

Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants

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I. INTRODUCTION

The United States has always been an immigrant nation. From talented students and professionals to “your tired, your poor, your huddled masses yearning to breathe free,” migrants have, since the nation’s birth, come from around the world seeking liberty and better fortunes. The nation has become very diverse by consequence, and in recent years, the Hispanic population in the United States has grown significantly. With migrants from Latin American countries pouring into the United States by the millions, Hispanics have become the nation’s largest minority.¹

The effects of Hispanics’ increased migration to the United States are manifold. These effects are perhaps clearest in Florida, California, and Texas, where Hispanic communities have experienced the most dramatic growth.² Many other communities are also having identity crises, either accepting the Spanish-speaking newcomers with open arms or turning them away.³ Employers have been quick to embrace Hispanic immigrants, for many industries depend heavily on migrant labor.⁴ However, they face backlash from many labor unions and politicians who claim that immigrants are stealing American jobs.⁵ Finally, the reality that millions of undocumented migrants successfully cross the U.S.-Mexico border with-

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¹ Steve Miller, *Hispanics Now No. 1 Minority in U.S.*, WASH. TIMES (D.C.), Jan. 22, 2003, at A1.

² JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 11 (2005), available at <http://pewhispanic.org/files/reports/44.pdf>.

³ See, e.g., Bruce Lambert, *L.I. Community Focus of Debate On Immigrants*, N.Y. TIMES, July 9, 2005, at B2.

⁴ Undocumented migrants constitute 20% of construction workers, 25% of meat and poultry workers, 26% of maintenance workers, and 23% of agricultural workers. PASSEL, *supra* note 2, at 27.

⁵ MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT (1994), available at <http://www.urban.org/url.cfm?ID=305184&renderforprint=1&CFID=3798610&CFTOKEN=79719524> (exploring public conceptions about migrants displacing American workers and providing empirical evidence for the opposite conclusion).

out detection raises national security concerns, especially after September 11, 2001.⁶

While migrant communities continue to grow, U.S. immigration law has lagged. For instance, current immigration law fails to accommodate the economic incentive that draws undocumented workers across the U.S.-Mexico border. Moreover, given the vast number of individuals wishing to enter the United States and the 10.3 million undocumented migrants already inside the country,⁷ far too few resources have been mobilized to enforce immigration law.⁸ This has led to arbitrary enforcement, uncompensated efforts by state and local governments, and dangerous private “enforcement.”⁹ Finally, immigration judges and the Board of Immigration Appeals (BIA), owing to limited resources and poor oversight,¹⁰ have been unable to provide effective adjudication, leaving massive immigration case-loads for the federal courts.¹¹ Added to the growing desire after September 11, 2001 to better secure U.S. borders, these circumstances have persuaded Congress to reform immigration law.

Several immigration reform bills have been proposed, but only one has been passed by the House of Representatives.¹² This Note explores how House Bill 4437¹³ would change federal immigration law to address the myriad difficulties associated with increased immigration, amending the Immigration and Nationality Act (INA).¹⁴ Part II summarizes the bill’s noteworthy provisions and political context. Narrowing the focus, Part III

⁶ See generally Ruchir Patel, *Immigration Legislation Pursuant to Threats to US National Security*, 32 DENV. J. INT’L L. & POL’Y 83 (2003). In this Note, the term “undocumented migrant” denotes any foreign-born person present in the United States without authorization.

⁷ PASSEL, *supra* note 2, at 3.

⁸ In January 2005, there were only 10,949 border patrol agents inside the United States, which equals 2% of the undocumented migrant population. In 2004, the Department of Homeland Security reported only 150,000 deportations, which equals about 1.5% of the undocumented migrant population and less than 25% of the number of undocumented migrants that enter the United States annually. U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2006 8 (2005).

⁹ See, e.g., Minuteman Civil Defense Corps, <http://www.minutemanhq.com/> (last visited Feb. 27, 2006).

¹⁰ Judge Posner recently observed that during one year the Seventh Circuit reversed 40% of the BIA cases reviewed on the merits. The corresponding figure for civil cases was 18%. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). He then concluded, after quoting widespread dicta criticizing immigration judges and the BIA for ineptitude and rudeness, that “[t]his tension between judicial and administrative adjudicators . . . is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.” *Id.* at 829–30.

¹¹ See Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, SACBEE.COM, Sept. 5, 2004, http://www.sacbee.com/content/news/courts_legal/story/10637877p-11556573c.html.

¹² For discussion see NAT’L CONFERENCE OF STATE LEGISLATURES, FEDERAL IMMIGRATION REFORM BILLS (2006), <http://www.ncsl.org/programs/immig/Immigreformbills0206.htm>.

¹³ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

¹⁴ Immigration and Nationality Act, 8 U.S.C.A. §§ 1101–1537 (2006) [hereinafter INA].

analyzes proposed amendments to the human smuggling provisions of the INA,¹⁵ found primarily in section 202 of House Bill 4437. Ultimately, this Note concludes not only that fears expressed about section 202 covering altruistic and non-discrimination-based assistance to undocumented migrants are well warranted, but also that section 202, deeply offensive to personal liberty and human dignity, can have no place in any constitutional or morally acceptable immigration reform package.

II. THE SENSENBRENNER-KING BILL

The House Judiciary Chairman Rep. James Sensenbrenner (R-Wis.) and Homeland Security Chairman Rep. Peter King (R-N.Y.) introduced House Bill 4437, entitled the “Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,” with 34 other co-sponsors in early December 2005.¹⁶ Although deliberation over what some call the “Sensenbrenner-King Bill” was allegedly hasty, chaotic, and politically pressured,¹⁷ the House passed the bill 239-182 on December 16, 2005, with votes falling roughly along party lines but with 36 Democratic ayes and 17 Republican nays.¹⁸ As the official title implies, House Bill 4437 emphasizes border protection, stemming illegal immigration, and better law enforcement against terrorism and human smuggling. This Section summarizes the bill’s noteworthy provisions roughly according to these categories.¹⁹

Border protection. Section 101 requires the Homeland Security Secretary to take every step “necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States,” including creating physical barriers, hiring and training more border patrol agents, and heightening surveillance with new technology,²⁰ such as unmanned aircraft and “radiation portal monitors.”²¹ Section 607 gives local sheriffs in counties located within twenty-five miles of the U.S.-Mexico border authority to enforce federal laws and provides reimbursement for undocumented migrants’ detention and transportation.²² Finally, section 1002 calls for the construction of a 700-mile, two-

¹⁵ *Id.* § 274.

¹⁶ The Library of Congress: Thomas, Search Results for H.R. 4437, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR4437>: (last visited Feb. 26, 2006).

¹⁷ Steve Pearce, *In Support of Secure Borders*, WASH. TIMES (D.C.), Jan. 14, 2006, in Letters.

¹⁸ Final Vote Results for Roll Call 661, <http://clerk.house.gov/evs/2005/roll661.xml> (last visited Feb. 26, 2006).

¹⁹ For additional summary see AM. IMMIGRATION LAWYERS ASS’N, THE BORDER PROTECTION, ANTITERRORISM, AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005 (H.R. 4437), AS AMENDED AND PASSED BY THE HOUSE ON 12/16/05 SECTION-BY-SECTION ANALYSIS (2006), <http://www.aila.org/content/default.aspx?docid=18258>.

²⁰ H.R. 4437 § 101.

²¹ *Id.* § 116.

²² *Id.* § 607.

layer fence along the U.S.-Mexico border, specifically in California, Arizona, New Mexico, and Texas.²³

Anti-smuggling. Section 202 amends section 274 of the INA, which concerns human smuggling, to prohibit assisting, encouraging, directing, or inducing migrants to come or remain in the United States illegally. Applicable only where the offender knows or should have known the migrant's immigration status, Section 202 further provides that violators may be fined and imprisoned for five to twenty years, depending on whether they sought financial gain.²⁴ Moreover, section 201 expands the INA definition of "aggravated felony" to include all smuggling offenses, certain solicitation and assistance offenses, and illegal entry and reentry offenses with a one-year sentence or greater punishment.²⁵ Section 619 adds human trafficking and human smuggling as predicate acts under the federal money laundering statute.²⁶

Illegal entry and presence. Section 203 creates a new federal crime for "unlawful presence," defined as presence "in the United States in violation of the immigration laws or the regulations prescribed thereunder."²⁷ Operating in conjunction with section 201, Section 203 makes the new crime an aggravated felony.²⁸ Section 617 requires U.S. Attorney offices to determine whether criminal defendants whom they prosecute are lawfully present in the United States and to report their findings to the court.²⁹ Section 614 makes removable migrants who procure or try to procure citizenship unlawfully or are convicted for offenses regarding the misuse of social security numbers or fraud in relation to identification documents.³⁰ Section 618 provides increased penalties for document fraud.³¹ Finally, section 407 expands the INA expedited removal provisions, which authorize immigration officers in certain situations to order migrants seeking admission removed without further hearing or review unless they apply for asylum,³² to include migrants apprehended within 100 miles from the border with Mexico or Canada within fourteen days after entry who are not Mexican or Canadian and who were never admitted or paroled into the United States.³³

²³ *Id.* § 1002; see Suzanne Gamboa, *House OKs 700-mile Mexico Fence*, BOSTON.COM, Dec. 16, 2005, http://www.boston.com/news/nation/washington/articles/2005/12/16/house_oks_700_mile_mexico_fence/.

²⁴ H.R. 4437 § 202.

²⁵ *Id.* § 201.

²⁶ *Id.* § 619 (amending 18 U.S.C.A. 1956(c)(7)(D) (2006)).

²⁷ *Id.* § 203(3) (amending INA § 275); see Michael D. Patrick, *Immigration Reform: Congressional Outlook for 2006*, N.Y.L.J., Jan. 23, 2006, at 3 (col. 1) (criticizing section 203 for punishing those who entered lawfully but lost lawful status due to minor technical errors).

²⁸ H.R. 4437 § 203(3).

²⁹ *Id.* § 617.

³⁰ *Id.* § 614.

³¹ *Id.* § 618.

³² INA § 235(b)(1)(A).

³³ H.R. 4437 § 407; see Jayne E. Fleming, *Immigration Bill a Step Back for Human*

Anti-terrorism. Section 601, which operates retroactively, makes ineligible for asylum and withholding of removal migrants whose actions fall under the INA definition of terrorism.³⁴ This broad definition would include anyone who “has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.”³⁵ Section 609 renders any person who has ever fallen under this definition ineligible for naturalization and makes the decision unreviewable by courts.³⁶ Section 602 authorizes indefinite detention for certain removable migrants classified as “dangerous aliens,” which would include migrants who have a highly contagious disease, whose release would probably have “serious adverse foreign policy consequences,” who may threaten national security, or whose release, given prior criminal convictions, may threaten any person or community.³⁷ Section 610 authorizes expedited removal proceedings to determine inadmissibility on criminal grounds,³⁸ and section 612 amends the INA definition of “good moral character” to exclude anyone described by inadmissibility or removability grounds relating to terrorism or security.³⁹

Unlawful employment. Currently, section 274A of the INA provides that for each employee, employers must examine certain documents establishing identity and employment authorization, formally attest to this verification, and maintain copies of these documents. Amending this section, Title Seven of House Bill 4437 requires the creation of an electronic or telephonic verification system.⁴⁰ Section 702 obligates employers to seek verification of identity and employment authorization for new employees generally within three days after the employment period begins,⁴¹ and section 703 requires the same verification for all previously hired employees.⁴² Increasing civil penalties for failure to use the verification system, section 706 requires that violators pay at least \$5,000 for each unlawfully employed migrant and that repeat violators pay at least \$25,000 for each unlawfully employed migrant. Increasing criminal penalties for em-

Rights, RECORDER (S.F.), Dec. 16, 2005, at 4 (arguing that this border control provision, conferring unbridled discretion on low-level immigration officials, strikes an improper balance with human rights).

³⁴ *Id.* § 601.

³⁵ INA § 212(a)(3)(F).

³⁶ H.R. 4437 § 609.

³⁷ *Id.* § 602.

³⁸ *Id.* § 610. See note 32 and accompanying text for a description of expedited removal.

³⁹ H.R. 4437 § 612.

⁴⁰ H.R. 4437 § 701. Such a system would require employers to use a toll-free telephone number or other electronic device to check a Social Security or DHS database to verify employees' identification and authorization documents. *Id.*

⁴¹ *Id.* § 702. Certain private employers and federal, state, and local governmental entities would have to verify previous hires within three years once the bill becomes law, whereas other employers would have to verify within six years. *Id.*

⁴² *Id.* § 703.

ployers with an unlawful employment pattern or practice, section 706 increases the maximum fine from \$3,000 to \$50,000 and makes the minimum imprisonment period one year; current law makes the maximum period six months. Finally, section 708 precludes state or local governments from requiring businesses to provide, build, fund, or maintain an area or shelter for day laborers' use or otherwise to facilitate their employment.

Miscellaneous. Section 805 changes the process by which removal orders are reviewed.⁴³ This provision requires that, once a migrant files his petition for review, an appellate judge must review this petition, find that the migrant has "made a substantial showing that the petition for review is likely to be granted," and issue a "certificate of reviewability."⁴⁴ The government need not file any response brief until this occurs, the appellate judge's decision not to issue the certificate cannot be reviewed, and without this certificate the migrant can be deported without further recourse.⁴⁵ Section 404 authorizes the Department of Homeland Security to deny admission to citizens, subjects, nationals, or residents of countries that deny or unreasonably delay accepting the return of someone ordered removed from the United States.⁴⁶ Finally, section 1102 eliminates the diversity lottery found in section 203(c) of the INA.⁴⁷

House Bill 4437, though resolutely defended by some, has been criticized as presenting an incomplete, unrealistic solution to the problems created by current immigration to the United States. Specifically, critics fault the bill's failure to include a guest worker program.⁴⁸ Some believe the omission indicates a blindness to the economic reality underlying illegal migration—namely the incredible job prospects available in the United States to unskilled immigrant workers.⁴⁹ Others observe the unique role that undocumented workers currently play within the U.S. economy. For instance, Rep. Howard Berman has claimed that failure to include some guest worker program, coupled with House Bill 4437's employee verification requirements, would devastate the tourist and the fruit and vegetable industries.⁵⁰ Rep. Sensenbrenner responded that Congress has reached no

⁴³ *Id.* § 805.

⁴⁴ *Id.* § 805.

⁴⁵ *Id.*; see AM. IMMIGRATION LAWYERS ASS'N, *supra* note 19, at 23 n.53 (criticizing House Bill 4437 for ignoring that increased immigration appeals arose mainly from standard administrative adjudication).

⁴⁶ H.R. 4437 § 404.

⁴⁷ H.R. 4437 § 1102. The Diversity Lottery Program makes available 55,000 immigrant visas to people who come from countries with low rates of immigration to the United States. The visas are assigned through an annual lottery held by the State Department. See Immigration through the Diversity Lottery, U.S. Citizenship and Immigration Services, <http://uscis.gov/graphics/services/residency/divvisa.htm> (last visited Mar. 1, 2006).

⁴⁸ See Rachel L. Swarns, *Tough Border Security Bill Nears Passage in the House*, N.Y. TIMES, Dec. 14, 2005, at A30; *Bad Border Bill*, WASH. POST, Dec. 28, 2005, at A20.

⁴⁹ See *Immigration Bill Only a Half Measure*, SEATTLE TIMES, Jan. 2, 2006, at B6.

⁵⁰ *Judiciary Committee OKs Border Security Bill*, FOXNEWS.COM, Dec. 8, 2005, <http://www.foxnews.com/story/0,2933,178144,00.html>; see also Brian Johnson, *Construction Groups Take Issue with Federal Immigration Bill*, DAILY RECORD (Mo.), Dec. 30, 2005,

consensus on guest worker programs and that important security measures cannot wait.⁵¹ According to another view, however, the guest worker program's conspicuous absence from House Bill 4437 comes from a deliberate political tactic designed to persuade the House—generally less friendly to immigrants—eventually to approve language that allows for guest workers.⁵² Under this plan, Senators would combine House Bill 4437 with their own guest worker program and send the amalgamation back to the House for another vote.⁵³ Hence, although many disbelieve that House Bill 4437 could ever pass in the Senate, the substantive provisions described above remain important to consider because they could easily reappear in an alternative bill much more likely to reach the President's desk.

III. ASSISTANCE TO UNDOCUMENTED MIGRANTS

While many sections of House Bill 4437 have created controversy, the most troubling portion directly affects not undocumented migrants but the millions of ordinary citizens and residents who treat them like neighbors. Section 202 prohibits assisting an undocumented migrant to reside in the United States and carries severe criminal penalties.⁵⁴ Accordingly, many fear that humanitarian aid workers, emergency health technicians, immigration lawyers, religious workers, and other well-intentioned citizens and residents could face imprisonment.⁵⁵ Others deny this possibility and allege that immigration officials and federal prosecutors badly need section 202 to handle migrant smuggling rings.⁵⁶ This Part closely examines the precise language in section 202 and concludes that the critics' fears that this section prohibits altruistic and non-discrimination-based assistance to undocumented migrants are well-warranted. Ultimately, this Part will show that section 202, which severely burdens personal liberties and human dignity, can have no place in any acceptable immigration reform package.

The activities that many fear would violate section 202 are numerous and diverse. Illustrative scenarios include: a soup kitchen operator serving undocumented migrants along with everyone else who arrives, a nurse giving medicine or advice to patients without Social Security numbers, an immigration lawyer continuing to advise a client who violated her student visa, a man donating his old winter coat to an undocumented migrant attend-

available at 2005 WLNR 22409150 (making similar claims for the construction industry).

⁵¹ *Judiciary Committee OKs Border Security Bill*, *supra* note 50.

⁵² See Anne C. Mulkern, *GOP Forms Strategy to OK Guest Workers*, DENVER POST, Dec. 6, 2005, at A02.

⁵³ *Id.*

⁵⁴ H.R. 4437 § 202.

⁵⁵ See Rachel L. Swarns, *Bill on Illegal-Immigrant Aid Draws Fire*, N.Y. TIMES, Dec. 30, 2005, at A24; Lucia Graves, *Border Measure Incites Debate*, FRESNO BEE, Jan. 13, 2006, at B1.

⁵⁶ See, e.g., *Hype, Hysteria and Immigration*, WASH. TIMES (D.C.), Jan. 7, 2006, at A12.

ing his church, a landlord renting an apartment to someone whose spouse overstayed her visa, a bank teller helping an undocumented migrant send money to his family in Mexico, and a city official building an enclosed shelter for day laborers who had congregated on area street corners. Assuming that section 202 covers these scenarios, the individuals described above would become aggravated felons and could face five-year prison sentences. Disagreeing with this assumption, some who support House Bill 4437 maintain that nothing in section 202 reasonably admits an interpretation that would allow the government to imprison someone for these or similar activities.⁵⁷

At its heart, this debate rests on uncertainty about what the bill's language actually means and how it may differ from existing INA provisions. Currently, section 274(a)(1)(A) of the INA imposes criminal liability in cases in which someone (i) "brings or tries to bring" a migrant into the United States at some place other than a designated entry point; (ii) "transports, or moves or attempts to transport or move" an illegal migrant within the United States in furtherance of his immigration law violation; (iii) "conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection" an illegal migrant; (iv) "encourages or induces" a migrant to come to, enter, or reside in the United States illegally; and (v)(I) conspires to commit or (II) aids and abets another committing one of these offenses. Concerning mental states, subsection (i) requires that the actor know of the migrant's unauthorized status, whereas subsections (ii) through (iv) require only that the actor know of or recklessly disregard the relevant illegality. Added to penalties ranging from fines to imprisonment or death,⁵⁸ the government must seize, and offenders may forfeit, any "conveyance" used in one of the offenses, the gross proceeds of the offense, and any property traceable to such conveyance or proceeds.⁵⁹

Amending section 274(a) of the INA, House Bill 4437 would impose criminal liability in cases in which someone (A) "assists, encourages, directs, or induces" an unauthorized migrant to enter the United States; (B) "assists, encourages, directs, or induces" an unauthorized migrant to enter the United States outside a designated entry point; (C) "assists, encourages, directs, or induces" an illegal migrant to reside in or remain in the United States; (D) "transports or moves" a migrant in the United States

⁵⁷ *Id.*

⁵⁸ Here are the complete penalties provided for in the INA: offenders under subsections (ii), (iii), (iv), or (v)(II) may be fined and imprisoned for not more than five years; offenders under subsections (i) or (v)(I) and offenders under subsections (ii), (iii), or (iv) who acted for "commercial advantage or private financial gain" may be fined and imprisoned for not more than ten years; any offender whose offense jeopardized life or caused bodily injury may be fined and imprisoned for not more than twenty years; and any offender whose offense resulted in any person's death may be fined, imprisoned for life, or punished by death. INA § 274(a)(1)(B).

⁵⁹ INA § 274(b)(1).

where this “will aid or further in any manner” the migrant’s illegal entry into or illegal presence within the United States; (E) “harbors, conceals, or shields from detection” an illegal migrant in the United States; (F) “transports, moves, harbors, conceals, or shields from detection” someone outside the United States who seeks to enter the United States unlawfully; and (G) “conspires or attempts to commit” one of these offenses. Basically the same mental state requirement applies for each offense: the actor must perform the prohibited activities “knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to enter or be in the United States.” Added to penalties ranging from fines to imprisonment or death,⁶⁰ offenders may forfeit any real or personal property used to commit or facilitate the commission of one of the offenses, the gross proceeds of the violation, and any property traceable to such property or proceeds.⁶¹

Given the words’ ordinary meanings, section 202’s most reasonable interpretation suggests that critics are correct in alleging that House Bill 4437 prohibits altruistic and non-discrimination-based assistance to undocumented migrants. Activities designed to improve someone’s health or living conditions clearly amount to assistance and doubtless increase that person’s ability and desire to remain in the United States. Under this theory, the immigration lawyer, landlord, bank teller, and local politician scenarios illustrate easy cases because they involve assistance intimately connected with continued residence in the United States. Moreover, since all seven scenarios involve someone treating undocumented migrants with the same humanity and generosity offered to others, the activities not only provide material assistance but engender an atmosphere of social acceptance and fellowship that encourages or enables undocumented migrants to remain in the United States. Under either theory, section 202 would cover the scenarios described in the beginning of this Part. Hence, the disputed fears seem warranted.

⁶⁰ Here are the complete penalties proposed by House Bill 4437: offenders not acting for “commercial advantage, profit, or private financial gain” may be imprisoned for not more than five years; first-time offenders acting with the described economic incentive may be fined and imprisoned not more than twenty years; economically motivated offenders whose offense involved two or more aliens, and economically motivated repeat offenders may be fined and imprisoned not more than twenty years nor less than three years; offenders whose offense furthered another crime against the United States punishable by imprisonment for more than one year, or whose offense imperiled another person’s life or limb and involved dangerous or inhumane transportation conditions may be fined and imprisoned for not more than twenty years nor less than five years; offenders whose offense caused anyone serious bodily injury may be fined and imprisoned for not more than thirty years nor less than seven years; offenders who knew or should have known the smuggled alien was a terrorist may be fined and imprisoned for not more than thirty years nor less than ten years; and offenders whose offense resulted in someone’s death may be fined, imprisoned for life or any period above ten years, or punished by death. H.R. 4437 § 202 (amending INA 274(a)(2)).

⁶¹ H.R. 4437 § 202 (amending INA 274(c)).

Admittedly, narrower interpretations of section 202 are possible. For example, one could argue that the phrase “assist[ance] . . . to reside in or remain in the United States” requires an obvious or conscious connection between the assistance and continued residence.⁶² According to this argument, section 202 would not cover situations where the assistance was tailored to improving health, for this aim seems neutral about precisely where the healthy migrant ultimately resides. But section 202’s structure belies this interpretation because the narrow construction requires inferring unstated *mens rea* requirements from the term “to” even though section 202 articulates *mens rea* elements elsewhere in explicit and ostensibly comprehensive terms—in this case, “knowing or in reckless disregard of the fact that such person is an alien.”⁶³ Even with the narrow interpretation, moreover, section 202 would still cover the lawyer, landlord, bank teller, local politician, and similar scenarios. Finally, the simple observation that narrower interpretations are possible does not undermine the reality that section 202’s precise language reasonably admits the broader interpretation, with all its troubling implications.

Some favoring section 202 have responded that although the language may seem broad, House Bill 4437 does not target altruistic and non-discrimination-based assistance to undocumented migrants but obviously aims to provide critical tools for prosecuting elaborate smuggling rings that bring undocumented migrants *en masse* into the United States.⁶⁴ Overall, the language in section 202 supports this claim by focusing especially on offenses seeking financial gain or bringing more than one undocumented migrant into the United States. But this observation should not alleviate concerns about section 202’s broad criminal prohibitions. Nothing would prevent the government from interpreting section 202 broadly once House Bill 4437 became law. Recent trends in immigration law enforcement, with politicians and the Department of Homeland Security aiming to show toughness on illegal immigration,⁶⁵ make such an interpretation alarmingly likely. Moreover, because the government could never prosecute the millions who assist undocumented migrants, section 202 would invite arbitrary enforcement and provide inadequate notice to those who foresee associating with undocumented migrants. Hence, even accepting that section 202 only targets migrant smuggling rings, the severe dangers created by overbroad criminal prohibitions oblige legislators to rewrite section 202 much more narrowly.

However, arguments voiced by Congressmen defending House Bill 4437 suggest that section 202 targets much more than migrant smuggling

⁶² H.R. 4437 § 202 (amending INA 274(a)(1)(C)) (emphasis added).

⁶³ *Id.*

⁶⁴ See Susan Ferriss, *Migrant Measure’s Reach is Feared*, SACRAMENTO BEE (CA), Jan. 27, 2006, at A1.

⁶⁵ See Nina Bernstein, *Faulty Papers Can Put Travelers In Rough Hands at US Border*, N.Y. TIMES, Feb. 10, 2006, at A1.

rings. Jeff Lungren, spokesman for Rep. Sensenbrenner and the House Judiciary Committee, stated that House Bill 4437 aims to “re-establish respect for our immigration laws.”⁶⁶ Similarly, others explain that it tries “to crack down on a culture of indifference to the nation’s immigration laws that has allowed 11 million illegal immigrants to live in this country.”⁶⁷ Consistent with this aim, section 202 provides penalties in cases “where the offense was not committed for commercial advantage, profit, or private financial gain,”⁶⁸ thus explicitly covering altruistic and non-discrimination-based assistance to undocumented migrants. Section 202 extends well beyond smuggling rings, and, targeting altruistic or non-discriminatory citizens and residents who betray “indifference” to immigration law, represents an attempt to criminalize acquiescence in immigration law violations.

This approach to immigration law enforcement suffers many deep flaws. For example, section 202 would push undocumented migrants deeper underground, encourage widespread racial discrimination, effectively saddle citizens and residents with law enforcement obligations, and distance moral culpability from criminal liability within immigration law. The latter two flaws, which concern the way in which section 202 affects citizens and aliens, are best understood by analogy to the common law of aiding and abetting. One cannot become an accessory before the fact through “[m]ere knowledge or even approval of the proposed commission of a crime, without more,”⁶⁹ nor does one “become an accessory after the fact merely by knowing and failing to disclose that another person has committed a felony [or] by failing to apprehend the felon or by approving of the felony.”⁷⁰ Hence, States generally decline to impose criminal liability for acquiescence in, failure to report, or approval of criminal activity. They maintain this position not only given the absence of any morally significant causal connection between the person and the criminal activity but also based on the notion that government should not make citizens responsible for enforcing criminal laws.

First, the principle that criminal law should not punish someone with only a tenuous causal connection to criminal activity directly conflicts with House Bill 4437’s attempt to “crack down on a culture of indifference to the nation’s immigration laws” by criminalizing benign associations with undocumented migrants. A good Samaritan who, while aiming to serve those most in need, provides the same assistance to undocumented migrants that others would receive bears no causally significant connection with migrants’ unauthorized entries into the United States. The argument

⁶⁶ Swarns, *supra* note 55, at A24.

⁶⁷ *Id.*

⁶⁸ H.R. 4437 § 202 (amending INA 274(a)(2)(A)).

⁶⁹ CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 32 (15th ed., Thomson Legal Publishing 1993).

⁷⁰ *Id.* § 33.

that providing such basic assistance has some causal connection with the migrants' continued presence in the United States proves too much, since virtually every good deed, commercial exchange, or other human encounter that benefits an undocumented migrant could be understood to assist his or her continued unlawful presence. Punishing individuals in these situations violates the basic principle of justice that requires some significant relationship between personal culpability and criminal punishment.

Second, the notion that criminal law should not oblige private citizens to become enforcement agents or proxies for the government applies equally within immigration law. The Constitution distributes criminal law enforcement duties in this way: citizens must obey criminal laws and fund their enforcement through taxes, whereas only government has the duty to enforce criminal law.⁷¹ Arranging the citizen-government relationship this way safeguards personal liberties by letting citizens decide for themselves whether to promote, disagree with, or even feel indifferent about criminal prohibitions. Avoiding the strict liability regime that personal duties to enforce criminal law would create, this arrangement also preserves personal autonomy because only deliberate actions, not passive experiences such as accidentally witnessing crimes, incur criminal liability. However, faced with woefully under-enforced immigration laws, House Bill 4437 would change this arrangement and saddle private citizens with enforcement responsibilities. Unlike before, this would transform the citizen-government relationship that safeguards the freedom of conscience into one that mandates "if you are not with us, you are against us," and citizens unable to control whether undocumented migrants enter their community would incur criminal liability for treating them like neighbors. With strikingly Orwellian implications, section 202's severe burdens on personal autonomy and liberties reveal another deep flaw in House Bill 4437's approach to immigration law enforcement.

There are also important flaws in the way section 202 affects migrants. For example, section 202 would invite widespread racial discrimination. By prohibiting assistance to undocumented migrants with "reckless disregard" for immigration status, section 202 encourages businesses and service providers to apply racial stereotypes and, since most undocumented migrants are Hispanic,⁷² request documentation from anyone who looks Hispanic. Accordingly, Hispanics would need to carry with them passports, social security cards, naturalization certificates, and any other documents that businesses and service providers decided necessary. Moreover, virtually anyone motivated by racial animus could harass Hispanics by refusing service because their documents looked forged. Given these circum-

⁷¹ See U.S. Const. art. II, § 1, cl. 1.

⁷² See PASSEL, *supra* note 2, at 3 (showing that eighty percent of undocumented migrants are Hispanic).

stances, many Americans would soon look and feel like second-class citizens.

Section 202 would also further divide U.S. society into castes by pushing undocumented migrants deeper underground. Although politicians already often say that undocumented migrants are forced to live in shadows,⁷³ the present situation pales beside what House Bill 4437 would produce. Since section 202 would make service providers report or turn away undocumented migrants, they would have even less incentive to emerge from the shadows. Thus situated, undocumented migrants would become even more vulnerable to abuse and exploitation, especially since the efforts of the few working against such exploitation would become unlawful.⁷⁴ Moreover, documented migrants who accidentally violated their visa conditions would become likely to enter the same shadows occupied by undocumented ones, since immigration lawyers could not provide assistance.⁷⁵ Basically, House Bill 4437 encourages citizens and residents to exclude undocumented migrants from civil society. Prohibiting deliberate assistance across the board, section 202 evidently tries to place undocumented migrants beyond society's reach. This outcome deeply offends human dignity and exposes another flaw behind House Bill 4437's approach to law enforcement.

Judge Robert Takasugi observed where section 202 went wrong almost three decades before House Bill 4437 was ever proposed.⁷⁶ Writing an opinion that addressed the same questions raised by section 202, Takasugi concluded that interpreting contemporary smuggling laws to mean what section 202 now expressly states

would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create...a new crime and a new class of criminals. All of our freedom and dignity as people would be so reduced.⁷⁷

⁷³ See, e.g., Press Release, White House Office of the Press Secretary, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

⁷⁴ See Ferriss, *supra* note 64.

⁷⁵ See Stanley Mailman & Stephen Yale-Loehr, *Immigration Reform: Restrictionists Win in the House*, N.Y.L.J., Dec. 28, 2005, at 3 (col. 1).

⁷⁶ U.S. v. Moreno, 561 F.2d 1321 (9th Cir. 1977).

⁷⁷ *Id.* at 1323. The case involved a reforestation company foreman whose job responsibilities included transporting crewmen from one job site to another. One day, immigration officials stopped his vehicle and arrested several crewmen, who were later found to be undocumented. Circumstances implied that the foreman knew the crewmen's immigration status. He was prosecuted and convicted under 8 U.S.C. § 1324(a)(2), imposing criminal liability on "any person who . . . knowing that [an alien] is in the United States in violation of law

Circumstances not having changed significantly since 1977, section 202 likewise threatens human dignity and personal liberties. Undocumented migrants who enter the United States should become like neighbors, while citizens and residents should remain free to feel indifferent about immigration law enforcement. However, section 202 would push undocumented migrants deeper underground, encourage widespread racial discrimination, saddle citizens and residence with law enforcement obligations, and distance criminal liability from moral culpability regarding immigration law. For these reasons, section 202's broadly worded criminal prohibitions, covering altruistic and non-discrimination-based assistance to undocumented migrants, should be removed from House Bill 4437 as inconsistent with any acceptable immigration reform package.

. . . transports, or moves, or attempts to transport or move [said alien] within the United States . . . in furtherance of such violation of law." *Id.* at 1322 n.1. On appeal, the question was how to interpret these final seven words. Reading them narrowly, Judge Takasugi reversed the conviction because the defendant had just been fulfilling his job responsibilities. Since section 202 effectively removes those final seven words, it would resemble the broader reading that Judge Takasugi warns against. *Id.* at 1322–23.