LEGAL momentum

The Women's Legal Defense and Education Fund

Harboring and Transportation of Undocumented Persons: Information for Domestic Violence, Sexual Assault and Victim Services Agencies

By: Kilpatrick Townsend & Stockton LLP, Laura Waters and Leslye E. Orloff

I. INTRODUCTION

Victims of domestic violence constitute a significant proportion of crime victims in the United States[1] and an overwhelming number of domestic violence victims are women.[2] Furthermore, acts of domestic violence are "terribly exacerbated in marriages where one spouse is not a [United States] citizen and the non-citizen's status depends on his or her marriage to the abuser."[3] In these cases, a battered immigrant's ability to lawfully remain in the United States may oftentimes depend on her relationship to her spouse and the spouse's willingness to submit an immigrant relative petition on her behalf.[4]

To help protect undocumented immigrants against domestic violence, the federal government has established certain safeguards to encourage undocumented women to report, and fully cooperate in the investigation of, incidents of domestic abuse without fear of arrest or removal from the United States.[5] These protections guarantee that all women, without regard to immigration status, have access to programs and services necessary to protect their life and safety, such as domestic violence shelters, emergency medical service and victim assistance programs.[6]

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[1] Shannan Catalano, Intimate Partner Violence in the United States, U.S. Department of Justice, Bureau of Justice Statistics (2007).

[2] Family Violence Statistics: Including Statistics on Strangers and Acquaintances, U.S. Department of Justice, Bureau of Justice Statistics (2005) (noting that women represent 84% of spouse abuse victims and 86% of victims of abuse at the hands of a boyfriend or girlfriend).

[3] Leslye E. Orloff & Janice v. Kaguyutan, Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses, 10 Am. U.J. Gender Soc. Pol'y & L. 95, 97 (2001) (quoting H.R. Rep. No. 103-395, at 26-27 (1993).

[4] *Id.*

[5] *See, e.g.,* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 §§ 1501-13 (2000) (hereinafter, *VAWA 2000*).

[6] *See, e.g.,* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

As a result, domestic violence shelters and other programs that serve abuse victims are designed to serve battered women of every class, race, religion and background in the United States and, as such, they must not deny access to protection and safety to immigrant victims of domestic violence who may be undocumented.[7] In fact, in many cases, the protection of victims of spousal abuse who are cultural minorities requires greater vigilance on the part of domestic violence agencies because immigrant women are often treated with suspicion and cultural insensitivity by society. As undocumented immigrant women are unauthorized to work in the United States and are often dependent upon their abusers for financial support and possibly legal residency status, they represent an insular minority that is most susceptible to continuing violence. Threats of deportation are the largest single concern of all immigrant, refugee or non-English speaking women who seek help fleeing violence in the home. This fear is largely exacerbated by the incorrect information that is provided to battered women by the batterers, and it is the primary reason why few seek any help unless the violence against them has reached "crisis proportions."[8]

In order to assist battered immigrant women in overcoming these barriers, shelter workers should work to build bridges, exchange information and create relationships with persons who are bicultural and bilingual, in order to improve their ability to play an important role in assisting battered immigrant women in obtaining relief and placing trust in the American legal system. Further, domestic agencies should lead the way in providing greater cultural sensitivity to battered immigrant women during the process of assistance and support in light of their unique circumstances.

The ability of domestic violence agencies to assist undocumented immigrants, however, is somewhat difficult to reconcile against federal and state laws that make it a crime for individuals or entities to knowingly harbor, shield or transport undocumented immigrants. In addition to federal statutes that make it illegal to harbor or transport undocumented persons, a number of state legislatures, including those in Arizona, Utah, Georgia, Indiana and Alabama have either enacted or proposed laws that would impose harsh criminal penalties for shielding undocumented immigrants from state or local authorities.

Several factors support the notion that domestic violence shelters should continue to assist all victims, including those who reveal that they are undocumented, despite the potential criminal liability associated with knowingly harboring or transporting an undocumented immigrant. First, federal legislation broadly supports undocumented victims of domestic abuse and has consistently evolved to provide greater protection to battered immigrants. As a result, domestic violence shelters that turn away undocumented women may risk losing their federal funding. Second, this federal legislation preempts any state immigration legislation denying undocumented immigrants access to life saving programs and services. Finally, a survey of case

[7] Shelter workers should note that, like all those born in the continental United States, Alaska and Hawaii, those born in Puerto Rico, Guam and the U.S. Virgin Islands, as well as American Samoans are all considered United States citizens, eligible for all the rights and privileges which citizenship has to offer. Such persons must not be considered undocumented persons.

[8] C.F. Klein & Leslye E. Orloff, "Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law," 21 Hofstra Law Review, 4 Summer 1993 at 1022.

law regarding U.S. Bureau of Citizenship and Immigration Services (formerly the U.S. Immigration and Naturalization Service) ("CIS") proceedings reveals that the services traditionally provided by domestic violence agencies make it unlikely that shelter workers acting within the scope of their employment will face prosecution for harboring or transporting undocumented immigrants.

II. RECENT STATE LAWS ADDRESSING THE HARBORING AND TRANSPORTATION OF UNDOCUMENTED PERSONS

In recent years, while federal lawmakers have repeatedly struggled with and failed to pass comprehensive immigration reform, state and local governments have increasingly responded with immigration measures of their own. Most notably, in July 2010, the Arizona legislature enacted the Support Our Law Enforcement and Safe Neighborhoods Act,[9] which has been characterized as the "nation's toughest bill on illegal immigration."[10] The legislation, which was introduced as Arizona Senate Bill 1070, and is commonly referred to as "SB 1070," has received national and international attention and has generated considerable controversy by critics who argue that its provisions promote racial profiling. Additionally, the passage of SB 1070 has prompted other states, such as Utah, Georgia, Indiana, and Alabama, to enact similar state immigration laws and has caused other state legislatures consider the adoption of stricter immigration statutes.

A. Arizona

Among other things, SB 1070 requires a state or local Arizona law enforcement officer to ask about the immigration status of an individual the officer has stopped or detained for other reasons if the officer has reasonable suspicion to believe that the individual is present in the United States unlawfully.[11] SB 1070 also makes it illegal for individuals or entities to knowingly "harbor" or "shield" undocumented immigrants within the state of Arizona.[12]

Although SB 1070 provides law enforcement officers with the discretion not to ask about an individual's legal status if such an inquiry would hinder or obstruct an investigation,[13] SB 1070 provides no specific legal protection for those operating domestic violence shelters or similar facilities. Instead, the only individuals with immunity from prosecution for harboring or shielding undocumented immigrants under SB 1070 are child protective services workers and

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[9] Arizona Senate Bill 1070, Support Our Law Enforcement and Safe Neighborhoods Act (2010) (hereinafter, *SB 1070*).

[10] Randal C. Archibald, Arizona Enacts Stringent Law on Immigration, N.Y. Times, Apr. 24, 2010, at A1, *available at* http://www.nytimes.com/2010/04/24/us/politics/24immig.html?r=2.

[11] *SB 1070,* supra note 9.

[12] *SB 1070,* supra note 9.

[13] *SB 1070,* supra note 9.

"first responders," such as paramedics or emergency medical technicians.[14] Accordingly, SB 1070 may undermine the ability of domestic violence shelters, rape crisis centers and other victim services providers to bring a victim to court, to meetings with prosecutors or to the hospital to receive critical treatment for injuries. Moreover, because shelter employees are not specifically granted immunity from prosecution for harboring or shielding undocumented immigrants, there is nothing under SB 1070 that would prevent law enforcement officials from stationing themselves outside of a domestic violence shelter or similar crisis center since undocumented women are entitled to the lifesaving services offered by these facilities under federal law.

On July 6, 2010, the United States filed a lawsuit against the State of Arizona challenging the constitutionality of SB 1070 and arguing that the legislation interferes with matters that are constitutionally reserved for the federal government, conflicts with federal immigration laws and policy and impedes the implementation of Congressional objectives.[15] On appeal, the U.S. Court of Appeals for the Ninth Circuit upheld a temporary district court injunction blocking the enforcement of SB 1070's provisions that: (i) require officers to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if they possess "reasonable suspicion" that the person is unlawfully present in the United States; (ii) impose criminal penalties for the failure to apply for or carry alien registration papers; (iii) prevent undocumented persons from soliciting, applying for, or performing work; and (iv) authorize the warrantless arrest of immigrants where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States.[16] The Ninth Circuit's decision did not enjoin the enforcement of SB 1070's prohibitions on the harboring or transportation of undocumented persons and SB 1070 continues to remain the focus of significant political and legal debate.

B. Utah

In March 2011, the Utah state legislature enacted the Utah Illegal Immigration Enforcement Act, which was introduced as House Bill 497 and is commonly referred to as "HB 497."[17] Among other things, HB 497 requires that a law enforcement officer verify the immigration status of a person arrested for a felony or a class A misdemeanor and a person booked for class B or C misdemeanor.[18] HB 497 also provides that, in certain situations where the operator of a vehicle has been detained, passengers in the vehicle may also be questioned and their immigration status verified.[19] Additionally, HB 497 also requires verification of

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[14] *SB 1070,* supra note 9.

[15] United States of America v. State of Arizona, No. 10-01413 (D. Ariz. *prelim. injunction granted* July 28, 2010); *prelim. injunction aff'd* , No. 10-16645 (9th Cir. April 11, 2011).

[16] *Id.*

[17] Utah House Bill 497, Utah Illegal Immigration Enforcement Act (2011).

[18] *Id.*

[19] *Id.*

immigration status regarding application for public services or benefits provided by a state or local governmental agency or subcontractor, except as exempted by federal law.[20] In May 2011, a class action lawsuit was filed by two national civil rights organizations in an effort to enjoin, among other things, the provisions of HB 497 that give law enforcement officers the ability to question people they stop about their immigration status.[21]

C. Georgia

Similarly, in March 2011, the Georgia state legislature passed the Illegal Immigrant Reform and Enforcement Act of 2011, which was introduced as House Bill 87 and is commonly referred to as "HB 87."[22] HB 87 generally provides that if a law enforcement officer has probable cause to believe the suspect has committed a crime, including any traffic offense, the officer is authorized to verify the suspect's immigration status if the suspect cannot provide identification.[23] In addition, HB 87 also imposes criminal liability on anyone who knowingly harbors or transports undocumented immigrants while committing another crime or using fake identification to gain employment in Georgia.[24] Although HB 87 will not become effective until July 1, 2011, some commentators have already witnessed its desired impact in Georgia by noting that a number of undocumented persons are making efforts to leave the state before its provisions take effect.[25] On June 2, 2011, the American Civil Liberties Union and other civil rights groups filed a class action suit challenging the constitutionality of HB 87, particularly the provision of HB 87 that permits allows law enforcement officers to check the immigration status of criminal suspects.[26] On June 27, 2011, a federal judge issued a temporary injunction against the section that would require law enforcement officers to check the immigration status of those stopped by police if there is probable cause that the suspect has committed a crime and against the section that makes it illegal to transport or harbor undocumented immigrants. The State of Georgia plans to appeal this decision.[27]

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[20] *Id.*

[21] *See* Julia Preston, Class-Action Lawsuit Says Utah Immigration Law Violates Civil Rights, N.Y. Times, May 3, 2011, at A20, *available at* http://www.nytimes.com/2011/05/04/us/04immigration.html.

[22] Georgia House Bill 87, Illegal Immigrant Reform and Enforcement Act of 2011 (2011).

[23] *Id.*

[24] *Id.*

[25] *See, e.g.,* Jeremy Redmon & Mario Guevara, Many Immigrants Leaving Georgia Behind, Atlanta Journal-Constitution, June 8, 2011, *available at* http://www.ajc.com/news/dekalb/many-immigrants-leaving-georgia-967054.html.

[26] *See* Stephen Caesar, Georgia Immigration Law Taken To Court, L.A. Times, June 2, 2011, *available at* http://articles.latimes.com/2011/jun/02/nation/la-na-georgia-immigration-20110603.

[27] *See* Kim Severson, Parts of Georgia Immigration Law Blocked, New York Times, June 27, 2011, *available at* http://www.nytimes.com/2011/06/28/us/28georgia.html

D. Indiana

In February 2011, Indiana also passed an immigration bill that would make it illegal for anyone to harbor or transport an undocumented immigrant within the state for purposes of "commercial benefit or private financial gain."[28] Although similar to the bills passed by Arizona, Utah, and Alabama, this new law, which is commonly referred to as "SB 590," indicates that organizations harboring and transporting undocumented persons are only in violation of the law if they stand to gain financially from such harboring or transportation activities.

E. Alabama

In June 2011, Alabama passed its own immigration bill, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, which is commonly referred to as "HB 56." HB 56 prohibits undocumented immigrants who are unlawfully present in the United States from receiving state and local public benefits. HB 56 provides exceptions for primary and secondary school education and state or local public benefits regarding life and safety that are listed in 8 U.S.C. § 1621(b). HB 56 also prohibits undocumented immigrants from enrolling in and attending any public post-secondary education institution in the state. Additionally, HB 56 makes it illegal to conceal, harbor, or shield, or attempt to conceal, harbor, or shield, or conspire to conceal, or shield an alien from detection in any place in Alabama, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the undocumented immigrant has come to, has entered, or remains in the United States in violation of federal law. Finally, HB 56 stays enforcement actions against victims of a crime, children of victims of a crime, and criminal witnesses and their children until the conclusion of all related legal proceedings.[29]

F. "Knowingly" Harboring Undocumented Persons Under Recent State Immigration Laws

The state immigration laws passed by Arizona, Utah, Georgia, Indiana and Alabama all require that those harboring or transporting undocumented immigrants must be doing so "knowingly" in order for them to be in violation of the law. It would appear that the easiest way for shelters and similar programs and services to escape culpability is by not asking clients about their immigration status. However, as a practical matter, it is has become increasingly important in recent years for shelter workers to inquire as to the immigration status of victims seeking their assistance, which could conceivably result in criminal liability for workers who continue to harbor individuals after learning of their undocumented status. It is essential for shelter workers to ask about a victim's immigration status to ascertain whether, in the event she is not lawfully

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[28] Indiana Senate Bill 590 (2011).

[29] Alabama House Bill 56, Beason-Hammon Alabama Taxpayer and Citizen Protection Act (2011).

present in the United States, the victim may qualify for a U visa (for victims of crime), a T visa (for victims of trafficking) or other protection due to the individual's status as a crime victim.

Additionally, due to recent changes in federal policy regarding the removal proceedings of immigrants with pending or approved immigration applications or petitions,[30] it may be useful for shelter workers to ascertain whether a victim is in the process of applying or petitioning for lawful residency in an effort to assist the victim in providing an applicable case number and other relevant information to authorities. Likewise, it may be useful for a shelter worker to inquire as to a victim's immigration status to determine if the victim and/or her children are entitled to certain Medicaid and other related medical insurance coverage offered to individuals lawfully residing in the country.[31] All of these questions must be answered for a domestic violence shelter or similar service to best aid its clients. It is not a viable solution for shelters to avoid asking clients about their immigration status in light of the protections and options given by federal law to undocumented immigrant crime victims.

III. HARBORING AND TRANSPORTING UNDOCUMENTED PERSONS

As indicated above, it is has become increasingly important in recent years for shelter workers to inquire as to the immigration status of victims seeking their assistance, which could conceivably result in criminal liability for workers who continue to harbor individuals after learning of their undocumented status. Shelter workers should be aware that several factors continue to support the notion that domestic violence shelters should strive to assist all victims, including those who reveal that they are undocumented, despite the potential criminal liability associated with knowingly harboring or transporting an undocumented immigrant. First, federal legislation broadly supports undocumented victims of domestic abuse and has consistently evolved to provide greater protection to battered immigrants. As a result, domestic violence shelters that turn away undocumented women may risk losing their federal funding. The Department of Homeland Security (the "DHS") has also released a series of memoranda that discourage enforcement officers from pursuing enforcement actions against immigrant crime victims. Second, under the supremacy clause of the United States Constitution, federal legislation addressing access to benefits to protect life and safety preempts any state legislation that bars access to these same benefits. Finally, a survey of case law regarding CIS proceedings reveals that the services traditionally provided by domestic violence agencies make it unlikely that shelter workers acting with the scope of their employment will face prosecution for harboring or transporting undocumented immigrants.

A. Federal Legislation and DHS Guidelines Support Access to Domestic Violence Shelters for Undocumented Victims of Domestic Abuse

[30] *See, e.g.,* U.S. Citizenship and Immigration Services, Memorandum on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approve Applications or Petitions (Aug. 20, 2010); U.S. Citizenship and Immigration Services, Memorandum on Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings (Feb. 4, 2011).

[31] *See, e.g.,* National Immigration Law Center, "Lawfully Residing" Children and Pregnant Women Eligible for Medicaid and Children's Health Insurance Program" (Nov. 2010)

The Violence Against Women Act of 1994[32], as amended ("VAWA"), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[33] ("IIRIRA"), the Personal Responsibility and Work Opportunities Act of 1996[34] ("PRWORA"), and federal and state confidentiality laws afford significant protection to undocumented women who are victims of domestic abuse. Among other things, VAWA encourages immigrant women to report crimes, including domestic violence, child abuse, sexual assault and human trafficking, regarding of immigration status.[35] Subsequently, in addition to preserving the safeguards VAWA afforded to battered immigrant women, IIRIRA and PRWORA also expanded access to public benefits for undocumented women who are victims of domestic abuse and secured certain additional legal protections for battered immigrants.[36] VAWA and IIRIRA, as well as certain federal and state confidentiality safeguards, are each discussed in greater detail below.

1. VAWA

VAWA, as enacted in 1994, originally contained a number of important provisions that specifically addressed the problems experienced by battered immigrant women. First, VAWA afforded undocumented women who were the victims of domestic abuse with the ability to independently self-petition for their immigration status.[37] Second, VAWA lowered the evidentiary burden that battered immigrants would need to meet with respect to a self-petition for immigration status.[38] As a result, VAWA provided that an undocumented woman filing a self-petition would typically only be required to demonstrate: (1) that she married her abuser in good faith; (2) that her abuser is a United States citizen or lawful permanent resident; (3) that she resided with her abuser in the United States; (4) that, during the marriage, either she or her child had been battered or subjected to extreme cruelty by her spouse; (5) that she possesses a good moral character; and (6) that her deportation or removal from the United States would result in extreme hardship to either herself of her children.[39] Third, VAWA created the possibility of suspension of deportation for undocumented women and children who were victims of domestic

[32] The Violence Against Women Act of 1994, Pub. L. No. 103-222, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.) (hereinafter, *VAWA*).

[33] Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter, *IIRIRA*).

[34] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, 110 Stat. 2105 (hereinafter, *PRWORA*).

[35] *VAWA,* supra note 32.

[36] *IIRIRA,* supra note 33.

[37] *VAWA*, supra note 32.

[38] *Id.*

[39] *Id.*

abuse.[40] Finally, VAWA placed an affirmative duty on domestic violence agencies that receive federal funding to provide services to victims from diverse communities, such as undocumented immigrant women.[41]

Despite its significant benefits, VAWA contained several deficiencies, such as: (1) the inability of a battered immigrant woman to file a self-petition if she divorced her abuser prior to filing the petition; (2) the complexity of demonstrating "extreme hardship"; (3) the difficulty of fulfilling the "good moral character" statutory requirement, which effectively denied access to self-petitioners convicted of crimes involving self-defense against their abuser; and (4) denying access to a self-petitioner who was married to a lawful permanent resident who was subsequently convicted and deported in connection with the domestic abuse because of the loss of her spouse's immigration status.[42]

Amendments to VAWA that were enacted in 2000 and 2005 helped remedy a number of the inadequacies described above and further demonstrated the federal government's commitment to protecting battered undocumented women. For example, the 2000 VAWA amendments permitted a divorced undocumented immigrant to self-petition within two years of her divorce, provided the immigrant could prove that the divorce was a direct result of domestic abuse.[43] Likewise, the 2000 VAWA amendments made it possible for an undocumented woman to self-petition for immigration status even if her spouse lost his immigration status within a two-year period following the filing due to a conviction arising from the abuse.[44] The 2000 VAWA amendments also created the U visa, a new visa category that confers legal residency status on individuals who aid in the investigation and prosecution of domestic violence cases and certain other crimes.[45] The U visa is widely regarded as an extremely important component of the 2000 VAWA amendments because it provides an alternative mechanism to lawful immigration status for undocumented battered women who would otherwise be unable to obtain such status through a VAWA self-petition.[46] Although a U visa is a temporary nonimmigrant visa, and will not necessarily result in permanent residency status, it includes an employment authorization that is particularly important for many undocumented women.[47]

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[40] *Id.*

[41] *Id.*

[42] *See* Katerina Shaw, Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women, 15 Cardozo J.L. & Gender 663, 671 (2009).

[43] *VAWA 2000*, supra note 5.

[44] *Id.*

[45] *Id.*

[46] *See* Shaw, supra note 42, at 672.

[47] *Id.*

The 2005 VAWA amendments also provided additional remedies to battered immigrant women. Notably, the 2005 VAWA amendments prevented immigration officials from initiating contact with an abuser and from relying on information obtained from an abuser to apprehend or remove undocumented victims of domestic abuse.[48] In addition, the 2005 VAWA amendments also provides additional access for undocumented battered women by authorizing certain federally funded legal services corporations to represent any victim of domestic abuse, regardless of the victim's immigration or marital status.[49] Moreover, the 2005 VAWA amendments enable undocumented women with approved VAWA petitions, as well as abused spouses of certain nonimmigrant visa holders, to obtain employment authorizations.[50]

2. PRWORA

Under PRWORA, if a publically funded program or service is necessary for the protection of life and safety, it is exempt from restrictions on immigrant access to public benefits.[51] These programs include but are not limited to police, fire, emergency medical technician and ambulatory services, emergency Medicaid, emergency shelter, transitional housing, access to courts, and victim services. The United States Attorney General is given the authority to exempt certain programs from any restrictions on immigrant access to services and benefits regardless of whether they are state or federally funded. PROWRA initially left out battered immigrants from guaranteed public benefits. As discussed below, IIRIRA amended PRWORA to ensure access for victims of abuse.

3. IIRIRA

IIRIRA has further implemented the ideals set forth in VAWA by PRWORA to provide expanded access to public benefits for undocumented women who are victims of domestic abuse. Previously, PRWORA denied undocumented immigrants access to practically all federally funded benefits and services. However, IIRIRA modified welfare eligibility requirements by granting undocumented women access to publicly funded shelters and services and providing certain battered immigrant women with the legal right to obtain public benefits and assistance.[52] IIRIRA's amendment of PRWORA further reflects the federal government's belief that all battered women, including undocumented immigrants, are in need of access to domestic violence agencies and shelters and intent to ensure that battered women were allowed these benefits to protect life and safety that they had previously been denied under the original passage of PRWORA.

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[48] Violence Against Women and Department of Justice Reauthorization Act of 2005 (H.R. 3402), Pub. L. No. 109-162 (hereinafter, *VAWA 2005*).

[49] *Id.*

[50] *Id.*

[51] *PRWORA*, supra note 34.

[52] *Id.*

4. Confidentiality Safeguards

Both VAWA and the 1984 Family Violence Prevention and Services Act ("FVPSA")[53], as amended, provide that any shelter, rape crisis center, domestic violence program or similar victim services program that receives either FVPSA or VAWA funding is barred from disclosing to anyone any information about a victim receiving services, including any information regarding the victim's location or the fact that the victim is currently or has ever received services from the shelter.[54] Shelters that violate these confidentiality requirements risk losing federal funding.

In addition, many states have also adopted laws protecting the identity of women seeking services provided by domestic violence shelters.[55] For example, Section 36-3005 of the Arizona Revised Statutes, which remains unchanged by the enactment of SB 1070, specifically requires that, in order to receive state funding, domestic violence shelters must "require persons employed by or volunteering services to the shelter to maintain the confidentiality of any information that would identify persons served by the shelter."[56] Furthermore, Section 36-3009 of the Arizona Revised Statutes imposes civil money penalties on any person or public or private agency that discloses the location or address of any shelter for victims of domestic violence in a manner that identifies the location or address as a shelter and threatens the safety of the shelter's inhabitants.[57]

5. Impact of VAWA, IIRIRA, PRWORA and Federal and State Confidentiality Safeguards

The scope of federal protection for battered immigrant women set forth in VAWA, the IIRIRA and the FVPSA, as well as the continued evolution of VAWA to provide additional safeguards for undocumented battered women, strongly suggests that it would be inconsistent for federal and state officials to prosecute domestic violence agencies for harboring illegal immigrants. The protection afforded to undocumented victims of domestic abuse has been extended within a variety of federal legislation, including laws that address immigration, welfare and domestic violence matters. Within each of these laws is a central theme that suggests all individuals within the United States, regardless of their immigration status, are entitled to receive protection from domestic violence, and to be free to cooperate in the prosecution of their abusers,

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[53] The Family Violence Prevention and Services Act of 1984, Pub. L. No. 98-457 (codified in 42 U.S.C. Section 10401, et seq.).

[54] *Id.* *See also VAWA,* supra note 32.

[55] Chart of State Confidentiality Laws available at: http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/state-confidentiality-laws

[56] Ariz. Rev. Stat. § 36-3005 (2011).

[57] Ariz. Rev. Stat. § 36-3009 (2011).

without risking deportation or removal. Consequently, even in light of recent aggressive state legislation, it remains unlikely that federal or state officials will prosecute domestic violence agencies for providing legally permissible services to undocumented persons.

6. DHS Guidelines

Through a series of memoranda,[58] the Department of Homeland Security has strongly indicated that undocumented immigrants should continue to have access to federally guaranteed life saving programs and should be encouraged to report crimes and assist law enforcement in the detection, investigation and prosecution of criminal activity perpetrated against them. Law enforcement officials are strongly discouraged from pursuing immigration enforcement against immigrant crime victims and witnesses and from undertaking enforcement actions at sensitive locations (schools, religious institutions, funerals) and must comply with federal VAWA confidentiality laws that prohibit enforcement actions at domestic violence shelters, rape crisis centers, victim services, community based organizations, courthouses, family justice centers and visitation centers. If immigration enforcement officials rely on perpetrator provided information to initiate or pursue enforcement actions against crime victims the immigration case can be dismissed by DHS or an immigration judge. Additionally, DHS has indicated that enforcement officers should take special care to exercise prosecutorial discretion when deciding whether to pursue actions against pregnant or nursing women, minors and elderly individuals, victims of domestic violence, trafficking, or other serious crimes, individuals who suffer from a serious mental or physical disability, and individuals with serious health conditions. DHS maintains that absent special circumstances, enforcement actions should not be taken against victims or witnesses to a crime. This adds a further layer of protection for domestic violence shelters, as enforcement officers will likely refrain from pursuing actions against victims utilizing their services.

7. Federal Preemption of State Laws

Federal legislation provides undocumented immigrants and all crime victims certain benefits regardless of immigration status. The supremacy clause of the United States Constitution requires that federal legislation in the field of public benefits would also appear to

[58] *See* John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17,2011); John Morton, Director, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011); John Morton, Assistant Secretary, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (August 20, 2010); John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); U.S. Citizenship and Immigration Services, Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (February 4, 2011); Memorandum from Peter S. Vincent, Principal Legal Advisor, Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Sept. 25, 2009); Memorandum from Julie L. Myers, Assistant Secretary of ICE, Prosecutorial and Custody Discretion (Nov. 7, 2007); Memorandum from William 1. Howard, Principal Legal Advisor, VAWA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367 (Feb. 1, 2007); Director John P. Torres and Director Marcy M. Forman, Interim Guidance Related to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007).

preempt any state legislation that restricts access to these benefits. Applicable law only carves out one exemption from access to PRWORA programs that are necessary for the protection of life or safety, that permits states to discriminate among immigrants "for programs of general cash public assistance."[59] Congress does not provide state and local governments with the authority to limit state and local government non-cash benefits. All federal cases agree that PROWRA occupies the field of provision of public benefits to immigrants, and thus the subset of provision of life and safety benefits to immigrants.[60] Given that federal law specifically requires that undocumented immigrants be allowed to access crisis counseling and intervention programs, violence and abuse prevention programs, and services to victims of domestic violence, it is unlikely that a shelter or similar service will be in violation of the law for "harboring" or "transporting" an undocumented immigrant solely as a result of providing such programs or services.

B. Domestic Violence Agencies Remain Unlikely Targets for Prosecution for Harboring Illegal Immigrants

Section 274 of the Immigration and Nationality Act (the "INA") generally prohibits individuals from concealing, shielding or harboring unauthorized individuals who enter and/or remain in the United States.[61] Under Section 274, it is a criminal offense punishable by a fine or imprisonment for any person to "knowingly, or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation."[62] In addition to this provision of the INA, many state legislatures have also enacted legislation, as discussed above, that makes it illegal to harbor or shield undocumented persons within their particular state.

1. Historical Case Law

As early as 1928, federal courts have convicted those who have "conspired" to violate the harboring provisions of the INA. In *Susnjar v. United States*,[63] the U.S. Court of Appeals for the Sixth Circuit convicted an individual who had "contracted with aliens" to transport them "secretly" from Canada to the United States. The court acknowledged the "clandestine" manner in which the convicted individual operated to violate the law as definitive of his guilt. Similarly, in 1940, in *United States v. Smith*,[64] the U.S. Court of Appeals for the Second Circuit convicted a

[59] 8 U.S.C. § 1101(a)(3)

[60] *See* League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

[61] 8 U.S.C. § 1324 (2011).

[62] *Id.*

[63] Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928).

[64] United States v. Smith, 112 F.2d 83 (2nd Cir. 1940).

woman for allowing two known undocumented women to reside at her residence while paying them to practice prostitution. Additionally, the court accepted evidence that the defendant had instructed the women to lie if they were stopped by the authorities.[65]

By the 1970s, the term "harboring" was no longer confined to "clandestinely shielding or concealing" undocumented persons from the authorities; instead it had come to mean simply "providing shelter to" an individual with knowledge of his or her unlawful presence in the country. Still, those who continued to be prosecuted under the harboring statute were generally involved in some greater, morally questionable activity. For example, in *United States v. Lopez*,[66] the U.S. Court of Appeals for the Second Circuit convicted the defendant for "harboring" undocumented immigrants, and found that at least twenty-seven undocumented persons were "harbored" at his residences for profit, many of whom had entered the United States with his address in hand. Additionally, the evidence presented satisfied the court that the defendant assisted these same undocumented individuals in obtaining employment, sham marriages, transportation to and from work and assistance in preparing applications for citizenship. In *United States v. Acosta de Evans*,[67] the U.S. Court of Appeals for the Ninth Circuit convicted an individual for having "harbored" an undocumented person in her apartment. A search of the defendant's residence by federal authorities revealed four undocumented people who claimed to have only been there "in passing" and one of the defendant's undocumented relatives, who had been residing with her for over two months. In *United States v. Winnie Mae Mfg. Co.*,[68] a federal district court held that the prohibition of "harboring" immigrants was not impermissibly vague so as not to apply to the defendants who had allegedly hid undocumented persons in a concealed stairwell or behind a false wall.[69]

During the 1980s, those who were prosecuted under "harboring" undocumented immigrant offenses generally fell into one of two categories: either they were involved in other illegal activities or they took part in the Sanctuary Movement.[70] In *United States v. Fierros*,[71] the

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[65] *Id.*

[66] United States v. Lopez, 521 F.2d 437 (2nd Cir. 1975).

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

[68] United States v. Winnie Mae Mfg. Co., 451 F.Supp. 642 (C.D. Cal, 1978).

[69] *Id.*

[70] During the 1980s, many domestic church workers and members launched a movement, known as the Sanctuary Movement, to provide shelter for refugees fleeing repressive Central American governments sponsored by the United States. These individuals helped assist and transport undocumented immigrants into the United States by virtue of a "moral necessity" that they believed was based in the Bible. Initially, church members took refugees who sought refuge in their churches directly to the CIS in order for them to obtain political asylum. However, after witnessing the repeated deportation of Central American refugees by the CIS, they soon became disillusioned with the asylum process, and began receiving and assisting undocumented refugees from Central America without notifying the CIS One of the reasons why Sanctuary Movement participants were actively pursued for prosecution during this time was due to their typically flagrant defiance of immigration laws and their having written or expressed policies of knowingly keeping undocumented persons in their churches as a challenge to the government.

defendant fell into the first category and the U.S. Court of Appeals for the Ninth Circuit upheld the defendants' convictions for conspiracy to transport and harbor undocumented immigrants. In *Fierros,* the court held that one of the defendants had contracted with a third party to "bring in" agricultural workers from Mexico during the tomato harvest in California and to transport between 250 to 300 undocumented workers from San Diego in buses that were equipped with border patrol scanning devices and preceded by "scout cars." Alternatively, in a significant Sanctuary Movement case, *United States v. Aguilar*,[72] one of the two defendants convicted for "harboring" undocumented immigrants was found to have knowingly provided a newly arrived undocumented person with a room key to his apartment, which was located behind a church that acted as a sanctuary for refugees fleeing Central America. A government informant testified that the defendant also tore up documents given by border patrol officers to two other undocumented persons coached them to lie to law enforcement officers if they were apprehended, deliberately intending to shield these persons from detection. In a 1992 case, *United States v. Sanchez,*[73] the U.S. Court of Appeals for the Eighth Circuit upheld the defendant's conviction for "harboring," "concealing" and "transporting" undocumented immigrants and, additionally, found that the defendant had acquired fraudulent documents for applicants seeking benefits under the Special Agricultural Worker program in exchange for payment.

2. Recent Case Law

Recent federal case law has provided greater guidance on what a prosecutor must prove in order to establish a violation of Section 274 of the INA. In *U.S. v. Shiu Sun Shum,*[74] the U.S. Court of Appeals for the Fifth Circuit concluded that to demonstrate a violation of the harboring statute, the government must show: "(1) the alien entered or remained in the United States in violation of the law; (2) the defendant concealed, harbored or sheltered the alien in the United States; (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law; and (4) the defendant's conduct tended to substantially facilitate the alien remaining in the United States illegally."[75]

The harboring provision of the INA, however, is not restricted to only those individuals who smuggle undocumented immigrants into the United States. Rather, as interpreted by courts, the harboring provision can apply to any person who knowingly harbors or shields an undocumented person, which would seemingly include any person who knowingly provides shelter to an undocumented immigrant. Nevertheless, the types of harboring cases that have historically come before the courts have helped provide greater clarity on the sorts of activities

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[71] United States v. Fierros, 692 F.2d 1291 (9th Cir. 1981).

[72] United States v. Aguilar, 883 F.2d 662 (9th Cir. 1988).

[73] United States v. Sanchez, 963 F.2d 152 (8th Cir. 1992).

[74] U.S. v. Shiu Sun Shum, 496 F.3d 390 (5th Cir. 2007).

[75] *Id.* (citing U.S. v. De Jesus-Batres, 410 F.3d 154,160 (5th Cir. 2005) (cert. denied, 126 S.C. 1020 (2005)).

that the U.S. Bureau of Citizenship and Immigration Services (the "CIS") seeks to deter when it decides to pursue a violation of the INA's harboring provision. Generally speaking, the CIS has traditionally prosecuted violations of the harboring statute when an individual's or entity's unlawful harboring or shielding is either motivated by financial gain or is accompanied by an element of moral turpitude or willful evasion of the immigration laws.

In recent years, the CIS has continued this trend and has increasingly targeted employers who harbor or shield undocumented immigrants for their own private financial gain.[76] In *U.S. v. Shiu Sun Shum*, for example, the defendant, an executive at an office cleaning company, was found guilty of violating the harboring provision of the INA because he, among other things, provided false identification cards to workers to facilitate background checks so the workers could clean government buildings.[77] Similarly, in *U.S. v. Zheng*, a defendant employer was found guilty of violating the INA's harboring provision because, among other things, he (1) provided employment and housing for undocumented workers; (2) paid the workers low wages; (3) failed to withhold federal taxes and social security payments; (4) provided false identification cards to workers to facilitate background checks so the workers could clean government buildings; and (5) transferred more than $200,000 in reported cash to bank accounts in China.[78] Finally, in *U.S. v. De Jesus-Batres*,[79] the defendant was found guilty of violating the harboring provision of the INA because he knowingly harbored undocumented immigrants that were smuggled into the United States for a fee by guarding them in his home until the smuggler's fees were paid.[80] Although by no means exhaustive, these cases demonstrate that the CIS has continued its historical practice of pursuing violations of Section 274 of the INA when the defendant's harboring activities are accompanied by some sort of tangible financial gain or element of moral turpitude.

3. Services Provided by Domestic Violence Agencies

Unlike those individuals or entities that have been traditionally prosecuted for violations of the INA's harboring provision, domestic violence agencies and shelters generally are not motivated by financial gain and do not engage in questionable or potentially illegal activities. Instead, domestic violence shelters focus their efforts on providing food, clothing, shelter and support for all women who have been victims of abuse. In doing so, shelters oftentimes provide, among other things: (1) counseling services, (2) assistance with the enrollment of children in school; (3) help obtaining medical assistance for abuse victims; (4) assistance with legal referrals and with obtaining civil protection orders against batterers, (5) help obtaining affordable housing for victims; and (6) advocacy services with respect to victims' receipt of certain public benefits.

[76] *See, e.g.,* U.S. v. Shiu Sun Shum, supra note 67.

[77] *Id.*

[78] U.S. v. Zheng, 306 F.3d 1080 (11th Cir. 2002).

[79] U.S. v. De Jesus-Batres, 410 F.3d 154 (5th Cir. 2005).

[80] *Id.* at 161.

These services are not designed to evade federal or state authorities or to violate existing laws, but are instead aimed at saving women from domestic abuse without regard to a victim's immigration status.

4. Reconciling Applicable Case Law with Domestic Violence Shelter Activities

The history of CIS prosecutions under Section 274 of the INA has shown that the individuals CIS chooses to prosecute are generally engaged in activities that are motivated by financial gain or accompanied by an element or moral turpitude or willful evasion of the immigration laws. It is apparent that the services provided by domestic violence shelters do not share these additional characteristics typically associated with harboring prosecutions. As a result, when comparing the differences in the activities performed by domestic violence shelters with those undertaken by individuals convicted for harboring undocumented immigrants, it becomes increasingly clear that domestic violence agencies are unlikely to face prosecution for harboring undocumented immigrants when they offer shelter and other related humanitarian services to battered immigrant women.

C. Domestic Violence Agencies Remain Unlikely Targets for Prosecution for Transporting Undocumented Immigrants

In serving victims of domestic violence, many shelter workers are often asked by their clients to provide assistance that goes beyond the scope of their duties, such as providing clients with transportation from place to place or, particularly in border towns, helping clients arrange re-entry into the United States. Shelter workers must be aware that providing helpful services such as transportation or assistance in re-entry for clients may constitute the crime of "bringing in" or "transporting" undocumented immigrants under certain specific circumstances. The services that shelter workers regularly provide with the scope of their employment, however, such as providing transportation for children of abuse victims to school, are unlikely to constitute the behavior that is prohibited by these laws. Services that shelters do not regularly provide, such as providing transportation to or from the U.S. border, should be avoided at all costs.

Section 274 of the INA also imposes criminal penalties on any individual who: "(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry . . . regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien; or (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law."[81] The discussion below of the crime of "bringing in" and

[81] 8 U.S.C. § 1324 (2011).

"transporting" undocumented immigrants demonstrates how workers can be sure to avoid activities which may be subject to such prosecution.[82]

1. Historical Case Law

a. Overview of the "Bringing In" Undocumented Immigrants Offense

There are several elements that must necessarily exist before one can be charged criminally with "bringing in" undocumented immigrants into the United States. In *United States v. Washington*,[83] the U.S. Court of Appeals for the Fifth Circuit held that this offense requires "active conduct" on the part of the defendant, which can include accepting payment from undocumented persons, providing them with false identification, instructing them on how to use identification to clear immigration officials and purchasing airline tickets to the United States for them. The offense of "bringing in" undocumented immigrants "by any means of transportation or otherwise" is not limited to vehicles actually operated or controlled by the defendant.[84] A private citizen who "uses some public means of transportation to bring an alien into or land one (alien) in the United States may be properly convicted" under Section 274 of the INA.[85] Additionally, according to the U.S. Court of Appeals for the Ninth Circuit in *Carranza-Chaidez v.United States*, the phrase "by any means of transportation or otherwise" may be interpreted to include providing a guide to bring undocumented persons across the border on foot as part of an overall plan.[86] Although it has been held that a citizen must have assisted in an undocumented person's "physical ingress into the United States" in order to be charged for "bringing in" undocumented immigrants, an individual who simply meets an undocumented person on the U.S. side of the border and assists that person's unlawful entry can be so charged.[87]

[82] Additionally, shelter workers should note that any transportation provided on one's "own time" to clients which are not consistent with the shelter's program or not at the direction of a supervisor and related shelter services, is the sole legal responsibility of the worker.

[83] United States v. Washington, 471 F.2d 402 (5th Cir. 1973).

[84] *See, e.g., id.*

[85] *Id.*

[86] Carranza-Chaidez v.United States, 414 F.2d 503 (9th Cir. 1969).

[87] *Id.* The court in this case held that the statute is meant to punish those persons who participate in the process of bringing undocumented persons into the United States, and that the offense of doing so does not end the instant an undocumented person sets foot across the border, but continues at least until such person reaches their immediate destination in the United States.

b. Knowledge Requirement for the "Bringing In" Undocumented Immigrants Offense

As with "harboring" offenses, knowledge of an undocumented person's legal status is necessary for a person to be charged with "bringing in" undocumented immigrants. Domestic violence shelter personnel should note that guilty knowledge may be inferred from an individual's actions and circumstantial evidence.[88] For example, in *United States v. Clements*, the U.S. Court of Appeals for the Ninth Circuit held that the defendant's "earlier association" with three undocumented immigrants in Mexico, and his various actions stemming from that association, supported the inference that subsequently he knowingly, and with requisite intent, brought them into the United States in violation of the statute.[89]

Federal appellate court decisions have also affirmed that the subsequent legitimization of undocumented persons brought into the United States does not "cure" illegal entry.[90] Accordingly, an individual may violate the law even if he or she unlawfully brings someone into the United States with the intention of helping them apply for legal status. In addition, shelter workers should note that even accompanying a person who has a green card at an unauthorized entry location into the United States could also constitute the crime of "bringing in" aliens and therefore result in criminal liability, as that person could still be deported if he or she enters without inspection. Therefore, domestic violence shelter personnel should be wary of performing tasks for clients entering the United States which, though may be helpful, lie outside the scope of services shelter workers typically provide all abuse victims particularly with respect to transportation.

c. The "Transporting" Undocumented Immigrants Offense

Similarly, the offense of transporting undocumented immigrants also requires that several factors must be present before one can be charged criminally for committing the offense. In *United States v. Salinas-Calderon*,[91] a federal district court articulated that in order for an offense of "transporting" undocumented immigrants to be complete, the following factors must exist: (1) the person charged must have provided transportation of an undocumented person within the United States; (2) the undocumented person must be not lawfully admitted or unlawfully entitled to enter the United States; (3) the person charged must have knowledge that the undocumented person was not lawfully admitted or not lawfully entitled to enter; (4) the person charged must have knowledge or reasonable grounds to believe that the undocumented person's last entry was within three years (this provision has since been removed from the provisions of Section 274 of the INA); and (5) the person charged must have performed a willful act in furtherance of the

[88] United States v. Clemons, 468 F.2d 909 (9th Cir. 1972).

[89] *Id.*

[90] *See, e.g.,* United States v. Pierre, 688 F.2d 724 (11th Cir. 1962); United States v. Hanna, 639 F.2d 194, 196 (5th Cir. 1981).

[91] United States v. Salinas-Calderon, 585 F. Supp. 599 (D.C. Kan, 1984).

undocumented person's violation of the law. Consequently, domestic violence workers should note that mere transportation of persons known to be undocumented is not by itself sufficient to constitute violation of Section 274 of the INA. Similarly, transportation based on purely humanitarian concerns, such as transportation of a known undocumented person to a hospital following injury or illness or to court to obtain a protection order does not appear to come within the purview of the prohibition[92] and the transportation must be "in furtherance of" the undocumented person's violation of the law.[93]

d. Defining the "In Furtherance Of" Requirement for the Offense of "Transporting" Undocumented Immigrants

In determining when actual "transporting" is "in furtherance of" an undocumented person's violation of the law, courts have held that there must be a "direct and substantial relationship" between the transportation provided and the furtherance of the undocumented person's existence in the United States.[94] It has been held that one must distinguish between acts which are geared more toward the "surreptitious or furtive" transportation of undocumented persons that inhibits government enforcement of immigration laws, and more attenuated incidents involving minimal, employment-related transportation.[95] If the defendant's act of transporting an undocumented person is only incidentally connected to the furtherance of the undocumented person's violation of the law, then courts have generally found that it is "too attenuated" to come within the prohibition of Section 274 of the INA.[96]

The courts have historically provided some important examples of certain acts that do not satisfy the "in furtherance of" element of the offense of "transporting", undocumented persons. For example, in *United States v. Salinas-Calderon*, a federal district court deemed that a person does not act "in furtherance of" an undocumented person's illegal presence in the United States in the absence of concealment or harboring, financial remuneration for efforts, smuggling operations, or other factors indicating that the person was acting willfully.[97] In *United States v. Rodriguez-Rodriguez*,[98] however, the U.S. Court of Appeals for the Ninth Circuit maintained that whether transportation is provided to an undocumented person gratuitously or for pay is irrelevant under the statute. Additionally, in *United States v. Salinas-Calderon*, the court held that providing transportation to undocumented companions to areas where they may gain

[92] *See, e.g.,* United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977).

[93] *Id.*

[94] *See, e.g.,* United States v. Salinas-Calderon, supra note 93.

[95] United States v. One 1984 Chevrolet Truck, 682 F. Supp. 1221 (N.D. Ga. 1988).

[96] United States v. Salinas-Calderon, supra note 93.

[97] *Id.*

[98] United States v. Rodriguez-Rodriguez, 840 F.2d 693 (9th Cir. 1988).

employment, thus enabling them to remain in the country, was too attenuated to come within the scope of the "in furtherance of" provision in the statute.[99] Likewise, in *United States v. One 1984 Ford Van*,[100] the U.S. Court of Appeals for the Ninth Circuit held that a vehicle used to transport undocumented persons was not used "in furtherance of" their unlawful presence in the United States where the transportation provided was part of an ordinary required course of employment, such as making the performance of a job possible which is only incidentally connected to furthering the violation of law, if at all.[101] Transportation at remote job sites necessarily entails transportation for food, personal items and trips home and is essential to job performance and, as such, also does not constitute a crime of "transporting" undocumented immigrants.[102] Similarly, in *United States v. Merkt*,[103] the U.S. Court of Appeals for the Fifth Circuit ruled that any citizen intending to assist an undocumented person in obtaining legal status is not acting "in furtherance of" the person's illegal presence in the country.[104] Provision of transportation by an employer who offered employment and "voluntary" transportation of persons known to have entered the United States unlawfully, however, has been interpreted by federal courts as furthering an undocumented person's presence in the country and has been deemed a violation of the INA's transportation provision.[105]

e. Knowledge Requirement for the "Transporting" Undocumented Immigrants Offense

With respect to the knowledge required for the offense of "transporting" undocumented immigrants, the words "reckless disregard" have been interpreted by the courts as "having reasonable grounds to believe" that an undocumented person's entry within the last three years was unlawful.[106] For example, in *United States v. Pruitt*,[107] the U.S. Court of Appeals for the Ninth Circuit held that this definition of "reckless disregard" was not unconstitutionally vague with respect to the offense of "transporting" undocumented immigrants so as to render it void for vagueness.[108]

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[99] *See, e.g.,* United States v. Salinas-Calderon, supra note 93.

[100] United States v. One 1984 Ford Van, 826 F.2d 918 (9th Cir. 1987).

[101] *Id.*

[102] United States v. One 1984 Ford Van, supra note 102.

[103] United States v. Merkt, 764 F.2d 266 (5th Cir. 1985).

[104] *Id.*

[105] *See, e.g.,* United States v. One 1982 Chevrolet Crew-Cab Truck, 810 F.2d 178 (8th Cir. 1987).

[106] *See, e.g.,* United States v. Pruitt, 719 F.2d 975 (9th Cir. 1983).

[107] 719 F.2d 975 (9th Cir. 1983).

[108] *Id.*

2. Recent Case Law

Recent federal case law suggests that, much like in recent harboring cases, the CIS has focused on prosecuting individuals under the "bringing in" and "transporting" provisions of the INA in cases where the defendant's actions result in financial gain or were accompanied by an element of moral turpitude. For example, in *United States v. Reyes-Bosque*, the U.S. Court of Appeals for the Ninth Circuit upheld the defendant's conviction under Section 274 of the INA after determining that defendant was paid to provide cell phones and automobiles to undocumented persons, and transported such undocumented persons to a "safe house" in the United States once they were smuggled across the border.[109] Similarly, in *United States v. Whittington*, the U.S. Court of Appeals affirmed a defendant's conviction under Section 274 for aiding and abetting in the "bringing in" of undocumented persons into the United States.[110] In *Whittington*, the court noted that, when border patrol officials stopped the defendant near the California and Mexico border, ten undocumented immigrants were found near or inside a small, camouflaged box, resembling a pile of two by fours, that had been built into a trailer attached to the defendant's pick up truck.[111] In affirming the defendant's conviction under Section 274, the court noted that the defendant was motivated by personal financial gain, as he was paid $1,000 by smugglers to bring the passengers into the United States.[112] Likewise, in *U.S. v. Franco-Lopez*, a federal district court upheld a co-defendant's conviction for conspiring to smuggle undocumented persons into the United States from Mexico after the co-defendant "conceded that he needed money because of various personal and financial problems he was experiencing."[113]

Interestingly, in *United States v. Al Nasser*, the U.S. Court of Appeals for the Ninth Circuit also upheld the defendant's conviction for bringing two undocumented persons into the United States because, even though the defendant himself did not receive payment for his services, his actions were part of a larger scheme designed to result in personal financial gain.[114] In *Al Nasser*, the court affirmed the defendant's conviction for driving undocumented immigrants into the United States from Mexico.[115] The court, in reaching its decision, noted that "even if the defendant did not get paid or expect payment for transporting the undocumented immigrants, he was part of a scheme in which the immigrants had paid money to a 'coyote' for

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[109] United States v. Reyes-Bosque, 596 F.3d 1017 (9th Cir. 2010).

[110] United States v. Whittington, 241 Fed. Appx. 388 (9th Cir. 2007), *available at* 2007 WL 2044712.

[111] *Id.*

[112] *Id.*

[113] United States v. Franco-Lopez, 709 F.Supp.2d 1152 (D.N.M. 2010).

[114] United States v. Al Nasser, 555 F.3d 722 (9th Cir. 2009).

[115] *Id.*

the transportation."[116] Accordingly, the court concluded that "this was not an unwise, generous picking up of hitchhikers" because the defendant "knew it was an organized activity involving . . . financial gain."[117]

3. Domestic Violence Shelter Context

In light of the applicable case law discussed above, both "bringing in" and "transporting" undocumented immigrants offenses are not likely to pose a significant concern for domestic violence shelter workers. Domestic violence agency workers who serve clients within the scope of their employment in a domestic violence context reduce the risk of being prosecuted under Section 274 of the INA. As in the case of the federal harboring statute, recent CIS prosecutions under the "bringing in" and "transporting" provisions of the INA have generally centered around individuals engaged in activities that are motivated by financial gain or accompanied by an element or moral turpitude or willful evasion of the immigration laws. Accordingly, when comparing the differences in the activities performed by domestic violence shelter workers with those undertaken by individuals convicted for "bringing in" or "transporting" aliens in recent years, it seems apparent that domestic violence shelter workers are unlikely to face prosecution for providing routine and customary transportation services to undocumented persons within the scope of their employment.

IV. CONCLUSION

Despite recent state immigration laws that have prohibited the harboring and transporting of undocumented immigrants, federal legislation guarantees undocumented immigrant victims access to benefits to protect their life and safety. Domestic violence shelters provide critical, and oftentimes life saving, services to immigrant victims and should continue to offer aid to all victims with the knowledge that their actions are supported by federal statutes and policy, as well as a history of favorable case law which indicates that the prosecution of domestic violence shelters is highly unlikely in cases where the actions of shelter workers are not motivated by financial gain or accompanied by an element of moral turpitude. Shelter workers should refrain from "bringing in" aliens, as this action is not within the purview of a domestic violence shelter's regular activities and therefore poses a greater risk of criminal liability for shelter workers based on historical case law.

[116] *Id.*

[117] *Id.*