Sanctuary and Harboring in Trump's America

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SANCTUARY AND HARBORING IN TRUMP'S AMERICA

John Medeiros† & Philip Steger††

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“Can we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe freely?”
- Ronald W. Reagan

I. INTRODUCTION

As a presidential candidate, Donald Trump made illegal immigration a signature issue of his campaign. Among his claims was that “Mexico was sending violent criminals, including rapists, to the United States.” Trump also called for the deportation of “more than eleven million undocumented immigrants living in the United States” and threatened to “triple the number of Immigration and Customs Enforcement [ICE] agents.” He promised to “restrict legal immigration” and put an end to birthright citizenship, which extends automatic citizenship to children born in the United States. Trump pledged not only to build a wall across the entire southern United States border, but also to have Mexico pay for it.

After inauguration, President Trump wasted no time implementing many of his campaign promises with a barrage of harsh anti-immigrant policies—mostly by executive order. On one day alone, President Trump signed two such orders. The first, “Enhancing Public Safety in the Interior of the United States,” announced massive immigration enforcement priorities destined to

1. Ronald Reagan, Address Accepting the Presidential Nomination at the Republican National Convention in Detroit (July 17, 1980).
3. Id.
4. Id.
5. Id.
devastate immigrant communities. The second, “Border Security and Immigration Enforcement Improvements,” included costly plans to further militarize the United States-Mexico border, build the wall he promised during his campaign, and increase immigration enforcement priorities. Perhaps the most well-known (and unpopular) of his executive orders was the one he signed two days later, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States,” which promised to “keep radical Islamic terrorists outside the United States.” This order left thousands of refugees facing life-threatening danger without protection by ceasing all refugee admissions for four months and the admission of Syrian refugees indefinitely. It also imposed a ninety-day ban on entry for all people with immigrant and nonimmigrant visas from seven predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syrian, and Yemen. After being blocked by various

9. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). This executive order prioritizes noncitizens for deportation so broadly that it puts all unauthorized individuals at risk, including families, long-time residents, those brought to the United States as children, and anyone who has committed chargeable criminal acts (which would include undocumented immigrants with no criminal history because entering without inspection is a chargeable criminal offense). See id.

10. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017). This executive order: (1) demands the construction of a contiguous wall along the 2,000 mile southern border; (2) expands the use of expedited removal; (3) directs the Department of Homeland Security (DHS) to detain individuals in removal proceedings (regardless of whether or not they are awaiting their court hearing); (4) allows to further deputize state and local law enforcement agencies to perform federal immigration enforcement functions; (5) directs the Attorney General to prioritize the prosecution of any offense connected with the southern border (including nonviolent offenses like unlawful entry); and (6) allows the DHS Secretary to heighten the credible fear standard that would make it even more difficult for asylum seekers to present their claims. See id.


In response to the President’s hard line stance on immigration, many American churches and other places of worship have declared themselves sanctuaries, or safe havens, for undocumented and other vulnerable immigrants.\footnote{16. See, e.g., Laurie Goodstein, *Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries*, N.Y. TIMES (Dec. 27, 2016), https://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html [https://perma.cc/ZC6G-QRJ5].} The number of sanctuary sites has more than doubled since Donald Trump took office, bringing the total to more than 800 according to the Church World Service.\footnote{17. Gabriella Borter, *Under Trump, More Churches Offer Sanctuary but Few Seek Refuge*, REUTERS (Aug. 1, 2017), https://www.reuters.com/article/us-usa-immigration-sanctuary/under-trump-more-churches-offer-sanctuary-but-few-seek-refuge-idUSKBN1AH350 [https://perma.cc/ZE7E-MYJS] (citing the Church World Service, an international humanitarian organization).} Part II of this article examines the origins of sanctuary as both a legal and moral obligation for churches and other places of worship. Part III looks at the history of the Sanctuary Movement in the United States in the 1980s, and the ways that sanctuary has shaped the current national immigration debate. Part IV explores how courts have interpreted liability under the anti-harboring provisions of section 1324 of the Immigration and Nationality Act.\footnote{18. 8 U.S.C. § 1324 (2012).} And finally, Part V looks at what considerations congregations in today’s America will need to balance should they decide to offer sanctuary to America’s vulnerable immigrant population.

II. ORIGINS OF SANCTUARY AS BOTH A LEGAL AND MORAL OBLIGATION FOR CHURCHES AND OTHER PLACES OF WORSHIP

A. What is Sanctuary?

“protective community with people whose basic human rights are being violated by government officials.” As a declared practice, he adds, “sanctuary holds the state accountable for its violations of human rights.”

Eric Jorstad, who has written extensively about the Sanctuary Movement of the 1980s, states that, as applied to immigrants, sanctuary is “an act of compassion, an expression of the fundamental Christian concern to love one’s neighbor . . . [a] way of providing for people in need, not only with social services, but also by giving them haven from the potentially disastrous consequences of deportation.” With respect to its purpose in the larger immigration debate, sanctuary does three things: (1) it “provides a safe haven for refugees who are under threat of deportation and subsequent threat of persecution when they are returned to their homelands;” (2) it “helps to resettle the refugees in the host community by providing emotional support, basic needs, and legal and social services;” and (3) it enables “endorsing congregation[s] to directly minister to the needs of the oppressed.” When we talk about sanctuary in today’s climate, we typically refer to places of worship that have somehow acted to provide support to undocumented immigrants who are most vulnerable to deportation.

B. Sanctuary in Early England

Sanctuary is long established in Judeo-Christian norms, and today’s Sanctuary Movement can be traced back to medieval England, where churches provided legal protection to fugitives fleeing the law. The tradition of sanctuary is rooted in the power of an inviolable religious site to grant protection to persons who fear for their life or liberty. Although the Anglo-Saxon sanctuary had its

(2009); see also infra Part III.A.

22. Id. at 6.
26. See id.
27. See Michael J. Davidson, Sanctuary: A Modern Legal Anachronism, 42 CAP. U.L.
origins in ancient Judeo-Christian heritage, the privilege was eventually integrated into England’s judicial system. In the sixth century, “the newly converted and baptized Christian King Ethelbert, King of Kent, issued an Anglo-Saxon code of laws that included the recognition of the Church’s right to grant sanctuary and provided a penalty for a violation of the Church’s peace.” This reference to sanctity of churches is important because it shows how quickly churches came to be recognized by the state as “inviolable.”

Under this early asylum system, once inside the church, fugitives had forty days to surrender themselves to the authorities and stand trial for their crime (the punishment could include execution). Otherwise, the fugitives could confess their guilt, take an oath to renounce the realm of England, and go into permanent exile. The primary benefit of sanctuary “was to delay a legal decision and enable fugitives to negotiate other options.” This concept of sanctuary as a means to explore legal alternatives would survive for several centuries.

Over the years, the Church clashed with the State over the final authority to grant sanctuary; the distinction was crucial. If the State granted sanctuary, it could regulate and even revoke it. But if the privilege of sanctuary flowed from the separate power of the Church, the State could not control it. It was ultimately during the reign of King Henry VIII (1509–1547) that the legal practice of sanctuary became highly regulated, eventually leading to its official abolishment. Interestingly, the concern at the time was not about...

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29. Davidson, supra note 27, at 588.
30. Id. at 588 n.41 (citing NORMAN M. TRENHOLOME, THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY 11 (Frank Thilly ed., 1903)).
31. See id. at 590–91.
32. See id. (noting that renouncing the realm of England resulted in a forfeiture of all property to the Crown).
33. Medeiros & Garnett McKenzie, supra note 25.
34. See id. at 20–21.
36. See id.
37. See id.
38. See Carro, supra note 28, at 766.
crime control, but rather the prevention of Roman Catholics from seeking refuge from the mandatory Anglicization of their churches.\textsuperscript{39} In 1540, Parliament passed a statute that prohibited sanctuary for those who had committed murder, rape, burglary, arson, or sacrilege.\textsuperscript{40} By 1623, the privilege of sanctuary was abolished entirely due to the Crown’s inability to prosecute political enemies.\textsuperscript{41} But even though sanctuary as a legal procedure has since remained outlawed, the use of sanctuary to provide protection to those most vulnerable has continued to this day.\textsuperscript{42} Mainly, this has occurred because the practice of the early Church “brought to light the notion of sanctuary as a sacred and moral duty” among that church’s followers.\textsuperscript{43}

III. HISTORY OF THE SANCTUARY MOVEMENT IN THE UNITED STATES IN THE 1980S AND WAYS IN WHICH SANCTUARY HAS SHAPED THE CURRENT NATIONAL IMMIGRATION DEBATE

A. The Refugee Act of 1980 and Its Role in the Rise of the Sanctuary Movement in the United States

The Sanctuary Movement began shortly after Congress passed the Refugee Act of 1980.\textsuperscript{44} The Act had two main purposes: “to respond to the urgent needs of persons subject to persecution in their homelands,”\textsuperscript{45} and “to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States.”\textsuperscript{46} Congress

\textsuperscript{39} See Pamela Begaj, An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement, 42 J. MARSHALL L. REV. 135, 141 (2008) (noting that “although sanctuary was formally abolished in the first half of the sixteenth century, the practice continued in England well into the middle of the eighteenth century” (citing HERMAN BLANCHI, JUSTICE AS SANCTUARY: TOWARD A NEW SYSTEM OF CRIME CONTROL 143 (1994))).

\textsuperscript{40} See Carro, supra note 28, at 766.


\textsuperscript{42} See Medeiros & Garnett McKenzie, supra note 25.

\textsuperscript{43} Id.


\textsuperscript{45} § 101(a), 94 Stat. at 102.

\textsuperscript{46} § 101(b), 94 Stat. at 102.
accomplished the first purpose by amending the Immigration Act of 1952 to prohibit the deportation of refugees to their home country if they met the statutory definition of “refugee.” The second purpose was met by a new provision in the Immigration Act that recognized asylum as a legal concept for the first time in United States law and established a single asylum procedure.

Before the passage of the Refugee Act in 1980, United States refugee law was overtly political. For example, the law required that refugees come from either Communist countries or the Middle East, and any exceptions required the United States Attorney General to exercise his or her discretionary parole authority. The Act tried to implement a more just system by incorporating the definition of “refugee” used by the United Nations—anyone with a “well-founded fear of persecution” based on “race, religion, nationality, membership in a particular social group, or political opinion.”

The Act was intended to prevent persecution, but it soon became clear that its implementation was not justly extended to all refugees. The law referred to the admission of refugees “of special humanitarian concern to the United States,” thus enabling the government to give preferences to certain refugee groups over others. Further, according to the operating instructions that accompanied the new procedures, applicants from the Soviet Union and Eastern Bloc countries received immediate action, while

47. See 8 U.S.C. § 1101(a)(42)(A) (2012) (explaining that a refugee is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”).


50. Id. (noting that this language originated with the 1951 United Nations Refugee Convention).

51. See Altemus, supra note 24, at 683–84 (excluding Salvadorans and Guatemalans).

52. Crittenden, supra note 49.
applicants from other countries did not.\textsuperscript{53} Most importantly, the Act failed nationals of Central America—primarily those from El Salvador and Guatemala—in two significant ways. First, the U.N. definition adopted by United States law \textit{excluded} people displaced by military operations, civil strife, or natural disasters.\textsuperscript{54} As a result, many Salvadorans failed to meet the legal definition of refugee because they were considered to be fleeing a generalized climate of terror and violence rather than any specific threats to their lives.\textsuperscript{55} Second, whereas under the previous system the United States had the luxury of screening potential refugees prior to admission, the new law failed to foresee the possibility that refugees were likely to be physically at the border rather than at refugee camps thousands of miles away.\textsuperscript{56} This possibility was not fully considered by the United States.\textsuperscript{57} Almost as an afterthought, the new law allowed for a discretionary asylum process: the United States Attorney General was required to establish a procedure for those in the United States or at the border to apply for and to be granted asylum \textit{only} if they were deemed to fall within the refugee definition.\textsuperscript{58}

Within the first six months of the passage of the 1980 Act, more than 100,000 claims for asylum were filed.\textsuperscript{59} With a new Republican team in the Justice Department, it became easy to dismiss Central American refugees as “economic” refugees.\textsuperscript{60} From May 1983 to September 1986, the Immigration and Naturalization Service (INS) noted that over 23% of asylum cases were approved.\textsuperscript{61} But, of the nearly 20,000 asylum applications filed by nationals of El Salvador, only 528 (2.6%) were approved,\textsuperscript{62} and of the nearly 1,500 asylum

\textsuperscript{53} See id. at 20–22.
\textsuperscript{54} See id. at 22.
\textsuperscript{55} See id.
\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{59} See \cite{crittenden.suppnote.49}, note 49, at 23.
\textsuperscript{60} See id.
\textsuperscript{61} See id. at 21.
\textsuperscript{62} See id.
applications filed by nationals of Guatemala, only 14 (0.9%) were approved.63

In response to what was perceived as an unfair application of the law to nationals of El Salvador and Guatemala, several churches and private individuals established a network determined to offer assistance to immigrants who had been denied asylum.64 This network was “originally conceived by Reverend Jim Fife, a minister of the Southside United Presbyterian Church in Tucson, Arizona, and Jim Corbett, a retired Quaker cattle rancher.”65 Fife’s church began offering weekly prayer vigils, which later became a place for immigration lawyers and refugees to discuss legal issues and options.66 In the months leading up to its official declaration as the Sanctuary Movement, the Tucson Ecumenical Council Task Force galvanized to “harness and direct a response of faith at all levels” to the plight of Central American refugees in the United States.67 This response included, among other things, a formal proclamation of biblically-based motivation, a weekly ecumenical prayer service outside the federal building housing the INS offices, the expansion of community-based legal services to assist Central American refugees, and the raising of over $750,000 for bonds and legal expenses.68

At first, the Church’s role prior to the emergence of the Sanctuary Movement was similar to that of the biblical sanctuaries: they provided an alternative, but co-existing, source of charity to that which the secular community could provide or would approve.69 The Task Force raised nearly $750,000 in bonds and up to $100,000 in legal expenses and assisted Central American refugees in the filing of their asylum applications.70 Soon, however, the Task Force realized its efforts were futile, as most of the asylum applications it filed were ultimately denied.71 This moment was a crucial turning

63. See id.
64. See Rose Cuison Villazor, What is a “Sanctuary”? 61 SMU L. REV. 133, 140 (2008).
66. See id.
68. See id.
70. See Bau, supra note 65.
71. See id.
point in the movement’s history.\textsuperscript{72} It transitioned from working within the law to exploring more options that posed higher legal risks.\textsuperscript{73} As Fife would later say, “If you hear from INS that what those church people ought to do is try to work within the law first, we did it. And we did it with as much energy and imagination and creativity as we could.”\textsuperscript{74}

Jim Corbett encouraged Fife and the rest of the Task Force to do more.\textsuperscript{75} He had already filled his own house and the houses of other Quakers with refugees.\textsuperscript{76} Now, he was asking Fife’s church to do the same.\textsuperscript{77} At first, members of the congregation volunteered to take refugees into their homes.\textsuperscript{78} Soon thereafter, members of the church were transporting refugees away from the border, then from the border to the church, and finally from across the United States-Mexico border.\textsuperscript{79} It was then that Fife decided to publicly declare sanctuary as a way to give “public witness” to what the group was doing.\textsuperscript{80} This public declaration, officially known as the Sanctuary Movement, took place on March 24, 1982, before eight television cameras and forty local, national, and international reporters.\textsuperscript{81}

The movement spread quickly and vastly, reaching all four corners of America—from Seattle to San Diego, and from Vermont to Florida.\textsuperscript{82} Within its first year, there were 45 sanctuary sites and

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{72}
\item See id.
\item Id.
\item See Bau, \textit{supra} note 65, at 11.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item Wallis & Hollyday, \textit{supra} note 72, at 17.
\item See Altemus, \textit{supra} note 24, at 684 n.7 (describing the Sanctuary Movement as “(1) a justice ministry offer of refuge to persons fleeing persecution; (2) a public declaration of a church or synagogue against the policies of (INS) and the policy of investigation in Central America; (3) an opportunity to enlighten citizens of the United States about the plight of thousands of their fellow human beings; and (4) a demonstration of faith in action”). After several months of trying to keep their sanctuary efforts a secret, a dissenting member of the Southside Presbyterian Church leaked the information to the FBI. CRITTENDEN, \textit{supra} note 49, at 70–71. As it turned out, the early publicity attracted far more attention than the simple announcement itself ever could have. Id.
\item See Bau, \textit{supra} note 65, at 12.
\end{enumerate}
\end{footnotesize}
600 supporting congregations and religious organizations across the country. By the end of the fall of 1983, the number of sanctuary sites throughout America rose to almost 70, and by the summer of 1984 grew to more than 150, with thousands of individuals committed to the movement.

The Sanctuary Movement had four central themes. The first was a ministry of hospitality, providing physical security and services to Central American refugees. This included both the traditional roles of the Church—sheltering the homeless and feeding the hungry—but it also included providing legal services (money for bail, legal assistance for deportation proceedings, and preparation of asylum applications), social services (such as food, medical assistance, and shelter), and evasion services (transportation and resettlement). To these sanctuary churches, it seemed only natural that doors open to the most needy Americans should also be open to Central American refugees.

The second theme was to create a social justice ministry among member congregations—a new type of activism. This included a rediscovering of a biblical tradition that sought justice and peace as concrete elements of Christianity. This re-imagining fostered new channels of dialogue and communication; it opened congregations for meeting spaces, bringing lay professionals like lawyers, doctors, and social workers within the congregation into the life and ministry of the church. It even welcomed those outside the congregation into the life and ministry of the church. But most importantly, congregations were encouraged to examine their place in the larger Sanctuary Movement and decide their degree of involvement—either as an “immediate sanctuary” congregation that provided direct services (such as shelter) or as a “secondary

83. See id.
84. See id.
85. See id. (recognizing the June 1984 list of sanctuary sites compiled by the Chicago Religious Task Force on Central America (citing Charles Austin, More Churches Join in Offering Sanctuary for Latin Refugees, N.Y. TIMES, Sept. 21, 1983, at A18)).
86. See id.
87. See id. at 13.
88. See id.
89. See id. at 14.
90. See id.
91. See id.
92. See id. at 15.
sanctuary” congregation that provided a wide variety of support services (such as money, food, clothing, furniture, transportation, volunteers, or education).

The third theme emphasized by the Sanctuary Movement concerned the emerging role of the Church in politics. Congregations were encouraged to engage in larger debates and discussions about the relationship between Church and State. This was particularly important, as it was the Reagan administration that increased military spending and continued to pursue a nuclear arms race that provoked an unprecedented degree of organizing and demonstrating by churchgoers.

The fourth theme of the Sanctuary Movement was the call to protest United States foreign policies in Central America that resulted in the influx of Central American refugees in the first place. Requiring each congregation that joined the movement to make a public statement of its intent, members of the Sanctuary Movement declared the current United States policy in Central America illegal and immoral. These members also stated that they would continue to extend sanctuary to the victims of the policy so long as it remained in place. But protests by members of the Sanctuary Movement go far beyond mere civil disobedience. As Jim Corbett said:

[S]anctuary also begins where war resistance played out, with community conversion. Civil disobedience is often understood . . . to be individualistic resistance to state-enforced injustice, but the declaration of sanctuary is a different kind of civil disobedience that is intended to do justice. Individuals can resist injustice, but only communities can choose to do justice.

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93. See id.
94. See id. at 17.
95. See id.
96. See id.
97. See id.
100. See id.
101. Bau, supra note 65, at 21 (quoting Jim Corbett from an unpublished paper titled Sanctuary and the Covenant Community).
B. Federal Prosecution of Members of the Sanctuary Movement

Initially, the federal government dismissed the activities of the Sanctuary Movement as a ploy for publicity. While congregations and individuals engaged in sanctuary activity for many months, neither the Department of Justice nor the INS sought to prosecute congregations that were part of the movement. But as its membership grew to over 100 congregations and 30,000 participants, tensions between Church and State also grew. It was only a matter of time before the federal government stepped in.

And so in 1984, as part of an undercover operation called “Operation Sojourner,” the INS authorized four undercover agents wearing “body bugs” to enter churches and tape private congregations, tap telephones, photocopy documents, gather personal information, and report regularly to the United States government. This investigation led to the indictment of sixteen people on January 14, 1985, and the arrest of more than sixty people on charges involving smuggling, transporting, and concealing “illegal aliens” under various provisions of section 274 of the Immigration and Nationality Act (INA)—particularly its anti-harboring and anti-transporting provisions. This case, United States v. Aguilar, would become the most critical of all the Sanctuary Movement cases and would later be called by the chief federal prosecutor the “death knell” of the Sanctuary Movement.

102. See Altemus, supra note 24, at 704.
103. See id. at 704–05.
104. See id. at 684.
105. See id.
106. Id. at 711.
107. See id. at 710.
108. 8 U.S.C. § 1324 (2000); see BAI, supra note 65, at 75–123.
109. 883 F.2d 662 (9th Cir. 1989).
110. This was not the first, but the fifth case for smuggling, harboring, or concealing an illegal alien. In the first, Stacey Merkt was charged with transporting two undocumented refugees within the United States. Altemus, supra note 24, at 705–06. In the second case, Phillip Willis-Conger and Katherine Flaherty were detained for transporting four Salvadoran refugees within the United States. Id. at 707. In the third, Jack Elder was charged with unlawful transportation of three Salvadorans to a bus station. Id. at 708. In the fourth, both Elder and Merkt were charged with smuggling, transporting, and conspiracy after transporting two Salvadorans across the border. Id. at 709.
111. See Loken & Babino, supra note 98, at 121.
The Sanctuary Movement prosecutions were based as much on the media’s characterization of the movement’s activities as “illegal” as the actual assistance to Central American refugees. In *Aguilar*, the government asked the trial court to preclude four separate defenses from being raised in any form: defenses based on international law, freedom of religion, law of necessity, and lack of specific criminal intent. The government saw the movement as nothing more than an alien smuggling ring and argued that it was irrelevant and prejudicial to reference refugees, international law, conditions in Central America, freedom of religion, humanitarian assistance, asylum, or a necessity defense. Of particular challenge to the defendants was the decision to either justify their actions as legal under existing law or to admit the illegality of their conduct but justify it on traditional civil disobedience grounds. The defendants chose to argue the legality of their actions, a move that would later define the movement’s future relationship with the law.

There were several defenses raised, including: (1) the belief that the sanctuary workers did not commit a crime because the refugees they assisted were entitled to enter and reside in the United States under the Refugee Act of 1980; (2) the conduct of the workers was protected under the Free Exercise Clause of the First Amendment; and (3) the actions of the workers did not fall within the definition of harboring under the INA. One by one, the courts rejected these defenses, but one argument was not rejected outright—that the anti-harboring provisions of 8 U.S.C. § 1324(a) were not meant to criminalize the mere sheltering of undocumented refugees, absent a specific intent to help them evade detection. This one small victory offered a glimmer of hope for the movement’s future endeavors and validated the goal of establishing sanctuary as a civic

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114. See id. at 52.
115. See Loken & Babino, *supra* note 98, at 137.
116. See id.
117. See Brief for the Appellants at 182, United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989).
118. See id. at 257–302.
119. See id. at 55–70.
120. United States v. Aguilar, 883 F.2d 662, 689–90 (9th Cir. 1989); see also Loken & Babino, *supra* note 98, at 140–41.
duty rather than a crime. This effectively met the primary purpose of the movement to provide non-clandestine shelter to those most vulnerable to deportation. The efforts of the religious communities involved in the Sanctuary Movement sparked debate over America’s human, ethical, and moral responsibilities in light of the mistreatment of Central Americans under the Refugee Act of 1980. The movement raised serious questions about the depths to which Americans will go, both individually and collectively, to respond to injustice. By the end of the movement, the public debates sparked by the efforts helped bring about several major changes in immigration law and policy. Significantly, the Immigration Reform and Control Act of 1986 provided amnesty and the opportunity to become lawful permanent residents to over 2.5 million undocumented immigrants.

IV. HOW COURTS HAVE INTERPRETED LIABILITY UNDER THE ANTI-HARBORING PROVISIONS OF SECTION 1324 OF THE IMMIGRATION AND NATIONALITY ACT

With an administration that has made enforcement of immigration laws one of its top priorities, many congregations across the United States are once again discerning their role in offering sanctuary to undocumented immigrants. Aware of the need to revive many of the sanctuary activities of the earlier movement, the prevalent issue these congregations must face is whether to provide shelter, arguably the most significant activity of

121. See Loken & Babino, supra note 98, at 141.
122. See id.
126. See Borter, supra note 17.
the original movement. While there is no law that specifically prohibits a faith congregation from responding to the needs of undocumented immigrants at their doors, the question at hand is whether—and how—a congregation may do so without violating the provisions of 8 U.S.C. § 1324(a)(1)(A), which prohibit the bringing in and “harboring” of noncitizens who are not lawfully present in the United States. 127 In order to understand the anti-harboring provision of section 1324, it helps to look at the language of the statute, and how the anti-harboring provision falls within the larger context of the other violations listed in the statute.

Section 1324 makes any person—individual or corporate—guilty of a crime who:

(i) 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;

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

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

(iv) 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. 128

The progression of this statute—starting with “bringing a non-citizen into the United States by undesignated port of entry”

128. Id. (emphasis added). A person also commits a crime who “engages in any conspiracy to commit any of [these] preceding acts, or aids or abets the commission of any of [these] preceding acts.” Id. at § 1324(a)(1)(A)(v).
and moving to “transporting,” then to “conceal[ing], harbor[ing],
or shield[ing],” and finally to “encourag[ing] or induc[ing]”—is a progression from concrete and specific conduct to more nebulous and ambiguous conduct, and matches the undocumented person’s unlawful journey in the United States. It also aligns with the historical development of the statute, as only cross-border infiltration and smuggling were initially prohibited, followed by the more nebulous conduct of “harboring,” “encouraging,” and “inducing” being added to the list of prohibited conduct by later amendments. The closer to an illegal border crossing one gets, the more clearly the conduct is unlawful. Assisting someone in making an illegal border crossing is clearly prohibited by this statute. Transporting from the border to points interior in a way that is intended to avoid detection by the authorities is also illegal. While “concealing” and “shielding from detection” are relatively clear and concrete concepts, the same is not true of “harboring.” What exactly does it mean to “harbor?” How should this third category of unlawful conduct be read? And what does it mean to “encourage or induce” someone to enter or reside in the United States?

While courts have interpreted “harboring” under section 1324 in a variety of ways, the central issue these courts have contended with is whether “harboring” requires the government to prove an element of clandestine sheltering or concealment in addition to some other act that substantially furthers an undocumented alien’s unlawful presence in the United States. As detailed further in this article, the first two courts interpreting the term—the Sixth Circuit in 1928 and the Second Circuit in 1940—found an unmistakable element of concealment or prevention of detection in Congress’ intent. The Second Circuit dropped that element in a

129. See id. at § 1324(a)(1)(A).
132. See id.
133. An act that substantially furthers an undocumented alien’s presence includes sheltering. See United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940); Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928).
134. Infra Part IV.A.
135. See Susnjar, 27 F.2d at 224 (explaining that within the context of the statute, “the natural meaning of the word ‘harbor’ [is] to clandestinely shelter, succor, and protect improperly admitted aliens, and that the word ‘conceal’ should be taken in the simple sense of shielding from observation and preventing discovery of such alien persons’); Mack, 112 F.2d at 291 (“[T]he statute is very plainly directed against
1975 case. A minority of circuits followed this decision relatively reflexively by formally omitting concealment as an element, while essentially affirming only those cases where concealment or prevention of discovery was a factor. In 2013, the Second Circuit revisited its prior decision, scrutinized Congressional intent (as well as its own case law), and returned to its original conclusion that harboring must contain an element of concealment. The same year, Seventh Circuit Judge Richard Posner authored an opinion based on a comparable depth of analysis that reached a similar, if somewhat idiosyncratic, conclusion. The Sixth Circuit never abandoned the concealment element, and a majority of circuits, including those which have given the harboring question the most thorough examination, now read the harboring statute to require it. To understand how the term is likely to be applied today, it helps to look more closely at its history.

A. History of the Harboring Element

The INA was enacted in 1907. In its first iteration, the statute simply prohibited the smuggling or bringing of unlawful aliens into the United States. The statute was amended in 1917 “to add as a crime the concealment or harboring of illegal aliens,” but Congress those who abet evaders of the law against unlawful entry, as the collocation of ‘conceal’ and ‘harbor’ shows. Indeed, the word, ‘harbor’ alone often connotes surreptitious concealment.

136. United States v. Lopez, 521 F.2d 437, 440–41 (2d Cir. 1975) (finding harboring “was intended to encompass conduct tending substantially to facilitate an alien’s ‘remaining in the United States illegally’”).

137. See United States v. Vargas-Cordon, 733 F.3d 366, 382 (2d Cir. 2013).

138. See id. (“The mere act of providing shelter to an alien, when done without intention to help prevent the alien’s detection by immigration authorities or police, is thus not an offense under § 1324(a)(1)(A)(iii).”).

139. See Cruz v. Abbott, 849 F.3d 594, 600 (5th Cir. 2017) (“This court interprets the words ‘harbor, shield, or conceal,’ which appear in a federal immigration statute, to mean that ‘something is being hidden from detection.’”); United States v. Costello, 666 F.3d 1040, 1048 (7th Cir. 2012). In Cruz, the court acknowledged that other circuits have interpreted similar language to suggest that something is being hidden from detection. Cruz, 849 F.3d at 601 (referencing the 7th Circuit’s interpretation of “harbor” in Vargas-Cordon).

140. The legislative history of the anti-harboring statute is discussed in Lopez, 521 F.2d at 437, Costello, 666 F.3d at 1040, and Vargas-Cordon, 733 F.3d at 366.


142. Ch. 1134, 34 Stat. at 898; see Lopez, 521 F.2d at 439.
neglected to define “harbor.” In 1928, the Sixth Circuit was the first court to interpret what Congress meant by “harboring.” In *Susnjar v. United States*, the court noted that one of the “principal objects” of the Immigration Act of 1917 was “to exclude from the country all aliens who have unlawfully succeeded in effecting an entry.” Interpreting the term in light of that purpose, the court concluded “the natural meaning of the word ‘harbor’ to be to clandestinely shelter, succor, and protect improperly admitted aliens, and that the word ‘conceal’ should be taken in the simple sense of shielding from observation and preventing discovery of such alien persons.” Judge Learned Hand, in a 1940 Second Circuit opinion, likewise read the statute to impart an element of concealment into the crime of “harboring.” He wrote that “the statute is very plainly directed against those who abet evaders of the law against unlawful entry, as the collocation of ‘conceal’ and ‘harbor’ shows. Indeed, the word ‘harbor’ alone often connotes surreptitious concealment.”

The Second Circuit revisited this conclusion thirty-five years later in *United States v. Lopez*. During that interim, the statute had undergone a change. The 1917 amendment added the crimes of “concealment” and “harboring,” but failed to extend the statute’s penalty provisions to that conduct. The Supreme Court addressed this discrepancy in *United States v. Evans*. The Court held that resolving the discrepancy would require it to go beyond its constitutional role of interpreting the law and into the territory of writing it. The Court noted that not only was the Act unclear as to whether Congress intended to penalize concealing and harboring conduct, but it was also unclear whether “the addition of concealing or harboring was meant to be limited to those acts only when closely

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145. *Id.* at 224.
146. *Id.*
148. *Id.*
149. 521 F.2d 437 (2d Cir. 1975).
150. *See id.* at 439.
151. *Id.*
152. 333 U.S. 483 (1948).
153. *See id.* at 489.
connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process.”

In 1952, Congress amended the statute once again, codifying it at 8 U.S.C. § 1324, and adding penalty provisions for “harboring,” but once again declined to define the term. Congress also added the language “preventing aliens from entering or remaining in the United States illegally.” This additional term—“or remaining”—proved significant when the Second Circuit concluded that it showed Congress’ intent to clarify that conduct could violate the anti-harboring provisions even if it was not directly connected to the smuggling process. Despite the absence of legislative history or statutory text indicating that Congress intended harboring to not include clandestine intent, the court departed from its prior holding in United States v. Mack and adopted a new definition of harboring that omitted concealment:

Although our task would have been lightened if Congress had expressly defined the word “harbor,” we are persuaded by the language and background of the revision of the statute that the term was intended to encompass conduct tending substantially to facilitate an alien’s “remaining in the United States illegally,” provided, of course, the person charged has knowledge of the alien’s unlawful status.

Lopez was a highly influential decision, and all circuits have since incorporated its “substantial facilitation of remaining illegally” concept into their definitions of “harboring.” In fact, some circuits used the “substantial facilitation” language in Lopez to

154.  Id.
156.  Ch. 108, 66 Stat. at 26 (emphasis added); see Lopez, 521 F.2d at 440.
157.  See Lopez, 521 F.2d at 441 (noting the legislative history contained “no suggestion that only conduct forming part of the smuggling process should be proscribed”).
158.  Id. at 440–41 (emphasis added).
159.  See, e.g., United States v. Ozcelik, 527 F.3d 88, 100 (3d Cir. 2008) (harboring “encompasses conduct tending substantially to facilitate an alien’s remaining in the United States illegally” (quoting United States v. Kim, 193 F.3d 567, 574 (2d Cir. 1999))); see also United States v. Cantu, 557 F.2d 1173, 1180 (5th Cir. 1977) (harboring encompasses activity “tending substantially to facilitate an alien’s ‘remaining in the United States illegally’” (quoting Lopez, 521 F.2d at 441)); United States v. Khamani, 502 F.3d 1281, 1287 (11th Cir. 2007) (“[A]ny knowing conduct by the defendant tending to substantially facilitate an alien’s escaping detection as an illegal alien, thereby remaining in the United States illegally.”).
eliminate any requirement of concealment or other clandestine activity or intent from at least the formal definition of “harboring.” The most significant of these decisions was *United States v. Acosta de Evans*, decided one year later, where the Ninth Circuit interpreted *Lopez* to reject the “interpretation of harbor as clandestine sheltering.” The court “constru[ed] ‘harbor’ to mean ‘afford shelter to,’” or “simple sheltering,” without any concealment required.

Thus, *Acosta de Evans* became an opinion cited by other circuits as authority to support the elimination of clandestine purpose. For example, the Fifth Circuit expressly rejected the idea that “harboring” must involve actions intended to inhibit government detection. Likewise, the Eighth Circuit concluded that harboring “does not require proof of secrecy or concealment.” But the Fifth Circuit at least attempted to find justification for this interpretation in the language of the statute:

> We believe that by referring to “harbor,” “conceal” and “shield from detection” Congress intended to broadly proscribe any knowing or willful conduct fairly within any of these terms that tends to substantially facilitate an alien’s remaining in the United States illegally, rather than to create a series of three separate offenses each contained in its own distinct watertight compartment.

In contrast, the Eighth Circuit has not attempted such statutory interpretation, relying instead on cases like *Acosta de Evans*. But this is not the only, nor even the most coherent, way to interpret “conceals, harbors, or shields from detection,” as explained below. Together, these circuits reduced the definition of “harboring” to a minimal showing of “substantially facilitate[ing] an alien’s remaining in the United States illegally.”

160. 551 F.2d 428, 450 (9th Cir. 1976).
161.  Id.
162.  See *United States v. de Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005) (citing *United States v. Valerio–Sanitânez*, 81 F. App’x. 836, 837 (5th Cir. 2005)).
165.  *See Rushing*, 313 F.3d at 434.
166.  *Infra* Parts IV.B, IV.C, V.
B. Problems with the “Substantially Facilitate” Definition of Harboring

There are significant problems with this formulation as a standalone definition. First, if Congress intended “harbor” to include any conduct that merely substantially facilitates a person illegally present in the United States to remain so, then why did it choose a term loaded with clandestine connotations and not a more straightforward term like “assist” or “aid”? And if Congress intended the word “harbor” to criminalize any conduct that substantially facilitated a person’s continued unlawful presence in the United States—rather than only such conduct that is intended to prevent the detection or apprehension of such person—then why did it sandwich the word between two types of conduct that explicitly mean hiding? Would not this broad and generic definition of “harbor” nullify the presence of “conceal” and “shield from detection” in the sentence? Concealing and shielding an undocumented person from detection is undoubtedly conduct that would substantially further the continued illegal presence of that person in the United States, but so is a broad spectrum of conduct having nothing to do at all with concealment or shielding from detection.

Second, the “substantially facilitate” definition, by itself, is so vague that it does not provide courts—let alone individuals—with much guidance on the kind of conduct that constitutes illegal harboring. For example, if all it takes to commit a crime is to “substantially facilitate” a person’s remaining in the United States illegally by providing simple sheltering, then does a homeless shelter commit a crime by giving a homeless immigrant family a bed, a meal, and roof over their heads? Does an emergency room commit a crime by admitting and keeping overnight a seriously injured or ill person who lacks requisite authorization? Clearly not.

In the early 2010s, three circuits detected the defects in this definition of harboring and sought to correct them. These courts rejected the conclusion that simple sheltering could violate the INA’s anti-harboring provision and affirmed that “harboring” requires some additional element of concealment or protection from discovery. In Delrio-Mocci v. Connolly Properties, the Third Circuit affirmed its test for “harboring,” requiring “some act of obstruction that reduces the likelihood the government will discover

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168. As discussed above, the Sixth Circuit never questioned whether conduct could be harboring if it lacked an element of secrecy or concealment. See Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928).
the alien’s presence.” The Third Circuit acknowledged that some circuits—such as the Fifth, Seventh, and Eleventh—“have defined ‘harboring’ more broadly than we have . . . [and] have found defendants to be guilty of harboring in a variety of situations.” However, those decisions “involved defendants who failed to make necessary state and federal employment-related disclosures, were involved in smuggling undocumented individuals into this country, attempted to warn undocumented individuals of the presences of law enforcement authorities, and/or provided specific assistance in obtaining false documents.” The Third Circuit determined that no court of appeals “has held that knowingly renting an apartment to an alien lacking lawful immigration status constitutes harboring . . . . [S]uch conduct does not constitute the type of ‘substantial facilitation’ that we require to make out a harboring offense.” Merely “[r]enting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien’s presence.”

In 2012, Judge Posner, writing for the Seventh Circuit in the case United States v. Costello, subjected the question of how to interpret harboring to a more intensive analysis and reached a similar, albeit idiosyncratic, definition. He observed that “harboring” has a connotation of “deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection.” As such, the term “harboring” goes beyond the terms “sheltering” and “giv[es] a person a place to stay.” Judge Posner noted that Black’s Law Dictionary from 1910 defined “harboring” as “[t]o receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the

169. 672 F.3d 241, 246 (3d Cir. 2012) (citing Lozano v. City of Hazleton, 620 F.3d 170, 223 (3d Cir. 2010)).
170. Id. (citing Edwards v. Prime Inc., 602 F.3d 1276, 1299 (11th Cir. 2010); United States v. Xiong Hui Ye, 588 F.3d 411, 417–18 (7th Cir. 2009); United States v. Singh, 261 F.3d 530, 535 (5th Cir. 2001)).
171. Id. at 247.
172. Id.
173. Id. at 246 (citing Lozano v. City of Hazleton, 620 F.3d 170, 223 (3d Cir. 2010)).
174. 666 F.3d 1040, 1043–45 (7th Cir. 2012).
175. Id. at 1044.
176. Id.
lawful custody of such person shall be deprived of the same.” Both the Sixth Circuit’s 1922 Susnjar and the Second Circuit’s 1940 Mack cases, discussed above, likewise expressly include this clandestine element.

This century-old definition, which includes both clandestine conduct and the purpose of preventing a person from being detected or apprehended by lawful authority, comports with the common statutory meaning of harboring (i.e., harboring a fugitive). In fact, Posner observed that the definitions of “harboring” in other parts of the federal criminal statutes explicitly include this element of secrecy. He noted that “harboring” a fugitive in violation of 18 U.S.C. § 1071 means “to lodge, to care for after secreting the offender,” and “harboring” a military deserter in violation of 18 U.S.C. § 1381 means “providing lodging and care ‘after secreting the deserter.’”

Judge Posner then turned to the word as it is used in the INA to answer the question of what congress intended by placing the word “harbor” between “concealing” and “shielding from detection.” Posner rejected as too vague the approach taken by some circuits of defining “harboring” merely as “substantial facilitation” of the immigrant’s continued illegal presence in the United States. He stated that the Ninth Circuit’s holding in Acosta de Evans with the

177. Id. at 1043.
178. Id. at 1048 (citing Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928); United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940)).
179. See id. at 1049.
180. Id. (emphasis added) (quoting United States v. Foy, 416 F.2d 941, 941 (7th Cir. 1969)).
181. Id. (emphasis added) (quoting Michael v. United States, 393 F.3d 22, 34 (10th Cir. 1968)).
182. Id. at 1046–47.
183. Id. at 1050 (citing United States v. Tipton, 518 F.3d 591, 595 (8th Cir. 2008); United States v. Ozcelik, 527 F.3d 88, 99 (3d Cir. 2008)). This approach to harboring appears to devolve into the proverbial “obscenity” test of “you know it when you see it.” See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). For example, in United States v. Rushing, the Eighth Circuit concluded that giving someone known to have entered the United States illegally “a job and a place to live” and helping that person “receive medical care and banking privileges” was “more than enough to support a conviction for harboring an illegal alien.” 313 F.3d 428, 434 (8th Cir. 2002). The court did not explain its reasoning for why or how that cluster of activity fell within the scope of conduct Congress intended to prohibit. Id. Nor did it attempt to explain what conduct was “just enough” to support a harboring conviction. Id. The only authority it cited was United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976).
meaning of “harboring” reduced to “simple sheltering” was a mistake and “unpersuasive.”\textsuperscript{184} Cases in other circuits where the court appeared to adopt a “simple sheltering” definition of “harboring” all turned on the fact that the defendants “did other things for the illegal alien besides providing a place to stay, such as employing him or helping him to obtain false documentation to conceal his illegal status.”\textsuperscript{185} In the one case where a defendant was prosecuted for merely cohabiting with an undocumented immigrant, the court of appeals reversed the conviction, concluding that cohabitation alone was insufficient to establish harboring.\textsuperscript{186} Even the Ninth Circuit appeared to overturn \textit{Acosta de Evans} in a much later case, approving a jury instruction for “harboring” that required proof that the defendant acted with the purpose of preventing detention of the illegal alien by immigration authorities.\textsuperscript{187}

Unlike the Fifth Circuit, which concluded that Congress intended to give harboring a broad, all-encompassing meaning unrelated to secrecy or concealment,\textsuperscript{188} Posner sought to determine Congress’ intent from the word’s placement and context.\textsuperscript{189} Unfortunately, Posner did not himself provide a clear and workable definition of “harboring” to take the place of the vague and over-encompassing definitions provided by other circuits. Harboring, Posner wrote, “can be given a meaning that plugs a possible loophole left open by merely forbidding, concealing, and shielding from detection.”\textsuperscript{190} Concealing is concealing.\textsuperscript{191} Shielding from detection is also concealing, but could involve non-physical methods of shielding from detection, such as bribing law enforcement to look the other way.\textsuperscript{192} Harboring, then, is some kind of obscuring conduct that is neither physical concealment nor non-physical shielding from detection. The problem with this loophole approach is that it forces Posner to try to articulate a definition of harboring that does not include concealment, which produces somewhat strained results.

\textsuperscript{184} Costello, 666 F.3d at 1049.
\textsuperscript{185} Id. (citing United States v. Zheng, 306 F.3d 1080, 1086 (11th Cir. 2002); United States v. Bajjargal, 302 F. App’x. 188, 191 (4th Cir. 2008)).
\textsuperscript{186} See id. at 1050 (citing United States v. Silveus, 542 F.3d 993, 1003–04 (3d Cir. 2008)).
\textsuperscript{187} See id. (citing United States v. You, 382 F.3d 958, 966 (9th Cir. 2004)).
\textsuperscript{188} See United States v. Singh, 261 F.3d 530, 532 (5th Cir. 2001).
\textsuperscript{189} See Costello, 666 F.3d at 1044–45.
\textsuperscript{190} Id. at 1045.
\textsuperscript{191} See id.
\textsuperscript{192} See id.
Consequently, Posner seems unable to settle on a definition of harboring that contains a concealment connotation but is not “concealment” or “shielding from detection.” In one place, Posner states that “harboring” means “materially to assist an alien to remain illegally in the United States without publicly advertising his presence but without needing or bothering to conceal it.” Elsewhere, he says harboring is “providing . . . or offering . . . a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.” These definitions are theoretically reconcilable: a defendant would not need to conceal assistance given to an undocumented alien if the assistance was being provided in a place where it would be unlikely for the authorities to look for that alien. However, the definitions are still different, and one can imagine scenarios in which the conduct could fall into one definition but not the other. For example, a person might assist an alien to remain illegally in the United States without bothering to conceal it, even though authorities are likely to be looking for that alien. This might occur where a defendant provides sanctuary to undocumented person in a high-profile case that has been covered by the press. The outcome of such a case would depend on which of Posner’s definitions a court applied.

There are other problems with Posner’s proposed definitions having to do with evidence and notice. How is a court, let alone a defendant, to know when one may avoid concealing assistance to an undocumented alien? How is one to know that the location or setting in which assistance is provided is one in which authorities are unlikely to be seeking the recipient of that assistance? Would a prosecution against an alleged harborer mean it was likely that the authorities had been seeking the undocumented immigrant and that the defendant therefore “needed to conceal” the assistance he or she was providing? And would the need to conceal the assistance mean the conduct was therefore not harboring?

Another significant concern is that Posner’s proposed definition of harboring appears to depend on the discretion of enforcement authorities. In a hypothetical, Posner postulates a Chinese restaurant owner in Chinatown who employs known undocumented aliens because they are cheap labor. The owner

193. Id. at 1047.
194. Id. at 1050.
195. See id. at 1045.
provides them with housing to make the employment more attractive, and because they lack documentation that other landlords would require of would-be renters.\textsuperscript{196} Posner states that this conduct would be harboring despite not needing any effort at concealment or shielding from detection, “simply because the immigration authorities, having very limited investigative resources, may have no interest in rooting out illegal aliens in Chinese restaurants in Chinatowns.”\textsuperscript{197}

The logic behind this theorizing is problematic. The purpose of discretion is to allow those with authority to enforce the law and to decide the offenses that should be prioritized given the circumstances.\textsuperscript{198} The factors typically considered in making such decisions include the seriousness of the alleged crime, the degree to which the alleged conduct reflects the kind of conduct Congress most clearly intended to prohibit, and the costs of attempting to enforce such conduct.\textsuperscript{199} The fact that an enforcement agency chooses not to enforce a particular conduct obviously does not mean that conduct is legal. But it would be an odd innovation if courts were to adopt a definition of harboring where an immigration agency’s decision not to investigate or enforce immigration law is the key fact that pushes a defendant’s conduct over the line into criminality. In addition to being logically inconsistent, such a definition could be unconstitutionally vague, failing to provide reasonable notice concerning what constitutes prohibited activity.\textsuperscript{200}

How is a citizen to know which factors an enforcement agency might

\textsuperscript{196} See id.

\textsuperscript{197} Id.

\textsuperscript{198} See The Dep’t of Homeland Sec.’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 1, 4 (2014), https://www.justice.gov/file/179206/download [https://perma.cc/8B7L-W5JD] [hereinafter Authority to Remove]; Heckler v. Chaney, 470 U.S. 821, 831 (1985) (“[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”).

\textsuperscript{199} See Authority to Remove, supra note 198, at 5–7.

\textsuperscript{200} See generally United States v. Harriss, 347 U.S. 612, 617 (1954) (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that [the] conduct is forbidden by the statute.”).
weigh in determining whether to enforce the law in a particular circumstance?

But the problem with Posner’s definition is more fundamental than this, and it stems from his efforts to read “harbor” in a way that is not redundant to the other words chosen by Congress—words that essentially mean the same thing. The “loophole plug” theory would make more sense—though would still not be conclusive—if “harbor” came after “shield from detection.” In that case, one might be able to discern the intent of the drafters to progress from narrower, more specific language to broader, more general language, setting up three, successively wider nets: “shield from detection” to catch whatever slips through “conceal,” and “harbor” to catch whatever slips through “shield from detection.” But this is not how Congress wrote the statute. Instead, “harbor” is located between “conceal” and “shield from detection,” strongly suggesting that whatever harboring conduct is, it is closer to concealing than merely shielding from detection. Given this placement of the terms in the statute, it would be awkward syntax, to say the least, if Congress wrote a list of prohibited conduct and intended the first word to be the most specific type of prohibited conduct; the last word to be the second most specific type of prohibited conduct; and the middle word to be the most general, inclusive type of prohibited conduct.

C. A Better Interpretation of Harboring

To find a better reading of the harboring subparagraph, we return to the Second Circuit, the court that set so many other circuits down the wrong path with Lopez, and a 2013 case explicitly overturning that decision—United States v. Vargas-Cordon. Nearly forty years after Lopez, the Second Circuit observed “there is no precedent binding us to a particular interpretation of ‘harbors’ under § 1324(a)(1)(A)(iii).” In a remark applicable to the approach to harboring by federal courts at large, the court stated, “Our case law has been inconsistent in describing the minimum conduct necessary to sustain a conviction under

202.  See id.
203.  See id.
204.  733 F.3d 366 (2d Cir. 2013).
205.  Id. at 380.
§ 1324. Beginning with Mack, the Second Circuit noted its earliest decisions in the 1940s “interpreted ‘harbors’ to connote an element of evading detection.” Thirty years later, the court “stated in two opinions,” Lopez and United States v. Herrera, “that harboring under § 1324 ‘was intended to encompass conduct tending substantially to facilitate an alien’s remaining in the United States illegally.’” Twenty years after those cases, the Second Circuit has “revert[ed] to language consistent with our original discussions of the meaning of ‘harbors’ as used in § 1324, affirm[ing] that harboring encompasses conduct which is intended to facilitate an alien’s remaining in the United States illegally and ‘to prevent government authorities from detecting [the alien’s] unlawful presence.’” The Second Circuit noted that “in our decisions arguably applying a broader conception of ‘harboring’ that does not require that a defendant aim to assist an alien in remaining undetected by authorities, the defendants did more than merely provide shelter.” In Lopez, the defendant arranged and provided for sham marriages to disguise the undocumented residents’ unlawful presence in the United States. “In Herrera, the defendants had taken clear steps to prevent the detection of the unlawfully present aliens who worked in their brothel, including the installment of a video surveillance and alarm system designed to alert their employees whenever immigration officials approached the building.”

In seeking to resolve the inconsistencies in its own precedent, the Second Circuit queried “whether the language at issue has a plain and unambiguous meaning.” It acknowledged that “‘harbor’ may sometimes be synonymous with ‘shelter.’” However, unlike those courts that looked no further than this single meaning, the Second Circuit acknowledged that many of the term’s “common uses—for example, ‘harboring a fugitive’—also connote concealment.” Consequently, the court concluded that “the

206. Id.
207. See id. (citing United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940)).
208. Id. (citing United States v. Lopez, 521 F.2d 437, 441 (2d Cir. 1975); United States v. Herrera, 584 F.2d 1137, 1144 (2d Cir. 1978)).
209. Id. (citing United States v. Kim, 193 F.3d 567 (2d Cir. 1999)).
210. Id.
211. See id.
212. Id. (citing Herrera, 584 F.2d at 1141–42).
213. Id. at 380–81.
214. Id. at 381.
215. Id.
ordinary meaning of ‘harbors,’ at least with respect to whether it entails avoiding detection, is unambiguous.”

Having determined the meaning of the term was clear, the court considered the placement of the term “harbors” in 8 U.S.C. § 1324(a)(1)(A)(iii). It observed that “conceals” and “shields from detection” both “carry an obvious connotation of secrecy and hiding.” Applying the canon noscitur a sociis (i.e., the principle that a word is known by the company it keeps), the court determined that “as the third and only other term in subparagraph (A)(iii), [‘harbors’] also shares this connotation, which easily fits into its ordinary meaning.” Thus, rather than eliminate the most distinctive and common sense connotation of “harbor”—its association with concealment—in order to make it mean something other than “concealment” and “shielding from detection,” the Second Circuit took a more common sense and less convoluted approach. The Second Circuit concluded Congress chose that term and placed it among other terms connoting concealment in order to underscore that very connotation.

The Second Circuit also observed that Congress employed the same approach of using near synonyms with considerable overlapping meaning in other subparagraphs surrounding the “conceals, harbors, or shields from detection” subparagraph. Specifically, the subparagraph immediately preceding the harboring subparagraph prohibits “transport[ing] or mov[ing]” an unlawfully present alien in furtherance of the original violation of entering the United States outside a specific port of entry. And the subparagraph immediately following prohibits “encourag[ing] and induc[ing] an alien to enter or remain” in the United States illegally. In other words, the Second Circuit noted that “[e]ach subpart thus focuses on a single kind of act, and those that use different terms to describe the act use near-synonyms with a clear

216. Id.
217. See id.
218. Id.
219. Id.
220. Id. (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)).
221. See id.
222. See id.
223. Id. at 379 (citing 8 U.S.C. § 1324(a)(1)(A)(iii) (2005)).
overlap in meaning: ‘transports’ and ‘moves’ . . . or ‘encourages’ and ‘induces.’ ”

Following this syntactical logic, the Second Circuit stated that “Congress did not intend the inclusion of ‘harbors’ in § 1324(a)(1)(A)(iii) to make that subsection, and that subsection alone, simultaneously cover the two distinct acts of keeping from the authorities an alien’s presence and simply offering the alien a place to stay.” The Second Circuit thus concluded that:

To “harbor” under § 1324, a defendant must engage in conduct that is intended both to substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and also is intended to help prevent the detection of the alien by the authorities.

V. CONSIDERATIONS OF SANCTUARY CONGREGATIONS IN TRUMP’S AMERICA

So where does this leave the definition of harboring with respect to congregations seeking to provide sanctuary? First, there must be some act substantially facilitating a person’s continued unlawful presence in the United States for liability under the anti-harboring provisions. Even in circuits that have said this element can be satisfied by “simple sheltering,” in practice, harboring requires more than merely assisting or aiding an undocumented person. Practically speaking, harboring also requires some act of obstruction intended to prevent the government from detecting an alien’s presence. This definition is faithful to the language of the statute, provides sufficient clarity, and is not dependent on government discretion. Conduct would not be harboring if the government knew of an undocumented immigrant staying at a church but chose not to arrest that person, so long as the church had not taken additional steps intended to prevent the government from learning of the undocumented person’s presence. Publicizing the potential presence of an undocumented guest ought to be a defense to harboring, as it alerts immigration authorities to the presence of a person who lacks the required authorizations. But this defense may be defeated if the defendant takes subsequent steps to interfere with

226. _Id._ at 381–82.
227. _Id._ at 382.
228. _Id._ (emphasis added).
the authorities attempting to enforce the law.\textsuperscript{229} Publicity, however, would not be needed to defend against a harboring charge if the congregation took no affirmative steps to conceal, shield from detection, or otherwise prevent detection of the undocumented guest.

Even the circuits that adopt the substantially facilitating element rely on evidence that the defendant took “steps that would shield [the undocumented persons’] identities from detection by the government,”\textsuperscript{230} or “warned [the illegally present persons] of the presence of the immigration officers so they might escape apprehension, detection, and deportation by the INS.”\textsuperscript{231} It is not enough to simply make it easier to remain in the United States illegally by providing housing, a ride, medical services, or day-to-day items. Some additional “but for” test is appropriate—such as, \textit{but for} the defendant’s actions, would the unlawfully present person’s presence in the United States have ended, whether by that person deciding to leave the United States or by being taken into the custody of immigration authorities and placed into removal proceedings?

So, where does this leave those congregations that seek to provide sanctuary? The answer depends on whether the congregation is involved in any kind of activity that resembles smuggling, arranging, assisting, or precipitating an illegal border crossing. In such circumstances, courts would likely apply cases from the 1980s that affirmed the convictions of “sanctuary” congregations.\textsuperscript{232} But it is important to note that these prosecutions were asserted under the anti-smuggling subparagraph of § 1324(a)(1)(A)(i), and \textit{not} the anti-concealment, harboring, and shielding from detection subparagraph of § 1324(a)(1)(A)(iii).\textsuperscript{233}

Generally, congregations in the 2010s have not been trying to smuggle noncitizens across the border and bypass official ports. Instead, they have responded with religious conviction and compassion to the human needs of noncitizens already present in the United States illegally—many of whom were children or adults with children. As has been the case historically, based on the authors’

\textsuperscript{229} See, e.g., United States v. Varkonyi, 645 F.2d 453, 459 (5th Cir. 1981).
\textsuperscript{230} United States v. Shiu Sun Shum, 496 F.3d 390, 392 (5th Cir. 2007).
\textsuperscript{231} United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982).
\textsuperscript{232} See United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989); United States v. Fierros, 692 F.2d 1291, 1294 (9th Cir. 1982); \textit{supra} Part III.
\textsuperscript{233} See, e.g., Aguilar, 883 F.2d at 671–72.
own discussions with representatives of groups exploring or actually providing sanctuary to undocumented individuals, congregation members feel motivated to support undocumented individuals in desperate situations in a variety of ways, such as: providing safe housing; giving rides to medical appointments, groceries, and meals; helping with school enrollment for children; teaching English as a second language; and assisting in finding immigration or asylum counsel.

There is no definite answer that can be given to the question of whether a sanctuary relationship violates the anti-concealment, harboring, and shielding from detection provisions of the INA. Nevertheless, the following general principles and tendencies may apply:

1. Providing housing alone, without some other criminal intent (such as intent to conceal, or intent to benefit financially from the undocumented person’s illegal presence in the United States) should not be considered illegal harboring.

2. Courts have found certain conduct to prevent detection or apprehension, and therefore could be viewed as facts that push a congregation’s sanctuary activities into harboring territory. These activities include: providing false documents to hide the lack of authorization to be in the country; warning people of an imminent immigration raid; and physically interfering with an official immigration investigation.

3. Conduct that courts have found to be illegal concealment, harboring, and shielding from detection include: helping a guest obtain false identification; providing false or fraudulent applications for lawful immigration status; hiding a person from an active search by immigration authorities; and giving false or fraudulent immigration status documents.


235. 8 U.S.C. § 1324(a)(2)(B)(ii) (2005); see also United States v. Kendrick, 682 F.3d 974, 984 (11th Cir. 2012) (finding that an individual who assisted an alien into the country for the purpose of commercial advantage or financial gain violated § 1324(a)(2)(B)(ii)).

236. See Edwards v. Prime Inc., 602 F.3d 1276 (11th Cir. 2010); United States v. Xiong Hui Ye, 588 F.3d 411 (7th Cir. 2009); United States v. Singh, 261 F.3d 530 (5th Cir. 2001).

237. See, e.g., United States v. Costello, 666 F.3d 1040, 1049 (7th Cir. 2012).
On the other hand, courts have found certain other activities do not facilitate escape from detection and therefore likely would not nudge a congregation’s sanctuary activities over the harboring line (e.g., advising people to “lay low” and bringing someone to an immigration lawyer for asylum processing).\(^{238}\)

Publicity may be a defense to harboring that could be rebutted with evidence that the congregation took subsequent steps to interfere with the lawful efforts of immigration authorities to detect apprehend an undocumented sanctuary guest.\(^{239}\)

Depending on all the services provided, at some point a congregation’s assistance could cross over into an even more vaguely worded provision of the INA—specifically, the anti-inducement and encouragement subparagraph of the statute.\(^{240}\) Like “harbor,” “inducement” and “encouragement” lack clear and consistent definitions in federal case law.

However, the majority of courts that have defined this conduct have concluded “inducement” or “encouragement” require “an affirmative act that served as a catalyst for aliens to reside in the United States in violation of immigration law when they might not have otherwise,”\(^{241}\) and “not just general advice” or assistance.\(^{242}\) The Third Circuit decided that simply renting an apartment to known noncitizens is not such a catalyst where there is no evidence the noncitizen would not or could not have resided somewhere else in the United States.\(^{243}\) The Ninth Circuit has ruled that inducement and encouragement require that the defendant take some action “‘to convince the alien to . . . stay in this country,’ or to facilitate the alien’s ability to live in the country indefinitely.”\(^{244}\) Some circuits have adopted a lower bar. The Seventh and Eleventh Circuits, for example, have held that encouragement may be defined as “help.”\(^{245}\) These cases have occurred in the smuggling context where it may be

\(^{238}\) See, e.g., United States v. Ozcelik, 527 F.3d 88, 99 (3d Cir. 2008).

\(^{239}\) See id. at 1047.


\(^{242}\) Id. at 248.

\(^{243}\) Id.

\(^{244}\) United States v. Thum, 749 F.3d 1143, 1144 (9th Cir. 2014) (quoting United States v. Ndiaye, 434 F.3d 1270, 1298 (11th Cir. 2006)).

\(^{245}\) See, e.g., United States v. He, 245 F.3d 954, 959–60 (7th Cir. 2001); United States v. Lopez, 590 F.3d 1238, 1249 (11th Cir. 2009).
easier to determine whether a defendant’s actions “helped” a noncitizen illegally enter the United States, because “entering” is a more discrete act with more clearly defined boundaries than “remaining.” The pilot of a boat used to smuggle illegal aliens into the United States clearly assists the act of illegal entry.

“Remaining” in the United States is a more nebulous act. Helping someone remain in the United States illegally cannot reasonably be interpreted to mean providing any assistance of any kind to someone who is illegally present in the United States. If it did, then every person who provides any kind of service to a person known or reasonably suspected to be illegally present violates the law. For example, a good Samaritan who helps fix a flat tire, a nurse or doctor who treats an illness or injury, a homeless shelter that provides a roof, warm bed, and meal to an undocumented mother and her children. The act would need to go a bit further and demonstrate the specific intent to affect the unlawfully present person’s continued unlawful presence in the United States. At one end of the spectrum, any criminal or fraudulent means to assist a noncitizen’s unlawful presence in the United States is likely to be illegal encouragement or inducement; for example, altering a United States passport or producing fraudulent documents that could help a person work or live in the United States without authorization by enabling them to conceal the lack of authorization.246 On the other hand, encouraging a person to obtain counsel, or even assisting them in doing so, should not be considered illegal encouragement or inducement.

It is also possible that an accumulation of otherwise lawful support could at some point combine to cross the line into unlawful encouragement and inducement. The Fourth Circuit, for instance, affirmed a conviction for encouragement or inducement where the defendant provided a noncitizen a place to live, an automobile, a cell phone, auto insurance, and a gym membership.247 This is what may be called a “rockslide” test: individual actions may not themselves carry any risk of criminal liability, but when piled together may cause

246. See, e.g., United States v. Ndiaye, 434 F.3d 1270, 1298 (11th Cir. 2006); He, 245 F.3d at 956 (ruling against a defendant who altered a United States passport in order to help a noncitizen enter the country illegally); United States v. Oloyede, 982 F.2d 133, 135 (4th Cir. 1992) (ruling against a defendant who knowingly supplied jobs and social security numbers).

the legal ground to give way, and the exact trigger point may be impossible to determine.

A congregation that pushes the envelope—by providing, for example, additional services such as medical services, education for the children of guests, ESL services, or even by not publicizing its sanctuary activity or by hosting a fundraiser—increases the risk that its conduct may cross the line into prohibited activity. That does not mean, however, it is any more likely to be investigated, prosecuted, or convicted.

The principles and tendencies discussed above are suggestive only. It is possible that a congregation might be investigated or prosecuted even without a violation of black letter law and judicial precedent, except for the “simple sheltering” minority rule discussed above, which even where adopted has never been applied to an actual simple sheltering set of facts. Nevertheless, the government will have the burden of proving a novel theory of harboring and encouraging or inducing against a sympathetic set of defendants likely possessing many political allies and advocates.

VI. CONCLUSION

There is no doubt that the Trump administration has made it a top priority to harshly enforce our immigration laws in ways this country has not seen in generations. In response, many places of worship across the country have declared themselves to be sanctuaries to the most vulnerable immigrant populations among us. And while these congregations weigh their risk of liability, they are also mindful that those seeking sanctuary remain at risk of arrest, detention, and deportation, and that tensions have already begun to arise between the needs of those impacted by the government’s hardline actions and the goals of a movement focused on policy change.

The Sanctuary Movement of our country’s recent past has provided many valuable lessons. Armed with those lessons, today’s sanctuary congregations must remember that the federal government has considerable discretion when deciding whether to press federal charges against them under the anti-harboring statute of section 1324. And while the decision to participate as a sanctuary

249. See Altemus, supra note 24, at 684; Goodstein, supra note 16.
congregation is an act of faith, the legal considerations mentioned in this article may help inform their faith-based decisions.