NOTES

HEMMING IN "HARBORING": THE LIMITS OF LIABILITY UNDER 8 U.S.C. § 1324 AND STATE HARBORING STATUTES

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8 U.S.C. § 1324 prohibits, among other activities, harboring aliens who enter the United States without authorization. In the more than six decades since the law was passed, federal courts' understandings of what "harboring" means have varied. This Note argues that recent decisions in the Second and Seventh Circuits, both of which narrow the scope of liability for harboring, provide exemplary understandings of "harboring" and best comport with fundamental principles of criminal liability. This Note also examines the problems raised by state harboring statutes that track the language of 8 U.S.C. § 1324, arguing that after Arizona v. United States*, state statutes that present even the potential for conflict with federal enforcement must be preempted. Together, redefining "harboring" and preempting state harboring statutes will promote a coherent and just federal immigration regime.*

INTRODUCTION

In July of 2014, Syracuse, New York, Mayor Stephanie Miner got an email from a federal official asking for help.[1] The issue was the so-called "border crisis," a surge of more than 60,000 minors from Central America at the southern border of the United States. As the crisis reached its peak, President Obama asked Congress to fund a temporary solution: providing housing for the unaccompanied children in underused state facilities.[2] Federal officials identified Syracuse's 226,000-square-foot aban-

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1. Monica Hesse, Two Thousand Miles from the Border, Syracuse Finds Itself in Immigration Debate, Wash. Post (July 28, 2014), http://www.washingtonpost.com/national/thousands-of-miles-from-the-border-syracuse-finds-itself-in-immigration-debate/2014/07/28/96bf59f6-1603-11e4-9e3b-7f2f110c6265_story.html?hpid=z1 (on file with the *Columbia Law Review*). The email stated, "[T]he U.S. Department of Health and Human Services and General Services Administration is conducting an assessment of 2500 Grant Blvd. to determine whether it may be used as a facility for temporarily housing children who have come into the United States without an adult guardian." Id.

2. Alan Gomez, Obama Seeks $3.7B to Stem Tide of Kids Crossing Border, USA Today (July 9, 2014, 7:35 AM), http://www.usatoday.com/story/news/nation/2014/07/08/obama-border-immigration-congress-funding-request/12352771/ (on file with the *Columbia Law Review*).

doned convent as ideal for the task. Mayor Miner was ready to help. In her reply, she told the federal officials that Syracuse was prepared to provide a "safe and welcoming site" for housing the children while they awaited further immigration proceedings.[3]

Not all of Mayor Miner's constituents shared her eagerness to volunteer the unused space. A strong negative reaction from a number of constituents led her to hold an emergency town hall meeting.[4] Carrying posters covered with pictures of well-known gang members, some opponents voiced concerns that the youths would contribute to violence in the community. Others argued that Syracuse, at 2,000 miles from the southern border,[5] should not have to deal with the immigration problems more commonly faced by other states. After the town meeting, constituents remained divided on the issue. Some expressed their support or opposition with yard signs: either "Mi Casa Es Tu Casa" or "Send Aliens Back."[6] Reactions to the 2014 border crisis from the humanitarian, anti-immigration, and national security communities were similarly passionate and polarized.[7] In one of the more striking examples of opposition to providing aid, a right-wing media outlet published photos purporting to capture the poor conditions in the temporary facilities,[8] complete with

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3. Hesse, supra note 1.

4. Id.

5. Id.

6. Id.

7. See, e.g., Manny Alvarez, Opinion, Border Crisis: Latino Media Not Presenting a Fair and Balanced Debate on Immigration, FoxNews.com (July 23, 2014), http://www.foxnews.com/opinion/2014/07/23/border-crisis-latino-media-not-presenting-fair-and-balanced-debate-on/ (on file with the *Columbia Law Review*) (asserting Latino community has unfairly portrayed Americans as "heartless or indifferent" without acknowledging fault of Central American countries); Martha Bergmark, Opinion, Refuge-Seeking Kids Face Deportation Hearings Alone, CNN.com (Sept. 4, 2014, 7:35 AM), http://www.cnn.com/2014/09/04/opinion/bergmark-minors-central-america-lawyers/ (on file with the *Columbia Law Review*) (arguing from experience as civil legal aid attorney "more resources are needed" to ensure immigrant children receive humane treatment); Veronica Escobar, Opinion, Why the Border Crisis Is a Myth, N.Y. Times (July 25, 2014), http://www.nytimes.com/2014/07/26/opinion/why-the-border-crisis-is-a-myth.html (on file with the *Columbia Law Review*) (stating as Democrat that "crisis" inaptly describes situation at border, where localities are well equipped to assist refugees); Douglas Farah, Opinion, Five Myths About the Border Crisis, Wash. Post (Aug. 8, 2014), http://www.washingtonpost.com/opinions/five-myths-about-the-border-crisis/2014/08/08/1ec90bea-1ce3-11e4-ab7b-696c295ddfd1_story.html (on file with the *Columbia Law Review*) (drawing on knowledge gained as national security consultant to debunk arguments that certain foreign affairs and immigration policies precipitated border crisis). Additionally, the *New York Times*'s Editorial Board took a position on the matter, supporting responses to the crisis commonly associated with liberal policy. Editorial, The Border Crisis: Congress Must Act to Help Children Crossing the Border, N.Y. Times (July 12, 2014), http://www.nytimes.com/2014/07/13/opinion/sunday/congress-must-act-to-help-children-crossing-the-border.html?_r=0 (on file with the *Columbia Law Review*).

8. Brandon Darby, Leaked Images Reveal Children Warehoused in Crowded U.S. Cells, Border Patrol Overwhelmed, Breitbart (June 5, 2014), http://www.breitbart.com/

commentary suggesting that Obama's immigration policies are both weak on security and inhumane.[9]

Negative reactions to the Obama administration's approach to the crisis are not without support in the law. Opponents of providing shelter could argue that doing so would be inconsistent with a federal immigration statute: 8 U.S.C. § 1324(a)(1)(A)(iii).[10] Under the law as it stands in some circuits, a court could find that housing minors in a Syracuse facility constitutes the crime of harboring unauthorized aliens.[11] Other activities, not sanctioned by the federal government and thus more likely to result in prosecution, might also be considered criminal harboring. Consider a small-scale Mayor Miner, a "Good Samaritan" who invites several of the children to stay with her temporarily; or after the border crisis, an American citizen whose cousin enters the country illegally, then falls ill. May the American citizen provide her cousin a place to stay while she recuperates? This Note explores the scope of the federal immigration harboring statute, focusing on a critical question: What does it mean to "harbor" another person?

The crime of harboring unauthorized aliens is one of many building blocks in a comprehensive federal immigration scheme. Like much federal criminal legislation, the harboring statute uses language that leaves its precise scope open to interpretation.[12] Although the statute specifies that a defendant must "harbor" an unauthorized alien with knowledge or in reckless disregard of the unauthorized alien's illegal status, there is no definition of "harboring"—a word whose plain meaning may convey any number of acts and may require, implicitly, a mental state beyond the mens rea specified in the statute.[13] In federal civil schemes, Congress usually gives administrative agencies the power to promulgate regulations, which provide more specific guidance to the officials tasked with enforcing vague statutes. For the federal criminal

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Breitbart-Texas/2014/06/05/Leaked-Images-Reveal-Children-Warehoused-in-Crowded-US-Cells-Border-Patrol-Overwhelmed (on file with the *Columbia Law Review*).

9. Id. ("Thousands of illegal immigrants have overrun U.S. border security and their processing centers in Texas along the U.S./Mexico border . . . . The photos illuminate the conditions of the U.S. Border Patrol's processing centers . . . .").

10. 8 U.S.C. § 1324(a)(1)(A)(iii) (2012) (prohibiting "conceal[ing], harbor[ing], or shield[ing] from detection . . . [an] alien"). The fact that the alleged harboring would occur with the permission of the federal government makes it unlikely that these circumstances would lead to prosecution.

11. This Note refers to aliens who have entered or are present in the United States in violation of federal law as "unauthorized aliens," following the terminology of the federal statute and relevant federal jurisprudence. See, e.g., Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1012 n.1 (9th Cir. 2013) (electing to use term "unauthorized alien" because it is "more precise" than its alternatives).

12. See Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2136 (1998) ("Most legal academics . . . would probably . . . agree that there are too many criminal statutes on the books, and that those statutes are frequently too broad and too vague.").

13. § 1324(a)(1)(A)(iii).

enforcement regime, however, Congress did not create regulatory power, leaving both the executive and judicial branches with considerable discretion.[14] In the case of the harboring statute, the result of this flexibility has been a definition of "harboring" that varies across circuits and from decade to decade. The earliest decisions interpreting the statute adopted a narrow definition, but liability for the crime was expanded in the 1970s and 1980s.[15] Recently, *United States v. Costello*[16] in the Seventh Circuit and *United States v. Vargas-Cordon*[17] in the Second Circuit have embraced a definition of "harboring" that would significantly limit criminal liability under the statute.[18]

The question of what it means to harbor another person is made all the more important by the United States' current immigration landscape. In 2013, the Congressional Research Service found that the 40 million foreign-born residents of the United States constituted 12.9 percent of the population in 2010, the highest proportion since 1910.[19] The pool of people eligible to immigrate to the United States as legal permanent residents on the basis of employment or family ties typically exceeds the cap set by the Immigration and Nationality Act, and about 65 percent of those who gain legal permanent resident status do so on the basis of family ties to the United States.[20] In the past five years, prior removal from or illegal presence in the United States has been the single most common reason for disallowing immigrant entry.[21] Estimates place the number of unauthorized aliens in the United States at 11.5 million as of 2011.[22] Given the number of hopeful immigrants with family

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14. This circumstance is not unique to federal immigration crimes: There is no parallel regulatory scheme for federal criminal law. For an argument that the Department of Justice should promulgate rules and regulations like other administrative agencies, see Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 488–506 (1996). For further discussion of the advantages and limitations of such an approach, see Lynch, supra note 12, at 2143–45.

15. See infra Part I.B (describing past interpretations of harboring statute).

16. 666 F.3d 1040 (7th Cir. 2012).

17. 733 F.3d 366 (2d Cir. 2013).

18. See infra Part II.A–B (examining Seventh and Second Circuit standards for "harboring"). The Seventh Circuit and its litigants have embraced *Costello* in subsequent harboring cases. See, e.g., United States v. Campbell, 770 F.3d 556, 568–71 (7th Cir. 2014) ("In this case, the parties agree that we should look to *Costello* . . . ."). Nevertheless, the federal government has already attempted to dilute the *Costello* standard. See id. at 569–70 ("The Government says that '*Costello* creates an effect-based, rather than purpose or intent based text.'"). This Note provides further guidance on how best to understand the case. See infra Parts II.A, II.C–D (discussing ramifications and possible justifications).

19. Ruth Ellen Wasem, Cong. Research Serv., R42988, U.S. Immigration Policy: Chart Book of Key Trends 1, 4 (2013). In 1910, the proportion of foreign-born residents was 14.8 percent. Id. at 2.

20. Id. at 5–6.

21. Id. at 10. Indigence was previously the most common reason for denial of legal permanent resident status. Id.

22. Id. at 18.

connections in the United States and the rate at which unauthorized aliens reside within the nation's borders, the criminalization of immigration-related crimes such as harboring has significant ramifications for domestic and foreign policy.

The federal circuit courts are not the only entities that have affected the scope of liability for harboring. While the federal courts grappled with the meaning of the harboring statute, state legislatures blurred the line between state and federal immigration regimes by enacting immigration-related statutes in unprecedented numbers.[23] Federal officials challenged these state immigration laws, claiming they interfered with the U.S. government's ability to enforce immigration laws as it sees fit. In *Chamber of Commerce v. Whiting*[24] and *Arizona v. United States*,[25] the Supreme Court invalidated state laws that go beyond the limits of liability imposed by federal immigration law and even laws that simply mirror it.[26] Recent circuit court opinions addressing state harboring statutes have followed suit, finding state laws that criminalize harboring preempted.[27]

This Note argues that interpreting the federal harboring statute to limit liability for harboring unauthorized aliens is appropriate as a matter of both law and policy. As a matter of statutory interpretation, a narrow interpretation of the word "harboring" comports with the plain meaning of the word.[28] Furthermore, a narrow understanding of "harboring" would help ensure that behavior not clearly contemplated as criminal remains outside of the statute's reach. The concern that the statute may capture such behavior is made all the more serious by the large number of unauthorized aliens who have personal relationships with legal residents. The principle of fair warning also weighs against an expansive

23. See infra Part III (discussing this phenomenon and its ramifications).

24. 131 S. Ct. 1968 (2011).

25. 132 S. Ct. 2492 (2012).

26. Preemption doctrine is typically understood not to reach state laws that merely mirror federal law. Several legal scholars have argued that the Court's invalidation of such laws in *Arizona* demonstrates that the Court uses a more expansive preemption analysis in immigration cases than in other contexts. See infra Part III.C. Some commentators, however, would see the Court go even further. For an argument that preemption doctrine alone does not effectively protect federal sovereignty from state encroachment, see Margaret Hu, Reverse-Commandeering, 46 U.C. Davis L. Rev. 535, 614–27 (2012).

27. Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1024–26 (9th Cir. 2013); United States v. Alabama, 691 F.3d 1269, 1285 (11th Cir. 2012), cert. denied, 133 S. Ct. 2022 (2013). At least one other circuit has invalidated a state harboring statute on preemption grounds. See Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 539 (5th Cir. 2013) (holding city ordinance criminalizing harboring invalid on preemption grounds).

28. See infra Part II.C.1 (examining textual arguments for and against narrow interpretation of "harboring").

definition of the crime because of the uncertainty surrounding the meaning of "harboring."[29]

To achieve a coherent and just federal immigration system, however, it is not sufficient for the federal courts to embrace a narrow understanding of "harboring"; state immigration laws may also pose a barrier.[30] This Note argues that the Supreme Court's holding in *Arizona v. United States*,[31] which emphasized the importance of exclusive federal enforcement of laws in the immigration area, requires preemption of state harboring statutes—even those that specifically incorporate the federal interpretation of the statute.[32] Furthermore, exclusive federal control of immigration law is prudent because of the national scope of the issue and the equal protection[33] concerns that arise in matters involving alienage.[34]

Part I explores the background leading up to the recent contraction in liability for harboring and presents the history of the federal harboring statute to highlight the expansive potential of harboring liability. Part II describes how the recent circuit cases interpreting § 1324(a)(1)(A)(iii) limit liability for harboring and analyzes the arguments for and against such an interpretation. It then weighs these considerations, concluding that a narrow definition of "harboring" is preferable to the expansive definitions used in some circuits. Part III considers recent state laws that criminalize harboring and argues that preemption is an appropriate means of maintaining a coherent and just federal immigration regime. Taken together, these two moves limit the scope of liability for harboring in a complementary manner.

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29. See infra Part II.C.3 (exploring often-overlooked fair warning issues raised by varying judicial interpretations of single statute).

30. See infra Part III (exploring role of state harboring statutes in immigration scheme).

31. 132 S. Ct. 2492 (2012).

32. See infra Part III.B (describing preemption of such a statute).

33. See U.S. Const. amend. XIV, § 1 ("[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."). The Fourteenth Amendment's Equal Protection Clause has also been incorporated against the federal government. See Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (holding federal government's discrimination on basis of race violates Due Process Clause of Fifth Amendment). The federal harboring statute is, therefore, as susceptible to attack on equal protection grounds as any state statute. This Note will argue, however, that equal protection concerns related to improper enforcement are less likely to arise under an exclusive federal enforcement regime than under a mixed regime in which states may also enforce immigration-related criminal laws. See infra Part III.C.2.

34. See infra Part III.C (outlining reasons for preemption of state harboring statutes).

I. INTERPRETATIONS OF "HARBORING" PRIOR TO *UNITED STATES V. COSTELLO*[35] AND *UNITED STATES V. VARGAS-CORDON*[36]

Though located in the title of the United States Code dedicated to immigration law rather than the criminal code, 8 U.S.C. § 1324(a)(1)(A)(iii) is a criminal statute. It provides for punishment of anyone who

> knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation . . . .[37]

Like many federal criminal statutes, its broad terms leave it subject to interpretation.[38] A number of legal scholars understand such statutes as delegations of the authority to define the substantive contours of liability to the executive and judiciary branches.[39]

Over the past few decades, concerns about "overcriminalization" resulting from the proliferation of such statutes and their broad application by the executive and judicial branches have fueled discussion of the advantages and limitations of configuring the federal justice system in this way.[40] Efforts to cabin the reach of federal criminal law have focused on the judiciary's role.[41] According to some theorists, judicial

35. 666 F.3d 1040 (7th Cir. 2012).

36. 733 F.3d 366 (2d Cir. 2013).

37. 8 U.S.C. § 1324(a)(1)(A)(iii) (2012).

38. See, e.g., Lynch, supra note 12, at 2137 ("Mail fraud, money laundering, and a host of strict liability regulatory offenses are only the most notorious examples of statutes that are ill-defined, overbroad, or insufficiently concerned with culpability.").

39. See, e.g., Samuel W. Buell, The Upside of Overbreadth, 83 N.Y.U. L. Rev. 1491, 1519 (2008) ("When Congress enacts open-textured criminal prohibitions . . . , much substantive criminal law work is left for the courts."). Courts' reluctance to apply the rule of lenity, more frequently propounding definitive judicial interpretations even in highly ambiguous statutory interpretation cases, may further reflect congressional delegation of criminal lawmaking to the judiciary—and the judiciary's willing acceptance of the task. See infra Part II.C.3; see also Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 367 (criticizing use of rule of lenity as violation of nondelegation doctrine).

40. In the context of federal criminal law, "overcriminalization" may refer to (1) violations of the legality principle—the traditional notion that vagueness will render a criminal statute void because it does not provide fair warning; (2) abandonment of the traditional requirements for culpability—a criminal act and a criminal state of mind; or (3) federalism concerns due to overreach of the federal criminal law into areas traditionally under state police powers.

41. See, e.g., Steven D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. Cal. L. Rev. 643, 656 (1997) (describing how judiciary has expanded federal criminal law); Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 893 (2005) (detailing concerns about "puzzling practice of courts taking ambiguous criminal statutes and interpreting them expansively"). But see Lynch, supra note 12, at 2136–41 (noting features of criminal justice system that limit negative effects of expansive federal criminal law).

expansionism occurs where courts interpret statutes broadly without attention to limiting factors inherent in their terms, perhaps as a result of creative theories of liability propounded by prosecutors in cases where the facts point toward criminal liability of some variety. This Part describes the role the circuit courts played in defining the culpable activity reached by § 1324(a)(1)(A)(iii) prior to *Costello* and *Vargas-Cordon*, highlighting the significance of the Seventh and Second Circuit's recent efforts to narrow the definition of illegal harboring activity under the statute. Part I.A describes the statute and its key characteristics, as well as its legislative history. Part I.B summarizes the definitions of "harboring" used throughout the circuits prior to *Costello* and *Vargas-Cordon*.

A. *The Statute and its Legislative History: 8 U.S.C. § 1324(a)(1)(A)(iii)*

The penalty for harboring is a fine and/or imprisonment of not more than five years.[42] The maximum sentence is increased to ten years if the harboring was done "for the purpose of commercial advantage or private financial gain,"[43] to twenty years if serious bodily injury occurs or a life is placed "in jeopardy" during or in relation to the offense,[44] and to life imprisonment or capital punishment if death results from the offense.[45] The statute includes an exception for certain religious activities.[46]

The history of the statute is relatively straightforward. Congress first added the misdemeanor crime of "harboring" to the statutes that govern federal immigration in 1917 but did not specifically provide for a penalty. The Supreme Court declined to apply a penalty to defendants convicted of harboring without further congressional action.[47] In 1952, harboring became a felony; a mens rea of willfulness or knowledge was required, and employers were exempted.[48] The debates leading up to the 1952 amendment demonstrate that the harboring statute had different purposes in the eyes of different congressmen. Some pressed passage of the bill because they believed that otherwise, the border agreement

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42. § 1324(a)(1)(B)(ii).

43. § 1324(a)(1)(B)(i).

44. § 1324(a)(1)(B)(iii).

45. § 1324(a)(1)(B)(iv).

46. § 1324(a)(1)(C). Under the exemption, religious organizations may "encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer." Id. An alien may receive housing and basic living expenses and still qualify as a volunteer. Id.

47. United States v. Evans, 333 U.S. 483, 487–88 (1948) ("[The Government] argues that . . . because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we should plug the hole in the statute. To do this would be to go very far indeed . . . ."); see also 98 Cong. Rec. 1345 (1952) (statement of Rep. Walter) ("[T]he language of the act is deficient in that it does not spell out a punishment for harboring aliens who are illegally in the United States.").

48. Act of Mar. 12, 1851, Pub. L. No. 283, 66 Stat. 26 (amending 8 U.S.C. § 144).

between the United States and Mexico would not be renewed;[49] others stressed that the bill was merely intended to attach a penalty to harboring, given the Court's holding in *Evans*.[50] There seemed to be some unity, at least, in Congress's conception of the subject of "harboring." The Congressional Record shows that members generally described unauthorized aliens as Mexican male migrant workers who come to the United States for economic reasons while maintaining families in Mexico.[51] Although the level of concern for the well-being of these workers appears inconsistent across members,[52] at least one Congressman expressed the belief that the harboring statute targeted "the man who sits back in the interior of the United States . . . [and] exacts a tribute from people he is harboring and concealing under the threat of exposing them if they do not contribute to him."[53] This suggests that inhumane and exploitative employers were the statute's main concern.

In 1986, the mens rea requirement was reduced to "knowing or in reckless disregard," and employers were no longer exempted.[54] This more expansive form of the statute is the current version. Congress increased the penalties for harboring in 1994, 1996, and 2004, but throughout its history, there has never been a definition of "harboring"

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49. See 98 Cong. Rec. 1340–41 (1952) (statements of Rep. Lyle) ("[T]he President of the United States and the Mexican Government, so I am told by newspaper clippings, have said that unless we pass this bill . . . , there will be no further negotiations, there will be no further agreements whereby we may have the legal labor.").

50. See id. at 1345 (statement of Rep. Walter) ("It is a crime to harbor an alien in the United States, but there is no punishment for it. It is because of that situation that we feel this legislation is absolutely essential—not because of the situation in Texas.").

51. See id. at 1339 (statement of Rep. Lyle) (describing "[t]he Mexican peon, unable to earn his subsistence in his own country, and thereby compelled to sneak into the United States").

52. One way in which some members of Congress appear to show prejudice toward the Mexican migrant workers is through the use of the word "wetback." Throughout the record, some members of Congress refer to "wetbacks" and to the bill as a "wetback bill." E.g., id. at 1340 (statement of Rep. Lyle) (discussing "problem of the wetback"); see also, e.g., id. at 1345, 1347, 1351, 1353 (referring to "wetbacks" or "wetback bill"). Although the word "wetback" was commonly used at the time, it has always had pejorative connotations in that it promotes a stereotype: Mexican immigrants have wet backs (hence, "wetback") because they swim across the Rio Grande River to illegally enter the United States. See Marisa Gerber, For Latinos, a Spanish Word Loaded with Meaning, L.A. Times (Apr. 1, 2013), http://articles.latimes.com/2013/apr/01/local/la-me-latino-labels-20130402 (on file with the *Columbia Law Review*) (providing brief history of word "wetback"); Gregory Korte, Mexican Slur Has Long History in American Politics, USA Today (Mar. 29, 2013, 6:30 PM), http://www.usatoday.com/story/news/politics/2013/03/29/mexican-immigration-slur-history/2036329/ (on file with the *Columbia Law Review*) (noting view that term "wetback" has "never been acceptable").

53. 98 Cong. Rec. 1346 (1952) (statement of Rep. Walter).

54. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 112, § 274(a), 100 Stat. 3359, 3381–83 (codified as amended at 8 U.S.C. § 1324 (2012)).

in the statute.[55] The fact that Congress has only amended the statute a handful of times and never elaborated further upon the statute's substantive scope is telling: Even though the federal courts have split on the issue of what "harboring" means,[56] Congress has failed to provide clarity through legislative action.

B. *Judicial Interpretations of "Harboring" Before* Costello *and* Vargas-Cordon

Since the 1986 amendment of the statute, its terms include a clear mens rea requirement of "knowing or [being] in reckless disregard" of the unauthorized alien's immigration status.[57] What is less clear from the language of the statute is what exactly "harboring" means. Does the word itself imply an intent to evade detection?[58] This section surveys the circuit courts' interpretations of "harboring" from the statute's enactment up to *Costello* and *Vargas-Cordon*. Part I.B.1 outlines the earliest interpretations of the statute, noting their constrained approach to understanding the meaning of "harboring." Part I.B.2 explains how the scope of the statute was expanded in the 1970s and 1980s by judicial acceptance of a broad variety of acts as "harboring." Part I.B.3 describes the messy doctrine on interpreting "harboring" that exists between and within circuits.

1. *Early Understandings of "Harboring."* — Early circuit court opinions interpreting the statute held that the word "harbor" implied an intent to evade detection, narrowing the reach of the statute to defendants who acted with such intent. The first circuit court decision to apply the harboring statute, *Susnjar v. United States*,[59] remains good law in the Sixth Circuit.[60] In *Susnjar*, the defendants had contracted with Canadian nationals to transport them across the border and to the homes of their relatives in Detroit.[61] Affirming the defendants' convictions, the court defined "harboring" narrowly to mean "clandestinely shelter, succor, and protect improperly admitted aliens" and found that the evidence

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55. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, sec. 5401, § 274(a), 118 Stat. 3638, 3737; Act of Sept. 30, 1996, Pub. L. No. 104-208, secs. 203(a)–(d), § 274(a) 110 Stat. 3009, 3009-565 to -566; Act of Sept. 13, 1994, Pub. L. No. 103-322, sec. 60024, § 274(a), 108 Stat. 1796, 1981-82.

56. See infra Parts I.B, II.A–B (outlining circuit courts' divergent definitions of "harboring").

57. 8 U.S.C. § 1324(a)(1)(A)(iii).

58. A lay reader of the statute would see that it provides explicitly for a mens rea of knowledge or reckless disregard of the alien's unauthorized status. Nevertheless, if "harbor" is indeed found to convey a particular mental state, that mental state should bind interpretation with the same force as the mens rea requirements provided separately in the statute.

59. 27 F.2d 223 (6th Cir. 1928).

60. See United States v. Belevin-Ramales, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006) (holding *Susnjar*'s definition of harboring appropriate for jury instruction in spite of intervening amendments).

61. *Susnjar*, 27 F.2d at 224.

supported a finding of both the acts and intent required by the word "harbor."[62]

Two Second Circuit opinions[63] decided twelve years after *Susnjar* defined "harboring" in a similarly narrow sense. In the first, *United States v. Smith*, the court specifically cited *Susnjar*, stating that "harbor" "means only that the [unauthorized aliens] shall be sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens."[64] In the second, *United States v. Mack*, the holding turned solely on the mens rea explicitly required by the statute, but the court explained its reasoning with reference to the definition of the word "harboring." In *Mack* a brothel owner housing an unauthorized alien could not be convicted of criminal "harboring" because the owner had no knowledge of the person's status.[65] According to the court, knowledge of the alien's unauthorized status is a prerequisite to a finding of harboring because such knowledge is necessarily antecedent to an additional requirement implicit in the word "harbor": "surreptitious concealment." A defendant lacking knowledge of a person's unauthorized status cannot possibly satisfy this further requirement of the word "harbor": an intent to "abet" that person.[66] In this way, the court relied on the implicit meaning of "harbor" to limit liability for the offense.

2. Judicial Expansionism: A Broader Definition of "Harboring." — A series of cases in the late 1970s departed from the notion of "harboring" espoused by earlier courts, adopting a standard that expanded the variety of acts that could constitute harboring and rejecting interpretations resting on implied intent. The first such case, *United States v. Lopez*, affirmed the conviction of a defendant who rented housing to unauthorized aliens and arranged sham marriages to assist their continued stay in the United States.[67] The standard for "harboring" developed by the court was "conduct tending substantially to facilitate" an alien's remaining in the United States, with knowledge of the unauthorized status as required by the statute.[68] This language does not provide much detail as to the actus reus required, nor does it require the element of surreptitiousness suggested in the circuit's earlier decisions in *Smith* and *Mack*.[69]

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62. Id.

63. United States v. Mack, 112 F.2d 290 (2d Cir. 1940); United States v. Smith, 112 F.2d 83 (2d Cir. 1940).

64. *Smith*, 112 F.2d at 85 (citing *Susnjar*, 27 F.2d 223).

65. 112 F.2d at 291.

66. Id. ("[T]he statute is very plainly directed against those who abet evaders of the law against unlawful entry . . . .").

67. 521 F.2d 437, 439–42 (2d Cir. 1975).

68. Id. at 440–41.

69. See supra notes 63–66 and accompanying text (discussing *Smith* and *Mack*).

Shortly after *Lopez*, the Fifth Circuit followed the Second Circuit's lead, explicitly adopting the *Lopez* standard in *United States v. Cantu*.[70] In a similar move, the Ninth Circuit declined to adopt *Susnjar*'s definition of harboring as "clandestine sheltering" in *United States v. Acosta de Evans*.[71] The court understood harboring to mean "simple sheltering": sheltering without secrecy or intent to conceal. As further support for its interpretive move, the court noted that the Second Circuit in *Lopez* had recently disavowed its earlier interpretations in *Smith* and *Mack*.[72] The expansion of the definition of "harboring" by these high-volume circuit courts[73] criminalized even the public, charitable provision of shelter to an unauthorized alien. This expansion opened the door for convictions of participants in the sanctuary movement of the 1980s, during which religious actors provided asylum to refugees from civil conflicts in Central America in open opposition to United States immigration policy.[74]

This pattern across circuits of interpreting the harboring statute to encompass more activity provides an example of the judicial expansionism discussed in the introduction to this Part. It may prove useful to have a sense of the motivations behind this expansion. One potential impetus is a strategic use of prosecutorial discretion: The compelling facts of *Lopez* and *Acosta de Evans* might have led courts to expand their understandings of "harboring" as a way of bypassing the evidentiary problems related to proving the "clandestine" nature of the sheltering.[75] In *Lopez*, the defendant provided housing for unauthorized aliens, but there is no suggestion that he did so clandestinely. Nevertheless, his arranging of sham marriages strongly suggests that a finding of criminal liability would be just.[76] In *Acosta de Evans*, the court upheld a defen-

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70. 557 F.2d 1173, 1180 (5th Cir. 1977) ("We agree with the conclusion in *Lopez* . . . .").

71. 531 F.2d 428, 430 (9th Cir. 1976).

72. Id.

73. See Anna O. Law, The Immigration Battle in American Courts 146 (2010) (describing how rise in immigration cases since 2003 "had a disproportionate impact on the U.S. Courts of Appeals system, substantially affecting the Second and Ninth Circuits in particular").

74. See, e.g., Eisha Jain, Immigration Enforcement and Harboring Doctrine, 24 Geo. Immigr. L.J. 147, 171–74 (2010) (describing impact of broad definition of "harboring" on prosecution of sanctuary movement participants). In one such case, the circuit court affirmed the conviction of a reverend for "masterminding and running a modern-day underground railroad"—apparently without irony. United States v. Aguilar, 883 F.2d 662, 666 (9th Cir. 1989). Note that § 1324's religious exemption applies only to unauthorized aliens already in the United States who become volunteer ministers or missionaries.

75. See Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757, 763 (1999) (suggesting "creative judicial interpretations" expanding breadth of federal criminal law are "spurred on by prosecutors careful to choose the right cases to advance their agendas").

76. See United States v. Lopez, 521 F.2d 437, 441 (2d Cir. 1975) ("[H]is arrangement of sham marriage[s] . . . for the purpose of enabling the aliens to claim citizenship . . .

dant's harboring conviction for allowing a relative to stay in her home where the defendant was acquitted on other counts of providing shelter to unauthorized aliens.[77] These facts may have made these cases the "right" ones for prosecutors hoping to expand the scope of federal criminal harboring liability.[78]

The consequences attached to § 1324 crimes may further incentivize prosecutors to expand the scope of the statute. A 2008 U.S. Attorney's Manual describes some of the advantages of prosecuting defendants under § 1324.[79] For example, conviction of a legal permanent resident may lead to removal, regardless of the term of imprisonment.[80] Additionally, the federal sentencing guidelines provide for a higher base offense level than other statutes that could apply in similar circumstances, like the statute targeting visa and work permit fraud.[81] Factors such as these inform prosecutors' judgment as to which statute to use as the basis of criminal liability where a particular defendant could be found guilty under a number of different statutes.

3. A Messy Doctrine Between—and Within—Circuits. — In the time since the expansive era of *Lopez*,[82] the definition of "harboring" has remained muddled across the circuits. *Acosta de Evans*[83] and *Cantu*[84] remain the law of the Ninth and Fifth Circuits, respectively, although the Ninth Circuit has since approved a jury instruction requiring proof that the defendant intended to prevent detection of the unauthorized alien.[85] One case in the Second Circuit, *United States v. Kim*,[86] suggested a shift away from expansive liability by returning to the definition of "harboring" in *Susnjar*,[87] *Smith*,[88] and *Mack*[89] as sheltering with intent to evade

warrant[s] the inference that Lopez was engaged in providing shelter and other services in order to facilitate the continued unlawful presence of the aliens in the United States.").

77. 531 F.2d at 429.

78. Richman, supra note 75. The fact that prosecutorial choices may have been the catalyst for expansive judicial interpretations of a statute does not, of course, necessarily disqualify that interpretation from being valid.

79. Beth N. Gibson, Large Scale Immigration Benefit Fraud: Prosecution Tips and Resources, U.S. Att'ys' Bull. on Immigr., November 2008, at 16, available at http://www.justice.gov/sites/default/files/usao/legacy/2008/12/01/usab5606.pdf (on file with the *Columbia Law Review*).

80. Id. ("If removal of the defendant at the end of their imprisonment serves the government's interest, 8 U.S.C. § 1324 may be preferable."). Compare the federal fraud statute, which requires a term of imprisonment of one year or more for "aggravated felony" designation that justifies removal. 18 U.S.C. § 1546 (2012).

81. 18 U.S.C. § 1546; Gibson, supra note 79, at 17 ("The slightly higher base offense level [carried by § 1324] may weigh in favor of the Title 8 offense.").

82. 521 F.2d 437 (2d Cir. 1975).

83. 531 F.2d 428 (9th Cir. 1976).

84. 557 F.2d 1173 (5th Cir. 1977).

85. United States v. You, 382 F.3d 958, 966 (9th Cir. 2004).

86. 193 F.3d 567 (2d Cir. 1999).

87. 27 F.2d 223 (6th Cir. 1928).

88. 112 F.2d 83 (2d Cir. 1940).

detection. In that case, the Second Circuit retained *Lopez*'s "conduct tending substantially to facilitate" language, but resurrected the requirement that the defendant intend "to prevent government authorities from detecting [the] unlawful presence" of unauthorized aliens.[90] This interpretation of the federal harboring statute was the most recent precedent relevant to the Second Circuit's opinion in *Vargas-Cordon*.[91]

Other circuits continued to adhere to expansive understandings of "harboring." In *United States v. Ye*, the Seventh Circuit passed over the Second Circuit's "conduct tending substantially to facilitate" language in favor of a "use of any means" test.[92] The latter test creates a greater scope of liability than the former: It finds liability even where the conduct was so negligible or ineffective that it did not actually facilitate the unauthorized alien's remaining in the country.[93] The case's holding with respect to the crime of harboring is legal dicta; the issue addressed in the case was the meaning of "shield from detection," a companion crime of harboring located in the same section of the statute.[94] Nevertheless, the court explicitly applied the same reasoning to harboring, suggesting an even more expansive notion of the acts that constitute criminal harboring than the *Lopez* standard. Furthermore, the *Ye* court stated that it was not passing judgment on the jury instructions used by the district court, which contained language that would suggest that liability for harboring requires intent, not mere knowledge.[95] Its mention of this detail suggests that it would not have required the instruction.

The Seventh Circuit in *Costello* and the Second Circuit in *Vargas-Cordon* found the law in this state of uncertainty as to whether "harboring" requires that one act with intent to prevent detection.[96] The doctrine defining liability for criminal harboring remained messy across circuits, and even within them, due to oscillations between narrow interpretations that required acting with knowledge of the alien's unauthor-

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89. 112 F.2d 290 (2d Cir. 1940).

90. *Kim*, 193 F.3d at 574. The court did not mention that it departed from *Lopez* by reinstating the intent requirement.

91. The Third Circuit has also followed the *Kim* court's definition of "harboring." See United States v. Ozcelik, 527 F.3d 88, 99 (3d Cir. 2008) (citing *Kim*, 193 F.3d at 575, to "illustra[te] the type of conduct that falls within the statute").

92. 588 F.3d 411, 415 (7th Cir. 2009) (internal quotation marks omitted).

93. See id. at 415–16 ("To support his position, [defendant] . . . argues that § 1324(a)(1)(A)(iii) only proscribes conduct 'tending substantially to facilitate an alien's "remaining in the United States illegally."' We disagree. The 'use of any means' language [adopted by this court] is not vague . . . ." (citation omitted)).

94. Id. at 414.

95. See id. at 417 n.6 ("The district court instructed the jury that . . . it had to find [Ye] ['] *intend[ed] to prevent government authorities from detecting the presence of such alien*.' . . . Neither party challenged this instruction, so we do not decide whether the italicized portion is an accurate statement of the law." (emphasis added by *Ye*)).

96. See infra Parts II.A–B (discussing *Costello* and *Vargas-Cordon*, respectively).

ized status and the intent to prevent detection and broad interpretations that do not contain the additional intent requirement.

II. SHRINKING LIABILITY FOR HARBORING: *COSTELLO* AND *VARGAS-CORDON*

Recent opinions in two circuits point to the end of expansive federal liability for harboring unauthorized aliens, interpreting "harboring" to narrow the statute's sweep.[97] In the Seventh and Second Circuits, the word "harboring" in § 1324(a)(1)(A)(iii) requires intent to evade detection by the authorities. Although the standards in *Costello* and *Vargas-Cordon* are not identical, both narrow the scope of liability by requiring similar acts and mental states for a harboring conviction. Part II.A discusses the holding in *Costello* and how it limits liability under the federal harboring statute. Part II.B considers *Vargas-Cordon*.

Given the disparate past interpretations of "harboring," the question raised by *Costello* and *Vargas-Cordon* is whether their limited definition of the term is merely a passing trend or a reflection of a more fundamental understanding of what "harboring" means, both textually and in today's immigration landscape. Part II.C analyzes possible legal and policy justifications for this move and arguments against it. Part II.D recommends a solution.

A. Costello: *A Plain Meaning Approach*

One characteristic common to the expansive standards developed in *Lopez*, *Acosta de Evans*, and *Ye* is an understanding of harboring that does not require an intent to evade detection. Writing for the Seventh Circuit in *Costello*, Judge Posner reversed the district court's conviction, making a strong argument for an understanding of "harboring" that includes a requirement of clandestine or secretive intent.

In *Costello*, the defendant was the girlfriend of a Mexican national who had been deported for drug-related crimes.[98] Upon illegally reentering the United States, the boyfriend called the defendant, who then picked him up from the train station and allowed him to stay at her home—where they had lived together previously—for about six months before he was arrested again on drug charges.[99] On appeal, the government relied on the Ninth Circuit's "simple sheltering" standard and the

97. United States v. Vargas-Cordon, 733 F.3d 366, 382 (2d Cir. 2013); United States v. Costello, 666 F.3d 1040, 1050 (7th Cir. 2012).

98. 666 F.3d at 1042.

99. Id. ("He returned to the United States without authorization, and . . . in March 2006 . . . the defendant picked him up at the Greyhound bus terminal in St. Louis and drove him to her home in Cahokia, the same home in which they had lived together during his previous sojourn in this country.").

dictionary to argue that Costello's actions were indeed "harboring" within the meaning of the statute.[100]

The court rejected the government's argument, along with the standards in practically every other circuit with precedent on the issue.[101] Declining to follow the dicta from its own circuit's opinion in *Ye*, which suggested a "use of any means" standard for harboring,[102] the court turned to Google to determine the appropriate meaning of "harboring."[103] The court agreed with the *Susnjar* and *Mack* courts,[104] finding that "harboring" contains an element of secrecy that "sheltering" does not.[105] After *Costello*, in order to convict a defendant for § 1324(a)(1)(A)(iii) harboring in the

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100. See id. at 1043, 1049 ("The government argues that 'to harbor' just means to house a person, a meaning that it claims to derive from dictionaries that were in print in 1952 or today . . . [and] directs us to judicial opinions such as *United States v. Acosta de Evans* . . . .").

101. See id. at 1049–50 (citing and rejecting standard in appellate cases from Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits).

102. Dicta is not always easily set aside. Following *Ye*, at least one commentator expressed concerns that its "use of any means" standard would proliferate. See generally Dolie Chacko, Note, Usage of the Substantial Means Standard Under 8 U.S.C. § 1324's Criminal Sanctions for Harboring, Shielding, and Concealing Illegal Aliens, 37 New Eng. J. on Crim. & Civ. Confinement 395, 396–97 (2011) (arguing "use of any means" standard will facilitate abuse by prosecutors).

103. The court provided a detailed summary of the results of its Google search:

> A Google search (conducted on December 13, 2011, rather than in 1952 or 1917, but the government implies by its reliance on current dictionaries that the word means the same today as on the date of the statute's enactment, an implication consistent with *Black's Law Dictionary*) of several terms in which the word "harboring" appears—a search based on the supposition that the number of hits per term is a rough index of the frequency of its use—reveals the following:
>
> "harboring fugitives": 50,800 hits
>
> "harboring enemies": 4,730 hits
>
> "harboring refugees": 4,820 hits
>
> "harboring victims": 114 hits
>
> "harboring flood victims": 0 hits
>
> "harboring victims of disasters": 0 hits
>
> "harboring victims of persecution": 0 hits
>
> "harboring guests": 184 hits
>
> "harboring friends": 256 hits (but some involve harboring Quakers—"Friends," viewed in colonial New England as dangerous heretics)
>
> "harboring Quakers": 3,870 hits
>
> "harboring Jews": 19,100 hits

Costello, 666 F.3d at 1044.

104. See id. at 1048 (citing *Susnjar* and *Mack* approvingly for their understandings of "harboring").

105. See id. at 1044 ("It is apparent from these [Google] results that 'harboring[]' . . . has a connotation—which 'sheltering,' and *a fortiori* 'giving a person a place to stay'—does not, of deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection.").

Seventh Circuit, the government must prove intent to evade detection by the authorities.

The *Costello* court did not end its analysis there, however. It also noted the unsuitability of the "substantial facilitation" standards in the Second and Third Circuits, even though they include proof of intent to evade detection, because of their failure to clearly define the acts that constitute "harboring."[106] The court offered what it considered to be a more complete understanding of "harboring": "providing . . . a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him."[107]

B. Vargas-Cordon: *A Robust "Substantial Facilitation" Standard*

Just a year later, the Second Circuit was asked to consider whether a jury instruction properly conveyed the standard for "harboring" where it required the jury to find "'that the defendant . . . afforded shelter to[] [the victim] *in a way intended to substantially facilit[ate] her remaining here illegally*.'"[108] In *Vargas-Cordon*, the "unlawfully present alien" was the defendant Vargas-Cordon's minor niece with whom he had a sexual relationship.[109] At her urging, Vargas-Cordon arranged for his niece to be brought into the country by a "coyote," or smuggler.[110] At the border, Vargas-Cordon's niece was apprehended by immigration authorities, who placed her in foster care in Virginia, six hours from Vargas-Cordon's home in New Jersey.[111] During that time, they kept in touch through telephone calls.[112] Despite knowing that his actions were unlawful,[113] Vargas-Cordon eventually drove to Virginia where he picked up his niece after she snuck out of her foster home.[114] He was convicted of transporting a minor for illegal sexual purposes, transporting an unlawfully present alien, and harboring an unlawfully present alien.[115]

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106. See id. at 1050 ("[The 'substantial facilitation' standard] strikes us as too vague to be a proper gloss on a criminal statute.").

107. See id. (stating its holding provides "better gloss" than standards previously announced by appellate courts).

108. United States v. Vargas-Cordon, 733 F.3d 366, 382 (2d Cir. 2013) (citation omitted).

109. Id. at 370 ("Vargas-Cordon is a thirty-seven-year-old citizen of Guatemala who resides in the United States. In 2008, while visiting family in Guatemala, Vargas-Cordon began a sexual relationship with his then fifteen-year-old niece . . . .").

110. See id. (noting Vargas-Cordon "initially refused," but eventually paid $6,000 to help his niece illegally enter the United States).

111. Id. at 371.

112. See id. ("[T]elephone records admitted at trial reflected a total of 189 calls.").

113. See id. ("Vargas-Cordon initially refused [to pick her up without authorization from her foster home], explaining to [his niece] that he would 'get into problems . . . with the police.'").

114. Id.

115. Id. at 370.

On appeal, the defendant urged the government to follow the *Costello* standard.[116] Although the court noted that there was no binding precedent in the Second Circuit,[117] it followed the standard set out in *Kim*—defining harboring as "conduct which is intended to facilitate an alien's remaining in the United States illegally and to prevent detection by the authorities of the alien's unlawful presence."[118] The court affirmed the conviction, even though the instruction did not specifically require the jury to find intent to evade detection, because the instruction nevertheless conveyed the element of intent required.[119]

Although the *Kim* standard does not articulate the same level of specificity as to the types of acts constituting harboring as the *Costello* standard, the two circuits appear to apply them in ways that lead to the same result: The Second Circuit's opinion in *Vargas-Cordon* distinguishes the facts of *Costello*, rather than its standard, suggesting that the different outcomes in the two cases are a matter of fact rather than the result of different interpretations of the law.[120]

C. *Shrinking Harboring Liability: Justifications and Counterarguments*

A consistent interpretation of "harboring" is clearly desirable. What is not immediately apparent, however, is whether a narrow definition of "harboring," as embraced by the Second and Seventh Circuits, or a more expansive definition, as adopted in the late 1970s,[121] should prevail. Determining whether the interpretation in *Costello* and *Vargas-Cordon* is justified requires analysis of the statutory language using canons of interpretation, as well as consideration of the principles underlying criminal law. This Part explores the justifications for and counterarguments to both approaches and concludes that arguments for the narrow definition are ultimately more convincing. Part II.C.1 analyzes arguments that focus on the statutory language. Part II.C.2 outlines how the principle of culpability bears on this debate. Part II.C.3 examines the principle of fair warning. Part II.D suggests a definition based on these considerations.

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116. Id. at 379–80 ("[Vargas-Cordon] argues we should follow the Seventh Circuit's recent decision . . . and conclude that to 'harbor' under § 1324 requires some element of preventing detection by the authorities.").

117. See id. ("We note first that there is no precedent binding us to a particular interpretation of 'harbors' under § 1324(a)(1)(A)(iii). Our case law has been inconsistent in describing the minimum conduct necessary to sustain a harboring conviction under § 1324.").

118. Id. at 382.

119. See id. at 382 n.10 ("[I]t would have preferable [sic] for the district court to explain that harboring requires acting with an intent to prevent an alien's detection . . . .").

120. See id. at 383 ("Vargas-Cordon's actions . . . distinguish his case from *Costello* . . . . [H]is sheltering of [his niece] substantially and successfully worked to help prevent her return to government-arranged foster care.").

121. See supra Part I.B.2 (discussing these approaches).

1. *The Statute's Plain Language.* — The late Judge Harold Leventhal is said to have noted that in statutory interpretation, using legislative history is like "'looking over a crowd and picking out your friends.'"[122] He might have been gratified by the minimal legislative history available to guide interpretations of "harboring" in § 1324. The same criticism can be made, however, about other doctrines of statutory interpretation: Even applying a textualist approach can lead to different definitions of "harboring." This section explores the implications of relevant canons of statutory interpretation for understanding "harboring." Although the question is a close one, the arguments for a narrow definition appear stronger.

The driving interpretive force behind the definitions of "harboring" in *Costello* and *Vargas-Cordon* is a plain meaning approach that emphasizes the "intent to evade detection" implicit in the word "harboring" itself.[123] Indeed, Judge Posner turned to Google for support for the definition he ultimately found persuasive.[124] For evidence of how people typically use the word "harboring," he searched a number of phrases using the word; "harboring fugitives," "harboring victims," and "harboring friends" are among those listed. "Harboring fugitives" generated 50,800 hits, while "harboring victims" returned only 114. Although both fugitives and victims could conceivably seek shelter, fugitives are more likely to seek shelter in hopes of evading the authorities than victims. The closer association of the word "harboring" with fugitives than with victims suggests that the word includes an intent to evade detection by the authorities that is typically absent when a person provides shelter to a victim.

Judge Posner also called upon the canon of noscitur a sociis[125] to support his interpretation, looking to the crimes collocated with "harboring" in § 1324(a)(1)(A)(iii): "concealing" and "shielding from detection." Noting that statutes often use words with overlapping meanings—the better to capture all criminal behavior—Judge Posner concluded "harboring" likely shares the sense of intent to evade detection conveyed by "conceal" and "shield from detection."[126] The dissent, however, used the same canon to come to the opposite conclusion, asserting that "harbor," "conceal," and "shield from detection" should

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122. Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983).

123. See supra Parts II.A–B (detailing holdings in *Costello* and *Vargas-Cordon*).

124. United States v. Costello, 666 F.3d 1040, 1044 (7th Cir. 2012) (listing results of Google-searching "harboring"); see also supra note 103 (same).

125. Noscitur a sociis is "[a] canon of construction holding that the meaning of an unclear word or phrase . . . should be determined by the words immediately surrounding it." Black's Law Dictionary 1224 (10th ed. 2014).

126. See *Costello*, 666 F.3d at 1048 ("Statutory redundancy is common, and also common as we've said is for a statute to string together words of prohibition that are almost synonyms, the better to plug potential loopholes.").

have "independent meanings."[127] This view seems rooted in the idea that statutes should not be redundant. But a comparison of "conceal" and "shield from detection" reveals that it cannot be correct that each collocated crime has an entirely independent meaning; to conceal something might be to shield it from detection, and vice versa. At the very least, it cannot be the case that "harbor" must *not* share the intent to evade detection conveyed by the other two acts.

Other federal statutes may provide evidence of what Congress believed "harboring" meant when it enacted the federal harboring statute. Congress appears to have associated "harboring" with fugitives in 18 U.S.C. § 1071, which criminalizes harboring fugitives from justice.[128] In contrast to the immigration harboring statute, the fugitive harboring statute explicitly requires that the defendant act "so as to prevent [the fugitive's] discovery and arrest."[129] The inclusion of this language may provide support for a narrow definition of "harboring," as it may simply reiterate what Congress already understands to be implicit in the word "harboring": an intent to prevent discovery of the harbored person. After all, federal statutes are not known for their consistency;[130] the fact that Congress made something explicit in one statute does not mean that it is not implicit in another.

On the other hand, there is significant support for an expansive definition of "harboring" that confines the elements of an offense to the words in the statute, even where common understandings of the offense suggest that it contains an additional, implicit element. In *United States v. Wells*,[131] the defendant lied on a loan application. The Court found that the statute did not require a "material" misrepresentation because the word "material"—which, critically, appears in similar statutes—did not appear in the statute in question.[132] This holding suggests that Congress must make a requirement explicit in order for courts to consider it part of an offense.[133] Opponents of a narrow definition of "harboring" could

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127. Id. at 1052 (Manion, J., dissenting).

128. 18 U.S.C. § 1071 (2012) ("Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, . . . shall be fined under this title or imprisoned not more than one year, or both.").

129. Id.

130. See Daniel Richman, Kate Stith & William Stuntz, Defining Federal Crimes 116 (2014) ("[M]embers of Congress write criminal statutes one by one, often failing to consider the relationships among them.").

131. 519 U.S. 482 (1997).

132. See id. at 490 ("Nowhere does [the statute] further say that a material fact must be the subject of the false statement or so much as mention materiality.").

133. The holding in *Wells* has been compared to the holding in *Brogan v. United States*, 522 U.S. 398 (1998), where the Court invalidated a line of circuit court decisions creating an exception to false statement liability under 18 U.S.C. § 1001. In both cases, the Court limited courts' ability to cabin liability by looking beyond the words of the statute. See Richman, Stith & Stuntz, supra note 130, at 115 (noting majority opinion in *Wells* "reads a

argue that Congress's inclusion of the "prevent discovery and arrest" language in the fugitive harboring statute means that it is specifically excluded from the immigration harboring statute.[134]

But this argument has a number of limitations. First, proponents of a narrow definition of harboring claim that the word itself contains an implicit requirement of intent to evade detection. The defendant in *Wells*, on the other hand, did not argue that the word "lying" had some inherent materiality requirement—such an argument seems unlikely to be successful. As Judge Posner's Google search revealed, "harboring" often connotes an intent to evade detection. Proponents of a narrow definition appear to have the better of the plain meaning argument.

2. *Culpability.* — One of the most fundamental principles of the criminal law is that it should punish culpable conduct—bad acts by persons with culpable mental states. One significant reason for this principle is obvious: The criminal law exists to maintain order through predictable schemes of punishment based on culpability. Differentiating between levels of culpability is conducive to meeting the criminal law's goals of deterrence and retribution. How that differentiation occurs may prove essential to meeting those goals, and judges may be responsible for drawing those lines when, as in the case of the harboring statute, open language allows for judicial interpretation. This section explores possible frameworks for determining whether to apply the more demanding level of culpability used in *Costello* and *Vargas-Cordon* to harboring cases.

One line of reasoning in the Supreme Court's jurisprudence suggests that the mental state required to commit a crime might bear some relationship to the nature of the offense. In *Staples v. United States*, the Court imported a mens rea requirement into a strict liability statute criminalizing possession of machine guns, arguing that "owning a gun is usually licit and blameless conduct" and therefore strict liability is inappropriate.[135] Although the harboring statute is distinct from the statute in *Staples* because it does not create a strict liability offense,[136] the reasoning in *Staples* may nevertheless support a narrow definition of "harboring." *Staples* stands for the idea that Congress should include some sort of culpability requirement in statutes criminalizing behavior that is not inherently "bad." Taking that reasoning one step further, one could argue that the less inherently "bad" the activity targeted by a criminal statute is, the higher the level of culpability should be. Judge

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good deal like Justice Scalia's majority opinion in *Brogan*); see also *Brogan*, 522 U.S. at 405–08 (holding Fifth Amendment does not protect right of those being questioned by law enforcement officials to deny wrongdoing if doing so would be false statement).

134. See supra notes 128–129 and accompanying text (introducing language of fugitive harboring statute).

135. 511 U.S. 600, 613, 619 (1994).

136. The statute explicitly requires knowledge or reckless disregard of the unauthorized alien's status. See 8 U.S.C. § 1324(a)(1)(A)(iii) (2012) (stating mens rea requirement).

Posner has endorsed this notion—that there should be an inverse relationship between culpability and the seriousness of the offense—in a case involving accomplice liability, requiring a higher level of culpability for aiding and abetting activities like prostitution and a lower level for crimes such as murder.[137]

Of course, unlike in *Staples*, Congress did specify a level of culpability in the harboring statute: a mens rea of knowledge or recklessness. But perhaps it did so with the understanding that "harboring" connotes a more inherently bad act than "simple sheltering." Furthermore, *Staples* indicates that courts may look beyond Congress's words when the principle of culpability has been compromised. Many would likely agree that providing someone a place to stay—perhaps even someone you know to be an unauthorized alien—is not among the most grievous acts contemplated by the criminal law. In fact, interactions with unauthorized aliens are likely very common in the United States.[138] Additionally, unauthorized aliens are not themselves subject to criminal penalties, suggesting Congress may view facilitation of their presence as less illicit than crimes with low mens rea thresholds.[139] Applying the narrow definition of "harboring," which recognizes the intent requirement implicit in the word, may best comport with this understanding of the principle of culpability.

3. *Fair Warning*. — Related to the argument in favor of an inverse relationship between mens rea and the seriousness of the offense are concerns about fair warning in the criminal law. The basis for these concerns is the Due Process Clause of the Constitution.[140] Just as it may be desirable to reserve punishment for minor offenses for actors with significant levels of culpability, it may also be desirable to punish only those actors who had notice of their activity's illegality. Although it is rare for courts to void statutes due to lack of notice, they may employ other interpretive moves to reduce fair warning concerns. This section examines fair warning jurisprudence as applicable to the harboring statute.

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137. See United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985) (differentiating between cases on basis of seriousness of crime and deterrent value of mens rea requirement). Although Judge Posner did not mention *Fountain* in his *Costello* opinion, its reasoning seems consistent, particularly given that harboring could be viewed as a crime of complicity.

138. See Jain, supra note 74, at 149–50 (2010) (arguing harboring statute "has come to be interpreted so as to cast doubt on the legality of a wide range of common and socially valuable interactions," including "domestic relationships"); see also supra notes 19–22 and accompanying text (detailing high percentage of unauthorized aliens and aliens with familial connections to U.S. citizens).

139. Material support to terrorists, for example, requires only knowledge that one's actions are contributing to terrorism. See 18 U.S.C. § 2339A(a) (2012).

140. U.S. Const. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . .").

The Supreme Court has articulated three doctrinal principles that seek to address fair warning concerns.[141] One requires the voiding of vague statutes.[142] The second doctrine prohibits courts from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[143] The third doctrine—the rule of lenity—requires that ambiguity in criminal statutes be resolved in favor of the defendant.[144]

Courts have been wary of voiding statutes passed by Congress on vagueness grounds, favoring instead a more rigorous form of statutory interpretation that provides protection for defendants against fair warning failures. In *Skilling v. United States*,[145] the Supreme Court endorsed the use of statutory interpretation to avoid invalidation on account of vagueness.[146] The defendant was charged under a statute that had been passed in response to the Court's prior invalidation of a judicial doctrine.[147] To avoid voiding the statute for vagueness, the Court looked to the history of the doctrine to narrow the conduct to which the statute was applicable.[148] If the harboring statute were considered vague enough to require more rigorous interpretation, *Susnjar*[149] and *Mack*[150] would stand out as the historical cases defining "harboring"; a narrow definition would preponderate.[151] Opponents of the narrow definition could argue that "harboring" has clear, expansive meaning, making rigorous statutory interpretation unnecessary. The divide in the circuit courts over its meaning, however, suggests that its meaning is not clear. As in *Skilling*, the precedent appears to favor a narrow understanding of the statute.

The second doctrinal line bars courts from construing statutes to include more conduct than one could reasonably conclude was previously within their scope.[152] Cross-jurisdictionally, the doctrine has limited applicability—one circuit is not required to follow another's

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141. See United States v. Lanier, 520 U.S. 259, 266 (1997) ("There are three related manifestations of the fair warning requirement.").

142. See id. (stating vagueness in criminal statutes bars application).

143. Id.

144. See id. (calling rule of lenity "junior version" of vagueness doctrine).

145. 561 U.S. 358 (2010).

146. Id. at 403 ("[The defendant] swims against our case law's current, which requires us, if we can, to construe, not condemn, Congress' enactments.").

147. See 18 U.S.C. § 1346 (2012) (defining "scheme or artifice to defraud" to include scheme to deprive of "honest services"); *Skilling*, 561 U.S. at 404–05 (describing history of honest services fraud statute).

148. *Skilling*, 561 U.S. at 406–10.

149. 27 F.2d 223 (6th Cir. 1928).

150. 112 F.2d 290 (2d Cir. 1940).

151. See supra notes 59–66 and accompanying text (analyzing application of narrow definitions in *Susnjar* and *Mack*).

152. See Trevor W. Morrison, Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes, 74 S. Cal. L. Rev. 455, 455–56 (2001) (describing doctrine).

interpretation of a federal statute. In the Second Circuit, however, where *Mack*'s narrow construction of "harboring" preceded *Lopez*'s expansive one, the doctrine would dictate that the earlier interpretation should prevail. As with the other two fair warning doctrines in discussion, however, the Supreme Court has limited the extent to which the third doctrine can dispose of a case against a given defendant. In *United States v. Rodgers*,[153] the Court held that a circuit split is sufficient to provide defendants with fair warning that their actions, though previously innocent in their circuit, might be deemed culpable at some point.[154]

The third doctrinal line, the rule of lenity, seems to provide the most support for a definition of "harboring" that requires the defendant to have intended to prevent detection of the unauthorized alien by the authorities. The rule of lenity requires resolving unclear questions of law in favor of the defendant.[155] In the case of the harboring statute, the narrow definition is without doubt more favorable to the defendant; the rule of lenity would require adopting that definition. This doctrine is used extraordinarily infrequently, leading some commentators to refer to it as the "so-called rule of lenity."[156] Nevertheless, the doctrine does provide substantial support for defining "harboring" as including a requirement of intent to evade detection.[157]

D. *Embracing the Recent Trend Toward Limiting Liability for Harboring*

This section presents a solution derived from the analysis in Part II.C, advising courts to use the *Costello* standard to define "harboring." Although there is some support for an expansive interpretation, *Costello*'s narrow definition best comports with the plain meaning of the statute and the culpability and fair warning principles that are fundamental to criminal law. Part II.D.1 explains why a narrow interpretation of "harboring" is preferable to more expansive definitions. Part II.D.2 explains why the *Costello* standard is preferable over the *Vargas-Cordon* standard.

1. *A Narrow Interpretation of "Harboring."* — This Note argues that the plain meaning of "harboring" contains an element of intent to evade detection, and thus that either the *Costello* or the *Vargas-Cordon* standard

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153. 466 U.S. 475 (1984).

154. Id. at 484 ("[E]ven if [defendant] could establish reliance upon the earlier . . . decision, [fair warning arguments] would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.").

155. See United States v. Lanier, 520 U.S. 259, 266 (defining rule of lenity as "resolving ambiguity in a criminal statute [so] as to apply it only to conduct clearly covered").

156. For a discussion of how and why the rule of lenity came to be called the "so-called rule of lenity," see Richman, Stith & Stuntz, supra note 130, at 117–19.

157. Judge Posner refers to the rule of lenity in support of his analysis in *Costello*. 666 F.3d 1040, 1048 (7th Cir. 2012).

is preferable to the standards announced in *Lopez*[158] and *Acosta de Evans*.[159] Although the statute could conceivably use the word "harboring" to mean "simple sheltering,"[160] without an associated sense of secrecy, that definition does not comport with common understandings of the word. The Google search results detailed in *Costello* provide compelling evidence of how most people understand "harbor."[161] Furthermore, the Court's holding in *Wells* does not bar the consideration of the implicit meaning of statutory terms;[162] in the case of "harboring," the additional intent element is not imported from the common law but drawn out from the statutory text itself. Finally, Congress's inclusion of an "intent to evade detection" requirement in the fugitive harboring statute is best interpreted as an explication of the implicit meaning of "harboring."[163]

Principles underlying the criminal law also militate in favor of adhering to the more demanding definition. First, a person who provides shelter to an unauthorized alien with the simple purpose of being humane—that is, without an intent to help the alien evade detection by immigration authorities—is not likely to possess criminal-level culpability. Consider Mayor Miner,[164] or someone who invites a homeless person to spend the night in her home on a freezing cold night, knowing that the person is an undocumented immigrant. Second, the confusion over the meaning of the statute implicates fair warning concerns. Though they may not be as pressing in the context of the harboring statute as in cases like *Skilling*,[165] fair warning considerations give weight to the already substantial support for a narrow interpretation.

One defense of overbroad federal laws is that prosecutors will use their discretion to "avoid bringing cases at the outer margin" of the sphere of liability created by an expansively interpreted statute.[166] Judge Posner's opinion in *Costello* suggests little faith in the likelihood that this discretion will prevent such cases from being brought before the

158. 521 F.2d 437, 440–41 (2d Cir. 1975).

159. 531 F.2d 428, 429–30 (9th Cir. 1976).

160. See id. at 430 ("Standard definitions of 'harbor' include both concealment and simple sheltering, although the latter appears to be the primary meaning.").

161. See supra note 124 and accompanying text (summarizing Judge Posner's Google search results).

162. See supra notes 131–133 and accompanying text (describing Court's holding in *Wells*).

163. 18 U.S.C. § 1071 (2012) (requiring acts of harboring be committed "so as to prevent . . . discovery and arrest").

164. See supra notes 1–6 and accompanying text (describing situation faced by Syracuse, New York, Mayor Stephanie Miner).

165. 561 U.S. 358 (2010).

166. United States v. Costello, 666 F.3d 1040, 1048 (7th Cir. 2012); see Lynch, supra note 12, at 2136–41 (noting institutional features of criminal justice system that limit negative effects of prosecutorial discretion).

courts.[167] Although institutional safeguards may alleviate some of the concerns associated with giving prosecutors leeway in their enforcement of federal statutes,[168] relying on their discretion is less than satisfying when there is an unstrained interpretation of the statute that could prevent prosecutors from even considering those marginal cases. After all, prosecutors' resourceful use of federal statutes may partly explain why courts expanded the definition of "harboring" in the first place.[169]

Additionally, the *Costello* standard is preferable to the *Vargas-Cordon* standard. As explained in Part II.C, both decisions represent a shift toward narrowing liability for criminal harboring under the federal harboring statute. Indeed, the Second Circuit's explicit reference to *Costello* in *Vargas-Cordon* suggests that the standards should in practice have the same legal effect.[170] In spite of their fundamental similarities, the standard in *Costello* is preferable because it goes beyond recognizing the intent requirement implicit in the word "harboring" to articulate specific activity that constitutes harboring: "providing . . . a safe haven, a refuge, a place to stay . . . ." This additional explanation of what "harboring" is provides meaningful direction for prosecutors and courts.[171]

III. A RESPONSE TO STATE HARBORING STATUTES: PREEMPTION

Adopting a narrow definition of "harboring" is a critical step for the federal courts to take. Even if the federal system applies that definition uniformly, however, there remains the problem of state statutes that track the federal harboring statute's language. If enforced to mean "simple sheltering" rather than sheltering with the intent to prevent detection by the authorities, these harboring statutes may capture behavior excluded from a narrowly construed federal statute. For the federal immigration regime to be just and coherent, it cannot compete with state statutes that may be interpreted and enforced differently.

Over the past ten years, states and localities have steadily increased their enactment and enforcement of laws creating liability for crimes related to illegal immigration.[172] These statutes have generated concerns

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167. See 666 F.3d at 1048 ("The government tells us not to worry: we judges can rely on prosecutors . . . .").

168. See Richman, supra note 75, at 810 ("There is . . . considerable evidence that legislators are well aware of how to constrain enforcer discretion and are willing to do so when they deem it appropriate.").

169. See supra notes 75–78 and accompanying text (noting potential for sophisticated use of prosecutorial discretion to expand scope of federal statutes).

170. See supra note 120 and accompanying text (describing *Vargas-Cordon* court's use of *Costello*).

171. See supra notes 106–107 and accompanying text (detailing *Costello*'s actus reus requirement).

172. See, e.g., Hu, supra note 26, at 542 ("An unprecedented historical movement is underway: a hostile takeover of federal immigration law and policy by state and local governments."); Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power

that state law is unconstitutionally encroaching upon an area of exclusive federal jurisdiction in violation of federalism principles.[173] Under the doctrine of preemption, grounded in the Constitution's Supremacy Clause,[174] federal statutes invalidate state laws covering the same ground.[175] Because immigration is an area of exclusive federal sovereignty, state laws encroaching on this area are subject to invalidation. Part III.A discusses the rise of state laws that criminalize immigration-related activities and the Supreme Court's opinions in *Whiting* and *Arizona*. Part III.B describes how two circuits have interpreted the Court's jurisprudence in the recent preemption cases to find state harboring statutes preempted, largely on the basis of potential enforcement conflicts. Part III.C describes the justifications and counterarguments for preempting state harboring statutes and concludes that courts should apply preemption doctrine to invalidate such statutes.

A. *A Precedent for Preemption in* Arizona

The rise of state immigration statutes[176] has generated a fierce public debate about the proper role of states and localities in the

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over Immigration, 86 N.C. L. Rev. 1557, 1559 (2008) ("Today, there is a veritable deluge of state and local legislation seeking to regulate noncitizens. In 2006, immigration was the subject of at least 540 bills . . . . The next year saw . . . more than 1,500 bills introduced in state legislatures . . . . This has become a national phenomenon."); Ken Belson & Jill P. Capuzzo, Towns Rethink Laws Against Illegal Immigrations, N.Y. Times (Sept. 26, 2007), http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?pagewanted=all&_r=0 (on file with the *Columbia Law Review*) ("In the past two years, more than 30 towns nationwide have enacted laws intended to address problems attributed to illegal immigration . . . , call[ing] for fines and even jail sentences for people who knowingly rented apartments to illegal immigrants or who gave them jobs."); Peter J. Spiro, Op-Ed, Let Arizona's Law Stand, N.Y. Times (Apr. 22, 2012), http://www.nytimes.com/2012/04/23/opinion/let-the-arizona-law-stand-then-wither.html (on file with the *Columbia Law Review*) ("Arizona is one of several states, including Alabama, Georgia, South Carolina and Indiana, that, frustrated by Congress's idling on immigration reform, have challenged federal authority by taking it upon themselves to devise draconian policies for undocumented immigrants.").

173. These concerns are undoubtedly grounded in traditional federalism, which creates distinct state and federal spheres. The term "reverse federalism" might be helpful to the reader more familiar with federalism as a limit on *federal* reach into *state* matters, as opposed to the converse.

174. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .").

175. For a detailed discussion of preemption doctrine in the context of state immigration statutes, see infra Part III.B.

176. A number of explanations for the rise of state immigration statutes have emerged. One popular theory asserts that changing demographics in certain parts of the country and a lack of federal attention to the resulting immigration-related concerns have led states to take matters into their own hands. See Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. Rev. 567, 594 (2008) ("[L]ocal communities are attempting to insulate themselves from demographic changes

decidedly national arena of immigration.[177] Recently, the Supreme Court took up the issue of whether state immigration laws are preempted by the federal scheme; the Court's decision in *Arizona v. United States*[178] may spell the end for a large cross-section of state legislation on immigration matters.[179] This section provides an overview of the Supreme Court's holdings with respect to preemption of state immigration laws.

The Supreme Court first addressed the preemption question raised by state immigration enforcement in 2011. In *Chamber of Commerce of the United States v. Whiting*, the Court held that state enforcement activities were not preempted because Congress had expressly delegated authority to local law enforcement.[180] The opinion asserted that the threshold for preemption of state statutes was high, making invalidation of other state immigration statutes uncertain.[181]

In *Arizona*, however, the Court invalidated state laws that expanded upon federal criminal immigration law *and* those that merely paralleled federal law.[182] At issue were four provisions of a state statute creating

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that feel overwhelming."). Others suggest that the federal expansion of criminal liability for immigration-related crimes has encouraged states to intervene, given their general police powers to enforce criminal law. See Stumpf, supra note 172, at 1565 ("Connecting immigration law with . . . domestic areas of law seems to invite states to regulate immigration concurrently with the federal government."). Still others have argued that political party strength is the strongest indicator of whether a locality will adopt immigration laws, with legislation increasing liability for immigration-related crimes more likely in Republican-heavy districts. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, Explaining the Rise of State and Local Immigration Laws 21 (Apr. 2012) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=pratheepan_gulasekaram (on file with the *Columbia Law Review*).

177. Compare Kris W. Kobach, Op-Ed, Why Arizona Drew a Line, N.Y. Times (Apr. 28, 2010), http://www.nytimes.com/2010/04/29/opinion/29kobach.html (on file with the *Columbia Law Review*) (arguing state laws "necessary" because executive has "shown it does not consider immigration laws to be a high priority"), with Editorial, Stopping Arizona, N.Y. Times (Apr. 29, 2010), http://www.nytimes.com/2010/04/30/opinion/30fri1.html (on file with the *Columbia Law Review*) ("[T]he federal government must react forcefully to the Arizona statute.").

178. 132 S. Ct. 2492 (2012).

179. Although commentators on both sides of the debate declared victory following *Arizona*, as a matter of doctrine, the Court's opinion quite clearly gives the federal government primacy in the regulation of immigration and its enforcement. For an incisive and pithy analysis of the case's holding and its implications, see David A. Martin, Reading *Arizona*, 98 Va. L. Rev. In Brief 41, 41 (2012) ("Both sides in our nation's ongoing immigration disputes are spinning the *Arizona v. United States* ruling as a victory . . . . It's the federal side, however, that has the better claim to success." (footnote omitted)).

180. 131 S. Ct. 1968, 1981 (2011) ("Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws.").

181. See id. at 1985 ("Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives' . . . ." (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment))).

182. See 132 S. Ct. at 2501–07 (providing reasoning for holdings).

liability for immigration-related crimes.[183] The Court identified three types of preemption: express preemption, in which Congress specifically precludes states from legislating in an area of federal sovereignty;[184] field preemption, where either the federal regulatory scheme is "'so pervasive . . . that Congress left no room for the States to supplement it'" or there is a "'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'";[185] and conflict preemption, where either "'compliance with both federal and state regulations is a physical impossibility'"[186] or state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[187] Given that there was no express preemption by Congress, the question was whether the state provisions were either field or conflict preempted. Using a combination of both field and conflict preemption, the Court held that even state regimes mirroring the federal law pose an unavoidable threat of enforcement that conflicts with the federal system and must therefore be preempted.[188]

The Court's reasoning on each of the provisions is instructive. It held that Section 3, which made willful failure to complete or carry alien registration a misdemeanor, was field preempted because the federal regulatory scheme "occupies [the] entire field" of alien registration.[189] In such cases, "even complementary state regulation is impermissible" because it could be implemented in a way that conflicts with the federal scheme or include different sanctions for the same activity.[190] Two other provisions were conflict preempted. Section 5(C), which imposed penalties on unauthorized aliens who seek employment, was held to be con-

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183. Id. at 2497–98.

184. Id. at 2500–01 ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.").

185. Id. at 2501 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

186. Id. (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

187. Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

188. The Court blends its field and conflict preemption analyses, suggesting a logical relationship between the two:

> Arizona contends that § 3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted.

Id. at 2502.

189. See id. ("The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a 'harmonious whole.'" (citation omitted)).

190. See id. at 2502–03 (comparing penalty schemes in federal and state harboring statutes to highlight significant differences).

flict preempted because the federal scheme penalizes only the employers of unauthorized aliens, not the aliens themselves.[191] The other preempted provision, Section 6, authorized state officers to arrest aliens without a warrant on suspicion of their having committed a removable offense.[192] The Court reasoned that the federal government must have discretion over when to arrest a person for removal—an uncommon practice—because of the national scope of immigration issues.[193] Furthermore, a federal statute expressly allowing state officers to "cooperate" with the federal government in removal proceedings did not cover the enforcement activities authorized under the state statute.[194] For these reasons, the provision was held to conflict with the federal scheme.

One provision was held not to be preempted: Section 2(B), requiring state officers to make a "reasonable attempt" to ascertain the immigration status of any person they detain and perform a status check through the federal system.[195] Noting that the statute contains several "limits" to promote implementation that would not conflict with the federal scheme, including a ban on considering race or national origin to determine status,[196] the Court nevertheless advised that preemption could occur in the future if the statute was construed in a way that created a conflict with federal enforcement.[197] For example, if the statute were construed to authorize detaining a person unlawfully or for the sole purpose of checking his status, it would conflict with federal law and therefore be preempted.[198]

The similarities between Section 2(B) and Section 6 are notable: Both involve state officials taking part in the enforcement of existing federal immigration practices. But Section 2(B) involves a mere status check, while Section 6 provides for arrest of suspected persons by state

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191. See id. at 2504 (noting federal harboring statute provides for some civil, but no criminal, penalties for alien employees).

192. Id. at 2505.

193. See id. at 2506–07 ("A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice.").

194. See id. at 2507 ("There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.").

195. Id. (quoting Ariz. Rev. Stat. Ann. § 11–1051(B) (2012)).

196. See id. at 2508 ("[O]fficers 'may not consider race, color or national origin . . . except [as] permitted by the United States [and] Arizona Constitution[s]' [and] . . . the provisions must be 'implemented in a manner consistent with federal law regulating immigration, protecting the civil rights . . . and respecting the privileges and immunities of United States citizens.'" (citing Ariz. Rev. Stat. Ann. § 11–1051(L).

197. See id. at 2507–09 (detailing interpretations and applications of statute that would result in preemption).

198. See id. at 2509 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns . . . . The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.").

actors. Section 2(B) can be characterized as requiring that state officers cooperate with federal authorities, but Section 6 requires state actors to take more drastic enforcement measures. This distinction suggests that the *Arizona* Court was concerned primarily with state legislation that threatens to expand the scope of liability for federal immigration crimes—not only through new definitions of criminal liability, but also through broader *enforcement* of existing federal policies.

B. *Applying* Arizona *to Preempt State Harboring Statutes:* United States v. Alabama[199] *and* Valle del Sol Inc. v. Whiting[200]

Though *Arizona* did not involve a state harboring statute, both of the circuits that have addressed state harboring statutes since *Arizona* have issued decisions preempting those statutes. Just a few months after *Arizona*, the Eleventh Circuit had the occasion to apply the case's holding to a state statutory provision criminalizing the harboring of unauthorized aliens and other related crimes also found in federal law.[201] Even though the state legislation included a provision specifically stating that it should be "interpreted consistent with 8 U.S.C. § 1324(a)(1)(A),"[202] the court found it preempted on both field and conflict preemption grounds.[203] Part of the basis for the conflict preemption holding was "substantive differences between the federal and state laws."[204] Conspiracy, for example, was a possible offense under the state statute.[205] Notably, however, the Eleventh Circuit's opinion emphasized the importance of federal executive discretion to enforce immigration law as it deems appropriate.[206]

In October 2013, the Ninth Circuit held an Arizona statute that criminalized harboring unauthorized aliens void for vagueness in *Valle del Sol*.[207] Critically, the court's analysis did not stop at its void for

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199. 691 F.3d 1269 (11th Cir. 2012).

200. 732 F.3d 1006 (9th Cir. 2013).

201. See Ala. Code § 31-13-13(a)(1) (LexisNexis Supp. 2013), invalidated by *Alabama*, 691 F.3d 1269 ("It shall be unlawful for a person to . . . [c]onceal, harbor, or shield from detection . . . an alien . . . if the person knows or recklessly disregards the fact that the alien has come to . . . the United States in violation of federal law.").

202. Id. This provision was added in May of 2012, two months before the *Alabama* decision was issued. See Act of May 18, 2012, No. 491, sec. 1, § 31-13-13, 2012 Ala. Laws 491, available at http://immigration.alabama.gov/docs/Immigration-AL-Law-2012.pdf (on file with the *Columbia Law Review*).

203. *Alabama*, 691 F.3d at 1287–88 ("[W]e . . . conclude that Alabama is prohibited from enacting concurrent state legislation in this field of federal concern.").

204. Id. at 1287.

205. Ala. Code § 31-13-13(a)(1) ("It shall be unlawful for a person to . . . conspire to conceal, harbor, or shield from detection an alien . . . .").

206. See *Alabama*, 691 F.3d at 1287 ("[S]ection 13 undermines the intent of Congress to confer discretion on the Executive Branch in matters concerning immigration.").

207. See Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1019 (9th Cir. 2013) ("We conclude that the phrase 'in violation of a criminal offense' is unintelligible and therefore the statute is void for vagueness." (quoting Ariz. Rev. Stat. Ann. § 13-3939(A) (Supp.

vagueness holding. It went on to state that the statute was also preempted by federal law on both field and conflict preemption grounds.[208] Its reasoning largely tracks the Eleventh Circuit's reasoning in *Alabama*, including that decision's emphasis on the importance of exclusive federal discretion over enforcement of immigration-related matters.[209] One judge wrote separately to concur in the vagueness holding but dissent from the preemption analysis, stating that he would not have reached the preemption issue.[210] To the extent that a preemption analysis was inessential to the court's decision in the case, its inclusion highlights the Ninth Circuit's willingness to embrace the expansive preemption of state immigration statutes made possible by *Arizona*.

C. *Preemption of State Harboring Statutes*

Both the *Alabama* and *Valle del Sol* opinions conclude that the Supreme Court's holding in *Arizona* requires preemption of state harboring statutes. As an application of that precedent, they are almost certainly correct—in terms of what state law enforcement is authorized to do, statutes criminalizing harboring are more akin to the provision of the Arizona law that provided for arrest of unauthorized aliens than to the simple status check that survived the Court's preliminary preemption analysis.[211] On the other hand, the Court might distinguish state harboring statutes from the preempted Arizona law because harboring is more squarely within the states' inherent police powers than laws like those preempted in *Arizona*, which interfered with the federal schemes for alien registration and removal.[212] Part III.C.1 presents the arguments for and against applying *Arizona*'s holding to preempt state statutes that

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2014))). Although the provision was substantially similar to the federal harboring statute, it included as one of its key elements the phrase "in violation of a criminal offense." Ariz. Rev. Stat. Ann. § 13-2929(A). The court found the phrase "unintelligible" and asserted that to reinterpret the statute to avoid the vagueness issue would go beyond the court's authority. 732 F.3d at 1019.

208. See *Valle del Sol*, 732 F.3d at 1022 ("Even were we to accept Arizona's proposed interpretation of § 13-2929, we conclude that the statute is also preempted by federal law.").

209. See id. at 1027 ("[Arizona's state harboring statute] conflicts with the federal scheme by divesting federal authorities of the exclusive power to prosecute these crimes.").

210. Id. at 1029 (Bea, J., concurring in part and dissenting in part) ("Because this case is resolved on other grounds, namely vagueness, I believe the court should not reach the preemption issue.").

211. See supra Part III.A (discussing differences between preempted and not preempted provisions of law at issue in *Arizona*).

212. See Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) ("Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law."); Kerry Abrams, Plenary Power Preemption, 99 Va. L. Rev. 601, 624 (2013) ("[A]lien registration . . . [has] a slim history of state rather than federal involvement.").

criminalize harboring. Part III.C.2 concludes that preempting such statutes is appropriate.

1. *Benefits and Limits*. — The preemption analysis applied by the Court in *Arizona* is the most expansive in the Court's jurisprudence.[213] One commentator has called this form of preemption "plenary power preemption" because of its logical relationship to the plenary power doctrine, which instructs courts to be extremely deferential to Congress and the executive in the immigration arena due to the sensitive nature of foreign affairs.[214] It emerges where the boundary between state police powers and federal immigration powers is unclear,[215] placing a "very heavy thumb . . . on the federal government's side of the scale."[216] "Plenary power preemption" analysis is characterized by reasoning that relies heavily on national sovereignty to bolster its case for preemption.[217]

In spite of its somewhat murky doctrinal features, expansive preemption of state immigration laws has been characterized as serving two important purposes. First, it creates a sphere of exclusive federal enforcement in the immigration context, consistent with principles of federalism that traditionally give the federal government exclusive jurisdiction over immigration matters. This rationale for preemption of state harboring statutes appeared in the *Alabama* and *Valle del Sol* opinions, which emphasized the importance of executive discretion.[218] Though the Court has never plainly stated the exact nature of the executive's power over immigration,[219] its responsibility for national security and international relations suggests a reason why the Court has placed immigration within the federal enforcement scheme's exclusive purview in decisions such as *Arizona*. The executive's knowledge of international affairs and ability to act quickly make it well equipped to handle enforcement of immigration policy.[220]

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213. See Abrams, supra note 212, at 606 (highlighting "exceptional way in which courts treat preemption in cases implicating core immigration functions"); Rodríguez, supra note 176, at 573 (noting Court's practice of "giving extra weight to an overriding national interest in immigration regulation").

214. See Abrams, supra note 212, at 602–03 (explaining history of plenary power doctrine).

215. See id. at 604 (arguing plenary power preemption is used when "it is difficult to categorize a particular regulation with any certainty as an exercise of state police power or of federal immigration power").

216. Id. at 603.

217. See id. ("[T]he Court gave four whole pages to its analysis of national sovereignty . . . .").

218. See supra notes 206, 209 and accompanying text (citing circuit courts' reasoning related to executive discretion).

219. See Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law, 119 Yale L.J. 458, 461 (2009) (arguing executive's role in immigration law has been left unclear by the Court).

220. See Abrams, supra note 212, at 636 (asserting executive can "respond nimbly to international crises").

The second purpose served by expansive preemption is to substitute for a robust equal protection analysis, which has not been developed in the immigration context.[221] Indeed, public discussion of *Arizona* was fraught with concerns about racial and ethnic discrimination.[222] To the extent that state harboring statutes implicate either executive discretion or equal protection concerns, preempting them would comport with the apparent purposes of *Arizona*'s expansive preemption analysis.

Additionally, preemption of state harboring laws may provide an effective means of countering the phenomenon of states' passing extraordinary numbers of immigration laws in response to political pressures.[223] State legislatures may be incentivized to pass these laws so they appear tough on crime.[224] Federal preemption of state statutes criminalizing harboring would eliminate the pressure on state politicians to enact immigration legislation—and could even incentivize Congress, in spite of its historical recalcitrance, to make progress on federal immigration reform.

Nevertheless, there are strong arguments against broadly preempting state immigration statutes. As discussed previously in this section, it is not clear that *Arizona* demands preemption of state harboring statutes; the Court's majority opinion left open the possibility that a "State may make violation of federal law a crime in some instances."[225] Additionally, though undeniably within the purview of the federal government to regulate, immigration has substantial effects on the internal affairs of the states. Some commentators have argued that an "integrated regulatory structure" in which the federal government and states and localities worked concurrently would best "absorb immigration flows and manage the social and cultural change that immigration inevitably engenders."[226] In such a regime, equal protection would apply

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221. There is only one example of the Supreme Court using equal protection doctrine to strike down a statute touching alienage issues. See Plyler v. Doe, 457 U.S. 202, 230 (1982), in which the Court struck down a Texas statute banning undocumented children from attending public schools without paying tuition. Notably, the *Plyler* Court did not find that preemption applied.

222. See Jennifer M. Chacón, The Transformation of Immigration Federalism, 21 Wm. & Mary Bill Rts. J. 577, 579 (2012) ("The courts and the litigants were aware of individual rights issues that lurked behind the dispute over federal power. Preemption became a means through which the feared individual rights consequences of S.B. 1070 might be averted without the need to litigate the effects of the law on particular individuals.").

223. See supra notes 172–177 and accompanying text (detailing rise in state immigration legislation).

224. See Lynch, supra note 12, at 2137 ("The political tendency in the United States over the past quarter century has only exacerbated this problem, as politicians compete for popularity by enacting ever more numerous, more severe, and more expansive criminal laws, in an effort to appear tough on crime.").

225. Arizona v. United States, 132 S. Ct. 2492, 2502 (2012); see also supra note 212 and accompanying text (noting possibility of distinguishing state harboring statutes).

226. Rodríguez, supra note 176, at 571.

forcefully to state and local immigration regulations to ensure that they were applied constitutionally.[227] Furthermore, some might argue that preemption should not be used in the immigration context precisely because equal protection analyses more aptly engage the constitutional problems with state immigration laws.[228]

Another argument against preemption has its basis in political theory. The proposition states that the gridlock plaguing Congress might be reduced if state officials can spur federal lawmakers to action by passing laws of their own.[229] Under this theory, state officials are more likely to pass laws than federal lawmakers.[230] When state laws not clearly worthy of preemption are left on the books rather than invalidated through expansive preemption theories, aggrieved constituents will lobby Congress to take action by passing a strong preemptive federal statute. This theory assumes, however, that the people affected by the state statute will have the wherewithal to lobby. In the case of harboring, many of the statute's constituents are likely to be undocumented immigrants and citizens who have personal relationships with them.[231] It is not apparent that this constituency will have the financial means or political clout to conduct a lobbying campaign.[232]

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227. But see supra note 221 and accompanying text (describing only case in which Court has struck down statute targeting unauthorized aliens on equal protection grounds).

228. See Pratheepan Gulasekaram & S. Karthick Ramakrishnan, Immigration Federalism: A Reappraisal, 88 N.Y.U. L. Rev. 2074, 2131 (2013) ("[T]here is something intuitively disquieting about consistently applying a structural power context to understand lawmaking that is, at its core, about the disparate treatment of individuals based on accidents of birth and veiled racial categories." (citing Harold Hongju Koh, Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens, 8 Hamline L. Rev. 51, 55–56 (1985)).

229. See Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process, 82 N.Y.U. L. Rev. 1, 22 (2007) ("[T]o the extent that courts find that state regulatory efforts . . . are preempted, Congress is relieved of pressure from regulated bodies to put these issues on the decisionmaking agenda . . . . Preemption thus suppresses political entrepreneurship by suppressing the most active source of such entrepreneurship—nonfederal elected officials.").

230. See id. at 22–23 (outlining three characteristics of state officials that make them more likely to pass legislation).

231. See supra note 138 and accompanying text (noting relationships between unauthorized aliens and U.S. citizens are common).

232. This is not to say that the constituency is not large. For context, an estimated 360,000 undocumented immigrants resided in Arizona as of January 2011, constituting 3 percent of the undocumented immigrant population. Michael Hoefer, et al., DHS Office of Immigration Statistics, Estimates Of the Unauthorized Immigrant Population Residing In the United States: January 2011, at 5 (2012), available at https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf (on file with the *Columbia Law Review*). In California, where approximately 25 percent of undocumented immigrants reside, the estimate is upward of 2.8 million. Id.; see also supra note 22 and accompanying text (citing estimated number of unauthorized aliens in the United States).

2. *Preemption of State Harboring Statutes Protects the Interests of the Executive and Avoids Equal Protection Concerns.* — Although immigration affects the United States on both the state and federal levels, federalism concerns weigh in favor of preempting state harboring statutes and reserving for the federal government the power to enforce liability for harboring. Creating an exclusive sphere of federal enforcement ensures that sensitive issues implicating national security and international relations will be handled consistently and by the superior capacity of the executive.[233] Furthermore, while anti-preemption policies might encourage Congress to legislate more clearly on matters involving strong interest groups,[234] unauthorized aliens are unlikely to have the ability to mobilize or gain momentum in Congress.

Not least among the concerns generated by state harboring statutes are fears that local enforcement of these laws will result in unconstitutional discrimination based on alienage.[235] Some commentators have argued that preemption should be replaced with a robust equal protection analysis for alienage cases in the immigration context.[236] But no such equal protection analysis currently exists, and thus there is no guarantee that courts could strike down invidiously applied statutes without using preemption.[237] Arguments against the preemption of state immigration-related statutes imagine a world in which states and localities create a system for policing immigration that is integrated with the federal scheme.[238] This may be the ideal system for managing immigrants to the United States and integrating them into American society. It cannot, however, become the reality until equal protection applies to statutes that make classifications based on alienage status.

Preemption is, undeniably, a blunt instrument. Nevertheless, it is well suited to preventing state harboring statutes from interfering with the federal enforcement regime. The lack of an equal protection analysis applicable to such statutes is a further justification for preemption. Additionally, preemption of state harboring statutes need not necessitate preemption of every state statute touching on immigration. The reasoning that applies to preempt exclusionary state laws, like criminal harboring statutes, should not apply to immigrant-inclusive state statutes designed to

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233. See supra notes 218–220 and accompanying text (detailing reasons for exclusive executive discretion over immigration matters).

234. See supra note 229 and accompanying text (arguing against preemption for political action reasons).

235. See supra notes 221–222 and accompanying text (explaining equal protection concerns related to state immigration statutes).

236. See supra note 228 and accompanying text (arguing equal protection doctrine more aptly engages with constitutional problems posed by state immigration laws).

237. See supra note 221 (noting lack of equal protection doctrine for alienage cases).

238. See supra notes 226–227 (describing integrated state–federal immigration regime).

integrate immigrants into local society.[239] Through inclusionary laws, it may be possible to at least partly develop a state-based structure for managing the uncertainties caused by immigration.

CONCLUSION

Recent circuit decisions have signaled a shift away from broad liability for harboring. Circuits have interpreted the federal harboring statute more narrowly and preempted state harboring statutes that threaten to expand or confuse the federal immigration regime. This Note has argued that courts should follow these decisions by narrowing the definition of "harboring" for purposes of liability under 8 U.S.C. § 1324(a)(1)(A)(iii). Specifically, courts should apply the interpretation of "harboring" articulated in *Costello*: providing an unauthorized alien a place to stay with the intent to prevent detection by the authorities. This definition comports with the plain meaning of the word and principles of culpability and fair warning.

To ensure that the coherence and fairness gained by applying a narrow definition of "harboring" is not eroded by state actors, courts should apply the Supreme Court's holding in *Arizona* to preempt state harboring statutes. Preemption of such statutes ensures that the federal government retains the exclusive power of enforcement over an area of the law where national interests are strong and the risk of unchecked improper enforcement is high. The combined effect of these two policies is to create a well-defined scope of liability for harboring unauthorized aliens.

239. See Stella Burch Elias, The New Immigration Federalism, 74 Ohio St. L.J. 703, 706 (2013) (arguing post-*Arizona*, immigration scheme can "encompass all multi-governmental rulemaking pertaining to immigrants and immigration—including rulemaking intended to foster immigrant inclusion").