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-NOTE-

THE ROAD TO LIABILITY IS PAVED WITH HUMANITARIAN INTENTIONS: CRIMINAL LIABILITY FOR HOUSING UNDOCUMENTED PEOPLE UNDER 8 U.S.C. § 1324(A)(1)(A)(III)

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I. INTRODUCTION

On the morning of May 12, 2008 in Postville, Iowa, Father Ouderkirk of St. Bridget's Roman Catholic Church got a simple, desperate message: "We need to see a collar here."[1] Immigration authorities had raided a local processing plant and arrested 400 undocumented workers, many of whom were long-time members of the community, and of his parish.[2] Within minutes of the raid, families who feared for their future, primarily Mexican and Guatemalan descent, came to St. Bridget's to find solace.[3] By evening, hundreds of families, some members of the church and some unaffiliated, "occupied every pew, every aisle, every folding chair, every

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[1] Samuel Freedman, *Immigrants Find Solace after Storm Of Arrests*, N.Y. TIMES, July 12, 2008 at A9.

[2] *Id.*

[3] *Id.*

inch of floor" of the church.[4] As the threat of immediate detention lessened, the families left the sanctuary, and the parish began the work of mending the broken community through legal and financial assistance to devastated families.[5]

When members of St. Bridget's opened its doors to undocumented members of the community, they were potentially criminally liable for "harboring" illegal aliens[6] under 8 U.S.C. § 1324(a)(1)(A)(iii).[7] The statute imposes penalties on:

> 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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

This provision is one of four crimes outlined in § 1324, the others dealing with bringing in illegal aliens, transporting or moving illegal aliens within the United States, and inducing an alien to come to the United States.[8] If an offense is committed without the expectation of "commercial advantage or private financial gain" the penalty is a fine and maximum term of imprisonment of five years for each alien in question.[9]

At first blush, St. Bridget's members' conduct does not seem to fall within the scope of the statute. They had no intention of "shielding" or "concealing" the undocumented persons from detection, and "harbor" seems inextricably linked to these concepts. Nevertheless, courts have interpreted the statute broadly, finding that harboring does not connote "concealment" and is broad enough to cover any conduct "tending substantially to facilitate" an alien's unlawful

[4] *Id.*
[5] *Id.*
[6] This note will refer to undocumented or unauthorized immigrants as "illegal aliens" periodically for the sake of consistency with the statute. However, the term "illegal alien" is increasingly regarded as offensive. Elie Wiesel, writer, Holocaust survivor, and Nobel Peace Prize winner has famously stated, "You who are so-called illegal aliens must know that no human being is 'illegal'. That is a contradiction in terms. Human beings can be beautiful or more beautiful, they can be fat or skinny, they can be right or wrong, but illegal? How can a human being be illegal?" *See also* Lawrence Downes, *What Part of 'Illegal' Don't You Understand?*, N.Y. TIMES, Oct. 28, 2007 at 11.
[7] The provision is also codified in the Immigration and Nationality Act. *See* I.N.A § 274(a)(1)(A)(iii).
[8] 8 U.S.C. § 1324 (a)(1)(A)(i)-(iv).
[9] 8 U.S.C. §1324 (a)(1)(B)(ii). If the violation is done for commercial gain or profit, the maximum imprisonment is 10 years.

presence in the United States.[10] The Fifth and Sixth Circuits limit the "substantially facilitates" test to instances where the defendant intentionally obstructed the alien's discovery or apprehension by law enforcement officials.[11] However, in other circuits, harboring essentially means mere housing, and humanitarian or religious motivations are no defense to liability.[12]

The harboring provision is of concern for the many churches, like St. Bridget's, who find themselves in an unintentional relationship with immigration law.[13] It is also of direct importance to members of the formal New Sanctuary Movement who intentionally shoulder the burden of aiding immigrant families.[14] This note argues that the broad interpretations of the harboring provision represent a significant deviance from Congressional intent in designing the provision. Congress was specifically wary of creating criminal liability for humanitarian acts.[15] In light of the legacy of the sanctuary movement in this country, as well as the present-day realities and complexities of unauthorized immigration, the incorrectly broad interpretation of the harboring provision must be confronted by both correct judicial interpretation and direct Congressional action. It is imperative for the health of the relationship between the faithful of

[10] U.S. v. Lopez, 521 F.2d 437, 441 (2d Cir.1975).
[11] *See* Susnjar v. U.S., 27 F.2d 223 (6th Cir. 1928); U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981).
[12] U.S. v. Aguilar, 883 F.2d 662 (9th Cir. 1989). There is one specific exception that concerns religious workers in the statute, but does not help church workers in a common sanctuary situation. Under 8 U.S.C. § 1324(a)(1)(C) it is not a violation –

> [F]or a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

[13] Daniel J. Wakin & Julia Preston, *Speaking Up for Immigrants, Pontiff Touches a Flashpoint*, N.Y. TIMES, Apr. 20, 2008 at A1. Pope Benedict, speaking in Washington D.C. encouraged the American Catholic community "to continue to welcome immigrants who join your ranks today, to share their joys and hopes, to support them in their sorrows and trials, and to help them flourish in their new home." During the visit, Pope Benedict expressed concern for the "many immigrant children" that are separated from their parents by the enforcement of United States immigration law.
[14] New Sanctuary Movement Homepage, www.newsanctuarymovement.org (last visited Feb. 10, 2008).
[15] Gregory Loken & Lisa Babino, *Harboring, Sanctuary and the Crime of Charity under Federal Immigration Law*, 28 HARV. C.R.-C.L.L. REV. 119 (1993).

the nation and the government that compassionate acts that are not intentionally obstructive of immigration enforcement are not criminalized.[16]

Part II explores the investigation and prosecution of the sanctuary workers in the 1980s movement to illustrate the disturbing collision between church workers and immigration law, and how § 1324 was applied in that context. Part III discusses the New Sanctuary Movement, founded in 2006, as evidence that a clash between churches and immigration authorities is a contemporary concern. Part IV explores Congressional intent around the harboring provision, and the following section examines how Courts have arrived at varying interpretations of the provision. Next, Part IV discusses policy concerns not present in judicial analysis of the provision, and finally, Part VII discusses proposed legislation and reveals the inadequacy of recent attempts to protect and encourage humanitarian aid to undocumented people.

II. SANCTUARY IN THE 1980S: A CAUTIONARY TALE

The criminal prosecutions of nuns, pastors, and other sanctuary movement workers in the 1980s illuminate the need to avoid legal clashes between church workers and immigration authorities. In the summer of 1980, Salvadorans and Guatemalans fled to the United States bringing stories of violence, murder, and torture plaguing their homelands. Despite their consistent tales of horror, the United States government deported 48,409 Salvadorans between 1980 and 1986, even in the face of mounting documentation of torture and murder upon return to El Salvador.[17] The Tucson Ecumenical Council, comprised of six churches, and the Phoenix Valley Religious Task Force, made up of eleven churches, organized a legal advocacy group designed to assist both Salvadorans and Guatemalans in applying for asylum.[18]

[16] This note does not mean to undermine the importance of religiously motivated civil disobedience movements in the United States for effecting social change. *See* Kathleen Villarruel, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429 (1987). The purpose of civil disobedience is to defy unjust laws to effectuate their change. The problem with the harboring provision is that it criminalizes behavior that is not done with the intent to defy the law, forcing religious actors into civil disobedience who do not desire to act illegally, but merely compassionately.

[17] ANN CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION 361 (Weidenfeld & Nicholson 1988).

[18] Douglas Colbert, *A Symposium on the Sanctuary Movement: The Motion in Limine: Trial Without Jury: A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5 (1986).

However, the efforts to provide protection through legal routes proved futile. The Arizona legal project assisted fourteen hundred people with filing claims for asylum, but not one was granted.[19] It was the unavailability of applying for asylum, and the deadly prospect of return, that compelled roughly fifteen churches around the country to declare themselves sanctuaries for Central Americans affected by the violence.[20] The Tucson Ecumenical Council, led by John Corbett, created a modern-day underground railroad, working with churches in Mexico to assist people in crossing the border and linking them with family once they arrived.[21] One hundred and fifty churches nationwide supported the core sanctuary churches with donations of money, food, and clothing.[22]

As it happened, the railroad was not exactly "underground." Sanctuary workers invited, and encouraged, press coverage of their efforts as a forum to express disgust at the Reagan Administration's policies in Central America. Sanctuary providers were outraged at the United States' interventionist policies, support for brutal regimes, and subsequent categorical denial of asylum for people who barely escaped the regimes alive.[23] The compelling stories of the Central Americans in need garnered public support for the sanctuary movement. The public was particularly roused by a 60 Minutes story featuring Jim Corbett that portrayed his work and the Central Americans in a sympathetic light.[24] Corbett admitted that his network had assisted "a few hundred" Salvadorans in entering the United States illegally.[25] This public defiance of the law stirred immigration authorities, and in December of 1983 the government began its formal investigation into the sanctuary movement.[26] The Immigration and Naturalization Services

[19] *Id.* at 34. The United States foreign policy has always played a significant role in the success of asylum claims. U.S. intervention in El Salvador and Guatemala made asylum essentially unavailable, in stark contrast to natives from countries with which the United States had strained relations. From January 1982 to January 1985, The United States granted 2.6% of Salvadorian asylum applications. The United States granted less than 0.5% of Guatemalan applications (only four applicants out of 862 were granted asylum). In contrast, in 1983, the United States granted 72% of Iranian asylum applications and 62% of Afghani applications.
[20] CRITTENDEN, *supra* note 17.
[21] *Id.*
[22] CRITTENDEN, *supra* note 17, at 100.
[23] Colbert, *supra* note 18.
[24] CRITTENDEN, *supra* note 17, at 103.
[25] CRITTENDEN, *supra* note 17.
[26] CRITTENDEN, *supra* note 17, at 103.

("INS") dubbed their covert investigative plan "Operation Sojourner," and it eventually resulted in the criminal prosecutions of eight sanctuary workers.[27]

There is little doubt that members of the sanctuary movement committed violations of § 1324 when they helped Central Americans cross the United States border. Sanctuary workers themselves touted the illegality of their actions, at times daring the government to intervene.[28] Nevertheless, there are several reasons why this historical episode cannot simply be dismissed as a civil disobedience movement that was justly prosecuted. This chapter in history remains open because it raises a plethora of contemporary concerns about citizens' liability for aiding illegal immigrants. The contours of the clash between the federal government and sanctuary workers illuminate the importance of avoiding laws that require citizens to choose between compassionate impulses and legal behavior.

Particularly because the sanctuary movement was *religiously* motivated humanitarian aid, the investigations of the sanctuary workers raise important concerns about the ability of the federal government to infiltrate church groups in the name of immigration enforcement. The integrity of houses of worship, First Amendment freedoms of religion and speech, and a right to privacy are all called into question by the investigative tactics employed. The INS[29] used former "coyotes," people who had been convicted of human trafficking for profit, to pose as church workers and tape bible studies.[30] While it has been argued that the government took a "restrained position" by not sending INS agents into churches to arrest aliens and citizens

[27] There were other prosecutions that did not arise from "Operation Sojourner." Stacy Lynn Merkt, a 29-year-old nun and border worker in Texas was arrested. She was stopped at a checkpoint after volunteering for only two and half weeks. *See* U.S. v. Merkt, 794 F.2d 950 (5th Cir. 1986); *see also* U.S. v. Meese, 712 F. Supp. 756 (N.D. Cal 1989).

[28] U.S. v. Aguilar, 883 F.2d 662, 668. In a September 13, 1982 issue of U.S. News and World Report, John Fife, one of the leaders of the movement, was quoted as saying he was "willing to suffer the consequences" of his course of action. A year prior he had released a statement to an Arizona newspaper that he and his congregation "can no longer cooperate with or defy the law covertly as we have done."

[29] By act of Congress on March 1, 2003, the INS was dissolved and separated into three new agencies under the Department of Homeland Security. Today, U.S. Immigration and Customs Enforcement (ICE) performs all investigative and enforcement functions.

[30] U.S v. Aguilar, 883 F.2d at 669 (undercover agent Jesus Cruz "quickly became appellants' trusted and valued colleague . . . .").

directly, the undercover informant tactic was, in many ways, more egregious.[31] The federal government claimed that it "restrained" itself from entering churches because of the bad press it would engender, and that paying informants to gather information was a less intrusive measure.[32] Arguably, public arrests by INS agents would have been more honest, and alerted the American public to the federal infiltration of the churches' work. The covert operation might have temporarily saved face for the INS, but it denied the American public the right to raise concern, and engage in a debate, about the appropriate relationship between church and state in these circumstances.

Additionally, it is worth noting that the sanctuary workers' instincts were correct: the deportation of Salvadorans and Guatemalans to their deadly homelands violated the United State's obligations under both international and domestic law. The international law principle of *non-refoulment* prohibits a nation from returning an individual to a violent homeland. This principle is codified in the Refugee Act of 1980.[33] Under the act, a refugee is defined as one who has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[34] The exact plight of the Salvadorans and Guatemalans in the 1980s was the impetus for the codification of Temporary Protected Status in 1990, which allows the government to grant a temporary stay of deportation so that people are not being returned to deadly conditions.[35]

The fact that the sanctuary workers were ultimately correct does not mean that every citizen should be entitled to define and carry out their own interpretation of international asylum

[31] Paul Wickham Schmidt, *Refuge in the United States: The Sanctuary Movement should Use the Legal System*, 15 HOFSTRA L. REV 79 (1986).
[32] Loken & Babino, *supra* note 15, at 119.
[33] Refugee Act of 1980, Pub.L. No. 96-212, 94 Stat. 102; 8 U.S.C. § 1251(h)(1). "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Courts determined that Salvadorans and Guatemalans were not "refugees" because they could not claim that they were targeted for specific religious and political beliefs. The violence was so widespread and indiscriminate that it was "normal." *See* Colbert, *supra* note 18, at 5, 39. This has since been regarded as a blatantly incorrect reading of the Refugee Act, and a highly politicized method for systematically denying claims. *See id.*
[34] *Id.*
[35] I.N.A § 244. Immigration authorities can allow an alien to remain and work in the United States for a period of time when they cannot return to their homeland. As of writing in 2009, Salvadorans are still on the list of nations whose citizens are eligible for a grant of temporary protected status.

law. However, if a narrow reading of § 1324 is tenable, the fact that citizens in the past have worked to uphold the United States' international obligations when the federal government failed to do so should weigh heavily in favor of narrow liability for humanitarian aid. It is a warning sign to the concept of criminalizing assistance to immigrants that the members of the new sanctuary movement were tried and convicted under U.S. domestic law by a federal government that was itself in violation of its legal commitments.[36]

III. THE SEARCH FOR LEGAL SANCTUARY FOR HUMANITARIAN AID

The above reasons for proceeding with caution in the investigation, indictment, and prosecution of church workers acting on a bona-fide religious belief did not provide any relief for sanctuary workers. A brief overview of the defenses raised is necessary to fully comprehend the dynamic that took place between the government and the sanctuary workers, and would be likely replicated in any modern day trial.

A. International Law and Mistake of Law

Defendants in *United States v. Aguilar*, the largest of the sanctuary prosecutions of the 1980s, put forth several defenses, all of which were rejected.[37] First, defendants argued that sanctuary workers did not violate domestic law because the Central Americans they assisted were entitled to enter and reside in the United States as "refugees" under the Refugee Act of 1980.[38] Alternatively, they argued that even if the Central Americans were not refugees under the Act, the sanctuary workers were protected by their mistake of law under *Liparota v. United States*.[39] Defendants contended that because there was a legal element in the definition of the

[36] CRITTENDEN, *supra* note 17.
[37] 883 F.2d 662. The *Aguilar* defendants were tried under an old version of the statute, but the current version is substantively the same for the harboring analysis.
[38] *See supra* notes 33, 34 and accompanying text.
[39] Liparota v. U.S., 471 U.S. 419 (1985).

offense, that the alien was "not lawfully entitled to enter or reside," a mistake that the alien was legally present insulated them from liability.[40]

The court squarely rejected these arguments, finding that sanctuary workers did not make a pure mistake of law but were truly pleading ignorance of the law, which is never a defense.[41] An invocation of the necessity defense also failed because the legal alternative of asylum was technically available. Defendants vigorously argued that the systematic denial of asylum, and subsequent deadly deportations for many, precluded this option.[42] The court pointed to contemporary cases wherein Salvadorians were granted injunctions from deportation after suing the INS as the legal alternative that should have been pursued.[43]

B. First Amendment

Additionally, the invocation of the Free Exercise clause provided no refuge for the sanctuary workers. When coming up against the plenary power of the federal government to regulate immigration, the government's interest is so "overriding," and so compelling, that it trumps any action in contravention, regardless of the motivation.[44] The Court in *United States v. Aguilar* postulated that the sanctuary movement could have exercised its religious convictions in a variety of legal ways that did not interfere with the government's overriding interest in protecting its borders.[45]

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[40] U.S. v. Aguilar, 883 F.2d at 672.

[41] United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988). ("[W]e observe that there are few exceptions to the rule that ignorance of the law is no excuse.").

[42] CRITTENDEN, *supra* note 17, at 361.

[43] Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982); Orantes-Hernandez v. Meese, 685 F, Supp. 1488 (C.D. Cal. 1988).

[44] United States v. Aguilar, 883 F.2d 662, 695 (9th Cir. 1989); *see also* United States v. Merkt, 794 F.2d 950 (5th Cir. 1986).

[45] 42 U.S.C. § 2000bb-1 reads: Government may burden a person's exercise of religion only if it demonstrates that application of burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. The failure of the *Aguilar* defendants to invoke Constitutional protection of their religiously motivated aid would likely be replicated in any modern day trial. Even the Religious Freedom Restoration Act, codified in 1993 after most of the sanctuary trials, likely would not provide any refuge for sanctuary workers, because it allows the government to burden the free exercise of religion if it is "in furtherance of a compelling governmental interest" under which immigration regulation certainly falls. *See* Lile, Natalie, Student Author, *The Religious Freedom Restoration Act: Could it Have Helped the Sanctuary Movement?* 11 GEO. IMMIGR. L.J. 199 (1996). The federal government's ability both expel and exclude aliens is "essential to the safety, independence, and welfare" of any nation-state. Fong Yue Ting v. United States,

In the end, the government's emphasis on smuggling violations and the movement's self-declared civil disobedience carried the day. Defendant's periodic challenges to the federal government made it difficult for the court to grant the defenses of free exercise, mistake of law and international law raised without feeling that they were granting amnesty to a group of vocal law breakers. For the most part, the 1980s movement touted its illegality at the outset, but then attempted to justify its actions when the prosecutions commenced.[46] Because of this, the court felt that exonerating them would judicially sanctify the creation of "personal immigration policies" thereby threatening the integrity of the entire system.[47] Changing the law for religiously motivated defendants "would result in no immigration policy at all."[48]

C. Actions did not Constitute "Harboring"

In *United States v. Aguilar*, the Court briefly entertained, but ultimately rejected, the argument that workers did not "harbor" illegal aliens under § 1324 because the workers were open about the immigrants they were housing once they were in the country, and did not conceal them from authorities.[49] Indeed, they introduced many of the immigrants to the press by name. Nevertheless, instructions to the jury defined harboring as including "conduct tending to directly or substantially facilitate the alien's remaining in the United States in violation of law" with no requirement of an intent to evade or obstruct immigration enforcement.[50] Defendants argued that harboring was criminal conduct only when done to obstruct enforcement in conjunction with the act of smuggling. The court rejected the argument because *Acosta de Evans* had a similarly

149 U.S. 698, 705 (1893). The judicial and legislative history of immigration regulation paints federal plenary power as beyond "compelling," defining the right to have and enforce immigration laws as paramount and central to the very concept of nationhood. *See id.*; Chae Chan Ping v. United States, *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

[46] Loken & Babino, *supra* note 15, at 137-39. The decision of the 1980s movement to legally justify their actions, rather than accept the consequences of a civil disobedience movement, solidified the relationship between sanctuary and the law.

[47] *Aguilar*, 883 F.2d at 696 (quoting United States v. Elder, 601 F. Supp. 1574, 1579 (S.D. Tex. 1985)).

[48] *Id.*

[49] *Aguilar*, 883 F.2d at 690. Only two Defendants, Father Anthony Clark and Darlene Nicgorski, were accused of harboring.

[50] *Id.*

broad instruction and was binding precedent.[51] The court further noted that "even if *Acosta de Evans* were incorrectly decided, the appellant's claim would fail given the facts of this case." Based on the nature of the underground railroad established, the court found that it was clear beyond any doubt that defendants "intended to help the aliens in question to evade INS detection."[52]

The Court refused to reconsider the *Acosta De Evans* holding, and noted that they could not overturn an en banc decision of the Ninth Circuit.[53] The broad reading of harboring remains the Ninth Circuit standard. Overall, the legacy of the 1980s sanctuary movement is that the federal government will infiltrate church groups and houses of worship to enforce § 1324(a)(3), even when there is evidence that religious workers are on the right side of international law. Religious and humanitarian motives will not preclude enforcement or mitigate penalties.

III. THE NEW SANCTUARY MOVEMENT'S DESIRE FOR LEGAL SANCTIFICATION

Despite the troubling legacy of the 1980s movement, the tradition of religiously motivated humanitarian aid to undocumented people persists. Compassion and hospitality to undocumented persons has a continuing legacy and biblical roots. Indeed, the Hebrew Bible includes one command to love thy neighbor, and thirty-six commands to love the stranger.[54]

The New Sanctuary Movement, founded in 2006, is a network of churches dedicated to hosting undocumented people, and providing legal and financial support while they are in removal proceedings.[55] The New Sanctuary Movement has created a community of churches who agree to host mothers and fathers of U.S. Citizens who are placed in immigration proceedings, to use the church as a mailing address, and to create a network of lawyers to defend viable cases.[56]

[51] United States v. Acosta DeEvans, 531 F.2d 428 (9th Cir. 1976).
[52] *Aguilar*, 883 F.2d at 690.
[53] *Id.* at 689-90.
[54] Elizabeth McCormick & Patrick McCormick, *Colloquim: Religion and Immigration: Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy*, U. DET. MERCY L. REV at 857, 858 (2006).
[55] http://www.newsanctuarymovement.org/legal.htm (last visited Feb. 10, 2009).
[56] http://www.newsanctuarymovement.org/hospitality.htm (last visited Feb. 10, 2009).

The movement galvanized in 2006 when Elvira Arellano, who had an 8-year-old United States citizen son, defied a deportation order by taking up sanctuary in a Chicago church.[57] The impetus for the movement is the failure of current immigration law to protect family unity[58] and the movement states that, "[w]e cannot in good conscience ignore such suffering and injustice."[59] The public network serves as a symbol of solidarity in recognition of the injustice done to families in the enforcement of immigration law.[60]

There are many differences between the 1980s movement and the modern movement. For example, U.S. domestic policy is implicated in the modern movement, while international obligations were the focus of the 1980s movement. And as devastating as family estrangement is, most clients who come in contact with The New Sanctuary movement are not facing death and violence upon deportation, and will be granted asylum if they are. From a statutory standpoint, the New Sanctuary Movement does not assist in border-crossing, and its actions are wholly detached from a course of smuggling conduct and at first blush seems to be outside the scope of liability under § 1324.

Additionally, in stark contrast to the church workers of the 1980s, the New Movement defends its legality from the outset, and does not purport to purposely violate unjust laws. There are some, albeit very limited, forms of relief from deportation for unauthorized immigrants with United States citizen family members.[61] The New Sanctuary Movement is dedicated to helping immigrants invoke these legal protections, while publicly standing as a witness to the unjust application of immigration laws. The New Sanctuary Movement has a disclaimer of its legality on the website, stating that because members freely report to the INS the names of the people they house, they are not concealing them. They assert that because they have no intent of

[57] Gretchen Ruethling, *Chicago Woman's Stand Stirs Immigration Debate*, N.Y. TIMES, Aug. 19, 2006 at A10.
[58] While formally family unity is a policy endorsed by our immigration system, the deportation of parents in "mixed status" households have left U.S. Citizen children without their parents. The problem is that ICE has no jurisdiction over the children. *See* Julia Preston, *Immigration Quandry: A Mother Torn from her Baby*, N.Y. TIMES, Nov. 17, 2007 at A1.
[59] http://www.newsanctuarymovement.org/pledge.htm.
[60] *Id.*
[61] *See* I.N.A § 240. Cancellation of Removal requires (1) physical presence in the United States for 10 years (2) extreme and unusual hardship to a United States citizen and (3) good moral character and the grant of discretion.

evading or obstructing the enforcement of immigration law, they assert they are not liable under the statute.[62] As explained below, that assertion currently depends on the Circuit where the congregation is located, as some courts impose liability for merely housing an undocumented person.[63]

Despite the differences between the New Sanctuary Movement and the 1980s movement, the statutory stage is set for another showdown between church workers who aid undocumented people and immigration authorities, with the numerous negative implications that accompany that dynamic. The New Sanctuary Movement, while asserting its legality, is still overtly critical of domestic immigration law and maintains overtones of a civil disobedience movement.[64] The fact is that many circuit courts continue to read harboring broadly, and liability for church workers who house undocumented people while family members are in deportation proceedings remains an unresolved question of law.[65] The New Sanctuary Movement could be backed into a civil disobedience corner depending on the courts' implementation of harboring liability, and prosecutorial discretion of the Department of Justice.

IV. CONGRESS NEVER INTENDED TO CREATE AN OFFENSE OF "HARBORING" THAT COULD BE USED TO CONVICT "GOOD PEOPLE"

"Harbor" is not defined anywhere in the statute, but the history of the provision makes it highly unlikely that Congress intended to create a broad scope of liability that could be used to reach citizens whose only intent was to render humanitarian aid.[66] The crime of "harboring"

[62] Michael Gutierrez, *We're Not Breaking the Law*, CAL. CATHOLIC DAILY, Sept. 2, 2007.
[63] U.S. v. Lopez, 521 F.2d 437 (2d Cir. 1975).
[64] *See* http://www.newsanctuarymovement.org/pledge.htm. One of the stated goals of the New Sanctuary Movement is "To protect immigrant workers and families from unjust deportation." *Id.*
[65] *But see* Paul Wickham Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79, 96 (1986). Mr. Schmidt, Deputy General Counsel for the INS at the time, listed the ways that sanctuary workers could legally provide support, and noted "[T]hey can house and support such individuals during the hearing process."
[66] It could be argued that this provision is not heavily prosecuted outside of a smuggling scheme. However, is vitally important that there are principled laws regarding the criminalization of arguably benevolent behavior. The federal government already enjoys a tremendous amount of power in the realm of immigration legislation and enforcement, and all statutory provisions should be viewed with this in mind. The statute should be precise and narrow, so that there is no room for abuse.

made its first appearance in the Immigration Act of February 3, 1917.[67] The provision remained untouched until it was challenged in the Supreme Court forty years later in *United States v. Evans*.[68] The Supreme Court pondered, but did not resolve, whether "harboring" was meant to be understood as part of a smuggling scheme or as a distinct offense.[69] The question before the Court was not the scope of harboring liability, but whether the construction of the statute provided any penalties for harboring at all.[70] Defendants argued that only smuggling activities were penalized under the statute, while the government urged the Court to close the statutory gap and apply the statute's smuggling penalties to defendants' harboring conviction.

The Court determined that applying smuggling penalties to acts of harboring in the absence of clear statutory support would infer too much.[71] On one hand, it seemed reasonable that Congress intended to punish acts of harboring within the United States as harshly as the act of smuggling someone across the border, since they were in the same scheme of conduct. There was indication from the Senate Report that the harboring provision was included "merely to complete the definition of the crime of smuggling aliens into the United States," making it plausible that Congress intended to punish acts of harboring equally with acts of smuggling.[72]

However, it was equally plausible that Congress intended harboring to be read apart from a smuggling scheme, and was creating a distinct offense. If this was the case, the Court mused, then the statute would require "in any sound legislative judgment, very different penalties" for smuggling aliens and acts of harboring "disconnected with that process."[73] The court hypothesized that at the outer limits of liability, the provision could be read to cover innkeepers who rented a room to someone who had entered the United States legally, but overstayed their

[67] Act of Feb 3, 1917 ch. 29 § 8, 39 Stat. 874, 880 ("Any person … who shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway care, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor . . . .").
[68] U.S. v. Evans, 33 U.S. 483 (1948).
[69] *Id.*
[70] The statute provided that "any person . . . who shall bring into or land in the United States . . . or shall conceal or harbor" any illegal alien shall be fined and imprisoned "for each and every alien *so landed or brought in* or attempted to be landed or brought in." *Id.* at 483 (emphasis added). The statute did not provide a penalty for aliens harbored.
[71] *Evans*, 33 U.S. at 483.
[72] *Id.* at 488, n. 5; Sen. Rep. No. 352, 64th Cong., 1st Sess. 9.
[73] *Evans*, 33 U.S. at 489-90.

visa.[74] Imposing smuggling penalties on this type of behavior was untenable without clear statutory support, and the Court left it up to Congress to fix the inconsistency.

Congress responded to the Supreme Court's invitation to address the gap left in the statute, but failed to engage in the legislative work of defining the scope of harboring to address the innkeeper problem posed in *United States v. Evans*.[75] Rather, at the request of President Truman, Congress closed the punishment loophole and left the work of parsing out the meaning and scope of harboring for another day; a day which, as of this writing, has unfortunately not yet arrived. The addition of penalties for "harboring" illegal aliens came in the form of emergency legislation called the "Wetback Bill" of 1952 by its proponents.[76] The hastily prepared bill was pushed through the Senate in one day and the house in two, without committee hearings in either chamber.[77]

This bill had a very specific purpose – to stem the tide of illegal immigration from Mexico that was serving to undercut the efficacy of the *bracero* program, a legal migrant worker system that the United States had established with Mexico.[78] The bill sought to fix the *Evans* problem by creating penalties for harboring and concealing illegal aliens with the interest of our diplomatic relations with Mexico in mind. President Truman was deeply concerned with the exploitation of Mexican workers, recognizing that illegal aliens "have to hide and yet must work to live" and have no bargaining power against their potential exploiters.[79]

Proponents of the bill argued that the scope of harboring liability was limited, meant only to reach the immediate concerns of worker smuggling and exploitation. Opponents expressed concern that the bill could be interpreted broadly. Senators Humphery and Lehman were worried that the statute as written could lead to liability in the following situation:

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[74] *Id.* at 489. "In that event an innkeeper furnishing lodging to an alien lawfully coming in but unlawfully overstaying his visa would be guilty of harboring, if he knew of the illegal remaining. And, with him, one harboring an alien known to have entered illegally at some earlier, even remote, time would incur the penalties provided for smuggling, if the Government's position giving implied extension of the penalty provision were accepted."
[75] *Id.*
[76] Loken & Babino, *supra* note 15, at 150.
[77] *Id.* at 149.
[78] *Id.*
[79] *Id.* at n.166. "President Truman summarized Mexico's position on illegal migration in a 1951 message to Congress calling for special legislation on the subject." 82 CONG. REC. 97, at 8144-45 (1951).

> If some good soul should open his door in the cold of night and see a shivering, bedraggled person, and should offer him the comfort of his house for the evening, so that he would not perish from the cold or rain or storm, that the good Christian act, that act of compassion, might result in the householder being charged with the commission of a felony.[80]

These fears were quelled by proponents by assuring the Senators that the bill was limited in scope, only applicable to the smuggling, and exploitative harboring of Mexican workers.[81] Congressman Celler, Chairman of the Judiciary Committee, articulated the purpose and the scope of the legislation as follows: "I do not wish to center an attack on anybody except the smuggler and the man who tries to make money out of the misery of some of the workers. That is what I want to get after. *Certainly we do not want to get after the good people.* It is the bad at whom we aim our shafts."[82]

However, the fears of opponents to the broad scope of the bill remain unresolved. Courts interpreting the statute broadly, without a requirement of intent to assist in the evasion of laws, could very well impose liability in the above situation. The "act of compassion" that deserved protection in 1952, letting a stranger in from the storm, deserves protection in 2009, regardless of the immigration status of the caller.

Admittedly, Congress has had multiple opportunities to amend the statute since the decisions that have interpreted it broadly, and have instead increased the maximum penalties for a harboring violation and declined to define it. Rather than limiting liability, Congress has relaxed the mens rea requirement, thereby broadening the scope of liability under § 1324. As codified in 1952, one needed to "willfully or knowingly" aid the alien, but the Immigration Reform and Control Act of 1986 changed the mens rea to "knowing or in reckless disregard" of an alien's status. The only legislative foray into the specific definition of "harbor" was the "Texas Proviso" which provided that employment does not constitute harboring.[83] Nevertheless,

[80] 82 CONG. REC. 97, at 8144-45 (1951).
[81] 98 CONG. REC. at 5321 (1952).
[82] 98 CONG. REC. 1346 (1952) (Statement of Rep. Celler) (emphasis added).
[83] The "Texas Proviso" reads: For the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." It was repealed in 1986, with the IRCA, so technically employers can be subject to harboring liability. However, there hasn't been a sea change in

the genesis of harboring liability was aimed at very specific conduct. Originally, in 1917, it was enacted in order to punish prostitution.[84] Faulty legislative drafting left it dormant until it was reactivated in 1952 with the narrow function of protecting Mexican workers, who were smuggled across the border and exploited for private financial gain. The next section discusses how the intended narrow scope of the statute has evolved to create potentially broad liability for humanitarian groups who merely house illegal aliens.

V. JUDICIALLY DEVELOPED DEFINITIONS OF HARBORING AND THEIR EFFECT ON HUMANITARIAN HOUSING

Congressional silence on the precise definition and scope of harboring liability resulted in differing definitions in the circuit courts.[85] The evolution of harboring liability has severed the word from the smuggling concerns. Courts are unanimous in holding that sheltering an alien within the United States can result in liability, even when the defendant had no part in the alien's illegal entry. This is arguably broader than Congress intended, but it is now well-settled that a harboring violation can occur outside of a smuggling scheme. The law is in flux, however, with regard to the type of activities that constitute harboring. Some courts read harboring in conjunction with "shielding" and "concealing" and therefore require the government to show an intent to evade immigration authorities.[86] Other courts impose broad liability for humanitarian aid, holding that any conduct "tending to substantially facilitate" an alien's presence in the United States is a violation of the harboring provision, and mere housing of an alien could suffice.[87]

harboring jurisprudence, because the "Texas Proviso" was largely understood as merely reiterating the definitional scope of harbor, rather than creating an exception to it. *See* Loken & Babino, *supra* note 15, at 151.

[84] U.S. v. Evans, 33 U.S. 483 (1948).

[85] U.S. v. Lopez, 521 F.2d 437, 440-41 (2d Cir. 1975). "Although our task would have been lightened if Congress had expressly defined the word 'harbor', we are persuaded by the language and background of the revision of the statute that the term was intended to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally', provided, of course, the person charged has knowledge of the alien's unlawful status."

[86] Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928); United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981)

[87] *Lopez*, 521 F.2d at 441.

A. The Ninth Circuit's Broad Scope of Liability

As discussed above, some of the 1980s sanctuary workers were convicted of harboring, based the binding Ninth Circuit holding in *U.S. v. Acosta DeEvans*.[88] The court in *Acosta DeEvans* articulated four reasons for imposing harboring liability in the case of mere housing.[89] First, the "primary" meaning of "harbor" in Webster's Dictionary means simple sheltering.[90] Second, a broad reading of "harbor" is the best to give effect to the "purpose of the section" which is "to keep unauthorized aliens from entering *or remaining in* the country."[91] Third, the provision must be read disjunctively because it is more appropriate grammatically.[92] Harboring, concealing and shielding are separate concepts, and harbor is not qualified, because "harbor from detection" does not make any sense.[93] Finally, the stipulation that employment is not "harboring" indicates that harboring is a separate offense from concealing, with a distinct meaning.[94]

In so reasoning, the Ninth Circuit did not deny the possibility that reading the harboring provision in this way could impose liability on an entirely well-meaning Samaritan. Defendant argued that the employment provision simply illuminates that the statute is designed to punish harboring within the context of a smuggling operation, which employment is not.[95] If that is not the case, she argued, it is "invidious" to exempt employers from harboring, who have something financially to gain, and not sincerely well-meaning citizens.[96] The court did not disagree. They recognized that their interpretation of the provision "[A]llows those who exploit their labor to escape punishment while penalizing persons who, in some instances, may be acting in a neighborly and humane fashion – but it is the kind of unfairness which it is for Congress, not

[88] United States v. Acosta DeEvans, 531 F.2d 428 (9th Cir. 1975).
[89] *Id.*
[90] *Id.* at 430.
[91] *Id.* at 430 (emphasis added).
[92] *Id.* at 430, n.3.
[93] *Id.*
[94] *Id; see also supra* note 83 and accompanying text. The revocation of the Texas Proviso illustrates that the court was wrong in this regard; the proviso was meant to emphasize an existing limitation in the word "harboring" for the protection of farmers, not to create an exception to broad liability.
[95] *Id.* at 430.
[96] *Id.*

courts, to cure."[97] Thirty-three years later, the inimical provision remains unchanged, and liability can be prompted by a course of action motivated by humaneness, civility, and responsibility towards one known to be unlawfully present.

In addition to the fact that the *Acosta DeEvans* holding was used to convict the sanctuary workers, the specific facts of the case illustrate its broad implications for humanitarian aid.[98] While visiting family in Mexico, de Evans was talking to a relative about her difficulty in getting immigration papers.[99] Her relative illegally crossed the border, without any assistance from DeEvans, but contacted DeEvans when she arrived.[100] DeEvans allowed her relative to stay in her apartment for two weeks before the pair were caught.[101]

In holding her criminally liable, the court mandated that Acosta DeEvans was required to turn away a family member in need in order to conform to her nation's immigration policy. While she did not desire or act to impede the enforcement of immigration law, her compassion and sense of loyalty was alone threatening to the United States government. In essence, the federal government asks her to hold the highly technical and complex immigration statute closer to her heart than a relative's need for assistance. [102] One can see how easily church workers could cross this line if the facts are changed from relative to parishioner, and from home to sanctuary.

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[97] *Id.*
[98] *See* Loken & Babino, *supra* note 15, at 156 (arguing that the *Aguilar* court misread the *Acosta De Evans* holding, and interpreted it too broadly).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *See* Tim Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977):

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges. In this instance, Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle.

B. The Second Circuit's Fluctuating Articulation of Policy Concerns

In one of the earliest decisions to address harboring liability, Judge Learned Hand was hesitant to hold individual citizens accountable for private immigration enforcement.[103] In *United States v. Mack*, Judge Learned Hand grappled with the meaning of the harboring provision, and ultimately imposed a mens rea requirement of knowingly, although it was not codified in the statute at the time.[104] His reasons for limiting liability in this way were two-fold. First, knowledge must be an element because "[i]t would be shocking to hold guilty anyone who gave shelter to an alien whom he supposed to be a citizen; and besides, the statute is very plainly directed against those who abet evaders of the law against unlawful entry, as the collocation of 'conceal' and 'harbor' shows." [105] His conclusion that, for policy reasons, the only people that should be punished are those who knowingly assist in the evasion of immigration law rings true today. Second, Judge Hand reasoned that the plain meaning of the word was in line with this policy, as "'harbor' alone often connotes surreptitious concealment."[106] For Judge Hand, the concept of knowledge of illegal status was necessary because it indicated a desire help impeach the integrity of the laws. Modern jurisprudence dealing with "harboring" assumes that knowledge of an alien's status is synonymous with a subordination of immigration law.

However, the Second Circuit, when confronted later with what precisely "harboring" was, adopted a notably broad test. In *United States v. Lopez*, aliens arrived in the United States with defendant's address and he helped them get jobs, housing, and even arranged sham marriages.[107] The court held that harboring encompasses "conduct tending to substantially facilitate an alien's remaining in the United States illegally, provided, of course, the person charged has knowledge of the alien's unlawful status."[108] The evidence against Lopez showed

[103] It should be noted that the contemporary debate over the private enforcement of immigration law manifests itself not just with individual citizens, but with states and municipalities as well. "Sanctuary cities" such as New York and Seattle have passed ordinances prohibiting city employees from inquiring into the status of any person. It is an open question whether an indifference to legal status amounts to obstruction of immigration laws. *See* Jennifer M. Hansen, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289 (2008).
[104] 112 F.2d 290 (2d Cir. 1940).
[105] *Id.* at 291.
[106] *Id.*
[107] U.S. v. Lopez, 521 F.2d 437 (2d Cir. 1975)
[108] *Id.*

that he indeed intended to help aliens evade immigration laws, so he was likely liable under even a narrow reading of the statute.

The "substantially facilitate" test employed by the Second Circuit is problematic because it effectively prohibits any group dedicated to helping unauthorized immigrants from aiding them in any way, precisely because they are immigrants. Assistance with food, clothing, housing, and medical care can all accurately be said to "substantially facilitate an alien's remaining in the United States illegally."[109] However, a recent case in the Second Circuit scaled back the test in *Lopez*, and instructed the jury that harboring, within the meaning of § 1324, encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally *and to prevent government authorities from detecting his unlawful presence*.[110] The court did not engage in an analysis of why they altered the test, but it could represent a hopeful sea change in harboring jurisprudence in the Second Circuit.

C. The Third, Fifth, and Sixth's Circuits' Correctly Narrow Definition

The Third, Fifth, and Sixth circuits recognize that Congressional intent was to punish harboring in connection with smuggling, and engage in a correctly limited reading of harboring liability.[111] In *Susnjar v. United States*, the defendant had a plan to bring aliens across the border and "place them in homes."[112] Defendants' liability for transporting them was clear, but there was a question as to their liability for harboring. When the immigrants arrived at Susnjar's home at 2:00a.m. on January 17, 1927, they were cold, wet, and hungry.[113] They were given food and whiskey, and then sent to other homes.[114] Given the purpose of the statute, which is "to exclude from the country all aliens who have unlawfully succeeded in effecting an entry" the court found that Susnjar's actions did not constitute harboring.[115]

[109] United States v. Kim, 193 F.3d 567, 574 (2d Cir. 1999) (discussing the broad range of activities that "substantially facilitate").
[110] *Id.*
[111] Susnjar v. U.S., 27 F.2d 223 (6th Cir. 1928); U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981).
[112] *Susjar*, 27 F.2d at at 224.
[113] *Id.*
[114] *Id.*
[115] *Id.*

The court posited, in light of the purpose of the statute, "the natural meaning of the work 'harbor' [is] to clandestinely shelter, succor, and protect improperly admitted aliens."[116] It is interesting to note that the *Susnjar* court and the *Acosta de Evans* court formulated the purpose of the statute in identical ways, but arrived at different meanings of harboring. This indicates that the purpose of the statute, alone, does not indicate the extent to which citizens are expected to privately enforce immigration law.

Even though *Susjnar* was decided under the 1917 version of the statute, it continues to be binding Sixth Circuit precedent. In 2006, in *United States v. Belevin-Ramales*, the government argued that harboring liability could attach without the intent to evade immigration laws.[117] Defendants urged a jury instruction, based on *Susnjar*, that required the jury to find that the defendant acted with "intent to prevent the detection of an 'illegal' alien."[118] The government pointed to the Ninth and Second Circuits, as well as to the fact that *Susnjar* was based on an older version of the statute.[119] The court rejected these arguments, determining that the Ninth and Second circuit tests were in flux, while the binding precedent set forth in *Susnjar* was clear.[120] The conceptual basis for the court's decision remained sound, and neither *Evans* nor Congressional imposition of penalties in 1952 changed the meaning of harbor under the statute to include activity that was not designed to conceal.[121]

The Fifth Circuit similarly limits liability. They adopted the Second Circuit's "substantially facilitates" test of *United States v. Lopez*, but also held that "implicit in the wording 'harbor, shield, or conceal' is the connotation that something is being hidden from detection."[122] The Third Circuit has only recently reached the question, and adopted the Fifth Circuit test.[123]

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[116] *Id.*
[117] 458 F.Supp.2d 409 (E.D. Ky. 2006).
[118] *Id.* at 409.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] U.S. v. Varkonyi, 645 F.2d 453, 459 (5th Cir. 1981). Defendant was guilty because he "forcibly interfered" with INS agents, provided illegal aliens with employment and lodging and assisted one alien in escaping from INS custody.
[123] *See* U.S. v. Hakan Ozcelik, 527 F. 3d 88, 100 (3d Cir. 2008). The government argued that Defendant's actions of telling immigrants to maintain multiple addresses and to "keep a low profile" violated the harboring provision of the

D. Practical Policy Concerns

Courts that interpret the statute broadly find policy support in ensuring that immigration laws are respected. However, there are many compelling policy arguments in favor of a narrow reading. These were not articulated in any of the decisions explained above, but there are numerous reasons why people who assist unauthorized aliens for humanitarian reasons should be classified as the "good souls" that Senators Humphery and Lehman worried about protecting when drafting the bill in 1952. The marked increase in illegal immigration, government recognition of humanitarian concerns, and developing jurisprudence on the rights of illegal immigrants signal that the reality of immigration makes it impracticable to hold individual citizens responsible for its enforcement.

First, from a practical standpoint, the state of immigration today is entirely different from 1952. Undocumented immigration is at its highest rate in history, with approximately 11.1 million unauthorized people living in the United States as of 2005, with the number continuing to climb.[124] The probability that citizens have an undocumented people in their community is more likely than not in most parts of the country, and the possibility of liability for U.S. Citizens is therefore ever-expanding.

Additionally, many "illegal" immigrants are not people who surreptitiously crossed the border, but who were lawfully admitted but have fallen out of status.[125] In 1952, approximately 300,000 immigrants were lawfully admitted into the United States.[126] In 2001, there were 1,050,000 immigrants lawfully admitted to the United States.[127] Clearly, asking United States citizens to not assist anyone out of status is an increasingly tall order. The reality of the present state of immigration in this country is that the United States government does not have the

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statute. The Third Circuit held that the conduct was not "substantially" assisting the immigrants, because it was common sense advice that could have been obtained from any source, and there was no evidence that Defendant "actively attempted to intervene in or delay an impending immigration investigation." *See also* U.S. v. Silveus, 542 F.3d 993 (3d Cir. 2008) (finding that Defendant was not guilty of harboring by cohabitating with her boyfriend, a Haitian citizen who had defied a final deportation order).

[124] THOMAS ALEXANDER ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY (Thompson West 2003).

[125] The Supreme Court in *United States v. Evans* specifically contemplated this problem. If liability is divorced from smuggling concerns, then citizens could be liable for someone who entered lawfully "at some remote time" and then fell out of status. *See supra* note 74 and accompanying text.

[126] THOMAS ALEXANDER ET AL., *supra* note 124.

[127] *Id.*

resources it would need to deport every unauthorized person.[128] Broadening liability for citizens who have no intent to break the law does not help immigration enforcement. It simply serves to take resources away from investigating and prosecuting people engaged in smuggling and exploitation, and serves to isolate undocumented members of the community.[129] Broad liability for harboring also presents the palpable problem of racial profiling and discrimination in dealing with members of the community.[130]

Secondly, the federal government itself has recognized that humanitarian concerns trump legal status in many instances. If the United States government itself recognizes room for compassion and humanitarianism, legislators should be reluctant to ask citizens to check all compassionate impulses at the door in the name of immigration law. A recent example would be the official statements issued in the wake of Hurricane Gustav.[131] The Department of Homeland Security called off all of its agents in the area.[132] Just a few days after one of the biggest workplace raids in history in Mississippi, the agency issued an announcement that there would be no inquiry into the status of anyone evacuating in the wake of Hurricane Gustav.[133] The actions of the agency were humane, necessary, and appropriate. When life and limb are at stake, technical legal distinctions regarding status must make way for humanitarian concerns. While the federal government can likely only make this concession in dire circumstances, legislators should recognize that many citizens feel this humanitarian imperative at all times. Certainly the 1980s sanctuary movement felt that deportation was a death sentence, just as deadly as remaining in the eye of a storm. The New Sanctuary movement's spiritual imperative to keep

[128] Allen O'Rourke, *Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants*, 9 HARV. LATINO L. REV. 195 (2006). "In January 2005, there were only 10,949 border patrol agents inside the United States, which equals 2% of the undocumented migrant population. In 2004, the Department of Homeland Security reported only 150,000 deportations, which equals about 1.5% of the undocumented migrant population and less than 25% of the number of undocumented migrants that enter the United States annually." U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2006 8 (2005).

[129] The trend in some communities toward day labor hiring sites revolves around this issue, namely, whether assistance to undocumented immigrants is synonymous with disrespect or subordination of immigration law. It is a hotly contested debate in both communities and courtrooms.

[130] Sophie Marie Alcorn, Note, *Landlords Beware, You May be Renting Your own Room . . . In Jail: Landlords Should not be Prosecuted for Harboring Aliens,* 7 WASH. U. GLOBAL STUD. L. (2008).

[131] Author unknown, *No Shelter From the Storm*, N.Y. TIMES, September 7, 2008 at 11.

[132] *Id.*

[133] *Id.*

families together regardless of legal status should be respected, encouraged, and regarded as rational and recognized as legal.

Finally, the evolution of judicially-determined rights of undocumented people support the need for legalizing humanitarian aid. In *Plyler v. Doe*, petitioners brought an equal protection claim against the state of Texas for denying undocumented children access to free public education.[134] The state argued that the legislation was rational because of limited resources and the desire to deter illegal immigration. The court rejected these arguments, and articulated a conceptual problem with statutes that adversely affect undocumented people's access to public benefits:

> [T]here is no assurance that a child subject to deportation will ever be deported. Any illegal migrant might be granted federal permission to continue to reside in this country, or even become a citizen. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.[135]

The Supreme Court used the concept of an "inchoate permission to remain" to preclude a state legislative scheme. If States cannot deprive immigrants of resources because immigration status is a flexible and discretionary thing, citizens should be given wide latitude in their ability to render humanitarian aid to undocumented people who have the potential to become documented. If undocumented people are not conclusively "illegal" but rather "legally undetermined" then humanitarian aid alone is not obstructive to government enforcement of immigration law. The spiritual and altruistic impulse to provide aid is consistent with an immigration scheme that has a presumption of "undetermined until proven illegal."[136]

[134] Plyler v. Doe, 457 U.S. 202 (1982).
[135] *Id.* at 226.
[136] Cancellation of removal is an example of a mechanism that can transform an undocumented person into a documented one. *See supra* note 61 and accompanying text. Having U.S. Citizen children, especially when the children would suffer unique hardships upon the deportation of a parent, weighs in favor of eligibility for Cancellation of Removal. The New Sanctuary movement, with its concern for family unity, is in furtherance, and not in obstruction of this statutory mechanism.

VI. IMMIGRATION REFORM AND THE UNCERTAIN FUTURE OF HARBORING LIABILITY AND HUMANITARIAN AID

Immigration reform is a hotly contested and highly politicized issue, and all recent attempts at reform have been met with opposition. None have resulted in consensus or change. The most recent wave of attempts at reform was started by the Border Protection, Antiterrorism and Illegal Immigration Control Act in 2005, also called the Sensenbrenner-King Bill.[137] The sponsors of the bill were House Judiciary Chairman Rep. James Sensenbrenner (R-Wis.) and Homeland Security Chairman Rep. Peter King (R-N.Y.).[138] The bill took an enforcement-only approach, dramatically tipping the balance between human rights and security in favor of Homeland Security. It was criticized as xenophobic.[139]

Religious and humanitarian groups were particularly outraged at the bill's targeting of citizens who aided undocumented people. The bill did not dramatically change harboring liability, but rearranged the provision to penalize anyone who "harbors, conceals, or shields from detection," likely to emphasize that harboring is an offense separate from a scheme of smuggling. However, the bill made dramatic changes with respect to other criminal provisions, creating criminal penalties for anyone who "assists, encourages, directs, or induces" an illegal immigrant to reside or to remain in the United States."[140]

Sponsors of the bill argued, eerily similar to the arguments made in the 1952 Act regarding limited liability, that the section was not designed to target altruistic assistance, but

[137] H.R. 4437, 109th Con. (2005).
[138] Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, AKRON L. REV. 291 (2008).
[139] *Id.*
[140] House Bill 4437 would impose criminal liability in cases in which someone –

> (A) "assists, encourages, directs, or induces" an unauthorized migrant to enter the United States
> (B) "assists, encourages, directs, or induces" an unauthorized migrant to enter the United States outside a designated entry point
> (C) "assists, encourages, directs, or induces" an illegal migrant to reside in or remain in the United States
> (D) "transports or moves" a migrant in the United States where this "will aid or further in any manner" the migrant's illegal entry into or illegal presence within the United States;
> (E) "harbors, conceals, or shields from detection" an illegal migrant in the United States;
> (F) "transports, moves, harbors, conceals, or shields from detection" someone outside the United States who seeks to enter the United States unlawfully; and (G) "conspires or attempts to commit" one of these offenses.

assistance in connection with a smuggling scheme.[141] History has shown that legislative intention regarding limited liability in this realm can be easily usurped by aggressive agency enforcement and broad judicial interpretation. Furthermore, proponents of the bill used language that suggested the intent to create a broad sphere of liability. Jeff Lungren, spokesman for Representative Sensenbrenner stated that the proposed bill sought to "re-establish respect for our immigration laws."[142] Others articulated the purpose as trying "to crack down on a culture of indifference to the nation's immigration laws that has allowed 11 million illegal immigrants to live in this country."[143] These comments indicate that the bill sought to shut down not purposeful obstruction of the law, but mere indifference to a broken immigration system.

A bill that sought to punish even "benign associations" with undocumented persons surely poses a threat to those who render humanitarian aid precisely because of an immigrant's membership in a marginalized, excluded portion of society.[144] The impulse to expand the sphere of liability for aiding immigrants is evidence that skepticism of compassion can be incited by highly politicized debates. For consistency, predictability, and health of the body politic it is important to solidify a commitment to First Amendment freedoms by allowing compassionate acts in all ways that do not intentionally obstruct immigration enforcement.

Indeed, religious communities were outraged by the proposal. Los Angeles Cardinal Roger M. Mahoney sent a letter to President George W. Bush in December 2005 promising to defy the provision if it became law.[145] He argued that it would force church workers into becoming "quasi-immigration enforcement officials" and that "[i]t is staggering for the federal government to stifle out spiritual and pastoral outreach to the poor, and to impose penalties for doing what our faith demands of us."[146] The Cardinal's statements echo those of John Corbett's made in the early days of the 1980s sanctuary movement and illustrate that liability for humanitarian aid has an eternal tendency to pit religious groups against the state.

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[141] O'Rourke, *supra* note 128.
[142] *Id.*
[143] Rachel L. Swarns, *Tough Border Security Bill Nears Passage in the House*, N.Y. TIMES, Dec. 14, 2005, at A30; *Bad Border Bill*, WASH POST, Dec. 28, 2005, at A20.
[144] O'Rourke, *supra* note 128, at 205. People who arguably "assist" an alien could include bank tellers, landlords, nurses, city officials, and lawyers. Religious workers could also be added to that list.
[145] McCormick & McCormick, *supra* note 54, at 897.
[146] *Id.*

In spring of 2006, Senators McCain and Specter introduced a compromise bill.[147] Entitled "A Bill to Provide for Comprehensive Immigration Reform and for Other Purposes," Senate Bill 2611 contained some promising and pragmatic solutions, but failed to become law. It kept the language of the Sensenbrenner-King bill with respect to "harbors, conceals, or shields from detection" but eliminated the broad "assists" liability. The bill did not define harbor, but did create a blanket exception to harboring liability for humanitarian aid.[148] It is not a violation of paragraphs (D), (E), or (F)-

> [F]or an individual or organization, not previously convicted of a violation of this section, to provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered.[149]

This exception for humanitarian aid is clearly a step in the right direction for the future of immigration regulation. Of course, it does not protect individuals or organizations who have been previously convicted of a violation, but the type of aid envisioned will make it easy for religious and humanitarian groups to fulfill their calling in a legal way.

On the other hand, the explicit exemption is problematic because it illuminates that the current statute's "harboring" language is broad enough to cover humanitarian efforts.[150] The

[147] This bill was proposed one month after S. 2454. Section § 205(c) contained a similar exception for humanitarian aid. However, S. 2611 was a more comprehensive package and garnered more publicity and support.

[148] S. 2611, § 274(a)(3). The exception applies to the following paragraphs:

> (D) encourages or induces a person to reside in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to reside in the United States;
> (E) transports or moves a person in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to enter or be in the United States, if the transportation or movement will further the alien's illegal entry into or illegal presence in the United States
> (F) harbors, conceals, or shields from detection a person in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to be in the United States.

The exception does not apply to the provisions against smuggling, but just to inducing someone to come to the United States, and conduct occurring when the undocumented person is within the United States.

[149] S. 2611, § 274(3)(B).

[150] *See* McCormick & McCormick, *supra* note 54, at 897. "Neither of these fairly limited exceptions would protect the majority of religious workers . . . providing non-emergency but nonetheless critical services to non-citizens." *Id.*

apparent need for an amendment to exempt humanitarian assistance under the current text of the statute should be a warning sign to everyone who provides altruistic aid. The best approach for legislation moving forward would be a humanitarian aid exception coupled with a definition of harboring which adopts the Third, Fifth, and Sixth's Circuit's limited interpretation.

The most recent piece of failed legislation is the "Secure Border, Economic Opportunity and Immigration Reform act of 2007", or Senate Bill 1639.[151] Introduced in the summer of 2007, it attempted to reconcile S. 2611 and House Bill 4437, but failed a motion for cloture and was never put to a vote.[152] The bill did not change the definition of harboring liability, or address exemptions for humanitarian aid to immigrants.

VII. CONCLUSION

The legacy of the 1980s sanctuary movement should make both Congress and the courts wary of imposing liability on religiously motivated aid to undocumented people. The investigation and prosecution of the 1980s sanctuary workers, and the emergence of a New Sanctuary Movement, illustrate the importance of avoiding clashes between religious workers and immigration authorities, whenever possible. Narrowing the scope of harboring liability under § 1324 to instances where there is an active concealment and intentional interference with immigration enforcement is necessary to protect the health of the relationship between the government and the faithful of the nation. A narrow reading is most in line with Congressional intent to create liability in a narrow set of circumstances, and as a matter of policy, most practical. Citizens should not have to choose between spiritual, humanitarian impulses and adherence to the law of the land. A narrow reading of harboring ensures that churches can fulfill their calling to aid undocumented people, and affirms our belief as a society that compassion toward all people should be respected, encouraged, and legal.

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[151] Meriam N. Alrashid, *The "Comprehensive" Immigration Reform: Only as Good as the Bureaucracy it is Built Upon*, 13 NEXUS J. OP. 29, 42 (2007-2008). Alrashid criticizes the bill as being "far too broad, and failed to exercise comparable ambition in crafting a precise and efficient implementation plan for the myriad of far reaching programs it proposed."

[152] S.1639: AgJOBS Act of 2007, *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-1639.