NONCITIZEN HARBORING AND THE FREEDOM OF ASSOCIATION*

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The United States has long criminalized assistance to unauthorized migrants. It is a crime to smuggle, transport, harbor, or encourage unauthorized migrants to remain in the country, regardless of the reasons for such aid. In response to recent federal harboring prosecutions of humanitarians assisting migrants at the U.S.-Mexico border, scholars and advocates have shown tremendous interest in a defense to liability under the Religious Freedom Restoration Act and the First Amendment's Free Speech Clause. But a comparative analysis of harboring law reveals that some foreign jurisdictions conceptualize harboring law and defenses to liability in terms of citizen-migrant associations rather than religious freedom or freedom of speech.

This Article argues that conceptualizing harboring law in the United States in terms of the freedom of association, like these foreign jurisdictions, would pay off in three ways: First, it would improve the descriptive accuracy of the stakes in harboring prosecutions; providing water, food, and shelter to other people amounts to association more clearly than it does an expression of religious belief or a political view. Second, it would provide an opportunity to rework aspects of associational jurisprudence by potentially extending the category of protected "intimate" associations to include activities of care outside of the family. Finally, focusing on association brings the relationships between citizens and migrants to the fore, which in turn stands to improve the visibility and stature of migrants in the law.

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INTRODUCTION

In recent years, federal prosecutors have criminally charged U.S. citizens for offering humanitarian aid to unauthorized migrants, including offers of clean clothes, water to drink, and a place to rest.[1] Charged with felonies under the harboring statute and misdemeanors under federal regulations, these defendants face fines and jail terms for their humanitarian work. Harboring prosecutions have increased in recent years and are likely to recur.[2] Since the

1. *See* Criminal Complaint at 1, United States v. Warren, No. 4:18-CR-00223-RCC-DTF (D. Ariz. Jan. 18, 2018).

2. *See Along the US-Mexico Border Prosecutions for Harboring Immigrants Continue To Climb*, TRAC REPS. (Apr. 13, 2020), https://trac.syr.edu/tracreports/crim/603/ [https://perma.cc/WM4H-6LRL]

1990s, the U.S. government's official policy of "prevention through deterrence" closed off common routes of entry and recognized the increased peril that migrants faced when pushed to indirect routes.[3] But under the logic of that policy, officials believe that the threat of death and dehydration deters migrants from making the journey in the first place. Humanitarians who make the journey safer undermine that policy objective.

The high-profile criminal prosecutions of humanitarians in recent years have led to a surge of interest in a defense based on the Religious Freedom Restoration Act ("RFRA").[4] Defendants have asserted that criminal prosecution substantially interferes with the exercise of their sincere religious belief, a contention several courts have accepted,[5] and that the government lacks a compelling interest justifying the burden on religion, or that imposing the burden is not the least restrictive means of pursuing a compelling interest in border security.[6] One scholar has also suggested that certain forms of assistance could constitute expressive conduct, a form of dissent from border policy.[7] These arguments have advanced recognition of the ways that criminal prosecution impedes citizens' personal rights relating to religious and political expression.

Other jurisdictions, however, such as Canada, the European Union ("EU"), and some EU member states, regulate harboring differently, with exemptions either for family relationships or for acts of fraternity. For example, Canadian law does not explicitly criminalize harboring, although commentators

(showing increase in all harboring prosecutions from FY 2016 through FY 2019, not only prosecutions of humanitarian actors).

3. *See* U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN: 1994 AND BEYOND 6–7 (1994), https://www.hsdl.org/?abstract&did=721845 [https://perma.cc/HXD9-WK3J] (click "Download") (describing "prevention through deterrence" as strategy of increasing risk of apprehension to render illegal entry futile, and further, that "illegal traffic will be deterred, or forced over more hostile terrain").

4. Religious Freedom Restoration Act, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488–89 (1993) (codified at 42 U.S.C. § 2000bb-1 (1993)); *see, e.g.*, Stephanie Acosta Inks, *Immigration Law's Looming RFRA Problem Can Be Solved by RFRA*, 2019 BYU L. REV. 107, 157–58 (discussing RFRA-based construction of harboring law); Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion?*, 20 U. PA. J. CONST. L. 1101, 1129–38 (2018) (discussing RFRA analysis of "sanctuary" corporations' harboring liability); Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 433–49 (2019) (discussing how RFRA applies to harboring law); Lydia Weiant, Note, *Immigration v. Religious Freedom in Trump's America: Offering Legal Sanctuary in Places of Worship*, 58 AM. CRIM. L. REV. 257, 275–77 (2020) (discussing the RFRA defense to harboring); Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 KAN. L. REV. 535, 600–02 (2020) (same).

5. *See, e.g.*, United States v. Hoffman, 436 F. Supp. 3d 1272, 1289 (D. Ariz. 2020) (ruling in favor of defendants on their defense under the Religious Freedom Restoration Act).

6. *See* Scott-Railton, *supra* note 4, at 441–45 (discussing the backend of the test that shifts burden to the government).

7. *See* Jason A. Cade, "*Water Is Life!*" *(and Speech!): Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 261 (2020).

note the uncertain legality of institutions like church sanctuary.[8] Canadian smuggling law, too, includes exemptions for family, mutual, and humanitarian aid. The EU legal regime, on the other hand, gives member states the discretion to criminalize nonprofit aid to unauthorized migrants.[9] Although most member states criminalize harboring, or "facilitation of residence," even when undertaken by family members or humanitarian actors, some have carved out exemptions.[10] In France, for example, an olive farmer famously avoided criminal liability for humanitarian assistance to unauthorized migrants based on the French Constitutional Court's ruling that his acts were protected acts of "fraternity."[11]

Ultimately, this Article posits, the contours of harboring law in these other jurisdictions reflect a recognition that harboring law impacts citizen-migrant associations rather than religious freedom or political expression alone. In Canada and some EU member states, scholars, advocates, and policymakers expressly cast the toll of harboring laws as burdening associations between citizens and migrants.[12] They conceptualize harboring law also as chilling the activities of civil society more generally.[13] This approach contrasts with the dominant view in the United States of harboring law as legally problematic only when it impacts defendants' rights of religious or political expression.

This Article further argues that this reframing pays off in three ways. First, it avoids awkwardly characterizing acts of providing water, food, and shelter as "religious expression" or "expressive conduct" under the religion and speech clauses of the First Amendment. Instead, those acts are better characterized as ways of associating with other people. In the words of volunteer

8. *See* Sean Rehaag, *Bordering on Legality: Canadian Church Sanctuary and the Rule of Law*, 26 REFUGE 43, 48 (2009).

9. Sergio Carrera, Lina Vosyliute, Stephanie Smialowski, Jennifer Allsopp & Gabriella Sanchez, Directorate General for Internal Policies of the Union, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update*, at 10 (Dec. 2018) [hereinafter Carrera et al., *Fit for Purpose?*], https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf [https://perma.cc/D4UM-8TK3].

10. *Id.* at 10–11.

11. *Fraternité*, 15 EU CONST. L. REV. 183, 189 (2019) (discussing the case of Cedric Herrou).

12. *See* Rehaag, *supra* note 8, at 50; SERGIO CARRERA, VALSAMIS MITSILEGAS, JENNIFER ALLSOPP & LINA VOSYLIUTE, POLICING HUMANITARIANISM: EU POLICIES AGAINST HUMAN SMUGGLING AND THEIR IMPACT ON CIVIL SOCIETY 1–2 (2019) [hereinafter CARRERA ET AL., POLICING HUMANITARIANISM].

13. *See* Laura Schack, *Humanitarian Smugglers? The EU Facilitation Directive and the Criminalisation of Civil Society*, OXFORD L. FAC. BLOGS (July 6, 2020), https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/humanitarian [https://perma.cc/W6BE-3SLM] (noting that the targeting of people and NGOs that assist migrants and refugees "is an attack on the freedom of civil society, a foundation of liberal democracy"). In the U.S. context, Eisha Jain powerfully analyzes how immigration enforcement can chill a whole host of socially useful interactions. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1509–11 (2019).

Scott Warren, "[Caring for injured migrants is] a little different than like going and protesting the wall being built."[14] Because aid to migrants is best understood as associational activity rather than religious expression or political expressive conduct, the reframing improves descriptive accuracy.

Second, reframing the harboring statute as an infringement on association as applied to the provision of humanitarian aid presents a challenge and an opportunity. In the United States, freedom of association jurisprudence remains anemic, and some would argue, insufficiently protective of associations *among* citizens, let alone between citizens and migrants.[15] Even for associations among citizens, the jurisprudence today recognizes just two classes of protected associations: intimate and expressive, leaving a vast realm of association wholly unprotected.[16] Reframing the problem, however, points to a new direction in advocacy and reform by illuminating what a fuller conception of "association" might look like. Intimate association, for example, might be broadened to cover activities of care typically found in a family, even if the association is short-lived, serendipitous, and between strangers.[17] Such activities of care might encompass humanitarian aid to migrants.

Finally, a focus on harboring law's toll on associations highlights citizen-migrant *relationships* and not merely citizens' consciences or political worldviews. As evidenced in France, which recognizes a defense to a harboring-type offense based on the value of fraternity, a focus on the connection between citizens and migrants creates a space for viewing migrants as worthy of interaction, assistance, and general regard.[18] The invocation of values like fraternity and solidarity also complicates the picture of "rightless" migrants by making them visible and calling attention to their migration journey and their connections to the haven state.[19] When the problem is framed as the clash of a

14. Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, TIME (Nov. 21, 2019, 3:29 PM), https://time.com/5732485/scott-warren-trial-not-guilty/ [https://perma.cc/KQ89-RUF6 (staff-uploaded archive)].

15. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 61–62 (2012). Current doctrine provides only minimal protection to citizens seeking to associate with migrants not yet present on U.S. soil. *See generally* Kerry v. Din, 576 U.S. 86 (2015) (plurality opinion) (upholding consular denial of visa to a noncitizen in Afghanistan married to a U.S. citizen); Kleindienst v. Mandel, 408 U.S. 753 (1972) (upholding Attorney General's refusal to grant a waiver of inadmissibility to a journalist from Belgium despite First Amendment implications).

16. Roberts v. U.S. Jaycees, 468 U.S. 609, 614, 617–18 (1984); *see Kerry*, 576 U.S. at 93–94.

17. *Cf.* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980) (describing intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship").

18. Elian Peltier & Richard Pérez-Peña, *'Fraternité' Brings Immunity for Migrant Advocate in France*, N.Y. TIMES (July 6, 2018), https://www.nytimes.com/2018/07/06/world/europe/france-migrants-farmer-fraternity.html [https://perma.cc/H7KQ-Q7YL (staff-uploaded, dark archive)].

19. For discussion along these lines, see Daniel Kanstroom, "*Either I Close My Eyes or I Don't": The Evolution of Rights in Encounters Between Sovereign Power and "Rightless" Migrants*, *in* BEYOND BORDERS:

citizen's conscience and the law, we risk forgetting the migrants who undertook such an arduous, and often deadly, journey.[20]

This Article proceeds in four parts. Part I offers an overview of harboring and related offenses in the United States. Part II provides background on American associational freedom jurisprudence, both generally and with respect to citizen-noncitizen associations. Part III offers a comparative analysis of harboring law in France, the European Union, and Canada, demonstrating that associational freedom plays a stronger role in harboring law in those jurisdictions. Part IV argues for reframing defenses to harboring liability under U.S. law in terms of associational freedom and considers obstacles and objections.

I. HARBORING AND RELATED OFFENSES IN THE UNITED STATES

U.S. law prohibits several forms of assistance to unauthorized migrants. Under 8 U.S.C. § 1324(a), any person who smuggles, transports, harbors, conceals, or shields from detection an unauthorized migrant, or any person who encourages or induces an unauthorized migrant to remain in the United States "shall be punished" with fines or imprisonment.[21] The federal government has charged for-profit smugglers and humanitarians alike under this statute.

In recent years, the U.S. government has prosecuted people associated with humanitarian nonprofit organizations for aiding unauthorized migrants, charging them with misdemeanors or felonies. The government has charged humanitarians[22] with misdemeanors for violation of laws regulating access to

THE HUMAN RIGHTS OF NON-CITIZENS AT HOME AND ABROAD 126, 148–49 (Molly Land, Kathryn Libal & Jillian Chambers eds., 2021).

20. Sasha Hartzell, Paul Ingram & Dylan Smith, *Scott Warren Trial: Hung Jury in Case of No More Deaths Volunteer*, TUCSON SENTINEL (June 11, 2019, 3:30 PM), https://www.tucsonsentinel.com/local/report/061119_warren_verdict/scott-warren-trial-hung-jury-case-no-more-deaths-volunteer/ [https://perma.cc/H9UB-NSYB] (quoting Warren, observing that the two migrants he assisted, Kristian Perez-Villanueva and José Arnaldo Sacaria-Goday, had not "received the attention and outpouring of support that I have" and noting "I do not know how they are doing now, but I do hope they are safe").

21. 8 U.S.C. § 1324(a)(1) (Bringing in and Harboring Certain Aliens). For a discussion of harboring liability for humanitarian aid, see generally Shalini Bhargava Ray, *Saving Lives*, 58 B.C. L. REV. 1225 (2017) [hereinafter Ray, *Saving Lives*]; Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71 (2012). For discussion of harboring liability under U.S. law more generally, see generally Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147 (2010). Because the statute applies to "any person" who commits the proscribed acts, one need not be a citizen to be guilty of harboring. *See id.* at 157. However, for the ease of discussion, and to distinguish the parties to the associations at issue more effectively, this Article assumes that harboring defendants are "citizens."

22. Merriam-Webster defines "humanitarian" to mean "a person promoting human welfare and social reform," and in this Article, the term refers to people who provide basic goods, such as food, water, shelter, and clothing, without the intent to profit. *Humanitarian*, MERRIAM-WEBSTER (Oct. 13, 2022), https://www.merriam-webster.com/dictionary/humanitarian [https://perma.cc/5WMH-FB5S].

wildlife refuges without permits and prohibitions on abandoning property there, even food and water.[23] The federal government has also brought felony charges against humanitarians for violating the "harboring" statute.[24] These prosecutions have prompted defendants to challenge the harboring statute on overbreadth grounds and to assert defenses to criminal liability under the Religious Freedom and Restoration Act. Scholars have further suggested that the First Amendment's Free Speech Clause might also offer a basis for a defense. This part describes these prosecutions and analyzes these arguments for limiting liability.

A. *Criminal Liability for Harboring and Littering*

Prosecutions for misdemeanors against humanitarians assisting unauthorized migrants typically arise under regulations requiring a permit to use a vehicle in national wildlife refuges or regulations prohibiting the abandonment of property therein.[25] In 2008, for example, a volunteer named Dan Millis, affiliated with a nonprofit organization called No More Deaths, left gallon-sized jugs of purified water for migrants in the Buenos Aires Wildlife Refuge.[26] The government charged him with disposal of waste.[27] Millis argued that "placement of plastic bottles of purified water was not littering."[28] A jury convicted Millis, but the Ninth Circuit overturned his conviction in 2010 based on statutory interpretation, ruling that the word "garbage" in the applicable regulation was ambiguous, and that the rule of lenity favored an interpretation that did not cover bottles of purified water.[29]

In the summer of 2017, a federal wildlife officer apprehended four volunteers with No More Deaths in the Cabeza Prieta National Wildlife Refuge.[30] The volunteers had received a call on their NGO's "Search and

23. *See, e.g.*, Disposal of Waste, 50 C.F.R. § 27.94(a) (2023) (prohibiting the "littering, disposing, or dumping in any manner of garbage, refuse sewage . . . or other debris on any national wildlife refuge except at points or locations designated by the refuge manager").

24. Criminal Complaint, United States v. Warren, No. 4:18-CR-0223-RCC-DTF (D. Ariz. Jan. 18, 2018) (including felony harboring charge); *see also* Emily Breslin, Note, *The Road to Liability Is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People Under 8 U.S.C. § 1324(a)(1)(A)(iii)*, 11 RUTGERS J.L. & RELIGION 214, 217–20 (2009).

25. *See, e.g.*, 50 C.F.R. § 35.5 (2021) (prohibiting "use of motor vehicles" in national wildlife refuge system, save for specified circumstances).

26. United States v. Millis, 621 F.3d 914, 914–15 (9th Cir. 2010).

27. *Id.* at 916.

28. Gary Minda, *The Struggle for a Right to Water as a Human Right: 'No More Deaths' and the Limits of Legality in the Ninth Circuit Decision of* United States v. Millis, 19 WILLAMETTE J. INT'L L. & DISP. RESOL. 140, 148 (2011).

29. *Millis*, 621 F.3d at 918.

30. United States v. Deighan, No. MJ-17-0340-TUC-BGM, 2018 WL 2046811, at *1 (D. Ariz. May 1, 2018).

Rescue Hotline" indicating that three migrants were in distress in the refuge.[31] After they responded, the government charged these volunteers with driving in a wilderness area and "entering a national wildlife refuge without a permit."[32] Defendants sought to dismiss the indictment based on the necessity defense, citing the emergency facing the distressed migrants, as well as RFRA, but the court denied these defenses.[33] The government, however, ultimately dropped the charges.[34] Similarly, the government prosecuted Scott Warren, for both misdemeanors as well as felony harboring for offering shelter to and otherwise assisting two migrants who had crossed the border without authorization.[35] A jury acquitted Warren on the felony harboring charges.[36]

As described above, littering charges tend to arise from alleged violations of federal regulations governing access to federal wildlife refuges. In contrast, harboring is not linked to conduct occurring on federal land. The Supreme Court has not definitively interpreted what it means to "harbor," leaving the lower federal courts to adopt divergent interpretations.[37] For example, some appeals courts have interpreted harboring to encompass any act of affirmative assistance to an unauthorized migrant in the United States, including "simple sheltering."[38] Other appeals courts have adopted a narrower definition of harboring, one that does not encompass mere sheltering.[39] Others interpret harboring to mean any act that "substantially facilitates" an unauthorized

31. Nicole Ludden, *Federal Charges Against Four No More Deaths Volunteers Are Dropped*, CRONKITE NEWS (Feb. 21, 2019), https://cronkitenews.azpbs.org/2019/02/21/no-more-deaths-charges-dropped/ [https://perma.cc/6LY7-GJ6L].

32. *Id.*

33. United States v. Deighan, No. MJ-17-0340-TUC-BPV, 2018 WL 6809429, at *3–5 (D. Ariz. Dec. 27, 2018).

34. Ludden, *supra* note 31.

35. Teo Armus, *After Helping Migrants in the Arizona Desert, an Activist Was Charged with a Felony. Now, He's Been Acquitted*, WASH. POST (Nov. 21, 2019, 7:03 AM), https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/ [https://perma.cc/S3ZY-PJFZ (dark archive)] (describing prosecution); *Misdemeanor Count Against Scott Warren Dismissed*, U.S. DEP'T. JUST. (Feb. 27, 2020), https://www.justice.gov/usao-az/pr/misdemeanor-count-against-scott-warren-dismissed [https://perma.cc/4XQ2-G6UG].

36. Armus, *supra* note 35 (noting acquittal). For discussion of the broader implications of Warren's prosecution and acquittal, see generally Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619 (2020) [hereinafter Ray, *Law of Rescue*]; Cade, *supra* note 7, at 275–77.

37. JULIE YIHONG MAO & JAN COLLATZ, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, UNDERSTANDING THE FEDERAL OFFENSES OF HARBORING, TRANSPORTING, SMUGGLING, AND ENCOURAGING UNDER 8 U.S.C. § 1324(A), at 2–4 (2017), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2017_28Sep_memo-1324a.pdf [https://perma.cc/LDK4-FVRJ].

38. *See* United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976); MAO & COLLATZ, *supra* note 37, at 3. *But see* United States v. Tydingco, 909 F.3d 297, 302–03 (9th Cir. 2018).

39. *See, e.g.*, United States v. Costello, 666 F.3d 1040, 1050 (7th Cir. 2012); MAO & COLLATZ, *supra* note 37, at 3.

migrant's presence in the United States,[40] and some courts have, in turn, taken this to require something akin to hiding the noncitizen or avoiding immigration officials.[41] Others have held that "substantial facilitation" requires no proof of secrecy or concealment.[42]

In the Ninth Circuit, where many of the prosecutions of humanitarians have taken place, to secure a conviction on felony harboring charges, the government must prove beyond a reasonable doubt that the defendant intended to violate the law.[43] This does not require proving an intent to hide the migrant from detection by law enforcement.[44] The court noted that a sanctuary worker who publicly harbors an unauthorized migrant "to call attention to what she considers an unjust immigration law" will be deemed to intend to violate the law, but due to the public nature of the harboring, the defendant is not attempting to "hide" the harbored migrants.[45] Under this standard, individuals or NGOs poorly trained in harboring law cannot be held responsible for their ignorance, whereas sophisticated volunteers who intend to violate the law face liability. This aspect of the law in the Ninth Circuit constrains the imposition of criminal penalties to some extent, but it does not provide uniform protection to humanitarians—many of whom are outspoken about intentionally challenging laws they regard as unjust.[46]

Other federal circuits, however, interpret "harboring" itself more narrowly to mean shielding or concealing from detection by law enforcement.[47] Simple sheltering or the provision of necessities does not constitute harboring in these jurisdictions. In *United States v. Costello*,[48] for example, the U.S. Court of Appeals for the Seventh Circuit applied this narrower definition of harboring to criminal charges brought against a woman who lived with her undocumented boyfriend.[49] The court ruled that merely sharing a living space did not rise to the level of "strong measures" to induce her boyfriend to remain in the country.[50] As a result, the court reversed her conviction. In contrast, the court held in a different case that providing unauthorized workers with housing and

40. *See, e.g.*, United States v. Hernandez-Zozaya, 826 F. App'x 144, 148 (3d Cir. 2020).

41. United States v. Dominguez, 661 F.3d 1051, 1063 (11th Cir. 2011); MAO & COLLATZ, *supra* note 37, at 35.

42. *See* United States v. Rushing, 313 F.3d 428, 433–34 (8th Cir. 2002), *vacated*, 388 F.3d 1153 (8th Cir. 2004); MAO & COLLATZ, *supra* note 37, at 32.

43. *Tydingco*, 909 F.3d at 302–03 ("We hold that . . . harboring instructions must require a finding that Defendants intended to violate the law.").

44. *Id.* at 303.

45. *Id.* at 304.

46. *See id.*

47. For a discussion of different interpretations of the harboring statute in the federal courts of appeals, see generally MAO & COLLATZ, *supra* note 37.

48. 666 F.3d 1040 (7th Cir. 2012).

49. *Id.* at 1042.

50. *Id.* at 1045–46.

utilities serves to "safeguard [these] employees from the authorities" and amounts to harboring under this standard.[51] Decisions like these suggest that everyday interactions with unauthorized migrants might not support harboring liability. However, that fact alone does not preclude the government from bringing charges.

Although the "strong measures" standard would likely protect many casual, everyday interactions among intimates, some circuits have adopted a broad "substantial facilitation" standard instead,[52] and the harboring statute lacks an express exemption for family-based assistance.[53] The Immigration and Naturalization Act ("INA") provides for a discretionary waiver of inadmissibility for smuggling for reasons of family unity or other humanitarian factors, but it does not contain a comparable waiver for *harboring* family members.[54] In fact, harboring family members can constitute an aggravated felony, which renders a deportable noncitizen completely ineligible for relief from removal.[55] Acts that constitute harboring vary by circuit, and several circuits have adopted a broad definition that might sweep up the provision of food, water, shelter, and clothing to unauthorized migrants.[56]

Apart from prohibiting harboring, federal law also prohibits "encourag[ing] or induc[ing] an [unauthorized] alien to come to, enter, or reside in the United States . . . ."[57] An immigration consultant in California recently challenged this provision as overbroad and unconstitutional. In *United States v. Sineneng-Smith*,[58] the defendant was an immigration consultant in California whose clients hired her for services to obtain permanent residence through the "Labor Certification" program.[59] But that program was defunct as of April 30,

51. United States v. McClellan, 794 F.3d 743, 750–51 (7th Cir. 2015); *see also* United States v. Grayson Enters., Inc., 950 F.3d 386, 407 (7th Cir. 2020) (housing unauthorized workers in a warehouse minimized the threat of detection by the authorities and constituted "strong measures to keep them here").

52. *See, e.g.*, United States v. Tipton, 518 F.3d 591, 595 (8th Cir. 2008) ("Harboring means any conduct that 'substantially facilitate[s] an alien's remaining in the United States illegally.'" (quoting R. Doc. 52, Jury Instruction 14; United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 (5th Cir. 1982))). After years of interpreting harboring to mean substantial facilitation, the Second Circuit adopted a new interpretation of harboring that also requires evasion of the government. *See* United States v. Vargas-Cordon, 733 F.3d 366, 381 (2d Cir. 2013) (noting the phrase "'conceals, harbors, or shields from detection' [shares] a common 'core of meaning' centered around evading detection").

53. *See* 8 U.S.C. § 1324(a) (lacking an exception for harboring family members).

54. Immigration and Naturalization Act of 1952, Pub. L. No. 414, § 212(a)(31)(b), 66 Stat. 163, 182 (codified as amended at 8 U.S.C. § 1182(a)(6)(E) (1952)).

55. *See* AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 3 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf [https://perma.cc/W22J-WZ29 (staff-uploaded archive)].

56. *See* MAO & COLLATZ, *supra* note 37, at 26–35 (discussing harboring law in each of the federal circuits).

57. 8 U.S.C. § 1324(a)(1)(A)(iv).

58. 140 S. Ct. 1575 (2020).

59. *Id.* at 1577–78.

2001.[60] Nonetheless, she signed retainer agreements and falsely told clients that they could obtain green cards through the program.[61] When prosecuted, Sineneng-Smith argued that the statute was unconstitutionally overbroad, as it would sweep in protected speech, such as a grandmother telling her grandson on an expired visa "to stay."[62] An amicus brief further argued that such words of encouragement, under the statute as written, could trigger criminal liability.[63] The Supreme Court sidestepped the substance of the case and reversed the Ninth Circuit's ruling on procedural grounds.[64] As a result, the substantive question regarding the potential overbreadth of the inducement provision remains unresolved by the Court.[65]

The encouraging and inducing provision has led to government harassment of advocates. For example, lawyers representing asylum seekers and other unauthorized migrants have alleged government harassment in retaliation of their lawyers' advocacy on behalf of unauthorized migrants. Customs and Border Protection ("CBP") detained a U.S. citizen lawyer for Al Otro Lado, a binational nonprofit serving migrants in Mexico and the United States, at the U.S.-Mexico border.[66] An "alert" had been placed on her passport, presumably by the government.[67] Similarly, CBP was found to have targeted Americans with more intrusive searches because of their associations with migrant caravans approaching the southern border in 2018. Targeted persons included journalists covering the caravan and individuals who offered to assist caravan members.[68] The prosecutions of Millis and Warren and the harassment of U.S. citizen attorneys assisting asylum seekers demonstrate the potency of harboring and related doctrines in the United States and the need for a narrower interpretation of what constitutes prohibited activity.[69]

60. *Id.* at 1578.

61. *Id.*

62. *See* Leading Case, *First Amendment — Freedom of Speech — Criminal Solicitation* — United States v. Sineneng-Smith, 134 HARV. L. REV. 480, 482, 489 n.109 (2020).

63. United States v. Sineneng-Smith, 910 F.3d 461, 483 (9th Cir. 2018), *vacated*, 140 S. Ct. 1575 (2020).

64. *Sineneng-Smith*, 140 S. Ct. at 1578 ("We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties . . . .").

65. The Ninth Circuit subsequently had an opportunity to address this question, as raised by the parties, and concluded again that this provision of the INA was unconstitutionally overbroad because it covered much more speech than the narrow legitimate sweep of the statute. *See* United States v. Hansen, 25 F.4th 1103, 1105 (9th Cir. 2022).

66. *Court Filing Seeks Information Regarding Retaliation Against Immigrants' Rights Attorneys at Southern Border*, CTR. FOR CONST. RTS. (Feb. 27, 2019), https://ccrjustice.org/home/press-center/press-releases/court-filing-seeks-information-regarding-retaliation-against [https://perma.cc/2KL3-J2SD].

67. *Id.*

68. *Id.*

69. For a discussion of how courts can limit harboring liability through statutory interpretation, see Ray, *Law of Rescue*, *supra* note 36, at 665–66.

B. *Potential Limits to Criminal Liability*

The contours of harboring liability have evolved in recent years, as defendants have sought to limit the scope of the harboring statute and have asserted a defense to liability based on the Religious Freedom Restoration Act. This section describes arguments advanced by participants in the original sanctuary movement asserting that the harboring statute was unconstitutionally overbroad with respect to rights of association. It then considers more recent arguments, advanced by participants in the new sanctuary movement, based on RFRA, which was passed in 1993. Finally, this section describes instances in which some participants have avoided liability for crimes related to harboring.

1. Overbreadth with Respect to Protected Associations

The first generation of First Amendment challenges to application of the harboring statute, pressed in the 1980s, met with failure.[70] Attorneys for sanctuary workers argued that prohibiting sanctuary workers from providing sanctuary violated sanctuary workers' right to free exercise of religion under the First Amendment and the right of intimate association.[71] As for free exercise, sanctuary workers argued that they had engaged in protected religious activity in providing humanitarian aid to undocumented people.[72] As for intimate association, sanctuary workers argued that a broad harboring statute could criminalize cohabitation by family members even though such cohabitation is a protected fundamental liberty.[73] Ultimately, these arguments sought to demonstrate that the statute simply could not be applied to the sanctuary workers' humanitarian conduct. But federal courts rejected this argument as a matter of constitutional doctrine, holding that the federal government's interest in deterring unauthorized migration was compelling, and that it justified the

70. Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 139–40 (1993).

71. *See, e.g.*, United States v. Pereira-Pineda, 721 F.2d 137, 139 (5th Cir. 1983) (per curiam); United States v. Merkt, 764 F.2d 266, 273 (5th Cir. 1985) (per curiam).

72. *See* Deborah Cohan, Rachel San Kronowitz, Clara Amanda Pope & Gloria Valencia-Weber, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 501, 579 (1986) (relying on *Sherbert v. Verner*, 374 U.S. 398 (1963), which was subsequently overruled by *Employment Division v. Smith*, 494 U.S. 872 (1990), which itself was superseded by the Religious Freedom Restoration Act of 1993). Although the U.S. Supreme Court ruled RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), the statute remains valid as applied to the federal government. *See* Burwell v. Hobby Lobby, 573 U.S. 682, 691 (2014).

73. *See* Loken & Bambino, *supra* note 70, at 175–76.

prosecution of religious sanctuary activists.[74] With the passage of the RFRA, however, protection for religious expression has strengthened.[75]

2. Religious Freedom Restoration Act

Several federal courts have been receptive to defenses based on RFRA for defendants assisting unauthorized migrants, but none have yet awarded relief in a harboring case. RFRA establishes that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[76] That subsection reads: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[77]

Scott Warren's prosecution offered an opportunity for the federal courts to consider RFRA in the setting of humanitarian aid to migrants at the border. The district court denied Warren's RFRA defense at the pretrial phase, allowing him to raise it at trial without prejudice.[78] Specifically, the court determined that Warren had other, nonprohibited alternatives for expressing his religious beliefs.[79] As the jury ultimately acquitted Warren on the felony charges, the court had no occasion to adjudicate his defense on a full record.[80]

But the court took a different view on his misdemeanor charges. Despite convicting Warren on those charges, it found that "leaving water for migrants in the desert was an expression of Dr. Warren's sincerely held religious beliefs . . . ."[81] Accordingly, Warren prevailed on his RFRA defense with respect to those charges.[82]

Other defendants have also prevailed on their RFRA defenses under similar circumstances.[83] In *United States v. Hoffman*,[84] the federal government

74. *See id.*; *see also* Bill Curry, *Sanctuary Movement Just Smugglers, U.S. Says*, L.A. TIMES (Apr. 2, 1986, 12:00 AM), https://www.latimes.com/archives/la-xpm-1986-04-02-mn-2335-story.html [https://perma.cc/QHS8-SR46 (dark archive)].

75. *See* Scott-Railton, *supra* note 4, at 432 ("Today, religious exercise is afforded stronger legal protections than ever before.").

76. 42 U.S.C. § 2000bb-1(a).

77. *Id.* § 2000bb-1(b).

78. United States v. Warren, No. CR-18-00223-001-TUC-RCC (BPV), 2018 WL 4403753, at *3–4 (D. Ariz. Sept. 17, 2018).

79. *See* Carmella, *supra* note 4, at 600–02.

80. Hannah Hafter, *The Acquittal of Scott Warren: A Humanitarian Perspective*, UNITARIAN UNIVERSALIST SERV. COMM. (Nov. 26, 2019), https://www.uusc.org/the-acquittal-of-scott-warren-a-humanitarian-perspective/ [https://perma.cc/RC22-VG9P].

81. *Id.*

82. *Id.*

83. *See* United States v. Hoffman, 436 F. Supp. 3d 1272, 1277 (D. Ariz. 2020).

84. 436 F. Supp. 3d 1272 (D. Ariz. 2020).

charged other No More Deaths volunteers with violating 50 C.F.R. § 26.22(b) by entering the Cabeza Prieta National Wildlife Refuge without a permit and 50 C.F.R. § 27.93 by abandoning property there,[85] namely, "gallons of water and pallets of beans [for migrants] . . . ."[86] Although a magistrate judge found the defendants guilty, in reviewing the record, the district court reversed the convictions based on defendants' RFRA defense.[87] The court explained that a defendant must show that the governmental action burdens a sincere exercise of religion, and that this burden is substantial.[88] Further, once the defendant has made this showing, the government must demonstrate that prosecuting defendants "is the least restrictive means of furthering any compelling governmental interest."[89]

In *Hoffman*, defendants volunteered with No More Deaths ("NMD"), a nonprofit affiliated with the Unitarian Universalist Church.[90] They argued that their volunteering activities were "exercises of sincerely held religious and spiritual beliefs."[91] The court applied the standard of sincere belief and considered "whether [those beliefs] are, in Defendants' own scheme of things, religious."[92] Although the government attempted to characterize the volunteers' religious beliefs as a post-hoc justification to cloak political activities, the court determined that NMD emphasized the "spiritual principles" underlying their volunteer work in the volunteer training they offered.[93] The defendants testified as to their familiarity with the religious beliefs of Reverend John Fife, a founder of NMD.[94] In particular, the court noted Reverend Fife's testimony that "the life of faith" is a matter of "what you do in relationship to those who are in most need."[95] Defendants further testified about growing up going to church and their beliefs about the sanctity of life.[96] Further, defendants demonstrated the depth of their commitment by either moving to Arizona to volunteer with NMD or frequently traveling to Arizona to do so.[97] The court

85. *Id.* at 1278.

86. *See* Ludden, *supra* note 31; Nicole Ludden, *'No More Deaths' Volunteers Found Guilty*, RANGE (Jan. 21, 2019, 1:40 PM), https://www.tucsonweekly.com/TheRange/archives/2019/01/21/no-more-deaths-volunteers-found-guilty [https://perma.cc/WJA7-43TA].

87. *Hoffman*, 436 F. Supp. 3d at 1289.

88. *Id.* at 1280.

89. *Id.* at 1277.

90. *Id.*

91. *Id.* at 1280.

92. *Id.* at 1281.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1282.

97. *Id.*

further noted defendants' "willingness to endure hardship for their beliefs" as evidence of the sincerity of their beliefs.[98]

The court also determined that the government's prosecution imposed a substantial burden on those beliefs by coercing them to cease in their religiously motivated activity.[99] The court clarified that defendants need not prove that their religious beliefs required them to enter the wildlife refuge; rather, RFRA protected "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[100] Further, the court rejected the government's characterization of the interest at stake—"the national decision to maintain [the wildlife refuge] in its pristine nature."[101] The court also held that the government had not demonstrated that exempting the defendants would impede that interest.[102] The refuge is far from pristine in its current state—it features unexploded munitions from the refuge's former status as an active military bombing range; "the detritus of illegal entry" and the vehicle traffic of the Border Patrol.[103] Further, the government could not demonstrate that enforcement *against these specific claimants* vindicated its objective.[104] The court concluded its analysis by noting that the government did not show that its prosecution of defendants was the least restrictive means of achieving its objective, assuming it was compelling in the first place.[105]

Accordingly, in at least three different cases, discussed above, federal judges have granted RFRA defenses for humanitarian assistance to migrants. But these defenses have succeeded exclusively with respect to misdemeanor charges; no court has held that a RFRA defense nullifies liability for harboring. As a result, convictions for humanitarian aid continue and remain a constant threat. Commentators have argued that RFRA might very well offer a defense to harboring liability for churches providing sanctuary, where churches honor ICE warrants but provide shelter.[106] A focus on religious expression, however, leaves unprotected people who engage in basic acts of caregiving out of a thinner sense of decency rather than a particular belief system. Nonetheless, RFRA remains a valuable shield for religiously motivated humanitarians, of which there are many.[107]

98. *Id.* at 1285.

99. *Id.*

100. *Id.* at 1286 (emphasis omitted) (quoting 42 U.S.C. § 2000cc-5(7)(A)).

101. *Id.* at 1273.

102. *Id.*

103. *Id.*

104. *Id.* at 1288.

105. *Id.* at 1289.

106. For a discussion of how RFRA could protect church sanctuary, see Scott-Railton, *supra* note 4, at 452–53 (analyzing the "least restrictive means" prong of a RFRA defense as applied to church sanctuary); Breslin, *supra* note 24, at 221–24.

107. *See* Elizabeth Ferris, *Faith-Based and Secular Humanitarian Organizations*, 87 INT'L REV. RED CROSS 311, 311 (2005) (noting that "[f]aith-based and secular humanitarian organizations have a long

3. Free Speech Clause

Beyond the statutory defense that RFRA offers, Professor Jason A. Cade has argued that some aspects of No More Death's humanitarian aid to migrants constitutes "expressive conduct" entitled to First Amendment protection under the Free Speech Clause.[108] Cade situates NMD's work in the context of government rhetoric casting migration as a "siege," which in turn "helps generate and justify large fiscal appropriations."[109] When the public remains ignorant of the thousands of migrant deaths at the border in recent years, the government avoids a "challenging policy debate . . . ."[110] In disseminating information about deaths at the border, and seeking to prevent them, NMD's humanitarian work overtly dissents from border policy.[111] The Trump administration's efforts to suppress NMD's message further demonstrates the organization's potency in debates over border policy. Unlike other humanitarian organizations that focus solely on saving lives, Cade argues, NMD also communicates a message.[112] Focusing on the expressive content of symbolic action, Cade reasons that NMD leaving jugs of water at the border is sufficiently communicative to trigger First Amendment protection.[113]

4. Evaluating Current Options

As scholars have argued elsewhere, courts should not interpret the harboring statute to encompass basic activities of care, like the provision of food and water, but the current jurisprudence in some federal circuits allows for the prosecution of such activities.[114] Accordingly, defendants have understandably advanced defenses under RFRA, and Cade has characterized some forms of humanitarian aid at the border as expressive conduct entitled to First Amendment protection. These ways of conceptualizing the problem help defendants resist criminalization.

But they also have a couple of shortcomings. First, RFRA requires defendants to justify their actions with reference to a "comprehensive

history of responding to people in need and today are important players in the international community's response to emergencies").

108. Cade, *supra* note 7, at 265.

109. *Id.* at 270–72.

110. *Id.* at 271.

111. *Id.* at 273.

112. *Id.*

113. *Id.* at 282. Cade limits his analysis to misdemeanor charges, reserving for future work the question of how the Free Speech Clause might apply to face-to-face aid to migrants, typically charged as felony harboring. *Id.* at 291.

114. *See* Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 74–75 (2012); Ray, *Law of Rescue*, *supra* note 36, at 665–66.

doctrine,"[115] or a moral worldview. Someone might wish to provide water without challenging the underlying border regime or subscribing to a full theory of migration and human rights. Their view might be as thin as a belief that people should not die of dehydration alone in the desert. Such defendants will not succeed in asserting a RFRA defense, but their activities are nonetheless worthy of protection.

Second, religion- and speech-based characterizations of the challenged conduct lack descriptive accuracy. As Cade acknowledges, for the typical humanitarian organization, the simple act of providing lifesaving aid is unlikely to trigger the Free Speech Clause.[116] Depending on the exact form and context of aid, extracting expressive content might be an uphill battle. Finally, existing jurisprudence emphasizes citizens' personal rights of conscience and political expression, but this minimizes migrants—relegating them to background actors in the communication of a message or the performance of a moral worldview.[117] For these reasons, this Article seeks an additional avenue for defending against liability. It proposes an alternative doctrinal hook and explores reframing harboring as a matter of associational freedom, a "relational" or "cooperative" right.[118] Even though the first generation of sanctuary workers failed in their bid to characterize their work as protected intimate association, they were on the right track. Although they emphasized possible applications of the harboring statute to family members as rendering the statute illegitimate, they failed to show that the law applied much more broadly than its legitimate sweep. The better argument today is that caregiving activities like the provision of food, water, and shelter to those in need are properly thought of as "intimate" associations themselves.

II. REFRAMING HARBORING AS A MATTER OF ASSOCIATIONAL FREEDOM

As suggested in Part I, the freedom of association offers an intriguing foundation for a right to provide basic care to unauthorized migrants.[119] This section explores the promise and limitations of associational freedom in this setting. It first describes the state of associational freedom jurisprudence in the United States. It then considers citizens' freedom to associate with migrants, an area of the law dominated by cases involving migrants located abroad. A

115. The Stanford Encyclopedia of Philosophy characterizes John Rawls's conception of a "comprehensive doctrine" as an individual's "view about God and life, right and wrong, good and bad." *See* Leif Wenar, *John Rawls*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/rawls/ [https://perma.cc/CE97-GN3A] (last updated Apr. 12, 2021).

116. *Cf.* Cade, *supra* note 7, at 273 (noting that "NMD is distinguished from many similar humanitarian groups by the expressive messaging that underscores its work").

117. *See* Ray, *Law of Rescue*, *supra* note 36, at 666–70 (discussing RFRA's centering of the defendant's conscience in a migrant harboring case).

118. *See* Alan H. Goldman, *The Entitlement Theory of Distributive Justice*, 73 J. PHIL. 823, 827 (1976).

119. *See* Ray, *Law of Rescue*, *supra* note 36, at 654–55.

noncitizen who has not yet effectuated an entry into the United States faces the government's plenary power to exclude them.[120] In that setting, a citizen enjoys only a weak freedom to associate with a noncitizen. But harboring prosecutions regulate interactions between citizens and migrants who have already effectuated an entry, thus potentially limiting the relevance of the plenary power doctrine.

The relationships or associations that humanitarian workers form with people migrating deserve to be recognized as protected associations for First Amendment purposes. A leading scholar on association, Professor Mark E. Warren, takes "associations" to encompass "those kinds of attachments we choose for specific purposes," such as pursuing a cause or forming a family.[121] Some theorists define associations to require "a common purpose" and "rules of common action."[122] Quintessentially, they constitute "'communities of choice' rather than 'communities of fate.'"[123] Humanitarians seeking to prevent migrants' deaths and suffering at the border come together in such "communities of choice."[124] Nonetheless, they face doctrinal obstacles of the kind discussed below.

A. *Freedom of Association in U.S. Law*

Scholars have traced the early role of the freedom of assembly in guaranteeing the right to join others in a physical space to pursue common ends.[125] But that freedom has largely disappeared from U.S. jurisprudence.[126] As John Inazu has chronicled in his book on the freedom of assembly, the U.S. Supreme Court pivoted away from assembly and towards the implied freedom of association during the early twentieth century, and the jurisprudence never recovered.[127] Inazu argues that much has been lost in the shift away from

120. *See* Kleindienst v. Mandel, 408 U.S. 753, 759 (1972).

121. MARK E. WARREN, DEMOCRACY AND ASSOCIATION 39 (2001).

122. *Id.* at 44 (quoting G.D.H. COLE, SOCIAL THEORY 37 (1920)).

123. *Id.* at 45 (quoting PAUL HIRST, ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE 52, 54 (1994)).

124. *See id.*

125. *See* INAZU, *supra* note 15, at 61–62 (describing the early right of assembly as "one that encompassed social and other 'nonpolitical' gatherings and extended to a group's composition and membership as well as its moment of expression" that was forgotten); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 558 (2009) (describing the right of assembly as promoting "festive politics . . . well into the nineteenth century"); Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593, 622 (discussing the role of the colonial tavern in facilitating peaceable assembly as a "unique situs to assemble for the purpose of debating and discussing important social, political, economic, and cultural matters").

126. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 570 (2010).

127. INAZU, *supra* note 15, at 61–62.

peaceable assembly and towards a more amorphous right to association.[128] In particular, the earlier right to peaceable assembly extended to "nonpolitical" gatherings and extended to group composition or membership.[129] In its stead, Inazu notes the jurisprudence features a right largely restricted to political associations and intimate ones, based both on the First Amendment and the Due Process Clause.[130]

The Supreme Court faced an early choice of whether to ground the freedom in the First Amendment or in the liberty component of the Due Process Clause.[131] In a pair of cases involving the NAACP, the Supreme Court affirmed the centrality of the freedom of association in a democracy on distinct grounds. In *NAACP v. Button*,[132] the Court invalidated a Virginia law that banned champerty on First Amendment grounds.[133] Virginia officials attempted to apply the law to the NAACP's desegregation litigation efforts, but the Court upheld the right of a civil rights group to pursue public interest litigation in an as-applied challenge.[134] In *NAACP v. Alabama*,[135] the Court ruled that the state of Alabama violated the Due Process Clause of the Fourteenth Amendment by issuing a subpoena for the organization's membership lists, among other records.[136] Inazu notes that Justice Harlan could have resolved the case in terms of assembly but elected to frame the issues in terms of association.[137]

These cases involving the NAACP illustrate the role of the freedom of association in historical campaigns for equality. For example, early twentieth century union organizers relied on the freedom of association to defend the legality of picketing against the so-called "labor injunction."[138] In addition, the civil rights movement depended on the freedom of association to organize and

128. *Id.* at 4; *see also* Timothy Zick, *Parades, Picketing, and Demonstrations*, *in* OXFORD HANDBOOK OF FREEDOM OF SPEECH 369, 371 (Adrienne Stone & Frederick Shauer eds., 2021) (describing the essential role of parades, pickets, and public demonstrations in advancing "self-governance, the search for truth, and individual autonomy").

129. INAZU, *supra* note 15, at 61 ("Earlier intimations of a broadly construed right—one that encompassed social and other 'nonpolitical' gatherings . . . were largely forgotten.").

130. *Id.* at 74–75 (discussing liberty and incorporation arguments for recognizing associational freedom).

131. *Id.* at 74.

132. 371 U.S. 415 (1963).

133. *Id.* at 428–29. "Champerty" refers to a relationship between a third party and a litigant, usually in which the third party has no interest other than a pecuniary one in supporting the litigation. *See Champerty*, CORNELL LEGAL INFO. INST. (Aug. 2022), https://www.law.cornell.edu/wex/champerty [https://perma.cc/5D2Q-F94Q].

134. Sekou Franklin, NAACP v. Button *(1963)*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/69/naacp-v-button [https://perma.cc/T2PL-AH2D]; *see Button*, 371 U.S. at 418, 428–29.

135. 357 U.S. 449 (1958).

136. *Id.* at 466.

137. INAZU, *supra* note 15, at 82.

138. LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 25, 38 (Harv. Univ. Press 2016).

mobilize against segregation and racial inequality.[139] In the years following the civil rights movement, however, noncommercial groups' freedom to decide their composition weakened.

According to Inazu, modern associational freedom jurisprudence features a tension between equality or antidiscrimination norms and the right to exclude.[140] In *Roberts v. U.S. Jaycees*,[141] the Supreme Court considered the conflict between antidiscrimination principles and the freedom of association.[142] The Jaycees, a national organization, had chapters in Minneapolis and St. Paul that violated the national bylaws by extending membership to women.[143] When the national organization threatened sanctions on the local chapters, the local chapters filed charges of discrimination with the Minnesota Department of Human Rights ("MDHR").[144] The Commissioner of the MDHR found probable cause that the threatened sanctions violated the Minnesota Human Rights Act, but the Jaycees then filed a federal lawsuit against Minnesota officials, seeking declaratory and injunctive relief.[145] The Jaycees argued that requiring the organization to accept women as regular members "would violate the male members' constitutional rights of free speech and association."[146]

The Supreme Court observed that its jurisprudence contemplated two categories of protected associations: intimate and expressive.[147] Intimate human relationships warranted protection from state intrusion as a matter of personal liberty.[148] Other associations warrant protection for instrumental reasons: because they support First Amendment activities, such as speech, assembly, the exercise of religion, and petitioning for the redress of grievances.[149] The Court recognized that, "[b]etween these poles . . . lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State."[150] It ultimately found that the Jaycees were neither an intimate nor expressive association protected from state antidiscrimination law.

In contrast, in *Boy Scouts of America v. Dale*,[151] the Supreme Court held that a New Jersey public accommodations law could not constitutionally require the Boy Scouts of America ("BSA") to include a gay former Eagle Scout to serve as

139. *See, e.g.*, *Button*, 371 U.S. at 419–20.
140. INAZU, *supra* note 15, at 9–10, 77.
141. 468 U.S. 609 (1984).
142. *Id.* at 612.
143. *Id.* at 614.
144. *Id.*
145. *Id.* at 615.
146. *Id.*
147. *Id.* at 617–18.
148. *Id.*
149. *Id.* at 618.
150. *Id.* at 620.
151. 530 U.S. 640 (2000).

an assistant scout master.[152] Applying the law to so require would violate BSA's freedom of expressive association. The Court determined first that the BSA engages in "expressive association."[153] It then described BSA's official position condemning "homosexuality," a view expressed in position statements and prior litigation.[154] It then concluded that requiring BSA to admit Dale, a gay man and "gay rights activist," would "derogate from the organization's expressive message."[155] The dissent noted that the BSA's teachings on sexuality voiced no opinion on homosexuality, and that BSA leadership plainly contemplated yielding to public accommodation laws and "obeying" the command.[156]

Purely "social associations" lacking an expressive quality do not receive constitutional protection. In *City of Dallas v. Stanglin*,[157] the Court upheld a municipal ordinance imposing age restrictions on dance halls and regulating their hours of operation.[158] Far from gathering members of an organization, the dance hall convened strangers, including any teenager willing to pay the admission fee.[159] Moreover, these teens engaged in recreational dance rather than protected speech. Because the Constitution does not protect a right of "social association," the Court noted no justification for heightened scrutiny and upheld the ordinance under rational basis review.[160] These fundamental precedents in U.S. associational jurisprudence suggest that the Constitution protects expressive associations to facilitate members' political speech or intimate associations based on enduring emotional, familial bonds rather than casual, serendipitous connections between acquaintances or strangers.

Apart from restricting protection based on the kind of association, the location of the association also matters. Associational interests are especially circumscribed regarding entities located abroad. In *Holder v. Humanitarian Law Project*,[161] the Supreme Court held that an antiterrorism statute that established criminal liability for supporting designated terrorist groups, rather than merely associating with said groups, passed constitutional muster.[162] The Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. § 2339B, makes it a federal crime to "knowingly provid[e] material support or resources to a foreign

152. *Id.* at 653, 659.
153. *Id.* at 651–53.
154. *Id.* at 653.
155. *Id.* at 661.
156. *Id.* at 672–73 (Stevens, J., dissenting).
157. 490 U.S. 19 (1989).
158. *Id.* at 28.
159. *Id.* at 25.
160. *Id.*
161. 561 U.S. 1 (2010).
162. *Id.* at 8; *see also* Zick, *supra* note 128, at 376 (describing the First Amendment's "expressive topography," or the significance of place in determining whether "speakers and assemblies were permitted to engage in expressive activities").

terrorist organization."[163] Plaintiffs wished to support the lawful, nonviolent missions of groups that *also* engaged in violence or that were designated foreign terrorist organizations ("FTOs"). They argued that the statute violated their First Amendment freedoms of speech and association because it failed to require the government to prove plaintiffs' "specific intent to further the unlawful ends of those organizations."[164] But the Court denied that specific intent was required of a criminal law, instead ruling that Congress had elected to adopt a "knowing" standard rather than specific intent.[165] With respect to association, the majority endorsed a baffling distinction between "mere membership" in an organization and membership plus some amount of communication or support.[166] Accordingly, defendants in terrorism cases faced prosecution for membership in an FTO and some additional act of communication or coordination, but the Court offered no guidance on how much additional action was enough to bring the relationship out of protected association and into the realm of illicit support.

After *Humanitarian Law Project*, citizens enjoy circumscribed rights of association with foreign entities abroad. The basis for limiting rights, however, relates to the unique setting of terrorism rather than garden-variety immigration regulation. Importantly, *Humanitarian Law Project* did not involve face-to-face personal relationships, but enduring support of a foreign organization's mission.

B. *Citizens' Rights To Associate with Noncitizens or Entities Abroad*

The freedom of association in immigration law and policy typically runs into a problem: the federal government's plenary power to exclude noncitizens. The problem is conceptualized as a clash between citizens' desire to associate with noncitizens currently located abroad, and the federal government's power to deny entry to such noncitizens.[167] Which will prevail? Although the Court has acknowledged citizens' interests in immigration policy, it has denied that citizens' interests can overcome Congress's plenary power to decide the terms of admission and deportation. Ultimately, citizens' rights of association rooted in the First Amendment, or the Due Process Clause, do not outweigh the federal government's power to exclude a noncitizen.

163. 18 U.S.C. § 2339B.

164. *Holder*, 561 U.S. at 10–11.

165. *Id.* at 16; *see also* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 140 S. Ct. 2082, 2087 (2020) (describing foreigners abroad as lacking protection under the U.S. Constitution).

166. *See* Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 589–90 (2014) (characterizing majority's discussion of the right of association as "an afterthought"); *id.* at 601 (questioning the meaning of "membership" as used by the majority); *id.* at 603 (characterizing treatment of First Amendment in terrorism prosecutions as "a mess").

167. For a discussion of the freedom of association as a basis for a nation's right to exclude, see Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109–11 (2008).

In *Kleindienst v. Mandel*,[168] the Supreme Court applied the most deferential level of review to a decision by the Attorney General not to waive the inadmissibility of a Belgian professor, Ernest Mandel.[169] In *Mandel*, several American universities invited Mandel to speak on their campuses, as he had done in prior years.[170] The government, however, denied Mandel's visa this time, precluding his visit.[171] The universities that had invited him to speak sued, asserting *their* First Amendment associational rights—essentially their right to hear Mandel speak on campus, to debate him, and so forth.[172] The Court framed the issue as a "narrow" one: does the First Amendment confer upon the American university professors the ability to compel the Attorney General to waive Mandel's inadmissibility?[173] The Court began by acknowledging that the First Amendment rights at issue relate to the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning."[174] But it then quickly reasoned that Congress's plenary power, delegated to the Executive here, requires no more than a "facially legitimate and bona fide" reason for denying a visa.[175] Given the Attorney General's letter indicating that Mandel's "previous abuses" supported denying the waiver, the standard was met, and the Court would "neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of citizens who wished to hear him speak.[176]

In his dissent, Justice Douglas likened ideological exclusion to racial exclusion and argued that the First Amendment prevented the Attorney General from essentially censoring speakers that citizens wished to hear, in the absence of a national security concern or risk of Mandel acting as a "saboteur."[177] Justices Brennan and Marshall similarly decried the violation of citizens' First Amendment rights and observed that "[m]erely 'legitimate' governmental interests cannot override constitutional rights."[178] Moreover, a cursory examination of the Attorney General's reason for denying Mandel's visa

168. 408 U.S. 753 (1972).

169. *Id.* at 759 (noting that the Department of State had recommended that the Attorney General find Mandel ineligible for a waiver of inadmissibility). For a discussion of the contemporary relevance of *Mandel*, see JULIA ROSE KRAUT, THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES 183–217 (Harv. Univ. Press 2020).

170. *Mandel*, 408 U.S. at 757 (discussing invitations from Stanford, Princeton, Amherst, Columbia, and Vassar).

171. *Id.* at 759–60.

172. *Id.*

173. *Id.* at 762.

174. *Id.* at 765.

175. *Id.* at 769.

176. *Id.* at 770.

177. *Id.* at 772 (Douglas, J., dissenting).

178. *Id.* at 777.

revealed it to be a "sham."[179] Nonetheless, under *Mandel*, courts offer minimal protection to citizens' associational rights in the context of exclusion.

The Court has more recently affirmed the limited strength of associational rights with respect to a noncitizen located abroad, applying *Mandel* to a U.S. citizen's spouse's visa denial. In *Kerry v. Din*,[180] a U.S. citizen, Fauzia Din, petitioned for a spousal visa for her husband who resided in Afghanistan.[181] The State Department denied his application, finding her husband inadmissible based on one of the INA's terrorism grounds without any explanation.[182] Din challenged the denial as implicating a liberty interest in her marriage, a right of association with her spouse, and related formulations under the Due Process Clause.[183] In his controlling opinion, however, Justice Kennedy rejected Din's challenge and determined that even *if* marital liberty or liberty to live in the United States with one's spouse were a protected liberty under the Due Process Clause or a nonfundamental liberty entitled to procedural protections, the State Department had satisfied *Mandel* by citing an INA provision that set out specific statutory factors.[184]

Most recently, in *Trump v. Hawaii*,[185] the Court applied *Mandel* to a presidential exclusion order that barred entry of noncitizens from a list of mostly majority-Muslim countries.[186] In the face of plaintiffs' claim that the exclusion order violated the Establishment Clause because it expressed anti-Muslim animus, the Court deemed the exclusion order "facially legitimate and bona fide."[187] It was "facially legitimate" because the government had offered a national security rationale, and it was "bona fide" because the government arrived at the list of countries through a multiagency worldwide review.[188] In crediting the government's facts supporting its stated rationale, the Court notably did not analyze plaintiffs' evidence that the exclusion order was the very "Muslim Ban" the President had promised on the campaign trail.[189]

Mandel, *Din*, and *Hawaii* demonstrate the weakness of citizens' constitutional rights, whether with respect to political or intimate associations, or under the Establishment Clause, as a constraint on the government's power to exclude noncitizens. But these holdings should not lead courts to downgrade protections for citizen-migrant relations in the interior. At the same time, a

179. *Id.* at 778.
180. 576 U.S. 86 (2015).
181. *Id.* at 88.
182. *Id.* at 89–90.
183. *Id.* at 88.
184. *Id.* at 104.
185. 138 S. Ct. 2392 (2018).
186. *Id.* at 2403–04.
187. *Id.* at 2419, 2423.
188. *Id.* at 2421.
189. *Id.*

simple exterior-interior distinction can prove difficult to maintain.[190] In the current legal climate, noncitizens' constitutional status is low—and uncertain.[191] Nevertheless, avenues for advocacy and reform are not necessarily closed.

Other jurisdictions, like Canada and member states of the European Union, regulate harboring differently, and scholars and advocates there emphasize harboring law's implications beyond citizens' personal rights to religious freedom or political expression. The United States stands to learn from these jurisdictions, even if neither represents a substantively just legal regime in the eyes of migrants and those who assist them. Characterizing the provision of food or water as a matter of conscience or conduct expressing a political view, rather than acts of intimately relating to or associating with migrants, forces defendants to tether their ordinary acts of care in extraordinary claims of totalizing belief systems. These claims—that conduct is based on religious or political faith—invite the government's counterclaim of false religiosity.[192] But the freedom of association, while expressive, fundamentally protects the relationships among people rather than worldviews alone.

III. CRIMINAL LIABILITY FOR HARBORING IN CANADA AND THE EUROPEAN UNION

Other wealthy haven states, or destinations for asylum seekers, regulate harboring with greater sensitivity to family relationships between citizens and noncitizens and the interests of humanitarian actors. In the European Union, member states must criminalize for-profit smuggling and related offenses, pursuant to the Migrant Smuggling Protocol.[193] The EU Facilitation Directive and Framework Decision further require member states to criminalize the facilitation of residence, akin to harboring.[194] Most EU states criminalize nonprofit versions of these offenses as well, prompting commentators to decry

190. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982, 1989 (2020) (deeming an asylum seeker who had entered some twenty-five yards into the interior to not yet have "effected an entry").

191. Shalini Bhargava Ray, *The Emerging Lessons of* Trump v. Hawaii, 29 WM. & MARY BILL RTS. J. 775, 808 (2021) (noting courts' "dim view of immigrants' rights" in recent years).

192. *See* Elana Schor, *Religious Freedom Law Plays Key Role in Migrant-Aid Case*, AP NEWS (Nov. 26, 2019), https://apnews.com/article/religion-immigration-us-news-acquittals-in-state-wire-1c894dedcb744e4f82ad925dbbc8042f [https://perma.cc/4XZT-ZJPP] (quoting prosecutor endorsing "religious freedom rights" but suggesting that defendant Scott Warren's "true intention is to help others gain successful illegal entry into this country").

193. ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING 50–51 (2014) (describing state parties' obligations to criminalize smuggling and related offenses).

194. *Id.* at 393–94.

insufficient protection for civil society actors.[195] In Canada, for example, antismuggling law does not apply to a person's assistance to family members or assistance undertaken for humanitarian reasons,[196] and Canadian law does not explicitly criminalize harboring.[197] This part analyzes harboring law in Canada and the European Union and examines the unique fraternity-based defense to liability for humanitarian harboring recognized under French constitutional law. Finally, this part then considers the implications of grounding a defense in fraternity rather than religious expression.

A. *The European Union's Regime*

The European Union requires member states to criminalize for-profit smuggling and harboring. Although member states take different approaches to nonprofit harboring, advocates for migrants and civil society actors have urged states to cease prosecuting "solidarity" crimes.[198]

1. EU Smuggling and Harboring Law

EU law creates a common baseline for member states when it comes to regulating unauthorized migration. Nearly twenty years ago, the EU acceded to the Protocol Against the Smuggling of Migrants, which requires state parties to criminalize for-profit smuggling and related offenses.[199] Article 6.1 states:

> Each State Party shall adopt [laws] as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
>
> (a) The smuggling of migrants;
>
> (b) . . .

195. *See generally* Carrera et al., *Fit for Purpose?*, *supra* note 9 (examining legislative and policy changes regarding "criminalisation of humanitarian actors, migrants' family members and basic service providers").

196. R. v. Appulonappa, [2015] 3 S.C.R. 754, 772, para. 37 (Can.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/15648/1/document.do [https://perma.cc/CRZ6-LHWA].

197. *See* Rehaag, *supra* note 8, at 50.

198. *See* YASHA MACCANICO, BEN HAYES, SAMUEL KENNY & FRANK BARAT, TRANSNAT'L INST., THE SHRINKING SPACE FOR SOLIDARITY WITH MIGRANTS AND REFUGEES: HOW THE EUROPEAN UNION AND MEMBER STATES TARGET AND CRIMINALIZE DEFENDERS OF THE RIGHTS OF PEOPLE ON THE MOVE 4 (2018), https://www.tni.org/files/publication-downloads/web_theshrinkingspace.pdf [https://perma.cc/HE3J-XU4P].

199. G.A. Res. 55/25, annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, arts. 3, 6 (Jan. 8, 2001).

> (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State . . . .[200]

The crime of "enabling" a person to remain tracks what the EU calls "facilitation of residence."[201]

The relevant instruments under EU law are the Facilitation Directive and the Framework Decision, which together comprise the "Facilitators Package."[202] The Facilitation Directive establishes "a common definition of the offence of facilitation of unauthorised entry, transit, and residence," and the Framework Decision requires member states to "take measures that would punish" these offenses.[203] The Facilitation Directive gives member states the option to exempt humanitarian assistance from criminalization.[204] Accordingly, member state governments have remained free to prosecute civil society actors engaged in rescue work or providing necessities to migrants.

European commentators have deemed the Facilitators Package not "fit for purpose."[205] They describe the definition of the "facilitation of irregular migration [as] over broad" and note the lack of protection for actors with a charitable intent.[206] The failure of EU law to carve out protection for assistance rendered not for profit has jeopardized "solidarity" between citizens and migrants at the European and member state levels.[207] But the broader problem is the framing of antismuggling measures as a matter of "broader security and migration management," rather than an effort to combat the activity of "criminal groups."[208]

Criminalization has had "downstream" effects, such as prompting member states to adopt binding codes of conduct for NGOs engaged in search and rescue

200. *Id.* at art. 6.

201. *See* Council Directive 2002/90/EC, Defining the Facilitation of Entry, Transit, and Residence, 2002 O.J. (L328), art. 1(b), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:328:0017:0018:EN:PDF [https://perma.cc/F6DP-EGPN] (requiring member states to impose sanctions on "any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens").

202. *Migrant Smuggling*, EUR. COMM'N, https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/migrant-smuggling_en [https://perma.cc/S5B5-YBJA].

203. Milan Remáč & Gertrud Malmersjo, Eur. Parliamentary Rsch. Serv., *Implementation Appraisal*: *Combatting Migrant Smuggling into the EU*, PE 581.391 at 5–6 (Apr. 2016).

204. *Commission Guidance on the Implementation of EU Rules on Definition and Prevention of the Facilitation of Unauthorised Entry, Transit and Residence*, at 1, C(2020) 6470 final (Sept. 23, 2020).

205. Carrera et al., *Fit for Purpose?*, *supra* note 9, at 18. This inquiry regarding the "fitness" of a policy appears to be a part of EU law. *See Evaluating Laws, Policies and Funding Programmes*, EUR. COMM'N, https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_en [https://perma.cc/9P2P-9WZN].

206. Carrera et al., *Fit for Purpose?*, *supra* note 9, at 12.

207. *See id.*

208. *Id.* at 14.

("SAR"). Civil society actors view these codes as hampering SAR by "institutionali[zing] suspicion" and creating uncertainty about the legality of disembarking "rescued persons to the closest port of safety."[209] Researchers have also documented the ways in which the Facilitators Package produced several unintended consequences, such as "disciplining, harassment, intimidation and suspicion."[210] This research further found that "[t]he policing of civil society actors negatively affects fundamental rights of EU citizens, the freedom of assembly, freedom of speech and opinion, all of which lay at the foundations of national constitutional systems and EU primary law."[211] The principal harm here appears to be injury to fundamental freedoms of EU citizens—over and above the harm experienced by those denied SAR services or otherwise prevented from applying for asylum.

The danger of everyday interactions triggering criminal liability is real. In contrast to criminal organizations, typically hierarchical and highly organized, local community members might inadvertently become "smugglers" under EU law by offering services through peer-to-peer platforms like Airbnb,[212] distributing food, buying a train ticket, or even performing sea rescue.[213] Far from merely creating a "hostile environment" for unauthorized migrants, these strict policies essentially draft civil society actors into immigration enforcement roles.[214]

Unsurprisingly, criminalization has imposed a range of harms beyond criminal prosecution.[215] Civil society actors confirm the "chilling effect" of the Facilitators' Package. NGOs providing basic needs, such as housing and food, face administrative fines, increased police intimidation, "disciplining measures like repeated ID checks on volunteers," and the complete absence of police protection against far-right attacks.[216] Scholars have argued that these "policing" tactics have sowed societal mistrust and impeded associational freedom.[217]

In response to growing concern about the prosecution of civil society actors and those engaged in family-based assistance, the United Nations Office

209. *Id.* at 14–15. For a critique of codes of conduct regulating SAR actors, see Eugenio Cusumano, *Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs*, 24 MEDITERRANEAN POL. 106, 112 (2019).

210. Carrera et al., *Fit for Purpose?*, *supra* note 9, at 45.

211. *Id.* at 16.

212. *Id.* at 17.

213. *Id.* at 53.

214. *See id.* at 94.

215. *Id.* at 92.

216. *Id.* at 93.

217. CARRERA ET AL., POLICING HUMANITARIANISM, *supra* note 12, at 165–67 (noting erosion of social trust); *id.* at 171–78 (discussing NGOs' core role in preserving freedoms of assembly and association and negative impact of policing tactics on these NGOs); Carrera, et al., *Fit for Purpose?*, *supra* note 9, at 10 (discussing detrimental effects of policing civil society actors and citizens, especially with regard to freedom of assembly).

on Drugs and Crime ("UNDOC") disavowed use of the Protocol as a basis for criminalizing humanitarian assistance.[218] In its issue paper, *The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol*, UNDOC stated that the Protocol "does not seek—and cannot be used as the legal basis for—the prosecution of those acting with humanitarian intent or on the basis of close family ties where there is no purpose to obtain a financial or other material benefit."[219] UNDOC further acknowledges that most states do not include a humanitarian exemption but suggests that states use prosecutorial discretion to filter cases involving humanitarian actors.[220] Prosecutorial discretion, however, has not protected humanitarians from prosecution in recent years throughout the European Union, specifically in Sweden, Belgium, Croatia, Italy, Greece, and France.[221] Volunteers in these countries have faced prosecution, detention, and in some cases, conviction for their "good Samaritan" deeds.[222]

Prosecutions in the UK and France further illustrate the uneven protection for intimate associations with unauthorized migrants. Researchers note the following cases: First, a mother was prosecuted for migrant smuggling for attempting to bring her three children into France through forged documents.[223] The children were barred from entry and returned to Cameroon, and the mother was convicted of "assisting the irregular entry, transit, and stay of a foreigner in France."[224] Second, a French woman was prosecuted for hosting her Moroccan boyfriend, an irregular migrant.[225] Third, a woman was prosecuted in France for permitting her foreigner husband to live with her, despite his irregular entry.[226] Ultimately, she was deemed immune from prosecution under the Code of Entry and Stay of Foreigners and Right of

218. United Nations Off. on Drugs & Crime, *The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol*, 14 (2017), https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC_Issue_Paper_The_Profit_Element_in_the_Smuggling_of_Migrants_Protocol.pdf [https://perma.cc/999W-TEW3].

219. *Id.*

220. *Id.* at xii (discussing prosecutorial discretion).

221. RSCH. SOC. PLATFORM ON MIGRATION, THE CRIMINALISATION OF SOLIDARITY IN EUROPE (2020), https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf [https://perma.cc/SE6A-ERVC].

222. *Id.* In September 2020, the European Commission proposed a "new Pact on Migration and Asylum" to better "balance the principles of fair sharing of responsibility and solidarity." European Commission Press Release IP/20/1706, A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity (Sept. 23, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 [https://perma.cc/V8X2-W39B]. However, "solidarity" here refers to assist to *other member states "in times of stress,"* not civil society actors assisting migrants. *Id.* (emphasis added).

223. Carrera et al., *Fit for Purpose?*, *supra* note 9, at 101, tbl. 7.

224. *Id.* (quoting Cour d'appel [CA] [regional court of appeal] Paris, June 21, 2001, 0100550).

225. *Id.*; *cf*. United States v. Costello, 666 F.3d 1040, 1050 (7th Cir. 2012) (finding no harboring liability for woman whose undocumented boyfriend lived in her apartment).

226. Carrera et al., *Fit for Purpose?*, *supra* note 9, at 101–02, tbl. 7.

Asylum, which exempts spouses from liability for facilitating residence in France.[227] Finally, a British woman was prosecuted for attempting to smuggle her friend's children into the United States from Nigeria by using her own daughter's passport to facilitate the children's passage.[228] Along with the prosecution of civil society actors, these prosecutions illustrate the substantial toll of criminalization.

European researchers have documented the toll of policing humanitarian actors—on citizens as well as society more broadly.[229] Specifically, researchers have found that policing directly impacts citizens' "rights and freedom of assembly" through the criminalization of solidarity with migrants.[230]

2. EU Protection for the Freedom of Association

EU law recognizes the freedom of association as a fundamental value, but courts have accepted incursions on this freedom in the realm of citizen-migrant relations. Many fundamental freedoms are implicated, such as the freedoms of association and speech, and a robust civil society sector more generally, which, commentators contend, performs the necessary work of safeguarding constitutional systems.[231] The EU Charter of Fundamental Rights, Article 12, guarantees the right to freedom of assembly and association, and Article 11 guarantees the right to freedom of expression. Crucially, these rights apply to all persons, not only citizens of the EU.[232] International legal instruments underscore the core function of free association.[233] The UN International Covenant on Civil and Political Rights, Article 22.1, guarantees the "right to freedom of association with others."[234] The European Convention on Human Rights, Article 11, guarantees the same, along with peaceable assembly.[235]

Criminalization hobbles civil society actors' essential functions of monitoring the government and promoting human rights protection. These actors, encompassing not only formal NGOs, but "disorganised" movements

227. *Id.* at 102, tbl. 7.

228. *Id.*

229. *Id.* at 10.

230. *Id.*

231. *Id.* at 88–89.

232. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 398, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT [https://perma.cc/ZY4Q-C7R6].

233. *See generally Fraternité*, *supra* note 11 (discussing how the legal codes of France interact with the principle of fraternity and its effects on migrants).

234. G.A. Res. 2200A (XXI), at art. 22, International Covenant on Civil and Political Rights (Mar. 23, 1976), https://www.ohchr.org/sites/default/files/ccpr.pdf [https://perma.cc/77HS-HKYC].

235. Convention for the Protection of Human Rights and Fundamental Freedom, art. 11, Nov. 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/documents/convention_eng.pdf [https://perma.cc/6NVH-LZPK].

and activists, safeguard the freedom of association.[236] For example, EU citizens have filed petitions complaining of rights violations related to the criminalization of solidarity. A lawyer from Spain, for example, represented three Spanish lifeguards volunteering for an NGO, who were arrested for assisting migrants.[237] Although a court acquitted the clients, the prosecution itself "exacerbated mistrust in society—towards civil society and towards the criminal justice systems."[238] EU citizens have further underscored civil society's central role in guaranteeing fundamental rights when the government fails to respond to urgent developments "quickly and effectively."[239] The European Citizens' Initiative on this issue calls not only for decriminalization of humanitarian aid to migrants, but also community sponsorship of refugees and access to justice for victims of exploitation.[240]

These core freedoms appear in the recognition of solidarity between citizens and migrants. French law offers a vivid example. France's Code of Entry and Residence of Foreigners criminalized those who helped illegal entry and circulation.[241] However, it exempted from liability the foreign national's closest relatives and the nonprofit facilitation of illegal residence involving the provision of "legal advice, food, accommodation or health care" or "any other assistance aimed at preserving [an individual's] dignity or physical integrity."[242] The statutory scheme in place already recognized a right to provide life's necessities to unauthorized migrants, but the French Constitutional Court extended these rights further in a 2018 case.[243]

In the 2018 case of Cedric Herrou, the Constitutional Court broadened the exemption to include any humanitarian assistance after entry.[244] In that case, French authorities had arrested and charged Herrou with several crimes relating to his assistance of migrants passing from Italy into France.[245] At his trial, Herrou argued that as a "Frenchman," he had a right to act out of a sense of solidarity with migrants.[246] After an initial conviction and unsuccessful appeal,

236. *See* Carrera et al., *Fit for Purpose?*, *supra* note 9, at 90.

237. *Id.* at 12.

238. *Id.* at 51.

239. *Id.* at 52.

240. The ECI is "a unique way . . . to help shape the EU by calling on the European Commission to propose new laws." *See European Citizens' Initiative*, EUR. UNION, https://europa.eu/citizens-initiative/_en [https://perma.cc/849A-CLKZ].

241. *Fraternité*, *supra* note 11, at 185.

242. *Id.*

243. *Id.* at 186–87.

244. *Id.* at 185.

245. *French Farmer on Trial for Helping Migrants Across Italian Border*, GUARDIAN (Jan. 4, 2017, 1:26 PM), https://www.theguardian.com/world/2017/jan/04/french-farmer-cedric-herrou-trial-helping-migrants-italian-border [https://perma.cc/GZ8Z-EQQB].

246. Adam Nossiter, *Farmer on Trial Defends Smuggling Migrants: 'I Am a Frenchman.,'* N.Y. TIMES (Jan. 5, 2017), https://www.nytimes.com/2017/01/05/world/europe/cedric-herrou-migrant-smuggler-trial-france.html [https://perma.cc/4BE4-VZP8 (dark archive)].

Herrou took his case to the French Constitutional Court, which ruled that the constitutional principle of fraternity indeed insulated Herrou's actions from prosecution, insofar as they related to facilitation of circulation and residence.[247] But the court left intact the prohibition on assistance in entry or smuggling.[248] The French legislature confirmed this interpretation by amending the exemption to conform to the court's decision.[249]

One commentator noted that the Constitutional Court adopted a broad notion of fraternity, one not limited to French citizens, nor to those who share fidelity to the core tenets of French citizenship: liberty and reason.[250] Instead, the court's conception of fraternity amounted to a principle of "dignity than to an idea of national kinship."[251] Commentators have noted the "subversive" function of fraternity evidenced here: as the "mother" of all social rights, fraternity has the greatest potential to upset the separation of powers by inducing judicial encroachment on public policy, traditionally viewed as the legislature's domain.[252] In preserving the prohibition on illegal entry, however, commentators noted that the court's decision would have only a limited impact.[253] Nonetheless, the decision has been described as a "milestone" judgment enshrining "normative consequences in the field of immigration and asylum."[254]

B. *Canada's Regime*

Less conclusively, Canadian law offers another example of a regime that takes associational interests of citizens and migrants seriously. Canadian law regulates smuggling directly and the assistance of unauthorized migrants indirectly, creating confusion as to the scope of criminal prohibition. But some aspects of Canadian immigration law demonstrate strong regard for citizen-migrant associations, offering a useful example for the United States.

1. Canadian Smuggling and Harboring Law

Canadian law does not explicitly criminalize migrant harboring. Instead, the Immigration and Refugee Protection Act ("IRPA") prohibits smuggling or assisting unauthorized migrants in entering Canada. Section 117 states:

247. *Fraternité*, *supra* note 11, at 186.
248. *Id.*
249. *Id.* at 187.
250. *Id.* at 189.
251. *Id.*
252. *Id.* at 190.
253. *Id.*
254. *Id.* at 187–88; *see also* EXPERT COUNCIL ON NGO L., USING CRIMINAL LAW TO RESTRICT THE WORK OF NGOS SUPPORTING REFUGEES AND OTHER MIGRANTS IN COUNCIL OF EUROPE MEMBER STATES 26–27 (Dec. 2019), https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969 [https://perma.cc/SSQ6-ELDL].

> No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.[255]

The government arrested a humanitarian actor under a predecessor to this provision,[256] although it ultimately dropped the charges.[257] But litigation over the scope of the predecessor provision led to a narrowing of the statute. In a 2015 decision, *R. v. Appulonappa*,[258] the Canadian Supreme Court held that the provision was overbroad as drafted, as it could support the prosecution of humanitarian actors, contrary to Parliament's purpose.[259] The court ruled that Section 117 violated the Canadian Charter of Rights and Freedoms, "insofar as [it] permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members."[260] In particular, the court referenced Section 7 of the Charter, which guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[261] The court further noted that a broad punitive purpose to reach such individuals would be inconsistent with statutory purpose gleaned from statutory text, Canada's international commitments, Section 117's role within the statute, the history of Section 117, and the parliamentary debate leading up to the provision's adoption.[262]

Appulonappa may have defanged the smuggling statute, but other provisions of the IRPA remain a threat to humanitarian actors. For example, Section 126 of the Act states:

> Every person who knowingly counsels, induces, aids or abets[,] or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant

255. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 117 (Can.).

256. Julia Preston, *Canada Arrests Worker Aiding Refugees*, N.Y. TIMES (Sept. 29, 2007), https://www.nytimes.com/2007/09/29/us/29immig.html [https://perma.cc/M9MA-5N7T (staff-uploaded, dark archive)].

257. *Human Smuggling Charges Dropped Against U.S. Aid Worker*, CBC NEWS (Nov. 9, 2007), https://www.cbc.ca/news/canada/montreal/human-smuggling-charges-dropped-against-u-s-aid-worker-1.659566 [https://perma.cc/WK9G-NRBH].

258. [2015] 3 S.C.R. 754 (Can.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/15648/1/document.do [https://perma.cc/CRZ6-LHWA].

259. *See id.* at 772, para. 37.

260. *Id.* at 762, para. 5.

261. *Id.* at 768, para. 7.

262. *See* Ray, *Saving Lives*, *supra* note 21, at 1269–71 (discussing *Appulonappa*). In 2012, Parliament amended § 117 in several ways, but courts have similarly concluded that the section is overbroad insofar as it purports to reach humanitarian assistance to unauthorized migrants seeking entry. *See* R. v. Boule, 2020 BCSC 1846, para. 166 (Can.) (holding that the amended § 117 evinced a much broader purpose than its predecessor, but that the same humanitarian carveouts were nonetheless warranted).

> matter that induces or could induce an error in the administration of this Act is guilty of an offence.[263]

Advocates for refugees have worried that they could be prosecuted for counseling or aiding refugees by, say, disposing of documents.[264] Commentators have suggested that the same line of argument as in *Appulonappa* should dictate the scope of these provisions as well.[265] Namely, the commentators advise advocates to argue that these provisions do not reach humanitarian actors.[266]

The status of "harboring" under Canadian law remains unsettled, in part due to the broad terms of the IRPA. Some commentators assume that assisting migrants who have already been ordered deported violates the law.[267] This follows through indirect operation of the IRPA: Section 124 criminalizes any violation of the Act,[268] and Section 131 criminalizes "aid[ing] or abett[ing]" such an offense.[269] Specifically, it reads: "Every person who knowingly . . . aids or abets . . . any person to contravene section . . . 124 . . . or who counsels a person to do so, commits an offence and is liable to the same penalty as that person."[270] As a result, anyone who aids or abets another person's violation of *any* provision of the act commits a criminal offense.[271] A migrant who remains in Canada after issuance of a removal order violates Section 48(2) of the Act, and therefore, commits a criminal offense under Section 124.[272] In turn, anyone who aids or abets this person's continuing presence also violates Section 131.[273] The same logic applies to a migrant who violates the IRPA's obligations to maintain legal status and the prohibition on entering without inspection.[274] As a result, the criminalization chain apparently extends to those who assist either migrants ordered deported or migrants who are merely deportable.[275]

Scholars have critiqued this line of reasoning that results in a criminal prohibition on migrant harboring, even if undertaken for humanitarian reasons. Professor Sean Rehaag has analyzed "aiding" and "abetting" distinctly.[276] With

263. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 126 (Can.).

264. *See* Lorne Sabsay & Angela Ruffo, *Criminalizing Refugee Assistance*, 37 FOR DEFENCE 40, 44 (2016).

265. *Id.*

266. *Id.*

267. *See* Rehaag, *supra* note 8, at 47 (describing scholar Randy Lippert's analysis of Canadian sanctuary practices).

268. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 124 (Can.).

269. *Id.* § 131.

270. *Id.*

271. *See id.*

272. *Id.* §§ 48(2), 124.

273. *See id.* §§ 48(2), 131.

274. *See id.* § 18(1) (requiring every person seeking entry into Canada to "appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada").

275. *See id.*

276. Rehaag, *supra* note 8, at 49.

respect to the definition of "aiding," Rehaag helpfully distinguishes strategies of "concealment" and "exposure" in Canadian sanctuary practice.[277] Concealing a migrant to avoid law enforcement detection "aids" the continued stay of someone with a removal order.[278] But the public provision of sanctuary without thwarting immigration enforcement does not similarly constitute "aid" in Rehaag's view.[279] Here, liability tracks a lack of transparency.

Rehaag further considers whether Canadian law might prohibit more ordinary assistance, such as the provision of food or shelter.[280] Noting that Canadian law contains no express prohibition on migrant harboring,[281] Rehaag argues that "aiding" under the IRPA does not include "harboring."[282] In addition, he notes the practical problems created by a broader interpretation of "aiding."[283] Specifically, social service providers whose clientele includes immigrants without lawful status, for example, domestic violence shelters or legal clinics, schools, and hospitals, could face "harboring" liability under a broader interpretation.[284] Rehaag contends that if Parliament intended the IRPA to have such a broad reach, it "would have done so explicitly."[285]

Rehaag also analyzes "abetting," which under Canadian criminal law means, "counselling an offence" or "encouraging someone to commit an offence."[286] Justices have interpreted "abetting" in the Criminal Code to mean "encourag[ing] the principal with his or her words or acts, but also that the accused intended to do so."[287] Whether counseling amounts to "abetting," Rehaag argues, depends on the facts, with some sanctuary providers probably encouraging migrants to remain in Canada despite a valid removal order, but others publicly providing sanctuary while simultaneously informing law enforcement.[288] This recalls the concealment-exposure distinction discussed with respect to aiding.[289] Here, too, Rehaag warns of criminalizing vast swaths of "moral and political support" for migrants, including from public officials

277. *Id.* at 44.

278. *Id.* at 49.

279. *See id.* at 49–50.

280. *Id.* at 50.

281. *Id.* ("Because Canadian law does not explicitly prohibit harbouring migrants who are unlawfully present in the country, . . . merely providing shelter, food, and other services . . . should not be considered 'aiding' the commission of an offence.").

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* This reasoning echoes the Canadian Supreme Court's approach to the statute in *Appulonappa*, which it deemed overbroad. *See* R. v. Appulonappa, [2015] 3 S.C.R. 754, 772, para. 37 (Can.).

286. *See* Rehaag, *supra* note 8, at 51.

287. *Id.* (quoting R. v. Greyeyes [1997] 2 S.C.R. 825, 842, para. 38 (Can.)).

288. *See id.*

289. *See supra* Section I.A.

and community leaders.[290] Outspoken public officials announcing an intention to assist migrants in sanctuary could be ensnared by a broad reading of "abetting."[291]

Outside of the sanctuary setting, practitioners have observed that the IRPA itself offers many avenues for discretionary relief, complicating the criminalization of underlying immigration offenses. Is someone whose status lapses, but who then seeks to restore it, guilty of a criminal offense for having had a lapsed status?[292] Letting one's status lapse, after all, is a violation of the duty to maintain status under IRPA. Or is it cured by the application to restore? Questions like these suggest that IRPA Section 124's vast criminalization lacks stability and coherence. For all these reasons, substantial uncertainty remains as to the status of migrant harboring under Canadian law, but the lack of an explicit migrant harboring provision provides support for the notion that humanitarians will not necessarily be prosecuted for providing life's necessities to unauthorized migrants. In fact, there are no recent recorded cases of the Canadian government prosecuting humanitarians for doing this work.

2. Canadian Protection for the Freedom of Association

Canada protects the freedom of association in broad terms, including citizen-migrant relations to the extent consistent with the nation's right to exclude noncitizens. The Canadian Charter of Rights and Freedoms guarantees the freedoms of assembly and association. Section 2 states: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."[293] As noted above in the discussion of *Appulonappa*, Section 7 safeguards the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[294]

Although the bulk of Canada's federal free association jurisprudence relates to labor unions and the right to collective bargaining in various industrial

290. Rehaag, *supra* note 8, at 51.

291. *Id.* ("[A]n expansive interpretation of 'abetting' would catch a significant number of influential public officials and community leaders, who regularly provide political assistance to migrants who are in Canada in violation of removal orders."). Rehaag's emphasis on concealment as the core offense covered by aiding and abetting echoes the jurisprudence in several U.S. Courts of Appeals that similarly require concealment or shielding from law enforcement for the offense of harboring. *See supra* Section I.A.

292. Erica Olmstead, *Are the Immigration Offence Provisions Unconstitutional?*, EDELMANN & CO. LAW OFFS. (June 1, 2020), https://edelmann.ca/are-the-immigration-offence-provisions-unconstitutional/ [https://perma.cc/3ELV-9QQR].

293. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 2 (U.K.).

294. *See supra* Section III.B.1.

sectors,[295] the Supreme Court of Canada has emphasized the value of free association more broadly.[296] Despite some vacillation, the court has expanded the freedom of association to encompass collective rights as well as individual rights.[297] Commentators note that Canadian law protects individual rights exercised "in association with others."[298]

Some aspects of Canadian immigration law suggest robust protection for citizen-migrant associations. First, as discussed above, Canadian law regulates harboring and smuggling much less harshly. It does not expressly criminalize harboring at all, let alone nonprofit assistance to unauthorized migrants.[299] In the realm of smuggling, the Canadian Supreme Court has clarified that criminal law does not prohibit smuggling family members, providing mutual assistance, or humanitarian aid to unauthorized migrants.[300] Second, apart from a more accommodating statutory regime, Canada famously runs a private refugee sponsorship program, which allows citizens to host refugees directly or to help them find housing, work, and appropriate services.[301] Through this program, citizens help integrate new members of the polity.[302]

Under private refugee sponsorship, Canadian citizens can apply to sponsor particular refugees from abroad whom the Canadian government then vets.[303] After vetting, the refugees travel to Canada, and their sponsoring family or organization, often a church or group of friends or neighbors, begin assisting the individuals in starting their new lives in Canada.[304] Studies suggest that refugees benefit from the community ties and local support, whereas Canadian citizens find the process of helping refugees integrate into the local community gratifying.[305] This idealized "everyone wins" narrative, however, conceals

295. PETER W. HOGG, *Assembly and Association*, *in* CONSTITUTIONAL LAW OF CANADA 44-4–44-8 (Student ed., 2015) (discussing labor cases).

296. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 29 (2006) (noting general rule to interpret Section 2 of Canadian Charter "broadly").

297. HOGG, *supra* note 295, at 44-14.

298. *Id.* at 44-13.

299. But this does not mean that the law contains *no* basis for harboring liability. *See* Rehaag, *supra* note 8, at 49–50.

300. *See supra* Part I.

301. *See What Is the Private Sponsorship of Refugees?*, UNHCR CAN., https://www.unhcr.ca/in-canada/other-immigration-pathways-refugees/private-sponsorship-refugees/ [https://perma.cc/R2TL-X6EY] [hereinafter *Private Sponsorship*].

302. *See* Audrey Macklin, *Working Against and with the State: From Sanctuary to Resettlement*, 4 MIGRATION & SOC'Y 31, 31 (2021).

303. *See generally* Ray, *Saving Lives*, *supra* note 21 (discussing the mechanics of private humanitarian aid for asylum seekers in Canada).

304. *Private Sponsorship*, *supra* note 301 (noting that sponsored refugees are approved outside of Canada and "become permanent residents upon arrival in Canada," and describing range of sponsorship arrangements).

305. *See, e.g.*, Morton Beiser, *Sponsorship and Resettlement Success*, 4 J. INT'L MIGRATION & INTEGRATION 203, 213 (2003) (suggesting that sponsors might expose "refugees to a broader range of

potential issues. Unmet expectations exist on both sides: citizens sometimes feel that too much is being asked of them or that refugees are insufficiently grateful for their assistance, while refugees might find the support inadequate or half-hearted. In the worst case, citizens might exploit less powerful refugees.[306]

Apart from the statutory framework and administration of refugee resettlement, other evidence suggests traditional limits on associational freedom when immigration regulation is implicated. Noncitizens have asserted claims under the Charter to contest deportation, denial of a visa, and other immigration decisions, but the Canadian immigration bureaucracy has not been receptive to claims based on the freedom of association in those settings.[307] Instead, Canadian courts have held that deportation does not implicate the freedom of association on its own, nor in relation to its effect on family relationships with citizens.[308] In a case where a long-term resident challenged his deportation as a violation of liberty protected by Section 7 of the Charter, the court noted that deportation on its own does not implicate protected liberties.[309] Similarly, in *Medovarski v. Canada (Minister of Citizenship and Immigration)*,[310] the Supreme Court of Canada held that "the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of [the Charter]" because "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada."[311] The court further noted that, even if deportation implicated these interests, the unfairness did not rise to "a breach of the principles of fundamental justice."[312] Accordingly, the freedom of association does not guard against expulsion.[313]

Canadian federal courts have not generally regarded intimate relations between citizens and migrants as falling within the liberty protected by the

services than government settlement workers" can); Michael Lanphier, *Sponsorship: Organizational, Sponsor, and Refugee Perspectives*, 4 J. INT'L MIGRATION & INTEGRATION 237, 245–46 (2003) (discussing advantages of private sponsorship to include "[i]nterpersonal bonds" between sponsor and refugees, connection to the wider Canadian community, and solidarity-building).

306. *See What Should You Do if You Are Being Mistreated, Exploited or Abused?*, REFUGEE SPONSORSHIP TRAINING PROGRAM, https://www.rstp.ca/en/your-rights-as-a-privately-sponsored-refugee/mistreated-exploited-abused/ [https://perma.cc/JY2Z-7PMB].

307. Moretto v. Canada (Minister of Citizenship & Immigr.), [2019] FCA 261, para. 47 (Can.) (contesting deportation); Horbas v. Canada (Minister of Emp. and Immigr. & Sec'y of State for External Affs.), [1985] 2 F.C. 359, 363–64 (Can.) (contesting visa denial); Rasullie v. Canada (Minister of Citizenship & Immigr.), 2004 CanLII 71231, para. 17 (Can. I.R.B.) (contesting visa denial).

308. *See* Medovarski v. Canada (Minister of Citizenship & Immigr.), [2005] S.C.C. 51, para. 47 (Can.).

309. *See Moretto*, [2019] FCA at para. 47.

310. [2005] S.C.C. 51 (Can.).

311. *Id.* at para. 46.

312. *Id.* at para. 47.

313. *See id.*

Charter, mirroring the U.S. Supreme Court's decision in *Kerry v. Din*.[314] For example, in *Rasullie v. Canada (Minister of Citizenship and Immigration)*,[315] a Pakistani woman appealed the denial of her sponsored application for a permanent resident visa based, in part, on the freedom of association with her spouse.[316] Although her husband at the time sponsored her to migrate as his spouse, the marriage ended before the applicant arrived in Canada.[317] The Immigration and Refugee Board rejected the applicability of the Charter to the applicant's right to reside in Canada with her former husband.[318] The Board's refusal to recognize the impact of visa denial was overdetermined in that case, for even if a marital association triggered Charter rights, here, the applicant no longer had any marital association. The Board, however, also suggested that the visa statute simply does not "engage[]" the Charter.[319] The marital relationship "exists irrespective of the [visa] legislation."[320] Moreover, the Board noted that the statute creating family classes for visas was not responsible for her separation from her partner.[321] Instead, it was the applicant's failure to correct inaccuracies in her file.[322]

Similarly, in *Horbas v. Canada (Minister of Employment and Immigration and Secretary of State for External Affairs)*,[323] the Federal Court held that neither Section 7 nor Section 2 protected the right of marital partners to cohabit.[324] In *Moretto v. Canada (Minister of Citizenship and Immigration)*,[325] the Federal Court of Appeal confirmed the inapplicability of the Charter to deportation.[326] The court considered the noncitizen's claim based on the freedom of association.[327] The court noted precedent that characterizes the freedom of association as procedural rather than substantive, a freedom that relates to the *way* collective goals are pursued.[328] As a result, "institutions like the family do not fall easily under the rubric" of the freedom of association under Section 2(d) because the family is not a collective institution in the way a club is.[329] Instead of representing a voluntary association for purposes of pursuing common goals, it

314. Kerry v. Din, 576 U.S. 86, 93–95 (2015) (plurality opinion).
315. 2004 CanLII 71231 (Can. I.R.B.).
316. *See id.* at para. 1, 7.
317. *Id.*
318. *See id.* at para. 16–17.
319. *See id.* at para. 16.
320. *Id.* at para. 17.
321. *Id.*
322. *Id.*
323. [1985] 2 F.C. 359 (Can.).
324. *See id.* at 363–64.
325. [2019] FCA 261 (Can.).
326. *See id.* at para. 7.
327. *Id.* at para. 68–73.
328. *Id.* at para. 71–73.
329. *See id.* at para. 69.

represents an entity formed through economic necessity and the need to love and be loved.[330] By apparently cabining "associations" to voluntary relationships, *Moretto* diverges from U.S. law that regards family relationships as core to associational freedom.[331]

Ultimately, Canadian law protects the freedom of association, and limitations stem from the nation's right to exclude foreigners, an area where associative freedom cannot be expected to prevail under the current nation-state system.[332] But the durable program of private refugee sponsorship, lack of an explicit criminal prohibition on harboring, and exemption from liability for smuggling family members all suggest that associative freedom between citizens and migrants exceeds that which is enjoyed in the United States. Perhaps most significantly, the emergence of a fraternity-based defense in France and examination of the Canadian regime suggests that those relationships on their own are worthy of protection, not only in terms of a citizen's conscience or political message for the public.

IV. HARBORING AND THE FREEDOM OF ASSOCIATION IN THE UNITED STATES

Observing harboring law's toll on citizen-migrant associations in other jurisdictions yields helpful insights for the United States, even if no prescriptions. American courts have rejected challenges to harboring law based on the freedom of association thus far, albeit under distinct circumstances. But the point of the comparative inquiry is not simply to take harboring's toll on association and argue for invalidating all harboring law. Instead, it calls for treating citizen-migrant associations with greater care, even when they elude the existing doctrinal categories of expressive or intimate association as currently understood. This "greater care" could be accomplished through an affirmative defense to harboring liability for nonprofit assistance or through statutory reform to require proof that the defendant provided assistance for profit rather than out of altruism.[333] But the groundwork for such reform lies in the development of a fuller conception of association. It begins with advancing a more complete picture of what potentially protected associations look like. This part considers both the contours of this fuller conception and likely objections.

330. *See id.* at para. 72. These Canadian decisions echo U.S. Supreme Court decisions on similar matters, discussed *supra* Part II.

331. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (decrying "intrusive regulation of the family" via city ordinance that prohibited grandmother from living with her grandson).

332. *See* SARAH SONG, IMMIGRATION AND DEMOCRACY 105 (2018).

333. *See generally* Ray, *Saving Lives*, *supra* note 21 (discussing law reforms for unleashing private humanitarian aid to asylum seekers).

A. *Reworking U.S. Associational Jurisprudence To Recognize Care-Giving Activities*

Current associational jurisprudence protects only intimate and expressive associations, leaving most associations unprotected. The Supreme Court has recognized intimate associations as protected liberties under the Due Process Clause, including, for example, parents' fundamental liberty to control the upbringing of their children.[334] It has recognized expressive associations also as protected under the implicit freedom of association under the First Amendment.[335] The citizen-migrant associations contemplated in this Article do not fit neatly into either category, but two paths for extending protection to such associations warrant consideration. First, the category of "intimate" associations might be interpreted to encompass noncommercial lifesaving or life-sustaining aid, such as the provision of food, water, and shelter, even between strangers. Second, advocates might wish to revive an older concept of assembly for nonpolitical gatherings.

Rather than focusing on the legal or blood relationship between the people involved, the law might instead focus on the nature of the regulated activities. To the extent that citizens assisting migrants wish to give them food or a place to rest, these relationships would seem to comfortably inhabit the space in between protected intimate associations and unprotected commercial ones.[336] Although these relationships do not directly implicate marriage, childbirth, or cohabitation with relatives, they do serve the ends of human health, well-being, and flourishing. Moreover, these interactions may involve strangers, but not for recreational purposes. Accordingly, *Stanglin*, which held that social dancing fell short of a protected intimate association, is no bar to this theory of intimate association.[337] Lawyers for sanctuary workers in the 1980s advanced a similar theory of intimate association, but they focused on the "sacrifice of giving help to another out of religious or humanitarian convictions,"[338] thus reinscribing the jurisprudence's emphasis on respecting citizens' comprehensive doctrines rather than protecting activities of care.

334. *See generally* Troxel v. Granville, 530 U.S. 57 (2000) (children's visitation rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (children's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (school teaching of foreign language); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (children attending private schools); City of Dallas v. Stanglin, 490 U.S. 19, 28 (Stevens, J., concurring) (characterizing "the opportunity to make friends and enjoy the company of other people" as implicating substantive due process rather than the First Amendment right to association).

335. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 437 (1963).

336. *See* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 463–64 (2015) (defending asymmetric freedom of association doctrine, which provides little protection to for-profit enterprises, on the grounds that the shareholder wealth-maximization norm "crowd[s] out personhood interests").

337. *See Stanglin*, 490 U.S. at 24–25 (rejecting notion that "the Constitution recognize[s] a generalized right of 'social association' that includes chance encounters in dance halls").

338. Loken & Bambino, *supra* note 70, at 175.

The argument for broadening the category of "intimate associations" builds indirectly on social science research suggesting the value of seemingly insignificant connections. Social science research suggests that relationships with "consequential strangers" have the potential to increase well-being.[339] These people are background actors, not close associates. Typically, these relationships involve repeated, low-stakes interactions over a period. Here, in contrast, the relationships at issue are high-stakes and potentially one-off.[340] Often, however, citizens engage in continuous efforts to assist migrants, participating as part of a nonprofit organization or community group. In that sense, stepping back, these roles and relationships have a more enduring quality. Moreover, even nonexpressive associations carry civic and political potential.[341]

Broadening the class of relationships regarded as "intimate" also builds on Sam Fleischacker's idea of the value of "insignificant communities," or "particle communities."[342] Fleischacker argues that U.S. jurisprudence has it exactly backward in its preference for communities that share core beliefs, like religious communities, or political organizations.[343] These are what Fleischacker calls traditional or "solid" communities that share higher purposes.[344] Instead, Fleischacker argues that the more important avenue for community-building is in the "insignificant"—the shared meals, the games of basketball, the interactions at the gym, and the casual, serendipitous interactions that help us meet our basic needs.[345] Think: the pub over the pew. Institutions like public libraries and community centers also facilitate particle communities.[346] Proposals to protect associations built around basic human needs through particle communities cut across political divides by focusing on basic human needs, like eating and socializing, and not the "higher purpose" of the group[347] or their "comprehensive doctrines."[348] This has implications for the issues at hand: rather than forcing citizens to claim religious freedom to avoid liability,

339. *See* MELINDA BLAU & KAREN L. FINGERMAN, CONSEQUENTIAL STRANGERS: THE POWER OF PEOPLE WHO DON'T SEEM TO MATTER . . . BUT REALLY DO 31–40 (2009).

340. *See* Loken & Bambino, *supra* note 70, at 175 (noting short-lived nature of citizen-migrant interactions in sanctuary setting).

341. Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 100–02 (2014).

342. *See* Sam Fleischacker, *Insignificant Communities*, *in* FREEDOM OF ASSOCIATION 273, 293–94 (Amy Gutmann ed., 1998).

343. *Id.* at 291.

344. *Id.* at 273.

345. *Id.* at 293–94.

346. *See id.*

347. *Id.* at 304.

348. *See* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987) (arguing that a workable conception of political justice "must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life . . . affirmed by the citizens of democratic societies").

citizens could instead rely on stronger protection for the activities of meaningful, even if fleeting (and therefore "insignificant" in one sense), associations with migrants based on their need for life's basics. Because the migrants in question are presumably already on U.S. territory, the plenary power doctrine as applied in *Din* and *Mandel* to noncitizens abroad is not a definitive bar.[349] By focusing on the kinds of activities associated with intimate relationships, rather than legal bonds or blood relationships, the law can correct course. Based on this insight about the relative value of seemingly superficial connections that help meet human needs,[350] we might reorient the law to better protect acts of providing food, shelter, clothing, and water—the kind of assistance that helps a body survive.[351]

Recognizing gatherings where citizens provide food, water, and shelter to migrants as protected "assembly" achieves a similar end.[352] Early on, the freedom of assembly protected nonpolitical gatherings, but, as John Inazu writes, the Supreme Court "swept the remnants of assembly within the ambit of free speech law" in the twentieth century.[353] Inazu notes the expressive quality of many practices of assembly, including parades, strikes, pageants, worship, and sharing meals.[354] A more expansive right to peaceable assembly

349. As noted above, unlike *Kleindienst v. Mandel* and related cases, the association at issue here is between a citizen and a migrant already present in the United States. For that reason, the plenary power doctrine need not downgrade citizens' associational interests. *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (noting that the Court will not scrutinize the Executive's decision to deny a waiver of excludability, pursuant to the plenary power delegated by Congress, so long as the Executive supplies a facially legitimate and bona fide reason for its exercise of discretion).

350. Admittedly, Fleischacker's case for insignificant communities is liberty-oriented; that is, he fears the government's power to benefit and burden associations based on their higher purposes. *See* Fleischacker, *supra* note 342, at 293–94. But his insight is nonetheless useful in acknowledging the value of associations that do not fit neatly into the categories of intimate or expressive, as traditionally conceived.

351. Another area where this analysis might have an impact is feeding the homeless. Many municipalities have regulated the distribution of food in public places, impeding charitable organizations that seek to feed homeless people. The nonprofit organization Fort Lauderdale Food Not Bombs ("FLFNB") has challenged these ordinances as violations of the First Amendment, characterizing their work as expressive conduct under existing free speech jurisprudence. *See* Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1245 (11th Cir. 2018) (holding that FLFNB's activity amounted to expressive conduct given "the factual context and environment in which it was undertaken"). In contrast, this Article contends that associational interests should also be recognized in such a case as well, for groups that wish to share food but without the burden of proving a particular moral worldview or political message to the government. This does not mean that municipalities lack the power to regulate the public-spirited distribution of food, but rather, such laws, perhaps designed to promote health and safety, should be well-tailored to achieve their end. As Karst noted with respect to intimate association, recognizing associational interests creates a presumption in favor of the activity but not an absolute right. Karst, *supra* note 17, at 627.

352. *Cf.* INAZU, *supra* note 15, at 61 (discussing the demise of the freedom of "assembly" in the context of social gatherings).

353. *Id.*

354. *Id.* at 21.

could offer a firm doctrinal foundation for protecting nonprofit citizen-migrant interactions at the border and within the interior.[355] It would also require a substantial revision of prevailing law, as the Free Speech Clause has "effectively supplanted neighboring provisions including the Press Clause, the Assembly Clause, and the Petition Clause."[356] A resuscitated Assembly Clause, however, might empower groups to determine their boundaries more fully and exclude nonmembers. A robust right of assembly could, thus, erode antidiscrimination interests.[357] But recent religious freedom precedents suggest a court committed to robust expressive and associational rights and correspondingly less committed to antidiscrimination values.[358] In that sense, arguments for fuller protection for citizen-migrant associations would simply exploit an existing trend. Advocates committed to antidiscrimination principles might question the ethics of nurturing this trend, but the ethics of declining to advance a potentially successful argument, given the current state of the law, are also dubious.

These doctrinal innovations—expanding the class of associations deemed "intimate" and resuscitating protection for nonpolitical gatherings under the Assembly Clause—bring the relationships between citizens and migrants to the fore, thereby enhancing unauthorized migrants' visibility as parties in a relationship.[359] When the law protects citizen-migrant associations, it recognizes migrants as people relevant to the citizenry and to the polity. It draws attention to migrants' specificity.[360] It lays a groundwork for conceiving of migrants as potential rights holders, regardless of status.[361] As noted in the Introduction and Part I, pegging protection of these associations to citizens' consciences and worldviews fails to appreciate that relationships between citizens and noncitizens warrant protection because of the value of both parties' lives, liberty, and security.

355. *See* Gail M.L. Mosse, *U.S. Constitutional Freedom of Association: Its Potential for Human Rights NGOs at Home and Abroad*, 19 HUM. RTS. Q. 738, 777–78 (1997) (discussing the freedom of assembly).

356. Timothy Zick, *Restroom Use, Civil Rights, and Free Speech "Opportunism*,*"* 78 OHIO ST. L.J. 963, 997 (2017).

357. *Cf.* INAZU, *supra* note 15, at 3 (discussing expressive association and antidiscrimination protections).

358. *See, e.g.*, Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1730 (2018) (noting civil rights commission's "hostility" to wedding cake baker who declined to decorate cake for a gay wedding based on his religious beliefs).

359. *See* Kanstroom, *supra* note 19, at 126–50.

360. *Cf.* Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359, 393 (arguing that human rights law has the effect of "humaniz[ing] migrants" by "drawing attention to their family and community connections").

361. *See* Ray, *The Law of Rescue*, *supra* note 36, at 656–58 (discussing dignity of migrants in need of life-saving aid).

B. *Objections*

There are several grounds for skepticism about the arguments advanced thus far. First, the practical impediments are substantial. The few federal courts to consider the matter have not been receptive to arguments for limiting harboring liability based on the freedom of association. Second, one might object to the expansion of the types of associations afforded constitutional protection on normative grounds apart from the erosion of antidiscrimination norms. Finally, assisting an undocumented immigrant by providing food, water, and shelter might strike some as illegitimate, akin to harboring an escaped prisoner or fugitive.

1. Practical Impediments

The idea of asserting the freedom of association as a constraint on the government's criminalization of harboring is not new. During the original sanctuary movement in the 1980s, churches throughout the United States shielded deportable Central American asylum seekers from immigration enforcement.[362] When prosecuted by the federal government, sanctuary workers claimed that the harboring statute violated their First Amendment rights to religious expression and association.[363] But the nature of the association claim in those cases differed. Sanctuary workers challenged the breadth of the harboring statute by arguing that the statute was unconstitutionally overbroad because it could reach protected family cohabitation.[364] They sought a "rigorous overbreadth analysis."[365] Such an analysis would require a court to find that the statute sweeps far more broadly than its legitimate scope.[366] Instead, this Article asserts that acts of humanitarian aid to migrants should be recognized as constitutionally protected, and the harboring statute, as applied to these acts, treads on constitutional rights.

There are also other signs of trouble. More recently, federal courts have rejected association-based challenges to harboring prosecutions outside the realm of humanitarian aid or family assistance. In *United States v. Good*,[367] the defendant was charged with criminal harboring of unauthorized migrants for providing them with a residence in order to conceal them from immigration authorities and warning them of possible ICE presence near the restaurant where they worked.[368] A federal judge considered the defendant's claim that harboring liability curtailed his ability to "associate with persons in his

362. *See* Loken & Bambino, *supra* note 70, at 122–23.
363. *Id.* at 139.
364. *Id.* at 174–75.
365. *Id.* at 175.
366. *See* United States v. Williams, 553 U.S. 285, 292 (2008) (describing overbreadth analysis).
367. 386 F. Supp. 3d 1073 (D. Neb. 2019).
368. *Id.* at 1083–84.

community who want to build the community, start new businesses, establish[] homes, have children," and so on.[369] The defendant argued that the harboring statute interfered with his associational rights, but the court disagreed, noting that no criminal liability attached to "associating and conversing with illegal aliens."[370] Instead, associating was distinct from assisting, and the law proscribed only the latter.[371]

Federal courts have also indirectly rejected challenges to Section 1324 based on associational rights. In *United States v. One 1990 GEO Storm*,[372] the Ninth Circuit rejected a Rule 60(b) motion to set aside the judgment below awarding summary judgment to the U.S. government in an action for civil forfeiture of a vehicle allegedly used to transport an undocumented immigrant in violation of Section 1324.[373] The owner of the vehicle argued that the statute violated his freedom of association.[374] He contended that he had tried to verify the immigration status of a person to whom he gave a ride, even calling the then-INS to verify the person's status, but the agency refused to divulge the information, citing the Privacy Act.[375] Upon transporting the individual, Potts was arrested by Border Patrol for transporting someone in violation of Section 1324.[376] Potts argued that the provision violated his right to free association because, to avoid liability under the statute, he would need to avoid all contact with persons who appear to be foreign born.[377] In an unpublished decision, the Ninth Circuit rejected that argument, citing an earlier case that rejected a religion-based First Amendment challenge to Section 1324.[378] This challenge to Section 1324 based on the freedom of association, however, was raised in a post-trial motion in a case based on in rem jurisdiction.[379]

Courts have similarly dismissed claims based on rights to intimate and expressive association raised in contexts comparable to harboring. Under 18 U.S.C. § 1591, for example, a person is liable if they knowingly "recruit[], entice[], harbor[], . . . [or] maintain[] by any means a person . . . knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, [or] coercion . . . will be used to cause the person to engage in a commercial sex act," and that the person is under the age of eighteen.[380] In *United States v. Estrada-*

369. *Id.* at 1089.
370. *Id.* at 1089–90.
371. *See id.* at 1090.
372. No. 96-56141, 1997 WL 30359 (9th Cir. Jan. 23, 1997) (unpublished table decision).
373. *Id.* at *1.
374. Petition for a Writ of Certiorari at 7, Potts v. United States, 522 U.S. 870 (1997) (No. 97-351).
375. *Id.* at 4–5.
376. *Id.* at 5.
377. *Id.* at 21–22.
378. *One 1990 GEO Storm*, 1997 WL 30359, at *1.
379. *See id.*
380. 18 U.S.C. § 1591.

Tepal,[381] the defendants argued that the statute unconstitutionally lacked a requirement of criminal purpose to further sex trafficking[382] and could ensnare family members who cohabit "when one knows that a family member is an underage or coerced sex worker."[383] For that reason, the defendants argued, Section 1591 impermissibly interferes with family relationships so central to the right to intimate association.[384] For example, a mother who feeds her child, knowing the child will be coerced into sex trafficking, could be liable for "maintaining" the child in violation of Section 1591.[385]

The defendants further argued that the statute chills expressive association by curbing the rights of organizations, such as soup kitchens, hospitals, and counseling centers, that support coerced or underage sex workers.[386] Rejecting these overbreadth arguments, the court determined that such incursions into protected associations were "indirect and incidental to the plainly legitimate scope" of the statute.[387] In contrast to the district court in *Good*, which interpreted association thinly to encompass mere conversations and physical proximity to another person, the court in *Estrada-Tepal* recognized a fuller conception of association but deemed potential violation of associational rights insignificant relative to the legitimate purposes of the statute.[388] Presumably, prosecutorial discretion would prevent the mother from facing charges for feeding her trafficked child—and yet the experience of humanitarian actors at the border reveals the folly of relying on the wisdom of prosecutors.

These cases, however, did not involve defendants providing humanitarian aid, nor did courts in these cases consider the arguments advanced in this Article. *Estrada-Tepal* and similar cases also reveal that superficial appeals to "family" relationships, even if based on initially consensual intimacy, often mask criminal abuse.[389] This reality counsels against fixating on the category of "familial" relationships. Rather than focusing exclusively on bonds of blood, marriage, or sexual intimacy, the law might turn its attention, instead, to the

381. 57 F. Supp. 3d 164 (E.D.N.Y. 2014).
382. *Id.* at 169–70.
383. *Id.* at 171.
384. *Id.*
385. *Id.*
386. *Id.* at 172.
387. *Id.*
388. *Id.*
389. *See, e.g.*, United States v. Campbell, 770 F.3d 556, 570–71 (7th Cir. 2014) (ruling that evidence supported defendant's conviction for harboring where he manipulated and abused migrant women after an initial courtship period during which he cultivated a "Family" identity); United States v. Vargas-Cordon, 733 F.3d 366, 382 (2d Cir. 2013) (affirming defendant's conviction for harboring his niece, whom he had raped, when he "helped [her] escape from her foster home and then brought her to a new location in a different state unknown to [the government]"). Here, though, the defendants committed crimes against the migrants they harbored, distinguishing these cases from the usual case of family-based assistance.

activities of care that make such relationships worthy of protection. Actors in the legal system—lawyers and judges alike—might consider developing a jurisprudence that offers more protection for people engaged in acts of caregiving.

2. Normative Concerns About Expanding the Class of Protected Associations

One could also object to the expansion of the class of protected associations on several normative grounds. First, one could argue that an expansive conception of "intimate" associations undermines the core concern of intimate association jurisprudence: the protection of deep emotional bonds that facilitate expression of an individual's identity.[390] This Article questions the jurisprudence's exclusive protection of relationships that are assumed to provide emotional sustenance. Instead, it calls for greater attention to relationships that provide the material foundations of human flourishing, motivated by fellow feeling rather than commerce or obligation. It contends that those relationships warrant recognition and protection, and that to some extent, this will require an expansion of, or departure from, current case law.

Second, one might worry that more extensive protections for citizen-migrant associations would interfere with legitimate governmental interests in, say, regulating immigration enforcement in the interior. But constitutional protection of an association does not mean the government cannot regulate the association at all.[391] Instead, constitutional protection establishes a presumption in favor of the regulated association, requiring the government to better justify its incursion on that association.[392] Extending constitutional protection to certain citizen-migrant associations would not preclude government regulation of the border. For example, the government could still prohibit entry without inspection. In France, the government now permits citizens to assist migrants out of solidarity while maintaining prohibitions on unauthorized entry.[393] Such a regime has not proven unreasonable or unworkable, let alone calamitous. Moreover, permitting citizens to assist migrants in the interior by providing food, water, shelter, and clothing does not mean the government cannot regulate more traditional forms of harboring, such as concealment or shielding

390. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984).

391. *See* Karst, *supra* note 17, at 627 (noting that constitutional protection creates a presumption rather than absolute protection).

392. *Id.*

393. *Fraternité*, *supra* note 11, at 186–87.

of unauthorized migrants.[394] But the two interests are in tension, juxtaposing "compassion" with "repression."[395]

Finally, a more fundamental normative question arises: Is solidarity, fraternity, or fellow feeling possible, given radical inequalities between citizens and migrants, as well as the state violence used to enforce borders?[396] To loosely paraphrase a question posed by anthropologist Didier Fassin, is compassion, rather than justice, at stake?[397] As Fassin observed in his study of humanitarian intervention, humanitarianism can operate as domination, with highly valued NGO workers on the one hand and the "victims" (of violence, war, or border restrictions) on the other.[398] The currency in the world of humanitarian aid is the suffering and trauma of migrants, typically translated into terms of bodily health, undermining critical assessment of background institutions.[399]

This Article has pressed for transcending the personal rights of religious or political expression and recognizing a cooperative right of association that includes both citizens and migrants. But if this recognition merely amounts to a legal right of citizens to act with benevolence toward migrants, the resulting regime reproduces the hierarchy of saviors over those in need of saving.[400] This recognition is not rooted in a meaningful mutuality, nor does the freedom of association for citizens and migrants alter severe background inequalities. Yet in extending protection to face-to-face interactions rooted in "public-spiritedness,"[401] the law creates an opening for a jurisprudence in which migrants are visible and connected to citizens and the polity more broadly. That possibility does not address structural inequalities or restrictive asylum policies, but it does provide an important alternative to the even narrower view that citizen-migrant interactions matter only when justified in terms of a citizen's religious expression or conduct expressing a political message.

394. *See* Scott-Railton, *supra* note 4, at 444 (suggesting that a church refusing to honor a valid judicial warrant might impose a greater administrative burden on the government, influencing the assessment of the government's interest).

395. *Cf.* DIDIER FASSIN, HUMANITARIAN REASON: A MORAL HISTORY OF THE PRESENT 135 (Rachel Gomme trans., Univ. Cal. Press 2012) (discussing state official's goal, with respect to reception center for asylum seekers in France, of reconciling humanitarian aid with a rejection of illegal immigration and characterizing it as "compassionate repression").

396. For a discussion of acts of solidarity by citizens on behalf of noncitizens seeking refuge, see Ray, *Saving Lives*, *supra* note 21, at 1245.

397. *See* FASSIN, *supra* note 395, at 8.

398. *See id.* at 232; *see also* Ana Aliverti, *Benevolent Policing? Vulnerability and the Moral Pains of Border Controls*, 60 BRIT. J. CRIMINOLOGY 1117, 1122 (2020).

399. *See* FASSIN, *supra* note 395, at 221–22.

400. Helge Schwiertz & Helen Schwenken, *Introduction: Inclusive Solidarity and Citizenship Along Migratory Routes in Europe and the Americas*, 24 CITIZENSHIP STUD. 405, 416–17 (2020).

401. WARREN, *supra* note 121, at 18.

3. The Analogy to "Fugitives"

Finally, one might also analogize assisting an unauthorized migrant to assisting a fugitive, or a person convicted of a crime who escapes after having been sentenced to imprisonment. Just as the government has the authority to regulate citizens' assistance to fugitives,[402] the argument goes, the government also has the authority to regulate citizens' assistance to unauthorized migrants. However, the analogy falters. Unlike a fugitive convicted pursuant to a criminal legal process, an unauthorized migrant's status often has *not* yet been determined.[403] For example, a migrant might apply for asylum and become a lawful permanent resident after one year of residence.[404] Even for those whose asylum claims have been rejected, their right to remain is not settled. They might be sponsored by a family member or employer and obtain a waiver of their inadmissibility, transforming their status from "illegal" to "legal."[405] Even if they are ordered deported, the government might grant them a reprieve, such as an order of supervision, which is recognized as a source of "lawful presence" for certain purposes.[406] As one scholar has observed, immigration status, and by extension, functional membership in the polity, is dynamic rather than fixed—and is better understood along a spectrum rather than as strictly binary, legal or illegal.[407] Thus, the comparison to a fugitive of fixed legal status does not hold.[408]

402. *See*, *e.g.*, 18 U.S.C. § 1071; State v. Durgin, 959 A.2d 196, 198 (N.H. 2008) (noting that, "[a]t common law the accessory after the fact was one who 'receives, relieves, comforts, or assists' a felon" (quoting MODEL PENAL CODE § 242.3, cmt. 4 at 230)). To be convicted under federal law, however, prosecutors must prove "a physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension." *Id.* (quoting United States v. Mitchell, 177 F.3d 236, 239 (4th Cir. 1999)).

403. *See* Ray, *Law of Rescue*, *supra* note 36, at 661 (arguing that convicted prisoners have received some form of due process).

404. *See Green Card for Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2017), https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-asylees [https://perma.cc/D6SW-6F3A].

405. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of inadmissibility based on unlawful presence); Del Valle v. Sec'y of State, 16 F.4th 832, 836 (11th Cir. 2021) (discussing approval of unlawful presence waiver in one noncitizen's case).

406. United States v. Chinchilla, 987 F.3d 1303, 1305–06 (11th Cir. 2021) (noting "various federal regulations identify orders of supervision as evidence of lawful presence in the United States" for certain purposes).

407. *See* Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1834 (2022). Furthermore, not all unauthorized migrants are unauthorized for having entered the country without authorization; some might have been admitted pursuant to a valid visa and then overstayed. The latter is a civil immigration violation, not a crime. Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

408. A possible future grant of clemency or a pardon does not change the analysis. Forbearance from removal is a fundamental feature of the deportation system in U.S. immigration law. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 513–14 (2009) (discussing the rise of de facto delegation to the executive branch). This thorough-going power to forbear, exercised through "shadow sanctions" like deferred action, administrative closure, and orders

CONCLUSION

Nations regulate associations between citizens and migrants at the border and within the interior. As the experiences of NGOs and others illustrate in Canada, EU member states, and the United States, laws prohibiting assistance to unauthorized migrants threaten people and organizations that have formed valuable—even if short-lived—associations with migrants. Recognizing the valuable associations involved in such assistance, aided by a comparative analysis, can help illuminate a promising direction for advocacy and reform. Specifically, this recognition calls for interpreting the protected class of intimate associations as extending to care-giving activities undertaken on a charitable basis. Although this Article does not offer a roadmap for a litigation victory under current jurisprudence, it offers a different way of understanding the problem, one grounded in the possibility of solidarity between citizens and migrants.

of supervision, can lead to a prolonged permitted stay in the United States, even for a noncitizen ordered deported. *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2053 (2021); Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1120 (2015) (noting that individuals in "nonstatus" categories "occupy a paradoxical middle ground between legality and illegality"). In contrast, clemency and pardons are exceptionally rare, requiring a decision by the President. *See Standards for Consideration of Clemency Petitioners*, U.S. DEP'T JUST. (Sept. 21, 2018), https://www.justice.gov/pardon/about-office-0 [https://perma.cc/3H4D-U2RD]. Fugitive status is not fairly characterized as equally "dynamic."