

“GRUESOME LOGIC”: THE TUCSON NO MORE DEATHS PROSECUTIONS AND RELIGIOUS LIBERTY*

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Every year, hundreds of migrants die crossing the desert in the American Southwest on their journey to safety in the United States.¹ In response, groups of humanitarian volunteers of faith and conscience – united by the belief that “humanitarian aid is never a crime” – came forward to provide lifesaving water, shelter, food, and medical aid to those in need of assistance in the desert.² Instead of being lauded for their life-saving actions, humanitarian volunteers were threatened, harassed, and in the most extreme cases, criminally prosecuted by the federal government for harboring undocumented immigrants.³

In this Article, I review the recent criminal alien smuggling prosecutions of humanitarian volunteers for the Arizona nonprofit organization, No More Deaths, also known as No Más Muertes. In Part I, I will provide a brief history of No More Deaths, a humanitarian organization in southern Arizona dedicated to ensuring that no more lives are needlessly lost in the Arizona desert. In Part II, I will describe the hostile environment No More Deaths faced during the years of the

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1. See Jeff Gammage, *Hundreds of migrants die every year trying to cross the southwest border into the U.S.*, PHILADELPHIA INQUIRER (Oct. 29, 2019), <https://www.inquirer.com/news/southwest-border-deaths-desert-heat-20191029.html>.

2. See *About No More Deaths*, NO MORE DEATHS/NO MÁS MUERTES, <https://nomoredeaths.org/about-no-more-deaths/>.

3. *Id.*; *Legal Defense campaign*, NO MORE DEATHS/NO MÁS MUERTES, <https://nomoredeaths.org/legal-defense-campaign/> (“Since the election of Donald Trump, we have seen the resurgence of government efforts to criminalize the lifesaving aid No More Deaths provides to migrants in the southwest borderlands. In June of 2017, our humanitarian aid camp on the outskirts of Arivaca, Arizona was raided by Border Patrol and four patients receiving care were arrested. Since then, federal misdemeanor charges have been filed against nine No More Deaths volunteers for our work in the West Desert. In January of 2018, a second raid occurred, this time on our humanitarian aid base in Ajo, Arizona, and Border Patrol arrested two individuals receiving humanitarian aid and No More Deaths volunteer Scott Warren. The targeting of our work is part of a larger governmental push to punish and abuse migrants and those who stand in solidarity with them.”) (last visited Mar. 19, 2025).

George W. Bush and Donald J. Trump Presidential Administrations, in which federal agents actively harassed and threatened members attempting to provide humanitarian aid to suffering migrants. In Part III, I will discuss the two federal criminal trials of Scott Warren for harboring undocumented migrants in Tucson, Arizona in 2019. In Part IV, I discuss the reversal of the criminal convictions of four other No More Deaths volunteers in 2019 on the grounds that their prosecutions violated the Religious Freedom Restoration Act (RFRA) and argue that the decision to charge the No More Deaths volunteers for violating federal criminal statutes were politically motivated select prosecutions. Finally, I conclude the Article with suggestions regarding how concerned individuals of faith and conscience can continue to safely provide humanitarian aid to vulnerable migrants in need in the desert Southwest.

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INTRODUCTION

*Five men stumbled out of the mountain pass so sunstruck they didn't know their own names, couldn't remember where they'd come from, had forgotten how long they'd been lost. One of them wandered back up a peak. One of them was barefoot. They were burned nearly black, their lips huge and cracking, what paltry drool still available to them spuming from their mouths in a salty foam as they walked. Their eyes were cloudy with dust, almost too dry to blink up a tear. Their hair was hard and stiffened by old sweat, standing in crowns from their scalps, old sweat because their bodies were no longer sweating. They were drunk from having their brains baked in the pan, they were seeing God and devils, and they were dizzy from drinking their own urine, the poisons clogging their systems They were walking now for water, not salvation. Just a drink. They whispered it to each other as they staggered into parched pools of their own shadows, forever spilling downhill before them: "Just one drink, brothers. Water. Cold water! . . ."*⁴

*[E]very day in the border region migrants, refugees, people who are coming across the border, who are coming through the desert, who are suffering, who are at risk of dying, are knocking on people's doors, and they're in need of water, and they're in need of food. They're in need of basic medical care and basic necessities. And people all across the border region are continuing to respond by offering these folks a glass of water, by offering them some rest or some food.*⁵

As detailed in Luis Alberto Urrea's modern classic *The Devil's Highway*, 2001 was a particularly deadly year for migrants crossing the

4. LUIS ALBERTO URREA, *THE DEVIL'S HIGHWAY* 18–19 (2004).

5. See *No More Deaths: Scott Warren & Catherine Gaffney on How Humanitarian Aid Is Criminalized Near Border*, DEMOCRACY NOW! (May 29, 2019), https://www.democracynow.org/2019/5/29/no_more_deaths_scott_warren_speaks.

Arizona desert into the United States.⁶ Nominated for a Pulitzer Prize in nonfiction, Urrea's book follows the lives – and in some cases, the deaths – of twenty-six men as they traveled from Mexico into southern Arizona in May of that year.⁷ The catastrophic loss of life made headlines even before Urrea's book was published in 2004, due in part to the unfathomable cruelty of smugglers that led directly to the deaths of fourteen of the men profiled by Urrea.⁸ As recounted in the media in an interview with Johnny Williams, then-director of the Immigration and Naturalization Service's (INS) western region, the group of migrants got lost in the desert and were presumably abandoned by their *coyotes* (smugglers). Searching for the lost migrants was a daunting task, as the desert in which the migrants were lost was approximately the size of Delaware.⁹ Due to the high temperatures – well over 100 degrees Fahrenheit – Williams said that “the men who died suffered a ‘grisly’ death from dehydration,”¹⁰ as survival in such conditions would require an individual to carry at least five gallons (or forty pounds) of water with them.¹¹

The discovery of the twenty-six abandoned migrants¹² in May 2001 was, at the time, “the deadliest immigrant smuggling incident ever in Arizona.”¹³ Law enforcement stated that they “were sharing

6. The Southwest Border Sectors of the United States Border Patrol reported 340 deaths for fiscal year 2001. See *Southwest Border Deaths by Fiscal Year*, U.S. BORDER PATROL, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf> (last visited Mar. 19, 2025).

7. See URREA, *supra* note 4.

8. See James Sterngold, *Devastating Picture of Immigrants Dead in Arizona Desert*, NEW YORK TIMES (May 25, 2001), <https://www.nytimes.com/2001/05/25/us/devastating-picture-of-immigrants-dead-in-arizona-desert.html>.

9. See *Cross-border manhunt seeks smugglers linked to 14 migrant deaths*, CNN (May 24, 2001), <http://archives.cnn.com/2001/US/05/24/border.deaths.02/> [<https://web.archive.org/web/20080103110128/http://archives.cnn.com/2001/US/05/24/border.deaths.02/>].

10. *Id.*

11. *Id.*

12. See Sterngold, *supra* note 8 (“The initial sighting was about 10 a.m. Wednesday, about 30 miles north of the border. Four men were found badly dehydrated, and they told agents that 22 others were behind them.”).

13. *Id.* (“Though dozens die every year trying to cross illegally into Arizona from Mexico, this was the area’s worst single incident in memory.”). Unfortunately, this death toll was surpassed just two years later. On May 14, 2003, 19 people died in Victoria, Texas after being smuggled in the back of a trailer and left to die. The Victoria deaths remain the deadliest immigrant smuggling incident to date in the United States. See *Trucker in deadly Texas migrant case given life sentences*, REUTERS (Apr. 20, 2019),

information regarding [the] incident in order to bring justice,”¹⁴ and an arrest for smuggling the men was made by the Immigration and Naturalization Service (INS) shortly thereafter.¹⁵ However, the smuggling of migrants through the dangerous terrain of the Arizona desert continues unabated, and the death toll continues to climb.¹⁶ Between 1998 and 2004, more than 7,000 migrants died in the borderlands attempting to cross into the United States from Mexico.¹⁷

In this Article, I review the recent criminal alien smuggling prosecutions of humanitarian volunteers for the Arizona nonprofit organization, No More Deaths (NMD), also known as No Más Muertes. Part I summarizes the history of NMD, a humanitarian organization in southern Arizona dedicated to saving the lives of migrants in the Arizona desert. Part II describes the hostile environment NMD faced in recent years in their attempt to provide humanitarian aid to suffering migrants. Part III discusses the criminal trials of Scott Warren for harboring undocumented migrants in 2019, and Part IV details the subsequent reversal of the criminal convictions of four other NMD volunteers on the grounds that their prosecutions violated the Religious Freedom Restoration Act (RFRA). I conclude the Article with some suggestions for regarding how concerned individuals may continue to provide humanitarian aid to vulnerable migrants in need in the desert Southwest.

I. HUMANITARIAN AID IS NOT A CRIME: A LOCAL RESPONSE TO AN INTERNATIONAL TRAGEDY

NMD’s mission is “to end the death and suffering of migrants on the US–Mexico border by mobilizing people of conscience to uphold

<https://www.reuters.com/article/us-texas-bodies-migrants/trucker-in-deadly-texas-migrant-case-given-life-sentences-idUSKBN1HR35A> (“The driver of a truck packed with migrants, 10 of whom died due to sweltering Texas heat in July, was sentenced on Friday to life in prison without parole after pleading guilty in October to federal human smuggling charges. James Bradley, 61, could have faced the death penalty in the case, considered one of the deadliest human smuggling incidents in modern U.S. history.”).

14. CNN, *supra* note 9.

15. See *Arrest in Border Deaths*, CBSNEWS.COM (May 24, 2001), <https://www.cbsnews.com/news/arrest-in-border-deaths/>.

16. See U.S. BORDER PATROL, *Southwest Border Deaths by Fiscal Year*, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf> (last visited Nov. 29, 2024).

17. *Id.*

fundamental human rights.”¹⁸ NMD is “an autonomous project, and since 2008, has been an official ministry of the Unitarian Universalist Church of Tucson.”¹⁹ Since the beginning, NMD has been guided by the first faith-based principle for immigration reform – “the failed militarized border enforcement strategy.”²⁰ Since its inception, NMD volunteers have focused on providing humanitarian aid to individuals suffering and dying in the Arizona desert and to bring to light the tragic consequences of the United States border enforcement policy.

The goals of No More Deaths 2004 were to provide water, food, and medical assistance to migrants walking through the Arizona desert; to monitor US operations on the border and work to change US policy to resolve the “war zone” crisis on the border; and to bring the plight of migrants to public attention. These goals were implemented by recruiting aid programs as well as supporting already existing ones, by interfaith, humanitarian, peaceful, solidarity-building events, and by establishing camps for assistance, outreach and border monitoring. Under the No More Deaths umbrella, participating groups—staffed by volunteers--abided by clear medical and legal protocols and worked in concert to save human lives.²¹

A. *Arks of Covenant*

Arks of the Covenant (Ark)—permanent humanitarian rescue sites where volunteers worked year-round, including during the blistering hot summer months—were central to NMD’s founding.²² NMD volunteers traverse the desert terrain, both by foot and vehicle, looking for persons

18. *No More Deaths/No Más Muertas*, IDEALIST, <https://www.idealists.org/en/nonprofit/3763dbc04c604d2b80e09bb9b8c942d6-no-more-deathsno-mas-muertes-tucson> (last visited Mar. 19, 2025) (elaborating that their work “includes providing aid in the desert, providing aid in Mexico, documenting and denouncing abuse, searching for the disappeared, helping get belongings back, running a biweekly legal clinic for undocumented community members, and alliances with border communities.”).

19. *History and Mission of No More Deaths*, NO MORE DEATHS/NO MÁS MUERTAS, <http://nomoredeaths.org/index.php/Information/history-and-mission-of-no-more-deaths.html> [https://web.archive.org/web/20100611195214/http://nomoredeaths.org/index.php/Information/history-and-mission-of-no-more-deaths.html] (last visited Mar. 19, 2025).

20. *Id.*

21. *Id.*

22. *Id.*

attempting to cross into the United States in need of humanitarian assistance.²³

In 2004, NMD volunteers working at the Ark sites also participated in a seventy-five-mile walk from Sasabe, Sonora, Mexico, to the U.S. Border Patrol headquarters in Tucson to draw attention to the humanitarian crisis occurring in the desert.²⁴

NMD's activism helped draw worldwide attention to the immediacy of the humanitarian crisis at the border. As the organization grew, it quickly became apparent that a more formal organization of the rescue mission was necessary. Thus, NMD's partnered with the Unitarian Universalist Church (UCC) of Tucson in 2008.²⁵

B. *Ministry of the Unitarian Universalist Church of Tucson*

In July 2008, pursuant to the growing scope of the organization, NMD officially became a ministry of the UCC.²⁶ This allowed NMD to transform from a loosely organized group of concerned citizens to a charity with tax-deductible status.²⁷ Additionally, NMD could also continue its support of creating diverse congregations and working toward creating a worldwide culture of justice and compassion.²⁸

NMD's guiding philosophy centers on faith-based principles for immigration reform.²⁹ The principles preamble states that:

We come together as communities of faith and people of conscience to express our indignation and sadness over the continued death of hundreds of migrants attempting to cross the US–Mexico border each year. We believe that such death and suffering diminish us all. We share a faith and a moral imperative that transcends borders, celebrates the contributions immigrant peoples bring, and compels

23. *Id.*

24. *Id.*

25. *About No More Deaths*, No More Deaths/No Más Muertas, <https://nomoredeaths.org/about-no-more-deaths/> (last visited Mar. 19, 2025) (“Since 2008 we have been an official ministry of the Unitarian Universalist Church of Tucson.”).

26. *Id.*

27. *Id.*

28. *Id.*

29. *See Faith Based Principles for Reform*, NO MORE DEATHS/NO MÁS MUERTAS, <https://nomoredeaths.org/about-no-more-deaths/faith-based-principles-for-immigration-reform/> (last visited Mar. 19, 2025).

us to build relationships that are grounded in justice and love. As religious leaders from numerous and diverse faith traditions, we set forth the following principles by which immigration policy is to be comprehensively reformed. We believe that using these principles—listed from the most imminent threat to life to the deepest systemic policy problems—will significantly reduce, if not eliminate, deaths in the desert borderlands.³⁰

NMD has five faith-based principles for immigration reform that guide their work.³¹ Briefly, the five principles are: 1) criticism of militarized border enforcement policy; 2) regulating the status of undocumented persons currently in the United States; 3) emphasizing family unity and reunification in immigration law and policy; 4) permitting workers to live and work safely in the United States through an employment-based immigration program; and 5) acknowledgement that the “root causes of migration lie in environmental, economic, and trade inequities.”³² Since its inception, NMD activism and advocacy has been primarily dedicated to its first principle³³—“the current Militarized Border Enforcement Strategy is an ill-conceived policy.”³⁴ NMD contends that, while nations have the right to control their own borders, militarized borders do not stop people from migrating.³⁵ Thus, they argue that enforcement of immigration laws must be applied in a humane and proportionate way that protects both the people and the land.³⁶

Out of this commitment to ending a militarized border, NMD focuses on providing “civilian, non-governmental, nonviolent, voluntary, and community-based” work.³⁷ They emphasize that their work “is humanitarian relief, which includes the provision of water, food, respite, medical care, family reunification, search, and rescue/recovery services, emotional first aid, legal resources, and other necessities that prevent exposure to further harm.”³⁸ From the very beginning, NMD has been

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. No More Deaths, *supra* note 2.

38. *Id.*

clear that their work is faith-based, mission-driven, and non-partisan; their work is an act of conscience.³⁹

C. *The Foundations of Borderland Humanitarian Relief and Increasingly Activist Ministry of NMD*

The efforts of NMD, in partnership with other humanitarian aid groups in Arizona,⁴⁰ led to the establishment of a document entitled “Foundations of Borderland Humanitarian Relief.”⁴¹ The Foundations of Borderland Humanitarian Relief document came out of a collaboration between the Ajo Samaritans, NMD, and People Helping People in the Border Zone.⁴² The document squarely blames the U.S. government for the refugee crisis, alleging that the humanitarian crisis on the Southwest border is due to U.S. government policies.⁴³ In particular, the humanitarian groups allege that the militarization of the U.S.–Mexico border has led to “tens of thousands of documented deaths and disappearances over the last twenty years.”⁴⁴

This bold and unequivocal placement of blame on the U.S. government’s actions and inactions almost certainly put NMD in its crosshairs. As discussed later in Section III, it almost defies logic that in the United States – a nation founded in large part on the principle of religious freedom – that a non-violent, faith-based humanitarian organization such as NMD would be subjected to the intense scrutiny, retaliation, and persecution that its members have suffered over the last two decades in its efforts to save human lives through charitable acts of mercy.⁴⁵ Rather than accepting that the members of NMD and other

39. *Id.* (“The mission of No More Deaths is to end death and suffering in the Mexico–US borderlands through civil initiative: people of conscience working openly and in community to uphold fundamental human rights.”)

40. No More Deaths routinely cooperates with the humanitarian organizations Ajo Samaritans and People Helping People in the Border Zone to provide aid to migrants in the Arizona desert. *See id.* (“All actions taken under the auspices of the Ajo Samaritans, No More Deaths, and People Helping People in the Border Zone are with concern for the lives, well-being, and dignity of all people in the borderlands.”).

41. *Foundations of Borderland Humanitarian Relief*, NO MORE DEATHS/NO MÁS MUERTAS, 1 <https://nomoredeaths.org/wp-content/uploads/2019/08/Foundations-English.pdf> (last visited Nov. 10, 2024).

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* Ryan Deveraux, *Bodies in the Borderlands*, INTERCEPT (May 4, 2019), <https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/>.

borderland humanitarian aid groups were motivated by their faith and conscience to critique and combat federal immigration law and policy, the U.S. government chose to cast their activism as criminal activity that violated federal laws prohibiting the smuggling and harboring of undocumented immigrants.⁴⁶ The U.S. government's interpretation of the federal smuggling and harboring statutes, INA § 275 and INA § 276 (also known as 8 U.S.C. § 1325 and § 1326), stretched credulity as applied to the NMD and other border aid groups' humanitarian work.⁴⁷

Further, the U.S. government has a complete inability or unwillingness to accept that the call to save the lives of human beings dying in the desert in their attempt to cross into the United States without documentation is a valid expression of faith. Both the U.S. government's interpretation of the harboring statutes and their inability to accept a valid expression of faith are examples of the dangerous narrow-minded focus on enforcement that has influenced that immigration law and policy in recent years, and which reached a fever pitch during the Trump Administration.⁴⁸ Given the fact that Trump is once again in White House as of 2025, humanitarian groups like NMD are facing the real threat that their efforts will once again be stymied by vigorous law enforcement tactics on the border.

The Foundations of Borderlands Humanitarian Relief are unapologetically based on the NMD founders' faith and their sincerely held belief in their duty to provide humanitarian aid to those in need of

46. *See id.* ("The change went into effect July 1. By the time Warren and No More Deaths met with the U.S. Attorney's Office days later, Slone was already looking to have humanitarian volunteers charged with crimes. That same day, he sent a letter to a Bureau of Land Management official stating that his office was 'pursuing legal action against' Warren for driving on designated wilderness. In the field, Cabeza Prieta rangers documented their removal of food and water left by No More Deaths. Slone, meanwhile, began creating blacklists of people who were banned from the refuge—comprised entirely of No More Deaths volunteers.").

47. 8 U.S.C. §§ 1325, 1326.

48. *See* Deveraux, *supra* note 45 ("Border Patrol enthusiasm for candidate Trump was evident on the hills surrounding Byrd Camp, where volunteers say Border Patrol agents used their megaphones to urge them to 'vote Trump!' Once in office, the president's anti-immigrant brain trust wasted no time. In April 2017, Sessions, who had become the most powerful law enforcement official in the country, flew to Arizona to announce a new prong of the administration's immigration enforcement strategy. Standing in the sun on the Arizona side of Ambos Nogales, the attorney general described the region as a war zone was directing his prosecutors to prioritize. The first among them: transportation and harboring of aliens. 'This a new era,' Sessions warned, his excitement building as he gripped the lectern with two hands. 'This is the Trump era.'").

rescue.⁴⁹ They also reaffirm that international human rights are at the heart of their humanitarian actions in the borderlands: “we recognize that all people who cross the southern border are human beings deserving of basic dignity. We work to support the right to life, liberty, and security of persons as guaranteed by the Universal Declaration of Human Rights.”⁵⁰ NMD also clarifies that the immigration status of individuals in need of rescue is irrelevant to their ministry:

We recognize that those we serve often do not have legal immigration status or authorization to enter the country. Some may have a pathway to gain status, while others would have their claims denied by the immigration legal system. We reject the notion that some people are “less deserving” of care based on their motivations for crossing or vulnerabilities.⁵¹

This dedication to saving lives and providing aid to individuals in need, without regard to immigration status, is a duty that has been embraced for decades in southern Arizona by those in the borderland’s humanitarian rescue movement.⁵² Chief among the movements that inspired the ministry of NMD was the Sanctuary Movement of the 1980s, which has its origins in the Southside Presbyterian Church of Tucson.⁵³

1. Civil Initiative

“Civil initiative” is a term that was coined by philosopher and activist Jim Corbett as part of the Tucson Sanctuary Movement in the early 1980s.⁵⁴ Tucson Southside Presbyterian Church is considered by

49. *Foundations of Borderland Humanitarian Relief*, NO MORE DEATHS 1 <https://nomoredeaths.org/wp-content/uploads/2019/08/Foundations-English.pdf> (last visited Nov. 10, 2024).

50. *Id.*

51. *Id.* at 2.

52. See Deveraux, *supra* note 45 (explaining how many people in Arizona volunteer to provide assistance to immigrants. There are also many groups in the state committed to this kind of volunteer work, including faith-based humanitarian groups.).

53. See *Civil Initiative*, NO MORE DEATHS/NO MÁS MUERTES, <https://nomoredeaths.org/about-no-more-deaths/civil-initiative/> (last visited on Nov. 8, 2024) (“No More Deaths operates according to the principles of civil initiative, a term coined by Jim Corbett in the context of the Sanctuary Movement.”).

54. *Id.*

some to be the birthplace of the modern sanctuary movement in the 1980s.⁵⁵ During that time, Southside Presbyterian provided aid and shelter to more than 13,000 refugees fleeing the civil wars in Central and South America.⁵⁶ Corbett stated that “our responsibility for protecting the persecuted must be balanced by our accountability to the legal order. As formed by accountability, civil initiative is non-violent, truthful, universal, dialogical, germane, volunteer-based and community-centered.”⁵⁷ Quaker activist John Stephens has described the civil initiative as peace building, grounded in the “exercise of natural rights”.⁵⁸ Stephens also emphasizes that civil initiative is distinct from civil disobedience in that it is rooted in community action.⁵⁹

As Stephens asserts, civil initiative is distinguishable from other forms of protest, such as civil disobedience, because it actively resists social injustice.⁶⁰ Unlike civil disobedience, civil initiative is not passive resistance to the law.⁶¹ To the contrary, civil initiative is “community action that brings recognized rights into social norms and legal practice.”⁶²

This type of radical action refuses to simply protest social injustice but requires engagement by those opposed to inequality to peacefully – yet forcefully – demand that the systems sustaining and perpetuating injustice be changed.⁶³ Again, Stephens summarizes civil initiative as doing justice, not just resisting injustice.⁶⁴

55. *The Sanctuary Movement*, SOUTHSIDE PRESBYTERIAN CHURCH, <https://www.southsidepresbyterian.org/the-sanctuary-movement.html> (last visited Mar. 19, 2025).

56. *Id.*

57. *See* NO MORE DEATHS, *supra* note 53.

58. John Stephens, *About Civil Initiative*, DESIGN OPUS (Apr. 29, 2009), <https://designop.us/wrote/about-civil-initiative>.

59. *Id.*

60. *See id.* (“Civil initiative is designed to protect natural rights by incorporating them into accepted social standards. Instead of depending on government plans or international enforcement, civil initiative focuses on community powers and voluntary effort.”).

61. *Id.* (“Indiscriminately fused with civil disobedience, civil initiative would become do-gooder vigilantism. Civil initiative means doing justice, not just resisting injustice.”).

62. *Id.*

63. *Id.*

64. *Id.* (quoting Jim Corbett, *Sanctuary, Basic Rights, and Humanity’s Fault Lines: A Personal Essay*, 5.1 WEBER J., (1988).

Quoting Jim Corbett's book *Goatwalking*,⁶⁵ Stephens also points out that "civil initiative is almost identical to the *satyagraha*⁶⁶ pioneered by Indian lawyer and non-violence activist Mohandas K. Gandhi."⁶⁷

Civil initiative must be societal rather than organizational, nonviolent rather than injurious, truthful rather than deceitful, catholic rather than sectarian, dialogical rather than dogmatic, substantive rather than symbolic, volunteer-based rather than professionalized, and based on community powers rather than government powers.⁶⁸

As Presbyterian minister John Fife, one of the founders of the original movement in Tucson, said at the time: [W]e're not going to stop helping these people. We can't stop . . . As people of faith and conscience, with all of those poor hardworking God-fearing desperate migrants dying in the Sonora desert for no reason at all except for a failed border strategy, we've got to be out there providing whatever humanitarian aid we can.⁶⁹

Ultimately, civil initiative can be summarized as "concrete action to meet the basic needs of victims—for security, subsistence, and liberty. This is bound up with accountability to civil order."⁷⁰ Unfortunately, this dedication to "integrate natural rights into social norms, with a focus on the needs of victims"⁷¹ is what ultimately gained NMD and other borderlands humanitarian rescue organizations the attention of law enforcement. This resulted in the prosecution of several members of

65. See generally JIM CORBETT, *GOATWALKING: A GUIDE TO WILDLAND LIVING, A QUEST FOR THE PEACEABLE KINGDOM* (Viking Adult, 1991).

66. *Satyagraha*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/satyagraha>.

67. SOUTHSIDE PRESBYTERIAN CHURCH, *supra* note 55.

68. No More Deaths, *supra* note 54.

69. ASSOCIATED PRESS, *Volunteers Fight Arrests for Aiding Illegals*, DESERET NEWS (Apr. 2, 2006), <https://www.deseret.com/2006/4/2/19946256/volunteers-fight-arrests-for-aiding-illegals/>; see SOUTHSIDE PRESBYTERIAN CHURCH, *supra* note 55.

70. Stephens, *supra* note 58.

71. *Id.*

NMD, and the persecution of individuals committing acts of mercy on account of their beliefs.⁷²

II. PERSECUTION AND PROSECUTION

Since the inception of NMD, critics have been skeptical that the humanitarian motivations of the organization are legitimate expressions of religious convictions.⁷³ They argue that NMD volunteers are merely politically motivated individuals who are not only breaking federal law with their rescue missions, but that their activities also pose a threat to national security.⁷⁴

The targeting of NMD members for criminal prosecution, began in 2005 with the prosecution of two humanitarian aid workers, Daniel Strauss and Shanti Sellz.⁷⁵ Prosecutions reached a crescendo in 2019 with the trials of Scott Warren, a NMD volunteer whose prosecution for providing humanitarian aid to migrants in the Arizona desert gained international attention.⁷⁶ Strauss and Sellz were the first NMD members to be criminally prosecuted for their works of mercy.⁷⁷ However, they were not the first individuals to be prosecuted by the federal government for providing humanitarian aid to migrants fleeing to the United States. In the 1980s, the U.S. government notoriously prosecuted people who provided humanitarian aid to Central American refugees in a sting

72. See Deveraux, *supra* note 45.

73. See ASSOCIATED PRESS, *supra* note 69.

74. See, e.g., Ellis Freilich, *The No More Deaths Case: Humanitarian Aid or Crime on the U.S.-Mexico Border?*, MEUB ASSOCIATES, PLC (Mar. 16, 2019), <https://www.yourvtlawyer.com/post/humanitarian-aid-on-u-s-mexico-border> [<https://web.archive.org/web/20200814232807/>]. (“*No More Deaths* and some of their activists are facing a host of legal problems related to their work in the Arizona desert. Are the members of this organization breaking federal law? Do they pose a threat to our country? Or are they being targeted by local police because of their “pro-immigrant” stance? . . . It’s unfortunate that this case is an example of the law being used to further an agenda, rather than promote what the rules say and maintain fair and equal order. Let’s hope that in the future, fewer cases involve the political game and more cases that support the greater good come to courts.”).

75. USA: Amnesty International’s Concerns About Criminal Charges Filed Against Two Human Rights Activists Who Assisted Migrants in the Desert, AMNESTY INT’L (Dec. 13, 2005), <https://www.amnesty.org/en/wp-content/uploads/2021/08/amr512012005en.pdf>.

76. See Ryan Deveraux, *Criminalizing Compassion: The Unraveling of the Conspiracy Case Against No More Deaths Volunteer Scott Warren*, INTERCEPT (Aug. 10, 2019), <https://theintercept.com/2019/08/10/scott-warren-trial/>.

77. ASSOCIATED PRESS, *supra* note 69.

operation with the code name “Operation Sojourner.”⁷⁸ Inspired by the first sanctuary movement,⁷⁹ NMD volunteers and members of the local community in southern Arizona gathered to save the lives of migrants dying in the desert, knowing full well that doing so could put them squarely in the federal government’s crosshairs.⁸⁰

A. *The 2005 Prosecutions of Daniel Strauss and Shanti Sellz*

Daniel Strauss and Shanti Sellz were the first NMD members targeted by the federal government, but they were certainly not the last.⁸¹ On July 9, 2005, Border Patrol stopped Strauss and Sellz near Arivaca, Arizona with three severely dehydrated and very ill migrants in their vehicle.⁸² It was undisputed that the condition of the individuals that Strauss and Sellz were accused of assisting were gravely ill and required immediate medical attention. The Associated Press described the scene as follows:

Emil Hidalgo-Solis couldn’t stop throwing up. His diarrhea was bloody. His feet blistered. He had staggered through the desert, stumbled across the border, gulped contaminated water from a slimy cattle trough . . . He collapsed in a ditch. He and two others among the 10 immigrants could go no farther.⁸³

78. See Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 U. ST. THOMAS L. J. 474 (2017).

79. ASSOCIATED PRESS, *supra* note 69. (“The new activists were organized by some of the leaders of the earlier Sanctuary movement, and they say they are merely responding to a humanitarian emergency.” We were seeing increasing numbers of people dying in our desert. We asked ourselves, ‘What’s our responsibility as people of faith?’ “ says Presbyterian pastor John Fife, who was among those convicted in 1986.”).

80. *Id.* (“There had been indications that the Border Patrol might crack down on No More Deaths . . . [but e]ven local government has chipped in, providing annual grants of \$25,000 to Humane Borders. “It is a humanitarian issue where you have to draw on your own religious beliefs to try to prevent death,” said Pima County Supervisor Richard El.”).

81. *See id.* (“There had been indications that the Border Patrol might crack down on No More Deaths. In August 2004, Michael Nicely, a 25-year veteran agent, took over as chief of the Border Patrol’s Tucson sector. Nicely warned organizers that his agents might keep watch over their aid camps, and that if they transported people, they risked arrest.”).

82. *Id.*

83. *Id.*

Hidalgo-Solis and his fellow travelers faced certain death that day in the Arizona desert in July 2005.⁸⁴ However, their lives were saved when truck full of NMD members arrived in a truck bearing the word “Samaritan” on its side, offering them food, water, and medical care.⁸⁵

When questioned by the agents, Strauss and Sellz explained that they were following NMD protocol and taking the migrants to a clinic for medical treatment.⁸⁶ They alleged that they had been told by NMD officials, which included attorneys and physicians, that “the [NMD] ‘protocol’ had been approved by Border Patrol and that the transportation for these medical purposes was not a violation of the law.”⁸⁷ Thus, believing in good faith that their humanitarian actions were legal, Strauss and Sellz put Hidalgo and two other migrants in their vehicle so they could receive medical attention.⁸⁸ However, before they were able to deliver them to a nurse and a doctor waiting at a clinic set up by NMD, the group was intercepted by the Border Patrol, and all five were arrested.⁸⁹

84. *Id.*

85. *Id.*

86. See Craig Wiesner, “Good Samaritans Found Not Guilty!,” MULTIFAITH VOICES FOR PEACE & JUSTICE, <https://www.multifaithpeace.org/article.php/samaritans>, (“On July 9th, 2005, a pair of Samaritans, named Daniel and Shanti, was wandering the desert when they came upon a group of travelers. The travelers were hungry, thirsty, and suffering from severe and crippling blisters. Desperate for water, some of them had drunk from a tepid cattle tank and were very sick, unable to hold down any liquids for several days as temperatures soared past 115 degrees. Three of the travelers were so ill, that the Samaritans called two physicians and a nurse for advice. “Get them to medical care” they were told. Even a lawyer was consulted, and he agreed that the Samaritans should get the three sick men to a doctor. So, the Samaritans loaded the men into their car, attached their organization insignia on the side of the car so that people would know they were transporting people in need of help, and began driving. Soon, a Border Patrol car came up behind them, followed them for a while, and eventually pulled them over. Perhaps it was the same Border Agent who had passed the other dying many by. And the agent asked them “Who are these neighbors you have in your car?” “We do not know” said the Samaritans, “but they are very ill and need medical care.”).

87. See *infra*, note 97.

88. See ASSOCIATED PRESS, *supra*, note 69.

89. See *id.* (“The officers trailed them for maybe 13 miles before pulling them over . . . The officer asked, ‘Are your three passengers illegal?’ ‘I don’t know,’ Strauss said. Then, Sellz recalls, the officer poked his head into the car and asked the passengers: ‘Do you guys speak English?’ No one answered. The officer turned to us and said, ‘Those guys are illegal and you know it.’ . . . They arrested Hidalgo-Solis and his companions. But they also arrested Strauss and Sellz.”).

It was clear to Strauss and Sellz that the migrants were sick and dying and urgently needed to receive medical attention.⁹⁰ Despite their good faith belief that they were seeking humanitarian aid for migrants in distress in accordance with the law, Strauss and Sellz were later indicted by a grand jury for conspiring to transport and transporting undocumented migrants.⁹¹ If convicted of this crime – a felony⁹² – Straus and Sellz faced up to fifteen years in federal prison.⁹³

The position that the Border Patrol took against humanitarian aid workers such as Strauss and Sellz was crystal clear – the aid workers were smugglers. Johnny Bernal, a Border Patrol supervisory agent in Tucson states at time of Strauss and Sellz’s prosecutions in 2005 that “[i]t doesn’t matter who you are, humanitarian, Minuteman or just a citizen if you’re transporting an illegal alien then you’re breaking the law. You’re smuggling an illegal alien.”⁹⁴ Yet despite this hard line, NMD volunteers and their supporters – including Strauss and Sellz – remained adamant that they were not going to stop providing humanitarian aid, even in the face of potential criminal consequences.

Ultimately, the charges against both Strauss and Sellz were dismissed in September 2006 by United States District Judge Raner Collins.⁹⁵ Judge Collins found that in the case of Strauss and Sellz, whose argument boiled down to the NMD slogan that humanitarian aid is not a crime,⁹⁶ “further prosecution would violate the Defendant’s due process rights.”⁹⁷ Judge Collins reasoned that, in addition to NMD having shared their activities with Border Patrol for several years, “the conduct of people similar to those now charged in this case had been, at least

90. *Id.* (“‘They insist that in transporting sick people, they were not in any way breaking the law.’ ‘Are you really arresting me?’ Sellz recalls asking, in amazement. ‘I know you guys are good people but what you’re doing is illegal,’ she was told.”).

91. *Id.*

92. 8 U.S.C. § 1324(a)(1)(A).

93. *Id.* at § 1324(a)(1)(B).

94. *Id.*

95. Bob Ortega, *Trial Begins for No More Deaths Volunteer Who Aided Migrants*, CNN: INVESTIGATES (June 3, 2019, 6:30 AM), <https://www.cnn.com/2019/06/03/us/trial-scott-warren-no-more-deaths-volunteer-migrants-arizona-invs/index.html>.

96. *Id.* (“Shanti Sellz, a vegetable farmer in eastern Iowa. Sellz was a college student and visiting summer volunteer at No More Deaths in 2005 when she and another volunteer, Daniel Strauss, were arrested by Border Patrol agents while driving three dangerously ill undocumented immigrants to a hospital in Tucson. They spent three days in federal custody and were charged with conspiracy and transporting illegal aliens, both felonies. ‘We argued that humanitarian aid is never a crime,’ Sellz said by phone.”).

97. *United States v. Strauss*, CR 05-1499-TUC-RCC at 6 (D. Ariz. Sept. 1, 2006).

tacitly, approved by the Border Patrol.”⁹⁸ Thus, for a time, it seemed as if organizations such as NMD could provide humanitarian assistance to migrants in the Arizona desert without worrying about fear of prosecution.⁹⁹ However, that time came to an end in 2010, with the prosecution of Daniel Millis for felony littering in a national park.¹⁰⁰

B. *The 2010 Prosecution of Daniel Millis*

The prosecution of Daniel Millis in 2010, stemming from his humanitarian aid activities as part of his association with NMD,¹⁰¹ received a fair amount of notoriety due to Millis successful appeal of his criminal conviction.¹⁰²

In 2008, while serving as a volunteer with NMD, Millis was found guilty of “disposal of waste” pursuant to 50 C.F.R. § 27.94(a), in the United States District Court for the District of Arizona.¹⁰³ The statute under which Millis was convicted prohibited littering in a national wildlife refuge.¹⁰⁴ Millis was performing activities for NMD, including driving a car with other volunteers and placing water in the desert to be used by migrants on their journey to the United States.¹⁰⁵ Although unsuccessful at the trial level, Millis’ mounted the same defense as Strauss and Sells the motto for NMD – “humanitarian aid is never a crime.”¹⁰⁶ Millis contended that because the water NMD volunteers left in the desert was for the express purpose of saving lives, his conduct could not be criminalized.¹⁰⁷ Notwithstanding these arguments, Judge Cindy K. Jorgenson held that Millis’ disposal of the water violated the federal anti-littering statute, and he was convicted.¹⁰⁸

In 2010, the United States Court of Appeals for the Ninth Circuit heard Millis’ appeal, and a three-judge panel reversed his conviction. The

98. *Id.* at 5.

99. *See* Deveraux, *supra* note 45.

100. *U.S. v. Millis*, 621 F.3d 914 (9th Cir. 2010).

101. *Id.*

102. *See, e.g.*, Mark Carlson, *Court reverses conviction for migrant littering*, NBC NEWS (Sept. 2, 2010), <https://www.nbcnews.com/id/wbna38980085>.

103. *United States v. Millis*, No. CR 08-1211-TUC-CKJ, 2009 WL 806731, *6 (D. Ariz. Mar. 20, 2009).

104. 50 C.F.R. § 27.94(a) (2025).

105. *Millis*, 2009 WL 806731 at *6.

106. *See id.* at *5.

107. *Id.*

108. *Id.* at *6.

panel applied the rule of lenity¹⁰⁹ to find that the water left in the desert by Millis and the other NMD volunteers was not properly included in the federal statute.¹¹⁰ Thus, despite not prevailing on his original defense of “humanitarian aid is never a crime” Millis nonetheless scored a victory for the humanitarian immigrant rights movement when his conviction was overturned, and the retaliatory prosecutions of NMD members was, for a time, halted. That is, until the prosecutions of Scott Warren, a longtime NMD volunteer, began in 2018.

III. THE 2019 PROSECUTIONS OF SCOTT WARREN

In 2018, a 35-year-old volunteer for NMD, Dr. Scott Warren, was arrested by the federal government and prosecuted for allegedly committing several crimes while providing humanitarian assistance to migrants crossing the Arizona desert.¹¹¹ On January 17, 2018, Warren was arrested in Ajo, Arizona, small community in southern Arizona close to the Mexican border.¹¹² Warren was “accused of providing 23-year-old Kristian Perez-Villanueva, of El Salvador, and 20-year-old José Sacaria-Goday, of Honduras, with food, water, and a place to sleep over three days.”¹¹³ Warren’s arrest came the same day that NMD published a scathing report about the Border Patrol’s systemic destruction of life-saving water left in the desert for migrants over the course of several years.¹¹⁴ The report, “*Interference with Humanitarian Aid: Death and Disappearance on the U.S.-Mexico Border*,” documented in painstaking detail the destruction of and obstruction of the provision of humanitarian

109. *Legal Information Institute (LII)*, CORNELL LAW SCH., https://www.law.cornell.edu/wex/rule_of_lenity (“The rule of lenity is a principle used in criminal law, also called rule of strict construction, stating that when a law is unclear or ambiguous, the court should apply it in the way that is most favorable to the defendant, or to construe the statute against the state.”).

110. *United States v. Millis*, 621 F.3d 914, 917 (“We next turn to the language of the regulation. When construing a word, we generally construe the term in accordance with its ‘ordinary, contemporary, common meaning.’ (citation omitted) . . . Applying those definitions in the present context, the text of [50 C.F.R.] § 27.94(a) is ambiguous as to whether purified water in a sealed bottle intended for human consumption meets the definition of ‘garbage.’”)

111. *See* Deveraux, *supra* note 76.

112. Ryan Deveraux, *Nine Humanitarian Activists Face Federal Charges After Leaving Water for Migrants in the Arizona Desert*, INTERCEPT, Jan. 23, 2018, <https://theintercept.com/2018/01/23/no-more-deaths-arizona-border-littering-charges-immigration/>.

113. Deveraux, *supra* note 45.

114. *Id.*

aid provided to migrants by NMD and other border humanitarian aid groups.¹¹⁵

At the time of his arrest in 2018, Warren¹¹⁶ had been volunteering with NMD for ten years.¹¹⁷ When he was arrested in January 2018, he was at a NMD volunteer gathering at a location known as “The Barn” in Ajo.¹¹⁸ The border agents discovered The Barn’s address by doing online research and surveilling the property.¹¹⁹ The Border Patrol agents who arrested Warren were in plain clothes and did not present a warrant.¹²⁰ Despite Warren’s request for them to leave, the Border Patrol agents arrested Warren, eight other NMD volunteers, and the migrants they provided with life-saving provisions; the migrants were held as material witnesses in the federal prosecution ultimately brought against the NMD volunteers.¹²¹

Although the federal government had already secured four criminal convictions against NMD volunteers for providing humanitarian aid to migrants, Warren’s case, notably, was first one in which the federal government sought a felony conviction.¹²² They made an example of Warren to send the message, loud and clear, that attempting to save the lives of desperate migrants by providing them with food, water, and

115. *Part II: Interference with Humanitarian Aid: Death & Disappearance on the US-Mexico Border*, DISAPPEARED REPORT, 2 (2018) (“The second section [of the report] explores the vandalism of the water drops established by No More Deaths volunteers in the remote borderlands of Arizona. Drawing on data collected by volunteers over a three- year period, we use a Geographic Information Systems (GIS) analysis to provide evidence that Border Patrol agents are the most likely actor responsible for the destruction of water provisions. We also use GIS analyses to establish the potential consequences of these actions for border crossers. The third section documents the obstruction of humanitarian-aid efforts. Testimonies offered by No More Deaths volunteers reveal the extent to which law-enforcement agencies have targeted humanitarian volunteers, preventing border crossers from accessing lifesaving resources and medical aid in the remote regions of the borderlands.”).

116. Warren is a geographer at Arizona State University (ASU). *See* Deveraux, *supra* note 45.

117. *Id.*

118. *Scott Warren Facing 20-Year Prison Sentence for Providing Humanitarian Aid*, FRONT LINE DEFENDERS, <https://www.frontlinedefenders.org/en/case/scott-warren-facing-20-year-prison-sentence-providing-humanitarian-aid>.

119. *See* Deveraux, *supra* note 45.

120. *Id.*

121. *Id.*

122. *See* Deveraux, *supra*, note 76 (“The prosecutors had won four convictions in those cases, but the punishments were relatively light — \$250 fines plus probation. The felony case presented an opportunity to mete out real consequences: 20 years in prison if Warren was convicted and sentenced to consecutive terms.”).

shelter was a federal crime and would be punished accordingly.¹²³ At trial, the federal government portrayed Warren as “an experienced and wily senior official in an organized, nonprofit human smuggling operation that uses humanitarian aid as a cover,”¹²⁴ and alleged that his and NMD’s ultimate goal was a “borderless society.”¹²⁵

A. *Dr. Scott Warren’s First Trial – June 2019*

Warren’s first trial, which was held in June 2019, lasted nine days.¹²⁶ The trial began in an inauspicious manner. After opening arguments, in which the jurors learned that the majority of the witnesses called by the government to prove their case were Border Patrol agents, including members of the so-called “Disrupt Unit”, or “Critical Border Patrol Incident Teams” (CBPITs)¹²⁷ The government witnesses testified in support of the criminal conspiracy charge against Warren. They alleged that Warren and other immigrants’ rights advocates – including an individual named Irineo Mujica, one of the leaders of the immigrant advocacy group Pueblo Sin Fronteras¹²⁸ – were working together to smuggle undocumented people into the United States.¹²⁹ However, much of the witness testimony was discredited when it was demonstrated on cross-examination that the communications between humanitarian groups were used for exactly what they claimed they

123. *Id.* (“A young prosecutor in a baggy suit approached the microphone. The American flag pin fixed to his lapel glinted in the light. ‘This case is not about humanitarian aid,’ Nathaniel J. Walters declared in his first words to the jury. Instead, he said, it was about Scott Warren’s decision to take part in a conspiracy to break the law and “shield two illegal aliens from law enforcement over the course of several days.” Warren was a “high-ranking leader of an organization called No More Deaths,” Walters told the jurors, but “No More Deaths is not on trial. Scott Warren is.””).

124. *Id.*

125. *Id.*

126. *Id.*

127. *FAQ on Border Patrol Cover Up Shadow Units*, S. BORDER CMTYS. COAL. (May 6, 2022), https://www.southernborder.org/faq_on_border_patrol_cover_up_shadow_units.

128. Devereaux, *supra* note 45. Pueblo Sin Fronteras (“People Without Borders”) was an organizer and supporter of migrant caravans that journeyed to the U.S.-Mexico border in 2018, and was thus a “target[] in a sprawling intelligence-gathering operation” used to detain “activists, journalists, and immigration attorneys” working with caravan members. *Id.*

129. *Id.*

were – life-saving collaborations, rather than criminal alien smuggling.¹³⁰

Warren took the stand in his own defense, testifying for two days about how and why he became involved with NMD.¹³¹ Explaining how his academic work as a geographer dovetails with the live-saving mission of NMD, he also emphasized to the jurors that “humanitarian aid work is legal.”¹³² He explained: “my intention was to provide them some basic humanitarian aid” and to “treat them as I would any human being who showed up on my doorstep.”¹³³ One of the most powerful arguments made by Warren during his testimony – which also encapsulates both the NMD motto of “humanitarian aid is not crime” and the act of conscience defense that people of faith turn to when welcoming the stranger – is that the people of southern Arizona, and Ajo in particular, have provided life-saving aid to migrants in their backyards for generations.¹³⁴ Reading aloud from an op-ed he wrote for the Washington Post, Warren explained:

Local residents and volunteers organize hikes into this desert to offer humanitarian aid. We haul jugs of water and buckets filled with canned food, socks, electrolytes and basic first-aid supplies to a few sites along the mountain and canyon paths . . . Over the years, humanitarian groups and local residents navigated a coexistence with the Border Patrol. We would meet with agents and inform them of how and where we worked . . . In a town as small as Ajo, we’re all neighbors, and everybody’s kids go to the same school . . . In Ajo, my community has provided food and water to those traveling through the desert for decades – for generations. Whatever happens with my trial, the next day, someone will walk in from the desert and knock on someone’s

130. *Id.* (“The emails were later shown to be part of an ongoing correspondence between Warren, Mujica, and other humanitarian volunteers, which included Warren providing tips on how to obtain useable information regarding where missing or dead migrants could be found.”).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

door, and the person who answers will respond to the needs of that traveler.¹³⁵

Warren's op-ed also forcefully criticized the Trump Administration's immigration enforcement policies as "seek[ing] to impose hardship and cruelty," and noted that "[f]or this strategy to work, it must also stamp out kindness."¹³⁶ While somewhat rhetorically asking "whether the government will take seriously its humanitarian obligations to the migrants and refugees who arrive at the border,"¹³⁷ Warren's op-ed concluded with this powerful proclamation: "if they are thirsty, we will offer them water; we will not ask for documents beforehand. The government should not make that a crime."

Ultimately, the jurors in Scott Warren's first trial did not reach a unanimous decision, and the judge declared a mistrial.¹³⁸ Unfortunately, however, that was not the end of the story for Warren. The government, undeterred by its loss at the first trial, decided to re-charge Warren and try him a second time.¹³⁹ What came next would, at last, be the final chapter in Warren's saga.

B. *Dr. Scott Warren's Second Trial – November 2019*

Shortly after the mistrial in Warren's first prosecution, on July 2, 2019, the government informed the court that while it would be dropping the conspiracy charge against Warren, it would prosecute him

135. Scott Warren, *I gave water to migrants crossing the Arizona desert. They charged me with a felony.*, WASH. POST (May 28, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/05/28/i-gave-water-migrants-crossing-arizona-desert-they-charged-me-with-felony/>.

136. *Id.*

137. *Id.*

138. See Isaac Stanley-Becker, *An activist faced 20 years in prison for helping migrants. But jurors wouldn't convict him.*, WASH. POST (June 12, 2019, 6:58 AM), <https://www.washingtonpost.com/nation/2019/06/12/scott-warren-year-sentence-hung-jury-aiding-migrants/> ("Deciding who Warren is and what he did proved a task too tortuous for jurors, who said on Tuesday they remained deadlocked in their deliberations and could not reach a unanimous verdict.").

139. Ryan Devereaux, *A jury found Scott Warren not guilty in the government's second attempt to lock him up for providing humanitarian aid on the border in Arizona.*, INTERCEPT (Nov. 23, 2019, 11:30 AM), <https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border/>.

for the two alien harboring charges he faced in his first trial.¹⁴⁰

Despite criticism from human rights groups and humanitarian defenders around the world,¹⁴¹ Warren once again found himself in the unenviable position of defending himself for acts that he asserts are rooted in “human kindness” and charity.¹⁴²

Warren’s second trial was again held in Tucson federal court in November 2019.¹⁴³ The government maintained that Warren intentionally “concealed and shielded” undocumented immigrants from Border Patrol detection while volunteering with NMD.¹⁴⁴ Once again, Warren took the stand in his own defense, explaining to the jurors that his intention in volunteering with NMD was to save human lives.¹⁴⁵ He also testified that he informed the migrants he encountered that “we don’t hide people, we can’t hide people, and we can’t protect them from Border Patrol.”¹⁴⁶

On November 21, 2019, the jury found Warren not guilty of criminal alien harboring.¹⁴⁷ This time, the jury took less than three hours to acquit Warren.¹⁴⁸ After Warren’s acquittal, his attorney said: “[the jury] decided that humanitarian aid is not always a crime the way

140. *Id.* See also *Activist arrested for giving migrants food and shelter faces retrial*, GUARDIAN (July 2, 2019, 5:04 PM), <https://www.theguardian.com/us-news/2019/jul/02/activist-helped-migrants-retrial-scott-warren>.

141. See, e.g., Jasmine Aguilera & Billy Perrigo, *They Tried to Save the Lives of Immigrants Fleeing Danger. Now They’re Facing Prosecution*, TIME (Nov. 11, 2019, 7:00 AM), <https://time.com/5713732/scott-warren-retrial/> (“The arrest of Warren ‘threw up several red flags,’ says Brian Griffey of Amnesty International, which has used Warren’s prosecution as a rallying cry for humanitarian workers worldwide as civil wars, persecution, and violence fuel a global migration surge unseen since World War II.”).

142. See Devereaux, *supra* note 45.

143. See Rafael Carranza, *Arizona border aid worker Scott Warren takes stand in second trial against him*, REPUBLIC (Nov. 19, 2019, 2:52 PM), <https://www.azcentral.com/story/news/politics/border-issues/2019/11/19/border-aid-worker-scott-warrentakes-stand-tucson-retrial/4240891002/>.

144. *Id.*

145. *Id.*

146. *Id.*

147. See Bobby Allyn and Michel Marizco, *Jury Acquits Aid Worker of Helping Border-Crossing Migrants in Arizona*, NPR, (Nov. 21, 2019, 2:59 PM), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona>.

148. *Id.* (“[Warren’s] lawyers have argued for years that their work is not illegal because they are offering humanitarian assistance to desperate border crossers regardless of legal status, a perspective the jury affirmed in fewer than three hours of deliberations.”).

the government wanted it to be . . . Instead, they decided that humanitarian aid is virtually never a crime.”¹⁴⁹

The government, however, was unpersuaded by the jury’s verdict. After Warren’s acquittal, Michael Bailey, the U.S. Attorney for the State of Arizona, said, “We won’t distinguish between whether someone is harboring or trafficking for money or whether they’re doing it out of a misguided sense of social justice or belief in open borders.”¹⁵⁰

The jury’s acceptance of Warren’s defense that “humanitarian aid is not a crime” was a victory for the members of NMD and other migrant advocates.¹⁵¹ Even in the face of years-long persecution by the government, NMD volunteers were steadfast in their assertion that not that they had a constitutional right to provide such aid to migrants based on their faith and their conscience.¹⁵²

After Warren’s acquittal, Reverend Mary Katherine Morn of the Unitarian Universalist Service Committee said: “the verdict is a sharp and welcome rebuke to the administration’s ongoing effort to criminalize compassion — and marks a major victory for all the humanitarian workers willing to risk their own lives to save those of others.”¹⁵³ Previously, members of NMD that had been prosecuted for their humanitarian actions used a necessity defense, invoking their slogan “humanitarian aid is not a crime,” with little success.¹⁵⁴ Despite this victory, however, Warren would not be last member of NMD to be prosecuted for providing humanitarian aid to migrants in the Arizona desert.¹⁵⁵ The next prosecution of NMD volunteers would raise a new and different legal defense – the right to provide humanitarian aid in the free exercise of religion pursuant to the Religious Freedom Restoration Act (RFRA).¹⁵⁶

149. *Id.*

150. *Id.*

151. *Id.*

152. See Devereaux, *supra* note 45.

153. Allyn & Marizco, *supra* note 147.

154. See, e.g., Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 72 SYRACUSE L. REV. 79 (2012).

155. See *United States v. Hoffman*, 436 F.Supp. 3d 1272, 1276–77 (D.Ariz. Jan 31, 2020).

156. 42 U.S.C. §§ 2000bb–2000bb-3.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT AND THE NO MORE DEATHS PROSECUTIONS

The Religious Freedom Restoration Act (RFRA) became law on November 16, 1993.¹⁵⁷ The Act:

[p]rohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹⁵⁸

RFRA codified the common law standard articulated by the United States Supreme Court for determining the constitutionality of a content-neutral restriction by the government pursuant to the Free Exercise Clause of the First Amendment.¹⁵⁹ RFRA recognizes that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."¹⁶⁰ RFRA may also be used as an affirmative defense to criminal charges, should defendants claim that the government has substantially burdened a person's free exercise of religion in violation of the First Amendment.¹⁶¹

To succeed when raising the affirmative defense to criminal charges that a defendant's prosecution runs afoul of RFRA, the defendant must demonstrate that both that governmental action burdens a sincere "exercise of religion," and that the burden is "substantial."¹⁶² If the individual claiming a violation of the RFRA is able to demonstrate that their criminal prosecution resulted in a substantial burden on their sincerely held religious beliefs, the burden then shifts to the government

157. Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. 1993–94, <https://www.congress.gov/bill/103rd-congress/house-bill/1308>.

158. *Id.*

159. *See* United States v. Christie, 825 F.3d 1048, 1055 (9th Cir. 2016).

160. *See* 42 U.S.C. § 2000bb(a)(2).

161. *See Christie*, 825 F.3d at 1065.

162. 42 U.S.C. § 2000bb-1(a).

to demonstrate both that the government action “furthers a compelling governmental interest” and “is the least restrictive means of furthering that compelling government interest.”¹⁶³

A. *United States v. Hoffman: “Sincere Religious Beliefs” under the RFRA and the Provision of Humanitarian Aid*

In the 2020 decision *United States v. Hoffman*,¹⁶⁴ United States District Judge for the District of Arizona, Rosemary Marquez overturned the misdemeanor convictions of NMD members Natalie Hoffman, Oona Holcomb, Madeline Huse, and Zaachila Orozco-McCormick.¹⁶⁵ The facts state that on August 13, 2017, the defendants “left bottles of water and cans of food at several pre-selected locations along foot trails used by people entering the United States unlawfully.”¹⁶⁶ On December 6, 2017, the defendants “were charged by criminal information with entering the [Cabeza Prieta National Wildlife Refuge] without a permit in violation of 50 C.F.R. § 26.22(b) and abandoning property in violation of 50 C.F.R. § 27.93.”¹⁶⁷ The defendants in *Hoffman* were convicted of “operating a motor vehicle in a wilderness area and entering a national wildlife refuge without a permit and abandoning property there.”¹⁶⁸

Although the defendants raised the violation of their constitutional rights under the RFRA in their initial trial before a magistrate judge in the District of Arizona,¹⁶⁹ Magistrate Judge Bernardo P. Velasco did not address this defense in his decision convicting the defendants on all counts.¹⁷⁰ The defendants appealed their conviction.¹⁷¹ The Ninth Circuit Court of Appeals held that “[w]hether application of a federal law violates RFRA is a question of statutory construction for the court’ that is reviewed *de novo*.”¹⁷²

In a twenty-two-page decision issued on February 3, 2020, District Judge Marquez first held that the defendants in *Hoffman* provided

163. *Id.* § 2000bb-1(b).

164. *United States v. Hoffman*, 436 F. Supp. 3d 1272 (D. Ariz. Jan. 31, 2020).

165. *Id.* at 1272, 1289.

166. *Id.* at 1277.

167. *Id.* at 1278.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1278 n. 3.

172. *Id.* at 1278.

humanitarian aid to migrants in the Arizona desert because of their “sincere religious beliefs.” Judge Marquez explained that although the defendants did not claim to be members of mainstream or traditional congregations, their volunteer activities with NMD are exercises of sincerely held religious and spiritual beliefs.¹⁷³ Judge Marquez then engaged in lengthy exposition of defendants’ provision of humanitarian aid and its relation to their sincere religious beliefs:

[T]he fact that Defendants do not profess belief in any particular established religion does not bar their RFRA claim . . . The Court concludes that Defendants’ beliefs, as described, are religious . . . Additionally, the nature of Defendants’ conduct itself suggests sincerity. Defendants were convicted for activities that included hiking food and water into a rugged, unforgiving wilderness during Southern Arizona’s extreme August heat . . . Defendants’ willingness to suffer for their beliefs likewise suggests such sincerity.¹⁷⁴

Judge Marquez’s decision not only expands the interpretation of the RFRA, it lends credence to the mission statement of NMD – “humanitarian aid is not a crime.”¹⁷⁵ In reversing their convictions, Judge Marquez held that the alleged crime committed by the defendants – “venturing into the Cabeza Prieta National Wildlife Refuge and leaving containers of water”¹⁷⁶ – was an expression of their “sincere religious beliefs” that is protected by RFRA.¹⁷⁷ Thus, their convictions were unconstitutional under the First Amendment because the government “failed to demonstrate that prosecuting Defendants is the least restrictive means of furthering any compelling governmental interest.”¹⁷⁸

The acquittal of NMD members due to their sincerely held religious beliefs under RFRA marked a turning point in the prosecution

173. *Id.*

174. *Id.* at 1281, 1289.

175. *See id.*

176. EJ Monti, Opinion, *Federal Judge Finds Our Lost Conscience, Rules That Saving Lives is NOT a Crime*, AZCENTRAL (Feb. 4, 2020, 2:55 PM), <https://www.azcentral.com/story/opinion/op-ed/ej-montini/2020/02/04/federal-judge-rules-arizona-no-more-deaths-not-crime/4658979002/>.

177. *Hoffman*, 436 F. Supp. 3d at 1289.

178. *Id.*

of members of humanitarian groups and other people of faith and conscience ministering to migrants in the borderlands. However, it is yet to be seen if the RFRA defense is raised again in future prosecutions – to say nothing of whether it would again be successful. In the meantime, humanitarian volunteers continue their works of mercy knowing full well that their actions could subject them to criminal prosecution notwithstanding their religious beliefs.

CONCLUSION

Unfortunately, the members of NMD are not the only people of faith and conscience who have faced persecution for taking humanitarian action on behalf of vulnerable migrants fleeing to the United States for safety.¹⁷⁹ Under the first Trump Administration, the number of prosecutions for harboring undocumented immigrants rose more than 25% between 2018 and 2019.¹⁸⁰ Before his acquittal, Warren wondered about the potential extent of the government's prosecution of humanitarian workers:

You're buying food for your uncle who is undocumented, so now we're going to go prosecute you for harboring. You drive your kids or your family to the park for a picnic or something — is the government going to arrest you and say that you're smuggling or you're transporting?" he says. "That's the other fear that I have, that they will try to keep using these laws in new ways to target more people."¹⁸¹

The government acknowledges that its interpretation and application of the federal criminal statutes under which Warren was prosecuted were novel.¹⁸² But contrary to what Warren and his defenders assert, the government contends that it has not singled out members of NMD and other humanitarian aid groups for prosecution because of their

179. Olivia Marti & Chris Zepeda-Millán, *Criminalizing Humanitarian Aid at the U.S.-Mexico Border*, UCLA LATINO POL'Y & POLS. INITIATIVE 2 (Sept. 9, 2020), <https://latino.ucla.edu/wp-content/uploads/2021/08/CZM-2-Facuty-Brief.pdf>.

180. See Aguilera & Perrigo, *supra* note 142 ("It's impossible to say how many U.S. aid workers have been prosecuted since Donald Trump's election, though the Trump Administration made clear in a speech by then-Attorney General Jeff Sessions in April 2017 that it planned to step up its pursuit of anyone suspected of aiding undocumented migrants. A data-gathering organization based at Syracuse University says the number of people prosecuted in the United States for charges related to bringing in or harboring undocumented migrants was more than 5,200 in fiscal year 2019, a 25.6 percent increase over 2018.").

181. *Id.*

182. See Deveraux, *supra* note 46.

political activism.¹⁸³ As immigration policy continues to be fraught with emotion and used for political gain across party lines, it remains to be seen whether Warren's prosecution was the first – or the last – of its kind in response to the attempts to criminalize humanitarian aid. Given the reelection of Donald Trump in 2024, the chances that humanitarian aid workers will emerge from his presidency unscathed are small, as the vitriol and xenophobia toward migrants crossing the U.S.-Mexico border is at an all-time high.

183. See Paul Ingram, *Prosecutors Argue No More Deaths Volunteer Conspired to Protect 2 Men in Country Illegally*, TUCSON SENTINEL (May 29, 2019), https://www.tucsonsentinel.com/local/report/052919_warren_nmd_trial/prosecutors-argue-no-more-deaths-volunteer-conspired-protect-2-men-country-illegally/.