

# LANDLORDS BEWARE, YOU MAY BE RENTING YOUR OWN ROOM . . . IN JAIL: LANDLORDS SHOULD NOT BE PROSECUTED FOR HARBORING ALIENS

## I. INTRODUCTION

Congress's failures to pass immigration reform in 2006<sup>1</sup> and 2007<sup>2</sup> frustrated many Americans, causing municipalities across the country to take "illegal immigration" into their own hands. In recent years, over two hundred municipalities have considered or approved anti-immigrant ordinances,<sup>3</sup> and many of the approved ordinances are in litigation.<sup>4</sup> These ordinances often prohibit landlords from renting to undocumented immigrants.<sup>5</sup> They raise the issue of whether the federal government should enforce the prohibition of harboring undocumented immigrants against landlords, subjecting them to the possibilities of felony convictions, federal prison sentences, and heavy fines.<sup>6</sup>

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1. Charles Babington, *New Congress Unlikely to Rush Toughest Issues*, WASH. POST, Nov. 27, 2006, at A03; see Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

2. Jonathan Weisman, *Immigration Bill Dies in Senate; Bipartisan Compromise Fails To Satisfy the Right or the Left*, WASH. POST, June 29, 2007, at A1; see S. 1639, A Bill to Provide for Comprehensive Immigration Reform and for Other Purposes, 110th Cong. (2007).

3. See Fair Immigration Reform Movement, Database of Recent Local Ordinances on Immigration, July 23, 2007, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/> (click on "Database"). But see Ken Belson & Jill Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1, A23 ("In June, a federal judge issued a preliminary injunction against a housing ordinance in Farmers Branch, Tex., that would have imposed fines against landlords who rented to illegal immigrants. . . . [A] federal judge struck down ordinances in Hazleton, Pa., the first town to enact laws barring illegal immigrants from working or renting homes there."); Press Release, ACLU, ACLU Applauds Repeal of Anti-Immigrant Ordinance in Riverside, NJ (Sept. 17, 2007), available at <http://aclu.org/immigrants/31856prs20070917.html>.

4. The Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu> (follow "Search" hyperlink; select "Immigration" on the "case type" drop-down menu; then follow "Conduct Search" hyperlink) (last visited Feb. 20, 2008).

5. This Note uses the term "undocumented immigrant," instead of "illegal alien," to refer to a person lacking valid immigration status present in the United States. The Immigration and Nationality Act defines "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006). However, the term "illegal alien" is ambiguous and imprecise, as well as xenophobic and dehumanizing. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1193 (Thomson West 2005); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 281 n.5. See also Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 51 n.7 (1994).

6. 8 U.S.C. § 1324(a)(1)(A)(iii) (2006).

During fiscal year 2006, 1,596 individuals were convicted of “human smuggling and trafficking,” which includes “bring[ing], transport[ing], harbor[ing], or smuggl[ing] illegal aliens into or within the United States.”<sup>7</sup> These convictions constituted approximately one-tenth of all immigration-related criminal convictions and resulted in \$11 million worth of seized property.<sup>8</sup> These numbers would increase dramatically if the federal government prosecuted landlords for harboring.

Although America’s current wave of anti-immigrant sentiment raises the specter of a federal crackdown on landlords, this Note asserts that the Supreme Court should narrowly interpret the definition of “harboring” to prevent normal landlords from being prosecuted for renting to undocumented immigrants. Part II of this Note explores the harboring statute’s scope, sentencing, legislative history, related provisions, and past applications. Part III examines the circuit split regarding the definition of “harboring.” Part IV analyzes problems that would arise if landlords were prosecuted for harboring, drawing on landlord-tenant liability, employment law, and housing discrimination.

## II. BACKGROUND

Federal law prohibits individuals from “harboring” aliens. This Part explains the statute’s text, legislative history, penalty provisions, and companion crimes. It also discusses past prosecutions for harboring in the context of the human trafficking and the Sanctuary Movement.

### A. *Harboring Prohibition*

The federal anti-harboring statute, 8 U.S.C. § 1324, states:

Any person who . . . *knowing or in reckless disregard* of the fact that an alien has come to, entered, or remains in the United States in violation of law, *conceals, harbors, or shields from detection*, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation . . . shall be punished.<sup>9</sup>

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7. Dep’t of Homeland Sec., Yearbook of Immigration Statistics: 2006, <http://www.dhs.gov/ximgtn/statistics/publications/YrBk06En.shtm> (follow “Table 37” hyperlink) (last visited Feb. 20, 2008).

8. *Id.*

9. 8 U.S.C. § 1324(a)(1)(A)(iii) (2006) (emphasis added); *see also id.* § 1324(a)(3)(B) (“An alien described in this subparagraph is an alien who . . . is an unauthorized alien (as defined in section

The statute mandates that proceeds and properties resulting from harboring shall be seized and are subject to forfeiture.<sup>10</sup> It also sets forth the materials evidencing the alien's lack of valid immigration status.<sup>11</sup>

Congress has determined that employment does not constitute harboring;<sup>12</sup> however, in the prohibition's long history, Congress has never defined "conceal," "harbor," or "shield from detection."<sup>13</sup>

### B. Legislative History

Before 1917, bringing aliens into the United States was a crime, but harboring them once they arrived was not.<sup>14</sup> With the Immigration Act of February 3, 1917, Congress made harboring "any alien not duly admitted" a misdemeanor punishable by a maximum fine of \$2,000 and a prison sentence of five years.<sup>15</sup> This statute did not include a mens rea requirement.

The 1917 act was repealed by the Immigration and Nationality Act of 1952.<sup>16</sup> Though the maximum fine and prison sentence remained the same, this act harshened the former anti-harboring statute by making violation a felony and narrowed it by requiring the mens rea of "willfully or knowingly."<sup>17</sup>

1324(a)(h)(3) of this title), and . . . has been brought into the United States in violation of this subsection.").

10. *Id.* § 1324b(1).

11. *Id.* § 1324b(3) (including judicial or administrative proceeding records, executive branch records, and immigration officer testimony).

12. See Immigration and Nationality Act of 1952, Title II, ch. 8, § 274(a), 66 Stat. 229 ("[F]or the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."). See also *infra* notes 66–78 and accompanying text.

13. 8 U.S.C. § 1324(a)(1)(A)(iii) (2006).

14. William G. Phelps, Annotation, *Validity, Construction and Application of § 274(a)(1)(A)(iii) of Immigration and Nationality Act (8 U.S.C.A. § 1324(a)(1)(A)(iii)), Making it Unlawful to Harbor or Conceal Illegal Alien*, 137 A.L.R. FED. 255 § 2 (1997).

15. Act of Feb. 3, 1917, ch. 29 § 8, 39 Stat. 874, 880 ("[A]ny person . . . who shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor . . .") (emphasis added).

16. Immigration and Nationality Act of 1952, Title IV, § 403(a)(13), 66 Stat. 279.

17. *Id.* § 274(a), 66 Stat. 228-29 ("Any person . . . who . . . 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 . . . any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony . . .") (emphasis added).

In 1981, Congress added forfeiture provisions to the anti-harboring statute,<sup>18</sup> permitting the government to seize without a warrant any property either owned by a consenting party or any party privy to a violation of § 1324(a), given probable cause, “where a warrant is not constitutionally required.”<sup>19</sup>

With the Immigration Reform and Control Act of 1986 (IRCA), Congress rewrote the anti-harboring provisions.<sup>20</sup> The mens rea requirement, formerly “willfully or knowingly,” became “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.” Congress also increased the maximum prison sentence to five years.<sup>21</sup>

In 1994,<sup>22</sup> 1996,<sup>23</sup> and 2004,<sup>24</sup> Congress modified and increased maximum sentences for harboring.<sup>25</sup> Despite this extensive legislative history, Congress has never defined “harboring.”

18. Act of Dec. 29, 1981, Pub. L. 97-116, § 12, 95 Stat. 1617.

19. *Id.*

20. Immigration Reform and Control Act § 112(a), Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1324 (2005)) (“Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, *conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place*, including any building or any means of transportation . . . [shall be fined and/or imprisoned].”) (emphasis added).

21. *Id.* It also moved the fine provisions to United States Code, Title 18. *Id.*

22. Act of Sept. 13, 1994, Pub. L. 103-322, Title VI, § 60024, 108 Stat. 1981-82 (“Section 274(a) of the Immigration and Nationality Act (8 U.S.C. 1324(a)) is amended—(1) in paragraph (1) . . . (G) by adding at the end the following new subparagraph: ‘(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—(i) in the case of a violation of subparagraph (A)(i), be fined under title 18, United States Code, imprisoned not more than 10 years, or both; (ii) in the case of a violation of subparagraph (A) (ii), (iii), or (iv), be fined under title 18, United States Code, imprisoned not more than 5 years, or both . . . .’”).

23. Act of Sept. 30, 1996, Pub. L. 104-208, Div. C, Title II, §§ 203(a)–(d), 110 Stat. 3009-565 (“Section 274(a)(1)(B)(i) (8 U.S.C. 1324(a)(1)(B)(i)) is amended by inserting ‘or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain’ after ‘subparagraph (A)(i).’”).

24. Act of Dec. 17, 2004, Pub. L. 108-458, Title V, § 5401, 118 Stat. 3737 (“Section 274(a) of the Immigration and Nationality Act (8 U.S.C. 1324(a)) is amended by adding at the end the following: ‘(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if—(A) the offense was part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(i) aliens were transported in a manner that endangered their lives; or (ii) the aliens presented a life-threatening health risk to people in the United States.’”).

25. 8 U.S.C. § 1324(a)(1)(B)(i) (2006).

### C. *Penalty Provisions*

Currently, the anti-harboring statute punishes harboring with a fine, imprisonment of not more than five years, or both.<sup>26</sup> The maximum sentence for harboring “done for the purpose of commercial advantage or private financial gain” is ten years imprisonment and/or a fine under Title 18.<sup>27</sup> If the landlord is “part of an ongoing commercial organization or enterprise,” the judge can increase the sentence by another ten years.<sup>28</sup> The United States Sentencing Guidelines’ lowest recommended<sup>29</sup> sentence for a person with no criminal history who has harbored a single individual for profit is ten years.<sup>30</sup> Thus, a landlord convicted of harboring could face severe consequences, including a twenty-year sentence in federal prison.

### D. *Companion Crimes*

Congress’s attempts to deter unpermitted immigration are broader than the harboring prohibition. Section 1324 reveals Congress’s perception of this problem as a process: individuals induce aliens to come to the United States without permission, and the aliens enter, travel, and reside in the country.<sup>31</sup> The harboring statute’s companion crimes are: (1) encouraging or inducing 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;”<sup>32</sup> (2) bringing an alien into the United States “at a place other than a designated port of entry or place other than as designated by the Commissioner;”<sup>33</sup> and (3) transporting an undocumented immigrant within the United States.<sup>34</sup> Although Congress has never defined “harboring,” this statutory framework suggests it intended the anti-harboring statute to prevent entry without permission by deterring the final step in this process.

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26. *Id.* § 1324a(1)(B)(ii).

27. 8 U.S.C. § 1324(a)(1)(B)(i) (2006).

28. *Id.* § 1324 (a)(4)(A).

29. *See* United States v. Booker, 543 U.S. 220, 233 (2005).

30. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(1) (2006), available at <http://www.ussc.gov/2006guid/g12006.pdf>; *id.* at 381 (Sentencing Table).

31. *Id.* § 1324(a)(1)(A).

32. *Id.* § 1324(a)(1)(A)(iv).

33. *Id.* § 1324(a)(1)(A)(i).

34. *Id.* § 1324(a)(1)(A)(ii).

### E. Past Harboring Prosecutions

The federal anti-harboring statute has been used to prosecute individuals who intentionally subvert border control, as demonstrated by human trafficking prosecutions and the Sanctuary Movement.

#### 1. Human Trafficking

Some human trafficking prosecutions involve allegations of harboring. For example, in *United States v. Valle-Maldonado*,<sup>35</sup> four defendants were indicted on twenty-eight counts, including harboring. “The defendants had arranged for women, including two minors, to be smuggled into the United States from Mexico to engage in commercial sexual activity. The defendants suppressed attempts to escape by threatening to harm the victim’s relatives in Mexico.”<sup>36</sup> However, trafficking prosecutions that include counts of harboring are not brought often.<sup>37</sup> They should occur more, because the traffickers know the individuals are undocumented, intend to hide them from immigration authorities, and trafficking is dangerous.

#### 2. Sanctuary Movement

In the 1980s, the federal government prosecuted individuals who provided sanctuary to Central American asylum-seekers on the basis of harboring.<sup>38</sup> In *United States v. Aguilar*, eight defendants were “convicted of masterminding and running a modern-day underground railroad that

35. No. 2:04-CR-00387 (C.D. Cal., filed Mar. 11, 2004).

36. Sara Elizabeth Dill, *Old Crimes in New Times: Human Trafficking and the Modern Justice System*, CRIM. JUST., Spring 2006, at 15.

37. See Becki Young, *Trafficking of Humans Across United States Borders: How United States Laws Can be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73, 90 (1998) (“Whereas the term trafficking by definition involves some degree of coercion or force, the term smuggling is frequently applied to cases in which the alien actively seeks the assistance of a smuggler to assist him in entering the United States. Although the alien in the former case may properly be classified as a ‘victim,’ the alien in the latter case may not. The perception that the ‘bringing and harboring’ provisions are intended to apply to ‘victimless’ cases of smuggling might lead to their less than vigorous enforcement, even in cases of trafficking in which the aliens truly may be classified as victims. However, nothing in the language of the statute precludes its application in cases of trafficking, so long as the INS makes a conscious choice to use the bringing and harboring provisions in prosecuting traffickers, this obstacle should not be significant.”); see generally Katrin Corrigan, Note, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT’L L.J. 151 (2001).

38. See generally Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119 (1993); Michele Altemus, *The Sanctuary Movement*, 9 WHITTIER L. REV. 683 (1988) (describing major prosecutions).

smuggled Central American natives across the Mexican border with Arizona.”<sup>39</sup> The Ninth Circuit Court of Appeals upheld the two harboring convictions because the defendants “intended to help the aliens in question to evade INS detection.”<sup>40</sup>

In *American Baptist Churches in the United States of America v. Meese*,<sup>41</sup> churches and refugee organizations sued the government to challenge their members’ sanctuary harboring convictions. They lost on a motion for summary judgment.<sup>42</sup> The sanctuary workers clearly showed their intent to hide the asylum-seekers from immigration enforcement.

Human trafficking and the Sanctuary Movement are clear contexts for harboring prosecutions because the perpetrators know the aliens are undocumented and intend to shield them from law enforcement. However, Congress has never defined “harboring” despite the statute’s long legislative history and severe criminal penalties. Through more murky fact patterns, some courts of appeals have emerged with different definitions of “harboring.”

### III. CIRCUIT SPLIT REGARDING THE DEFINITION OF HARBORING

Courts have struggled to define “harboring” for the last eighty years, and, as a result, the circuits are split. The Sixth<sup>43</sup> and Second<sup>44</sup> Circuits’ narrow definitions of harboring require a defendant to know that the alien is undocumented and to hide the alien from law enforcement in order to be convicted. The Fifth<sup>45</sup> and Ninth<sup>46</sup> Circuits’ definitions are broader, thus making conviction easier. In the Fifth Circuit, evading law enforcement is not required, whereas in the Ninth Circuit, knowledge of the alien’s undocumented status is unnecessary. These cases are factually distinct from a landlord whose tenant is an undocumented immigrant, and are therefore mere dicta. However, the broad definitions of the Fifth and Ninth Circuits suggest such landlords could be at risk of being prosecuted and convicted of harboring.

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39. 883 F.2d 662, 666 (9th Cir. 1989).

40. *Id.* at 690.

41. 712 F. Supp. 756 (N.D. Cal. 1989).

42. The plaintiffs grounded their arguments in the Free Exercise Clause of the First Amendment, selective enforcement, international law, equal protection and tort claims. *Id.* at 758–59.

43. *Susjar v. United States*, 27 F.2d 223 (6th Cir. 1928).

44. *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999).

45. *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1072 (5th Cir. 1982).

46. *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976).

### A. Sixth Circuit: Narrow Definition of Harboring

In 1928, the Sixth Circuit became the first court of appeals to define harboring. In *Susnjar v. United States*,<sup>47</sup> the defendants transported undocumented aliens from Canada to Detroit and agreed to house them in Cleveland.<sup>48</sup> They were convicted of conspiring to violate the Immigration Act of 1917 for “concealing and harboring and attempting to conceal and harbor” the aliens.<sup>49</sup> The Sixth Circuit upheld their convictions because they harbored the aliens by “clandestinely shelter[ing], succor[ing], and protect[ing]” them and concealed them by “shielding [them] from observation” and preventing their discovery.<sup>50</sup>

Despite the circuit split that emerged after *Susnjar*,<sup>51</sup> the Eastern District of Kentucky upheld this definition in 2006.<sup>52</sup> The district court focused on *Susnjar*’s use of the term “clandestinely,” defined as “done secretly or in hiding,” to hold that “harboring” includes a scienter element.<sup>53</sup> The court reasoned that “clandestinely” implies that harboring includes the “intent to assist the alien’s attempt to evade or avoid detection by law enforcement.”<sup>54</sup>

These cases are mere dicta as applied to a landlord and tenant whose relationship is limited to housing. However, they do suggest that a landlord who knows that her tenant is an undocumented alien cannot be convicted of harboring unless she houses her tenant in an effort to hide him from law enforcement.

### B. Second Circuit: The Development of Another Narrow Definition of Harboring

The Second Circuit first addressed the definition of harboring in 1940,<sup>55</sup> but its definition has changed many times. In *United States v.*

47. 27 F.2d 223.

48. *Id.*

49. *Id.*

50. *Id.* at 224.

51. *See infra* Parts IV.B–D.

52. *United States v. Belevin-Ramales*, 458 F. Supp. 2d 409 (E.D. Ky. 2006).

53. *Id.* at 411 (citing WEBSTER’S NEW WORLD DICTIONARY 262 (1982)).

54. *Id.*

55. *United States v. Smith*, 112 F.2d 83 (2d Cir. 1940). Smith was charged with conspiring to violate 8 U.S.C. § 144 (1925), a precursor of the current harboring provision (“Any person . . . who . . . shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor . . .”) and 18 U.S.C.



*Smith*, the defendant was convicted of harboring and prostituting undocumented immigrants.<sup>56</sup> The Second Circuit held that harboring “means only that the [aliens] shall be sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens.”<sup>57</sup> As in the Sixth Circuit, this definition requires the defendant to intend to help the undocumented immigrant evade the law in order to be convicted of harboring.

Two weeks later,<sup>58</sup> the Second Circuit handed down *United States v. Mack*, authored by Judge Learned Hand.<sup>59</sup> Mack, a brothel manager, was convicted of conspiring to harbor a Canadian prostitute whom she employed.<sup>60</sup> However, Mack did not know of the prostitute’s immigration status,<sup>61</sup> so the court reversed the conviction. It held that “knowledge of the alienage is an element” of harboring.<sup>62</sup> Judge Hand reasoned:

It would be shocking to hold guilty anyone who gave shelter to an alien whom he supposed to be a citizen; and besides, the statute is very plainly directed against those who abet evaders of the law against unlawful entry, as the collocation of “conceal” and “harbor” shows. Indeed, the word, “harbor” alone often connotes surreptitious concealment.<sup>63</sup>

Like *Smith*,<sup>64</sup> *Mack* requires a defendant to perceive an individual as an undocumented immigrant and conceal her from law enforcement in order to be convicted of harboring.

The Second Circuit broadened this definition in 1975 in *United States v. Lopez*, in which the defendant rented houses to undocumented immigrants and arranged jobs and sham marriages for some of them.<sup>65</sup> The court held that harboring means “to give shelter or refuge”<sup>66</sup> to an

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§ 402 (1946) (making it a misdemeanor for “[e]very person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution . . . any alien woman or girl . . .” who fails to register with the Commissioner-General of Immigration or commits fraud in the registration).

56. *Id.*

57. *Id.* at 85.

58. *Smith*, 112 F.2d 83, was issued May 20, 1940, and *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940), was issued June 3, 1940.

59. *Mack*, 112 F.2d at 291.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Smith*, 112 F.2d 83.

65. *United States v. Lopez*, 521 F.2d 437 (2d Cir. 1975), *cert. denied*, 423 U.S. 995 (1975).

66. *Id.* at 441 (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1031 (1961); BLACK’S LAW DICTIONARY 847 (4th ed. 1951)).

undocumented immigrant and the defendant need only have knowledge of the “alien’s unlawful status” to be convicted of harboring.<sup>67</sup> *Lopez* broadened *Mack*’s definition of harboring, because the defendant’s intent to hide the undocumented immigrant from the immigration authorities was no longer necessary to sustain a harboring conviction.

*Lopez* is the basis of the Fifth Circuit’s definition of harboring.<sup>68</sup> Its holding is mere dictum when applied to a landlord who does not operate a haven, arrange illegal employment, or create sham marriages. However, if applied liberally, this definition of harboring implicates a landlord who rents to an individual whom she knows is an undocumented immigrant, regardless of whether the landlord intends to shelter the individual from immigration enforcement.

In 1999, the Second Circuit returned to *Mack*’s narrow definition, holding that harboring “encompasses conduct tending substantially to facilitate an alien’s remaining in the United States illegally *and* to prevent government authorities from detecting his unlawful presence.”<sup>69</sup> Based on this definition, a landlord whose relationship with his tenant is limited to housing could not be convicted of harboring in the Second Circuit.

### C. Fifth Circuit: A Broad Definition of Harboring

The Fifth Circuit adopted and expanded *Lopez*, which held that a defendant must have knowledge of the immigrant’s undocumented status in order to be convicted of harboring,<sup>70</sup> and that the anti-harboring statute “does not prohibit only smuggling-related activity.”<sup>71</sup> The court reaffirmed this holding in 1982 in *United States v. Rubio-Gonzalez*.<sup>72</sup> Since this interpretation of the statute lacks any connection to the smuggling process, it implicates a landlord who rents to an individual she knows to be an

67. *Id.* at 441; *see also* *United States v. Rodriguez*, 532 F.2d 834, 837 (2d Cir. 1976), *cert. denied*, 543 U.S. 910 (2004); *United States v. Herrera*, 584 F.2d 1137, 1145 (2d Cir. 1978) (defining harboring as “conduct tending substantially to facilitate the alien’s ‘remaining in the United States illegally’”).

68. *United States v. Balderas*, 91 F. App’x. 354, 354 (5th Cir. 2004), *cert. denied*, 543 U.S. 910 (2004) (Harboring is “conduct which by its nature tends to substantially facilitate the alien’s remaining in the United States illegally.”).

69. *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (emphasis added) (internal citation omitted). Conduct that substantially facilitates an alien’s remaining in the United States could include an act as simple as giving food to an undocumented alien child.

70. 521 F.2d 437.

71. *Cantu*, 557 F.2d 1173.

72. 674 F.2d at 1073. *See also* *Balderas*, 91 F. App’x. at 354.

undocumented immigrant, even if the landlord is not trying to help the immigrant evade immigration authorities.<sup>73</sup>

*D. Ninth Circuit: An Independently Broad Definition of Harboring*

The Ninth Circuit defined harboring independently of *Lopez*,<sup>74</sup> but its definition is broader. In *United States v. Acosta de Evans* the court held that the purpose of the anti-harboring statute is to “keep unauthorized aliens from entering or remaining in the country.”<sup>75</sup> To effectuate this purpose, the court defined harboring as affording shelter and held that “harboring need not be part of the chain of transactions in smuggling.”<sup>76</sup> *Acosta de Evans* omits any discussion of mens rea, implying that a landlord with no knowledge that his tenant is an undocumented immigrant could be convicted of harboring.

Appellate cases defining harboring are dicta as applied to landlords whose sole relationship with their tenants is providing housing. If these cases were liberally applied to landlords, the circuit split regarding the definition of harboring would be of great importance. For instance, it would be difficult to prosecute landlords in the Sixth and Second Circuits, where, in order to be convicted of harboring, a landlord must know that his tenant is an undocumented immigrant and intend to hide him from law enforcement. However, in the Fifth Circuit, a landlord could be convicted of harboring even if the shelter he provides is unrelated to the smuggling process and does not attempt to evade authority. Landlords are most exposed to prosecution in the Ninth Circuit, where a landlord could be convicted even if he does not know that his tenant is an undocumented immigrant. Other areas of law, including the landlord-tenant relationship, employment law, and housing discrimination, support the Second and Sixth Circuits’ narrow definitions of “harboring.”

#### IV. HARBORING’S LIMITS

The anti-harboring statute is not the proper vehicle with which to regulate immigration in the context of landlord-tenant relationships. First,

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73. *Rubio-Gonzalez*, 674 F.2d at 1074 n.5 (“We need not determine in this case whether one can conceive of willful or knowing conduct tending to substantially facilitate an aliens’ remaining in the United States illegally that nevertheless might not be within a fair reading of the words knowingly or willfully harboring, concealing or shielding from detection an illegal alien or attempting to do so.”).

74. 521 F.2d 437.

75. 531 F.2d at 430.

76. *Id.* n.4.

prosecuting a normal landlord for harboring would be flawed, because the landlord would receive a significantly greater penalty than his undocumented immigrant tenant. Second, harboring prosecutions would place landlords in the untenable position of being required to ascertain tenants' immigration status. Third, a landlord who evicts a tenant or denies an applicant could be sued for national origin discrimination in violation of the Fair Housing Act.<sup>77</sup>

#### A. *Comparison of Landlord and Tenant Liability*

Convicting a landlord under the federal anti-harboring statute for renting to an undocumented immigrant is contrary to the normal balance of tenant and landlord criminal liability. A landlord can be implicated by a tenant who commits a crime on the rental property. For example, if a landlord discovers that her tenant sells drugs or is involved in other illegal activity on the premises and she fails to evict him, she risks being sued and having the property forfeited.<sup>78</sup> Additionally, a landlord cannot provide for the commission of unlawful acts in a lease.<sup>79</sup> If a landlord leases property to a tenant with the knowledge that the tenant will commit a crime, the lease becomes void,<sup>80</sup> and the landlord shares equal criminal liability with the tenant.<sup>81</sup>

Being undocumented is not a crime. The tenant's lack of valid immigration status could cause him to be removed from the United States, but the Supreme Court has held that "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."<sup>82</sup> If harboring were interpreted broadly to implicate landlords who rent to undocumented immigrants, such a landlord would face criminal penalties, whereas the tenant would only face civil penalties. There is only one other situation in which a person can be criminally sanctioned for another's civil legal matters: immigration in the context of employment, but Congress passed a law expressly authorizing this dichotomy. Therefore, harboring should be narrowly interpreted.

77. 42 U.S.C. § 3604 (2000).

78. 83 AM. JUR. TRIALS 385 § 36; *see also id.* § 41.

79. Zankman v. Tiren Towers, 297 A.2d 23, 24 (N.J. Dist. Ct. 1972).

80. *See* McMahon v. Anderson, 728 A.2d 656, 659 (D.C. 1999); Cent. States Health & Life Co. of Omaha v. Miracle Hills Ltd. P'ship, 456 N.W.2d 474, 477 (Neb. 1990).

81. 83 AM. JUR. TRIALS 385 § 36.

82. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). Deportation is now termed "removal." Immigration and Nationality Act § 240, 8 U.S.C. § 1229a(a)(1) (2006). Aliens are neither entitled to due process nor to the Constitutional prohibition on application of ex post facto laws. *Harisiades*, 342 U.S. at 596.

### B. Civilian Determination of Immigration Status

Immigration is an incredibly complex area of law, based on federal statutes, treaties, federal cases, executive orders, and administrative law.<sup>83</sup> The federal government extensively regulates the only situation in which it requires a private citizen to ascertain the immigration status of another, which is the employer-employee relationship under IRCA.<sup>84</sup>

IRCA prohibits employers from hiring “unauthorized aliens.”<sup>85</sup> It also prohibits employers who are aware of their employees’ unauthorized status from continuing to employ them.<sup>86</sup> Employers can raise the affirmative defense that they complied in good faith with IRCA’s employment verification system<sup>87</sup> by correcting any errors after law enforcement notifies employers of them.<sup>88</sup>

Congress has never required tenants to identify themselves or demonstrate proof of occupancy eligibility, but IRCA requires employees to identify themselves and demonstrate proof of work eligibility. An employer must attest that she has viewed documentation establishing the employees’ identity and work authorization,<sup>89</sup> and she is required to retain evidence of the documents.<sup>90</sup>

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83. See *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (“[T]he labyrinthine character of modern immigration law” is “a maze of hyper-technical statutes and regulations.”).

84. *Supra* note 20, § 101(a)(1) (codified as amended in scattered sections of 8 U.S.C.).

85. 8 U.S.C. § 1324a(a)(1) (2006) (“It is unlawful for a person or other entity—(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or (B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.”).

86. *Id.* § 1324a(a)(2) (“It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.”).

87. *Id.* § 1324a(a)(3) (“A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.”).

88. *Id.* § 1324a(b)(6) (“[A] person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.”).

89. *Id.* § 1324a(b)(1)(A). The potential employee can either show a single document establishing both his employee’s work authorization and identity, or two documents, one evidencing his work authorization and one establishing his identity. Documents establishing employment authorization and identity include a United States passport and a resident alien card. *Id.* § 1324a(b)(1)(B). An example of a document establishing employment authorization is a social security card. *Id.* § 1324a(b)(1)(C). An example of a document establishing identity is a state-issued driver’s license. *Id.* § 1324a(b)(1)(D).

90. *Id.* § 1324a(b)(2).

Employers charged with violating IRCA are entitled to a hearing with an administrative law judge (ALJ).<sup>91</sup> If the ALJ finds a violation by a preponderance of the evidence,<sup>92</sup> the employer must cease and desist and pay a fine.<sup>93</sup> The employer can be criminally punished for a maximum of six months, but only if she “engage[d] in a pattern or practice” of violations.<sup>94</sup> The parties can appeal to the Attorney General<sup>95</sup> and the employer can appeal to a circuit court of appeals.<sup>96</sup>

IRCA includes two major protections for employees.<sup>97</sup> First, employers cannot discriminate against employees on the basis of national origin or citizenship.<sup>98</sup> Second, an employer cannot harass an employee for

91. *Id.* § 1324a(e)(3)(B). ALJs are under the Office of the Chief Administrative Hearing Officer of the Department of Justice. Department of Justice, Organization, Mission and Functions Manual, February 2006: Executive Office for Immigration Review (EOIR), <http://www.usdoj.gov/jmd/mps/manual/eoir.htm> (The Office of the Chief Administrative Hearing Officer “is headed by a Chief Administrative Hearing Officer, who is responsible for the general supervision and management of the administrative law judges who preside at hearings mandated by IRCA and the Immigration and Nationality Act of 1952 (INA). Administrative law judges hear cases and adjudicate issues arising under the provisions of the INA relating to (1) unlawful hiring, recruiting, referring for a fee, and continued employment of unauthorized aliens, and failure to comply with employment verification requirements, (2) immigration-related document fraud, and (3) immigration-related unfair employment practices. Complaints are brought by DHS immigration officials, with the exception of those involving immigration-related unfair employment practices, which are brought by the Office of Special Counsel or private litigants as prescribed by statute.”).

92. 8 U.S.C. § 1324a(e)(3)(C) (2006).

93. *Id.* § 1324a(e)(4) (“With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection—(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—(i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred. (ii) not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or (iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and (B) may require the person or entity—(i) to comply with the requirements of subsection (b) of this section (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and (ii) to take such other remedial action as is appropriate.”).

94. *Id.* § 1324a(f)(1) (“Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.”).

95. The parties can appeal the ALJ’s decision to the Attorney General within thirty days. *Id.* § 1324a(e)(7).

96. If the Attorney General finds against the employer, the employer has forty-five days to petition a court of appeals for review. *Id.* § 1324a(e)(8).

97. See generally Donald R. Stacy, *The Standard for Proving an Unfair Immigration-Related Employment Practice Under IRCA: Disparate Impact or Intent?*, 4 LAB. LAW. 271 (1988); Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059 (1988).

98. 8 U.S.C. § 1324b(a)(1) (2006) (“It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as

immigration documents after the employee presents apparently valid documents from an approved list.<sup>99</sup> An employee can file a complaint against her employer with the Special Counsel for Immigration-Related Unfair Employment Practices, who can then choose to file a complaint with an ALJ.<sup>100</sup> Upon finding a violation by a preponderance of the evidence, an ALJ can issue a cease and desist order,<sup>101</sup> grant limited back-pay to the employee,<sup>102</sup> and fine the employer.<sup>103</sup>

Congress articulated a sophisticated balance of prohibitions and safeguards for employers and employees in relation to employees' immigration status. However, Congress has never done so for landlords and tenants with respect to tenants' immigration status.

Adopting a broad definition of harboring that could implicate normal landlords for renting to undocumented immigrants would be inconsistent with Congress's concern for authorized immigrants as reflected in IRCA. First, unlike employers, who are protected under IRCA if they show a good faith effort to ascertain documents' validity, even if the documents are actually invalid,<sup>104</sup> landlords have no protection for incorrectly accepting them. Second, concerned landlords would probably evict many aliens present lawfully because they are unfamiliar with the range of valid documents. This would be inconsistent with Congress's concern for authorized immigrants as reflected in IRCA, because it would mean that they would no longer be able to live in the United States, much less work in the United States. Therefore, the courts should adopt a narrow definition of harboring so that normal landlords are not prosecuted.

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defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—(A) because of such individual's national origin, or (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.”). There are only limited exceptions. *Id.* § 1324b(a)(2).

99. *Id.* § 1324a(b)(1)(A)(ii) (“If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.”).

100. *Id.* §§ 1324b(b-c).

101. *Id.* § 1324b(g)(2)(A) (“If, upon the preponderance of the evidence, an administrative law judge determines that any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue and cause to be served on such person or entity an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.”).

102. *Id.* § 1324b(g)(2)(B)(iii).

103. *Id.* § 1324b(g)(2)(B)(iv).

104. *Id.* § 1324a(b)(6).

### C. National Origin Discrimination

Adopting a broad definition of harboring would increase the likelihood that normal landlords would be prosecuted for renting to undocumented immigrants, which would increase housing discrimination on the basis of national origin. The Fair Housing Act (FHA)<sup>105</sup> broadly<sup>106</sup> declares:

[I]t shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.<sup>107</sup>

The FHA also makes discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” unlawful in that it is based on the same protected classes.<sup>108</sup>

If courts adopted broad definitions of harboring and landlords began to fear prosecution, the landlords would probably also grow to fear FHA national origin discrimination lawsuits. Under § 1324, landlords cannot provide shelter to unauthorized immigrants with knowledge or reckless disregard for their immigration status.<sup>109</sup> The FHA simultaneously prohibits landlords from refusing to rent to potential tenants or discriminating in the terms of leases based on the tenants’ national origin.

The FHA has been interpreted to prevent landlords from even seeking information about prospective tenants’ national origin. In *Housing Rights Center v. Donald Sterling Corporation*, the district court granted a preliminary injunction, because the plaintiffs were likely to succeed on the merits that “asking a tenant to state his or her national origin as part of an application for apartment-related services violates the Fair Housing Act.”<sup>110</sup> The court rejected any rational basis for the questions and determined that the defendants’ national security justification was a sham.<sup>111</sup>

It would be very difficult for landlords to navigate between lawfully determining an individual’s immigration status and discriminating based

105. 42 U.S.C. §§ 3601–3631 (2006).

106. *See* United States v. Gilbert, 813 F.2d 1523, 1528 (9th Cir. 1987).

107. 42 U.S.C. § 3604(a).

108. *Id.* § 3604(b).

109. 8 U.S.C. § 1324(a)(1)(A)(iii) (2006).

110. 274 F. Supp. 2d 1129, 1141 (C.D. Cal. 2003).

111. *Id.* at 1142.



on national origin status. If the landlord denies a lawfully present applicant and the applicant suspects that the decision was based on alienage or national origin discrimination, the applicant can sue the landlord under the FHA.<sup>112</sup> Whether or not landlords are required to pay damages, litigation is very expensive. Immigration law is extremely complex, making it likely that landlords will discriminate against tenants based on perceived stereotypes about “illegal aliens.” Therefore, adopting a narrow definition of harboring is consistent with housing discrimination law.

#### V. CONCLUSION

The Supreme Court should construe harboring narrowly, resolving the split in favor of the Sixth and Second Circuits. The definition should not just include housing an undocumented alien, but should also include the intent to hide the immigrant. Courts should also strictly adhere to the statutory mens rea of “knowing or in reckless disregard” of immigration status.<sup>113</sup> This narrow interpretation of “harboring” will protect normal landlords who rent to documented immigrants.

A broad interpretation of “harboring,” followed by landlord prosecutions, would pose many problems. Limited immigration enforcement resources would be better directed at dangerous cases of harboring, such as human trafficking. Whereas the landlords could receive twenty-year sentences and be ordered to pay large fines, undocumented immigrant tenants would only face a civil consequence—deportation. Landlords would refuse to rent to lawful immigrants after incorrectly determining that documents are insufficient or invalid. They would resort to stereotypes of “illegal aliens” to deny new tenants and anticipatorily evict old ones. FHA national origin discrimination lawsuits would increase, as would the size of our homeless population.

Normal landlords should not be prosecuted for harboring undocumented immigrants, and the Supreme Court should define “harboring” narrowly to prevent this from occurring.

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112. *Supra* note 105.

113. 8 U.S.C. § 1324(a)(1)(A)(iii) (2006).

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