction, be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not less than one (1) year, or by a fine of not less than One Thousand Dollars (\$1,000.00), or by both such fine and imprisonment.¹⁴

11. H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007).

12. H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007).

13. OKLA. STAT. tit. 21, § 446 (2007).

14. *Id.*

The Oklahoma law, which patterns a similar federal law,¹⁵ has generated fear and uncertainty among the undocumented population and those who would serve them. In his pastoral letter, “The Suffering Faces of the Poor Are the Suffering Faces of Christ” (“Los rostros sufrientes de los pobres son el rostro sufriente de Cristo”),¹⁶ Tulsa’s Bishop Edward Slattery provides a few examples of the fear generated by H.B.1804. In one case, Catholic Charities knew of a mother of a two-month-old “who has no relatives here in the United States and will not leave the house” because she is “terrified . . . of being detained and then deported.”¹⁷ Another woman, who he referred to as María H. has four citizen children, the youngest suffering from cancer. Although the boy needed radiation treatment, María could “find no one to give her a ride to and from the clinic” for fear of committing the crime of transporting illegals.¹⁸ Finally, Bishop Slattery recounts that “[o]n Saturday, November 17th, the sanctity of Saint Francis Xavier Church in Sallisaw was violated by three policemen who . . . [arrived] before the 5:30 o’clock Spanish Mass . . . [and] began to ask the members of the faithful for their papers as they came to offer Christ’s sacrifice.”¹⁹ H.B. 1804 has also been blamed for the death of United States born Edgar Castorena, a two-month-old suffering from diarrhea, whose undocumented parents were afraid to take him to the hospital for fear of deportation.²⁰

15. 8 U.S.C. § 1324(a)(1)(A) (2006). The statute provides criminal penalties for any person who:

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation

Id.

16. Letter from Edward J. Slattery, Catholic Bishop of Tulsa, to priests and deacons of the Diocese (Nov. 25, 2007), <http://www.dioceseoftulsa.org/images/photos/Bishop's%20letter%20B5B15.pdf> [hereinafter *Suffering Faces*].

17. *Id.* at 6-7.

18. *Id.* at 7.

19. *Id.* at 10.

20. ASSOCIATED PRESS, Justin Juozapavicius, *HB 1804 Blamed for Exodus of Hispanics, Baby's Death*, TULSA WORLD, Jan. 25, 2008, available at http://209.184.242.25/common/printerfriendlystory.aspx?articleID=20080125_1__tulsa65184.

II. RESPONSE OF THE RELIGIOUS COMMUNITY

Catholic bishops, the Episcopal Diocese of Oklahoma, and the Baptist General Convention of Oklahoma said that their ministries to the undocumented would continue, regardless of the law and its potential consequences. Archbishop Eusebius Beltran, the priest's council for the Archdiocese of Oklahoma City, and more than one thousand Catholics signed a "Pledge of Resistance" and sent it to Governor Brad Henry vowing that

[b]ecause this law is overly punitive and makes a felony of the act of providing humanitarian assistance to an undocumented person in need; we the undersigned clergy, religious leaders, and lay people of conscience will not and can not obey this law. We will continue to aid and assist all people regardless of their legal citizenship status, with charitable care and spiritual counsel.²¹

Explaining the reason for the Pledge, Archbishop Beltran said: "[t]he Church has always upheld the fundamental dignity of every human person. This dignity comes from God and His creation of us in His own Image and Likeness."²² Beltran is convinced that HB 1804 "is contrary to our Christian beliefs and detrimental to the fundamental dignity of the human person. Therefore, it is a bad law and adherence to it will negatively affect our society."²³

In his seventeen-page pastoral letter, Tulsa Bishop Slattery expands on the themes developed by Archbishop Beltran. Quoting from another document, which also quotes John Paul the Great and Pope Benedict XVI, he says:

Our faith proclaims that 'Jesus Christ is the human face of God and the divine face of humanity.' For this reason, the 'preferential option for the poor is

21. Letter from Council of Priests – Archdiocese of Oklahoma City to Governor of Oklahoma Brad Henry, Pledge of Resistance, available at <http://www.catharchdioceseokc.org/Pledge%20of%20Resistance-Governor%20Signatures.pdf>; see also *Almost 1100 Pledge Resistance to State Immigration Law*, ASSOCIATED PRESS, Oct. 30, 2007, <http://www.kswo.com/Global/story.asp?S=7285806>; Michael Scaperlanda, *Immigration and the Bishops*, 180 FIRST THINGS 14, (Feb. 2008), available at http://www.firstthings.com/article.php3?id_article=6139 (stating my reflections on the statements issued by Archbishop Beltran and Bishop Slattery).

22. Archbishop Beltran, *The Good News... And Who is My Brother?*, SOONER CATHOLIC ONLINE, Nov. 4, 2007, <http://www.catharchdioceseokc.org/sooner/Past%20good%20news/pastgoodnews2007/pgnnov42007.htm> (quoting also from the Declaration of Independence).

23. *Id.* St. Thomas Aquinas writes in his treatment of law in the Summa Theologica that a bad positive law (a law contrary to the natural law) is no law at all. Robert P. George, *Natural Law*, HARV. J.L. & PUB. POL'Y 171, 187-88 (2008).

implied in the Christological faith we have in God who became poor in order that he might make us rich with his poverty.' . . .

If this option for the poor is indeed implicit in our Christological faith, then Christians, as disciples and missionaries, are called to contemplate, in the suffering faces of our brothers, the face of Christ who calls us to serve Him in them. . . .

From our faith in Christ there also flows our sense of solidarity [with the poor], which is seen as a permanent attitude of encounter, cooperation and service. This solidarity manifests itself in visible choices and gestures, principally in the defense of life and of the rights of the most vulnerable and excluded. . . . The charitable outreach of the Church among the poor 'is an endeavor which characterizes in a decisive manner the Christian life, the Church's witness and our pastoral activity.'²⁴

Addressing H.B. 1804, Slattery said: "[o]ur faith calls us to serve those in need with the same prompt response and the same generous love that we would show Christ Himself were He to come before us sick or tired or in need."²⁵ Therefore,

[t]o make charity a crime is to make those who love criminals. . . and when it becomes a crime to love the poor and serve their needs, then I will be the first to go to jail for this crime and I pray that every priest and every deacon in this diocese will have the courage to walk with me into that prison.²⁶

Slattery makes clear that "no one will be denied access to our Catholic charitable, pastoral and/or educational programs because they are illegal immigrants."²⁷ He also pledged legal assistance to the undocumented and emergency foster care in the event that families are separated by arrest and/or deportation.²⁸

At its seventieth annual convention held in November 2007, the Episcopal Diocese Oklahoma, reacting to H.B. 1804, approved a resolution affirming "God's call to us in our Baptismal Covenant to 'seek and serve Christ in all persons, loving neighbor as yourself' and 'to strive for justice and peace among all people, and respect the dignity of every human being.'²⁹ Therefore, they "pledge to continue to aid and assist all people with charitable care and spiritual

24. *Suffering Faces*, *supra* note 16, at 4.

25. *Id.* at 14.

26. *Id.*

27. *Id.* at 15.

28. *Id.*

29. Resolution 3A, Resolution on Illegal Immigration and Our Baptismal Covenant, 70th Convention of the Episcopal Diocese of Oklahoma, Nov. 16-17, 2007 (on file with the *Tulsa Journal of Comparative & International Law*).

counsel.”³⁰ At its November annual meeting, the Baptist General Convention passed a resolution saying “the law will not change their ministry to any people.”³¹

H.B. 1804’s author, State Representative Randy Terrill, appears insensitive to the effect that the law will have on the lives of ordinary people struggling to feed their families. Equating those who risk their lives to come to the United States in search of a better life³² with burglars, Terrill conceded “that family breakups will be wrenching, but said bad things also happen to relatives of other people who break laws.”³³ His callousness caused me to refer to him as a modern day Inspector Javert on a relentless mission to hunt down the Jean Valjeans of Oklahoma.³⁴ Not only is Terrill going after Oklahoma’s Jean Valjeans, he appears to be targeting those who, like the bishop in *Les Misérables*, greet the outcast with kindness, mercy, and the possibility of redemption. A question is: Has Terrill been successful? At one level the answer is clearly “no.” Various religious leaders and lay faithful have vowed to continue their ministries without counting the cost or examining the legal consequences: But, will they bear the cost? Are those who provide humanitarian aid and spiritual comfort to the undocumented guilty of a felony? The answer to these questions is much less clear.

30. *Id.*

31. Garrett, *supra* note 8; see generally Leslie Scanlon, *Oklahoma Immigration Law: First Step in Wrong Direction?*, PRESBYTERIAN OUTLOOK, Jan. 21, 2008 (showing other religious responses), <http://www.pres-outlook.com/tabid/2097/Article/6719/Default.aspx>.

32. See generally DANIEL GROODY, *BORDER OF DEATH, VALLEY OF LIFE: AN IMMIGRANT JOURNEY OF HEART AND SPIRIT* (Virgil P. Elizondo ed., Rowman & Littlefield 2002) (depicting the human face of illegal immigration); see also *DYING TO LIVE: A MIGRANT’S JOURNEY* (Groody River Productions 2005), available at <http://dyingtolive.nd.edu/>.

33. Garrett, *supra* note 8. In his Hager lecture, Hiroshi Motomura spoke of the different modes of thinking about justice and the rule of law in the immigration debate. One approach would recover the rich natural law tradition of the Thomistic school. St. Thomas Aquinas taught that if someone had an orchard full of fruit and another person was in desperate need of food, it would not be theft for the desperate person to take an orange from the orchard. I propose that one reasonable way to assess much of illegal immigration is through this Thomistic lens. Cf. Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT’L L. (forthcoming May 2008).

34. Michael Scaperlanda, Op-Ed., *Confused in the Heartland*, DAILY OKLAHOMAN, Apr. 1, 2006, at 13A.

III. NARROW OR BROAD INTERPRETATION OF H.B. 1804?

A. *Transportation*

Does H.B. 1804 make it unlawful to transport an undocumented person to the hospital? To school? To the grocery store? To work? Is a person guilty of concealing, harboring, or sheltering from detection an undocumented person by providing that person with housing either temporarily or permanently? The answer to these and similar questions is going to hinge on how section three of H.B. 1804 is interpreted. H.B. 1804 tracks closely the language of 8 U.S.C. §1324(a), and so I turn to judicial interpretations of that statute as a guide to how H.B. 1804 might be interpreted.

To convict someone of transporting illegal aliens, courts have consistently required the government to prove four elements: “(1) the transporting or moving of an illegal alien within the United States, (2) that the alien was present in violation of law, (3) that the defendant was aware of the alien’s status, and (4) that the defendant acted willfully in furtherance of the alien’s violation of the law.”³⁵ For our purposes, the interpretive key as to the breadth of the statute’s effect lies in the fourth element.

The Eighth and Ninth Circuits have adopted a “direct or substantial relationship” test to determine when the “in furtherance of” element has been satisfied.³⁶ To convict, “there must be a direct or substantial relationship between that transportation and its furtherance of the alien’s presence in the United States.”³⁷ In *Moreno*, the court concluded that transporting aliens from one job site to another “as part of the ordinary and required course of his employment as foreman . . . was only *incidentally connected* to the furtherance of the violation of law, if at all. It was too attenuated to come within the boundaries of § 1324(a)(2).”³⁸ The court said that a broader interpretation of the statute:

would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create, in effect judicially, a new crime and a new

35. *United States v. Barajas-Chaves*, 162 F.3d 1285, 1287 (10th Cir. 1999); *United States v. Diaz*, 936 F.2d 786, 788 (5th Cir. 1991); *United States v. Hernandez*, 913 F.2d 568, 569 (8th Cir. 1990).

36. *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977); *see United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991).

37. *Moreno*, 561 F.2d at 1323.

38. *Id.* at 1322 (emphasis added).

class of criminals. All of our freedom and dignity as people would be so reduced.³⁹

The Sixth Circuit has an even narrower interpretation of the “in furtherance of” element. Guilt rests on the government proving “that the defendant willfully transported an illegal alien with the *specific intent* of supporting the alien’s illegal presence.”⁴⁰ The court listed several factors to be considered in determining intent: “whether the defendant was compensated for the transportation, and what efforts the defendant took to conceal or harbor the illegal aliens. It may also consider whether the illegal aliens were friends, co-workers, or companions of the defendant, or merely human cargo that was being shipped.”⁴¹ The court distinguished between transportation “in hopes of finding employment . . . [and transportation] to escape prosecution or otherwise evade the law.”⁴² In this particular case, “[t]he purpose of . . . transporting the aliens from Texas to Kentucky was not to support their illegal presence, though that may have been the ultimate effect . . . [t]heir purpose was to promote the well-being of friends and relatives by helping them obtain employment.”⁴³ One judge disagreed: “[b]y transporting illegal aliens for the admitted purpose of getting construction jobs for them, defendants clearly intended to further the alien’s illegal presence.”⁴⁴

In contrast to the other circuits, the Tenth Circuit broadly interprets the “in furtherance of” language. In *U.S. v. Barajas-Chavez*, the court concluded that:

the element is sufficiently broad to encompass any person who acts, regardless of profit motive or close relationship, with knowledge or with reckless disregard of the fact that the person transported is an illegal alien and

39. *Id.* at 1323.

40. *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989) (emphasis added); *see also United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994) (stating that without adopting a specific test, the Court concluded that the statute had a mens rea requirement and “that a defendant’s guilty knowledge that his transportation activity furthers an alien’s illegal presence in the United States is an essential element of the crime. . . .”); *United States v. Merkt*, 764 F.2d 266, 271-72 (5th Cir. 1985) (speaking of a “direct and substantial relationship,” the court concluded that the statute “punishes only an intentional act” and that the “intent is a question of fact that the jury must resolve under the totality of the circumstances”).

41. *1982 Ford Pick-up*, 873 F.2d at 951 (citations omitted).

42. *Id.* at 952.

43. *Id.*

44. *Id.* Dissenting Judge Feikens also stated that “employment can support aliens financially, providing them with daily necessities and hope, thereby furthering the aliens’ illegal presence here” *Id.* at 952-53.

that transportation or movement of the alien will help, advance, or promote the alien's illegal entry or continued illegal presence in the United States.⁴⁵

In a sense, any transportation offered to an undocumented alien – to the grocery store, to the doctor, to school, to work, to church, to home – helps, advances, or promotes a person's presence in the United States. But the Tenth Circuit does not seem inclined to take its argument to its logical extreme. Instead, it agrees that “the element does not encompass persons ‘who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with [illegal aliens] socially or otherwise.’”⁴⁶ Rejecting tests adopted by other circuits, the court said that “a factfinder may consider any and all relevant evidence bearing on the ‘in furtherance of’ element (time, place, distance, reason for trip, overall impact of trip, defendant's role in organizing and/or carrying out the trip).”⁴⁷

B. Harboring

Does providing shelter to an illegal alien constitute concealing, harboring, or sheltering that alien from detection in violation of H.B. 1804? According to the Fifth Circuit, to convict under the federal counterpart to Oklahoma's anti-harboring provision:

the Government must establish the following four elements: (1) the alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law, and (4) the defendant's conduct tended to substantially facilitate the alien remaining in the United States illegally.⁴⁸

In that case, the defendant argued that “substantially facilitate” ought to be read narrowly, requiring the government to “show that ‘but for’ his conduct, the affected alien . . . would not remain in the United States.”⁴⁹ Rejecting that interpretation, the Court held that “‘substantially facilitate’ means to make an

45. *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999) (en banc). Because the Court concludes that the statute is unambiguous, “the rule of lenity – or strict construction – may not be applied.” *Id.* at n.1 (citation omitted).

46. *Id.* at 1288.

47. *Id.* at 1289.

48. *United States v. Shum*, 496 F.3d 390, 391-92 (5th Cir. 2007) (internal quotation and citation omitted).

49. *Id.* at 392.

alien's illegal presence in the United States substantially 'easier or less difficult.'"⁵⁰

Another key question is whether the harboring requires an element of intent to conceal or whether simple sheltering meets the standard even where the government makes no showing of an attempt to evade detection. Two courts have explicitly concluded that simple sheltering is all that is required for a conviction.⁵¹ Whether or not the Oklahoma courts ultimately conclude that simple sheltering without proof of intent to conceal or evade detection is all that is required for a conviction, it seems unlikely that the regular charitable and sacramental work of church members will run afoul of the statute if the Oklahoma courts adopt the "substantially facilitates" threshold for violations. Operating a Sanctuary Movement or an underground railroad for undocumented aliens would, however, probably come within the ambit of the statute.⁵²

IV. DOES OKLAHOMA'S RELIGIOUS FREEDOM ACT PROTECT THE CHARITABLE AND SACRAMENTAL MINISTRY OF THE CHURCH?

After the United States Supreme Court struck down major parts of the Religious Freedom Restoration Act⁵³ in *City of Boerne v. Flores*,⁵⁴ several states enacted their own religious freedom statutes. Oklahoma passed its version, the Oklahoma Religious Freedom Act (ORFA) in 2000.⁵⁵ For our purposes, the relevant provision is Section 253:

- A. Except as provided in subsection B of this section, no governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.
- B. No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:
 - 1. Essential to further a compelling state interest; and

50. *Id.* (citation omitted).

51. *See* *United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1976); *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1975); *but see* *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (stating that "harboring . . . encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence"); *United States v. Belevin-Ramales*, 458 F.Supp.2d 409, 411 (E.D. Ky. 2006) (stating that "jury instructions . . . should not state that 'government does not have to prove that the Defendant harbored the alien with the intent to assist the alien's attempt to evade or avoid detection by law enforcement'").

52. *See, e.g., Merkt*, 794 F.2d at 956.

53. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006).

54. *City of Boerne v. P.F. Flores*, 521 U.S. 507, 509 (1997).

55. OKLA. STAT. tit. 51, §§ 251-58 (2007).

2. The least restrictive means of furthering that compelling governmental interest.⁵⁶

To date only one court has applied this provision. In *Steele v. Guilfoyle*, the Oklahoma court of appeals held that the person alleging an ORFA violation must initially show that the law places a “substantial burden” on the person’s free exercise of religion before the burden shifts to the state to prove that the law is necessary to achieve a compelling governmental interest.⁵⁷ A “substantial burden” is one that “[s]ignificantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person’s] individual beliefs, meaningfully curtail[s] a [person’s] ability to express adherence to his or her faith; or . . . den[ies] a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion.”⁵⁸ In *Steele*, the court concluded that random cell assignment that led to a Muslim rooming with a non-Muslim in a state correctional facility only incidentally affected plaintiff’s practice of the Muslim faith. No substantial burden was present because the assignment policy neither restrained religious conduct nor denied the inmate “a reasonable opportunity to engage in those activities that are fundamental to his religion.”⁵⁹

If H.B. 1804 is read broadly by prosecutors or judges to prohibit the provision of sacramental or charitable care to the undocumented, it would, in contrast to the policy at issue in *Steele*, clearly constrain conduct manifesting a central tenet of the Christian faith. We could turn to many biblical passages or theological texts to prove this point. The 25th chapter of Matthew’s gospel serves our purpose, putting the case succinctly and starkly.

When the Son of Man comes in his glory, and all the angels with him, he will sit upon his glorious throne, and all the nations will be assembled before him. And he will separate them one from another, as a shepherd separates the sheep from the goats.

He will place the sheep on his right and the goats on his left. Then the king will say to those on his right, ‘Come, you who are blessed by my Father. Inherit the kingdom prepared for you from the foundation of the world. For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me.’ Then the righteous will answer him and say, ‘Lord, when did we see you hungry and feed you, or thirsty and give

56. Oklahoma Religious Freedom Act of 2000, OKLA. STAT. tit. 51, § 253 (2007).

57. *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Ct. App. 2003).

58. *Id.* (quoting *Werner v. McCotter*, 49 F.3d 1470, 1480 (10th Cir. 1995)).

59. *Id.*

you drink? When did we see you a stranger and welcome you, or naked and clothe you? When did we see you ill or in prison, and visit you?’

And the king will say to them in reply, ‘Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me.’

Then he will say to those on his left, ‘Depart from me, you accursed, into the eternal fire prepared for the devil and his angels. For I was hungry and you gave me no food, I was thirsty and you gave me no drink, a stranger and you gave me no welcome, naked and you gave me no clothing, ill and in prison, and you did not care for me.’ Then they will answer and say, ‘Lord, when did we see you hungry or thirsty or a stranger or naked or ill or in prison, and not minister to your needs?’ He will answer them, ‘Amen, I say to you, what you did not do for one of these least ones, you did not do for me.’ And these will go off to eternal punishment, but the righteous to eternal life.⁶⁰

In short, Christ teaches that we will be judged and be granted either eternal life or eternal punishment based upon how we treat the least of our brothers and sisters. All Christians, even the most saintly, fall far short of living this commandment to “love thy neighbor” completely, and so we rely on unmerited grace given by God.⁶¹ God’s grace does not, however, excuse human inaction. According to Christ, we are called to be love for our neighbor.

An overzealous prosecutor might be tempted to argue a) that not everyone is a “neighbor” and b) even if everyone is a neighbor, there are so many in need that the Christian can fulfill her obligation by helping those in need who are here legally. Jesus answers this hypothetical prosecutor on both scores in the parable of the prodigal son. In Luke’s Gospel, a not so hypothetical lawyer asks Jesus the question: “Who is my neighbor?”⁶² Jesus uses Socratic dialogue to explore the issue, asking the lawyer which of three characters acted with neighborly love to a Jewish man who fell victim to thieves and was left wounded and dying on the side of the desert road between Jericho and Jerusalem. Two Jewish men passed him by but the third person, a Samaritan, stopped, tended to his wounds, took him to an inn where he could be cared for, and promised the innkeeper that he would cover the expenses. The lawyer answered that the Samaritan – a stranger and enemy of the Jews – was the one who had kept the commandment to love his neighbor. From this story, we can see that Christ commands that we

60. *Matthew* 25:31-46 (New American Bible).

61. See Michael Scaperlanda, *Lawyering in the Little Way of St. Therese of Lisieux with Complete Abandonment and Love*, 46 J. CATH. LEG. STUD. 43, 59 (2007).

62. I explore this question in relation to immigration and welfare reform in: Michael Scaperlanda, *Who is my neighbor? An Essay on Immigrants, Welfare Reform, and Constitution*, 29 CONN. L. REV. 1587, 1612-17 (1997); see also *Luke* 10:25-37 (New American Bible).

love all persons, even enemies, foreigners, and strangers. And, to a large measure we do not get to choose the objects of our love. Instead, the objects of our love – our charity and concern – are those who are presented to us by an encounter, which can be as unexpected as the encounter between the Samaritan and the wounded man.

If H.B. 1804 makes the sacramental or charitable work of Christians toward the undocumented a felony, it substantially burdens the religion of Christians by inhibiting or constraining conduct central to the faith.⁶³ To impose this substantial burden the state would have to show, which it cannot, that the imposition of the burden is necessary to achieve some compelling state interest.

V. CONCLUSION

I sincerely hope that law enforcement, prosecutors, and judges in Oklahoma exercise good judgment and let the populace know that they will leave the churches alone, as members of those churches continue to engage in sacramental and charitable ministry to all, regardless of immigration status. But the beginning has not been promising. In two criminal cases, the district judge inquired about the immigration status of defendants placed on probation.⁶⁴ Based upon the answers, the judge, acting *sua sponte*, ordered each committed to the custody of the sheriff saying that “under House Bill 1804 . . . I took both these people into custody as being illegal aliens and charged the Oklahoma County Sheriff to contact whoever 1804 says to contact.”⁶⁵ The Court of Criminal Appeals concluded that “nothing within House Bill 1804 authorized or required Judge Bass to take that action.”⁶⁶

Given that some public officials like Judge Bass are implementing 1804 without any research or critical reasoning, the public fear over the law’s reach is understandable. Hopefully his actions will be an aberration. But if others follow in his footsteps, failing to read the statute with prudence and wisdom, those providing sacramental and charitable support to the undocumented might find themselves reluctant participants in the criminal justice system. They can offer in their defense that H.B. 1804 should not be read so broadly as to stifle their ministries and that, in any event, such a broad reading would violate their religious freedom.

63. See *Abbott v. City of Fort Lauderdale*, 783 So.2d 1213, 1214-15 (Fla. Dist. Ct. App. 2001) (noting that the city violated an individual’s religious freedom by denying him the ability to serve food to the homeless in a city park).

64. *Ochoa v. Bass*, No. HC-2007-1120, 2008 WL 650662, at 1, 2008 OK CR 11 (Okla. Crim. App. Mar. 12, 2008), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=451352>.

65. *Id.* at 4.

66. *Id.* at 5.