Maria, a graying, recently widowed woman of fifty-seven, knelt to say the rosary. No doubt she needed the spiritual strength it provided, for her house was full of destitute foreigners sent to her by her parish priest. Beside her was a man named Jesús, who joined in her prayer. According to the ancient forms, they would introduce each decade of Hail Mary's with the Lord's Prayer and the words "Thy kingdom come." They would conclude by addressing the Virgin Mary: "To thee do we cry, poor banished children of Eve; to thee do we send up our sighs, mourning and weeping in this valley of tears." Yet while they spoke the same words, their motivations could not have been more contrary: Maria del Socorro Pardo de Aguilar believed it her duty to shelter those whom civil war had banished from their homeland; Jesús Cruz was attempting to prove Mrs. Aguilar guilty of a federal crime for acting on that belief.

Mr. Cruz said these prayers, in short, because the United States government was paying him to say them. During 1984 he earned $18,000 for proving, through elaborate undercover infiltration of the Arizona Sanctuary Movement, that Maria del Socorro Pardo de Aguilar and other sanctuary workers were assisting undocumented Central American refugees along the Arizona-Mexico border in violation of Section 274(a) of the Immigration and Nationality Act of 1952 (the I.N.A.).

Seven years later, after Mrs. Aguilar and seven other sanctuary workers had been convicted of federal felonies, the chief prosecutor in United States v. Aguilar would declare that the case marked the "death knell" of the Sanctuary Movement. At the very least the Movement seemed destined to travel a long valley of tears, through a kingdom hostile to the most basic acts of charity.

It happened, though, that the obituary for sanctuary was premature. Despite the Ninth Circuit's affirmation of the Aguilar convictions, many individuals and organizations, including mainstream churches and charities, have continued the work of caring for and sheltering undocumented persons. And while the Supreme Court denied certiorari on January 14, 1991, the next day marked the beginning of the Gulf War and a new outburst of sanctuary declarations. On January 27, 1991, the congregation of New York's highly prominent Riverside Church, which had either declared itself a sanctuary for Central American refugees, adopted a resolution committing itself "to providing counseling and sanctuary ... to military personnel in danger of deployment to the Middle East pending determination of their application for [Conscientious Objector] status." During early 1991 a substantial number of other churches across the country declared themselves sanctuaries for war resisters as well.
The problem of sanctuary, then, is not likely to fade. It dates back in American history to at least the Underground Railroad which carried slaves to freedom before the Civil War. [FN14] It has survived even after later civil disobedience dramas—regarding Southeast Asia, Central America, the Middle East, and the United States—departed center stage. [FN15] During the past decade the idea of sanctuary for Central Americans was embraced not merely by the over 300 local churches that declared themselves sanctuaries, [FN16] but by a broad array of national religious bodies, [FN17] and some twenty state and local governments. [FN18] At present, a broad spectrum *123 of local churches and community groups across the nation remain committed to the Sanctuary Movement, including intervention on behalf of Haitian refugees. [FN19]

The breadth and depth of the commitment inspired by the Sanctuary Movement of the 1980s is especially remarkable in view of an apparent consensus among both participants and critics that the provision of sanctuary to undocumented persons [FN20] (and, later, to war resisters) is illegal. Tucson's Southside Presbyterian Church adopted the first formal declaration of sanctuary for Central Americans in 1982, notifying the U.S. Attorney General by letter that the church "will publicly violate the Immigration and Nationality Act, Section 274(a). . . ." [FN21] Specifically, Southside's members voted to "assert our God-given right to aid any one fleeing from persecution and murder ... [despite the fact that] [t]he current administration of United States law prohibits us from sheltering these [undocumented] refugees...." [FN22] As one Movement leader later explained, sanctuary workers were well aware that "compassion [had] become illegal." [FN23]

*124 Critics of the Sanctuary Movement, such as the United States government and the federal courts, have enforced the illegal status of sanctuary. From the mid-1970s to the present, several federal circuit courts have adhered to an extremely broad construction of Section 274(a) which declares guilty of a felony anyone who, with actual or imputed knowledge of an alien's illegal status, "conceals, harbors, or shields [an undocumented person] from detection." [FN24] In United States v. Lopez, [FN25] the Second Circuit found that the term "harbors" in Section 274(a) should be read "to encompass conduct tending substantially to facilitate an undocumented person's remaining in the United States illegally," [FN26] a definition since adopted by the Fifth Circuit. [FN27] In United States v. Acosta de Evans, [FN28] the Ninth Circuit, which later would decide Aguilar, developed an even more sweeping formulation: "harbor" means "afford shelter to." [FN29] Either of these definitions seems to place the provision of any recognizable form of sanctuary for undocumented persons outside the law. [FN30] If reflexively applied to other anti-harboring statutes, particularly the one that prohibits the harboring of military personnel absent without leave, [FN31] these definitions would criminalize other forms of sanctuary as well.

These broad readings of harboring threaten the work of many mainstream charities and churches. Providing community services, these organizations come in regular contact with undocumented persons and provide them services while possessing at least imputed knowledge of their irregular status. One of those convicted in United States v. Aguilar was Father Anthony Clark, whose *125 crime, in the view of the Ninth Circuit, consisted of this: with knowledge of a seventeen-year-old Salvadoran boy's unlawful status, "Clark invited [him] to have lunch ... and to stay in an apartment behind the church." [FN32] In response to Clark's conviction, five mainstream charitable organizations filed a brief amicus curiae before the Ninth Circuit in Aguilar arguing that the interpretation of harboring applied in that case would "gravely threaten the daily activities of thousands of humanitarian groups and individuals--charitable activities ranging from providing crisis medical care, shelter and food to longer term assistance with psychological, economic, or family needs." [FN33]

The Government's response in Aguilar has failed to reassure. Arguing that the fears expressed by mainstream charities were *126 fanciful, [FN34] the Government urged the court to retain the Acosta de Evans harbor-equals-shelter formulation and to reject any exemption for actions taken for humanitarian reasons. [FN35] The purpose of this Article is to focus on this narrow but important dispute over the alleged criminalization of the provision of humanitarian aid to undocumented persons under federal immigration law. This Article will argue that courts have incorrectly read the harboring provisions of Section 274(a) and Section 1324(a) to include humanitarian aid. The language, legislative history and applicable constitutional doctrine all prove that the anti-harboring laws should criminalize only those activities undertaken with a specific intent to hinder the detection of an undocumented person by government authorities. Because sanctuary workers provide their services without this specific intent, Section 274(a) and its successor Section 1324(a) should properly be interpreted as not criminalizing the kinds of activities long championed by the Sanctuary Movement. By failing to incorporate the requisite specific intent into their
analyses, the courts in U.S. v. Acosta de Evans and U.S. v. Lopez mischaracterized the anti-harboring provisions of the statute in a way that provoked tragic confusion in Aguilar and other cases.

Before examining the legal aspects of this problem, however, it is crucial to consider what sanctuary has come to mean for the Sanctuary Movement. Reflections on the meaning of this term have tended to focus on the stark confrontations between law enforcement and sanctuary, government and religion, and realpolitick and human rights. Unfortunately, such paradigms ignore the subtle but very real dilemmas facing many outside the government and outside the Movement. Mainstream charities and churches, not to mention countless individuals, plainly react with horror at the plight of Central Americans both here and abroad. Yet few Americans are sympathetic to the wholesale smuggling of foreigners across our southern borders when their presence arguably results in the loss of job opportunities for American citizens. [FN36] Massive civil disobedience against basic immigration structures seems to many as instinctively unthinkable as turning a desperate refugee from the church door.

In order to address these tensions, this Article will explore the legal distinction between illegal harboring and permissible sanctuary and will attempt to develop a framework for understanding the place of sanctuary within the current immigration policy of the United States. This framework will offer several key benefits. First, it will suggest how federal immigration policy can effectively proceed without declarations of war on those who offer sanctuary. Second, it will challenge the Sanctuary Movement itself to define more precisely the boundaries, and the necessity, of the various forms of civil disobedience the Movement has felt compelled to endorse.

Finally, by demonstrating that humanitarian sanctuary activities are not illegal, this Article will force mainstream charities and religious organizations to confront in moral rather than legal terms their own reluctance to pursue humanitarian work with the undocumented.

I. The Contours of Sanctuary

Sanctuary is a powerful word and an ancient concept. [FN37] Because of its long pedigree and its attractiveness as a label, sanctuary has acquired numerous inconsistent connotations, even within the Sanctuary Movement.

A. Active and Reactive Sanctuary

Determining which of the activities performed by sanctuary workers should be included in the definition of "sanctuary," remains a fundamental problem for the Movement. Different branches of the Sanctuary Movement provide different combinations of services to undocumented persons. These services can roughly be categorized as active forms of sanctuary (such as smuggling aliens across the border) or reactive forms (such as providing shelter overnight).

The activities of the Aguilar defendants are emblematic of the Sanctuary Movement and involve both forms of sanctuary. [FN38] The Aguilar defendants travelled to Mexico to assist Central American refugees in finding holes in the border fence [FN39] and walked through a port of entry with an undocumented thirteen-year-old Salvadoran girl. [FN40] Inside the United States, they transported undocumented refugees en route to safe houses outside Arizona. [FN41] At the same time, two defendants merely provided shelter and food to undocumented Central Americans for less than a day. [FN42]

1. Shelter

Responding to the immediate and often desperate need of refugees for shelter is probably the most significant activity of the Movement. According to the literature of the Chicago Religious Task Force on Central America, which became the national coordinator for the Sanctuary Movement in 1982 at the invitation of the Tucson leaders, offering sanctuary means "providing food, shelter, clothing, and medical assistance" along with providing assistance in obtaining employment, finding appropriate schools and learning English. [FN43] Such was the definition agreed to by the scores of churches and synagogues which eventually offered "sanctuary." [FN44] The Arizona Sanctuary Movement began with the provision of shelter to hundreds of undocumented, twenty at a time, [FN45] both at Southside Presbyterian in Tucson and at Sacred Heart Church in Nogales, Mexico. [FN46] The Rio Grande Valley branch of the Sanctuary Movement also grew out of the simple provision of shelter to the undocumented at Casa...
Oscar Romero. [FN47]

2. Smuggling

Smuggling is the act of helping undocumented persons to enter the United States. This activity generated a significant amount of publicity for the Movement. [FN48] but has been confined to a very small group of activists within the Tucson branch of the Movement. Led by Jim Corbett, this group brought as few as 120 refugees into the country each year. [FN49] The Sanctuary Movement's own publications describing how to participate in its activities do not include any call to help unauthorized aliens enter the United States. [FN50] In the Rio Grande Valley area of Texas, where sanctuary workers were also convicted of federal crimes for their work, [FN51] even the staunchest of the sanctuary workers did not smuggle aliens across the Rio Grande. [FN52] For all the publicity about smuggling of refugees in the Tucson Movement, only two of the Aguilar defendants, both Mexican citizens, were even indicted for "bringing in" unauthorized *131 aliens, and only one of those two was convicted on that charge.

3. Transportation

Another form of active sanctuary, helping undocumented persons travel within the United States, was more widely practiced than smuggling. Refugees who found a way to cross the international border needed transportation to reach the sanctuary churches of Tucson and beyond. [FN53] These transportation services, labelled "evasion services," were actions taken primarily to frustrate the efforts of authorities to capture unprocessed refugees. [FN54] One-third of the convictions in Aguilar [FN55] and several of the convictions handed down against sanctuary workers in the Rio Grande Valley [FN56] were for transportation of undocumented or for aiding and abetting such transportation. The lack of resources in border-area churches made it necessary to move refugees to sanctuary churches in other states. [FN57] As a practical matter, transportation of undocumented often meant as little as giving a refugee a ride to a bus station. [FN58]

Although the term "underground railroad" became a popular descriptor for the Movement's activity, transportation should not be seen as the defining component of sanctuary itself. The literature on sanctuary published by CRTFCA does not explicitly include transportation as part of providing sanctuary. [FN59] Moreover, the Legal Memorandum circulated by CRTFCA detailing the legal risks faced by sanctuary workers does not mention possible liability under the anti-transportation provisions of Section *132 274(a)(1)(b) [then Section 274(a)(2) ]. [FN60] In fact, CRTFCA urged that only refugees bound for "public sanctuary," (i.e., highly visible, politically active sanctuary) be given transportation on the "underground railroad." [FN61] On at least one occasion CRTFCA refused to transport Guatemalan refugees referred by Tucson workers. [FN62] These actions, motivated by what CRTFCA saw as the strategic concerns of the Movement, angered activists in Tucson, [FN63] but all agreed that the "railroad" could accommodate only a small proportion of refugees needing to be moved. [FN64]

B. Historical Precedent and Definition

Both the active and reactive forms of sanctuary have historical roots, though the precedent for reactive sheltering activities is probably stronger. Sanctuary as practiced in both ancient and medieval times was centered on the idea of a religious place of refuge for those who had offended civil authorities. [FN65] Only those who reached a place of sanctuary on their own were protected. [FN66] Evasion services played no role in pre-modern concepts of sanctuary. [FN67] Nor was there any serious debate in the ancient and medieval worlds about the legality of providing shelter to criminals and debtors under the rubric of sanctuary; as long as specific *133 conditions were satisfied, the legality of providing such sanctuary was fully, if not always happily, recognized by civil authorities. [FN68]

The history of recent rescue movements, particularly the antebellum Underground Railroad operated by abolitionists and the efforts of some in Europe to shelter Jews from the Nazis, offer moral support for active forms of sanctuary. [FN69] Unlike sanctuary in the Middle Ages, these later rescue movements embraced smuggling and clandestine transportation. [FN70] although provision of shelter in each case was probably far more important. [FN71] These movements, unlike Medieval sanctuary, were also clearly illegal. [FN72]

The activities of the current Sanctuary Movement differ significantly from these recent rescue efforts in two respects. First, one of the essential requirements for becoming a sanctuary for Central Americans is a "[p]ublic
statement and service inaugurating your congregation as a public sanctuary for Salvadoran and Guatemalan refugees." [FN73] Even with respect to transportation and smuggling activities, Sanctuary Movement leaders scorn secrecy [FN74] and have some confidence in government civility and restraint. [FN75] Such openness would have been fatal to the efforts in the antebellum United States and Nazi Europe. [FN76]

*134 A second, more subtle difference is the selectiveness of the current movement. Major elements in the Sanctuary Movement were from the beginning unwilling to provide help to any but "high risk" refugees who passed "political screening." [FN77] Only those Central Americans who had a "good story" of horrifying abuse in their home areas were of value in swaying public opinion. [FN78] This exclusivity met with fierce resentment in some quarters of the Movement, most notably from Father Tony Clark [FN79] and Maria Aguilar. In fact, refugees were turned away for failure to satisfy Movement screening. [FN80] In contrast, the Underground Railroad, in its willingness to help any Black fleeing the South, sometimes found itself aiding imposters and "bogus fugitives." [FN81]

It is thus impossible to find any clear basis for what Movement leaders mean by sanctuary in the Sanctuary Movement's use of historical precedents. The use of evasion services, public proclamations defying government authority and highly selective criteria are each consistent and inconsistent with one or more of the traditions cited in support of the Sanctuary Movement.

C. At Cross-Purposes Over Sanctuary

Just as the Sanctuary Movement's participants have been unable to agree on the proper scope of sanctuary activity, they have been unable to agree on a common set of goals for the Movement. Two questions have proven particularly vexing: (1) should political change or (theologically inspired) humanitarianism be the chief aim of sanctuary work?; and (2) is sanctuary work a form of civil disobedience which derives meaning from its illegality, or is sanctuary a just cause which should not be criminalized?

1. Political Change or Humanitarian Charity?

Federal officials monitoring the Sanctuary Movement have long presumed it to be a wholly political (as opposed to religious [FN82] *135 or humanitarian) effort to force dramatic changes in U.S. policy toward Central America. As the director of the undercover investigation directed at the Aguilar defendants explained, the Government believed "members of the [[sanctuary] conspiracy [were] ... motivated by a strong political philosophy under the guise of religious beliefs." [FN83] The Government clung to this belief despite knowledge of Mrs. Aguilar's longstanding religious devotion and the fact that among her ten co-defendants were two Catholic priests, a Presbyterian minister and a Catholic sister. [FN84] Government contempt for the sincerity of sanctuary workers' religious motivations reached its apex when federal agents posing as co-workers and co-believers in the Arizona Sanctuary Movement made tape recordings and gathered information at church meetings and religious events. In court, the Government made every effort to suggest that what sanctuary workers called religious gatherings were in fact "press conferences" or "conspiratorial meetings." [FN85]

Political goals were of primary importance to some in the Sanctuary Movement. Renny Golden and Michael McConnell, two leading theorists of the Movement, have acknowledged that I.N.S. officials "were correct in stating that the Sanctuary Movement has understood its stance in behalf of refugees as an inevitably political act." [FN86] Such political acts sought not merely changes in U.S. immigration and foreign policy toward Central America, [FN87] but fundamental *136 transformations in domestic structures. The Reverend William Sloane Coffin summed up this point of view, noting:

[T]he real issue is human rights in economic terms. The real issue is the pyramid of property and power relationships. In other words, a successful social revolution....

[W]e in the Sanctuary Movement can no longer separate foreign policy from domestic policies, and we may have to recognize that the best way to change the former lies in a change of the latter. I realize that by making these connections, the Sanctuary Movement may lose some of its middle-class adherents, but only by making these connections will the Movement gain converts among the poor in this country, especially blacks.... [FN88]

Many members of the Sanctuary Movement adhered to this strongly political perspective. For example, many
sanctuary workers in Texas avoided giving assistance to refugees from Nicaragua largely because of their sympathy with the Nicaraguan revolution from which the refugees had fled. [FN89]

It is ultimately incorrect, however, to view the primary aim of the Sanctuary Movement as changing governmental policy. While many participants pursued political goals, most, especially mainstream church groups, resisted any agenda beyond charitable assistance to actual refugees. [FN90] Many sanctuary workers along the border were deeply angry at the refusal of CRTFCA and the more political wings of the Movement to accept into sanctuary any refugees except those with both heart-wrenching tales of oppression and the ability to describe their experiences in overly political terms. [FN91]

*137 The split between the political and humanitarian perspectives was apparently never resolved. The 1985 arrests of the Aguilar defendants overshadowed this division in importance; following the indictments in that case, Movement leaders put aside their differences, at least temporarily. [FN92]

2. The Importance of Legality in Sanctuary

In preparing their defense, the Aguilar defendants were forced to decide whether to attempt to justify their actions as legal under existing law, or, alternatively, whether to admit the alleged illegality of their conduct but justify their actions on traditional civil disobedience grounds. Because of the immense symbolic power of their defense within the Sanctuary Movement, their decision to argue the legality of their actions substantially defined the Movement's future relationship with civil law.

This decision did not necessarily flow from the history and philosophy of sanctuary. The earliest declarations of sanctuary had openly declared the intent of the churches involved to violate the "law"--I.N.A. Section 274(a). [FN93] Media accounts of the exploits of early sanctuary workers all gave prominent place to the illegality of the actions involved, with no protests or denials from those portrayed. [FN94] In 1982 one member framed sanctuary in classic civil disobedience terms:

There's a very clear mandate on our part that when the law results in terror and torture and even death to innocent *138 people, the church must look to a higher law--the law of God. We are willing to suffer the consequences. [FN95]

Open defiance of the law was a way of attracting public attention to the plight of Central American refugees. [FN96] This strategy proved quite successful, [FN97] attracting the attention of the Ninth Circuit when it considered Aguilar on appeal. In a corrosive opinion that referred to the heightened media coverage, the court noted the Movement's "so-called safehouses," "self-described sanctuaries" and ultimately its leaders' "disdain for federal immigration law." [FN98]

Long before the Aguilar arrests, however, much of the Movement's leadership, particularly Jim Corbett, had rejected the premise that their work was illegal. The Tucson sector of the Sanctuary Movement argued vehemently that their assistance to refugees was legal because the Central Americans they were helping had the lawful right to be in the United States under the Refugee Act of 1980. [FN99]

As developed in Aguilar, this argument consisted of several key propositions. (1) Sanctuary workers committed no crime under Section 274(a) because the Central Americans they assisted were entitled to enter and reside in the United States as "refugees" under the Refugee Act of 1980 and were lawfully present in the country. [FN100] (2) Even if sanctuary workers were mistaken in their understanding of the Refugee Act, an honest belief that an undocumented alien was entitled to reside in the country because he or she fit within the Act's definition of a "refugee" provide a good *139 defense to the knowledge element of Section 274(a) [FN101] under the mistake-of-law-mistake-of-fact doctrine of Liparota v. U.S.. [FN102] (3) The Government's tactics in its Aguilar investigation negated key substantive elements of Section 274(a) and precluded conviction of any sanctuary workers on constitutional/procedural grounds. [FN103] (4) The conduct of the sanctuary workers was protected under either the Free Exercise Clause of the First Amendment [FN104] or a more specific humanitarian exception to the prohibitions of Section 274(a). [FN105] (5) Their conduct could be justified through a "necessity defense." [FN106] (6) The actions of the defendants did not constitute harboring as that term is used in Section 274(a). [FN107]
Many of these legal arguments received support in scholarly literature. [FN108] They did not, however, receive a favorable reception in the Fifth and Ninth Circuits, where Aguilar defendants, John Elder and Stacy Merkt appealed their convictions. Both circuits rejected the argument that an undocumented alien can "lawfully" enter or reside in the United States in any way which would preclude Section 274(a) liability for sanctuary workers without first filing an application for refugee status. [FN109] Both circuits also rejected the sanctuary defendants' Liparota claims, holding that a mistake about the applicability of the Refugee Act of 1980 to the asylum claims of an alien is a mistake of law for which ignorance is no excuse. [FN110] All attacks on the Government's tactics against the Sanctuary Movement were rebuffed, [FN111] as were pleas to find in the Free Exercise Clause or in Section 274(a) itself an exemption for sanctuary actions motivated by religious or humanitarian beliefs. Most ironically, the sanctuary defendants' necessity defense was rejected based on what the Aguilar court labeled a failure "to establish there were no legal alternatives" to their conduct [FN112]--despite the finding of one district court, [FN113] and later the admission of the I.N.S. itself, [FN114] that the federal government had systematically discriminated against Salvadoran and Guatemalan asylum applicants, thereby making the legal process useless for the vast majority of them. [FN115]

Only one argument advanced by the Aguilar defendants was not firmly rejected by the Ninth Circuit: that the "harboring" provisions *141 of Section 274(a) were not meant to criminalize the mere sheltering of undocumented persons absent a specific intent to help them evade I.N.S. detection. [FN116] While noting that this "very claim" had been rejected in United States v. Acosta de Evans, [FN117] the court held that a panel not sitting en banc has no authority to overturn Ninth Circuit precedent. [FN118] The court declined to reaffirm or criticize the prior case, finding that "[e]ven if Acosta de Evans were incorrectly decided, the appellants' claim would fail given the facts of this case." [FN119] That is, the court viewed it as "clear beyond any doubt" that the defendants convicted of harboring offenses had "intended to help the aliens in question to evade I.N.S. detection." [FN120] Given the ringing endorsement of the panel for every other controlling Ninth Circuit precedent it cited, [FN121] its refusal to consider Acosta de Evans in this context provided at least some hope for a future change of direction.

This hope, while faint, is of extreme practical importance for the Movement. The broadest contingent of sanctuary churches and workers have been engaged in the reactive, non-clandestine shelter of the undocumented. It is this sheltering of the endangered that is most squarely within the various traditions of sanctuary on which the Sanctuary Movement rests its work. Finally, this reactive form of sanctuary is least likely to provoke sharp political divisions within the Movement's ranks. Vindicating the legality of sheltering undocumented refugees would be but a small but significant step toward Jim Corbett's goal of establishing sanctuary as a civic duty rather than a crime.

II. Sheltering, Harboring and the Law

Assessing the future of the Sanctuary Movement depends in part on the answer to the fundamental question: Does federal law prohibit Americans from providing humanitarian shelter to anyone known to be an unauthorized alien, especially when that shelter is intended to be public and not clandestine? That the question is a legal one--in contrast with the political, philosophical and religious questions raised by the Sanctuary Movement--is hardly a guarantee that it can be easily resolved.

This section analyzes this question in three steps. First, careful textual analysis of Section 1324(a)(1)(C)--the successor, under the Immigration Control and Reform Act of 1986, [FN122] to the anti-harboring provision applicable to the Aguilar defendants--will reveal a substantial array of knotty unresolved issues as to its meaning. Second, careful attention to the path Congress travelled to arrive at the anti-harboring provisions of the 1952 and 1986 immigration acts will reduce sharply the range of likely solutions to most of the textual issues Section 1324(a)(1)(C) poses. Once that history is applied with other standard tools of statutory construction, very different conclusions will emerge about the elements of the crime of "harboring" in Section 1324(a)(1)(C) than those suggested by recent federal court rulings. Finally, analysis of Keller v. United States, [FN123] a rarely cited but still robust Supreme Court decision, will demonstrate that the language of Section 1324 cannot constitutionally be applied to humanitarian shelter of undocumented persons.

A. The Mysteries of Section 1324(a)(1)(C)

The current language of Section 1324(a)(1)(C), while hardly a model of elegance, seems on first reading to be...
rather straightforward:

(1) Any person who--

....

(C) 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 *143 from detection, such alien in any place, including any building or any means of transportation....

....

shall be fined in accordance with Title 18, or imprisoned not more than five years, or both, for each alien in respect to whom any violation of this paragraph occurs. [FN124]

The three subsections of Section 1324(a)(1) that precede and follow this anti-harboring provision prohibit smuggling aliens into the United States, [FN125] transporting within the country aliens unlawfully present here, [FN126] and inducing aliens to enter or reside in the United States illegally. [FN127] Each of these crimes are assigned the same penalty.

The anti-harboring provision, however, is quite special. Its language presents enormous interpretative problems, most obviously in its use of the term "harbor." How should this uncommon word be read? The Supreme Court, in its only encounter with the problem in this context, openly admitted it was stumped. [FN128] The Second Circuit was likewise frustrated in its attempt to construe the anti-harboring statute in Lopez. "Our task would have been lightened," the court noted dryly, "if Congress had expressly defined the word 'harbor.' " [FN129]

Indeed, the four federal appellate decisions that have wrestled with the meaning of "harbor" in the immigration context have produced four distinct definitions: (1) "to clandestinely shelter, succor and protect" (Sixth Circuit); [FN130] (2) "that [aliens] be sheltered from immigration authorities and shielded from observation to prevent their discovery as aliens" (Second Circuit, 1940); [FN131] (3) "conduct tending to substantially facilitate an alien's 'remaining *144 in the United States illegally' " (Second Circuit, in Lopez); [FN132] and (4) "afford shelter to" (Ninth Circuit, in Acosta de Evans). [FN133]

Where the judges are unable to reach consensus, might the dictionary help? The Ninth Circuit in Acosta de Evans appeared to think so, referring to Webster's and finding that "simple sheltering ... appears to be the primary meaning" of "harbor." [FN134] Yet the Oxford English Dictionary takes the opposite view, labelling "to provide a lodging or lodging place for" as an "obsolete" definition of "harbour." [FN135] Instead, the Oxford English Dictionary gives the leading current definition of the term as "... to give secret or clandestine entertainment to noxious persons or offenders against the laws." [FN136] Ultimately the term "harbor" in Section 1324(a)(1)(C) offers its readers arcane, metaphorical charm, perhaps, but little concrete guidance as to the intent of Congress in crafting the provision.

The term "shield," likewise, makes a rather puzzling appearance in Section 1324(a)(1)(C). Unlike "harbor," which is typically paired with "conceal" in accomplice-after-the-fact statutes, [FN137] "shield" is not a familiar term in federal law. But like "harbor" it has a metaphorical character that invites confusion, as the following definition of "shield" (from the Oxford English Dictionary) reflects:

To protect (a person or object) by the interposition of some means of defense; to afford shelter to; to protect (an accused person, etc.) by authority or influence. [FN138]

*145 Does "shielding" under Section 1324(a)(1)(C) thus mean the same thing as Acosta de Evans' view of "harboring"--i.e., "afford[ing] shelter to?" And if so, how is this consistent with the insistence of Acosta de Evans and Lopez that "harbor," "conceal" and "shield" each have distinct meanings? Or, as the Fifth Circuit appears to believe, does "shielding" mean any overt act that makes apprehension of an unauthorized alien more difficult? [FN139] Or, as the Oxford English Dictionary implies, does "shielding" require an additional element of "authority," "influence," or, more vaguely, "the interposition of some means of defense?" [FN140] If all these alternatives have the air of plausibility, none of them seems especially compelling.

The structure of Section 1324(a)(1)(C) is even more opaque than its vocabulary. To begin with, what are we to make of the phrase "from detection" immediately following "conceal, harbor, or shield?" Is it meant only to modify "shield," as the Acosta de Evans panel believed? [FN141] Or is "from detection" an adverbial phrase meant to
modify all three of the preceding verbs as does "in violation of law" earlier in the same provision ("knowing or reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law")? [FN142] The latter approach comports with what the Supreme Court has described as the "natural construction" of such phrases. [FN143] There are also strong reasons in the legislative history to prefer the latter reading, though the text by itself offers no compelling reason to prefer one approach to the other. [FN144]

From another structural angle, what should be made of the disjunctive character of the phrase "conceal, harbor, or shield?" (emphasis added) Does the presence of the "or" indicate that each of the terms should be given distinct meanings? [FN145] On the other *146 hand, should the "or" be read as placing the words, in Judge Learned Hand's phrase, [FN146] in "collocation" with each other, each helping to define the other? [FN147] That is, did Congress mean to say "conceal or [alternatively] harbor" or, rather, "conceal or [similarly] harbor?" [FN148] Both are perfectly acceptable in standard use. [FN149]

The puzzles of Section 1324(a)(1)(C) reach Gordian complexity when the impact of yet another disjunctive construction in the provision--"[k]nowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law" (emphasis added)--is factored in. This frightening phrase, perhaps best characterized as a Double-Triple Disjunctive with a Twist, [FN150] creates the possibility, recognized in United States v. Esparza, [FN151] that an alien who "comes to" or "enters" the United States illegally might trigger a Section 1324(a)(1)(C) violation even after his or her status has been legitimated through administrative or judicial means. Esparza upheld a Section 1324(a)(1)(C) conviction based on the coercive concealment of individuals who had entered the United States illegally but had been given temporary permission to remain in this country pending deportation proceedings. Other, less literal readings of this language, including those of Acosta de Evans and Lopez, have concluded that assistance to aliens can only come within the "harboring" statute if the aliens in question are currently in unlawful status. In this respect, as in others, the language of Section 1324(a)(1)(C) is riddled with ambiguity.

The ambiguities of this provision in its current and (slightly different) previous versions have been so substantial that no court *147 since the 1940s has claimed to be able to decipher the anti-harboring prohibitions of the federal immigration statutes from the text alone. The inexact nature of the words "harbor" and "shield" and the perilously unstable disjunctive structure of Section 1324(a)(1)(C) and its predecessors have left the federal courts obviously frustrated in attempting to perform their duty to determine the statute's meaning based primarily on its "plain language." [FN152]

B. The History of Federal Anti-Alien-Harboring Statutes

Until early in this century, a prohibition against harboring an illegal immigrant was inconceivable. Until 1875 no restrictions existed regarding entry to, or residence in, the United States. [FN153] Between that year and 1910, more than 23 million immigrants crossed our borders. [FN154]

From the first decade of this century, however, Congress attempted to prohibit actions to "conceal or harbor" certain foreign nationals. In 1907, it banned those aliens involved in prostitution; [FN155] in 1917, Congress widened the ban to include all aliens "not lawfully entitled to enter or reside in the United States." [FN156] Both efforts foundered in the Supreme Court. Keller v. United States held the 1907 Act unconstitutional, on federalism grounds, as applied to one who had "only furnished a place" to an alien prostitute. [FN157] In response, Congress quickly enacted legislation in furtherance of its responsibilities under international agreements to require the filing of disclosure statements by anyone harboring alien prostitutes. [FN158] Evans v. United States, [FN159] decided almost forty *148 years later, held that the 1917 statute was so confusing in its language, particularly its failure to define the scope of the word "harbor," that it failed to provide an effective penalty for concealment or harboring of undocumenteds. [FN160]

The Evans court saw serious dangers in giving the Government the broad construction it sought of the 1917 Act's anti-harboring provisions, noting:

In that event the innkeeper furnishing lodging to an alien lawfully coming in but 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.... [FN161]
The Court found it absurd for Congress not to provide "very different penalties" for those involved in smuggling and those involved in acts "disconnected from that process." [*FN162] Ultimately the Court reasoned it "better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make." [*FN163] The 1917 anti-harboring provisions had become dead letters.

1. The Wetback Law of 1952

It is possible that immigration anti-harboring prohibitions would have remained ineffective but for a crisis in relations between the United States and Mexico during the four years that followed Evans. In 1951 and early 1952 the longstanding arrangement for importation of braceros--temporary agricultural laborers from Mexico admitted under a bilateral agreement to harvest [*149] American crops [*FN164]--threatened to come apart. [*FN165] Mexico insisted that the United States take strong measures to stop the flow of illegal labor out of Mexico, migration that undermined the wages and working conditions of lawfully admitted braceros. [*FN166] In response, President Truman urged Congress to "put a stop to the employment of illegal immigrants," first by responding to the Evans decision and "providing punishment for the offense of harboring or concealing" illegal aliens, [*FN167] and second, by permitting immigration officials to inspect places of employment without a warrant. [*FN168] In urging these measures he noted that illegal aliens "have to hide and yet must work to live," and are "thus in no position to bargain with those who might choose to exploit them." [*FN169] In addition, their presence hurt the economic position of both domestic workers and braceros. [*FN170] Yet Truman clearly expressed no intention to extend the reach of harboring liability beyond its scope under the 1917 Act; [*FN171] all he asked was that the Evans no-punishment-equals-no-crime loophole be closed. [*FN172]

Rushed through the Senate in one day and the House in two--without committee hearings in either [*FN173]--the hurriedly prepared "wetback bill" (as it was called by its backers) [*FN174] became law on March 20, 1952. [*FN175] Though described by its sponsor, Senator Kilgore, as "a temporary expedient to take care of an emergency," [*FN176] [*150] the "wetback bill" would triumph over its casual parentage. It was incorporated without change as Section 274 of the Immigration and Nationality Act of 1952 [*FN177] and remained untouched until the Immigration Reform and Control Act of 1986. [*FN178] Similar in its anti-harboring language to its 1917 Act predecessor, the "wetback bill" swept wider, prohibiting for the first time the transportation of illegal aliens within the United States, as well as the inducement of their entry into the country. [*FN179] However, the legislative record of its passage lends no basis for an expansive reading of its anti-harboring language. In fact, through strong disavowals of any marginal applications of "harboring" liability, and in their affirmative descriptions of the conduct that the law would cover, the bill's sponsors and chief backers signaled a clear intention that the provision be narrowly interpreted.

Senator Kilgore viewed his bill as a "temporary expedient," sharply limited in scope. [*FN180] The very brief report of the Senate Judiciary Committee presented the bill's anti-harboring provision in the most non-controversial light possible. The proposal, it declared, only "corrects" the "deficiency" in the 1917 Act's penalty clause that United States v. Evans had exposed. [*FN181]

Congressman Celler, Chairman of the Judiciary Committee, was even more explicit in pronouncing the limits of S.1851:

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. [*FN182]

*151 He assured his colleagues that the only purpose of the bill was to punish "malefactors ... who exploit and oppress these illegals." [*FN183]

At the urging of commercial and agricultural interests, the Senate drafters of S.1851 added to its language the infamous Texas Proviso:

Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring. [*FN184]
In the debate on the "wetback bill," this was the only point that generated substantial controversy, with a vocal minority supporting the addition of language making employment of illegal aliens a crime. [*FN185] Yet all sides agreed that employment of aliens is not the same thing as the harboring of them, [*FN186] a fact that appears to have escaped the attention of several federal courts later engaged in attempting to understand the meaning of the proviso. Far from being a specific exemption of employment from a broadly sweeping "harboring" provision, the proviso was simply, in the words of Senator Kilgore, "an additional safeguard" to prevent needless anxiety on the part of farmers and others. [*FN187]

The distinction between employment and harboring made perfect sense in the context of the "wetback bill" most likely because of the strong nexus between "harboring" and "concealing" in the minds of its drafters. Not only had courts in interpreting prior law combined the two terms, but they were used synonymously in the legislative debates and reports that preceded adoption of S.1851. [*FN188] [*152] One of the more revealing examples of the symbiosis of "harbor" and "conceal" occurred in Senator Kilgore's explication of the "employment proviso":

By stating that so long as an employer lets the employee carry on only the normal work of his employment and does not make any special effort of any kind to conceal him, that of itself shall not constitute harboring. But if he takes any further steps, such as providing a place for the employee to hide out, that does constitute harboring. [*FN189]

"Harboring," in Kilgore's view, thus required some "special effort to conceal" an alien or some "further steps" to permit continued concealment. At no point in the debates or in the committee reports on the "wetback bill" was it even suggested that "harboring" liability could attach in a situation where an alien was not being actively concealed from the immigration authorities.

2. Section 274(a) of the Immigration and Nationality Act

The technical life span of the Wetback Law was remarkably short, although the precise language of its penal provisions were incorporated as Section 274(a) of the Immigration and Nationality Act of 1952 (the "I.N.A."). [*FN190] The legislative history of this Section, part of the omnibus McCarran-Walter bill, [*FN191] is brief.

In two respects, however, the background to Section 274(a) is highly illuminating. It is only in the legislative history of that section that any clue exists as to the provenance of the mysterious phrase "shield from detection." The 1917 Act's anti-harboring section had made it unlawful to "conceal or harbor" undocumented persons; [*FN192] both the "wetback bill" and Section 274(a)(3) changed the wording to "conceal, harbor, or shield from detection" (emphasis added). That left a riddle of subtle importance in measuring [*153] the statute's reach: were the words "from detection" meant to modify, and therefore limit, all three of the preceding verbs, or only "shield?" Though grammatically either reading is correct, the legislative record offers conclusive evidence regarding Congressional intent. When the House made its final revisions in Section 274(a)(3) prior to sending it to conference, it approved the measure with critically different wording: the crime in this version was to "conceal, harbor, or shield such alien from detection." [*FN193] When Section 274(a)(3) emerged from the conference committee, it had been reworded to move "such alien" after subsection (4), where it served as the object of all the preceding subsections' verbs. [*FN194] The slight change in the anti-harboring section received no mention in the Committee's notations on House and Senate differences, as it was part of the Committee's "perfecting and conforming changes in the bill's language." [*FN195] As ultimately worded, the new Section 274(a) conformed exactly with the wording of the previous Wetback Law. Despite the view of one decision to the contrary, [*FN196] Congress clearly targeted for penalty primarily that conduct which was intended to prevent the detection of an alien. [*FN197]

The brief legislative record surrounding Section 274(a)(3) does not help illuminate the intended scope of the word "harbor." [*FN198] In an effort to defeat the McCarran bill in the Senate, opponents painted a dark picture of the committee's decision to omit the [*154] words "willfully and knowingly" from the Wetback Law anti-harboring language. [*FN199] Senators Humphrey and Lehman warned that the new Section 274(a) might lead to the following horror:

[I]f 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 wold 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. [*FN200]
Senator Humphrey's language is ironically the apparent basis for the conclusion of the Second Circuit in United States v. Lopez [*FN201*] that in adopting Section 274(a)(3), "members of Congress appear to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act...." [*FN202*] In fact the debates reveal exactly the opposite. Senator McCarran, the bill's sponsor, agreed that Humphrey's chimera would be an "abuse of legislative power," [*FN203*] and responded to the criticism of the committee's version by declaring that he would offer an amendment to reinsert "willfully or knowingly" in the provision. [*FN204*] Humphrey then convinced McCarran to concede that the current section was intended simply to mirror the Wetback Law and would "not apply except under wetback conditions." [*FN205*] This view was consistent with the view of both the House Judiciary Committee [*FN206*] and the Administration that the word "harbor" in Section 274(a)(3) did not include within its definition the employment of undocumented persons.

*155* C. Judicial Construction of Former Section 274(a)(3)

Although the drafters of Section 274(a)(3) were confident in the narrow scope of the measure they adopted, Congress did not clarify the meaning of the word "harbor" in the new Act. Because the Supreme Court never ruled on this term after Evans, lower federal courts were left to parse Section 274(a)(3)'s language alone. Prior to the enactment of the Immigration Reform and Control Act of 1986 the judiciary seemed to have defined the act of harboring with some success. The courts, however, to agree upon the mens rea necessary to turn certain forms of assistance into illegal harboring.

None of the reported cases purporting to interpret Section 274(a)(3) carefully examined its background or legislative history. [*FN207*] Three cases decided in the mid-1970s, United States v. Lopez, [*FN208*] United States v. Acosta de Evans [*FN209*] and United States v. Cantu, [*FN210*] have become the cornerstones for determining harboring liability. [*FN211*] Those decisions, especially Acosta de Evans, are the basis for the expansive reading of "harboring" liability by the Government and the Sanctuary Movement in the early 1980s. Because of their continuing relevance to the post-1986 understanding of "harboring," those cases merit careful scrutiny.

1. Acts of Harboring Under Pre-1986 Law

Lopez, Acosta de Evans and Cantu present substantially different fact patterns which make their underlying agreement on the *156* parameters of harboring conduct under Section 274(a)(3) a formidable legacy. Both Lopez and Cantu involved assistance to undocumented aliens in the hope of profit. The defendant in Lopez rented single family houses to several aliens who had entered the country illegally. He also helped them get jobs, transported them to work and helped arrange sham marriages with American citizens for several of them. [*FN212*] When I.N.S. agents arrived at Cantu's restaurant one morning, he tried to help several of his undocumented employees escape. [*FN213*]

The Second Circuit in Lopez, followed by the Fifth Circuit in Cantu, upheld convictions on these facts, proposing that the term "harbor" in Section 274(a)(3) "was intended to encompass conduct tending substantially to facilitate an alien's remaining in the United States illegally...." [*FN214*]

In Acosta de Evans, [*FN215*] by contrast, the Ninth Circuit confronted harboring allegations in a non-commercial context. The defendant met her fifteen-year-old Mexican cousin in Tijuana, where they discussed "the difficulty of getting immigration papers," and then let her stay at the defendant's apartment in San Diego for two months. [*FN216*] A jury convicted her of harboring after being instructed that Section 274(a)(3) covers only "clandestine" activities that are "calculated to obstruct the efforts of the authorities in discovering or apprehending illegal aliens." [*FN217*] The Ninth Circuit affirmed and broadened the reach of the statute by declaring that "harbor" means simply to "afford shelter to." [*FN218*] Any significant differences between this approach and the substantial-facilitation standard in Lopez and Cantu disappeared when the Ninth Circuit upheld "harboring" instructions tracking the Lopez test in United States v. Aguilar. [*FN219*]

To reach this definition of "harboring" liability the courts confronted two key questions posed by the Supreme Court in United States v. Evans. [*FN220*] First, are the "concealing" and "harboring" denounced by Section 274(a)(3) "offenses distinct and disconnected *157* from smuggling operations?" [*FN221*] Second, are "concealing" and "harboring" offenses "separate and distinct from each other," or does harboring necessarily require concealment? [*FN222*]
Lopez, [FN223] Cantu [FN224] and Acosta de Evans [FN225] all considered claims that Section 274(a)(3) applied only to harboring closely connected to smuggling, and all rejected this line of reasoning. As Lopez found, the companion provisions of Section 274(a)(2) prohibited movement of aliens within 3 years of their entry, a time so long that the transportation "would not normally be in furtherance of the smuggling process." [FN226] Further, though wrong in its reading of history, Lopez viewed the Texas Proviso's exemption of employment from "harboring" as indicating that the Act embraced other conduct not typically involved in smuggling. [FN227]

Federal courts also rejected the argument that "harboring" in Section 274(a)(3) included only conduct that concealed undocumenteds from the Government. Acosta de Evans interpreted the Section as applying the employment exemption only to "harboring" the undocumented and not to "concealing" or "shielding" them: a decisive indication "that 'harbor' has a different meaning from 'conceal.' " [FN228] In Cantu, the Fifth Circuit took a less tortuous path to distinguish "harbor" from "conceal." If they were used "synonymously," the Court said, then "conceal would be redundant." [FN229] These textual arguments prevailed despite clear evidence that the drafters of Section 274(a)(3) drew virtually no distinction between "harboring" and "concealing." [FN230] and the fact that the leading case prior to 1952 had defined "harbor" as "clandestinely shelter, succor, or protect." [FN231]

*158 Further, the courts' attempt to detach harboring from both smuggling and physical concealment failed to account for the one branch in the pedigree of the anti-harboring statute not overtly discussed by Congress in 1952: the Supreme Court's holding in Keller v. United States that an anti-harboring provision aimed at someone who "only furnished a place" for an alien but did not "assist in [her] importation" was beyond Congress' immigration powers and thus unconstitutional. [FN232] The Court has never overruled this decision; assuming it still controls, the 1952 anti-harboring provision must be construed to be consistent with it. [FN233] Even if Keller has no current validity, it is possible that the legislators in 1952 assumed it was valid then. [FN234] and worded the provision to be consistent with it. The rationale of Lopez, Acosta de Evans, and Cantu for the substantial-facilitation test is thus at best incomplete.

2. Section 274(a)(3) and Mens Rea

Even as a description of harboring, the substantial-facilitation test is incomplete. The determination of federal courts in the 1970s to widen the sweep of activities classified as harboring only began to define the crime; it in no sense addressed the problem of criminal intent. [FN235] Every court construing Section 274(a) prior to its 1986 revision acknowledged the need for mens rea to complete an offense, [FN236] yet none even attempted to articulate a clear intent standard for the anti-harboring provisions. [FN237]

*159 This fact managed, however, to escape the Ninth Circuit panel in United States v. Aguilar, where the Sanctuary defendants urged both the district and appeals courts to find that Section 274(a)(3)'s harboring prohibition included a requirement for an intent to aid the unlawful alien for the purpose of evading INS detection. [FN238] The Aguilar court found that Acosta de Evans rejected this argument. Although the panel shied away from explicitly reaffirming this reading of Acosta de Evans, it refused on procedural grounds to reconsider the issue. [FN239] This refusal reduced the intent necessary to violate Section 274(a)(3) from specific intent to mere knowledge of an undocumented's illegal status. [FN240]

The cruel irony of this result is that the holding of Acosta de Evans with respect to intent under the harboring provision was the opposite of that articulated by Aguilar. The panel in Acosta de Evans declared that "the definition of 'harbor' used by the trial court was correct," [FN241] even though that definition included exactly the intent requirement urged by the Aguilar defendants: "the harboring statute forbids only intentional acts calculated to obstruct efforts of the authorities in discovering or apprehending illegal aliens." [FN242] In its brief, the Government acquiesced in this reading of "harbor." [FN243] And only a short time later another Ninth Circuit panel, which included one of the Acosta de Evans judges, cited this definition as authority for including the requirement that the defendant "acted willfully in furtherance of the alien's violation of law" as an element of Section 274(a)(2), the anti-transportation provision. [FN244] Only a year later, a different Ninth Circuit panel explicitly narrowed the transportation prohibitions of Section 274(a)(2) to exclude the actions of those "who, with no evil or criminal intent, intermingle with [undocumented]s socially or otherwise." [FN245] When the Acosta de Evans panel defined "harbor" to mean "afford shelter to," it was thus refusing a narrow construction *160 of the acts constituting the

crime, even as it was ratifying a stringent intent requirement. Further, the panel cited in support of its reading of "harbor" the venerable United States v. Grant, where the Court held that a "harboring" prohibition applies to "all persons who knowingly furnish [deserting seamen] food, shelter, or other aid with the intent thereby to encourage them to continue in their violation of the law." [FN248]

Similarly, United States v. Lopez [FN249] provides little support for Aguilar's weak intent requirement. Although the Lopez court noted support in the legislative history for the proposition that "providing shelter with knowledge of the alien's illegal presence would violate the Act," [FN250] it becomes obvious upon inspection of the Government's brief that this proposition is not a complete description of the mens rea requirement of Section 274(a). [FN251] Both the court and the Government emphasized heavily those actions of Lopez that demonstrated an intent to help undocumented evade the I.N.S. and immigration law. [FN252]

The Aguilar panel was simply wrong in its belief that courts interpreting Section 274(a)(3) ever rejected an "intent to evade detection"--or, perhaps less concretely, an "intent to encourage continued violation of law"--as an essential element of "harboring" liability. In fact, the admittedly few reported decisions point to the same conclusion reached in 1971 by the National Commission on Reform of Federal Criminal Laws when it examined Section 274(a). [FN253] In rewriting Section 274(a) to fit the style of the proposed new federal criminal code, the Commission explicitly *161 included an intent requirement as an essential element of the anti-harboring provision: an "intent to hinder, delay or prevent the discovery or apprehension of another who is an alien...." [FN254] At the same time, both the Commission and the courts took a broad view of the kinds of conduct that could be subject to prosecution for "harboring." [FN255] The publication of this report only five years before Lopez and Acosta de Evans is further evidence that the seeming breadth of their holdings applied only to conduct, and not to criminal intent.

The Aguilar panel cannot easily be excused, therefore, for its failure to conduct a careful review of the language and history of Section 274(a). [FN256] The complex legislative history of the provision indicates that it does not target "good people" who do not intend to conceal or exploit undocumenteds. The words "from detection" in the language of Section 274(a)(3) were almost certainly intended to limit the reach of "harboring" liability. In short, neither the canons of penal law construction nor the Congressional intent animating passage of the anti-harboring statute warranted jettisoning the specific intent requirement.

D. Defining Harboring in Current Immigration Law

Although the federal courts failed to provide a defensible and understandable reading of the 1952 Immigration and Nationality Act's anti-harboring provisions, they received a reprieve when the Immigration Reform and Control Act of 1986 ("I.R.C.A.") substantially revised the former Section 274(a)(3). [FN257] These changes *162 present an opportunity to reexamine the statute's scope in light of those considerations identified by the Supreme Court as crucial to the interpretation of penal statutes--the "language and structure, legislative history, and motivating policies of the statute." [FN258]

Such reexamination is unavoidable for several reasons. First, the changes wrought in immigration law by I.R.C.A. severely undermine the already tenuous rationale for interpreting "harboring" liability broadly. Second, developments in related aspects of federal criminal law and in principles of interpreting that law are in severe tension with the analytical methods of Lopez and its progeny. Finally, the courts must eventually confront the constitutional issues that will emerge if Congress is deemed to have taken action to punish humanitarian, non-evasive assistance to undocumenteds.

1. I.R.C.A. and Harboring

With I.R.C.A, Congress made three critical changes in the Immigration and Nationality Act that bear on the scope of the harboring prohibitions carried over from previous law. Read together, they cast doubt on the continued vitality of a broad reading of Section 1324(a)(1)(C). Because of the extraordinarily barren legislative history accompanying the 1986 anti-harboring language, [FN259] changes in the language and structure of the Immigration and Nationality Act are crucial in attempting to divine Congressional intent.

a. Revisions in Standard of Intent
The most obvious change wrought by I.R.C.A. that bears on "harboring" liability occurred in the language of Section 274(a)(3) itself. Whereas the old anti-harboring provision required that conduct be done "willfully or knowingly" to trigger a violation, [FN260] the new Section 1324(a)(1)(C) requires that concealing, harboring or shielding be done "knowing or in reckless disregard of the fact" *163 of illegal entry or status. [FN261] At first glance, this suggests that in 1986 Congress intended to relax the intent required to support a harboring conviction.

Linking the knowing/reckless intent language, however, to the status of the alien still leaves undefined the intent associated with the proscribed acts themselves--"concealing," "harboring" and "shielding." [FN262] How deliberate must concealment be to be criminal? Purely inadvertent conduct that incidentally shields or conceals one known to be an alien [FN263] certainly could not be encompassed by the statute. [FN264] Furthermore, is "reckless" or "knowing" conduct enough? When Congress in 1952 similarly omitted an intent requirement in the "bringing in" prohibition of Section 274(a)(1), the Fifth Circuit upheld the trial court's construction of the provision as requiring an "intent to evade and elude inspection by Immigration officers." [FN265]

A workable standard should stipulate that harboring must be accompanied by an intent to evade detection. [FN266] If harboring means merely giving assistance to a known alien, lawfully admitted aliens requiring emergency shelter or medical assistance might go unserved pending an inquiry by the provider into the status of the endangered person. [FN267] The new "recklessness" standard thus counsels *164 courts to be wary of mechanically relying on old formulations of the other elements of "harboring" liability.

b. Harboring and Employment under I.R.C.A.

But if the revised intent requirement merely underscores the need for careful construction of Section 1324(a)(1)(C), a second aspect of I.R.C.A. has more vivid consequences. Explicitly recognizing that "as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country ... will continue," [FN268] Section 1324(a) provides a broad series of civil and criminal penalties for employment of unauthorized persons. [FN269]

In enacting I.R.C.A., Congress also repealed the "Texas Proviso," which exempted employment of undocumented aliens from the prohibition against "harboring." [FN270] Again, as with the changes in the intent language of the section, I.R.C.A. might be viewed by those not on intimate terms with the comedies of immigration law as having dramatically expanded the scope of criminal liability for "harboring."

If anything, the elimination of the "Texas Proviso" means precisely the opposite. It is clear from the adoption of nuanced [FN271] employer penalties for employing undocumented aliens that Congress had no intention of making employment of undocumented aliens a felony under Section 1324(a)(1)(C). [FN272] In addition, soon after the adoption of I.R.C.A. the I.N.S. conceded that "employment of illegal aliens *165 in and of itself does not constitute harboring under Section 274(a) of the Act as amended." [FN273]

What, then, is left of the argument--successful in Lopez [FN274] and Acosta de Evans [FN275]--that the employment proviso would be unnecessary unless "harboring" was a term to be understood in its broadest possible sense? [FN276] Is not the Government hoist on its own pitard? Having previously equated employment and simple shelter in its definition of "harboring," the Government cannot now claim that the former but not the latter is excluded from the term's meaning.

That the I.N.S. did not except live-in employment from its concession regarding the scope of "harboring" liability [FN277] is further evidence that mere sheltering, detached from any motive to prevent detection of undocumented aliens by the I.N.S., [FN278] is excluded from the current reach of Section 1324(a)(1)(C). As federal law clearly contemplates, provision of shelter may be an ordinary and necessary part of employment. Attempting to separate non-harboring employment from harboring shelter would introduce Byzantine complexity and unfairness into enforcement of the employment sanctions. [FN279]

In sum, the demise of the "Texas Proviso" in the context of I.R.C.A.'s carefully structured employment prohibitions strongly supports a narrow construction of "harboring" under the amended Act.
c. Legalization and Harboring

Crucial to the 1986 reforms was the one-time amnesty program for undocumented persons who entered the United States prior to *166 January 1, 1982. [FN280] If able to satisfy other fairly minimal eligibility criteria, those undocumentededs could apply for temporary residence status for eighteen months, then for permanent residence status. [FN281] From the time an undocumented person received temporary residence status, she was excluded from receiving all but a few forms of public assistance. [FN282] Perhaps to give the I.N.S. ample time and support to organize the program, Congress provided up to 6 months of delay before applications for temporary residence were accepted, [FN283] and permitted private voluntary organizations to receive, prepare and submit such applications. [FN284]

The conflict between this scheme and a broad reading of "harboring" liability becomes apparent in light of I.R.C.A.'s requirement that applicants for amnesty be in unlawful immigration status. [FN285] Provision of any kind of shelter to applicants during the period before applications were accepted falls squarely into the Acosta de Evans/Lopez formulation of "harboring" unless "harboring" also implies the specific intent to frustrate immigration law enforcement. [FN286] Congressional invitation to private charities to assist in the amnesty process is absurd if those organizations feared "harboring" liability for "substantially facilitat[ing undocumenteds'] remaining in the United States illegally" [FN287] during the period prior to consideration of their temporary residence applications. [FN288] Section 1324(a)(1)(C) must therefore exclude such charitable work. [FN289] The most plausible way to reconcile that exclusion with *167 Lopez/Acosta de Evans is, again, to read into Section 1324(a)(1)(C) a requirement of specific intent to obstruct immigration-law enforcement.

2. "Harboring" as a Term of Art

Congress' intent as to the meaning of Section 1324(a)(1)(c) was manifested not only by the changes it wrought in immigration law, but what in immigration law it left alone. At the heart of the provision remains the elliptical phrase: "conceals, harbors, or shields from detection." In retaining this language from the 1952 legislation even as it modified other aspects of Section 1324, Congress signaled its contentment with those words as a description of the crime. [FN290] Ultimately, their meaning must control the extent of "harboring" liability possible in this context.

Because only four circuits prior to 1986 had advanced interpretations of harboring in the immigration context, and because those interpretations are varied and conflicting, it is untenable to assume that Congress meant to adopt any one of them by implication. [FN291] Parsing the phrase involves a resort to a method of statutory interpretation that received its most eloquent formulation in Morissette v. United States, and has recently returned to a starring role in major federal criminal cases:

where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the *168 body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them. [FN292]

This rule has particular force in the context of the I.N.A.'s anti-harboring provision, which was described by one of its architects in 1952 this way:

It is very difficult to amend a bill as carefully considered as this has been. These are words of art, legal art, that have been used in the bill. [FN293]

What, then, is the "cluster of ideas" the Congress adopted in making the phrase law?

If the question is approached, as it was most recently in Evans v. United States, [FN294] with reference to the common law definition of the crime, [FN295] the weight of authority seriously discredits the Look-It-Up-In-Webster's approach of Acosta de Evans. [FN296] The history of harboring in the common law clearly requires the presence of an intent to frustrate the law.

"Harboring" in older cases frequently appeared as part of an accessory-after-the-fact accusation, [FN297] where it
was interpreted broadly enough to cover almost any kind of assistance to a felon, but only if done either in secret or with the purpose of shielding the offender from apprehension. The common law definition of harboring a fugitive embraced the requirement of an intent to aid escape or hinder law enforcement. [FN298] American state cases have addressed the interpretation of harboring fugitives almost entirely in a statutory context, but have consistently required an intention to hinder law enforcement as an element of the crime. [FN299] According to Blackstone, moreover, that concept specifically did not include within its scope acts of charity toward felons, "for the crime ... is the hindrance of public justice, by assisting the felon to escape the vengeance of the law." [FN300]

With respect to the common law tort of harboring another's wife, courts universally required more than the mere provision of shelter or assistance. In 1791 Lord Kenyon ruled that if a wife is sheltered not from "selfish or criminal motives" but rather "from principles of humanity," the action could not be supported. [FN301] Likewise, actionable harboring in the context of runaway children requires a specific intent to obstruct their apprehension or encourage their conduct. [FN302] Otherwise, "the [law] would make innocent acts of charity criminal" and even "outlaw runaway shelters or hotlines." [FN303]

As a "term of art" in federal law, moreover, harboring has from the mid-nineteenth century had a specific meaning entirely consistent with this common law tradition. In construing the Fugitive Slave Act of 1793, which made it a crime to "conceal or harbor" runaway slaves, federal courts rejected the idea that "harbor" was simply a synonym for "shelter," [FN304] and found its meaning in the intention behind acts of assistance. [FN305] For help to a slave to have been criminal, one court explained, "the act must evince an intention to elude the vigilance of the master or his agents; and the act done must be calculated to attain this object." [FN306] In 1847, the Supreme Court adopted this precise formulation of "harboring" liability in Jones v. Vanzandt. [FN307] One consequence was the flat rejection of the notion that a harboring prohibition could "make common charity a crime" [FN308] or forbid rendering help to a slave "through motives of humanity." [FN309]

Apart from its appearance in immigration statutes, the verb "harbor" now appears in six federal criminal statutes, in every case linked with "conceal." [FN310] This is especially true of 18 U.S.C. § 1071, which makes it a felony to "harbor or conceal [a fugitive from justice] ... so as to prevent his discovery and arrest" ; the courts, including the Ninth Circuit, have overwhelmingly interpreted this statute as requiring an intent to obstruct the apprehension of the fugitive. [FN311] A companion statute aimed at the harboring of escaped prisoners [FN312] has received the same reading. [FN313]

*171 With respect to helping fugitives from military service, "harboring" clearly encompasses an intent to evade detection. 18 U.S.C. § 1381 prohibits any act that "harbors, conceals, protects, or assists" a deserter. [FN314] While this language may be seen as giving "harbor" a broad meaning, "harbor" has been read narrowly as meaning "to lodge and care for after secreting the deserter," [FN315] and "assist" has been held to mean only "to actively give aid and sustenance after harboring and concealed the deserter." [FN316] Thus, courts have required not simply knowing assistance, but assistance rendered, as one put it, "in order to help [the soldier] continue his desertion." [FN317]

"Harboring" is therefore as much a "term of art" as "extortion" [FN318] or any other word with deep roots in the common law and federal law. It also has a "cluster of ideas" [FN319] that may be defined with some degree of confidence. In view of the legislative history of Section 1324(a)(1)(C) and its ancestors, and the plain proximity of the words "from detection" in the provision's text, [FN320] it is extraordinary--indeed shocking--that courts have read the statute without explicit reference to such a specific intent.

3. Constitutional Limits on Harboring Liability

Even more remarkable than these courts' failure to recognize a specific intent requirement is the absence of concern for the constitutional values at stake in the conflict over "harboring" liability. Federal courts have often gone out of their way to avoid an obvious constitutional question in "harboring" cases: to what extent can the federal government curb the liberties of citizens and lawfully admitted aliens in its efforts to search out and deport undocumenteds? Given the "plenary power" doctrine that has dominated immigration law since the Chinese Exclusion Case, [FN321] this reluctance to confront constitutional issues is understandable. Yet ultimately the constitutional parameters of Congressional power in this area must be sketched out, if only because of the duty of

With the emergence of the Sanctuary Movement, no amount of judicial discretion can avoid the constitutional implications of a wholesale ban on meaningful fraternization between undocumented and citizens. Indeed, Aguilar heard and rejected a Free Exercise claim that I.R.C.A. forbade aid motivated by religious conviction; [FN323] this decision's reading of the Free Exercise Clause was essentially confirmed by the Supreme Court in Employment Division v. Smith. [FN324]

What Aguilar did not confront, however, is a constitutional limitation already recognized on Congressional power in this area. In Keller v. United States, [FN325] the Court declared invalid a statute that made it a federal crime for a citizen merely to shelter an alien engaged in prostitution. [FN326] Specifically finding such conduct "entirely immaterial" to Congress' power to "punish those who assist in the importation of [an alien]," [FN327] the Court could find no basis on which to sustain the statute. Indeed, the provision was viewed *173 as dangerous: if it were countenanced, the Court concluded, "we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution." [FN328]

Keller cannot be distinguished from Section 1324(a)(1)(C) if that section is interpreted, as suggested by Aguilar, to prohibit the knowing shelter of undocumented "[s]tripped of an intent to evade detection." [FN329] And because it has never been overruled or even questioned by the Supreme Court, lower courts are bound to apply it. [FN330] Keller, however, is a Lochner-era [FN331] case, and its continued vitality cannot be taken for granted. [FN332] Whether Keller is red herring or black letter, ultimately, is likely to depend on the contemporary force of two different rationales that support its result.

The first is the violence that a Congressional ban on even casual entertainment of undocumented may do to basic principles of federalism. The Keller Court sought to determine "whether there is any authority conferred upon Congress by which this ... statute can be sustained." [FN333] It found none then, and to find otherwise now--in an era marked by the presence, in every walk of life, of millions of undocumented throughout the country--would give Congress vastly expanded power. [FN334] If all actions that might somehow "substantially" affect an alien's decision to come to or remain in the United States are subject to federal regulation, then such traditional State preserves as marriage, adoption, child custody, *174 education and occupational licensing might be subject to direct Congressional control. [FN335] Even with the great expansion of federal responsibilities since the 1930s, so thorough a federal hegemony cannot easily be imagined, and Keller's forthrightly negative view of such a prospect cannot lightly be dismissed. [FN336]

A second and even more resonant constitutional basis for questioning the constitutionality of bans on the "mere sheltering" of undocumented may lie, however, in the right of free association. While initially confined to the context of expressive activity, free association doctrine has spilled over [FN337] into a recognition that "the Bill of Rights ... [affords] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." [FN338] Although this principle has been limited to only "personal" relationships based on a family tie, [FN339] the conflict between association rights and a broad reading of anti-harboring statutes becomes patent even in this narrow sphere.

If construed as broadly as the language of Aguilar suggests, the immigration anti-harboring provision forbids the cohabitation of relatives, perhaps even immediate family members. [FN340] The Supreme *175 Court has explicitly determined that such cohabitation is entitled to constitutional protection as a "fundamental element of liberty protected by the Bill of Rights," specifically the First Amendment. [FN341] Any statute traversing such rights should therefore be subject to rigorous overbreadth analysis, [FN342] entitling not only families aggrieved by anti-harboring provisions to challenge them, but others whose associational claims are less powerful.

But must those providing humanitarian shelter to undocumented rely on the rights of others to claim constitutional freedom of association protection for their activities? Whether provision of humanitarian shelter to people with whom one has no previous acquaintance is constitutionally privileged "association" has no immediately obvious answer. It is probably not decisive that those involved are initially strangers--Roberts v. United States Jaycees, after all, speaks of the "formation" of "certain kinds of highly personal relationships" as part of constitutionally protected liberty. Are the ties which bind sanctuary workers and undocumented "highly personal?" Given the inevitable
transience of those receiving shelter, and the substantial cultural gaps separating citizens from newly arrived refugees, it is possible to reply with a quick "no." Yet the substantial personal sacrifice of giving help to another out of religious or humanitarian convictions—as opposed, for example, to providing services for money—must inevitably be as highly personal as those convictions. [FN343] The Supreme Court in Village of Belle Terre upheld a restrictive zoning ordinance and attached decisive importance to the fact that the law allowed a family to "entertain whomever it likes." [FN344] If the liberty to receive casual, social visitors has constitutional status as part of the "formation and preservation" of personal relationships, then it is difficult to understand why charitably-motivated reception of the poor *176 and outcast should not have at least as privileged a place. [FN345] This is especially true in the context of providing emergency shelter to the homeless, for overbroad anti-harboring statutes may discourage charities from assisting any apparently foreign-born person for fear of violating the law.

Even if a statute collides with constitutionally protected association, of course, it is not automatically void. Under Moore, courts finding such a conflict must "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." [FN346] If Section 1324(a)(1)(c) is read to require a specific intention to obstruct federal law enforcement efforts, freedom of association concerns are clearly put to rest. If not, however, the potential of the section to lacerate families, block formation of strong friendships with aliens, and subvert important humanitarian efforts to shelter the homeless almost certainly outweighs the government's interest in rounding up undocumenteds. [FN347]

In potentially running afoul of both federalism and freedom of association values, Section 1324(a)(1)(C) has at least one parallel in the provision of the I.N.A. that confers special admission status on "spouses" of United States citizens. [FN348] In 1965 the Board of Immigration Appeals determined that a marriage must be "viable" to qualify under this section, thus permitting the I.N.S. to make an independent determination about the likelihood that spouses would remain married in the future. [FN349] Federal courts rejected this interpretation of the statute, and cited its potential conflict with *177 principles of federalism [FN350] and marital privacy. [FN351] Soon after, the Board reversed itself, [FN352] and when Congress addressed the issue of sham marriages in the Immigration Marriage Fraud Amendments of 1986 [FN353] it pointedly avoided inserting language that would preempt state laws governing marriage or intrude into the relations between spouses. [FN354] Congress imposed criminal penalties only on "[a]ny individual who knowingly enters into a marriage for the purpose of evading any immigration laws." [FN355] This specific-intent language appears to vitiate constitutional concerns, just as a specific-intent-to-evade-detection reading of Section 1324(a)(1)(C)'s "harboring" prohibition would prevent collision with Keller and the multiple constitutional values it represents.

4. Section 1324(a)(1)(C) and the Rule of Lenity

When a federal criminal statute contains language that can reasonably be read more than one way, and the ambiguity cannot be cured by reference to traditional tools of statutory interpretation, the federal courts are required by the "rule of lenity" to choose the narrowest such reading. [FN356] This is especially true when broader readings would raise constitutional concerns, [FN357] for the courts have an independent duty to construe statutes to avoid *178 constitutional doubts. [FN358] As described in United States v. Bass, the twin foundations of the rule are the need for criminal laws to give "fair warning" of what they forbid, and "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." [FN359]

Section 1324(a)(1)(C)'s anti-harboring language presents a paradigmatic occasion for application of the rule. Nothing in its language, [FN360] in its legislative history, [FN361] or in parallel federal criminal prohibitions [FN362] supports the broad reading given to it in Aguilar. Quite the contrary, each of these implements of construction point toward a narrower reading, one that limits "harboring" liability to conduct that is calculated to prevent or hinder apprehension of undocumenteds by federal authorities. [FN363] Only this narrower reading can prevent outright collision between Section 1324(a)(1)(C) and constitutional norms of federalism and protected rights of association. [FN364] Following Bass [FN365] and Rewis v. United States, [FN366] the federal courts should construe anti-harboring statutes to prevent needless constitutional controversy. Compassion is not, after all, illegal.

III. Sanctuary and Civil Legitimacy

Shortly before his death John Dryden looked back at the seventeenth century and summed it up so:

All, all of a piece throughout;
Thy Chase had a Beast in view;
Thy Wars brought nothing about;
Thy Lovers were all untrue;
'Tis well that an Old Age is out,
And time to begin a New. [FN367]

Our own century began with utopia in view, yet it has shown little love for those who brought something about, and even less for those who were true. From the ordeals imposed on suffragettes and Soviet refuseniks, to the martyrdom of resistance members and freedom fighters, from the outrages described by Graham Greene in The Power and the Glory [FN368] to those Taylor Branch has so movingly chronicled in his biography of Martin Luther King, [FN369] our age has shown a peculiar genius for punishing its prophets and philanthropists, even as it was about to yield to their efforts. The work of the Sanctuary Movement, while at times extraordinary, may not rank in importance with these others. Yet its experience is perhaps a more disturbing indictment of our age because it occurred entirely inside a constitutional democracy, with the sanction of every level of the federal judiciary, and within the last decade—long after we should have learned our lesson.

Throughout much of the 1980s, it seemed to many presumptuous to describe a group of convicted felons as entitled to special concern and deference. By 1989, however, the Ninth Circuit had itself conceded the truth of the central contention that gave life to the Sanctuary Movement: that the procedures and standards for considering political-asylum claims of Salvadoran and Guatemalan refugees were so deeply flawed as to make a mockery of the process. [FN370] In Orantes-Hernandez v. Meese the I.N.S. was found to have routinely denied Central American refugees even the barest hope of due process in applying for asylum. Its misconduct went so far as to involve "a pattern and practice of summarily [180] removing Salvadorans from this country by obtaining their signatures on the voluntary departure form through intimidation, threats and misrepresentation," misconduct that continued despite the existence of a preliminary injunction. [FN371] Ultimately, even the government conceded the Sanctuary Movement's main assertions, agreeing to reconsider hundreds of thousands of asylum claims by Salvadorans, and to adopt major changes in its approach to doing so. [FN372] Among those retrospectively entitled to seek relief under this settlement are many of the undocumenteds assisted by the Aguilar, Merkt and Elder defendants. [FN373] In the end, the Aguilar panel's stinging characterizations of the sanctuary defendants—how "[a]fter purportedly finding that the proper legal channels were futile, [they] resorted to an underground movement," [FN374] and how their actions were based on a "purported religious interest" [FN375]—seem hollow and viciously misguided. [FN376]

Even if the Sanctuary Movement was correct in its indictment of I.N.S. treatment of refugees, those who led the Movement in the early 1980s may still have some cause for regret about things done, and things undone. Those who continue its work or follow its example in helping other kinds of outcasts may want to reflect on the ambiguities of this legacy, and the questions about it that linger.

In retrospect, it is difficult to justify the interference with Mexican sovereignty implicit in trips across the border by some American sanctuary workers to smuggle out Central Americans. The enormous success of Central Americans in crossing the border *181 during the 1980s without Sanctuary Movement assistance suggests that this was the aspect of the Movement that refugees needed least, while at the same time these activities sharply increased the risk of a government crackdown on all of the Movement's work. The heady publicity created by these tactics was not worth the connotation it carried of contempt for orderly federal control of the nation's borders.

More importantly, smuggling activities left in the air an unpleasant odor of contempt for Mexico. While it is true that Mexico was for many Central Americans a desperately bleak haven, [FN377] it is also true that throughout the 1980s Mexico was involved in substantial cooperation with United Nations refugee programs. [FN378] Looking back, it is hard to understand why, instead of treating Mexico as a hopeless case, the Sanctuary movement did not make any effort to secure U.S. support and financial assistance for larger refugee-sheltering programs in Mexico than the Mexican Government was able to afford during those years. [FN379] At the very least, the Movement's platform should now contain, along with a denunciation of United States policy toward Central America, strong criticism of the U.S. Government's failure to work with and support Mexico in addressing the refugee problem.

Likewise, while the Sanctuary Movement challenged, through civil lawsuits, the legality of federal policy toward
Central Americans and refugee-assistance groups in almost every other way, its only protest against the government's perverse view of "harboring" liability came in the complex criminal proceedings of the *Aguilar* case. Its leaders early on conceded that the simple sheltering of undocumented refugees was probably illegal. As this Article has argued, that perception of the law was not unreasonable given the unfortunate language of cases construing Section 274(a) of the I.N.A., but it was nonetheless wrong then as it is wrong now. Giving shelter to the outcast, the heart of historic and current sanctuary theory, is not a crime as long as it is done with no intention to obstruct law enforcement. Because the Sanctuary Movement firmly believed in giving open, public shelter and services, its actions in this respect were legal. More important, they were crucially important to refugees, who usually could evade apprehension at the border, but could not avoid the harsh need to find a bed, food and the beginnings of a new life once here. Why, then, was this crucial issue not more aggressively pursued?

Given the dispute in the Sanctuary Movement between those who saw its work primarily in humanitarian terms and those for whom it was a primarily political crusade, there may have even been a kind of almost willful blindness to the potential of vindicating the legal right to provide humanitarian shelter. For with such vindication comes the possibility of a deeper rift in the Movement, with many of its members deciding to engage only in clearly legal activity. Conversely, those involved with the Movement mainly to protest American foreign policy through high-profile civil disobedience might find less appeal in humanitarian shelter efforts that brought no risk of criminal prosecution.

If this is the case, maintaining unity in the Sanctuary Movement by a shared sense of civil disobedience has come at a high price. It has been precisely the fear of law-breaking that has deterred the bulk of mainstream charitable organizations from strongly supporting the Movement by name or by imitation. Thus, although five of the eleven defendants in *Aguilar* were Catholic, and three were in the religious life, the American bishops have consistently refused to support their sanctuary work or the Movement itself—reportedly because of legal analysis prepared by their attorneys. [FN380] And though many other religious groups did endorse *183* the Movement, few of them, and even fewer mainstream charities, have taken the risk of actually providing substantial shelter services to undocumenteds. Just recently, the one major sanctuary shelter for undocumented Central Americans in Los Angeles was closed, nominally for health and safety violations, but in fact as the result of lack of church support. [FN381] It remains to be seen whether beleaguered Haitian refugees will be better received. [FN382]

No doubt it has been easier for mainstream charities already crushed by the demands of the "legal" poor to leave work with undocumenteds to the Sanctuary Movement and a few other intrepid souls—even if this results in fringe programs unable to meet minimum health and safety standards. If the potential for criminal "harboring" liability is a convenient excuse, it is, in view of *Aguilar* and its dismal parentage, at least a plausible one. [FN383] Surely, it is understandable that many mainstream charities dependent on support from the government and the general public see alignment with even the goals of the sometime radical Sanctuary Movement as dangerous or at best imprudent.

Ultimately, though, there is no good excuse for our failure to shelter, feed and clothe those who, "legal" or not, grace our land with their desperation and their hope. The federal government has a right to control our borders, but its laws cannot control our *184* charity. With the exception of a few, we have withheld help when we could have extended it, and we have even been afraid to speak up for the brave souls who have tried admirably to fill the gap. After years of ugly, often pointless conflict, it is time to begin an age in which kindness to Eve's banished offspring is a duty, not a crime.


I wish to thank Professor Martin B. Margulies for his helpful comments and Vicki Stifter for research assistance.


[FN2] Id. at 267.
The development of the Sanctuary Movement during the early 1980s is carefully chronicled in two excellent works by journalists: ROBERT TOMSHO, THE AMERICAN SANCTUARY MOVEMENT (1987); and CRITTTENDE, supra note 1, which contains the best available description of the federal government's efforts to investigate and prosecute the Sanctuary Movement in Arizona. The best accounts of the rise of the Movement written by participants are RENNY GOLDEN & MICHAEL MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD (1986), and SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE (Gary MacEoin ed., 1985) [hereinafter SANCTUARY RESOURCE GUIDE]. See also CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, SANCTUARY: A JUSTICE MINISTRY [hereinafter SANCTUARY: A JUSTICE MINISTRY], reprinted in 1 Government's Supplemental Excerpt of Record at 35-74, United States v. Aguilar, 883 F.2d 662 (9th Cir.1986) (Nos. 86-1208 to 86-1215) [hereinafter GSER]. By far the most comprehensive description and analysis of the Movement in legal literature is Note, Ecumenical, Municipal and Legal Challenges to United States Refugee Policy, 21 HARV.C.R.-C.L.L.REV. 493 (1986) [[hereinafter Sanctuary Note].

The term "Sanctuary Movement" in this Article refers to the people whose struggles to assist Central Americans are described in the above works. Sanctuary, by contrast, is a term loaded with historical and legal overtones. One of the central purposes of this Article is to help create a useful contemporary definition of sanctuary.

Sanctuary workers is used in this Article to refer to those who actually and consciously participated in the Sanctuary Movement by actually helping individual refugees or by organizing the work of others.

Act of June 27, 1952, ch. 477, 66 Stat. 163, 228 (codified at 8 U.S.C. § 1324(a) (1988), amended by the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, § 112(a), 100 Stat. 3381 [hereinafter I.R.C.A.]. Because this section has only recently been amended, and because the bulk of cases construing it (including those involving sanctuary workers) fall under its pre-1986 language, it will not be a simple matter to avoid confusion in discussing this section.

For clarity's sake, when the case or issue at hand involves the pre-1986 anti-harboring provision, the statute will hereinafter be described as Section 274(a) or Section 274(a)(3). Section 274(a) prior to I.R.C.A. read as follows:

(a) Persons liable
Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who--

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

The successor to this provision as amended by I.R.C.A. will hereinafter be described as Section 1324(a) (from its codification in Title 8 of the United States Code). Section 1324(a) currently reads as follows:

(a) Criminal Penalties
(1) Any person who--

(A) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(B) 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;

(C) 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; or

(D) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both, for each alien in respect to whom any violation of this paragraph occurs.

[FN6] Eight defendants in the case were convicted on May 1, 1986, on a total of 18 counts of violating §§ 1324(a) and 1325 of Title 8 of the U.S.Code. U.S. v. Aguilar, 883 F.2d 662, 665-66 nn. 1-8 (9th Cir. 1989), cert. denied, 111 S.Ct. 751 (1991). All were sentenced to probation; none were imprisoned. Id. at 667.


[FN8] After the jury's verdict in Aguilar, one of the defendants' attorneys reportedly wept, and one of the jurors told reporters "she had gone home and thrown up." CRITTENDEN, supra note 1, at 323.


[FN13] These churches revived a tradition that flourished during the Vietnam War era when 22 churches in the San Francisco Bay area alone offered shelter and counselling to servicemen unwilling to go to Vietnam. TOMSHO, supra note 3, at 28.


[FN15] For an excellent discussion of the role of the idea of sanctuary in joint efforts by religious groups and government officials to help refugees after World War II, see Bruce Nichols, Sanctuary and the Sanctuary Movement, THIS WORLD Spring/Summer 1985, at 3, 6-8.

[FN16] TOMSHO, supra note 3, at 5.

[FN17] These religious bodies include the American Lutheran Church, the Presbyterian Church (U.S.A.), the United Methodist Church, the U.S. National Council of Churches, and a substantial number of Roman Catholic organizations (not including the National Conference of Catholic Bishops). CRITTENDEN, supra note 1, at 201-02.

[FN18] Sanctuary Note, supra note 3, at 581; CRITTENDEN, supra note 1, at 298, 342.

[FN19] Formed in 1988, the Alliance of Sanctuary Communities is the principal national organization for those actively engaged in the hands-on work of providing sanctuary for the undocumented. This alliance loosely comprises several hundred churches, local groups and individuals. Telephone Interview with Beatriz Zapata, Editor, ALLIANCE OF SANCTUARY COMMUNITIES NEWSLETTER (Dec. 1, 1992). At its national assembly in May,
1992, the Alliance adopted a resolution pledging "to explore an appropriate response ... to raise the issue of the plight of Haitian refugees through a direct action, such as an attempted rescue of Haitian refugees at sea."


[FN20] This Article uses the phrases "undocumented persons" or "undocumented" wherever possible to refer to those who are not United States citizens but who are in this country without fully regular immigration status. Other popular terms for this group, such as "illegal aliens," either reflect strong bias or show a tendency to dehumanize the flesh-and-blood people whose very lives may be at stake in the making of immigration decisions. See Elie Wiesel, The Refugee (1985), in SANCTUARY RESOURCE GUIDE, supra note 3, at 7, 10 ("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, can be right or wrong, but illegal? How can a human being be illegal?").


[FN22] Id. Shortly after Southside Presbyterian's declaration, the Wellington Avenue United Church of Christ in Chicago made a similar decision to provide sanctuary, and sent a letter to the Attorney General stating: "We will openly receive a refugee family into the care and protection of the church. We realize in so doing that we will be in violation of the Immigration and Nationality Act, Section 274(a)." Letter from Barbara Lagoni et al. to William French Smith (July 18, 1982) [hereinafter Wellington Sanctuary Declaration], reprinted in SANCTUARY: A JUSTICE MINISTRY, supra note 3.

[FN23] Jim Wallis, Waging Peace, in SANCTUARY RESOURCE GUIDE, supra note 3, at 171. The Center for Constitutional Rights, which assisted in the sanctuary workers' defense, expressed the following view of Section 274(a): "This section applies, not only to clandestine activities, but also to public harboring. This harboring is defined broadly: it refers not only to the act of giving shelter, but covers any activity tending to substantially facilitate the ability of an illegal alien to remain in the U.S." CENTER FOR CONSTITUTIONAL RIGHTS, HAVENS OF REFUGE: THE SANCTUARY MOVEMENT AND THE LAW 8-9 (1985).

[FN24] I.N.A. § 274(a)(1)(C), 8 U.S.C. § 1324(a)(1)(C) (1988). The Aguilar defendants were convicted under an older version of this subsection, identical with respect to the quoted language, but differing in other important respects.


[FN26] Id. at 441. But see United States v. Smith, 112 F.2d 83, 85 (2d Cir.1940) (in predecessor to Section 274(a) "harbor" read to require the additional element of intent to "prevent ... discovery").


[FN29] Id. at 430.

[FN30] See Brief for the Appellants at 65, U.S. v. Aguilar, 883 F.2d 662 (9th Cir.1989) (Nos. 86-1208 to 86-1215) [hereinafter Aguilar Appellants' Brief] (conceding that any interpretation of harboring prohibition exempting charitable assistance to illegal aliens would be "at odds" with Acosta de Evans).


[FN32] Aguilar, 883 F.2d at 689. The court also concluded that "[i]t is clear beyond doubt that Clark ... intended to help the aliens in question to evade I.N.S. detection." Id. at 690. It is crucial to note, however, that the instructions to the jury in Clark's case on the meaning of "harboring" did not "require an intent to aid the alien for the purpose of evading I.N.S. detection"; indeed, an instruction proposed by the defense to that effect was refused. Id. at 689-90. Given the holdings in Morissette v. U.S., 342 U.S. 246, 274 (1952) ("However clear the proof may be ... the
question of intent can never be ruled as a question of law, but must always be submitted to the jury"), and especially
U.S. v. Aguon, 851 F.2d 1158, 1168 (9th Cir.1988) (en banc) ("failure to give an instruction on a vital element of the
crime," including "lack of an instruction on specific intent," is "plain error" that may not be "passed over as
harmless"), it is incomprehensible that the Aguilar panel could conduct its own assessment of the weight of the
evidence bearing on Clark's specific intent to help the boy evade detection. The court's only attempt to justify this
action is to cite to a general offer of proof in which the defendants, according to the court, "candidly acknowledge
that their religious beliefs caused them to avoid the I.N.S." Id. Yet that document in fact says no more than this:
"[defendants] realized that their religious beliefs precluded them from presenting the refugees whose lives were in
(emphasis added). At no point did the defense admit an intent on the part of Father Clark to help the Salvadoran boy
evade I.N.S. detection.

(9th Cir.1988) (Nos. 86-1208 to 86-1215) [hereinafter Aguilar Amicus Brief]. Five organizations joined in the brief:
(1) the Institute for Youth Advocacy of Covenant House, which provides crisis care for homeless and runaway
youth on an open-intake basis; (2) the St. Anthony Foundation, which provides food, shelter, clothing and other
services to any needy person; (3) the National Lawyers Guild, which works with refugee legal service providers and
sanctuary workers; (4) Travelers & Immigrants Aid of Chicago, which provides a wide variety of emergency and
longer-term assistance to homeless people, immigrants, refugees and other displaced people; and (5) Centro
Presente, Inc., which offers legal, educational and social services to Central American refugees. Id. at 1-4. All of
these organizations offer help to the needy without regard to their immigration status.

The authors of this Article were the authors of this brief and were counsel for the Covenant House Institute for
Youth Advocacy. It should be noted, however, that the views expressed in this Article do not necessarily reflect
those of Covenant House or any of the other amici in Aguilar.

[FN34] Brief for Appellee at 211, U.S. v. Aguilar, 883 F.2d 662 (9th Cir.1988) (Nos. 86-1208 to 86-1215)
[hereinafter Aguilar Government Brief].

[FN35] Id. at 208-09. The Government conceded that a humanitarian exception had been found in the anti-
transportation-of-illegal-aliens language of Section 274(a)(1)(B) (then Section 274(a)(2)) in U.S. v. Moreno, 561
F.2d 1321, 1322 n. 3 (9th Cir.1977), but urged that it did not apply to the anti-harboring provisions of the statute or
the factual circumstances of the case.

[FN36] See SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT 34-45

[FN37] Sanctuary for those in conflict with civil law is a concept with impressive historical and biblical roots. See
e.g., FREDERICK POLLOCK & FREDERICK W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW 590
(1911); Jeannie R. Brink, Sanctuary and the Sanctuary Movement, THIS WORLD 3, 4-6 (Spring/Summer 1985).
But see Jorge L. Carro, Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an

[FN38] The 11 members of the Tucson Sanctuary Movement indicted in Aguilar (eight of whom were convicted of
one or more federal offenses at trial) were dominant figures in the Movement for a wide variety of reasons. Jim
Corbett is generally credited with forcing the formation of an organized movement to protect Central Americans
through his unilateral decision to begin leading undocumented Salvadorans over the U.S.-Mexico border in 1981.
CRITTENDEN, supra note 1, at 54-58. Even more importantly, Corbett became a national symbol of the Movement
through his appearances on 60 Minutes and in People magazine. 60 Minutes (CBS television broadcast, Dec. 12,
1982) (transcript reprinted in 1 GSER, supra note 3, at 21-28); Linda Witt, Lifeline: Following Conscience, Not
Law, an Underground Railroad Smuggles Threatened Salvadorans to Safety in America, PEOPLE, Aug. 9, 1982, at
18-22 (reprinted in 1 GSER, supra note 3, at 10-17). John Fife is usually considered a co-founder of the recent
Movement, CRITTENDEN, supra note 1, at 10, 34, 55-58, partially because his church, Southside Presbyterian in
Tucson, was the first to formally proclaim its sanctuary status, see supra note 18, and partially because he generated
broad recognition for the Movement within the institutional church. CRITTENDEN, supra note 1, at 69-71. See
also, Aguilar Government Brief, supra note 34, at 6-8 (treating Corbett and Fife as earliest focuses of government

scrutiny).

Father Anthony Clark was a priest at Sacred Heart Church in Nogales, Arizona, which had long provided food and shelter to undocumented aliens and had been the first "safe house" used by Jim Corbett. TOMSHO, supra note 3, at 8; CRITTENDEN, supra note 1, at 50. Right across the border in Nogales, Mexico, Father Ramon Quinones, pastor of Our Lady of Guadalupe, had already established an "all-purpose social service agency" for refugees by 1981, which became the central Mexican link in Corbett's early "underground railroad." CRITTENDEN, supra note 1, at 50-52, 99, 133-35. Maria del Socorro Pardo de Aguilar was one of Father Quinones' parishioners. Her house in Nogales, Mexico, became a frequent way station for refugees en route to the United States. Id. at 99, 136-37. Darlene Niegosrski became a symbol of the leadership role of women in the Movement. She had particular importance because of traditional church exclusion of women from such roles. GOLDEN & MCCONNELL, supra note 3, at 59-60. Other Aguilar defendants, like Wendy LeWin, Mary K. Espinosa and Nena MacDonald, had only peripheral involvement in the Movement but were indicted anyway as "gofers." CRITTENDEN, supra note 1, at 193. They then came to symbolize the appeal of the Movement beyond the clergy to "ordinary" Americans. See id. at 284-85.

While lengthy accounts of the actions of the eleven people indicted in the Aguilar case have been written, see, e.g., CRITTENDEN, supra note 1, this section relies where possible on the accounts provided by the defendants themselves in court documents, especially their appellate briefs.


[FN40] Id. at 24, 93-98. The girl and her brother were journeying to Phoenix to meet their parents, who had fled El Salvador in 1979 because of danger to the father. The girl and her brother were deported to El Salvador by the Mexican Government. They again decided to leave their country after their cousin was murdered. Maria Socorro Aguilar met them in Mexico City and walked with the girl across the border. Id. at 20. She was convicted of bringing an illegal alien into the U.S. in violation of 8 U.S.C. § 1324(a)(1) (1988) [I.N.A. § 274(a)(1)].

[FN41] Wendy LeWin drove a Guatemalan refugee family from Phoenix to Albuquerque, but the evidence was ambiguous as to whether she knew they were undocumented. Id. at 24, 136-42. She was convicted of transporting illegal aliens in violation of 8 U.S.C. § 1324(a)(2) (1988). Philip Willis-Conger, Rev. John Fife, and Sister Darlene Niegosrski all encouraged or assisted others, who turned out to be government informers, to provide transportation from Arizona to other states for undocumented refugees. Id. at 25-26, 160-79. These three defendants were each convicted of one or more counts of aiding and abetting the transportation of an illegal alien in violation of 8 U.S.C. § 1324(a)(2) (1988); 18 U.S.C. § 2 (1988).


[FN43] SANCTUARY: A JUSTICE MINISTRY, supra note 3, at 11. There is no mention among the "general requirements" for becoming a "sponsoring" congregation of any participation in helping an undocumented refugee enter the U.S. or travel to the sponsoring church.

[FN44] This, for example, was the view of University Lutheran Church in Berkeley, California, which in 1971 offered refuge to sailors unwilling to go to Vietnam. In 1982 it decided to provide "shelter and legal assistance" to Central Americans. TOMSHO, supra note 3, at 29-30. Thus one of the most extensive commentaries on the subject could declare: "The modern Sanctuary Movement consists of a loose confederation of churches and religious institutions acting independently to provide temporary shelter for political refugees from Central America." Sanctuary Note, supra note 3, at 553. This description, while correct about the core of the Movement, seems oversimplified in retrospect. It ignores (1) the small but significant role of evasion services (smuggling and transportation) in the creation and operation of the Movement, see infra note 49 and accompanying text; (2) the coordinating and organizing role played by CRFTCA, see infra text accompanying notes 59-64; and (3) the fact that shelter was provided to many from Central America and elsewhere who were not, even in the loosest sense, "political refugees." See CRITTENDEN, supra note 3, at 78, 120-21.
CRITTENDEN, supra note 1, at 50, 66, 86. Prior to declaring itself a sanctuary in 1982, Southside Presbyterian Church had already taken over 300 Central Americans into shelter. Id. at 66. Larry Stammer, Sanctuary Drive to Aid Salvadorans Has Spread Among Churches in U.S., TUCSON CITIZEN, Feb. 7, 1983, at 1, reprinted in 1 GSER, supra note 3, at 115-16.

CRITTENDEN, supra note 1, at 83.

See TOMSHO, supra note 3, at 115-25, 137-47 (describing the founding of Casa Oscar Romero and the growth of the Sanctuary Movement in South Texas).

See infra notes 96-98 and accompanying text.

CRITTENDEN, supra note 1, at 139-40, 245-46.

See, Public Sanctuary for Salvadoran and Guatemalan Refugees: Organizer's Nuts & Bolts, reprinted in 1 GSER, supra note 3 at 75; SANCTUARY: A JUSTICE MINISTRY, supra note 3, at 8-12.

For the best account of the Texas branch of the Sanctuary Movement, centered at Casa Oscar Romero in San Benito, see TOMSHO, supra note 3, at 113- 50, 201-03. Jack Elder and Stacy Merkt, both associated with Casa Romero, were convicted of violating 8 U.S.C. § 1324(a) (1988) [I.N.A. § 274(a) ]. See id. at 201-03. See also, U.S. v. Merkt, 764 F.2d 266 (5th Cir.1985) (Merkt I); U.S. v. Merkt, 794 F.2d 950 (5th Cir.1986) (Merkt II), cert. denied, 480 U.S. 946 (1987); U.S. v. Elder, 601 F.Supp. 1574 (S.D.Tex.1985).

See TOMSHO, supra note 3, at 127-35, 143-47 (activities limited to sheltering and transporting undocumented refugees). However, on at least one occasion Jack Elder apparently waited for Central Americans on the U.S. side of the border and then transported them farther north, leading to his conviction for aiding aliens in crossing the border. Id. at 201-02.

See CRITTENDEN, supra note 1, at 99. Because in the Rio Grande Valley there were no sanctuary churches, refugees entering there had an especially urgent need to journey north. TOMSHO, supra note 3, at 115.

See GOLDEN & MCCONNELL, supra note 3, at 53-56.

Aguilar Appellants' Brief, supra note 30, at 3-4, App. B. One conviction was handed down for actual transportation and five for aiding and abetting transportation.

See Merkt II, 794 F.2d 950.

GOLDEN & MCCONNELL, supra note 3, at 48-49; TOMSHO, supra note 3, at 88. In addition, more generous I.N.S. policies regarding asylum sometimes existed in non-border areas, making removal of refugees to those oases highly desirable. See id. at 145 (more favorable asylum policies in San Antonio than in Harlingen as reason for transportation of aliens).

Jack Elder was first arrested for providing this minimal form of transportation. Id. at 146-47.

1 GSER, supra note 3, at 42-56; Organizer's Nuts and Bolts at 4-5, reprinted in 1 GSER, supra note 3, at 75.


CRITTENDEN, supra note 1, at 203.

Id. at 90-91.

Id. at 91, 203.

[FN64] See id. at 203. But see TOMSHO, supra note 3, at 127-35 (vivid description of one relay-system movement of Salvadorans from Harlingen, Texas to Houston).

Even in Tucson, where sanctuary workers were perhaps most committed to transporting refugees, the extent of transportation activity remains unclear. Of the six transportation counts in Aguilar on which convictions were returned, only two involved the actual giving of transportation by a sanctuary worker. In the other four instances it was an undercover government agent who gave the ride to the refugee; sanctuary workers were convicted of "aiding and abetting" such transportation.

[FN65] See, e.g., Numbers 35:32, 36:11 (referring to sanctuary in one of the six Levitical cities); Brink, supra note 37, at 4 (the temples of ancient Greece and Rome); 2 POLLOCK AND MAITLAND, supra note 37, at 590-91; Carro, supra note 37, at 749-51.

[FN66] Id. at 688.

[FN67] For much of the medieval period in England, the provision of sanctuary in a church carried with it the right of abjuration: the right of the fugitive, within 40 days of entering sanctuary, to leave the realm and escape punishment for as long as the fugitive remained in exile. See Carro, supra note 37, at 759-63; 2 POLLOCK & MAITLAND, supra note 37, at 590-91. This privilege is of interest to the modern Sanctuary Movement because many Central American refugees were sheltered in U.S. churches while awaiting favorable dispositions on their asylum applications in more tolerant Canada. See CRITTENDEN, supra note 1, at 355.

[FN68] 2 POLLOCK & MAITLAND, supra note 37, at 590-91.


[FN71] This was especially true, ironically, of the Underground Railroad, which rarely smuggled slaves out of the South. GARA, supra note 70, at 81-83.

[FN72] For a description of the battle between the federal government and abolitionist Underground Railroad supporters over the Fugitive Slave Law, see JAMES MCPHERSON, BATTLE CRY OF FREEDOM 79-85 (1988).


[FN74] See GOLDEN & MCCONNELL, supra note 3, at 53. Jim Corbett and other Movement leaders tried, if anything, to publicize their efforts and their tactics to sway public opinion. See CRITTENDEN, supra note 1, at 102.

[FN75] Thus one leading history of the Movement by insiders could declare: "The I.N.S. had made it clear that it would not 'break' a sanctuary church or synagogue, but there were no assurances about the underground railroad." GOLDEN & MCCONNELL, supra note 3, at 71. The I.N.S. was especially reluctant to invade church property to find refugees, CRITTENDEN, supra note 1, at 101, and the Justice Department was cautious in launching an investigation of the Movement's evasion services. Id. at 110-11.

[FN76] See, e.g., MELTZER, supra note 70, at 133-34.

[FN77] See CRITTENDEN, supra note 1, at 120-22.
[FN78] Id. at 120.

[FN79] Id. at 121.

[FN80] See id. at 90-91, 121-22.

[FN81] GARA, supra note 70, at 100-01.

[FN82] Attempting to distinguish neatly between "political" and "religious" purposes is of course a highly dubious proposition, for sincere religious belief almost always carries with it at least some political imperatives. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14 (2d ed. 1988). But distinctions between religious and political motivation are not illusory. Jim Corbett, for example, has been a leader of the Sanctuary Movement despite his open declaration of his "unbelief." See Jim Corbett, The Covenant as Sanctuary, in SANCTUARY RESOURCE GUIDE, supra note 3, at 186.

[FN83] Statement of James Rayburn, U.S. Border Patrol Agent, quoted in CRITTENDEN, supra note 1, at 143. See also, Memorandum from Dean B. Thatcher, U.S. Intelligence Agent, to Robert McCord et al., Jan. 4, 1983, in 1 GSER, supra note 3, at 33 ("This type of movement is particularly attractive to pastors with a political bent that are seeking a cause.")

[FN84] For a description of the background of the Aguilar defendants, see CRITTENDEN, supra note 1, and Aguilar Appellants' Brief, supra note 30, at 6-10.

[FN85] Aguilar Government Brief, supra note 34, at 182.

[FN86] GOLDEN & MCCONNELL, supra note 3, at 89.

[FN87] CRFTCA summed up the purpose of sanctuary this way: "Sanctuary offers a concrete and direct way to challenge the inhumane policy of the U.S. government in Central America and of the I.N.S., as well as providing a direct service to the refugees created as a result of these policies." SANCTUARY, A JUSTICE MINISTRY, supra note 3, at 2. The CRFTCA was the leading proponent in the Sanctuary Movement of a strong "political" approach to the work, which at times put it at odds with the more pragmatic, humanitarian premises of the Tucson leaders. CRITTENDEN, supra note 1, at 90-93.


[FN89] CRITTENDEN, supra note 1, at 93.

[FN90] GOLDEN & MCCONNELL, supra note 3, at 56-57.

[FN91] CRITTENDEN, supra note 1, at 90-93, 120-21, 203. At one point CRFTCA was urging that only those refugees willing to enter "public sanctuary," with its strongly political character, be given help by the "underground railroad." Id. at 203. The unwillingness of refugees to enter "public sanctuary" ultimately left large numbers of sanctuary churches with no refugees to sponsor. Id. at 345. See also GOLDEN & MCCONNELL, supra note 3, describing the "thematic differences" among Sanctuary workers as "charity or liberation, Matthew 25 or Exodus," and asserting that the arrests of the Aguilar defendants in 1985 ended that dispute.

[FN92] Id. at 205. In the view of some CRFTCA activists, the Aguilar arrests "helped the movement to synthesize, to develop a wholistic political and theological understanding of itself, its purposes" so that instead of being forced to choose between "charity or liberation," "the movement eliminated the or and substituted and." GOLDEN & MCCONNELL, supra note 3, at 177.

[FN93] See supra text accompanying notes 21-23.
See, e.g., 60 Minutes (CBS television broadcast Dec. 12, 1982) (transcript reprinted in 1 GSER, supra note 3, at 22):

CBS Commentator: "How many people do you estimate that you have helped smuggle into this country?" Corbett: "Personally, I don't know. I haven't kept count. I...." CBS: "Give me a ballpark figure." Corbett: "It could be 250 or 300, I dunno." CBS: "And you could be sentenced to 5 years for each one of those." Corbett: (laughs) ["]Fifteen hundred years or so. That's what, I guess that's what the act says. But I think that in terms of the choices its [sic] better to go to jail if I have to than to sit by and watch them go down the drain."


See TOMSHO, supra note 3, at 94-95; GOLDEN & MCCONNELL, supra note 3, at 46-47.

See CRITTENDEN, supra note 1, at 105 ("Every time a new sanctuary was declared, an article appeared in the press, and reporters would call up the local I.N.S. office to ask why the agency wasn't doing anything to stop the obvious lawbreaking.").


"Misconceiving sanctuary as a variant form of civil disobedience," Corbett wrote, "blinds us to its actual dynamics as socially constructive practice of our faith"—a practice that will allow "interfaith networking to ... build a social base from which individuals and communities can, by their own compliance with the law, hold the state accountable for its violation of human rights." SANCTUARY RESOURCE GUIDE, supra note 3, at 188.

Aguilar Appellants' Brief, supra note 30, at 71-93. The Aguilar defendants were precluded from offering any evidence of their belief in the eligibility of the aliens they had assisted for political refugee status by an in limine order of the trial court. Id. at 34-36.

Id. at 33-55. See id. at 45 ("[A] defendant who honestly believes, however mistakenly, that an alien is entitled to enter and reside in the United States under the 1980 Refugee Act cannot commit the crime of bringing that alien into the country, nor of illegally transporting or harboring him.").

471 U.S. 419 (1985) (holding that the statute prohibiting possession of food stamps in a manner not authorized by the regulations contained a mens rea requirement that the defendant know his possession or acquisition was unauthorized).

The Aguilar defendants argued, for example, that the aliens they were charged with smuggling, transporting and harboring all lacked, because of the government's monitoring of their every movement, the "freedom from official restraint" that is necessary to create an "entry" into the United States under U.S. v. Oscar, 496 F.2d 492, 493-94 (9th Cir.1974) (citing U.S. v. Vasilatos, 209 F.2d 195 (3d Cir.1954) and In Re Dubbiossi, 191 F.Supp. 65 (E.D.Va.1961)); therefore the defendants could never have been guilty of an illegal "bringing in" of an alien under Section 274(a)(1). Aguilar Appellants' Brief, supra note 30, at 98-108.

Aguilar Appellants' Brief, supra note 30, at 257-302.

Id. at 151-55.

Aguilar Appellants' Brief, supra note 30, at 223-56. The sanctuary workers claimed that the intransigent refusal of the I.N.S. to recognize legitimate claims of Central Americans for asylum left them with no choice but to take the actions they did: "action was needed to save lives." Id. at 256.

Id. at 55-70. See Amicus Curiae Brief in Support of the Appeal of Reverend Anthony Clark, United States v. Aguilar, Nos. 86-1208 to 86-1215 (9th Cir.1987) (brief of amici curiae Institute for Youth Advocacy, et al.).

[FN109] The Fifth Circuit dismissed this argument in United States v. Pereira-Pineda, 721 F.2d 137, 139 (5th Cir.1983). The Ninth Circuit followed Pereira-Pineda in Aguilar, 883 F.2d at 668-79, holding that this contention "improperly implies that an alien is entitled to enter and reside here without complying with the procedural formalities of the immigration laws." Id. at 677. The reasoning behind this view is strongest with respect to I.N.A. § 208(a), governing discretionary "asylum" status, for the statute and regulations mark out a clear path for qualifying aliens to obtain that status. See 8 C.F.R. § 208.11. Yet as the Ninth Circuit acknowledged in Aguilar, an application for non-discretionary § 243(h) relief "can only be filed subsequent to the institution of [deportation] proceedings..." 883 F.2d at 679.

[FN110] 883 F.2d at 673; United States v. Merkt, 764 F.2d 266, 273 (5th Cir.1985) (Merkt I). The holding of these cases, that the law "prevents [[[defendants] from offering evidence of mistake premised on an erroneous construction of the immigration laws," 883 F.2d at 676, sits uneasily with the Liparota Court's clear holding that in a criminal statute describing "knowing" violations, the "Government must prove knowledge of illegality to convict ...." 471 U.S. at 427-28 (emphasis added). See also Cheek v. United States, 498 U.S. 192, 203 (1991).

[FN111] See Aguilar, 883 F.2d at 696-705 (upholding government's infiltration of Sanctuary Movement meetings, activities and even prayer services by government agents under the "invited informer" rationale of Hoffa v. United States, 385 U.S. 293 (1966)).

[FN112] 883 F.2d at 693.


[FN115] In 1984, the year before the Aguilar indictments, 328 Salvadorans were granted asylum, and 13,045 were denied it. CRITTENDEN, supra note 1, at 205. See also Orantes-Hernandez, 685 F.Supp. 1488 (C.D.Cal.1988).

[FN116] Aguilar, 883 F.2d at 689-90. This argument was relevant in Aguilar only to Father Anthony Clark and Darlene Nicgorski, the only two defendants convicted of harboring (as distinct from smuggling or transportation) under Section 274(a). None of the sanctuary cases arising in the Fifth Circuit to date have yet raised this problem.


[FN118] Aguilar, 883 F.2d at 690 n. 25.

[FN119] Id. at 690.

[FN120] Id. For a critique of this dubious end run of the Acosta de Evans problem, see supra, note 32.

[FN121] See, e.g., the panel's careful explication, and reaffirmation, of United States v. Fierros, 692 F.2d 1291 (9th Cir.1982), cert. denied, 462 U.S. 1120 (1983), which had been cited by the defendants as supporting their right to use a mistake-of-law-as-mistake-of-fact defense. Aguilar Appellants' Brief, supra note 30, at 46-48.


[FN128] United States v. Evans, 333 U.S. 483 (1948). In attempting to construe the predecessor of Section 1324(a)(1)(C), the Court was unable to determine whether "conceal" and "harbor" have meanings distinct from each other, id. at 488, or whether "harboring" might include activities such as those of an innkeeper. Id. at 489-90.


[FN132] 521 F.2d at 441. The difference between the formulations in Lopez, supra note 129, and Smith, supra note 131, reflect the former decision's focus on the intent, and the latter decision's focus on the conduct encompassed in the term "harbor."


[FN134] 531 F.2d at 430 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1031 (1971)).

[FN135] 6 OXFORD ENGLISH DICTIONARY 1102 (2d ed. 1989) [hereinafter OED].

[FN136] Id. The full OED definition is as follows:
   To give shelter to, to shelter. Formerly often in a good sense: to keep in safety or security, to protect; now mostly dyslogistic; as to conceal or give cover to noxious animals or vermin; to give secret or clandestine entertainment to noxious persons or offenders against the laws.


[FN140] 15 OED at 254.


[FN144] See Bass, 404 U.S. at 339-40 (application of presumption that phrase modifies entire preceding series of
words "is a beginning ... [but] certainly neither overwhelming nor decisive").

[FN145] This appears to have been the view of the Ninth Circuit in Acosta de Evans, 531 F.2d at 430 n. 3.


[FN147] See McNally v. United States, 479 U.S. 1005 (1987) (rejecting view that independent phrases in criminal statute linked by "or" should be "construed independently," and holding that disjunctive was used to make the meaning of the first phrase "unmistakable").


[FN149] The definition of "or" is twofold: "1. [coordinating words] between which there is an alternative.... [2.] connect[ing] two words denoting the same thing." 10 OED at 882-83.

[FN150] The "twist" is the phrase "in violation of law," which has become an extremely vexed subject in attempts to parse Section 1324(a)(1)(C). Sanctuary defendants claim it should be read to incorporate international law norms regarding refugee status, and the government contends it embraces only United States immigration statutes. See United States v. Aguilar, 883 F.2d 662, 676-80 (9th Cir.1987), cert. denied, 111 S.Ct. 751 (1991).


[FN153] In its Act of March 3, 1875, ch. 141, 18 Stat. 477, [hereinafter 1875 Act], Congress excluded convicted felons and prostitutes from entering the United States. Id. at § 5.


[FN160] The confusion that doomed the 1917 Act centered on the language applying the specified penalty "for each and every alien so landed or brought in." 1917 Act, supra note 156 (emphasis added). Both the illogical reference to smuggling conduct and the ill-defined nature of harboring led the court to find the provision ineffective, presenting "three, or perhaps four, possible yet inconsistent answers on the statute's wording."

[FN161] Id. at 489.
[FN162] Id. at 489-90.

[FN163] Id. at 495.


[FN167] Truman Message, supra note 166, at 8145.

[FN168] Id.

[FN169] Id.

[FN170] Id.

[FN171] Id. That Truman did not conceive of harboring as encompassing the broadest sweep feared by the Evans Court is evident in his summary of his proposals: "But these ... actions by the Congress will give us the tools we need to find and report illegal immigrants once here and to discourage those of our own citizens who are aiding and abetting their movement into the country." (emphasis added).


I think we must handle it according to the suggestion of the West Virginia farmer, namely, "by the littles," and must not begin to punish Americans for things about which our predecessors in Congress were lax. (emphasis added)


The Administration's proposed revision of the anti-harboring statute in 1951 contained one subsection forbidding concealing or harboring aliens, and another almost immediately thereafter prohibiting knowing employment. Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings before the Subcomm.'s of the Comm.'s on the Judiciary, 82d Cong., 1st Sess. 716 (1951) (letter from Peyton Ford, Dep'y Attorney General, to Sen. McCarran).

The McCarran-Walter bill was denominated S. 2550 in its Senate consideration, and H.R. 5678 in the House; it came up for final debate in May, 1952.


See United States v. Acosta de Evans, 531 F.2d 428, 430 n. 3 (9th Cir.), cert. denied, 429 U.S. 839 (1976), a panel of the Ninth Circuit determined that "from detection" had to modify only "shield" of the three preceding verbs, because otherwise "we end up with the redundant phrase 'conceal from detection' as well as the awkward construction 'harbor from detection'." This is not much of an argument in the best of cases--"concealed from sight [view]" is, after all, a perfectly common, and perfectly "redundant" phrase--but Acosta de Evan's reading is also flatly inconsistent with the fact that in all other federal anti-harboring statutes, the conduct made criminal must be accompanied by an intent to help another avoid detection by federal authorities. See infra text accompanying notes 304-310.

See COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CODE 101-02 (1971) (assuming that "intent to hinder, delay or prevent the discovery or apprehension of [undocumented aliens]" is essential to commission of harboring offense under existing law, 8 U.S.C. § 1324(a)(3), and proposing to carry that requirement forward in reworded provision).
from the peremptory consideration of what was apprarently regarded as a technical amendment to its language. 98 CONG.REC. 4399-400 (Apr. 24, 1952).


[FN200] Id. at 5319.


[FN202] Id. at 440.


[FN204] Id. at 5320.

[FN205] Id. at 5321.


[FN213] 557 F.2d at 1175-76.

[FN214] Lopez, 521 F.2d at 440-41; Cantu, 557 F.2d at 1180 (emphasis added).


[FN216] Id. at 429.

[FN217] Appellee's Brief at 8, 13, Acosta de Evans (No. 75-2381).

[FN218] 531 F.2d at 430.

[FN219] 883 F.2d at 689-90 (instructions defined "harboring" as "conduct tending to directly or substantially
facilitate the alien's remaining in the United States in violation of law”).


[FN221] Id. at 488.

[FN222] Id.


[FN226] 521 F.2d at 440.

[FN227] The court's reasoning on this issue rested on its assumption that Congress would not have enacted the "Texas Proviso" if it were "unnecessary." 521 F.2d at 440. Yet that is precisely how its 1952 drafters described it. See supra text accompanying notes 182-187.

[FN228] 531 F.2d at 430 n. 3.

[FN229] 557 F.2d at 1180.


[FN231] Susnjar v. United States, 27 F.2d 223, 227 (6th Cir.1928). In Lopez, 521 F.2d 437, 440 n. 3 (2d Cir.), cert. denied, 423 U.S. 995 (1975), the Second Circuit rejected the Susnjar definition on the rather astounding basis that the Supreme Court had not explicitly adopted it in United States v. Evans, 333 U.S. 483 (1948).


[FN233] For a fuller discussion of this question, see infra text accompanying notes 325-337.

[FN234] The Supreme Court cited Keller with approval in Linder v. United States, 268 U.S. 5, 17 (1925), and it was viewed by constitutional scholars prior to 1952 as a perfectly respectable precedent. See HUGH WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 205 N. 176 (1936); HARRY ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 376 n. 65 (1939). Its holding survives to the present.

[FN235] It is an axiom of federal criminal law that, absent the clearest Congressional directive, some form of criminal intent is required before criminal liability will attach to a prohibited act. Morissette v. United States, 342 U.S. 246 (1952).

[FN236] See Bland v. United States, 299 F.2d 105, 107-08 (5th Cir.1962) (bringing in must be accompanied by an "intent to evade and elude inspection by Immigration officers"); United States v. Zayas-Morales, 685 F.2d 1272, 1277 (11th Cir.1982) ("general intent to commit an illegal act" required).

[FN237] See, e.g., United States v. Rubio-Gonzales, 674 F.2d 1067, 1074 n. 5 (5th Cir.1982) ("We need not determine in this case whether one can conceive of willful or knowing conduct tending to substantially facilitate an alien's remaining in the United States illegally that nevertheless might not be within a fair reading of the words [of 8 U.S.C. 1324(a)(3)].")


[FN239] Aguilar, 883 F.2d at 690.
[FN240] In contrast, the lower court in Aguilar had found that "concealing" and "shielding" were acts requiring "the intent to prevent detection by the Immigration and Naturalization Service" to be illegal under 8 U.S.C.A. § 1324(a)(3). Id. at 689.

[FN241] 531 F.2d 428, 430 (9th Cir.1976).

[FN242] Appellee's Brief at 13, Acosta de Evans (No. 75-2381) (emphasis added).


[FN245] United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir.1977).

[FN246] The court did reject, however, the notion that simply "acting in a neighborly and humane fashion" would automatically exempt persons from punishment. 531 F.2d at 430. One who sheltered undocumented immigrants in a "humane" fashion, but nevertheless did so with the object of preventing their apprehension, would be criminally liable on this reading of the statute.

[FN247] 55 F.414 (C.C.D.Or.1893), rev'd on other grounds, 58 F. 694 (9th Cir.1893).

[FN248] 55 F. at 415 (emphasis added).


[FN250] 521 F.2d at 440. This view of the legislative history, as discussed supra notes 188-206, was quite erroneous.

[FN251] Appellee's Brief, United States v. Lopez, 521 F.2d 437 (2d Cir.), cert. denied, 423 U.S. 995 (1975) (No. 75-Cr-1023). In its brief, the Government reproduced excerpts from the 1952 Senate debate which track the court's ultimate assumptions about what the legislators were "assuming."

[FN252] Lopez, 521 F.2d at 441 (emphasizing sham marriages "for the purpose of enabling the aliens to claim citizenship," and other activities undertaken "in order to facilitate [their] continued unlawful presence").


[FN254] Id. at 101-02 (§ 1223(1)).

[FN255] Thus, well before Lopez and Acosta de Evans, the Commission viewed provision of "a weapon, money, transportation, disguise or other means of avoiding discovery or apprehension" as included in the reach of Section 274(a)(3). Id. at 101 (§ 1223(1)(b)). No requirement of a nexus to smuggling operations was viewed by the Commission as necessary, nor any actual physical concealment. Id.

[FN256] In sharp contrast to Aguilar, for example, United States v. Sanchez-Vargas, 878 F.2d 1163, 1168-71 (9th Cir.1989) carefully reexamined the legislative history of anti-smuggling legislation from 1903 to the present and concluded that multiple penalties should not be imposed for "bringing in" and "transporting" an undocumented in one continuous automobile trip. Given the almost total absence of legislative history analysis in Acosta de Evans, Aguilar's refusal to consider arguments presented to it on that basis is difficult to understand. See McElroy v. United States, 455 U.S. 642, 656 n. 21 (1982) (rejecting prior authority not based on careful analysis of language, legislative history or purpose of statute).
[FN257] Pub.L. No. 99-603, § 112, 100 Stat. 3359, 3381 (1986) (now renumbered Section 274(a)(1)(c) and codified at Section 1324a(1)(c) of Title 8). Section 274 of the Immigration and Nationality Act as amended in 1986 is referred to hereinafter as "Section 1324" both to avoid confusion with its 1952 predecessor and because that is the usage most common in the case law.


[FN259] The reach of the anti-harboring provisions of prior law is never discussed in the committee reports on H.R. 3810 and S. 1200, the two bills in the 99th Congress that became the Simpson-Mazzoli Act, Pub.L. No. 99-603, nor is the intention of Congress respecting interpretation of the amended provisions clarified.


[FN261] 8 U.S.C. § 1324a(1)(C) (emphasis added). The "reckless disregard" standard was also inserted in the other provisions of Section 1324(a)(1).

[FN262] Under the old Section 274(a)(3), by contrast, "willfully or knowingly" could be read as defining intent for everything in the provision that followed.

[FN263] Such conduct could include, for example, accidentally stepping in front of someone known to be an undocumented alien just as an I.N.S. officer was passing.


[FN266] Zayas-Morales used the following logic to support its requirement of a "general intent to commit an illegal act" in Section 274(a)(1): "Were we to hold that criminal intent is not required, anyone who might rescue an alien from the sea, bring them to our shores, and deliver them to immigration officials for proper processing would be subject to prosecution.... We cannot conceive such an illogical application of this statute." 685 F.2d at 1277 n. 5.


[FN271] Small fines, and nothing more, are provided for first offenders, with increasing fines for later offenses.


[FN275] United States v. Acosta de Evans, 531 F.2d 428, 430 n. 2 (9th Cir.1976).

[FN276] See Appellee's Brief at 12, United States v. Lopez, 521 F.2d 437 (2d Cir.1975) (No. 75-Cr-1023).


[FN279] If this were the case, a shopkeeper employing an undocumented person by day would be subject to civil penalties only for a first violation, but a householder who hired that person for live-in child care would be a felon. As hiring of undocumented for live-in help is an extremely common practice in border areas, this is not a likely scenario.


[FN286] See supra text accompanying notes 213-221.


[FN288] While undocumenteds are given access to relief if apprehended prior to the beginning of the application period, 8 U.S.C. § 1255(a), I.R.C.A. provides no explicit safety net for those who counsel them, shelter them, or even rent rooms to them during that period. Where an undocumented's temporary-residence application is eventually denied, it is quite plausible to view the agency's actions as substantially helping the person to remain in this country illegally. And, of course, the new "recklessness" standard for ascertaining lawful status substantially removes the ability to escape liability based on ignorance.


[FN291] In 1952 Susnjar v. United States was the leading case on the meaning of "harbor" in the immigration
context, and its definition was contained in BLACK'S LAW DICTIONARY (5th Ed. 1951). While Acosta de Evans refused to follow Susnjar, 531 F.2d at 430, no other case after the 1952 Act specifically entered this debate. However, the "substantial facilitation" test of Lopez and Cantu is arguably inconsistent with Susnjar. Further, the recent Sixth Circuit decision in United States v. Ford Pick-Up, 873 F.2d. 947 (6th Cir.1989) indicates that Susnjar's restrictive reading of the anti-harboring section is probably still viable in that circuit. See id. at 950-51 (construing anti-transportation language of Section 1324(a)(1)(B) to apply only to conduct intended to advance or assist an alien's continued unlawful presence); accord United States v. Moreno-Duque, 718 F.Supp. 254, 259 (D.Vt.1989). In the legislative history of the 1952 and 1986 acts, none of the leading cases on this point are mentioned.


[FN297] See State v. Wells, 197 So. 419 (La.1940); Commonwealth v. Wood, 19 N.E.2d 320 (Mass.1939); Roberts v. People, 87 P.2d 251 (Colo.1938). For English cases viewing the term in a purely common law context see, e.g., Regina v. Green, 1861 Crim.L. Cases 441; Regina v. Good, 1 Car. & K. 768 (1842); Rex v. Greenacre, 8 Car. & P. 388 [35] (1837); Rex v. Lee, 6 Car. & P. 1353 [536] (1834).

[FN298] The most influential formulation of this principle, later wholly adopted by Blackstone and others, is found in William Hawkins' 18th-century treatise: "[G]enerally any Assistance whatsoever given to one known to be a Felon, in order to hinder his being apprehended or tried, or suffering the Punishment to which is condemned, is a sufficient Receipt for [liability as an accessory]". 2 A TREATISE OF THE PLEAS OF THE CROWN 317 (London 1721). See W. RUSSELL, 1 A TREATISE ON CRIMES AND MISDEMEANORS 63-64 (1865); 2 MODEL PENAL CODE AND COMMENTARIES § 242.3, Comment 4 (1980); see also Howard v. People, 51 P.2d 594, 595-96 (Colo.1935); Regina v. Green, [1861] All E.R. 441 (liability for "harbouring" escapee held to depend on whether defendant had "endeavored to conceal him from the police").


[FN300] 4 WILLIAM BLACKSTONE, COMMENTARIES 38.


[FN303] People v. Isom, 346 N.W.2d at 898.


[FN305] Driskill v. Parrish, 7 Fed.Cas. 1100, 1103 (C.C.D.Ohio 1845) ("The intention with which an act is done, gives the character of guilt or innocence to the act.").


[FN308] Oliver v. Kauffman, 18 Cas. at 662.

[FN309] Driskill v. Parrish, 7 Cas. at 1103.


[FN313] In United States v. Kutas, 542 F.2d 527, 528-29 (9th Cir.1976), cert. denied, 429 U.S. 1073 (1977), the Ninth Circuit declared that, in a prosecution for violating 18 U.S.C. § 1072: "The words 'harbor' and 'conceal' refer to any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension." (emphasis added). Accord United States v. Deaton, 468 F.2d 541, 543 (5th Cir.1972), cert. denied, 410 U.S. 934 (1973). One member of the panel in Kutas was Judge Choy, who that same year sat on the panel in United States v. Acosta de Evans, 531 F.2d 428 (9th Cir.1976), cert. denied, 429 U.S. 836 (1976). His presence in both cases reinforces the evidence that the construction of "harbor" in Acosta de Evans did not include a negation of an intent-to-help-avoidance-of-detection element. See supra text accompanying notes 244-249.


[FN315] Breeze v. United States, 398 F.2d 178, 194 (10th Cir.1968) (emphasis added); Michael v. United States, 393 F.2d 22, 34 (10th Cir.1968); Firpo v. United States, 261 F. 850, 853 (2d Cir.1919).

[FN316] Breeze, 398 F.2d at 194; Michael, 393 F.2d at 34. (Emphasis added.)


[FN321] Chae Chan Ping v. United States, 130 U.S. 581 (1889). "Plenary power," according to this view, is given Congress in establishing rules for entry and continued presence of aliens in the United States--plenary in the sense that Congressional decisions in the area are wholly immune from judicial scrutiny except in the service of statutory interpretation. For an overview of the development and decline of that doctrine, see Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545 (1990).

[FN323] United States v. Aguilar, 883 F.2d 662, 695 (9th Cir. 1989), cert. denied, 111 S.Ct. 751 (1991). The court rejected the Free Exercise claims on the grounds that "[t]he government's interest in controlling immigration outweighs appellants' purported religious interests" because a "religious exemption from [Section 274(a)] would seriously limit the ability to control immigration,"--a proposition which is probably correct when applied to outright smuggling of aliens into the country. See, Note, En El Nombre de Dios--The Sanctuary Movement: Development and Potential for First Amendment Protection, 89 W.VA.L.REV. 191, 217 (terming the likelihood of Free Exercise protection "very remote"). But see THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, REPORT TO OF THE COMM. ON THE JUDICIARY PURSUANT TO S.RES. 137, 80TH CONG., 1ST SESS. 223-29 (1950) (lauding the work of "voluntary agencies" with refugees).

[FN324] 494 U.S. 872 (1990) (upholding ban on peyote use by Native Americans in religious ceremonies and announcing that free exercise claims would henceforth fail in the face of state laws that pursue "legitimate" purposes in a "neutral" manner).


[FN326] Id. at 147-49.

[FN327] Id. at 147-48.

[FN328] Id. at 148-49.

[FN329] 883 F.2d at 689. Because prostitution is still a ground for deportation, see 8 U.S.C. §§ 1182(a)(2)(D), 1251(a)(1)(A) (1988), the precise facts of Keller could arise and be grounds under Aguilar's formulation for a "harboring" conviction.


One of the most unfortunate aspects of the Aguilar opinion was its failure even to address the impact of Keller despite the fact that the defendants and their amici had raised the issue in their briefs.


[FN332] However, while the Lochner-era Court was generally hostile to assertions of federal authority, this was not true in the immigration area, where this period marked one of the high points of the "plenary power" theory. In the same year it handed down Keller, the Court declared in another case that "over no conceivable subject is the legislative power of Congress more complete than it is over [admission of aliens]." Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).


[FN334] In its opinion the Court analyzed the federal government's power "to control the coming in or removal of aliens" and its power to make treaties, and found in neither an adequate support for the anti-harboring law. 213 U.S. at 147.

[FN335] Federal lawmakers could assert that lax divorce/marriage/child-custody rules or easy education/professional admission requirements attract aliens from abroad, then enact uniform federal standards in each of those areas applicable to all, citizens and aliens alike. At present each of these areas are "regulated" by federal immigration laws to the extent that they help determine whether an individual alien can gain entry to or remain in the United States. See, e.g., 8 U.S.C. §§ 1151(b)(2) (Supp. II, 1990) and 1153(a) (Supp. II, 1990) (admitting spouses and children of citizens and permanent residents); § 1153(b)(3)(A)(ii) (Supp. II, 1990) (admitting immigrants "who hold baccalaureate degrees and who are members of the professions"). Yet the I.N.A. explicitly and implicitly relies on state (or foreign) law to supply the definitions of the terms. See, e.g., 8 U.S.C. §

[FN336] Compare Keller, 213 U.S. at 148-49 (if Congress has full power to "control generally dealings of citizens with aliens," "an immense body of legislation" will move from state to federal government and "tend to substitute one consolidated government for the present Federal system"), with New York v. United States, 112 S.Ct. 2408, 2434 (1992) ("But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").


[FN340] 883 F.2d at 689. In United States v. Acosta de Evans, 531 F.2d 428 (9th Cir.1976), cert. denied, 429 U.S. 836 (1976), the conviction of a woman who had given shelter to an undocumented Mexican cousin was upheld. See supra text accompanying notes 216-221.

[FN341] Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987). Before Board of Directors of Rotary Int'l it was unclear whether "personal" association rights were viewed by the Court as rooted in the First Amendment or in more general privacy rights. See Roberts, 468 U.S. at 620 (personal association rights "an intrinsic element of personal liberty"); Moore, 431 U.S. at 501-03 (Fourteenth Amendment Due Process Clause).


[FN343] Thus Jesus could declare that it was the Good Samaritan, and not any of the others who passed the injured man along the road, who was "neighbor" to the one he "took pity on." See Luke 10:29-37.


[FN345] The Keller Court invoked this constitutional value when it recognized that "[e]very possible dealing of any citizen with the alien may have more or less induced her coming," while roundly rejecting the notion that "it [is] within the power of Congress to control all the dealings of our citizens with resident aliens." 213 U.S. 138, 148 (1909).


[FN347] Given the existence of millions of undocumented in the United States, it is difficult to credit the federal government with undiluted passion to exclude them. See Plyler v. Doe, 457 U.S. 202 (1982).

Congress' continued indulgence of the employment of undocumented people, moreover, hardly suggests that the Republic will perish if an undocumented person manages to find shelter for the night. Compare 8 U.S.C. § 1324(a)(f) (misdemeanor liability for "pattern or practice" of such employment), with Section 1324(a)(1)(C) (felony liability for only one harboring violation).


[FN350] Chan v. Bell, 464 F. Supp. 125, 131 n. 17 (D.D.C.1978) (if interpreted to allow federal authorities to define marriage the I.N.A. "would subvert traditional modes of domestic relations law and would thus raise substantial constitutional problems" under the Tenth Amendment).


[FN354] The statute as enacted continues federal reliance on state law to determine the existence of a marriage, and permits the I.N.S. to refuse benefits to a citizen's spouse only if the marriage is subsequently terminated or annulled, or is entered into "for the purpose of procuring an alien's entry as an immigrant." 8 U.S.C. § 1186a(b)(1)(A).

[FN355] 8 U.S.C. § 1325(b) (1988) (emphasis added) (providing for up to five years imprisonment for violation, the same penalty as that imposed for harboring violations under Section 1324(a)(1)(C)).


[FN359] Bass, 404 U.S. at 347-48 (quoting Henry Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in BENCHMARKS 196, 209 (1967)).


[FN361] See supra text accompanying note 259.


[FN363] This statute thus presents a situation similar to that examined by the Court recently in United States v. R.L.C., 112 S.Ct. 1329 (1992), where normal statutory construction approaches pointed toward the narrower reading urged by the juvenile offender; the majority looked to the "venerable rule of lenity" to remove all doubt as to the outcome. 112 S.Ct. at 1338 (plurality opinion), (Scalia, J., concurring).


[FN372] See American Baptist Churches v. Thornburgh, 760 F.Supp. 796 (N.D.Cal.1991) (approving settlement); American Baptist Churches in the U.S.A. v. Meese, 712 F.Supp. 756 (N.D.Cal.1989) (sustaining Equal Protection claims of Salvadoran and Guatemalan refugees against motion to dismiss). See also Katherine Bishop, U.S. Adopts New Policy for Hearings on Political Asylum for Some Aliens, N.Y. TIMES, Dec. 20, 1990, B18 (noting that a total of 500,000 people might be entitled to new hearings based on the settlement, and that after 1980 97% of Salvadoran applicants and 99% of Guatemalan applicants had been denied asylum under the previous rules, a far higher rate than many other countries).

[FN373] The defendants in those three cases focused their efforts on helping Salvadoran and Guatemalan refugees.

[FN374] 883 F.2d at 693 (emphasis added).

[FN375] Id. at 696 (emphasis added).

[FN376] It is notable that other courts deciding sanctuary appeals have used language far more restrained in describing the defendants even while rejecting all or most of their legal claims. See United States v. Merkt, 794 F.2d 950 (5th Cir.1986) (Merkt II), cert. denied, 480 U.S. 946 (1987); United States v. Merkt, 764 F.2d 266 (5th Cir.1985) (Merkt I); United States v. Elder, 601 F.Supp. 1574 (S.D.Tex.1985).


[FN378] See Joan Friedland & Jesus Rodriguez y Rodriguez, SEEKING SAFE GROUND: THE LEGAL SITUATION OF CENTRAL AMERICAN REFUGEES IN MEXICO 20-24 (1987) ("[UNHCR's] presence in Mexico is significant. It represents a commitment on the part of Mexico to provide at least physical protection to a limited group of Central Americans in the country." Id. at 23.). But see Olguin, supra note 377, at 349 ("Mexico's cooperation with the UNHCR has been less than satisfactory.") It is interesting that after visiting Mexico in 1981, Jim Corbett reached the "tentative" conclusion, according to one historian, "that for many refugees, economic and social opportunities were better in Mexico, where they shared a language and culture, than in the United States." CRITTENDEN, supra note 1, at 81.

[FN379] There are, of course, many precedents for United States assistance to refugee programs in other countries--most notably, the massive American effort after World War II to aid displaced peoples in Europe.

[FN380] Sanctuary: A Resource Guide, supra note 3 at 26. Not every bishop listened to this advice, however. Some have sanctioned the Sanctuary Movement as "consistent with our national history and biblical values." Id. at 26-27. As Catholics, the authors note their own continuing dissent from what they perceive to be a failure of reason and of charity in our Church by its paralysis on this issue.

[FN381] For a discussion of Our Lady Queen of Angels Church and its long battle with the Archbishop of Los Angeles over sheltering undocumented, see Marita Hernandez, The Last Fight of Father Olivares, L.A. TIMES MAGAZINE, Dec. 16, 1990. See also Russell Chandler, Mahony Sees Success in Meeting Latinos' Needs, L.A.

[FN382] Haitians, of course, cannot enter the United States surreptitiously as easily as Central Americans can because of the long sea passage they must endure and the vigorous, coldly efficient efforts of the Coast Guard to intercept them. Whether the Clinton Administration will enact policies more receptive to these refugees is unclear as of this writing. See, Haitian Refugee Center, Inc., v. Baker, 953 F.2d 1498 (11th Cir.), cert. denied, 112 S.Ct. 1245 (1992) (describing U.S. agreement with Haitian government authorizing interdiction of Haitian vessels and efforts of advocates to reach refugees so detained in order to provide them with legal counsel). This has not deterred current adherents of sanctuary work to call for efforts to assist these refugees. For those Haitians who do elude interdiction at sea—as well as those whose immigration status is at any point irregular—humanitarian assistance efforts may raise the same issues regarding "harboring" liability that have haunted sanctuary workers in the Southwest. See, United States v. Esparza, 882 F.2d 143, 145 (5th Cir.), cert. denied, 493 U.S. 969 (1989) (illegal "harboring" or "transportation" includes such conduct toward any alien who has "come to" the United States illegally, even if such alien has been detained by the I.N.S. and authorized to remain in the country pending I.N.S. processing).

[FN383] There is, however, evidence that the government is not currently eager to pursue sanctuary workers on harboring charges. See Pamela Constable, At Easter, Respite in a Haven for Weary Pilgrims, BOSTON GLOBE, Apr. 1, 1991, at 2 (Oscar Romero House in South Texas, which shelters undocumented Central Americans, has "tacit accommodation" with government regarding its work).