
“Humanitarian Aid Is Never a Crime”: Humanitarianism and Illegality in Migrant Advocacy

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I analyze the case of humanitarian pro-migrant activists in southern Arizona between 2000 and 2010 to explore how contending groups wield law and legality claims in a dynamic policy environment. Humanitarian activists both evade and engage the law. They appeal to a higher law to elude charges that they are acting illegally, while seeking assurances that their actions are within the law. Law enforcement agents rely on the authority and technical neutrality of the law in redefining humanitarian aid as illegal, while expanding their own claims to carry out humanitarian work. This case study of advocacy on behalf of “illegal” migrants highlights how both activists and those who enforce the law redefine legality in strategic ways.

On February 22, 2008, Dan Millis, a volunteer with the humanitarian group No More Deaths, stumbled upon the body of a 14-year-old Salvadoran girl at a national wildlife refuge in the Arizona desert near the U.S.–Mexico border. Josseline Jamileth Hernández Quinteros had been crossing the border with her younger brother and a group of migrants, headed for her parents’ home in Los Angeles. Millis found her while crossing between two migrant trails. Like hundreds before her, Josseline had succumbed to the elements—in this case the freezing cold of the desert night in winter—and perished before help could reach her (Vanderpool 2009a).

Two days later, Millis was out leaving gallon water jugs in the area where he had found Josseline. He was stopped by two agents from the U.S. Fish and Wildlife Service and issued a misdemeanor ticket for littering. Millis refused to pay the \$175 fine and challenged the charge on the grounds that “humanitarian aid is never a crime” (No More Deaths 2008b). A federal judge found Millis

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guilty of littering, but suspended his sentence. Millis and his lawyer decided to appeal the judge's determination (Ong Hing 2009; Vanderpool 2009a).¹

This was not the first time that a member of a humanitarian group had been intercepted by law enforcement officers. Three years earlier Border Patrol agents arrested two young No More Deaths volunteers who were driving three migrants to a Tucson clinic. The volunteers were charged with transporting and conspiring to transport "in furtherance of an illegal presence in the United States," felony charges that could potentially lead to 15 years in prison (No More Deaths 2005). In December 2008 another No More Deaths volunteer was charged with littering while placing gallon water jugs out along a known migrant trail at the same wildlife refuge. Thirteen more members of humanitarian groups received fines for littering in July 2009 (Ipsen 2009; No More Deaths 2008b, 2009a).

These accounts illustrate a struggle that is playing out on the southern border of the U.S., not just between the U.S. Border Patrol and migrants, but between federal agents and those citizens who have taken on the task of aiding migrants who become ill or injured, run out of water, or lose their way after crossing the border clandestinely. Humanitarian activists maintained that providing water, food, and medical care to migrants crossing the deadly Sonora desert was justified because the intent was to save lives. Federal law enforcement agents in the Border Patrol and U.S. Fish and Wildlife Service, however, argued that these humanitarian actions skirted the edges of the law and at times, crossed a line. While the humanitarian groups defended their actions with the claim that humanitarian aid can never be illegal, law enforcement agents redefined humanitarian work as discrete illegal acts subject to prosecution: "transporting aliens" and "littering."

Law and legality claims are central in this struggle. "Legality claims" in this context are efforts to portray actions as legal or illegal, regardless of whether the law specifically addresses such actions. Legality claims may be expressed as legal discourses or social practices in informal settings outside of official legal institutions, or they can emerge in the use of litigation strategies and formal institutions such as courts.

In this article I examine how both humanitarian activists and law enforcement agents use law and make legality claims to advance their respective goals. Humanitarian activists appeal to higher law,

¹ The U.S. Court of Appeals for the Ninth Circuit heard oral arguments in the case *United States v. Millis*, Ninth Circuit Court of Appeals, No. 09-10134, 2 March 2010. On September 2, 2010, the Court issued an opinion in which the judges ruled two-to-one to overturn Millis's conviction, arguing that it was unclear whether the water supplied met the definition of "garbage" (Lacey 2010).

drawing on alternate sources of legitimacy as a way to elude charges that they are violating laws, and they seek assurances that their actions are “within the law” in order to carry out their work. Activists both *evade* and *engage* the law by drawing simultaneously on legality claims that are “above the law” and recognized “on the ground,” or negotiated with authorities. Law enforcement agents also use legality claims in drawing on the apparent neutrality and authority of the law to curb the actions of humanitarian activists as they seek to expand their own capacity to perform humanitarian work.

This exploration of the uses of law in the context of unauthorized migrants and humanitarianism sheds light on several questions. First, the study shifts the conventional analytic focus on policy’s production of migrant illegality to those who advocate on migrants’ behalf. The study asks: How does the “illegality” of the beneficiary population shape and constrain the work of advocates? Sociological treatments of law and illegality in the area of immigration have tended to focus on immigrants rather than on the citizens who advocate for them (Bosniak 2000; Calavita 1998; Dauvergne 2008; De Genova 2005; Nevins 2002; Ngai 2006). Yet advocacy on behalf of migrants who enter the country clandestinely presents an interesting dilemma. How do advocates advance the interests of a stigmatized and targeted group while themselves avoiding scrutiny and arrest?² How do they negotiate the boundary of illegality that surrounds the unauthorized population? How do advocates for “illegal” migrants use the law to justify and carry out their work? Examining these questions can provide a unique lens into the uses of law “as discourse, process, practice, and system of domination and resistance” (Hirsch & Lazarus-Black 1994: 4).

I explore these issues by means of a case study of three grass-roots humanitarian aid groups that emerged in southern Arizona between 2000 and 2003: Humane Borders, Samaritans, and No More Deaths. The next section situates this case study within the literatures on immigration, legal mobilization, and humanitarianism. It is followed by a discussion of the research methods I employ and a brief description of the case study’s backdrop of border enforcement and migrant deaths. I then move to the case study itself, with a focus on two instances of prosecution of humanitarian aid: the first for transporting and the second for littering. From the case study I turn to an analysis that explores the uses of legality claims in the contentious exchanges between activists and law enforcement agents. I conclude with a discussion of the implications of this study for our understanding of the ways in which law

² I use the terms “advocate” and “activist” throughout this article to refer to volunteers with the humanitarian aid groups I study.

and legality claims may be wielded in other instances of activism in “illegal” domains and legally ambiguous settings.

Migrant “Illegality” and Humanitarian Advocacy: Engaging and Reshaping Law

The immigration literature has devoted considerable attention to the production of migrant “illegality” and to criminalization of immigrants as a consequence of immigration policy (Calavita 2005; De Genova 2005; Nevins 2002; Ngai 2006; Suárez-Navaz 2004). Pro-migrant groups comprised largely of citizens who advocate on behalf of “illegal” migrants have received less attention. Instead, the literature has concentrated on movements for immigrant rights led by immigrants themselves (Bada et al. 2006), on campaigns for immigrant access to services (Fujiwara 2008), and on structures and processes for political and social incorporation where questions of immigration status are largely settled (Ramakrishnan & Bloemraad 2008). Even where research focuses on groups that work on behalf of unauthorized migrants, questions of how they contend with issues of illegality and legality remain largely unexamined (Basok 2009; Hondagneu-Sotelo 2008; Milkman 2006). Many such studies tend to focus instead on the groups’ use of religion and morality to forge identities and make sense of their actions (Cunningham 1995; Hondagneu-Sotelo 2007, 2008; Menjívar 2007).

Yet migrant “illegality” presents a dilemma for advocates and an analytical challenge for scholars of grassroots activism and law. Because these advocates work with targeted populations, they are likely to become targets of law enforcement themselves. They must render assistance to beneficiaries of their advocacy while protecting them, and themselves, from arrests or other enforcement actions. Examining how advocates for “illegal” migrants carry out their work within these constraints can yield important insights into how law is eluded, negotiated, and even affirmed.

The relationship between social reform activism and law has been explored by a number of scholars in both socio-legal and social movement studies (McCann 2006). While some socio-legal scholars have argued that engaging with the law can have negative effects on activist groups, including co-optation, others note that legal strategies can effectively advance the rights claims of groups and supplement “power-oriented strategies” that take place outside the courtroom (Polletta 2000). Groups may also mobilize law as a set of legal discourses and practices that play a constitutive role in the contestation and reshaping of social relations and power. In legal mobilization theory, scholars adopt an “interpretive, process-oriented” approach that conceptualizes law in more expansive

terms and “decenters analysis of law in ways that deemphasize the state itself” (McCann 2006: xi–xiii, 248). While law is seen as generally “more limiting than liberating,” the legal mobilization approach also sees law as a strategic resource for social struggle and asks “how, when, and to what degree . . . legal practices can be both [a resource and a constraint] at the same time” (McCann 2006: 249).

The dual uses of law as both a tool of dominant groups and a resource for repressed groups emerge especially clearly in studies of social movements under authoritarian regimes. Rural Chinese engaged in “rightful resistance” in adopting an “innovative use of law, policies, and other officially promoted values” to attract influential advocates and apply pressure on elites who failed to live up to established values or a professed ideal (O’Brien 1996:32; O’Brien & Li 2006). Guatemalan trade unionists took pains to behave “legally” even when state forces murdered union members (Levenson-Estrada 1994: 122). Rural trade unionists pursued a legal strategy in Brazil in order to avoid “excessive provocation” of rural elites and authorities, becoming “champions of the law, pushing for enforcement of legislation on the books in order to protect their rights” (Maybury-Lewis 1994: 73). In my earlier work on the Mexican teachers’ movement in the 1980s, I found that dissident teachers sought formal, legal agreements with the union leadership and the government even when these went unenforced (Cook 1996).

These studies suggest that law may hold an appeal for grassroots groups even as authorities manipulate the law against them. This points to a form of “legal consciousness” that is mistrustful of the law, yet cognizant of its power to legitimize and protect. As Silbey and Ewick (2000) showed, individuals can regard the law as a powerful source of legitimacy at the same time that they seek to reframe, redefine, and manipulate law. Even where the law is silent or unclear, groups may engage in their own efforts to define what is legal and what is not. Activist groups may do this by framing their actions as legal, whether or not elites see them as such. For instance, Susan Bibler Coutin’s study of the Sanctuary movement showed that Sanctuary members claimed to act in accordance with international refugee conventions, and they also established the community as the legal authority in carrying out determinations regarding refugee status (Coutin 1993; 1994: 283, 289). In these ways, faith-based groups “enacted law” as a form of resistance to U.S. authorities who denied refugee status to Central Americans during the 1980s (Coutin 1994: 300).

In this study the “illegality” of the migrant population drew activists into encounters with law enforcement, but it was activists’ humanitarian work that obliged them to engage the law. Although

humanitarian aid aimed at relief of suffering and saving lives has a well-established basis in international humanitarian law (Leebaw 2007), the legality of humanitarian action remains contested in many national contexts. In particular, a growing number of countries have tried to criminalize humanitarian assistance provided to "illegal" migrants (PICUM 2002; Albahari 2006). At the same time, attempts to prosecute individuals for engaging in humanitarian assistance have been largely unsuccessful (Castañeda 2008; PICUM 2002). Humanitarianism has become contentious, but it remains an elusive target for authorities. Indeed, a humanitarian frame may give activist groups the discursive resources they need to fend off authorities in an otherwise unequal contentious exchange. For instance, humanitarianism may challenge authorities through its ability to shame. As Dauvergne (2005) notes, humanitarianism acts as a mirror: embracing humanitarianism reflects values of generosity and goodness in society's members. But the mirror can also expose an image of ourselves that shames us, prompting us to change our behavior (Dauvergne 2005: 163–4). Humanitarianism's association with political neutrality (Darcy 2004: 8–10; Heins 2008: 18; Leebaw 2007) can also help activists to criticize authorities while avoiding charges of partisanship.³

Yet humanitarian action also draws activists into "constructive engagement" and constant negotiation to gain access to needy populations (Darcy 2004: 11; Slim 1997: 346–7). Because humanitarianism is centrally concerned "with alleviating the symptoms of suffering and tackling their proximate causes" (Darcy 2004: 6–7), humanitarians need to maintain a presence in (usually) hostile environments (Darcy 2004: 9; Leebaw 2007). Since humanitarians rely on authorities for resources, such as funds, permits, and guarantees that they will not be hindered in their work, they must avoid risky behaviors such as speaking out, confrontation, and expressions of partisanship (Leebaw 2007: 225, 228, 233; Slim 1997). In other words, humanitarian action calls for maintaining a difficult balance between advocacy (criticism) and service (Heins 2008: 16).

Contention over humanitarian access extends to who will carry out humanitarian work: government or private actors. States have increasingly intervened in humanitarian crises where they patrol borders and have the technical capacity for intervention. They have also used their provision of search and rescue operations and other forms of humanitarian intervention to displace civilians from border agents' field of operations. By claiming a "monopoly on humanitarianism," governments have justified the targeting and arrest of humanitarian activists (Albahari 2006: 16).

³ I do not enter here into debates about traditional and "new" or rights-based humanitarianism. For more on these debates, see Slim (1997).

Research Methods

The research presented in this article draws on ethnographic fieldwork, including interviews and participant-observation, conducted in southern Arizona during the month of February 2006. I interviewed twenty-eight persons, all in Tucson, Arizona, associated with seven different humanitarian and migrant-advocacy organizations, with the Mexican consulate, and with the U.S. Border Patrol.⁴ I identified the groups and their leaders or most active members from press reports, Web sites, and the indications of others involved in the organizations. The majority of these interviews consisted of semi-structured, face-to-face interviews conducted by me and lasting between one and three hours.⁵

As part of the fieldwork I attended, observed, and participated in a number of meetings and activities. These included regular biweekly meetings of the Samaritans, a Samaritans desert patrol, and a Humane Borders trip to fill water tanks at several stations just outside Tucson. I accompanied members of Humane Borders to the towns of Altar and Sasabe in the state of Sonora, Mexico. These towns were major staging areas for migrants from Mexico and Central America. In March 2007 I returned to Tucson, revisited some of the sites, and spoke to a number of the people I had interviewed during the earlier fieldwork.

In all of the interviews I took detailed handwritten notes, which I entered onto a laptop computer on the same day. For participant-observation activities in which it was not possible to take notes *in situ*, I wrote detailed notes immediately following the activity. I then analyzed the interviews and field notes to discern themes and uncover patterns, similarities, and contrasts among the data. This article focuses on a persistent theme that emerged from the data analysis—the notion of the legality or illegality of humanitarian aid, including how group members situated themselves in relation to the law and how increased enforcement over time shaped the groups' actions and understandings about the legality of their work.

The research also draws on a wide range of site documents and other primary and secondary sources. I collected and reviewed government reports, articles from local and national newspapers,

⁴ The humanitarian and migrant-advocacy organizations include Humane Borders, Samaritans, No More Deaths, Coalición de Derechos Humanos, Border Action Network, BorderLinks, and the American Friends Service Committee. In this article I focus on three volunteer groups: Humane Borders, Samaritans, and No More Deaths.

⁵ I use names of those I interviewed if I received permission to do so and where these individuals were public figures who appeared frequently in the media. In other cases I have identified the position and organization of the interviewee. I use actual names of organizations.

Web pages, memos, meeting minutes, bulletins, and other documents produced by the humanitarian groups. I used these sources to gather information on the broader context in which the case study was situated and to supplement and check data obtained from interviews. These sources also enabled me to track and analyze events that occurred since the initial fieldwork, including the post-2006 arrest incidents analyzed here.

Border Enforcement and Migrant Deaths

The humanitarian aid groups in southern Arizona emerged against the backdrop of an expansion in the U.S. government's enforcement actions along the border and a corresponding increase in migrant border-crossing deaths. In 1994 the U.S. Attorney General announced an enforcement initiative designed to "shut down the traditional corridors for the flow of illegal immigration along the southwest border" (U.S. GAO 2006: 6–7). This strategy called for increasing control of the border through the addition of personnel and technology in order to make border crossings more costly and difficult. As urban areas came under control, migrants would be diverted to more remote areas where they could be detected and apprehended by Border Patrol agents more easily and where the difficult terrain of mountains, rivers, and deserts would act as a deterrent. The result of this initiative, called the Southwest Border Strategy, was a redirection of the migrant flow toward eastern California and the Sonora desert in Arizona, continued crossing attempts, and an increase in border-crossing deaths due to exposure (Cornelius 2001; Cornelius & Lewis 2007; Nevins 2008).

Estimates of the number of migrant deaths⁶ vary, depending on the area covered and the methodology used.⁷ A report by the U.S. Government Accountability Office estimated that the annual number of border-crossing deaths increased from 241 in 1999 to a total of 472 deaths in 2005 for the entire southwest border (U.S. GAO 2006: 4). Since 1999 most of these deaths have occurred in

⁶ Advocates and officials initially referred to "migrant deaths" in reporting annual tallies, but later began to use the more accurate phrase "recovered bodies," since there was no way to know how many people had died nor when they had died until the bodies were found (Rubio-Goldsmith et al. 2006: 19). Some groups later moved to using the term, "human remains," since this was an even more accurate reflection of what was found.

⁷ The *Arizona Daily Star*, a Tucson newspaper, has kept its own count since 2004 and publishes this information online. See <http://regulus.azstarnet.com/borderdeaths/search.php>. Data are drawn from Pima, Santa Cruz, Cochise, and Yuma County medical examiners from 2003–2009.

southern Arizona.⁸ A study conducted at the University of Arizona in 2005–06 reported a tripling in the number of bodies recovered between 1999 and 2005 in a three-county area along the Arizona border (Rubio-Goldsmith et al. 2006).⁹ Arizona advocacy groups claimed that a peak number of 237 “human remains” were recovered in the Tucson sector¹⁰ in fiscal year (FY) 2007 (October 1, 2006–September 30, 2007), compared with 205 in FY2006, 183 in FY2008, and 206 in FY2009. The total number of recovered human remains from 2000–2009 was 1,851 (Coalición de Derechos Humanos 2009).¹¹

The increase in migrant deaths brought the border enforcement strategy of the U.S. Government under greater scrutiny. The government was criticized for pushing migrants toward more dangerous terrain, providing self-serving undercounts of the number of deaths,¹² and failing to undertake effective measures to stem the number of deaths. In 1998 the U.S. Border Patrol initiated the Border Safety Initiative (BSI) as an effort to reduce injuries and prevent deaths of border crossers. The BSI consisted of the establishment of BORSTAR, the Border Patrol Search, Trauma and Rescue unit that specialized in carrying out search and rescue operations. Under continued pressure in the 2000s, the U.S. Border Patrol increased its search and rescue missions, instituted patrol flights to search for migrants in distress, set up emergency towers with distress-signal beacons, and developed an information campaign warning migrants of the dangers of crossing (Nevins 2003). Through these efforts, the Border Patrol claimed that it was limiting the number of deaths at the border, a claim contested by advocates and the U.S. General Accountability Office (Jimenez

⁸ The U.S. GAO analyzed data from the Border Safety Initiative, the National Center for Health Statistics, and from state vital registries for the southwest border between 1985 and 2005 (U.S. GAO 2006).

⁹ The University of Arizona study analyzed unauthorized border-crosser deaths examined by the Pima County Medical Examiner’s Office from 1990–2005 (Rubio-Goldsmith et al. 2006).

¹⁰ The Tucson sector refers to a U.S. Border Patrol jurisdiction and includes Pima, Santa Cruz, and Cochise counties. The Tucson sector is the busiest in the southwest and covers 262 miles of the Arizona border with Mexico from Yuma County to the Arizona–New Mexico border.

¹¹ The Coalición de Derechos Humanos draws on data from county medical examiners and consular offices for Mexico, Guatemala, El Salvador, Honduras, and Brazil in providing its counts for comparison to official government data.

¹² The Border Patrol count excluded skeletal remains, those who die while in custody of the Border Patrol or of “natural causes,” and deaths of suspected smugglers (Rubio-Goldsmith et al. 2006: 13). The U.S. Border Patrol Border Safety Initiative (BSI) defined a BSI-related death as “a death involving an undocumented migrant in furtherance of illegal entry within the BSI target zone, or deaths occurring outside the target zone when the Border Patrol was directly involved” (U.S. GAO 2006: 11).

2009: 32–6; Rubio-Goldsmith et al. 2006: 34–5; U.S. GAO 2006: 10, 29–30).

Resources destined for enforcement at the border grew throughout the 2000s but expanded especially rapidly after the U.S. Department of Homeland Security (DHS) announced the Secure Border Initiative in 2005, a multi-year, multi-billion dollar program aimed at securing U.S. borders and reducing illegal immigration (U.S. GAO 2009b). The number of Border Patrol agents deployed at the U.S.–Mexico border grew to 15,828 by the end of 2008, a 43 percent increase over that of 2006 (U.S. GAO 2009a). In the year 2006, 6,000 National Guard troops were posted at the border to assist the Border Patrol. DHS began to build a wall along 700 miles of the border and invested in the construction of a high-technology “virtual wall” consisting of mobile observation towers, motion detectors, night-vision cameras, and remote video equipment (Andreas 2009: 156–8). In addition, a civilian vigilante group calling itself the “Minuteman Project” drew national attention when it formed in 2005 and mobilized individuals to patrol the border.

The escalated enforcement pushed migrants to cross at more remote points and, despite a decline in apprehensions in 2008–09, ultimately increased the proportion of migrant crossings resulting in death (Rotstein 2009). According to the *Arizona Daily Star*, the risk of death in 2009 more than doubled relative to 2004, calling into question the Border Patrol’s claim that more border security would ensure greater safety for border crossers (McCombs 2009).¹³ The Border Patrol, meanwhile, pointed to the greater number of rescues it carried out—586 individuals in 2009, up from 443 the year before—as evidence that its surveillance helped to prevent rather than cause migrant deaths (McCombs 2009).

“Humanitarian Aid Is Never a Crime”: Humanitarian Activism in Southern Arizona

Between 2000 and 2003 three main groups of volunteers formed in southern Arizona to address the growing humanitarian crisis of border-crossing deaths. Humane Borders was started in 2000 when several individuals, many linked to Tucson churches, gathered to pose the question, “How can we respond with compassion to the migrants who are risking their lives in the desert?” Their answer was to put water in the desert. The group began by placing

¹³ The number of recovered remains per 100,000 Border Patrol apprehensions per fiscal year increased from 38.8 in 2004 to 88.2 in 2009 (McCombs 2009).

water jugs along migrant pathways. Eventually Humane Borders secured permissions from federal, state, and local authorities and private landowners to establish and maintain water tanks on their property and organized dozens of volunteers to drive water trucks to fill the tanks on a weekly basis.

The following year the Samaritans group was formed in order to establish a more active presence in the desert.¹⁴ It set up volunteer patrols to search for migrants in need of water, food, or medical care. No More Deaths was then created in 2003 in order to staff desert camps during the hottest and deadliest summer months and to coordinate volunteers from around the country. No More Deaths began as an umbrella organization encompassing a number of Arizona migrant rights groups. It was to function as a more flexible, creative, and dynamic vehicle that could respond to the needs of the moment.

Higher-Law Claims

Humane Borders, Samaritans, and No More Deaths were faith-based organizations. While the groups did not exclude volunteers on the basis of their religious beliefs (or lack of them), religion provided cultural, symbolic, and material resources and moral justification for the direct action the groups embraced (Hondagneu-Sotelo 2008: 19–21; Menjívar 2007). By placing water in the desert and tending to those who were injured or ill, group members were engaged in saving lives, and were therefore following “God’s law.”

Veteran activists and leaders underscored the importance of faith in securing individuals’ commitment to direct action. Reverend John Fife of Samaritans and No More Deaths stressed that faith-based organizations were better equipped to sustain a movement because of a more stable commitment from members as compared with secular groups, such as universities and labor unions. He also indicated that it was harder for opponents to discredit and criminalize faith-based organizations.¹⁵ Reverend Robin Hoover, President of Humane Borders, claimed that faith-based organizations had more staying power, along with practical advantages, such as a ready membership and financial support base through a network of other faith organizations and churches.¹⁶ Hoover noted that members were more likely to draw upon moral appeals than on rights discourse. “Rights talk” was sterile in terms

¹⁴ Interview with Rev. John Fife, Tucson, Arizona, 13 Feb. 2006.

¹⁵ Fife, interview.

¹⁶ Interview with Rev. Robin Hoover, Tucson, Arizona, 6 Feb. 2006.

of mobilizing people to act, he argued, “It’s one thing for you to do something because it feels right; it’s another to do it because God tells you to.”¹⁷

The groups also drew on secular sources to promote the notion that humanitarian aid was above the law. Because their humanitarian work was directed at saving lives, it complied with international human rights laws and conventions; it was legal by definition. Activists argued that the United States, although a signatory to the Universal Declaration of Human Rights and other international conventions, was in violation of its commitments because its policies were responsible for the deaths of border crossers. The groups based this claim on the assessment that migrant deaths were caused by the U.S. Government’s deliberate and “morally and legally abhorrent” policy of deterrence by funneling migrants through more difficult terrain.¹⁸

Legality Claims and the Humanitarian Imperative

In addition to drawing upon morality and international law, humanitarian groups typically appeal to authorities for access to populations they wish to aid. The “humanitarian imperative” (Darcy 2004; Slim 1997) to relieve suffering poses a clear tension, since a group may need to seek permission from the very authorities whose actions cause a population’s suffering. This can mean that humanitarians must engage in frequently contentious interactions with authorities.

In the case of southern Arizona humanitarian groups, these exchanges with authorities invariably entailed making claims about the legality of their efforts. Here the groups differed, with Humane Borders insisting on carrying out its humanitarian work while staying within the law, while Samaritans and No More Deaths saw their work more as questioning and pushing legal boundaries. Despite these differences of interpretation and actions among the groups, the use of legality claims was central to each group’s communications with its own members as well as with officials.

Humane Borders’ claim to legality was defined by what the group needed to do to ensure its fundamental purpose: save migrant lives by putting water out in the desert. To install water tanks on both private and public lands, Humane Borders needed permission to access the land, which in turn required contacts with federal, state, local, and tribal officials through written appeals and phone calls. Humane Borders’ President, Reverend Hoover, used moral

¹⁷ Hoover, interview.

¹⁸ Fife, interview.

arguments and the shaming associated with humanitarian appeals, together with practical arguments about costs, to persuade authorities and private citizens to facilitate the group's work. He presented facts—migrant deaths were increasing annually—arguing that lives could be saved through the simple act of placing water in the desert, and he talked about “taking death out of the immigration equation.” Humane Borders did not question the government's obligation to enforce immigration laws, Hoover said, but the government did not have a right to kill people in the process.

These arguments worked better with some officials than with others. The Pima County Board of Supervisors voted to grant \$25,000 to Humane Borders to assist in its work on the argument that saving lives would save the county some of the \$300,000 annually it cost to pick up, identify, autopsy, store, and bury bodies found in the desert (Enriquez 2006). On the other hand, the Tohono O'odham nation refused water stations on its territory. This was significant since the Tohono nation, the size of the State of Connecticut, occupied a large stretch of the border and migrants crossed and died on the reservation in growing numbers. In May 2001, 14 migrants were found dead in the Cabeza Prieta National Wildlife Refuge in what was, up to that point, the largest number of migrant deaths along the border (Urrea 2004). Two months earlier, the U.S. Fish and Wildlife Service had denied permission for water stations in the area, claiming concern about the effects on the pronghorn, a native hooved animal that was reintroduced to southeastern Arizona. After the tragedy, the U.S. Fish and Wildlife Service sought out Humane Borders and granted permission to install the tanks (Trent 2001).

Humane Borders saw cooperation with the Border Patrol as especially important for its mission. Without it, and without permission to install and service the water stations on federal lands, water could not be spread through the desert. Yet this cooperation did not come easily. In an initial meeting, the U.S. Border Patrol Chief for the Tucson sector had warned Hoover that Humane Borders was skirting the edge of the law. Pushing back with a moral argument, Hoover eventually gained agreement from the Border Patrol Chief that agents would not patrol the water stations.¹⁹ Operating under this understanding, Humane Borders was able to install and maintain more than 70 water stations throughout the desert between 2001 and 2005.

For Hoover, staying “within the law” provided Humane Borders with the legitimacy and protection necessary to carry out its work. When a campaign was initiated to support two No More Deaths volunteers who were arrested for transporting sick

¹⁹ Hoover, interview.

migrants, Hoover did not join in, saying he would not support breaking the law to make a point. He saw a clear distinction between the humanitarian groups: both Samaritans/No More Deaths and Humane Borders volunteers transported migrants to hospitals in cases of medical emergency, but where Humane Borders volunteers would first contact Border Patrol, Samaritans would not. In Hoover's view, this distinction is what kept Humane Borders activities legal, whereas Samaritans crossed the line.²⁰

Although Samaritans, too, were concerned with acting within the law, the nature of their work pushed the group more into a legal grey area. A key component of Samaritans' work was medical assistance, which could range from treatment of blisters to a medical evacuation to a clinic or the hospital emergency room. It was this and the regular, proactive search for migrants that distinguished the group's activities from those of Humane Borders. For these reasons, Samaritans were committed to protecting members from arrest while pushing as far as possible the boundaries of humanitarian work. They did this by establishing a protocol to be followed by all volunteers.

The Samaritans' protocol initially set out the following procedures: volunteers would drive to known migrant pathways and walk into the desert calling to migrants in Spanish to let them know that food, water, and first aid were available. When they encountered migrants, they would do a medical evaluation and assess whether the migrants needed to be transported to a place where they could receive a greater level of care.²¹ On the basis of a medical assessment, the migrant(s) would be driven to a hospital, left where they were, or removed to another safe area to recover from blisters or dehydration. The protocol stopped well short of advocating that volunteers call the Border Patrol, which Samaritans saw as hastening migrants' apprehension and deportation. To be associated with this would undermine their humanitarian mission by making it impossible for migrants to trust the volunteers.

All volunteers had to agree to follow the protocol, but in assessing medical need, discretion was also clearly involved. Did the migrant need to be taken to hospital? Did she require removal from the desert (because of severe blisters or moderate dehydration), but not a trip to the emergency room? Even seemingly mild symptoms like blisters could become life threatening if they impaired mobility in the desert, hence the rationale for moving people to safe places

²⁰ Hoover, interview.

²¹ Samaritans volunteers received a four-hour training course and most Samaritans patrols tried to include someone with medical expertise—a nurse or doctor. In cases where a medical person could not be present, one would be available for a phone evaluation.

to rest.²² But if volunteers moved migrants for this purpose, or even if they drove migrants to medical care at a clinic or hospital, were they breaking the law? Was moving someone allowed only in cases of medical emergency, but not in order to rest? How was one to define medical emergency under these conditions?

The ambiguity of defining medical need in these circumstances was paralleled by the ambiguity in the interpretations of the law regarding transporting of illegal immigrants. The U.S. Immigration and Nationality Act (1965) prohibits individuals from transporting illegal immigrants in the United States. Under the law, it is an offense for any person who “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 . . .”.²³ However, U.S. appellate courts have adopted different approaches to this issue, turning on the interpretation of “in furtherance of,” among other matters.²⁴ Ultimately, these different approaches rendered unclear whether transporting an illegal migrant to a hospital for an injury or illness violated the law (Herrling 2007).

Samaritans believed that their protocols on medical evacuations had been understood and accepted by the Border Patrol Chief (Vanderpool 2005). At the same time, they understood that they were “pushing the envelope” with medical evacuations.²⁵ Evacuating migrants meant that Samaritans were “transporting aliens,” which was technically against the law. Recognition of this was evident in the Samaritans’ protocol, which requires consultation with medical and legal personnel in the event of a medical evacuation. Yet by proceeding *as if* medical need proved an exception to the law, Samaritans were able to get the Border Patrol to accept the legitimacy of their humanitarian aid in practice. Samaritans saw this as a deliberate effort to expand the boundaries of permissible behavior to save migrants’ lives.

Samaritans had a term for this testing of legal boundaries. They saw themselves as engaged in “civil initiative,” a concept that descended directly from one of the founders of the 1980s Sanctuary movement in Tucson, Jim Corbett (Coutin 1993:108–11;

²² Interview with Dr. Norma Price, Samaritans, Tucson, Arizona, 14 Feb. 2006.

²³ INA Section 274(a)(1)(A)(ii); 8 U.S.C. Section 1324(a)(1)(A)(ii).

²⁴ In *U.S. v. Moreno* (1977) the Ninth Circuit noted that “the mere transportation of a person known to be such an alien is not sufficient to constitute a violation” of the law; and also that “based upon purely humanitarian concern, the transportation of a known undocumented alien to a hospital following an injury or illness does not appear to come within the purview” of the law.

²⁵ Several people I interviewed used this phrase.

Cunningham 1995).²⁶ In Corbett's words, "civil initiative is the exercise by individuals or their communities of their *legally established duty* to protect the victims of government officials' violations of fundamental rights" (Otter & Pine 2004: 385).²⁷ Civil initiative was not the same as civil disobedience, which involved breaking the law to achieve justice. Civil initiative entailed acting in ways that pushed the government to fulfill its legal and human rights commitments. The concept of civil initiative relied on a higher-law claim of legality: Sanctuary members acted legally because they acted in compliance with international law, even when their government did not (Coutin 1993). Similarly, Samaritans in the 2000s used civil initiative to make a legality claim based on international human rights principles. According to a founding member of the group, civil initiative helped Samaritans "make sense" of what they were engaged in and allowed them to "push the grey space."²⁸

Humanitarian Aid as Illegal Act: Transporting "Illegal Aliens"

Humanitarian groups initially claimed to have a gentlemen's agreement with the Tucson Sector Border Patrol Chief. The groups were tolerated and on occasion even contacted by Border Patrol agents in the field. The first indication of a more restrictive environment coincided with the arrival of a new Border Patrol Acting Chief in July 2004. The new Acting Chief claimed in a first meeting with humanitarian groups that he wanted to "draw a bright line in the desert" between what was and was not legal (Vanderpool 2005). Activists responded that there was no such thing as a bright line in the desert.²⁹ From that point on, group members noted a change in the behavior of Border Patrol agents. Samaritans were not allowed as readily as before to give food and water to migrants in custody of the Border Patrol as they waited on roadsides or in their vehicles. Border Patrol agents were also seen near water stations, and No More Deaths volunteers noted that agents watched their camps, forcing them to do their medical assessments out in the field rather than bring migrants to the camps.³⁰

²⁶ In the 1980s, Sanctuary activists argued that the U.S. Government's policies in Central America drove the region's population to flee across borders. In their view, U.S. citizens were obligated to aid the victims of U.S. policy when the U.S. Government failed to comply with its international obligations under the UN Refugee Convention and 1980 Refugee Act by refusing to recognize these people as refugees (Coutin 1993; Crittenden 1988; Cunningham 1995; García 2006).

²⁷ Emphasis in the quote is mine.

²⁸ Interview, Tucson, Arizona, 10 Feb. 2006.

²⁹ Fife, interview.

³⁰ Fife, interview.

On July 9, 2005, Border Patrol agents arrested two No More Deaths volunteers, Shanti Sellz and Daniel Strauss, both 23 years old. Sellz and Strauss had encountered three migrants on one of their patrols from the No More Deaths camp and, after consultation with an on-call medical person, decided it was best to drive them to a Tucson clinic. A Border Patrol agent apprehended the volunteers with the migrants in the back seat, and charged them with one count each of “transportation in furtherance of an illegal presence in the United States” and “conspiracy to transport in furtherance of an illegal presence in the United States.” These were felony charges that could potentially lead to 15 years in prison. A trial date was set for December 2005.

The humanitarian groups saw the arrests as part of the new Border Patrol Chief’s efforts to curtail their ability to render humanitarian assistance to illegal migrants. They responded with a strategy that combined a public campaign and negotiations with the Border Patrol. Led by the No More Deaths coalition, the groups launched a campaign in support of Sellz and Strauss and in defense of humanitarian action in an effort to “educate the jury pool,” as one of the defense attorneys put it.³¹ The goal was to broaden public support for the idea that humanitarian aid can never be made illegal, making the prosecution of the volunteers politically unpopular. This was done by seeking alliances, especially from churches and the religious community; through publicity, including speaking tours by Sellz and Strauss; and by expanding the pool of individuals in the area who pledged publicly that they would also be willing to risk arrest if they encountered someone in need. The campaign slogan, “Humanitarian Aid Is Never a Crime,” was reproduced on some 30,000 postcards mailed by supporters to the federal District Attorney in Phoenix and on 6,000 yard-signs posted throughout Tucson and southern Arizona.³²

The other part of the strategy was to negotiate an acceptable protocol for humanitarian work in the field, including medical assessments and evacuation. In meetings with the Border Patrol Chief and the U.S. District Attorney that lasted over a period of months, defense lawyers and members of Samaritans/No More Deaths tried to secure an agreement that would allow Samaritans and No More Deaths to continue to do their work. At one point the government indicated that it might drop the charges if the groups would halt their humanitarian work. The groups saw this as an intimidation tactic and tried to protect what they viewed as their right—indeed, their obligation—to continue humanitarian aid.

³¹ Interview with Margo Cowan, Tucson, Arizona, 22 Feb. 2006.

³² Interview with No More Deaths volunteer, Tucson, Arizona, 13 Feb. 2006.

The trial date for the two volunteers was repeatedly postponed, from December 2005 to April, then August, and finally, October 2006. The Border Patrol Chief eventually conceded that volunteers could give aid if they encountered migrants in the desert. Any assistance to migrants in the custody of the Border Patrol would depend on the discretion of the agents at the scene. But the issue of medical evacuations remained controversial. The Chief would not guarantee that volunteers would escape arrest if they were found transporting migrants for medical emergency reasons; they did so at their own risk. He said, "If you are involved in an act that meets all the elements of a criminal act, we're going to take enforcement action" (Vanderpool 2005).

Discussions over protocol continued over the spring and summer 2006 and in the lead-up to the trial. The discussions threw into sharp relief the risks and trade-offs of humanitarian work in what had become a more hostile environment. In meetings among themselves, volunteers wrestled with the choice of either defending the principle of their right to give aid in all situations, or else accepting some constraints in order to continue to assist migrants in most of the cases that would arise. Many people were unwilling to assume the risk of arrest, while others appeared more willing to defy the law in cases of medical emergency. Some were reluctant to call 911 (whose operators often contacted BORSTAR) or the Border Patrol directly because they did not want to be associated with migrants' apprehension. Others claimed that Border Patrol agents, including BORSTAR, were ill-equipped to deal with medical conditions in the field. At one point in spring 2006 a partial resolution left many volunteers dissatisfied: to have each patrol make the decision whether to transport or not, preferably before setting out. Several members expressed feeling tremendous psychological pressure in deciding how to proceed with the Samaritans work in the absence of a clear and accepted protocol.

Finally, on September 1, 2006, U.S. District Judge Raner C. Collins dismissed all charges against the two No More Deaths volunteers. He indicated that further prosecution would violate the defendants' due process rights, and that Sellz and Strauss had made reasonable efforts to ensure that their actions were not in violation of the law (No More Deaths 2006). Because the defendants were operating under a protocol previously approved by the Border Patrol, the court indicated that it was reasonable for them to have relied on the protocol as legal (Herrling 2007: 5).³³ The humanitarian group's efforts to reach an understanding with the

³³ The Court did not review the issue of whether the protocol itself violated the law, but instead dismissed the indictment on the grounds of entrapment by estoppel (see Herrling 2007: 5).

previous Border Patrol Chief on a protocol for humanitarian aid had produced a negotiated legality that was ultimately recognized in the judge's decision to dismiss the charges.

The dismissal of the charges was clearly a victory for humanitarian groups on the border. Humanitarian aid activists had managed to avoid a trial and to build strong local support for their actions, but did not have to sacrifice their ability to render aid in the process. Despite this outcome, it was far from clear that the groups would be able to operate as before; the threat of arrest hung in the air. In an effort to establish some clarity for their members on medical evacuations, the aid groups struggled to fashion a new and more conservative protocol that continued to draw them into exchanges with Border Patrol.

Humanitarian Aid as “Littering”

In our opening story, No More Deaths volunteer Dan Millis found the body of Josseline Hernández Quinteros, a 14-year-old Salvadoran girl. Two days later, agents with the U.S. Fish and Wildlife Service fined Millis for “littering” as he was leaving jugs of water near the spot where Josseline had been found in the 117,000-acre Buenos Aires National Wildlife Refuge southwest of Tucson. Millis, his lawyer, and No More Deaths disputed the charge; the jugs full of water were not discarded, but placed to save lives. Moreover, Millis was collecting trash as he set out the jugs, a task No More Deaths volunteers regularly undertook during their humanitarian work (No More Deaths 2008a). Refuge officials argued that littering on the refuge was illegal, and that migrant-related trash was harmful to the wildlife the refuge was obligated to protect. Millis decided to go to court. In a bench trial, the judge found Millis guilty, but suspended sentence (Innes 2008; No More Deaths 2008b). Millis and his lawyer appealed the decision, the district court affirmed the conviction, and Millis appealed again (Pedersen 2009; Lacey 2010). The Ninth U.S. Circuit Court of Appeals heard the case in March 2010 and later that year ruled to overturn Millis's conviction on the grounds that the definition of “garbage” within the context of the regulation was sufficiently ambiguous as to apply the rule of lenity, favoring the defendant.³⁴

In December 2008 another No More Deaths volunteer, Walt Staton, was cited for littering on the same refuge as he placed water

³⁴ In their opinion the Court noted that the rule of lenity “requires courts to limit the reach of criminal statutes to the clear import of their text and construe any ambiguity against the government.” This ruling left open the possibility of charging future humanitarian activists under other provisions of the statute, such as abandonment of property or failure to secure a special-use permit. See *U.S. v. Millis* (2010).

jugs along migrant trails. A U.S. Border Patrol agent who spotted Staton contacted U.S. Fish and Wildlife officers, who issued the citation. The charge involved "knowingly littering," a Class A misdemeanor, and carried a stiffer penalty of \$10,000 and/or one year in jail. A fellow volunteer likened the littering charge to "ticket[ing] an ambulance for speeding" (Fernandez 2009). The director of the refuge stated that leaving the water jugs was tantamount to leaving trash, "like a McDonald's happy meal in front of your yard, it is trash" (Fernandez 2009).

In response to humanitarian groups' complaints about the citation, the refuge director argued that there were already sufficient sources of water on the refuge, citing three Humane Borders tanks plus a number of spigots and cattle troughs. "There needs to be a valid reason for people to be out here," he added (*Arizona Daily Star* 2009a; Vanderpool 2009a). A statement released by the U.S. Fish and Wildlife Service after Millis's citation read, "*We have implemented measures that help save lives of those in need while also remaining consistent with our conservation mission*" (U.S. Fish and Wildlife Service 2008; emphasis mine). Humanitarian groups noted that the increase in migrant deaths indicated that water sources were insufficient. Moreover, migrant pathways were constantly shifting in response to increases in enforcement. Water stations were fixed, whereas humanitarian groups could track crossing points and respond by placing water where it was more likely to be seen (*Arizona Daily Star* 2009a).

On June 3, 2009, a jury found Staton guilty. Prior to Staton's sentencing, Samaritans and No More Deaths tried in vain to meet in person with the refuge director to discuss terms for humanitarian work on the refuge (Ipsen 2009). On July 9, 2009, the fourth anniversary of the arrests of Sellz and Strauss, ten agents from the U.S. Fish and Wildlife Service, Bureau of Land Management, Department of the Interior, and U.S. Forest Service cited thirteen members of No More Deaths and Samaritans for littering as they placed water jugs in the refuge in a deliberate challenge to agents' targeting of humanitarian activists. U.S. Border Patrol agents immediately removed the water (No More Deaths 2009a).

News of the clash between humanitarian aid groups and U.S. Fish and Wildlife agents reached Interior Secretary Ken Salazar, who asked to meet with the groups. According to humanitarian group representatives present at the meeting with the Secretary and his staff on July 21, 2009, Salazar expressed sympathy with the aims of the humanitarian groups, but insisted that they must work within the law; he referred to the permit system in place for access to wildlife areas (Martinez 2009; Vanderpool 2009b). Humanitarians asked Salazar to issue a directive indicating that humanitarian action was compatible with wildlife conservation (Martinez 2009).

Upon their return, humanitarian groups considered the trade-offs of applying for special-use permits. They feared that they would get drawn into the bureaucratic process of applying for permits and that permit applications would be denied (Humane Borders 2009; Martinez 2009; No More Deaths 2009a). In an August 5 meeting with humanitarians, refuge officials presented a map indicating the location of water sources on the refuge, and again declared these to be sufficient (Samaritans 2009). Meanwhile, humanitarian groups presented to the U.S. Fish and Wildlife Service and the Department of the Interior a Memorandum of Understanding, in which they pledged to pick up trash and report on their efforts in exchange for being allowed to give water, food, and aid to migrants on the refuge (No More Deaths 2009b, 2009c). Refuge officials continued to insist that groups apply for permits, that they not supply water that was not fixed in place, and that these containers of water could only be located along trail crossings and main roads (Samaritans 2009).³⁵

The standoff between refuge officials and humanitarian groups eroded the public's perception of both sides. The (Tucson) *Arizona Daily Star* took a readers' poll on the question of whether leaving water jugs on the refuge for humanitarian purposes was littering. Although the newspaper cautioned that the poll was unscientific, 66 percent of those who weighed in said that volunteers who leave water jugs are littering (*Arizona Daily Star* 2009b). The paper criticized both refuge officials and humanitarians for escalating the conflict, and accused No More Deaths of "coming off as a bunch of activists who refuse to follow the law" (*Arizona Daily Star* 2009a).

In its sentencing recommendation to the judge in Staton's case, the prosecution argued that Staton and No More Deaths were undeterred by the guilty finding in the earlier littering case of Dan Millis. According to the sentencing memo, a greater punishment in Staton's case would serve as an example to those contemplating further actions. The memo also stated that Staton's real motive was to criticize U.S. policy and to encourage migrants to continue on their journey: "The defendant left full, plastic water jugs on the Refuge *with the intent to aid illegal immigrant traffic*" (United States Attorney 2009: 4; emphasis mine). It continued, "If the defendant truly wanted to prevent the loss of life on the Refuge, he had many other alternatives other than to leave water. However, his actions are not about humanitarian efforts, but about protesting the immigration policies of the United States, and aiding those that enter

³⁵ The U.S. Fish and Wildlife Service eventually determined that only large, stationary containers of water would be permitted on the Buenos Aires National Wildlife Refuge (U.S. Fish and Wildlife Service (2010).

illegally into the United States” (United States Attorney 2009: 6). In other words, the prosecution framed Staton’s actions as civil disobedience and not life-saving aid.

On August 11, 2009, Walt Staton was sentenced to one year of unsupervised probation and 300 hours of community service to be performed by picking up trash. He was also prohibited from entering the Buenos Aires National Wildlife Refuge for a period of one year. Staton initially refused to comply with his sentence because his decision to place sealed jugs of water along migrant trails was an attempt to “uphold international human rights law, specifically the right to life” (Weisberg 2009). Upon the threat of possible imprisonment, Staton agreed to comply with 300 hours of community service.

Although Staton’s sentence was far more lenient than what the prosecution called for, it remained the most stringent punishment to date for humanitarian work on the Arizona border. In other incidents, one Samaritans volunteer was arrested in January 2008 by a Bureau of Land Management agent for “acting mysteriously” and “creating a nuisance” as she sat in her car by the road; charges were later dropped (Vanderpool 2008). In August 2008 two-dozen Border Patrol agents, some on horseback, raided a No More Deaths camp looking for migrants (Vanderpool 2009b). Three other No More Deaths volunteers were cited for littering at the same time as Staton in December 2008, but charges were later dropped. Charges were eventually dismissed for the thirteen volunteers cited in July 2009 for placing water in the Buenos Aires National Wildlife Refuge (Quinn 2010). In August 2009, two men, one a Franciscan priest, were arrested during a prayer vigil at a communications tower in southern Arizona; charges were dropped (Cohen-Joppa 2009; No More Deaths 2004). Reverend Fife reflected on the string of arrests and encounters with government agents: “There’s been a whole series of attempts to roll back humanitarian aid and intimidate aid workers” (Lydersen 2009).

Legality Claims and Legal Ambiguity

These instances of law enforcement encounters with humanitarian activists illustrate the ways in which both grassroots activists and enforcers of the law used legality claims to advance their goals. Each side—government and humanitarian activists—used a legal discourse in the course of their contentious exchanges over what to do about migrant deaths. Humanitarian activists appealed to the notion of a higher law in justifying their work on behalf of unauthorized migrants. This appeal to higher law was based on both religious (moral) authority and secular grounds. In both instances activists claimed a sort of humanitarian exception to national laws:

humanitarian aid could never be in violation of the law because its aim was to protect human life. In the first case, faith and morality provided powerful justification for actions that may have violated laws on the ground. “God’s law”—to prevent the death or suffering of fellow human beings—trumped any law that forbade such actions. In the second instance, the secular grounds for claiming a humanitarian exception involved references to international law and human rights. In this framing of legality, activists argued that the U.S. government violated international human rights law by enforcing policies that led to migrant deaths, and that citizens were therefore justified in taking action.

Appeals to a higher law, however, did not ensure protection from arrest. The risk of arrest imposed a cost on the groups in terms of the potential erosion of public support and of the groups’ volunteer base. Hence, in addition to their higher-law appeals, humanitarian activists invoked a more grounded legality that enabled them to pay practical attention to their mission and to the protection of their members. Activists claimed that their actions were above the law, but they also strove to operate within legal boundaries, even as they understood these as something to be negotiated and preferably expanded in their encounters with authorities, rather than as something fixed. Their exchanges with authorities entailed both a search for assurances that humanitarian work was legal and efforts to expand the space of permitted behavior. What was legal was contested, and it shifted as both parties used, negotiated, and subverted the law to advance their interests.

Humanitarian activists used humanitarianism to challenge the law and the legal boundaries authorities set. By arguing that they were simply trying to prevent migrant deaths, humanitarian activists on the border both invited others to support their generous, virtuous, and moral actions, *and* they held up a mirror to the government, whose policies (they argued) created the situation in the first place, and whose efforts to curb humanitarian action exposed a government indifferent to human suffering. In these ways, humanitarianism was both shield and weapon: activists defended their right (and obligation) to give aid, and they challenged official policy by highlighting its lethal effects and by establishing activists’ presence at the border, a zone of intensive surveillance.

Humanitarianism was also a target. Officials attempted to control and manage the behavior of humanitarian activists by selectively enabling or blocking groups’ ability to carry out specific activities, such as putting out water or giving medical aid. The arrests in the case of transporting migrants and the citations in the littering cases represented an escalation of enforcement from tolerance to targeting humanitarian assistance. In these instances, officials re-defined specific actions of humanitarian volunteers as

illegal by choosing to enforce laws and regulations in cases where these actions had once been tolerated. In resorting to these tactics, officials used the law to evade the humanitarian weapon of shame and to deflect the critique that government policies bear responsibility for migrant deaths.

Authorities also responded to the shaming function of humanitarianism by expanding their ability to rescue migrants in distress. Humanitarian groups' publicity of migrant deaths pushed the government to assume greater accountability for migrants' lives at the border. Expansion into activities such as search and rescue would show that the Border Patrol was capable of both enforcing laws and acting humanely toward migrants. It also allowed the government to shift the responsibility for migrant deaths onto smugglers, whom it then claimed to combat (Nevins 2003). This freed authorities to target humanitarian action by civilians by claiming that federal agents could more effectively carry out the mission of saving lives. These strategies were complementary: the government simultaneously narrowed the space for private actors to engage in humanitarian work and expanded its own claims to do so.

For each side, pursuing these strategies to their extreme—humanitarians through civil disobedience and government through arrests—carried risks and costs. Civil disobedience invites arrest to make a point and has been used to powerful effect by grassroots activists. Once humanitarians crossed over into civil disobedience, however—once they were seen to be acting in open defiance of the law in an effort to challenge the laws themselves—they risked a loss of support. As the *Arizona Daily Star* (2009a) editorial noted, they became “a bunch of activists.” The government had also argued in the Staton case that the defendant's actions were not about humanitarian efforts, but about protesting immigration policies. Humanitarianism was redefined from an apolitical to a political act, thus one less deserving of support.

For activists bound by the humanitarian imperative to assist migrants, arrests carried a cost in terms of time and money, public support, volunteer adhesion, and most important, the ability to carry out the work. But prosecuting activists carried a risk for government as well. Such cases could be difficult to prosecute—judges and juries might be sympathetic to the activist's intent to save lives—and entailed legal risk and financial cost. Moreover, arresting humanitarian activists could harm the government's public image and erode support for the laws and policies it was trying to enforce. In the arrest of No More Deaths volunteers for transporting migrants, the government did not succeed in bringing the case to trial or in getting humanitarians to desist from their work. The Millis case signaled a defeat for the government, despite the fact that the decision to overturn the conviction was based on

narrow grounds and would have allowed future prosecutions for the same actions. Where the government succeeded in prosecuting Staton for littering, officials still felt pressed to respond to charges that they were insensitive to the deaths of migrants in the refuge. Secretary Salazar reached out to the humanitarian groups, if only to channel them toward the legal permit process.

Most of the time, activists and law enforcement agents operated in a middle range without resorting to the two extremes of civil disobedience and arrest. Humanitarians wanted to pursue their work, and law enforcement agents wanted to limit the presence of activists and defuse their critique of government policy. Each side used legality claims for separate political ends while claiming to avoid politics: activists by appealing to the morality and political neutrality of humanitarianism, and enforcement agents by invoking the technical neutrality and authority of the law. Both sides constituted legality through their exercise of power: law enforcement via its power to enforce and arrest; activists through their power to mobilize, shame, and resist government efforts to unilaterally define permissible behavior.

This mobilization of law by both parties occurred in a legally ambiguous setting, where the illegality or legality of actions performed in the name of humanitarianism remained unsettled. Both activists and authorities relied on this ambiguity. Activists cited the humanitarian nature of their work in denying that they were breaking the law, yet they also sought agreements with authorities in order to provide aid. Authorities denied that activists' actions were humanitarian in order to make arrests, yet they also acknowledged migrants' need for life-saving assistance and often themselves assumed the role of aid giver. In denying the humanitarian impulse behind activists' work, the government also sought to obscure its responsibility in the deaths of migrants. Authorities asserted legal clarity where there was ambiguity; activists enhanced legal ambiguity while seeking the law's protection.

Conclusion

This study analyzes an important case of grassroots activism around illegal migration to explore the ways in which activists and authorities use law and legality claims to advance their goals. Activists became targets of law enforcement through their work on behalf of unauthorized migrants, but they drew upon legal discourses and engaged in practices that enabled them to continue to provide water and aid to migrants in the desert. Humanitarian aid groups framed their actions as legal by appealing to international law (and a higher moral authority), but they also negotiated legality

with authorities by seeking mutual understandings of permitted behavior in order to minimize disruption of their humanitarian work. While the groups' legal engagement—their search for agreements with law enforcement—proved critical in order to carry out humanitarian aid, it also constrained the groups by subjecting their activities to official approval and drawing them into protracted negotiations whose results often limited their work (McCann 2006: 228, 249).

Humanitarian activists were involved in "reshaping law . . . to fit shifting visions of need and circumstance" (McCann 2006: xiii). They evaded the law by justifying their work on higher-law grounds, and they engaged the law through both informal agreements and as defendants in court, thus moving in both the informal and formal spaces of the law. Law enforcement officials also moved between tolerating activists' behavior and forging agreements, to issuing citations and making arrests. They used law as a threat, but they also engaged with activists in less formal settings to negotiate parameters for humanitarian work. Although the role of authorities is typically seen as one of protecting and policing official readings of the law (McCann 2006: xiii), here they also reframed law, either by portraying activists' behavior as illegal or by permitting humanitarian work.

Any attempt to extend the analytic lessons of a single case study is necessarily limited. Yet this analysis may have wider applicability to other groups engaged in work on unauthorized migration as well as to other instances of grassroots activism, especially in illegal domains. This study identifies the challenges that the illegality of a beneficiary population poses for advocates. Advocates struggle with the paradox of making "legal" what is labeled "illegal." I have highlighted some ways in which groups may resolve this paradox: by appealing to alternate sources of law or moral authority in justifying and making sense of their actions; and by negotiating with authorities to seek protection from arrest and access to resources needed to carry out their work. This study also focuses on groups that combine advocacy and service, where advocacy is tempered by the need to provide service at the frontlines—at the point of contact with migrants. Groups that engage in advocacy alone or as a primary part of their work are likely to face different constraints, including those in which law is not a salient factor.

Finally, this study extends our understanding of the uses of law in contentious and legally ambiguous settings. Assertions about legality or illegality (legality claims) may appear at first glance to be efforts to clarify, to draw a line between what is legal and what is not. Yet legality claims can serve instead to obscure, to produce uncertainty, and to render targets elusive. In these ways legality claims can prove especially useful under asymmetrical conditions.

In particular, subordinate groups may use legality claims for protection, but also to reframe debates, go on the offensive, and reduce differences in power, if only temporarily.

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