

# The Weaponization of the “Alien Harboring” Statute in a New-Era of Racial Animus Towards Immigrants

*Hannah M. Hamley\**

*First they came for the Communists  
And I did not speak out  
Because I was not a Communist  
Then they came for the Socialists  
And I did not speak out  
Because I was not a Socialist  
Then they came for the trade unionists  
And I did not speak out  
Because I was not a trade unionist  
Then they came for the Jews  
And I did not speak out  
Because I was not a Jew  
Then they came for me  
And there was no one left  
To speak out for me.*

Pastor Martin Niemoller<sup>1</sup>

## CONTENTS

INTRODUCTION .....	172
I. THE DANGEROUS USE OF 8 U.S.C. § 1324 UNDER THE CURRENT ADMINISTRATION .....	175
<i>A. New-Era of Overt Racial Animus from the White House.....</i>	<i>175</i>

---

\* University of California, Los Angeles, B.A.; Seattle University School of Law, 2021 J.D. Candidate. Thank you to the entire *Seattle University Law Review* team for their feedback and edits. Special thanks and recognition to every mentor, friend, student, and family member, from Los Angeles to Seattle, who has challenged me to be better, provided me with opportunities to grow, and showed me the strength and power of community. As always, la lucha sigue, and I am honored to be in this fight with you.

1. Pastor Martin Niemoller, *First They Came*, HOLOCAUST MEM’L DAY TRUST, <https://www.hmd.org.uk/wp-content/uploads/2018/06/First-They-Came-with-new-branding.pdf> [<https://perma.cc/UA8M-TH7T>].

1. President Trump's Actions.....	176
2. President Trump's Appointments.....	180
II. THE VULNERABILITY OF IMMIGRANTS UNDER THE VIRTUALLY UNILATERAL EXECUTIVE POWER OVER IMMIGRATION .....	183
A. <i>Attorney General Renews Commitment to Prosecutions under     8 U.S.C. § 1324</i> .....	184
III. THE AMORPHOUS 8 U.S.C. § 1324 .....	187
A. <i>The Passage of the Harboring Statute</i> .....	187
B. <i>What Does It Mean to "Harbor"?: No Consensus Among     the Circuits</i> .....	191
IV. THE WEAPONIZATION OF THE HARBORING STATUTE.....	193
V. THE HARBORING STATUTE: A SHIELD, NOT A SWORD .....	202

#### INTRODUCTION

Consider this haunting scenario: You, a United States citizen, and your undocumented spouse are both inside your home when an Immigration and Customs Enforcement (ICE) agent knocks on your door. The agent says that he has a warrant to arrest your spouse for unlawfully residing in the United States. What do you do? If you know and understand your Fourth Amendment rights, you know that an ICE Administrative Arrest Warrant does not confer the same legal authority as a judicially signed warrant.<sup>2</sup> You would know that, absent your consent, the ICE agent is constitutionally forbidden from entering your home.<sup>3</sup> Acting within your constitutional rights, you refuse to allow the agent inside your home to effectuate the arrest of your loved one. As a result of this refusal, could

---

2. The arrest warrants issued by the Department of Homeland Security (DHS) to arrest noncitizen immigrants are Administrative Arrest Warrants and do not meet the basic legal requirements of the Fourth Amendment. IMMIGRANT LEGAL RSCH. CTR., ICE WARRANTS AND LOCAL AUTHORITY 1-2 (2017), [https://www.ilrc.org/sites/default/files/resources/ice\\_warrants\\_may\\_2017.pdf](https://www.ilrc.org/sites/default/files/resources/ice_warrants_may_2017.pdf) [https://perma.cc/85AE-B7YV].

3. "[T]he administrative removal warrant authorizes the ICE officer to arrest the subject, but not to enter into a [Reasonable Expectation of Privacy] area such as his or her home unless consent to enter is given. If the officer does not have consent to enter, even if the officer knows the person subject to the warrant is inside the home, the officer has no legal authority to enter the home pursuant to that removal warrant." John Seaman, *ICE Administrative Removal Warrants*, FED. L. ENF'T TRAINING CTRS., <https://www.fletc.gov/audio/ice-administrative-removal-warrants-mp3> [https://perma.cc/R6XM-AHXX] (John Seaman is the Senior Legal Instructor of the Federal Law Enforcement Training Center's Legal Division). *Know Your Rights*, NAT'L IMMIGR. L. CTR., <https://www.nilc.org/get-involved/community-education-resources/know-your-rights/> [https://perma.cc/FSM6-B56P]; *Know Your Rights: Police or ICE Are at My Home*, AM. C.L. UNION, <https://www.aclu.org/know-your-rights/immigrants-rights/#police-or-ice-are-at-my-home> [https://perma.cc/H9H7-2KR7].

you be criminally charged under federal statute 8 U.S.C. § 1324<sup>4</sup> for harboring an undocumented immigrant? The answer depends on which federal circuit you live in and how those courts interpret the term “harboring” under 8 U.S.C. § 1324. Despite the circuit courts’ interpretation of the statute’s language, government officials, namely ICE and Customs and Border Patrol (CBP) agents, reportedly threaten criminal sanction under this federal statute for refusing to comply with their demands. Meaning, government officials use 8 U.S.C. § 1324 as an intimidation tactic to coerce compliance, regardless of an individual’s constitutional rights.<sup>5</sup>

Now, consider this scenario: You are an undocumented immigrant. Suddenly, the threat of being charged with a federal felony carries a weight much greater than potential prison time alone—it carries the potential of deportation.<sup>6</sup>

Federal law 8 U.S.C. § 1324(a)(1)(A)(iii),<sup>7</sup> commonly referred to as the “Alien Harboring” statute,<sup>8</sup> was passed sixty-eight years ago<sup>9</sup> and has been used as a weapon against immigrants and their allies.<sup>10</sup> Spanning

---

4. This felony carries a prison sentence of up to five years. 8 U.S.C. § 1324(a)(1)(B)(ii).

5. See *infra* Part IV.

6. See 8 U.S.C. § 1227(a)(1)(B) (“Any alien who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable.”); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (stating that the federal government’s priorities for enforcement of removal include “those aliens . . . who . . . [h]ave been charged with any criminal offense, where such charge has not been resolved; . . . [or who h]ave committed acts that constitute a chargeable criminal offense”); SARAH HERMAN PECK & HILLEL R. SMITH, CONG. RSCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 2 (2018) (“When ICE determines that an alien located within the U.S. interior has violated the immigration laws—for example, by committing certain crimes—DHS typically apprehends the alien and initiates removal proceedings against him before an immigration judge (IJ) within [the Department of Justice’s] [Executive Office for Immigration Review].”).

7. 8 U.S.C. § 1324(a)(1)(A)(iii) (“Any person who . . . (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 (v)(I) engages in any conspiracy to commit any of the preceding acts, or (II) aids or abets the commission of any of the preceding acts, shall be punished . . .”).

8. Herein referred to as the “harboring statute.” The term “alien,” while legally accurate, dehumanizes and further marginalizes the immigrant community. See, e.g., Correcting Hurtful and Alienating Names in Government Expression (CHANGE) Act, H.R. 3776, 116th Cong. (2019) (proposal to prohibit the government from using the term “alien” when referring to foreign nationals); Rebekah Entralgo, *Joaquin Castro Introduces Bill to Remove ‘Illegal’ and ‘Alien’ from Federal Immigration Law*, THINK PROGRESS (July 17, 2019), <https://thinkprogress.org/joaquin-castro-change-act-derogatory-terms-immigrants-40eefb461863/> [<https://perma.cc/4YEC-L23D>].

9. See Immigration and Nationality Act of 1952, 66 Stat. 228 (codified at 8 U.S.C. § 1324).

10. See generally John M. Gannon, Note, *Sanctuary: Constitutional Arguments for Protecting Undocumented Refugees*, 20 SUFFOLK U. L. REV. 949 (1986) (discussing how the United States government used the harboring statute to prosecute individuals who provided sanctuary to Central

back decades, numerous scholars, alarmed by the dangerous use of the statute, have written about its muddled congressional intent and the unclear definition of “harboring.”<sup>11</sup> These issues continue to be relevant and are foundational concerns with the enforcement of the harboring statute. However, in the era of President Donald J. Trump, we are faced with a new danger. We are confronted with an Administration that is ferociously anti-immigrant and that wields the dangerous weapon of the amorphous, fear-inducing 8 U.S.C. § 1324.<sup>12</sup>

Nearly seven decades have passed since the enactment of 8 U.S.C. § 1324, and we are no closer to receiving any clarity on what conduct is subject to criminal sanction under this federal law.<sup>13</sup> As a result, good Samaritans, religious persons and entities, immigrant allies, and immigrants and their friends and family suffer the consequences. The current anti-immigrant—and more specifically, anti-immigrant-people-of-color—Administration has highlighted the dangers of how this statute can be weaponized. This Note proposes that the harboring statute be rewritten to convert it from a sword to a shield to protect noncitizen immigrants and U.S. citizens alike from the continued weaponization of the statute.

Part I of this Note aims to spotlight why the Trump Administration’s ability to wield the harboring statute is so dangerous. I do so by providing a few of the starkest examples of the current Administration’s displays of racism and white nationalism, particularly as they relate to immigrants. Part II briefly details the Executive Branch’s quasi-unilateral power in setting immigration policies, forming immigration laws, and enforcing immigration-related laws, including federal criminal codes that intersect with immigration. Part III of this Note explores the passage of the harboring statute with a focus on the legislative history and historical context. Part IV contains examples of the current Administration’s enforcement of the harboring statute and argues that the statute is used as a weapon to initiate deportations; attack allies, family, and friends of undocumented immigrants; and discourage people from helping immigrants through coercive intimidation tactics. Part V describes how the statute can prove beneficial when used as a shield, not a sword, and concludes with a proposed revision of the harboring statute.

---

American refugees in the 1980s); 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).

11. See, e.g., Loken & Babino, *supra* note 10.

12. See *infra* Part I.

13. See *infra* Part III.

I. THE DANGEROUS USE OF 8 U.S.C. § 1324 UNDER THE CURRENT  
ADMINISTRATION

*A. New-Era of Overt Racial Animus from the White House*

The United States has a long, well-established history of racism.<sup>14</sup> Similar to our government, our current President also has an extensive record of making racist remarks and engaging in racist practices in his life and business ventures.<sup>15</sup> In recent years, President Trump has targeted and verbally attacked many groups, including immigrants and Black, Indigenous, Latinx, and Muslim persons.<sup>16</sup> For purposes of this Note, I focus on a few of the many examples of bigotry that intersect with the President’s anti-immigrant sentiments and rhetoric.

---

14. For a noncomprehensive list of the United States’ history of racism, see generally *Slavery in America*, HIST. (July 6, 2020), <https://www.history.com/topics/black-history/slavery> [<https://perma.cc/JZS5-ZA7V>]; *Civil War*, HIST. (June 23, 2020), <https://www.history.com/topics/american-civil-war/american-civil-war-history> [<https://perma.cc/DJD4-G9NQ>]; *Manifest Destiny*, HIST. (Nov. 15, 2019), <https://www.history.com/topics/westward-expansion/manifest-destiny> [<https://perma.cc/U9A7-GGNC>]; *Segregation in the United States*, HIST. (May 16, 2019), <https://www.history.com/topics/black-history/segregation-united-states> [<https://perma.cc/3UKX-AA3W>]; Samuel Sinyangawe, *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> [<https://perma.cc/K6JR-PB2Q>]; Donald L. Fixico, *When Native Americans Were Slaughtered in the Name of ‘Civilization,’* HIST. (Aug. 16, 2019), <https://www.history.com/news/native-americans-genocide-united-states> [<https://perma.cc/K9LE-FXZB>]. Immigrants, of whom Latinxs make up most of the population, have not been exempt from this history of racism. Abby Budiman, Christine Tamir, Lauren Mora & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/#fb-key-charts-origins> [<https://perma.cc/DAR6-M5SQ>] (showing Latinx immigrants made up 50% of the immigrant population in 2018). The U.S. government illegally deported masses of Latinxs to Mexico. Erin Blakemore, *The Brutal History of Anti-Latino Discrimination in America*, HIST. (Aug. 29, 2018), <https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america> [<https://perma.cc/8QJK-MBEX>]. In the early 1900s, the U.S. government forcibly removed two million people they suspected to be of Mexican descent; nearly sixty percent of those deported were U.S. citizens. Blakemore, *supra*. In addition to being socially and educationally segregated, Latinx men, women, and children alike were brutalized, tortured, and lynched by white mobs with impunity. Blakemore, *supra*.

15. Evidence of President Trump’s racism has existed since as early as 1973. See generally David A. Graham, Adrienne Green, Cullen Murphy & Parker Richards, *An Oral History of Trump’s Bigotry*, THE ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/> [<https://perma.cc/HU9A-7WMK>]. Subpoenaed documents and testimony from depositions in a 1973 case against Donald J. Trump and his father revealed their insidious, racist housing policies for their residential projects by exposing their discrimination against people of color. See *id.*

16. See *id.*

### 1. President Trump's Actions

As an initial example, in 2019, President Trump publicly attacked four congresswomen who are women of color.<sup>17</sup> The President using the platform Twitter, publicly posted, in part, “Why don’t they *go back* and help fix the totally broken and crime infested places *from which they came*.”<sup>18</sup> The President’s suggestion that these congressional representatives “go back” to their countries is not only a categorically inaccurate statement but also an often-used phrase by racists and anti-immigrant groups.<sup>19</sup> Jennifer Wingard, a professor at the University of Houston, reflected on the President’s declaration and highlighted that “‘go back where you came from’ is the same as ‘go back to your own country’ is the same as ‘you are not allowed here’ is the same as ‘no immigrants allowed.’ . . . It carries all of this historical shorthand with it.”<sup>20</sup> A president who proudly declares that these women of color do not belong in the very country that they have vowed to serve and protect is a president who will tap into every resource available to make his “America white again”;<sup>21</sup> this includes using the harboring statute.

---

17. See Donald J. Trump (@realDonaldTrump), TWITTER (July 14, 2019, 5:27 AM), <https://twitter.com/realDonaldTrump/status/1150381394234941448> [<https://perma.cc/R589-5YPX>].

18. *Id.* (emphasis added).

19. The four congresswomen include Representatives Alexandria Ocasio-Cortez of New York, Ilhan Omar of Minnesota, Ayanna Pressley of Massachusetts, and Rashida Tlaib of Michigan. At a campaign rally in North Carolina, the President singled out Representative Ilhan Omar by inciting the crowd to chant, “Send her back! Send her back!” Salvador Hernandez, *Trump’s Supporters Chanted “Send her Back!” as the President Attacked Rep. Ilhan Omar*, BUZZFEED NEWS (July 17, 2019), <https://www.buzzfeednews.com/article/salvadorhernandez/trumps-supporters-chanted-send-her-back-as-the-president> [<https://perma.cc/93EF-RNGE>] (“Three of the women were born in the US. Omar, a Minnesota representative, was born in Somalia. Her family fled the war-torn country to a refugee camp in Kenya when she was 8 years old and arrived in the US four years later.”). See also Dwyer & Limbong, *infra* note 20 for a historical dive into the racist roots of this rhetoric.

20. Colin Dwyer & Andrew Limbong, *‘Go Back Where You Came From’: The Long Rhetorical Roots of Trump’s Racist Tweets*, NPR (July 15, 2019), <https://www.npr.org/2019/07/15/741827580/go-back-where-you-came-from-the-long-rhetorical-roots-of-trump-s-racist-tweets> [<https://perma.cc/N6UZ-27RF>]. Representatives were quick to correct the President’s false statement and expose the racial overtones of his message. See Claudia Koerner, *Trump’s Racism Hit a New Level as He Told Four Congresswomen to “Go Back” to Their “Broken” Countries*, BUZZFEED NEWS (July 14, 2019), <https://www.buzzfeednews.com/article/claudiakoerner/trumps-racist-congresswomen-tweets> [<https://perma.cc/A7H2-57L4>] (collecting various responses, including those from the four congresswomen, to the President’s “go back where you came from” message on Twitter). For example, Representative Pramila Jayapal of Washington state responded, “@realDonaldTrump, you can only HOPE to be as patriotic as we are. @AOC, @RashidaTlaib & @AyannaPressley were born IN America. @IlhanMN & I are proud naturalized citizens, making sure America keeps to our ideals.” Koerner, *supra*.

21. Speaker of the House Nancy Pelosi aptly responded, “When @realDonaldTrump tells four American Congresswomen to go back to their countries, he reaffirms his plan to ‘Make America Great Again’ has always been about making America white again.” Nancy Pelosi (@SpeakerPelosi), TWITTER (July 14, 2019, 7:16 AM), <https://twitter.com/SpeakerPelosi/status/1150408691713265665> [<https://perma.cc/643X-DG7B>]; see also Koerner, *supra* note 20.

Second, in June 2015, presidential candidate Donald J. Trump evoked the historical and racially charged rhetoric of calling Latinx immigrants—specifically Mexican nationals—criminals. He famously said, “The U.S. has become a dumping ground for everybody else’s problems. . . . When Mexico sends its people, they’re not sending their best. . . . They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>22</sup> When pushed back on these comments by CNN correspondent Don Lemon, presidential candidate Trump responded with more aggressive accusations, saying, “Well, somebody’s doing the raping, Don! I mean somebody’s doing it! Who’s doing the raping? Who’s doing the raping?”<sup>23</sup> This type of fear-mongering by villainizing an entire group of people—namely Mexicans—is illustrative of the President’s racial animus.<sup>24</sup> Similar to his go-back-to-your-country statement about the four congressional representatives, the then-presidential candidate’s comments equating Mexican nationals to rapists and criminals were not only denigrating but also patently false.<sup>25</sup>

Third, President Trump has demonized “sanctuary cities”<sup>26</sup> by spewing false information and perpetuating harmful stereotypes. The President stated that sanctuary laws are “dangerous,” “deadly,” and “forc[e] the release of illegal immigrant criminals, drug dealers, gang

---

22. Z. Byron Wolf, *Trump Basically Called Mexicans Rapists Again*, CNN (Apr. 6, 2018), <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html> [<https://perma.cc/J7SS-Y3BP>].

23. *Id.*; For more examples of President Trump calling Mexicans criminals, see Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult/> [<https://perma.cc/Y2YL-4RRW>].

24. U.S. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901, 1917 (2020) (Sotomayor, J., dissenting in part) (discussing the alleged racial animus of the President’s Administration in its decision to rescind the Deferred Action for Childhood Arrivals (DACA) program, Justice Sotomayor highlights that that President’s public statements about Mexicans and undocumented immigrants “bear on unlawful migration from Mexico—a keystone of President Trump’s campaign and policy priority of his administration . . . . Taken together, ‘the words of the President’ help to ‘create the strong perception’ that the rescission decision was ‘contaminated by impermissible discriminatory animus’”).

25. Eyal Press, *Trump and the Truth: Immigration and Crime*, NEW YORKER (Sept. 2, 2016), <https://www.newyorker.com/news/news-desk/trump-and-the-truth-immigration-and-crime> [<https://perma.cc/T8XZ-WAUS>]. Research has shown definitively that “communities with high concentrations of immigrants do not suffer from outsized levels of violence.” *Id.* When analyzing the incarceration rates of undocumented immigrants from Mexico, El Salvador, and Guatemala and their U.S.-born counterparts, the trend shows that the foreign-born men are less likely to commit crimes. *Id.*; see also Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html> [<https://perma.cc/7T26-Q45U>] (collecting the results of various research projects and investigations).

26. See *infra* note 29.

members, and violent predators.”<sup>27</sup> He went on to claim that California’s sanctuary state law “provides safe harbor to some of the most vicious and violent offenders on Earth” and puts its community “at the mercy of these sadistic criminals.”<sup>28</sup> The President’s comments highlight his lack of knowledge about the goals of sanctuary city legislation. Sanctuary or “safe cities” are not cities that release dangerous individuals into the community to wreak havoc, as the President suggests.<sup>29</sup> In reality, sanctuary cities are local governments—city, county, state—that “limit [their] cooperation with federal immigration enforcement agents in order to protect low-priority immigrants from deportation, while still turning over those who have committed serious crimes.”<sup>30</sup> Moreover, research shows that sanctuary or safe cities are actually safer and suffer from less crime than non-sanctuary cities.<sup>31</sup> Unfortunately, the apparent purpose of the President’s misinformed and fear-inducing allegations is to reinforce harmful stereotypes against immigrants.

Finally, in 2018, when Central American and Mexican refugees made their way to the U.S.-Mexico border to seek asylum, President Trump again employed rhetoric that villainized and criminalized these asylum seekers. He described the asylum seekers as a “[c]aravan” moving north to “inva[de] . . . our [c]ountry.”<sup>32</sup> Indeed, his statement concocts a mental image of a hoard of Latinx immigrants moving towards the United States en masse, as though they are a threat to our safety and well-being.<sup>33</sup>

---

27. Remarks at a Roundtable Discussion on California’s Immigration Enforcement Policies, 2018 DAILY COMP. PRES. DOC. NO. 00338 (May 16, 2018) [hereinafter Roundtable Remarks]; see Linda Qiu, *The Context Behind Trump’s ‘Animals’ Comment*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/us/politics/fact-check-trump-animals-immigration-ms13-sanctuary-cities.html> [https://perma.cc/F2P6-WB3R].

28. Roundtable Remarks, *supra* note 27.

29. *Immigration 101: What is a Sanctuary City?*, AMERICA’S VOICE (Oct. 9, 2019), <https://americasvoice.org/blog/what-is-a-sanctuary-city/> [https://perma.cc/8BQN-CSLT] [hereinafter *Immigration 101*].

30. *Id.*

31. *Immigration 101*, *supra* note 29 (“[O]ne analysis has shown that sanctuary cities see 15% less crime than non-sanctuary cities. Another found that two-thirds of the cities that had the highest jumps in murder rates in 2016 were not sanctuary cities—in fact, they are the opposite, generally eager to hold immigrants for ICE pick-up and detention.”).

32. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 7:41 AM), <https://twitter.com/realDonaldTrump/status/1056919064906469376> [https://perma.cc/99ZP-9C3V]; see also *Trump Calls Migrant Caravans ‘Invasion’ at Campaign Rally*, REUTERS (May 8, 2019), <https://www.reuters.com/video/watch/trump-calls-migrant-caravans-invasion-at-id547721354> [https://perma.cc/6AUB-7HYW].

33. At a campaign rally, President Trump talked about the “caravan” and asked, rhetorically, “How do you stop these people?” An audience member shouted, “Shoot them!” The President laughed and responded, with a smile on his face, “That’s only in the Panhandle you can get away with that statement.” Jeremy Diamond, *Trump Jokes After Rally Attendee’s Suggestion to ‘Shoot’ Migrants at the Border*, CNN (May 9, 2019), <https://www.cnn.com/2019/05/09/politics/donald-trump-rally-shoot->

Unsurprisingly, President Trump’s declarations have emboldened white supremacists, and his support is not lost on them.<sup>34</sup> David Duke, the former Ku Klux Klan (KKK) Grand Wizard, said that the 2017 “Unite the Right”<sup>35</sup> rally in Charlottesville, Virginia—which turned into a violent attack on counter-protestors—was meant “to fulfill the promises of Donald Trump.”<sup>36</sup> Therefore, the President’s rhetoric is particularly dangerous because it gives a nod of approval to white supremacists. We have seen how the current Administration’s emboldening of racists has resulted in the mass loss of lives. A particularly gut-wrenching example is the El Paso, Texas mass shooting that maimed and killed families shopping in a Wal-Mart in August 2019. The shooter, a white male, proclaimed that he specifically targeted the border town as a response to the “Hispanic invasion of Texas.”<sup>37</sup>

The President responded to this tragedy by shifting the focus away from the racial animosity and onto mental illness.<sup>38</sup> He said, “[T]his is mental illness. These are people who are very, very seriously mentally ill.”<sup>39</sup> While the shooter may have been mentally ill, he was also acting in furtherance of his racist, white nationalist beliefs, and the President’s refusal to acknowledge that is an act of violence in and of itself. The shooter wrote an online manifesto describing the “cultural and ethnic replacement brought on by an invasion.”<sup>40</sup> This invasion that the shooter describes is one that white supremacists refer to as the “great replacement”

---

migrants/index.html [https://perma.cc/PVK5-F7P5]. See generally Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217 (2018); Melina Juárez Pérez, *Treating Immigrants Like Criminals Has Long History in the United States*, WASH. POST (July 21, 2019), https://www.washingtonpost.com/politics/2019/07/21/treating-immigrants-like-criminals-has-long-history-united-states/ [https://perma.cc/QLH5-A86P].

34. Mallory Simon & Sarah Sidner, *Trump Says He’s Not a Racist. That’s Not How White Nationalists See It*, CNN (July 16, 2019), https://www.cnn.com/2018/11/12/politics/white-supremacists-cheer-midterms-trump/index.html [https://perma.cc/F3UW-4UXP].

35. See generally *Unite the Right*, S. POVERTY L. CTR., https://www.splcenter.org/unite-the-right [https://perma.cc/4RH6-QDNF] (providing frequently updated information about the white nationalist group “Unite the Right”).

36. German Lopez, *Donald Trump’s Long History of Racism, from the 1970s to 2019*, VOX (July 15, 2019), https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history [https://perma.cc/9JFT-M7H7]. See generally Evan Osnos, *Donald Trump and the Klu Klux Klan: A History*, NEW YORKER (Feb. 29, 2016), https://www.newyorker.com/news/news-desk/donald-trump-and-the-ku-klux-klan-a-history [https://perma.cc/D6JE-NNKU] (providing background on President Trump’s relationship with the KKK).

37. *Texas Walmart Shooting: El Paso Attack ‘Domestic Terrorism,’* BBC (Aug. 5, 2019), https://www.bbc.com/news/world-us-canada-49226573 [https://perma.cc/K7N3-HMCT].

38. *Id.*

39. *Id.*

40. *Id.* I note for the reader that the Wal-Mart massacre took place after President Trump’s initial and continued use of the term “invasion” when speaking about the asylum seekers. See, e.g., Diamond, *supra* note 33.

or a “white genocide” by immigrants and people of color.<sup>41</sup> This idea that immigrants are a threat to white nationalists is one that President Trump’s senior policy advisor, Stephen Miller, shares with white supremacists.<sup>42</sup>

## 2. President Trump’s Appointments

Stephen Miller, a well-known white supremacist,<sup>43</sup> was appointed by President Trump and functions as the President’s primary advisor on immigration.<sup>44</sup> Specifically, Miller is credited with authoring and shaping some of the President’s most discriminatory immigration policies, including the Travel Ban—or discriminatorily referenced as the “Muslim Ban”—proclamation and the rescission of the Deferred Action for Childhood Arrivals (DACA) program.<sup>45</sup>

Katie McHugh, a self-described former white supremacist, worked with Stephen Miller at Breitbart News and shed some light on Miller’s belief system.<sup>46</sup> McHugh explained that Miller “privately showed his true colors and pushed white supremacist ideals echoing his hardline views on restricting immigration.”<sup>47</sup> As one example, McHugh described that, to provide her with some direction on one of her Breitbart articles, Miller sent her an article that claimed that white people are facing a genocide due to the great replacement theory.<sup>48</sup> The white genocide or great replacement theory is the belief that “nonwhite people are systematically and deliberately wiping white people off the planet.”<sup>49</sup>

---

41. See Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, S. POVERTY L. CTR. (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails> [https://perma.cc/P78U-GM2Y]; see also Julissa Arce, *Trump’s Anti-Immigrant Rhetoric Was Never About Legality—It Was About Our Brown Skin*, TIME (Aug. 6, 2019), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/> [https://perma.cc/75RH-WYPV] (“The shooter didn’t stop to ask any of the 22 people he killed for their papers, or if they came to the U.S. ‘the right way,’ or if they immigrated ‘legally.’ That’s because it isn’t actually about legality. It is about our brown skin in America.”).

42. See Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [https://perma.cc/APE9-NX6U].

43. *Id.*; Sara Sidner & Rachel Clarke, *Former Breitbart Editor: Stephen Miller Is a White Supremacist. I Know, I Was One Too*, CNN (Dec. 16, 2019), <https://www.cnn.com/2019/12/13/politics/katie-mchugh-stephen-miller/index.html> [https://perma.cc/6WYR-7762]; Hayden, *supra* note 41.

44. Blitzer, *supra* note 42.

45. Hayden, *supra* note 41; see *infra* notes 60–67.

46. Sidner & Clarke, *supra* note 43.

47. *Id.*

48. Hayden, *supra* note 41.

49. *Id.*

Miller does not merely hold these beliefs for himself; he has manifested his supremacist ideologies in his policies. Miller’s leaked emails from 2015 and 2016 “showcase the extremist, anti-immigrant ideology that undergirds the policies he has helped create as an architect of Donald Trump’s presidency.”<sup>50</sup> Some of his policies include “setting arrest quotas for undocumented immigrants, an executive order effectively banning immigration from five Muslim-majority countries[,] and a policy of family separation at refugee resettlement facilities that the Department of Health and Human Services’ Office of Inspector General said is causing ‘intense trauma’ in children.”<sup>51</sup> Within the context of the family separation policy, a Department of Homeland Security (DHS) official confessed that Miller made it clear that “if you start to treat children badly enough, you’ll be able to convince their parents to stop trying to come with theirs.”<sup>52</sup> In other words, the Administration’s traumatic mistreatment of immigrant children was a deliberate tactic to deter immigration. Miller’s power over immigration-related issues is far-reaching and—because of his ideologies rooted in white supremacy and his staunchly held anti-immigrant sentiments—is damaging and, in some respects, irrevocably so.<sup>53</sup> Thus, it is unsurprising that this Administration uses other means, like the harboring statute, to deter immigration and eradicate immigrants from the United States.

One of Miller’s strategies, which former Attorney General Jeff Sessions (AG Sessions) shares,<sup>54</sup> is to make life in the U.S. so unbearable for immigrants that they “self-deport.”<sup>55</sup> In sync with the self-deport strategy, Miller has spearheaded immigration policies that drastically reduce the number of avenues available for foreign nationals to seek legal immigration status in the United States. For instance, Stephen Miller was behind the Trump Administration’s Interim Final Rule<sup>56</sup> that “virtually ended asylum at the southern border”; he was also an architect of the

---

50. *Id.*

51. *Id.*

52. Blitzer, *supra* note 42.

53. *See id.* Miller is described as “an adviser with total authority over a single issue that has come to define an entire Administration.” *Id.* One former senior official of the DHS raised red flags when he shed light on the fact that “lower-level officials in the [DHS] . . . answer directly to him” and even provide him “information, policy updates, and data, often behind the backs of their bosses.” *Id.*

54. *See* Kenneth Lipp, *Mass Deportation: Trump and Attrition Through Enforcement*, MEDIUM (Feb. 15, 2017), <https://medium.com/@kennethlipp/mass-deportation-trump-and-attrition-through-enforcement-5c9b2b020c09> [<https://perma.cc/SV8T-ZPAN>].

55. Blitzer, *supra* note 42; *see also* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1879 (2019) (stating that the term self-deportation involves the government’s “attempts attack every aspect of an illegal alien’s life,” including “the ability to find employment and housing, drive a vehicle, make contracts, and attend school”).

56. 84 Fed. Reg. 33,829, 33,835 (July 16, 2019).

public charge rule that denies legal permanent residence status to individuals who receive public benefits.<sup>57</sup> While President Trump has primarily focused on “building a wall” and preventing so-called illegal immigration, Stephen Miller has made significant steps towards narrowing even the lawful mechanisms for immigration.<sup>58</sup>

One of Miller’s more notorious immigration policies, which even President Trump disagreed with initially,<sup>59</sup> is the rescission of the DACA program.<sup>60</sup> DACA is a President Barack Obama-era program that protected over 700,000 “Dreamers”<sup>61</sup> from deportation while also providing them a work permit, social security number, and temporary lawful status.<sup>62</sup> Because of the DACA program, hundreds of thousands of individuals have been able to attend and graduate from college, purchase homes, obtain professional licenses to work as attorneys and doctors and the like, and build a life in the U.S. without the omnipresent fear of being subject to deportation.<sup>63</sup> Because of Stephen Miller’s “viscer[al] hostility to DACA,”<sup>64</sup> the Administration hurriedly and sloppily<sup>65</sup> rescinded the

---

57. Blitzer, *supra* note 42.

58. *See id.*

59. Donald Trump (@realDonaldTrump), TWITTER (Sept. 14, 2017, 3:28 AM), <https://twitter.com/realDonaldTrump/status/908276308265795585> [<https://perma.cc/7W7P-597L>] (“Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!”); Donald Trump (@realDonaldTrump), TWITTER (Sept. 14, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/908278070611779585> [<https://perma.cc/VR3D-GQKP>] (“They have been in our country for many years through no fault of their own - brought in by parents at young age.”).

60. *See* Blitzer, *supra* note 42.

61. DACA recipients are often referred to as “Dreamers” after the failed 2001 Dream Act. *See* Caitlin Dickerson, *What is DACA? And How did It End Up in the Supreme Court?*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/daca-supreme-court.html> [<https://perma.cc/K7WJ-6269>]. DACA recipients were either brought to or entered the U.S. before the age of sixteen and had to be under the age of thirty-one as of June 15, 2012, the day the DACA program took effect. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/R5BL-EX8H>] [hereinafter *DACA, USCIS*].

62. *DACA, USCIS, supra* note 61. Brief for DACA Recipient Respondents at 1–2, U.S. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (mem.) (Nos. 18-587, 18-588, 18-589), 2019 WL 4858288 (Sept. 27, 2019) [hereinafter *DACA Brief*].

63. *See* *DACA Brief, supra* note 62.

64. Blitzer, *supra* note 42.

65. The U.S. Supreme Court, in a 5–4 decision, held that the Trump Administration’s rescission of the DACA program was arbitrary and capricious, therefore violating the Administrative Procedures Act (APA). U.S. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (holding that the rescission of the DACA program is vacated). Justice Sotomayor, dissenting in part, opined that the Respondents’ Equal Protection claim alleging racial animus as the motivation for rescinding the DACA program should be remanded for further development because “[t]he complaints each set forth particularized facts that plausibly allege discriminatory animus.” *Id.* at 1917 (Sotomayor, J., dissenting in part).

program and then vowed to enforce the removal of the Dreamers or DACA recipients.<sup>66</sup>

Our nation is facing a new-era of government-led racial animus, and the Trump Administration has made successful efforts to focus this animus on immigrants. The enforcement of the harboring statute falls within the purview of the Executive Branch; without clear legislative direction, we are at its mercy. Between a president who espouses subtle and overt racism and a cabinet with proud white supremacists leading the way in the realm of immigration, we—with immigrants carrying the burden—are vulnerable to governmental attacks on our safety and well-being.

## II. THE VULNERABILITY OF IMMIGRANTS UNDER THE VIRTUALLY UNILATERAL EXECUTIVE POWER OVER IMMIGRATION

Immigrants are particularly vulnerable to the authority and power of the President and his appointees because of the organization of the immigration system.<sup>67</sup> The immigration system—including immigration court, removal enforcement, border security, and application adjudications—falls under the purview of the Attorney General.<sup>68</sup> The state of affairs under the current Administration has spotlighted the susceptibility of the immigration system to political abuses.

The Southern Poverty Law Center (SPLC) conducted extensive research on the immigration-court system and found that the Attorneys General under President Trump (1) “have strategically certified cases to channel immigration judges toward denying asylum claims,” (2) “abused its supervisory authority by unlawfully politicizing the hiring and firing of EOIR personnel . . . [and] block[ed] the hiring of EOIR adjudicators based on political bias,” and (3) hired a three-fourths majority of immigration judges who were prior trial attorneys for ICE, meaning that the same individuals who actively sought to deport immigrants are now

---

66. See Matthew Albence, Acting Dir., Immigr. & Customs Enf’t, Public Safety Media Briefing (Jan. 23, 2020) (“If they get ordered removed, and DACA is done away with by the Supreme Court, we can actually effectuate those removal orders.”); *Resources and Authorities Needed to Protect and Secure the Homeland: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affs.*, 116th Cong. (2020) (statement of Chad F. Wolf, Acting Secretary, U.S. Dep’t of Homeland Sec.) (“So when we get final orders of removal, we’re going to effectuate those.”); see also Blitzer, *supra* note 42.

67. See generally Hon. Mark A. Drummond, *Death Penalty Cases in a Traffic Court Setting: Lessons from the Front Lines of Today’s Immigration Courts*, 44 LITIG. NEWS 26 (2019) (“‘In essence, we’re doing death penalty cases in a traffic court setting,’ said immigration court Judge Dana Leigh Marks . . .”). See generally Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59 (2016) (providing background on the Executive Branch’s power in the immigration court setting).

68. See Family, *supra* note 67.

entrusted by the Trump Administration to impartially decide whether they are deported.<sup>69</sup>

Immigration judges, appointed by the Attorney General, are described by immigration attorneys as “faithful to the government, but not faithful to the law” and are said to “prosecute from the bench.”<sup>70</sup> In fact, some immigration judges have retired early because of the current Administration’s “draconian policies.”<sup>71</sup> One such judge, John Richardson, explained that his retirement was a “direct result of the draconian policies of the Administration, [including] the relegation of [judges] to the status of ‘action officers’ who deport as many people as possible as soon as possible with only token due process.”<sup>72</sup> Judge Richardson further explained that in removal proceedings, “[t]here’s no due process. There is no judging. It’s just a law enforcement assembly line.”<sup>73</sup>

*A. Attorney General Renews Commitment to Prosecutions under  
8 U.S.C. § 1324*

In addition to overseeing the immigration system, the Attorney General is responsible for setting federal law enforcement priorities. Although federal prosecutions under the harboring statute are not novel, the current Administration has taken full advantage of its prosecutorial discretion in charging people under 8 U.S.C. § 1324. In 2017, AG Sessions released a memorandum to all federal prosecutors calling for a renewed commitment to general criminal immigration enforcement, including a

---

69. *Attorney General’s Judges: How the Immigration Courts Became a Deportation Tool*, S. POVERTY L. CTR. (June 25, 2019), <https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool> [<https://perma.cc/R2WJ-UD25>] [hereinafter SPLC]. The Attorney General has the sole and unchecked power to single-handedly create, overrule, and change immigration case law precedent. *Id.* During Attorney General Jeff Sessions’ short time as the overseer of the Executive Office for Immigration Review (EOIR), he certified over five cases to himself and set precedent that narrowed the possibility for noncitizens to obtain immigration relief. *See id.*; *see also* *Matter of Castillo Perez*, 27 I. & N. Dec. 664 (A.G. 2019); *Matter of Thomas/Thompson*, 27 I. & N. Dec. 674 (A.G. 2019); *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019); *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019); *Matter of L-A-B-R-*, 27 I. & N. Dec. 245 (A.G. 2018); *Matter of A-B-*, 27 I. & N. Dec. 227 (A.G. 2018); *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018); *Matter of Castro-Tum*, 27 I. & N. Dec. 187 (A.G. 2018).

70. SPLC, *supra* note 69.

71. *Id.*

72. *Id.*

73. *Id.* First-hand accounts from practicing immigration attorneys reveal the irrevocable consequences of these policies. One immigration attorney in El Paso, Texas recounts that he heard an immigration judge tell asylum seekers, “This is the bye-bye place. Ninety-nine percent of you are going to fail. You’re not going to succeed. So think about this when you decide whether you want to ask for counsel.” *Id.*

renewed commitment to prosecutions under the harboring statute.<sup>74</sup> Specifically, former AG Sessions stated that “[e]ach District shall consider for prosecution any case involving the unlawful transportation or harboring of aliens, or any other conduct proscribed pursuant to 8 U.S.C. § 1324.”<sup>75</sup> As a result, there has been a 37.2% increase in the number of prosecutions under 8 U.S.C. § 1324 in 2019 compared to 2014.<sup>76</sup> In addition to a statistical increase in 8 U.S.C. § 1324 prosecutions, there is a surge in personal accounts of DHS officials threatening 8 U.S.C. § 1324 prosecution as an intimidation tactic.<sup>77</sup>

Based on the government’s interpretation, the statute is intended to dissuade or deter immigrants from entering or remaining<sup>78</sup> in the U.S. without lawful status. In a 2017 legal memorandum, AG Sessions instructed federal prosecutors to prioritize criminal prosecutions of immigrants with the intent of deterring unlawful immigration and “reduc[ing] illegality.”<sup>79</sup> His explicit instructions were to increase felony prosecutions for “[i]mproper entry by alien.”<sup>80</sup> He also directed federal prosecutors to work with the Department of Homeland Security to develop guidelines for prosecuting first-time unlawful entrants “to accomplish the goal of deterring first-time improper entrants.”<sup>81</sup> Similarly, in April 2018, AG Sessions initiated a “zero-tolerance” policy for unlawful or attempted

---

74. Memorandum for All Fed. Prosecutors, Jeff Sessions, Att’y Gen., Dep’t of Just., Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/FJ28-X7TC>] [hereinafter Sessions 2017 Memo].

75. *Id.*

76. *Immigration Prosecutions for September 2019*, TRAC IMMIGR.: SYRACUSE UNIV. (Oct. 31, 2019), <https://tracfed.syr.edu/results/9x705dbb7b76d5.html> [<https://perma.cc/ZGG9-66VE>] (as of September 2019); see also Lorne Matalon, *Extending ‘Zero Tolerance’ to People Who Help Migrants Along the Border*, NPR (May 28, 2019), <https://www.npr.org/2019/05/28/725716169/extending-zero-tolerance-to-people-who-help-migrants-along-the-border> [<https://perma.cc/G9FA-EXPT>] (“Figures confirmed to NPR by TRAC, the Transactional Records Access Clearinghouse at Syracuse University, show that in fiscal year 2018 there were more than 4,500 people federally charged for bringing in and harboring migrants. That is a more than 30% increase since 2015, with the greatest rise coming after Sessions’ order to prioritize harboring cases.”); Ivette Feliciano & Zachary Green, *Migrant Aid Workers Face Arrests and Prosecutions*, PBS NEWS HOUR (Nov. 10, 2019), <https://www.pbs.org/newshour/show/migrant-aid-workers-face-arrests-and-prosecutions> [<https://perma.cc/QT7U-WSY6>] (“In fiscal year 2019, there were close to 4,000 convictions for ‘bringing in and harboring certain aliens,’ a 34% rise compared to five years ago, according to data from Syracuse University.”).

77. See *infra* Part IV.

78. Consider such scenarios as a foreign national who lawfully entered the U.S. under a visitor visa, overstayed the terms of their visa, and is now unlawfully present in the country.

79. Sessions 2017 Memo, *supra* note 74.

80. *Id.*

81. *Id.*

unlawful entry.<sup>82</sup> Consequently, immigrants who did not enter through a designated port of entry were criminally prosecuted en masse, and the criminal courts along the Southern border were plagued with a surge of misdemeanor and felony cases for unlawful entry.<sup>83</sup> Courtrooms are filled with as many as forty defendants, many of whom are asylum seekers, while a judge presides over all cases at once.<sup>84</sup>

Another horrifying consequence of the zero-tolerance policy is that the government began separating children from their parents.<sup>85</sup> Again, the Attorney General explicitly stated that the goal of the policy was to “end the illegality in our immigration system.”<sup>86</sup> In a speech given on May 7, 2018, AG Sessions stated that, under this new policy, if an immigrant brings a child—which he referred to as “smuggling”—“then we will prosecute [them] and that child will be separated from [them] as required by law.”<sup>87</sup> Almost 3,000 children were separated from their parents before the family-separation policy was terminated in June 2018 (and only after the intense public outcry).<sup>88</sup> AG Sessions went on to emphasize that

---

82. Memorandum for Federal Prosecutors Along the Southwest Border, Jeff Sessions, Att’y Gen., Dep’t of Just., Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018) <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/7R2X-BKBH>] [hereinafter Sessions 2018 Memo].

83. Debbie Nathan, *Hidden Horrors of “Zero Tolerance”—Mass Trials and Children Taken from Their Parents*, THE INTERCEPT (May 29, 2018), <https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children/> [<https://perma.cc/JD2B-7NEV>] (“[O]n May 7, Attorney General Jeff Sessions announced that the U.S. government will prosecute ‘100 percent of illegal southwest border crossings.’ He added that people who were ‘smuggling a child’ will be prosecuted ‘and that child will be separated from you as required by law.’ In practice, this means that even parents fleeing violence to protect their young children will be deemed smugglers—that is, criminals.”); see also AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES (Jan. 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting\\_people\\_for\\_coming\\_to\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf) [<https://perma.cc/U8QT-DU8Q>] [hereinafter AIC REPORT].

84. AIC REPORT, *supra* note 83. While these en masse court proceedings are no longer highlighted in news stories, they continue to occur (at least as of August 2019, according to an immigration detainee I spoke with who was prosecuted in one of these en masse prosecutions for unlawfully entering the United States to seek asylum).

85. *Id.*; see also Matthew S. Schwartz, *Court Orders Administration to Identify Separated Migrant Children Within 6 Months*, NPR (Apr. 26, 2019), <https://www.npr.org/2019/04/26/717380923/court-orders-administration-to-identify-separated-migrant-children-within-6-month> [<https://perma.cc/Q4AM-Q3F6>].

86. Sessions 2018 Memo, *supra* note 82.

87. Jeff Sessions, Att’y Gen., Dep’t of Just., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/8S5R-MCHL>] [hereinafter Sessions 2018 Remarks]; see also Schwartz, *supra* note 85.

88. See *Q&A: Trump Administration’s “Zero-Tolerance” Immigration Policy*, HUM. RTS. WATCH (Aug. 16, 2018), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy> [<https://perma.cc/26QM-FDZN>].

“[e]ven million people are already here illegally,” which, in his opinion, furthered the need for zero-tolerance immigration policies.<sup>89</sup> While it is a crime to unlawfully enter the United States, it is not a crime to be unlawfully present in the United States.<sup>90</sup> However, the current Administration is using the harboring statute, a criminal statute, to “smoke out” undocumented individuals to initiate or effectuate their removal, while also sanctioning those who aid or associate with noncitizens.<sup>91</sup>

In essence, the government’s purported intention behind enforcing the harboring statute, in conjunction with the zero-tolerance policy, is to eradicate the presence of undocumented immigrants in the United States; while simultaneously narrowing the legal pathways available for immigration, the government creates and enforces policies at the border intended to be so inhumane that they deter any potential future immigrants from even trying to come to the United States.

### III. THE AMORPHOUS 8 U.S.C. § 1324

#### A. *The Passage of the Harboring Statute*

The harboring statute is an especially useful mechanism to systematically target immigrants because of the statute’s lack of overall clarity in its application. The history of the harboring statute has been the subject of law review articles for nearly three decades, as scholars have tried to parse through the muddled history of the harboring statute to gain some insight into what type of conduct Congress originally intended to criminalize.<sup>92</sup> Unfortunately, the 82nd Congress, when passing the bill, did not have a clear idea of what would and would not be subject to prosecution.<sup>93</sup> The bill was written and passed with one specific type of immigrant in mind: male Mexican laborers.<sup>94</sup> It was hastily passed in order to further labor renegotiations between the American and Mexican presidents,<sup>95</sup> but it ultimately failed at providing the public and the courts with any legitimate guidance on what conduct is criminal.

---

89. Sessions 2018 Remarks, *supra* note 87.

90. *Arizona v. United States*, 567 U.S. 387, 407 (2012) (“As a general rule, it is not a crime for a removable alien to remain in the United States.”) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)).

91. *See infra* Part IV.

92. *See, e.g.*, Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 *GEO. IMMIGR. L.J.* 147, 157–66 (2010); Loken & Babino, *supra* note 10.

93. *See To Assist in Preventing Aliens from Entering or Remaining in the United States Illegally: Hearings on S. 1851 Before the Comm. on the Judiciary*, 82d Cong. 802 (1952) [hereinafter *Hearings*].

94. *Id.*

95. *Id.*

The harboring statute, as we know it today, was passed in 1952.<sup>96</sup> This statute makes it a federal crime to

knowing[ly] or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, concea[l], harbor[r], or shiel[d] from detection, or attemp[t] to conceal, harbor, or shield from detection, any alien in any place, including any building or any means of transportation.<sup>97</sup>

From its inception, the racial element of the harboring statute was clear: the law was meant to enforce the removal of Mexican immigrants within the U.S. and discourage the unregulated immigration of Mexican nationals to the United States. The 82nd Congress passed this statute, which was introduced as the Wetback Bill,<sup>98</sup> for two main purposes. Its first purpose was to further along negotiations between the President of the United States and the President of Mexico in their negotiations regarding sending Mexican male laborers to the United States.<sup>99</sup> Its second purpose was to regulate the migration of Mexican male laborers within the United States.<sup>100</sup> As stated by the Congressional Representatives at the time, the “Wetback Bill” was intended to address the “wetback problem.”<sup>101</sup> In fact, Senator Lehman recounts that the Bill was intended to punish those who harbor or protect “persons who illegally enter the United States, namely, the wetbacks.”<sup>102</sup>

---

96. Immigration and Nationality Act of 1952, 66 Stat. 228 (codified at 8 U.S.C. § 1324).

97. Immigration and Nationality Act of 1952 § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii).

98. Hearings, *supra* note 93 (statement of Sen. Ernest McFarland, asking permission to present for discussion “a bill known as the wetback bill”).

99. Hearings, *supra* note 93, at 803, 1366-67 (statement of Sen. Hubert Humphrey, stating, “I recognize the difficulty which our Government has encountered in the renegotiation of the agreement with the Republic of Mexico, and if this is a part of the means to get the agreement renewed so that we can make some forward progress, then I shall not object”) (statement of Representative John Lyle Jr., stating, “This bill does nothing to prevent illegal immigration from Mexico, it has nothing to do with that. It was simply a threat by our own Government and the Mexican Government. . . . This bill was brought up for one purpose at this time and one purpose only, and the gentleman knows it and I know it. That is because the President of the United States and the Mexican Government have said that if we do not pass it during the 90-day period there would be no further negotiation”).

100. Hearings, *supra* note 93, at 823 (statement of Sen. Paul Douglas, stating the purpose of the bill is “to stop this flood of illegal immigration and restrict the importation of farm labor to the terms of the law and our agreements with Mexico”); *see also* Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 157 (2010).

101. Hearings, *supra* note 93, at 823 (statement of Sen. Paul Douglas) (statement of Sen. Hubert Humphrey).

102. *Id.* (statement of Sen. Herbert Lehman). The government’s casual and consistent use of the racist epithet “wetback” is an example of the wide acceptance of racism within the nearly all-white 82nd Congress. There were two Black Congressmen in the House of Representatives and two Latino Congressmen (one in the House of Representatives and one in the Senate). The other 99.31% were white. R. ERIC PETERSON, CONG. RSCH. SERV., R42365, REPRESENTATIVES AND SENATORS: TRENDS

Because of political pressure from President Truman to renegotiate the Bracero Program with the Mexican President, the Bill was rushed through the House and the Senate without proper committee hearings.<sup>103</sup> During discussions of the Wetback Bill, multiple Congressmen admitted to feeling political pressure to pass an ill-vetted and under-developed law.<sup>104</sup> Senator Humphrey stated that “because of a lack of time, many of us are not going to have any opportunity whatever to study this proposed legislation.”<sup>105</sup> He also complained that “[n]o hearings were held on this bill[,]” and “there is no report on this bill.”<sup>106</sup> Despite these raised concerns, the bill was pushed through.

The U.S. had entered World War II and was in desperate need of laborers—particularly agricultural laborers<sup>107</sup>—when Congress passed the Bracero Program in 1943 to allow for the migration of Mexican laborers into the United States.<sup>108</sup> During this time, unregulated immigration continued, and Texas—along with other states—relied on the undocumented Mexican immigrants to “augment its workforce.”<sup>109</sup> By 1951, the U.S. government changed its tune and referred to the Mexican migration as a virtual “invasion.”<sup>110</sup> The harboring statute was passed in 1952 during the new political climate where the once-needed and relied-upon Mexican immigrant was now the invader that needed to be expelled.<sup>111</sup>

---

IN MEMBER CHARACTERISTICS SINCE 1945, 23 (2012); Gregory Korte, *Mexican Slur Has Long History in Politics*, USA TODAY (Mar. 29, 2013), <http://www.usatoday.com/story/news/politics/2013/03/29/mexican-immigration-slurhistory/2036329/> [https://perma.cc/JW67-BKEX].

103. Hearings, *supra* note 97, at 809 (statement of Sen. Hubert Humphrey explaining that the Bill “deals directly with the wetback problem”) (showing members of the Senate discussing the Bill as a means to address the “wetback problem”); *see also* Loken & Babino, *supra* note 10.

104. Hearings, *supra* note 93, at 806–07.

105. *Id.* at 803 (statement of Sen. Hubert Humphrey, complaining that the “hearings” were “held by debate on the Senate floor”).

106. *Id.* at 809.

107. United States House of Representatives, *Depression, War, and Civil Rights*, HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Separate-Interests/Depression-War-Civil-Rights/> [https://perma.cc/DCV3-AZM9].

108. *Id.*

109. *Id.*

110. *Id.*

111. This anti-Mexican sentiment grew and reached a peak in 1954; two years after the Wetback Bill was passed and the U.S. fought so hard to bring Mexican laborers into the country, the U.S. government initiated the program Operation Wetback. Erin Blakemore, *The Largest Mass Deportation in American History*, HIST. (June 18, 2019), <https://www.history.com/news/operation-wetback-eisenhower-1954-deportation> [https://perma.cc/CQE9-9DZA]. For a description of the history of U.S. anti-Mexican sentiment and the comparison to President Trump’s rhetoric, see Alvaro Huerta, *Why President Trump’s Racially Charged Immigration Rhetoric and Policies Are So Dangerous*, SCHOLARS STRATEGY NETWORK (June 28, 2018), <https://scholars.org/contribution/why-president-trumps-racially-charged-immigration-rhetoric-and-policies-are-so> [https://perma.cc/YZ95-V66U].

During the few, hasty discussions on the Wetback bill, Congress attempted and failed multiple times to define “harbor.”<sup>112</sup> Ultimately, the 82nd Congress did not reach a consensus nor did they thoroughly consider the questions and concerns posed by some congressmen regarding the amorphous and unclear use of the term “harboring” in the bill. Representative Morano explicitly asked, “What is the definition of ‘harboring’?”<sup>113</sup> Possibly concerned about the very situation we face today, Representative Morano proposed the following hypothetical scenario: “Suppose an illegal alien from Central Europe came into the United States and was living at the home of a relative or friend[;]” wouldn’t this bill treat those situations a “bit severe[ly][?]”<sup>114</sup> Representative Morano continued on to warn that “[t]here might be a twilight zone in whether or not you are harboring one of these people.”<sup>115</sup> But, when he asked for clarification on the definition of harboring, he received no response.<sup>116</sup> Ultimately, the enacted harboring statute does nothing to address this scenario.

Some Congressmen shared their perspectives on the overall goal of the bill, possibly in an attempt to pin down a cognizable intent. Representative Celler expressed concern that there are “[farmers and ranchers] who exploit these illegals” and clarified that, under his view, the Wetback Bill was aimed at those types of employers.<sup>117</sup> Representative Walter explained that the bill was intended to “adequately deal with . . . racketeers who . . . exact[] a tribute from people [they are] harboring and concealing under the threat of exposing them.”<sup>118</sup> He said that the goal of the bill was to punish the “professional gangster.”<sup>119</sup> For some Representatives, the desired goal for the harboring statute, as articulated

---

The U.S. Attorney General at the time, Herbert Brownell, announced the creation and initiation of Operation Wetback, and President Eisenhower appointed former Army General Swing to be the Commissioner of the Immigration and Naturalization Service (INS) as the head of this operation. Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 27 W. HIST. Q. 421, 442 (2006). Unsurprisingly, the enforcement of Operation Wetback relied heavily on military tactics to apprehend and deport Mexican nationals and persons of Mexican heritage. Hernández, *supra*. Within the first year of Operation Wetback, over one million people were deported, including U.S. citizens of Mexican heritage. Blakemore, *supra*. Millions of Mexicans had legally entered the U.S. at the urging of the U.S. government, and Operation Wetback was designed to forcibly remove them. *See* Blakemore, *supra*.

112. *See infra* notes 113–120.

113. Hearings, *supra* note 93, at 1367 (statement of Rep. Albert Morano).

114. *Id.*

115. *Id.*

116. *Id.* at 1367–68.

117. *Id.* at 1373 (statement of Rep. Emanuel Celler).

118. *Id.* (statement of Rep. Francis Walter).

119. *Id.*

by Representative Celler and Representative Walter, was to have the statute act as a shield to protect against greed, abuse, and exploitation. However, as this Note explains in Part IV, the government increasingly uses the statute as a sword.

In an effort to assuage the concerns of other Congressmen, Representative Graham attempted to explain the bill, which he characterized as “perfectly simple”: “[the bill] is to apply to all our borders and applies against every type of person who has the intent of concealing or harboring aliens.”<sup>120</sup> Unfortunately, Representative Graham’s attempt to simplify the bill’s intent not only ran contrary to the numerous statements of other Congressmen but also did not help define how and under what circumstances a person is criminally liable for “harboring.”

#### *B. What Does It Mean to “Harbor”? : No Consensus Among the Circuits*

Absent clarity and guidance from Congress, the various circuits across the U.S. have been forced to concoct their own definitions of harboring under the federal statute, leading to inconsistent applications across the country.

Some circuits have adopted the definition created by another court. For instance, the Second Circuit defines harboring as “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>121</sup> The Fifth Circuit adopted the Second Circuit’s definition;<sup>122</sup> the Third Circuit also adopted the Second Circuit’s definition of harboring but differentiated between “harbor” and “shield” by holding that “shielding an alien ordinarily includes affirmative conduct—such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations—that facilitates an alien’s continuing illegal presence in the United States.”<sup>123</sup> Both the Fifth and Third Circuit require that the government prove that the individual took some steps towards “substantially” facilitating the noncitizen’s presence in the country.

The Seventh Circuit defined harboring a bit more narrowly and even opined that the other circuits’ attempt to refine the definition of harboring

120. *Id.* at 1376 (statement of Rep. Louis Graham).

121. *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (quoting *United States v. Lopez*, 521 F.2d 437, 440-441 (2d Cir. 1975)) (emphasis added).

122. *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977) (quoting *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1975)).

123. *United States v. Cuevas-Reyes*, 572 F.3d 119, 122 (3d Cir. 2009) (quoting *Kim*, 193 F.3d at 574); *see also* *United States v. Ozcelik*, 527 F.3d 88, 99, 100 (3d Cir. 2008) (analyzing *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982)).

by adding the “substantially facilitate” language is “too vague to be a proper gloss on a criminal statute.”<sup>124</sup> The Seventh Circuit held that harboring was more than “simple sheltering” in that it requires a showing that an individual provided or offered—“for remember that the statute punishes the attempt as well as the completed act”—“a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.”<sup>125</sup> The Circuit clarified that sheltering, as opposed to harboring, refers to “providing a place to stay or just cohabitating.”<sup>126</sup> In the Seventh Circuit—which includes Illinois, Indiana, and Wisconsin—one may be able to rely on judicial protection from the federal government’s attempts to intimidate and coerce through the use of the harboring statute; however, the Seventh Circuit’s definition is founded on the premise that the statute is intended to cast out noncitizen immigrants and punish those who conceal them rather than to shield a vulnerable population from abuses and exploitation.

In 1928, long before Congress passed the 1952 harboring statute, the Sixth Circuit defined harboring by the “natural meaning of the word”: “to clandestinely shelter, succor, and protect improperly admitted aliens.”<sup>127</sup> However, in 2006, when the U.S. District Court for the Eastern District of Kentucky revisited the definition of “harbor,” it stated that it was bound by the 1928 definition and was “not at liberty to ignore *Susnjar*.”<sup>128</sup>

According to the Ninth Circuit, harboring is conduct that “afford[s] shelter to” undocumented individuals.<sup>129</sup> The court notes that the “statute allows those who exploit [undocumented individuals’] labor to escape punishment while penalizing persons who, in some instances, may be acting in a neighborly and humane fashion.”<sup>130</sup> The court goes on to pass the buck to Congress by stating, “it is the kind of unfairness which it [sic] is for Congress, not the courts, to cure.”<sup>131</sup> The Ninth Circuit raised the flag for Congress in 1976. However, nearly forty-five years have passed, and we are no closer to receiving guidance or protection from the legislative branch.

---

124. *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012) (citing *United States v. Ye*, 588 F.3d 411, 416 (7th Cir. 2009)).

125. *Id.*

126. *Id.*

127. *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928).

128. *United States v. Belevin-Ramales*, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006).

129. *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976).

130. *Id.*

131. *Id.*

In another more recent Ninth Circuit case involving the harboring statute, the court held that a jury instruction was proper where it stated that the jury must find that a defendant acted with “the purpose of avoiding [the foreign nationals’] detection by immigration authorities.”<sup>132</sup> However, the court did not hold that jury instructions generally must include this element of “purpose.” It also did not hold that the definition of harboring must include this purpose element.<sup>133</sup> Notably, in the widely publicized Arizona case against humanitarian aid worker Dr. Scott Warren, the jury instructions defined harboring simply as “to provide shelter to.”<sup>134</sup>

The variance in the ways the circuits discuss and define “harboring” emphasizes the lack of clarity that Congress left when it passed the harboring statute. At least one court has understood that the statute could unfairly punish good Samaritans;<sup>135</sup> however, the court also understood and acknowledged that Congress is ultimately responsible for addressing the injustice.

The judicial branch has wrestled with the question of what constitutes harboring an undocumented individual, but we are no closer to knowing what conduct constitutes a federal crime. Unfortunately, we cannot rely on the judiciary to provide protections against the weaponized use of the harboring statute. The burden and responsibility rest on Congress to finally address the devastating effects of a statute left unsettled.

#### IV. THE WEAPONIZATION OF THE HARBORING STATUTE

Under the Trump Administration, more and more people have been prosecuted or threatened with prosecution under the harboring statute.<sup>136</sup> The government has used this statute to: (1) harass and prosecute nonprofit organizations and good Samaritans who offer assistance to immigrants; (2) coerce immigrants and their families and friends into complying with the government’s demands; (3) strip DACAmented individuals of their deferred action status; and (4) initiate deportation proceedings.

The religion-affiliated nonprofit organization No More Deaths has drawn the government’s ire in recent years. The mission of No More

---

132. *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004) (finding that the jury instruction was proper because it contained the necessary mens rea element of “knowingly”).

133. *Id.* at 965.

134. Closing Jury Instructions at 17, *United States v. Warren*, No. 4:18-CR-00223, 2019 WL 6271563 (D. Ariz. Nov. 22, 2019) [hereinafter Closing Jury Instructions].

135. *See You*, 382 F.3d 958.

136. *See infra* notes 138–206.

Deaths is to “end death and suffering in the Mexico-US borderlands.”<sup>137</sup> Some of their work includes leaving gallon-jugs of water and canned food along the U.S.-Mexico border,<sup>138</sup> and providing immediate medical assistance to anyone they encounter who is in need of aid.<sup>139</sup> No More Deaths volunteers “search for migrants (both alive and deceased), render emergency aid, and place supplies, primarily food and water, for use by distressed migrants.”<sup>140</sup>

Dr. Scott Warren, a No More Deaths volunteer, was arrested and federally charged in 2017 with “operating a motor vehicle in a wilderness area” and “abandonment of property” for dropping water and canned food along the border.<sup>141</sup> As a volunteer with this organization, Dr. Warren’s goal is to prevent the deaths of those who are traversing the dangerous desert terrain along the border; the group’s work also includes searching for missing persons and identifying the bodies of those who have died along the border.<sup>142</sup> Dr. Warren has “participated in the discovery and recovery of some 16 people who have died in the desert.”<sup>143</sup> After a bench trial, Dr. Warren was found guilty of operating a motor vehicle in a

---

137. *About Us*, NO MORE DEATHS, <https://nomoredeaths.org/about-no-more-deaths/> [<https://perma.cc/7RXB-S3GT>].

138. U.S. Customs and Border Patrol (CBP) officials routinely vandalize, destroy, and remove the water, canned food, and other aid left in the desert for migrants in need. Video footage shows CBP officials laughing as they dump out water left by humanitarian aid volunteers. *Footage of Border Patrol Vandalism of Humanitarian Aid, 2010–2017*, NO MORE DEATHS: ABUSE DOCUMENTATION (Jan. 17, 2018), <https://nomoredeaths.org/en/type/video/> [<https://perma.cc/J7MD-NZCQ>].

139. *Id.*

140. Motion to Dismiss Charges Pursuant to Religious Freedom Restoration Act at 3, *United States v. Warren*, No. 4:17-MJ-00341, 2018 WL 6809430 (D. Ariz. Nov. 21, 2019) [hereinafter Motion to Dismiss]. In 2017, the U.S. government criminally charged four volunteers for leaving water jugs, canned beans, and other aid along the U.S.-Mexico border where the bodies of deceased migrants are frequently found; these humanitarian aid workers were subsequently convicted. Kristine Phillips, *They Left Food and Water for Migrants in the Desert. Now They Might Go to Prison*, WASH. POST (Jan. 20, 2019), <https://www.washingtonpost.com/nation/2019/01/20/they-left-food-water-migrants-desert-now-they-might-go-prison/> [<https://perma.cc/YG3K-3HCH>]; Joel Rose, *‘No More Deaths’ Volunteers Face Possible Jail Time For Aiding Migrants*, NPR (Feb. 28, 2019), <https://www.npr.org/2019/02/28/699010462/no-more-deaths-volunteers-face-possible-prison-time-for-aiding-migrants> [<https://perma.cc/PW63-HS4Z>] (“Magistrate Judge Bernardo Velasco found them guilty of abandonment of property and of entering the refuge without a permit.”). When one of the volunteers was asked why she did not apply for a permit to enter that portion of desert, she responded, “[W]e did not agree with the clause that indicated that one could not leave food and water and other supplies in the desert because, to us, that infringed on the humanitarian aid work that we were providing that is necessary.” Ivette Feliciano & Zachary Green, *Migrant Aid Workers Face Arrests and Prosecutions*, PBS NEWS HOUR (Nov. 10, 2019), <https://www.pbs.org/newshour/show/migrant-aid-workers-face-arrests-and-prosecutions> [<https://perma.cc/N243-X5C5>].

141. Information, *United States v. Warren*, No. 4:17-MJ-00341, 2018 WL 6809430 (D. Ariz. Nov. 21, 2019).

142. Motion to Dismiss, *supra* note 140, at 2.

143. *Id.*

wilderness area and was acquitted of abandoning personal property.<sup>144</sup> The government, seeking to catch Dr. Warren in the act of assisting recent arrivals, continued their surveillance of him and No More Deaths.

The federal government, in 2018, arrested and charged Dr. Warren under the harboring statute for allegedly “harboring” two undocumented immigrants.<sup>145</sup> On or about January 17, 2018, officers witnessed Dr. Warren speak to two individuals whom the government believed to be in the U.S. without proper legal documentation.<sup>146</sup> These two individuals are named as “material witnesses” in the government’s complaint against Dr. Warren; they were offered immunity from prosecution for illegal entry in exchange for their testimony against Dr. Warren.<sup>147</sup> The complaint states that these two witnesses conducted an online search for the best ways to cross the border and found the address to “the barn,” a building located along the U.S.-Mexico border and owned by No More Deaths.<sup>148</sup> They found that “the barn” was a place they could get water and food after crossing the border.<sup>149</sup> The witnesses stated that Dr. Warren gave them beds, clean clothes, and food and water for three days.<sup>150</sup>

The government charged Dr. Warren with multiple counts of harboring under 8 U.S.C. § 1324.<sup>151</sup> After a seven-day trial and a three-day jury deliberation, the jury was unable to come to a consensus regarding Dr. Warren’s guilt, and the judge declared a mistrial.<sup>152</sup> The government refiled charges against Dr. Warren and, again, sought to federally prosecute him for two counts of harboring and one count of transporting an undocumented person.<sup>153</sup> The jury unanimously found Dr. Warren not

---

144. United States v. Warren, No. 4:17-MJ-00341, 2018 WL 6809430 (D. Ariz. Nov. 21, 2019).

145. Complaint, United States v. Warren, No. 4:18-CR-00223, 2018 WL 5257807 (D. Ariz. Nov. 22, 2019) [hereinafter Warren Complaint].

146. *Id.*

147. Closing Jury Instructions, *supra* note 134 (the judge directed the jury to examine the witnesses’ testimony with “greater caution” because they received immunity from federal prosecution in exchange for their testimony).

148. Warren Complaint, *supra* note 145.

149. *Id.*

150. *Id.*

151. *Id.*

152. Curt Prendergast, *Hung Jury Split 8-4 on Charges Against Border-Aid Worker Scott Warren*, ARIZ. DAILY STAR (June 11, 2019), [https://tucson.com/news/local/hung-jury-split-on-charges-against-border-aid/article\\_b8b99c57-9203-5ca3-ae3b-07fc52c5cfd7.html](https://tucson.com/news/local/hung-jury-split-on-charges-against-border-aid/article_b8b99c57-9203-5ca3-ae3b-07fc52c5cfd7.html) [<https://perma.cc/4B2P-EKCG>] (Dr. Scott testified that he called a doctor and was advised that these two individuals should stay off their feet and drink water).

153. Bobby Allyn, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NPR (Nov. 21, 2019), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona> [<https://perma.cc/Q7T3-KT5X>]; Teo Armus, *After Helping Migrants in the Arizona Desert, an Activist was Charged with a Felony. Now, He’s Been Acquitted*, WASH. POST (Nov. 21, 2019), <https://www.washingtonpost.com/nation/2019/11/21/>

guilty of all three charges.<sup>154</sup> Michael Bailey, the U.S. attorney for Arizona, told the Associated Press that the government would continue to prosecute anyone who harbors or smuggles migrants: “We won’t distinguish between whether somebody is trafficking or harboring for money, or whether they’re doing it out of, you know, what I would say a misguided sense of social justice or belief in open borders or whatever.”<sup>155</sup> What Arizona’s U.S. attorney describes as a “misguided sense of social justice” is more accurately described as a mission to save lives. The immigration status of those individuals does not make them any less worthy of basic humanitarian aid.

Dr. Warren published a response to the government’s pursuit of harboring charges against him where he warned of the very issue this Note tackles. He wrote:

My case in particular may set a dangerous precedent, as the government expands its definitions of “transportation” and “harboring.” . . . Now, the law may be applied to not only humanitarian aid workers *but also to the millions of mixed-status families in the United States*. Take, for instance, a family in which one member is undocumented and another member, who is a citizen, is buying the groceries and paying the rent. Would the government call that harboring? If this family were driving to a picnic in the park, would the government call that illegal transportation? Though this possibility would have seemed far-fetched a few years ago, it has become frighteningly real.<sup>156</sup>

The weaponization of the harboring statute is not limited to cases in which the government is able to successfully bring criminal charges

---

arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/ [https://perma.cc/54UM-9B5K].

154. Verdict, *United States v. Warren*, 2019 WL 9098533, 2019 WL 6271566 (D. Ariz. Nov. 20, 2019) (No. 4:18-cr-00223). Notably, a human rights official with the United Nations called for the charges against Dr. Warren to be dropped, stating that “Arizona has some of the border’s deadliest migrant corridors, accounting for over a third of the more than 7,000 border deaths recorded over the last two decades.” Miriam Jordan, *An Arizona Teacher Helped Migrants. Jurors Couldn’t Decide if It was a Crime*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/scott-warren-arizona-deaths.html> [https://perma.cc/AD6T-FELT]. The official further describes how “[t]emperatures in the Sonoran desert can reach 120 degrees in summer and fall below freezing in winter.” Jordan, *supra*.

155. Armus, *supra* note 153.

156. Scott Warren, *I Gave Water to Migrants Crossing the Arizona Desert. They Charged Me with a Felony*, WASH. POST (May 28, 2019) (emphasis added), <https://www.washingtonpost.com/outlook/2019/05/28/i-gave-water-migrants-crossing-arizona-desert-they-charged-me-with-felony/> [https://perma.cc/FBU3-S4SH]. The U.S. government’s prosecution of humanitarian aid workers at the border, in general, is “an expansion of the interpretation of what it means to harbor.” Matalon, *supra* note 76.

against an individual, like in the case of Dr. Scott Warren. Government officials, like CBP officials, also threaten prosecution under the harboring statute in an effort to intimidate and coerce people into compliance.

Immigrant ally, Ana Adlerstein, was arrested by CBP agents at a U.S.-Mexico border port of entry for “alien smuggling.”<sup>157</sup> In reality, Ms. Adlerstein was accompanying an asylum seeker to an official U.S. port of entry to assist him in legally applying for asylum.<sup>158</sup> Here, we have an immigrant and his ally making a good-faith effort to follow the immigration laws of the U.S. by following all proper procedures, yet the immigrant is called an “illegal alien” and Ms. Adlerstein is accused and arrested for being an “illegal alien smuggler.”<sup>159</sup> How could this be? While the Trump Administration and its supporters allege they are pro-immigration so long as it is done *legally*, the truth is that the leader of this nation of immigrants does not want to accept any more immigrants. And any person who offers any sort of aid, support, guidance, or kernel of humanity to an immigrant will be subject to the full weight of the federal government and its draconian proclivities.

There are many anecdotal examples of U.S. citizens within the U.S. who have been threatened with prosecution under the harboring statute for helping someone who is undocumented: (1) a father and son, who left water at a shrine near the border, were circled by a government helicopter and ordered to take their water and leave or be charged with aiding and abetting;<sup>160</sup> (2) a Texas attorney, who saw three people on the side of the road in need of medical assistance, pulled over and drove them to the hospital was arrested under the harboring statute for “alien smuggling”;<sup>161</sup> (3) a young woman in South Texas, who offered a ride to a man and his son, was promptly pulled over by an officer demanding to know the immigration status of the two men; upon discovering the men were undocumented, the officer arrested the woman and called CBP to arrest the two men.<sup>162</sup>

---

157. Ana Adlerstein, Opinion, *I Was Arrested at the Mexican Border Because the War on Immigrants Is Also Targeting Their Allies*, BUZZFEED NEWS (June 6, 2019), <https://www.buzzfeednews.com/article/anaadlerstein/arrested-at-the-border-us-citizen> [https://perma.cc/3AEP-RGPA].

158. *Id.*

159. *Id.*

160. *Id.*

161. Matalon, *supra* note 76. By the time the young woman was able to receive medical attention, she was “on the brink of death,” according to her doctors. *Id.* The three siblings fled El Salvador and came to the U.S. seeking asylum. *Id.*

162. Debbie Nathan, *Good Samaritans Punished for Offering Lifesaving Help to Migrants*, THE APPEAL (Apr. 17, 2019), <https://theappeal.org/good-samaritans-punished-for-offering-lifesaving-help-to-migrants/> [https://perma.cc/6GZC-EVVM].

An especially noteworthy example is that of Bryan MacCormack. Bryan MacCormack is an activist in New York who captured an incident with ICE agents whom had threatened him with the harboring statute in an effort to coerce him to comply with their unlawful demands.<sup>163</sup> In March 2019, MacCormack was pulled over by ICE agents who claimed to have an arrest warrant for the two immigrant passengers in MacCormack's car.<sup>164</sup> The ICE agent demanded that MacCormack open his car door to allow them to effectuate the arrest warrant.<sup>165</sup> MacCormack, the Executive Director of the Columbia County Sanctuary Movement, had undergone know-your-rights trainings and was familiar with his constitutional rights.<sup>166</sup> Specifically, MacCormack knew that the DHS's Warrant for Arrest of Alien is an administrative arrest warrant and does not meet the basic legal requirements of the Fourth Amendment.<sup>167</sup> Therefore, DHS's administrative arrest warrants do not confer legal authority to enter constitutionally protected spaces without consent. MacCormack, understanding his constitutional rights and the lack of legal authority of the DHS warrant, refused to give consent to the ICE agents.<sup>168</sup> Throughout the encounter, the ICE agents repeatedly asserted that the administrative arrest warrant "is a warrant," suggesting that it did in fact confer the legal authority to effectuate the arrest of the two noncitizen passengers regardless of their physical location.<sup>169</sup> When MacCormack continued to refuse consent, the ICE agent threatened MacCormack with the harboring statute, saying, "Are you familiar with title 8 Section of US Code 1324? . . . You're aware of the statutes of transporting and harboring illegal aliens in the United States?"<sup>170</sup>

When asked about the incident, the DHS doubled down and stated, "Those who engage in such actions expose themselves to potential criminal violations, and run the risk of harming the very people they

---

163. Michael Brice-Saddler, *An Activist Used Legal Arguments to Stop an ICE Arrest. He Says Others Should do the Same*, WASH. POST (Mar. 29, 2019), <https://www.washingtonpost.com/nation/2019/03/29/an-activist-used-legal-argument-stop-an-ice-arrest-he-says-others-should-do-same/> [<https://perma.cc/YJN8-55JN>].

164. *Id.*

165. *Id.*

166. CNN News, *Immigration Activist Shut Down Attempted ICE Arrest*, YOUTUBE (Mar. 30, 2019), <https://www.youtube.com/watch?v=JNNfdh17MI> [<https://perma.cc/VW5U-FYH7>]; see also L.A. Immigration Lawyers, *Man Stops ICE Arrest with Know Your Rights Training*, YOUTUBE (Mar. 27, 2019), <https://www.youtube.com/watch?v=2zBlIfXQDu8> [<https://perma.cc/XQB2-W2GK>] (full video).

167. See *supra* note 2 and accompanying text.

168. *Id.*

169. *Id.*

170. *Id.*

purport to support.”<sup>171</sup> MacCormack’s interaction with DHS is not completely unique because the U.S. government uses this harboring statute to manipulate, threaten, coerce, and frighten people into complying with their demands regardless of the law and the U.S. Constitution.<sup>172</sup> MacCormack’s situation was only unique in that he had a deeper knowledge and understanding of his Fourth Amendment rights than a lay person. MacCormack warns that “those rights have power and exercising those rights could be the difference between our neighbors going home to their families at night or being thrust in to the deportation pipeline.”<sup>173</sup>

The above-described circumstances are examples of the U.S. government’s manipulation, intimidation, and coercion of U.S. citizens who have the protection of their permanent citizenship status. Of course, ICE, CBP, and other government officials are also known to use the harboring statute as a means to intimidate and initiate removal proceedings against noncitizens.

One example of how the U.S. government has weaponized the harboring statute against noncitizen immigrants is the case of Alberto Luciano Gonzalez Torres. Gonzalez Torres was lawfully present in the U.S. under the DACA program.<sup>174</sup> In May 2016, he was arrested by CBP officers for allegedly harboring undocumented immigrants.<sup>175</sup> The facts of the case are as follows: Gonzalez Torres was dog-sitting for a friend.<sup>176</sup> CBP agents arrived and asked to search the house to which Gonzalez Torres refused because the agents did not have a warrant and Gonzalez Torres was merely a temporary guest at his friend’s home.<sup>177</sup> An hour later, a man claiming to be the owner of the house asked Gonzalez Torres to step outside; Gonzalez Torres complied, and the CBP agents detained him for questions.<sup>178</sup> Gonzalez Torres told the CBP agents that he was lawfully present in the U.S. under the DACA program and showed proof of his DACA status.<sup>179</sup> The CBP agent, erroneously, told Gonzalez Torres that

---

171. Brice-Saddler, *supra* note 163.

172. *See infra* notes 174, 179, 207.

173. *See* CNN News, *supra* note 166.

174. Order Granting Motion for Preliminary Injunction at 4, *Torres v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-01840-JM, 2017 WL 4340385, at \*2 (S.D. Cal. Apr. 12, 2018) [hereinafter *Gonzalez Torres Injunction*].

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Complaint for Declaratory and Injunctive Relief at 18, *Torres v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-01840-JM, 2018 WL 1757668 (S.D. Cal. Apr. 12, 2018) [hereinafter *Gonzalez Torres Complaint*]. Gonzalez Torres’s case is currently at the Ninth Circuit. *Torres v. U.S. Dep’t of Homeland Sec.*, No. 18-56037 (9th Cir. Oct. 2, 2019). Because removal proceedings are not made public, it is unknown whether he has had his merits hearing, and if so, the outcome of that hearing.

he “was in the country illegally and his DACA status did not matter.”<sup>180</sup> Gonzalez Torres was arrested despite his proof of lawful presence.<sup>181</sup> The CBP officers cited the harboring statute as the reason for his arrest.<sup>182</sup> Gonzalez Torres was immediately detained and subject to two days of intense questioning by CBP officers.<sup>183</sup> During the course of the interrogation, the CBP officers threatened to detain and deport Gonzalez Torres’s family members.<sup>184</sup>

One day after his arrest, CBP issued Gonzalez Torres’s charging document, a Notice to Appear (NTA), which contained the basis for officially placing him in removal proceedings.<sup>185</sup> Gonzalez Torres’s sole charge on the NTA was that he was unlawfully present in the United States.<sup>186</sup> The NTA “made no other allegations of wrongdoing or unlawful behavior, let alone criminality.”<sup>187</sup> Upon issuance of the NTA, Gonzalez Torres’s lawful DACA status was automatically terminated, a termination that was not subject to any review or appeal.<sup>188</sup> The termination of his lawful status was “absolutely final.”<sup>189</sup> Notably, upon issuance of the NTA, Gonzalez Torres was officially placed in removal proceedings.<sup>190</sup>

The U.S. government thus used the harboring statute as the basis to arrest and detain a lawfully present immigrant.<sup>191</sup> Despite the fact that the CBP officers cited to the harboring statute as their reason for arresting Gonzalez Torres, the NTA alleged no criminal conduct and made no reference to harboring.<sup>192</sup> The only basis for issuing the NTA was Gonzalez Torres’s alleged unlawful presence, which was factually untrue.<sup>193</sup> As a result, his legal status under DACA was immediately and automatically terminated upon the issuance of the NTA.<sup>194</sup> The circularity of this process is disgustingly astounding.

The DHS exhibits a pattern of unlawfully arresting lawfully present immigrants under DACA, charging them with being illegally present in the

---

180. *Id.*

181. *Id.*

182. Gonzalez Torres Injunction, *supra* note 174, at \*2 (CBP found twelve undocumented immigrants in the attic of the house).

183. *Id.*

184. Gonzalez Torres Complaint, *supra* note 179.

185. *Id.*

186. *Id.* (under INA § 212, 8 U.S.C. § 1182(a)(6)(A)(i)).

187. *Id.*

188. Gonzalez Torres Injunction, *supra* note 174, at \*3.

189. *Id.*

190. *Id.*

191. *See id.* at \*6.

192. *Id.* at \*5.

193. *Id.*

194. *Id.* at \*3.

country, which in turn automatically terminates their lawful status. This unjust process subjects such immigrants to deportation. In the case of Daniel Ramirez Medina, the U.S. government allegedly went so far as to forge evidence in an effort to justify an unlawful arrest.<sup>195</sup>

Ramirez Medina, a young man living in Washington with his father and brother, was “[o]riginally contacted by United States Immigration and Customs Enforcement (“ICE”) agents by happenstance.”<sup>196</sup> Ramirez Medina’s father was arrested by ICE agents outside their apartment building.<sup>197</sup> After arresting Ramirez Medina’s father, the ICE agents entered his apartment, allegedly with consent.<sup>198</sup> Once inside the apartment, the ICE agents startled a sleeping Ramirez Medina awake and began asking him a series of questions about his place of birth and legal status.<sup>199</sup> Ramirez Medina told the agents that he was lawfully present in the U.S. under the DACA program and showed them proof of his DACA status.<sup>200</sup> Despite his lawful presence and without any indication of criminal activity, the ICE agents arrested and detained Ramirez Medina.<sup>201</sup>

In an effort to justify the arrest of Ramirez Medina, the DHS first accused Ramirez Medina of harboring an undocumented immigrant—his father, with whom he lived—and threatened to federally prosecute him under 8 U.S.C. § 1324.<sup>202</sup> Once it came time to fill out the paperwork, the DHS alleged that Ramirez Medina was arrested for being a suspected gang member.<sup>203</sup> These allegations were based on pure speculation, at best, and had absolutely no corroborating evidence to sustain them.<sup>204</sup> Chief Judge

---

195. Nina Shapiro, *Lawyers for Detained ‘Dreamer’ Claim Feds Altered Note to Boost Gang Accusation*, SEATTLE TIMES (Feb. 16, 2017), <https://www.seattletimes.com/seattle-news/lawyers-for-detained-dreamer-claim-government-misconduct/> [<https://perma.cc/FJH4-YPR5>].

196. *Ramirez Medina v. U.S. Dep’t Homeland Sec.*, 408 F. Supp. 3d 1224, 1226 (W.D. Wash. 2019).

197. *Id.*

198. *Id.* at 1230 n.42; *Ramirez Medina v. U.S. Dep’t Homeland Sec.*, 313 F. Supp. 3d 1237, 1240 n.2 (W.D. Wash. 2018).

199. *Ramirez Medina*, 408 F. Supp. 3d at 1230; *Ramirez Medina*, 313 F. Supp. 3d at 1240.

200. *Ramirez Medina*, 408 F. Supp. 3d at 1230; *Ramirez Medina*, 313 F. Supp. 3d at 1241.

201. *Ramirez Medina*, 408 F. Supp. 3d at 1230; *Ramirez Medina*, 313 F. Supp. 3d at 1241. “Other than his official legal status, ICE agents had no proof, probable cause, or reasonable suspicion of any criminal activity.” *Ramirez Medina*, 408 F. Supp. 3d at 1230.

202. Interview with Daniel Ramirez Medina (Mar. 3, 2017) (interview conducted by Author).

203. See *Ramirez Medina*, 313 F. Supp. 3d at 1241; *Ramirez Medina*, 408 F. Supp. 3d at 1230–31.

204. *Ramirez Medina*, 408 F. Supp. 3d at 1230–31 (“After arresting Mr. Ramirez and transporting him to a processing facility, ICE agents confirmed that Mr. Ramirez had no known criminal history and had twice been granted DACA status. Nevertheless, the agents chose to interrogate Mr. Ramirez and attributed additional meaning to his innocuous answers that he knew gang members in middle and high school and that they may have been Sureños. ICE agents also speculated that Mr. Ramirez’s innocuous tattoo of a nautical star and the words ‘La Paz-BCS,’ representing his birthplace, indicated gang affiliation. Without any corroborating evidence, ICE concluded that Mr.

Ricardo Martinez, presiding over Ramirez Medina's writ of habeas corpus, went so far as to call the government's actions "baseless" and wrote that the government's actions in this case, "examined in closer detail, . . . cultivate and nourish suspicion."<sup>205</sup> Chief Judge Martinez described the government's actions as a "vendetta" against Ramirez Medina and noted that the "Court does not endorse the Government's actions in this matter."<sup>206</sup> As a result of this fundamentally unjust and unlawful arrest, Ramirez Medina was stripped of his lawful status under DACA, detained for one month in the Northwest Detention Center, placed in removal proceedings, and ordered deported by an immigration judge in Seattle, Washington.<sup>207</sup> Medina Ramirez's appeal of his removal order is currently pending at the Ninth Circuit,<sup>208</sup> and his future in the U.S. remains uncertain.

#### V. THE HARBORING STATUTE: A SHIELD, NOT A SWORD

I do not propose complete abolishment of the harboring statute. In fact, under some circumstances the harboring statute protects noncitizen immigrants from abuses.<sup>209</sup> Like Representative Celler stated when discussing the purpose behind the harboring bill, the statute is intended to punish and deter those who exploit the noncitizen immigrant.<sup>210</sup> In Hayward, California, the owner of a construction company, Job Torres Hernandez, was convicted by a federal jury<sup>211</sup> of harboring undocumented individuals.<sup>212</sup> This man recruited Mexican nationals to come to the U.S.

---

Ramirez had gang affiliations, detained him in the Northwest Detention Center, and initiated removal proceedings.").

205. *Ramirez Medina*, 408 F. Supp. 3d at 122–27 ("Despite the questionable actions of the Government, the Court is constrained by the law and has no basis to intervene. The Court attributes the inequitable outcome here to our shared failure to address a flawed immigration system, an agency's misguided attempt to justify prior actions, an overzealous enforcement philosophy, and an unfortunate confluence of bad luck.").

206. *Id.* at 1226.

207. *Ramirez-Medina v. Barr*, No. 19-72850 (9th Cir. Nov. 12, 2019).

208. *Id.*

209. *See infra* notes 209–219.

210. *See supra* note 117.

211. Torres Hernandez was also ordered to pay \$919,739 in restitution for unpaid wages to thirteen workers. *Hayward Contractor Gets 8 Years in Prison for Forced Labor, Abusing Undocumented Workers*, CBS S.F. BAY AREA (June 26, 2019), <https://sanfrancisco.cbslocal.com/2019/06/26/hayward-contractor-job-torres-hernandez-prison-forced-labor-abusing-undocumented-workers/> [<https://perma.cc/U7NU-WQD8>].

212. *Hayward Construction Company Owner Convicted of Horrendous Abuse of Illegal Workers*, CBS S.F. BAY AREA (Mar. 19, 2019), <https://sanfrancisco.cbslocal.com/2019/03/19/illegal-immigration-hayward-construction-company-forced-labor-worker-abuse-ice/> [<https://perma.cc/965B-9FDW>].

to work for him and forced them to work for little or no pay.<sup>213</sup> Torres Hernandez held these immigrants in “squalid conditions.”<sup>214</sup> Dozens of immigrants were held in warehouses and garages with limited access to basic amenities like toilets and showers.<sup>215</sup> They were oftentimes locked inside these facilities, physically unable to leave.<sup>216</sup> The immigrants were sometimes forced to work for twenty-four consecutive hours at a time.<sup>217</sup> The victims testified that Torres Hernandez forced them to work under these horrible conditions under threat of violence to them and their families.<sup>218</sup> He warned them that if they tried to report him to legal authorities, he would “harm them physically, have associates in Mexico harm their family, and have them deported.”<sup>219</sup> However, despite the occasions where the harboring statute has functioned in its intended manner and put an end to the exploitation of noncitizens, recent history has shown that its unintended effects are far too devastating to let this statute continue to exist in its present state.

Notwithstanding my personal ideologies, the desire for our government to maintain and enforce laws that, in theory, keep our international border secure is not without merit. Therefore, this Note proposes that the harboring statute be rewritten in the following way to serve the purpose of maintaining the integrity of our international borders and enforcing our criminal codes while also restraining the government from possible abuses of power:

Any person who...(iii) knowing or in reckless disregard of the fact that ~~an alien~~ a foreign national 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~~ foreign national in any place, including any building or any means of transportation, with the intent of and in furtherance of assisting the foreign national in crossing the border clandestinely . . . shall be punished.

By narrowing the statute to punish persons who actively and knowingly assist in what I call “clandestine border crossings,” the statute maintains the integrity of its purpose—as interpreted by the judicial and executive branch—of deterring unlawful entry. The use of the phrase “clandestine” as opposed to “unlawful” is deliberate. Many immigrants

---

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

enter the U.S. through locations that are not designated ports of entry and are, therefore, technically unlawful entries. Importantly, for migrants who come to the U.S. in search of protection (i.e., asylum), a lawful entry is not a requirement and physical presence inside the U.S. is a requirement for applying for asylum. Those who are fleeing their home countries in search of protection are oftentimes unfamiliar with the exact locations of a port of entry and instead are focused on making it to U.S. soil. Because the government's purported goal of border security is more appropriately focused on those who intend to enter the country with the intent to remain undetected, I propose qualifying the unlawful crossing as "clandestine."<sup>220</sup>

Furthermore, Congress should pass a companion piece of legislation intended to serve as a victim protection statute to criminally punish those<sup>221</sup> who harbor undocumented immigrants to the immigrants' detriment or harm, like Mr. Torres Hernandez from California.<sup>222</sup> To convert the statute from a weapon to a shield, I propose the statute be written with the following as a starting point:

Any person who knowing or in reckless disregard of the fact that a foreign national 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 foreign national in any place, including any building or any means of transportation, *which knowingly results in physical, financial, or psychological harm to the foreign national* shall be punished.

The harboring statute, if treated as a shield, protects one of our most vulnerable populations—undocumented immigrants—from abuse and exploitation, and will ultimately benefit us all. Employers will be held criminally liable for taking advantage of the vulnerable position of undocumented workers. Good Samaritans and religious persons and organizations, like No More Deaths, can continue to provide aid to others without the fear of criminal sanction. Allies, friends, and families of undocumented immigrants will not be vulnerable to ICE and CBP officers' intimidation tactics or to federal criminal prosecution. And noncitizens will be protected from the federal government's abusive use of the harboring statute to initiate removal proceedings.

---

220. "Secret or concealed, esp. for illegal or unauthorized purposes." *Clandestine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

221. As Representative Francis Walter put it, the "professional gangster." Hearings, *supra* note 93, at 1373.

222. *Supra* notes 211–212.