

# Settling the Law for *Eduin Rodriguez* and People Who Help People Like Him: A Current Circuit Split Impacting Immigration Law and Policy

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## I. INTRODUCTION

Consider the case of Eduin Rordriguez. Eduin was abandoned by both parents at a young age in Honduras.<sup>1</sup> He embarked on a dangerous journey, moving from the tops of freight trains through Mexico, and swimming through the Rio Grande to enter the United States at Hidalgo, Texas.<sup>2</sup> Under the language of § 1324(a)(2), the people who helped Eduin cross the border into Texas knew that he did not have prior official authorization to do so, and would be prosecuted under § 1324(a)(2) in the Eleventh Circuit. If Eduin presented them with a fake visa, it is unclear whether this would exculpate them. The language of § 1324(a)(2) in its current state does not provide a predictable answer, and depending on the jurisdiction in which this offense took place, the answer may vary greatly.

Now consider the case of Miguel Perez and Juan Carlos Valdez—two people who saw some people stranded in the water, and thought that they were doing a good thing, they were just helping them out.<sup>3</sup> The two were in their boat, off the coast of Florida, when they spotted another boat in the distance.<sup>4</sup> The passengers in the other vessel seemed to be having engine problems, and were signaling for help when they caught Perez’s eye.<sup>5</sup> When Perez and Valdez stopped, the passengers told them that they were from Miami, had been fishing, and were having trouble with their boat.<sup>6</sup> When they agreed to bring the passengers to land, Perez and Valdez asked all of them to see identification, except for one who

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<sup>1</sup> Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, August 25, 2012, available at [www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted](http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted).

<sup>2</sup> *Id.*

<sup>3</sup> *United States v. Perez*, 443 F.3d 772, 776 (11th Cir. 2006).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

began to cry when they spoke with her.<sup>7</sup> As Perez and Valdez docked their boat in Miami-Dade County later that night, local police discovered that the passengers were actually Cuban nationals illegally entering the United States through Perez' boat—unbeknownst to Perez.<sup>8</sup> Both Perez and Valdez were charged with, among other things, violations of 8 U.S.C. §1324 (a)(2)(B)(iii), the Immigration and Naturalization statute that criminalizes bringing aliens into the United States illegally.<sup>9</sup>

While Perez and Valdez did bring undocumented aliens<sup>10</sup> into the United States, they asked all but one of the passengers to see their identification and there was no reason for them to know that any of these people did not actually have authorization to be in the United States.<sup>11</sup> Yet, the United States District Court for the Southern District of Florida found Perez and Valdez guilty of violating § 1324(a)(2), and the Eleventh Circuit later affirmed.<sup>12</sup> As a result of the Eleventh Circuit's interpretation of the statute, Perez's helpful actions cost him his reputation and placed him on trial for a crime that he may have unknowingly committed.<sup>13</sup> The Eleventh Circuit's reading of § 1324(a)(2) does not require knowledge of an alien's lack of authorization to enter the United States, but rather calls for knowledge *or* a mere reckless disregard of the fact.<sup>14</sup>

Yet, not all jurisdictions agree with this determination.<sup>15</sup> In other federal circuits, such as the Ninth Circuit, to be found culpable under § 1324(a)(2), there must be more than simply the acts that constitute the offense.<sup>16</sup> In order to be culpable, one must possess a specific intent to violate the statute.<sup>17</sup> The inconsistent application of the mens rea requirement is problematic, and requires courts to constantly apply their own interpretation of what they think the mens rea requirement means or

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 775.

<sup>9</sup> *Perez*, 443 F.3d at 774.

<sup>10</sup> For a discussion regarding the use of the terminology “undocumented aliens” as opposed to “illegal aliens” or “illegal immigrants,” and the connotations and sentiments that accompany each term see generally Roque Planas, *Jose Antonio Vargas Restarts 'Illegal' v. 'Undocumented' Debates, Highlighting Role of Latino Media*, HUFFINGTON POST (Sept. 27, 2012) [http://www.huffingtonpost.com/2012/09/27/jose-antonio-vargas-illegal-undocumented\\_n\\_1918631.html](http://www.huffingtonpost.com/2012/09/27/jose-antonio-vargas-illegal-undocumented_n_1918631.html); See also Ilona Bray, NOLO BLOG, (Sept. 27, 2012) <http://blog.nolo.com/immigration/2012/09/25/should-the-media-use-the-term-illegal-alien/>.

<sup>11</sup> *Perez*, 443 F.3d at 774.

<sup>12</sup> *Id.* at 782.

<sup>13</sup> *Id.* at 779.

<sup>14</sup> See *United States v. Dominguez*, 661 F.3d 1051, 1070 (11th Cir. 2011).

<sup>15</sup> *Id.*

<sup>16</sup> *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir. 1999).

<sup>17</sup> *Id.*

should mean.<sup>18</sup> Resolving the conflicting applications of the mens rea standard is necessary to appropriately punish the types of behavior that Congress intended, without harshly punishing innocent actors.<sup>19</sup> The Supreme Court should address this issue and clarify what the applicable mens rea standard is. On its face, the statute does not require a specific mental intent or willful violation.<sup>20</sup> Another way to clarify the current confusion is to revise the statute, and use different language to make it clear to reviewing courts that a person's actions must rise, at minimum, to reckless disregard in order for them to be appropriately punished under the statute. Possible revisions to the statute may include looking at a different standard to determine culpability, or adopting a points system that mimics the aggravating and mitigating factors of the Model Penal Code.

This comment examines the language of 8 U.S.C § 1324(a)(2), address the current disagreement regarding the applicable mens rea standard among the circuits that have addressed this issue, and propose possible revisions to the statute that can help to resolve the issue. Part II looks to the language and history of the statute as well as the current split among the different federal circuits. Part III analyzes public policy concerns involved in the consideration of § 1324(a)(2) and immigration policy on a whole. Finally, Part IV contains proposed solutions to the statutory issue.

## II. THE CURRENT LANGUAGE AND APPLICATION OF § 1324(A)(2)

### *a. The Impact of the “Mariel Boatlift” and the Transition Toward the Current Statute*

The Immigration and Nationality Act (“INA”) was created in 1952.<sup>21</sup> Prior to 1952, immigration law had never been collected and codified into a single body of law.<sup>22</sup> The INA is included in the United States Code and has undergone many revisions since.<sup>23</sup> One significant revision of the INA took place in 1986, when Congress substantially rewrote § 1324 to expand the scope of activities punishable under the

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<sup>18</sup> Brett Sabbag, Case Comment, *Transnational Criminal Law—Eleventh Circuit Does Not Require Proof of Criminal Intent for Alien Smuggling Offenses—United States v. Dominguez*, 661 F.3d 1051 (11th Cir. 2011), 35 SUFFOLK TRANSNAT'L L. REV. 493, 502 (2012).

<sup>19</sup> See *id.* at 498.

<sup>20</sup> *Id.*

<sup>21</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/laws/immigration-and-nationality-act> (last visited March 5, 2014).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

statute.<sup>24</sup> The revisions were a part of the Immigration Reform and Control Act of 1986 (“IRCA”), which was one piece of a significant reform of immigration law and policy.<sup>25</sup>

IRCA was enacted partially in response to what is historically known as the “Mariel Boatlift,” and was an attempt to exercise control over persistent unauthorized entry by foreign aliens and “close the back door on illegal immigration so that the front door on legal immigration remains open.”<sup>26</sup> Toward the end of the 1970s and early 1980s, the United States embraced an “open arms” policy towards Cuban refugees who had been experiencing economic hardships and political turmoil in Cuba.<sup>27</sup> As a result of this open policy, approximately 125,000 Cuban aliens fled to the United States over the course of roughly six months during 1980.<sup>28</sup> The Immigration and Naturalization Service was not prepared to handle such a large number of arriving aliens.<sup>29</sup> Processing, overseeing, and managing an excessively large number of Cuban aliens, as well as all of the other applicants seeking entry and status, proved to be a very significant burden and caused the Service to suffer because of it.<sup>30</sup> Congress then enacted § 1324(a)(2) to further criminalize bringing undocumented persons into the United States.<sup>31</sup>

*b. The Previous Version of 8 U.S.C. § 1324(a) Created a Gap in Immigration Law*

With the addition to § 1324(a), Congress intended to expand the scope of the activities that are punishable.<sup>32</sup> At that time, many members of Congress found judicial opinions concerning the prosecution of persons assisting the unlawful entry of Cuban aliens during the Mariel Boatlift to be troubling.<sup>33</sup> Generally, these opinions found that the immigration statutes as they existed did not penalize those actions that are “clearly prejudicial to the interests of the United States.”<sup>34</sup> The case

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<sup>24</sup> H.R. REP. NO. 99-682, at 65 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5669.

<sup>25</sup> H.R. REP. NO. 99-682, at 45, *supra* note 22, at 5649.

<sup>26</sup> *Id.*

<sup>27</sup> *United States v. Dominguez*, 661 F.3d at 1079 (quoting *Nation: Open Heart, Open Arms*, TIME, May 19, 1980 at 14).

<sup>28</sup> UNITED STATES COAST GUARD, Alien Migrant Interdiction, <http://www.uscg.mil/hq/cg5/cg531/AMIO/mariel.asp> (last visited 05/17/14).

<sup>29</sup> H.R. REP. NO. 99-682, at 65, *supra* note 22, at 5669.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 5670.

<sup>32</sup> *Id.* at 5669.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

of *United States v. Zayas-Morales*<sup>35</sup> is one example that Congress cited that highlights the troubling outcomes that the statute produced.<sup>36</sup>

In *Zayas-Morales*, the Eleventh Circuit considered the culpability of captains and owners of the vessels used to transport Cuban nationals to the United States during the Mariel Boatlift, also historically known as the “Freedom Flotilla.”<sup>37</sup> The pertinent immigration statute as it existed at the time was 8 U.S.C. § 1324 (a)(1).<sup>38</sup> In analyzing whether the defendants possessed the requisite criminal intent to violate the statute, the Eleventh Circuit concluded that even though subsection (a)(1) did not include a specific criminal intent, subsections (2), (3), and (4) did in fact include knowledge requirements that should be imputed to subsection (1). Further, relevant case law has held that state of mind is an essential element of proving the statute.<sup>39</sup> Ultimately, the circuit court found that the actions of the defendants were not punishable under § 1324(a) because, while the defendants did bring undocumented aliens into the United States, they did so based upon the aliens’ representation that they

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<sup>35</sup> *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982).

<sup>36</sup> H.R. REP. No. 99-682, 66, *supra* note 22, at 5670.

<sup>37</sup> *Zayas-Morales*, 685 F.2d at 1273–74.

<sup>38</sup> The previous version of 8 U.S.C. § 1324 (a) provided:

Any person who, including the owner, operator, pilot, master, commanding officer, agent or Consignee of any means of transportation who –

(1) Brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) Knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his entry into the United States occurred less than three years prior thereto, transports, or moves or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) Willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation or;

(4) Willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of –

Any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs . . . .

*Id.* at 1274 (quoting 8 U.S.C. § 1324 (a) (1976)).

<sup>39</sup> *Id.* at 1277.

would seek legal status in the country; in fact, each Cuban alien was brought directly to immigration officials upon entry.<sup>40</sup> The Eleventh Circuit found that a criminal mind was such an essential element to a violation of § 1324(a), that without the intent to violate the statute, it was impossible to do so.<sup>41</sup>

A majority in Congress found the results of *Zayas-Morales* troubling because it presented a gap in immigration law, where committing an illegal act that impacted the interests of the United States went unpunished and left open the possibility that undocumented immigrants could flood the country via its ports of entry with minimal consequences to those who assisted them.<sup>42</sup> Thus, Congress amended 8 U.S.C. § 1324 (a)(2), which in its current form provides:

Any person who, *knowing or in reckless disregard* of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien, for each alien in respect to whom a violation of this paragraph occurs—

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

B) in the case of—

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> H.R. REP. 99-682, *supra* note 22, at 5670.

10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.<sup>43</sup>

By substantially rewriting the existing statute and adding subsection (a)(2), Congress tried to deter the transportation of undocumented aliens into the United States and significantly reduce the amount of smuggling offenses committed each year.<sup>44</sup> Notably, subsection (a)(2) applies to those who act in “knowing or reckless disregard” of an alien’s prior authorization.

The Supreme Court has defined “knowingly” as meaning that the offender knew the facts constituting their offense, although the court does not always require that the offender know that the act itself is illegal.<sup>45</sup> Unless the language of a statute indicates otherwise, the term “knowingly” simply requires proof that the defendant knew of the facts that constitute the offense.<sup>46</sup> “Reckless disregard,” the new language of § 1324(a), has been defined as a conscious awareness but deliberate indifference to facts and circumstances that, if properly considered, indicate a probability that the alien did not have authorization to enter the United States.<sup>47</sup> If Congress intended to dispense with a mens rea element of the statute, and simply make § 1324(a)(2) a strict liability offense, then there would necessarily have to be an indication of such an intent.<sup>48</sup> The language of the statute indicates that culpable actions can be done “knowingly” or in “reckless disregard,”<sup>49</sup> meaning actions done without a specific, criminal intent to violate the statute may still violate it nonetheless.

*c. Conflicting Interpretations of the New § 1324(a)(2)*

Most of the current case law concerning the mental intent necessary to violate subsection (a)(2) comes from the Ninth and Eleventh Circuits.

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<sup>43</sup> 8 U.S.C. § 2314(a)(2) (2012) (emphasis added).

<sup>44</sup> H.R. REP. 99-682, *supra* note 22, at 5670.

<sup>45</sup> *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology For Interpretation*, 52 VAND. L. REV. 521, 523–24 (1999) (“[A]lthough the Court has consistently defined ‘knowingly’ to require that the defendant actually knew he committed the acts that made his conduct criminal . . . when the Court hears a case involving a statute that criminalizes morally suspect behavior, it defines ‘knowingly’ to require only that the defendant knew he acted, regardless of whether the defendant knew those actions were illegal.”; *see also* *Staples v. United States*, 511 U.S. 600, 623 (1994) (Ginsburg, J., concurring).

<sup>46</sup> *Bryan v. United States*, 524 U.S. 184, 193 (1998).

<sup>47</sup> *United States v. Perez*, 443 F.3d 772, 781 (11th Cir. 2006).

<sup>48</sup> *Staples*, 511 U.S. at 605.

<sup>49</sup> 8 U.S.C. § 1324 (a)(2) (2012).

Their decisions have created a circuit split concerning the applicable mens rea that the statute requires. On its face, the plain language of the statute does not require a willful violation of the law to establish a punishable offense; rather, it simply calls for a violation done “knowingly” or with “reckless disregard.”<sup>50</sup> However, the application of the statute has been inconsistent at best arbitrary at worst.

*d. The Ninth Circuit’s Approach*

In 1999, the Ninth Circuit was faced with the question of whether or not § 1324 (a)(2) required willful conduct, an issue that had not previously been addressed by the courts.<sup>51</sup> In *United States v. Barajas-Montiel*, the Ninth Circuit considered the mental intent required to convict the defendant of bringing undocumented aliens into the United States for financial gain in violation of the felony provision of 8 U.S.C. § 1324 (a)(2)(B).<sup>52</sup> The defendant had been involved in an operation in which she helped facilitate the unauthorized entry of over twenty aliens, and had received several thousands of dollars in payment for her services.<sup>53</sup> She was convicted of, among other charges, six counts of violation of § 1324 (a)(2)(B)(ii).<sup>54</sup>

The Ninth Circuit acknowledged that no circuit court had previously addressed the issue of the mens rea required under § 1324 (a)(2).<sup>55</sup> Because the mens rea requirement for the particular subsection that the defendant was convicted under had not previously been considered by a court, the defendant argued that the court should apply the same mens rea standard that the Ninth Circuit applied in *United*

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<sup>50</sup> See Sabbag, *supra* note 16, at 498.

<sup>51</sup> *United States v. Barajas-Montiel*, 185 F.3d 947, 951 (9th Cir. 1999).

<sup>52</sup> *Id.*

<sup>53</sup> See *Id.* at 949–51. On multiple occasions, police surveillance observed Barajas-Montiel with her brother Everardo Barajas (“Everardo”), driving two separate vehicles in tandem. *Id.* at 949. On each occasion, Barajas-Montiel followed her brother’s vehicle, while driving a car with its rear suspension lifted, to a remote location. *Id.* When Barajas-Montiel’s vehicle reappeared, each time the rear suspension no longer appeared to be lifted. *Id.* On the first occasion, police surveillance discovered Barajas-Montiel and Everardo arrive at Barajas-Montiel’s residence and exit their vehicles. *Id.* Approximately eight to ten Hispanic men also exited the vehicles, none of whom had been visible prior to that moment. *Id.* On another occasion, Barajas-Montiel, her boyfriend Raul Esquivel-Castillo (“Raul”), and Everardo were spotted by police driving three separate vehicles along the same route that Barajas-Montiel and Everardo had taken on the first occasion. *Id.* This time, police followed the three vehicles, and arrived at a residence where they apprehended twenty undocumented aliens. *Id.* at 950. A search of Barajas-Montiel’s residence revealed over \$8000 and numerous records bearing Barajas-Montiel’s name. *Id.*

<sup>54</sup> *Id.* at 950.

<sup>55</sup> *Id.* at 951.

*States v Nguyen*,<sup>56</sup> in which the subsection in question was section 1324(a)(1)(A).<sup>57</sup> In *Nguyen*, the court considered whether the defendant violated § 1324 (a)(1)(A) by bringing aliens into the United States at a location other than a designated port of entry.<sup>58</sup> Nguyen was a mechanic on a vessel that was used to bring more than one hundred unauthorized aliens into the United States. While the defendant had been suspicious of the legal status of some of the people onboard, he did not interfere with the actions of those who were in charge of the smuggling scheme.<sup>59</sup> In that case, the Ninth Circuit determined that, even though Congress substantially rewrote § 1324 in 1986 to expand the scope of proscribed activity under the statute, based on widely accepted common law notions of statutory interpretation it was highly unlikely that Congress intended IRCA to dispense with a mens rea requirement.<sup>60</sup> As such, the court held that for a conviction under subsection (a)(1), there must be proof of criminal intent.<sup>61</sup>

In *Barajas-Montiel*, the Ninth Circuit agreed with the reasoning that Congress was unlikely to have intended to dispense with a mental intent element in the revised language of subsection (a)(2). It determined that looking to the prior treatment of another subsection of the same immigration statute was the best way to infer the appropriate mens rea standard.<sup>62</sup> In particular, the court noted that the statute bears significant overlap between crimes punished under (a)(1) and (a)(2) as well as significant punishments under both.<sup>63</sup> The court refused to dispense with mental intent as a critical element of the felony provision of (a)(2) because of the potential for lengthy and serious penalties for potentially innocent persons who technically violate the statute.<sup>64</sup> Accordingly, the Ninth Circuit held that a specific intent to violate United States immigration laws is required with respect to § 1324 (a)(2)(B).<sup>65</sup>

Since coming to this determination, the Ninth Circuit has consistently held that a conviction under § 1324(a)(2) requires a showing of specific intent, even though this determination seems to clearly fly in the face of the specifically enumerated mens rea requirement in the language of the statute. For example, in the case of *United States v.*

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<sup>56</sup> *United States v. Nguyen*, 73 F.3d 887 (9th Cir. 1995).

<sup>57</sup> *Barajas-Montiel*, 185 F.3d at 951.

<sup>58</sup> *Nguyen*, 73 F.3d at 889.

<sup>59</sup> *Id.* at 899–90.

<sup>60</sup> *Id.* at 893.

<sup>61</sup> *Id.*

<sup>62</sup> *Barajas-Montiel*, 185 F.3d at 951–52.

<sup>63</sup> *Id.* at 953.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

*Dixon*,<sup>66</sup> Terrill Dixon was convicted for bringing an undocumented alien into the United States<sup>67</sup> under 8 U.S.C. §§ 1324(a)(2)(B)(ii)<sup>68</sup> and (iii).<sup>69</sup> Dixon contested the jury instructions used in his case, claiming that they were not sufficient to convey to the jury that his guilt under subsection (a)(2)(B)(ii) must be proved beyond a reasonable doubt.<sup>70</sup> On appeal, the Ninth Circuit determined that the jury instructions used in Dixon's case were in fact sufficient because they clearly specified that "a defendant *must be shown to have acted with criminal intent* to be guilty" of the charge,<sup>71</sup> thereby emphasizing the essential nature of the mens rea element for a conviction under the statute.

Thus, the Ninth Circuit looks for clear evidence that is demonstrative of a specific intent to violate the statute. In the case of *United States v. Singh*,<sup>72</sup> Singh was convicted of several crimes connected to smuggling violations including an offense under 8 U.S.C. § 1324(a)(2)(B)(ii).<sup>73</sup> Kavel Multani arranged the smuggling scheme, and the first step was for Apla Patel and another one of the aliens involved in the scheme to walk across the U.S./Canadian border from British Columbia to Seattle.<sup>74</sup> Singh then met Patel at the Sea-Tac Inn near the Seattle-Tacoma International Airport.<sup>75</sup> Singh used his taxi to pick her up, and the following day Singh used a credit card to purchase two tickets for Patel and himself to travel to New York.<sup>76</sup> Upon arrival in New York, they met Patel's husband and Singh received his payment.<sup>77</sup> In considering whether Singh possessed the requisite specific intent necessary to establish a violation of § 1324(a)(2)(B)(ii), the court

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<sup>66</sup> 201 F.3d 1223 (9th Cir. 2000).

<sup>67</sup> *Id.* Dixon was stopped by Customs Inspector Sherman Lee for inspection upon entry into the United States from Mexico. When Inspector Lee requested that Dixon provide him with the keys so that he could further inspect the vehicle, Dixon did not comply and drove off. Officers later found Dixon's car apparently unoccupied; however, upon inspection, the officers discovered two Mexican aliens in the car's hatchback. *Id.*

<sup>68</sup> Section 1324 (a)(2)(B)(ii) provides criminal penalties for a person who brings an alien who has not received prior official authorization into the United States "for the purpose of commercial advantage or private financial gain." 8 U.S.C. § 1324(a)(2)(B)(ii) (2012).

<sup>69</sup> Section 1324(a)(2)(B)(iii) provides criminal penalties for a person who brings an alien who has not received prior official authorization into the United States and "the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry." 8 U.S.C. § 1324(a)(2)(B)(iii) (2012).

<sup>70</sup> *Id.* at 1231–32.

<sup>71</sup> *Id.* at 1231 (emphasis added).

<sup>72</sup> *United States v. Singh*, 532 F.3d 1053 (9th Cir. 2008).

<sup>73</sup> *Id.* at 1056.

<sup>74</sup> *Id.* at 1055.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1055–56.

<sup>77</sup> *Id.* 1056.

noted that merely showing that a defendant “was associated with someone who was involved with a smuggling operation in some unknown way or that [they] were associated with the transportation of the aliens within the United States after the fact of smuggling was insufficient to show that she had the specific intent” to commit the offense.<sup>78</sup> The court placed emphasis on the fact that though Singh’s “act of transporting an alien commenced only after the ‘brings to’ offense was completed,” Singh had agreed ahead of time to assist in transporting an alien in the United States thereby indicating that the offense was something “he wished to bring about.”<sup>79</sup> On this basis, the court found that Singh did possess the specific intent under the facts shown, and was as punishable as the principal in the smuggling scheme.<sup>80</sup>

In *United States v. Yoshida*,<sup>81</sup> the Ninth Circuit considered what level of involvement might serve as sufficient evidence of a mental intent to violate the statute.<sup>82</sup> Yuami Yoshida was convicted under 8 U.S.C. §§ 1324 (a)(1)(A)(iv) and (a)(2)(B)(ii) for assisting three Chinese citizens’ entry into the United States.<sup>83</sup> The aliens were on a three-part journey to the United States, with their flight leaving from Narita Airport in Japan.<sup>84</sup> In Narita Airport, an escort that met the aliens pointed to Yoshida and told them that Yoshida would be their escort for the next leg of the journey.<sup>85</sup> The aliens followed Yoshida towards their flight, and they were the last people to board.<sup>86</sup> Upon arrival, authorities found Yoshida’s journey and frequent traveling as indicated by her passport to be suspicious.<sup>87</sup> Yoshida never spoke with the aliens in question<sup>88</sup>; however, she was believed to have brought them into the United States for financial gain in violation of § 1324 (a)(2)(B)(ii).<sup>89</sup> In her defense, Yoshida argued that airline employees allowed the aliens to board a plane and travel to the United States, that she did not have knowledge that the aliens lacked authorization to enter the country and therefore, she conversely presumed that they did.<sup>90</sup> However, the court concluded that “Delta Airlines employees do not have the authority to admit aliens into

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<sup>78</sup> *Singh*, 532 F.3d at 1058.

<sup>79</sup> *Id.* at 1058–59.

<sup>80</sup> *Id.* at 1057–58.

<sup>81</sup> *United States v. Yoshida*, 303 F.3d 1145 (9th Cir. 2002).

<sup>82</sup> *Id.* at 1152.

<sup>83</sup> *Id.* at 1147.

<sup>84</sup> *Id.* at 1148.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Yoshida*, 303 F.3d at 1149.

<sup>88</sup> *Id.* at 1151.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1152.

the United States, and the fact that Delta allowed the aliens onto the flight does not negate the evidence that Yoshida knew or recklessly disregarded the fact that the aliens did not have authorization to enter the United States.”<sup>91</sup> The mere fact that the aliens were able to board the plane was not sufficient to give Yoshida reasonable cause to believe that they were authorized to enter the United States, and a jury could reasonably infer criminal intent from Yoshida’s actions.<sup>92</sup>

*e. The Eleventh Circuit’s Different Approach to the Mens Rea Requirement, Creating a Circuit Split*

Recently, the Eleventh Circuit also considered the question of the mental intent necessary to violate 8 U.S.C. 1324 § (a)(2), and in making its determination, created a circuit split.<sup>93</sup> In the case of *United States v. Dominguez*, Gustavo Dominguez was convicted under the felony provision of U.S.C. § 1324 (a)(2).<sup>94</sup> In November of 2003, Dominguez, a sports agent working for Total Sports International (“TSI”), made an agreement with Ysbel Medina-Santos (“Medina”) to smuggle two Cuban nationals into the United States in exchange for 5% of any Major League Baseball contract that the players would potentially sign.<sup>95</sup> The attempt to smuggle the players was successful, as was the Major League recruiting.<sup>96</sup> Then, in July of 2004 Dominguez contacted Medina and asked him to smuggle five Cuban baseball players into the United States.<sup>97</sup> After two smuggle attempts, the players were successfully brought into the country through Miami, and traveled to Los Angeles where they were to meet with Dominguez.<sup>98</sup> Dominguez then had the players meet with an experienced immigration attorney who had been conducting work for TSI for a number of years, and began to process the players through immigration.<sup>99</sup> During this time, TSI placed the players in an apartment complex, arranged for the players to attend try-outs with Major League Baseball scouts, and even participated in the filming of a documentary about Cuban baseball players in the United States.<sup>100</sup>

Dominguez was convicted of—among other offenses—conspiring to, aiding and abetting the attempt to, and aiding and abetting the

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1153.

<sup>93</sup> *United States v. Dominguez*, 661 F.3d 1051, 1076 (11th Cir. 2011).

<sup>94</sup> *Id.* at 1056.

<sup>95</sup> *Id.* at 1056–57.

<sup>96</sup> *Id.* at 1057.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1057–58.

<sup>99</sup> *Dominguez*, 661 F.3d at 1058.

<sup>100</sup> *Id.* at 1058–59.

successful bringing of aliens to the United States for the purpose of commercial advantage and private financial gain in violation of § 1324(a)(2)(B)(ii).<sup>101</sup> Interestingly, Dominguez argued that he believed that the Cuban Adjustment Act<sup>102</sup> and the Wet-Foot/ Dry-Foot policy was a basis for the players to have legal authorization to enter the United States.<sup>103</sup> Because of his belief that Cuban nationals were granted special treatment pursuant to these immigration laws and policies, Dominguez felt that he lacked the requisite mental intent necessary for a conviction under § 1324 (a)(2).<sup>104</sup>

However, the court rejected Dominguez' argument,<sup>105</sup> and determined that Dominguez's knowledge of the Cuban Adjustment Act's policies and the beliefs that came from them were not enough to exculpate him from liability under § 1324(a)(2).<sup>106</sup> First, the Eleventh Circuit sought to determine the applicable mens rea standard for a conviction. Though the court previously determined that mental intent was required for offenses under section 1324(a) in *Zayas-Morales*,<sup>107</sup> the statute was substantially rewritten in 1986 and therefore, the court felt compelled to revisit the same question under the new language of the statute.<sup>108</sup> The court considered the prior determination in *Zayas-Morales*, the new language of the statute, and the determination made by the Ninth Circuit, the only other circuit to address this question.<sup>109</sup> Specifically, although the court considered the Ninth Circuit's conclusion in *Barajas-Montiel*—which held that specific criminal intent

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<sup>101</sup> *Id.* at 1059.

<sup>102</sup> *Id.* at 1059–60. *See generally* 8 U.S.C. § 1225 (1966) for the adjustment of a Cuban native's status from alien to permanent resident if they have resided in the United States for two or more years).

<sup>103</sup> *Dominguez*, 661 F.3d at 1067 (“United States immigration law and policy afford special treatment to Cuban nationals who come to the United States. Under the Cuban Adjustment Act, a native or citizen of Cuba, who has been inspected and admitted or paroled into the United States and has been physically present in the United States for at least two years, can apply for permanent residency in the United States. By taking advantage of the CAA, Cuban nationals, who have no documents authorizing their presence in the United States, can remain in the United States without demonstrating that they suffered persecution or proving refugee status. The benefits of the CAA, however, can only apply to those Cubans who reach United States soil (those with ‘dry feet’) while Cubans who are interdicted at sea (those with ‘wet feet’) are repatriated to Cuba. This rule is commonly referred to as the ‘Wet-Foot/Dry-Foot’ Policy.”).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1070.

<sup>107</sup> *Id.* at 1069.

<sup>108</sup> *Id.* at 1070.

<sup>109</sup> *Dominguez*, 661 F.3d at 1070.

is a necessary element—it found the Ninth Circuit’s reasoning unconvincing.<sup>110</sup>

The Eleventh Circuit looked to Congress’s intent to expand the scope of the activities considered criminal under the statute, as well as the fact that the language of the statute itself indicates that conduct done “knowingly” or in “reckless disregard” would satisfy the mens rea requirement.<sup>111</sup> This led the court to believe that Congress never meant to impose a specific intent requirement.<sup>112</sup> Even before *Dominguez*, the Eleventh Circuit had supported the notion that each word in a statute contributes to its meaning as a whole<sup>113</sup> and thus it is consistent with the Eleventh Circuit’s notions of statutory interpretation to draw upon the plain meaning of each word in the statute. Further, the court noted that the Cuban Adjustment Act and Wet-Foot/Dry-Foot policies<sup>114</sup> did not officially authorize all Cuban nationals to enter the United States at their will; but rather they provided a means to take official action prior to entry, which § 1324(a)(2) makes clear is not an excuse for violation of the statute.<sup>115</sup> For these reasons, *Dominguez*’s argument failed and the mens rea element, knowing or in reckless disregard, was satisfied for his offense.<sup>116</sup> The Eleventh Circuit’s position in *Dominguez*, disagreeing with the Ninth Circuit’s position, resulted in a circuit split.

Like the Ninth Circuit in *Yoshida*, the Eleventh Circuit has similarly determined that evidence of mens rea is determined on the basis of what a jury reasonably believes the defendant knew and intended.<sup>117</sup> In *United States v. Kendrick*, the Eleventh Circuit considered the district court’s dismissal of Kendrick’s motion for a judgment of acquittal of the charges brought against him under § 1324 (a)(2)(B)(ii).<sup>118</sup> Kendrick was charged with, among other things, bringing an alien who did not have prior official authorization to enter into the United States for personal financial gain in conjunction with marijuana trafficking.<sup>119</sup> When the other charges against him were dropped, Kendrick moved for a judgment of acquittal for the remaining charge under § 1324(a)(2)(B)(ii).<sup>120</sup> The court denied Kendrick’s motion and the jury ultimately found him guilty

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *United States v. Lopez*, 590 F.3d 1238, 1258 (2009) (Bartlett, J., dissenting) (quoting *United States v. Canals-Jiminez*, 943 F.2d 1284, 1287 (11th Cir. 1991)).

<sup>114</sup> *See Dominguez*, 661 F.3d at 1067.

<sup>115</sup> *Lopez*, 590 F.3d at 1258. (Bartlett, J., dissenting).

<sup>116</sup> *Dominguez*, 661 F.3d at 1070.

<sup>117</sup> *United States v. Kendrick*, 682 F.3d 974, 985 (11th Cir. 2012).

<sup>118</sup> *Id.* at 978.

<sup>119</sup> *Id.* at 978–79.

<sup>120</sup> *Id.*

of the smuggling charge.<sup>121</sup> On appeal, the Eleventh Circuit considered whether there was sufficient evidence for the jury to find that Kendrick possessed the requisite mental intent to actually violate the statute.<sup>122</sup> Importantly, the court held that the standard was met if there was sufficient evidence for a jury to reasonably conclude that Kendrick knew or was in reckless disregard of the fact that the alien he was transporting did not have authorization.<sup>123</sup> The court found that, based upon the record, there was sufficient evidence for the jury to draw such an inference.<sup>124</sup>

*f. The Fifth and Second Circuits Examine Whether “Knowing” Means Knowing That the Alien Had Valid Prior Authorization*

One issue in determining whether knowledge regarding a lack of prior authorization is an essential element of the statute is determining whether that knowledge simply concerns authorization or if its scope extends to knowledge regarding the *authenticity* of the authorization. In *United States v. Gasanova*,<sup>125</sup> the Fifth Circuit considered whether a person charged with a violation of § 1324(a)(2) could demonstrate that the alien brought into the country was authorized to enter when the authorization was obtained fraudulently.<sup>126</sup> The court took issue with the lack of clarity regarding the term “official authorization” in § 1324(a)(2), and questioned whether it was a violation of the statute to bring an alien in to the country if the defendant knows that the alien holds a valid visa obtained through fraud or artifice.<sup>127</sup> It remained unclear whether an official-looking document, even if fraudulent, is sufficient to prove that a defendant was not in violation of the statute, as long as they believed that the alien they were bringing in to the United States did in fact have prior official authorization.<sup>128</sup>

Given the dearth of guidance in congressional materials or case law to inform its decision, the Fifth Circuit had to look to the purpose of IRCA, which led to the revision of the statute, in order to try to understand the meaning of “official authorization.”<sup>129</sup> The court found that assisting an alien with a visa that is fraudulent but in fact appears to be authentic goes against the very intentions of IRCA, and constitutes a

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 985.

<sup>123</sup> *Kendrick*, 682 F.3d at 985.

<sup>124</sup> *Id.*

<sup>125</sup> *United States v. Gasanova*, 332 F.3d 297 (5th Cir. 2003).

<sup>126</sup> *Id.* at 299-300.

<sup>127</sup> *Id.* at 299.

<sup>128</sup> *Id.* at 300.

<sup>129</sup> *Id.* at 299.

violation of § 1324(a)(2); this is because the assisting person may have, or should have, known that the documents were fraudulent and therefore, the alien had no prior authorization to enter the United States.<sup>130</sup>

The Second Circuit considered a similar question in the case of *United States v. Calhelha*.<sup>131</sup> In *Calhelha*, the defendants argued that they did not violate U.S. immigration law because while they did bring an unauthorized alien into the country, the alien had a government-issued visa, although it was obtained through fraudulent means.<sup>132</sup> Citing the Fifth Circuit's decision in *Gasanova*, the Second Circuit found that this interpretation flies in the face of the "fundamental purpose" of the statute, and would enable violations of immigration law.<sup>133</sup> Though the language of the case law does not specifically enumerate the standard applied, the Fifth and Second Circuit's approach embraces the "reckless disregard" element of the statute, and finds culpability even where there may not clearly be a specific intent to violate the statute by bringing an alien into the country literally without any authorization.<sup>134</sup>

*g. Mens Rea is a Critical Component of Criminal Law and Should Be a Necessary Part of Immigration Statutes with Criminal Punishments*

Immigration violations are generally considered to be violations of civil law, not criminal

law.<sup>135</sup> However, the law provides criminal punishments for certain violations.<sup>136</sup> Taking in to account that § 1324(a)(2) provides criminal punishment for offenses that fall within its ambit, the varying ways in which courts interpret and apply the mens rea requirement have created significant inconsistencies in the execution of immigration policy and criminal law.

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<sup>130</sup> *Id.*

<sup>131</sup> 456 F. Supp.2d 350 (2d Cir. 2006).

<sup>132</sup> *Id.* at 358.

<sup>133</sup> *Id.*

<sup>134</sup> See *Calhelha*, 456 F. Supp.2d at 358; *Gasanova*, 332 F.3d at 299.

<sup>135</sup> See generally *Immigration Law Enforcement by State and Local Police*, NATIONAL IMMIGRATION FORUM, <http://www.policyarchive.org/handle/10207/bitstreams/11652.pdf> (last accessed May 17, 2014); *Christie clarifies: 'Illegal' Immigrants are in civil violation*, NEW JERSEY (Apr., 8 2008) <http://nj.com/morisstown/index.ssf/morristown/index.html>; Ilona Bray, NOLO BLOG (Sept. 25, 2012) <http://blog.nolo.com/immigration/2012/09/25/should-the-media-use-the-term-illegal-alien/>.

<sup>136</sup> See 8 U.S.C. § 1324(a)(2) (2012); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, PINCITE (2007).

According to the Supreme Court, when criminal statutes contain ambiguities, the ambiguity should be resolved in favor of lenity.<sup>137</sup> Black's Law Dictionary defines lenity as "[t]he quality or condition of being lenient; mercy or clemency."<sup>138</sup> Thus, ambiguities in criminal statutes should be resolved towards a more lenient punishment.<sup>139</sup> The interpretation of a civil immigration statute with criminal penalties for offenses, then, becomes decidedly more complicated when trying to glean the applicable mens rea.

The Supreme Court has also stated that criminal offenses containing no mens rea requirement are generally disfavored.<sup>140</sup> The Ninth Circuit concluded in *Barajas-Montiel* that, because of this, Congress was unlikely to have dispensed with a mens rea requirement when it revised § 1324(a).<sup>141</sup> Conversely, the Eleventh Circuit believes that the mental intent language of "knowing" and "reckless disregard" used in the statute actually constitutes a mens rea requirement, and found this to be sufficient to satisfy the mens rea presumption that is generally attached to statutes that provide for criminal punishment.<sup>142</sup> Further, the Second Circuit has also found that in the context of immigration offenses, the use of "reckless disregard" as a mens rea element is sufficient.<sup>143</sup>

*h. The U.K. Model: A Comparison to the Use of Mens Rea In A Foreign Analog*

The United States has always been an attractive location for migration. For decades,

Congress and the federal government have struggled to implement policies that control immigration and enforce the security of U.S. borders.<sup>144</sup> However, the problem of illegal immigration is hardly exclusive to the United States. As other nations face similar problems of unauthorized entry, foreign laws have also been implemented regarding the control and punishment of illegal immigration. A look at the foreign analogs to 8 U.S.C. § 1324(a)(2) will highlight the efficiencies and limitations of U.S. immigration policy.

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<sup>137</sup> *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955).

<sup>138</sup> Black's Law Dictionary (9th ed. 2009), lenity.

<sup>139</sup> See generally Black's Law Dictionary (9th ed. 2009), rule of lenity.

<sup>140</sup> *Liparota v. United States*, 471 U.S. 419, 426 (1985).

<sup>141</sup> *United States v. Barajas-Montiel*, 185 F.3d 947, 952 (9th Cir. 1999).

<sup>142</sup> See generally *United States v. Dominguez*, 661 F.3d 1051 (11th Cir. 2011).

<sup>143</sup> *United States v. Mussaleen*, 35 F.3d 692, 698 (2d Cir. 1994).

<sup>144</sup> Brianna Lee, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS, (January 24, 2013), <http://www.cfr.org/immigration/us-immigration-debate/p11149>.

Section 25 of the United Kingdom's Immigration Act of 1971 ("Section 25"), assisting unlawful immigration to member states, is the most comparable statute to 8 U.S.C. § 1324 (a)(2).<sup>145</sup> The language punishes an action that facilitates the breach of an immigration law by someone who is not a citizen of the European Union, who knows or has reasonable cause to know that the act would facilitate the breach, and knows or has reasonable cause for believing the individual is not a citizen.<sup>146</sup> Subsection (1)(c) requires that the offender know or have reasonable cause for believing that the individual is not a citizen of the European Union.<sup>147</sup> The language "know or have reasonable cause for believing"<sup>148</sup> appears to be the mens rea element of Section 25, which is a mild contrast to the "knowing or in reckless disregard"<sup>149</sup> language of § 1324(a)(2).<sup>150</sup> The main difference between the mens rea elements of the two statutes comes down to the difference between "reasonable cause to believe" and "reckless disregard." As previously noted, both the Ninth and Eleventh Circuits have determined that the appropriate standard for determining knowledge or reckless disregard is one of reasonableness, as determined by a jury.<sup>151</sup> This is similar to the mental intent element laid out by the United Kingdom. While the United Kingdom standard of "reasonable cause to believe" seems to be a more lenient mental state standard to prove than "reckless disregard," both statutes make room for looking past what actual knowledge a defendant possesses. Both call for an evaluation of what *would have been* reasonable for the defendant to know or believe about the legal status of the alien involved in the offense.

Another significant difference between the illegal entry policies of the United States and the United Kingdom is the exception made for

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<sup>145</sup> See generally Immigration Act, 1971, c.77, § 25 (UK).

<sup>146</sup> § 25 Assisting unlawful immigration to member State

(1) A person commits an offence if he—

a. Does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union,

b. Knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and

c. Knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

Immigration Act, 1971, c.77, § 25, sch. 1 (UK).

<sup>147</sup> Immigration Act, 1971, c.77, § 25 (UK)

<sup>148</sup> *Id.*

<sup>149</sup> 8 U.S.C. § 1324 (a)(2) (2012).

<sup>150</sup> § 25 Immigration Act of 1971, [www.legislation.gov.uk/ukpga/1971/77](http://www.legislation.gov.uk/ukpga/1971/77).

<sup>151</sup> *United States v. Kendrick*, 682 F.3d 974, 985 (11th Cir. 2012); *United States v. Yoshida*, 303 F.3d 1145, 1153 (9th Cir. 2002).

those with innocent and/or humanitarian intentions. In the United Kingdom, the Immigration Act of 1971 includes a separate provision for those who assisted or facilitated entry of an alien into a member state for the purposes of asylum claims.<sup>152</sup> The statute provides that only those who knowingly and for gain facilitate the entry of an asylum-seeker are punishable, excluding those who assist asylum-seekers for no gain.<sup>153</sup> The language of the statute specifically enumerates that organizations that assist asylum seekers and do not charge for their services cannot be penalized under Section 25A.<sup>154</sup> This provision is in stark contrast to the United States illegal entry policy, which criminalizes all persons who facilitate the illegal entry of an alien who do not have prior official authorization, regardless of any subsequent official action taken.<sup>155</sup> Therefore, a violation of U.S. immigration law will occur even if the alien in question is an asylum-seeker or eligible for asylum.<sup>156</sup>

Like § 1324, the United Kingdom's Section 25 includes a list of potentially aggravating factors.<sup>157</sup> Among these are repeat offending, involving strangers instead of family members, a high degree of sophistication, the level of involvement of the offender, the number of immigrants involved, etc.<sup>158</sup> Section 1324(a)(2) provides for increased punishment with a minimum of one year and a maximum of fifteen years of imprisonment for a violation of the statute with the intent that the alien will violate the laws of the United States generally, a violation of the statute done for commercial or private gain, or a violation of the statute after which the alien is not brought to immigration officers immediately upon arrival.<sup>159</sup> The factors listed in Section 25 seem to take into account

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<sup>152</sup> See Section 25A of Immigration Act 1971, which provides:

- (1) Helping asylum-seeker to enter United Kingdom
- a. He knowingly and for gain facilitates the arrival in the United Kingdom of an individual, and
  - b. He knows or has reasonable cause to believe that the individual is an asylum-seeker.

...

(2) Subsection (1) does not apply to anything done by a person acting on behalf of an organization which—

- a. Aims to assist asylum-seekers, and
- b. Does not charge for its services.

Immigration Act, 1971, c.77, § 25, sch. 1, 2 (UK).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> 8 U.S.C. § 1324 (a)(2) (2012).

<sup>156</sup> KIM, YULE; CONG. RESEARCH SERV., RL34501, ALIEN SMUGGLING: RECENT LEGISLATIVE DEVELOPMENTS, May 22, 2008.

<sup>157</sup> Immigration Act, 1971, c.77, § 25 (UK), *supra* note 152.

<sup>158</sup> *Id.*

<sup>159</sup> 8 U.S.C. § 1324(a)(2)(B) provides, in pertinent part, in the case of—

the extent of the offenders' involvement and their positive or negative intentions, while the factors enumerated in § 1324(a)(2) are more general and broad.

### III. MOVING TOWARD A SOLUTION

#### *a. Additional Reasons Why § 1324(a) Should be Revised*

In addition to the circuit split, which represents a lack of clarity and the inconsistent application of the law, there are other issues with § 1324(a) that need to be addressed. For example, in *United States v. Assadi*,<sup>160</sup> the District Court for the District of Columbia noted that interpreting the ordinary meaning of § 1324 (a)(2)(B)'s language was problematic.<sup>161</sup> The court found the words "bringing to" particularly troublesome, and questioned whether accompanying an alien to the American border, yet not crossing with them, constitutes "bringing to" and is thereby a violation of the statute.<sup>162</sup> The court noted that Congress made adjustments to the statute's language several times, highlighting the complex history that has followed the initial enactment.<sup>163</sup> If the mens rea required by the statute is not the only aspect of the statute that has been unclear to reviewing courts, then it is not surprising that judicial application of 8 U.S.C. § 1324(a)(2) has been inconsistent. While the main focus of this comment is to bring much needed attention to the inconsistent application of the statute with regards to the mens rea requirement, revision of the statute would give Congress an opportunity to address the other areas of confusion.

#### *b. The Supreme Court Should Clarify the Mental Intent Requirement of § 1324(a) to Allow for More Equitable and Uniform Application*

The current circuit split is problematic because it engenders the inconsistent application of federal law, and in effect allows potential smugglers to strategically plan their actions in a way that will produce a

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(i) [A]n offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) [A]n offense done for the purpose of commercial advantage or private financial gain, or

(iii) [A]n offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer.

<sup>160</sup> *United States v. Assadi*, 223 F.Supp.2d 208 (D.C. Cir. 2002).

<sup>161</sup> *Id.* at 211.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

favorable outcome for them if prosecuted.<sup>164</sup> In the Ninth Circuit, individuals prosecuted under § 1324(a) may be able to evade punishment by claiming that they did not intend to violate the provision.<sup>165</sup> In *Dominguez*, if the alleged violation of § 1324 (a)(2) had taken place under the jurisdiction of the Ninth Circuit rather than the Eleventh, Dominguez's claim that he believed the aliens he brought into the United States were authorized to be here because of the CAA and the Wet-Foot/Dry-Foot policy could have been viable evidence that he did not intend to violate the statute.<sup>166</sup> Conversely, the Eleventh Circuit's stricter interpretation of the statute, calling for punishment even in the absence of willful behavior, runs the risk of punishing innocent actors.<sup>167</sup> Because of this disagreement among the circuits, the Supreme Court should address this issue in order to allow for consistent application of the statute among the lower courts.

Generally, courts defer to Congress as being in control of the creation and meaning of statutes.<sup>168</sup> In fact, the Supreme Court has consistently held that the "definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."<sup>169</sup> Accordingly, if the Supreme Court tries to resolve the circuit split, the Court would likely first consider the plain language of the statute and then the congressional intent in order to determine the most appropriate mens rea requirement. To determine Congressional intent, the court might look to legislative history such as House Reports, which demonstrate the concerns that prompted the creation of the statute, as well as discussions of the motivations behind it and what the goals of the statute are. House Report Number 99-682 describes illegal immigration concerns, and specifically explains that Congress felt statutory amendments were necessary to control borders, prevent the unlawful employment of aliens and prevent public assistance abuse by aliens.<sup>170</sup> Further, congressional records from

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<sup>164</sup> See Brett Sabbag, Case Comment, *Transnational Criminal Law—Eleventh Circuit Does Not Require Proof of Criminal Intent for Alien Smuggling Offenses*—United States v. Dominguez, 661 F.3d 1051 (11th Cir. 2011), 35 SUFFOLK TRANSNAT'L L. REV. 493, 502 (2012); see also *Dominguez*, 661 F.3d at 1099–1101 (Tjoflat, J., dissenting).

<sup>165</sup> See Sabbag, *supra* n. 16, at 501–502; *Dominguez*, 661 F.3d at 1099–1101.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See *United States v. Pacheco*, 225 F.3d 148, 149 (2000).

<sup>169</sup> *Liparota v. United States*, 471 U.S. 419, 424 (1985).

<sup>170</sup> See generally H.R. REP. No. 99-682, *supra* note 22 (explaining the current concerns regarding illegal immigration and the ways in which the new legislation are important for immigration reform).

the month that § 1324 was amended contain dialogue among senators whose concerns regarding immigration control led to the amendment.<sup>171</sup>

Congress revised and substantially rewrote the language of § 1324(a) in order to expand the activities that are punishable under its scope,<sup>172</sup> and in doing so expanded the acceptable mental intent necessary to satisfy the mens rea element of the offense.<sup>173</sup> Congress did not mean to dispense with a mens rea element altogether, but wrote § 1324(a)(2) to apply to more people than those who knew the aliens they were bringing in lacked prior authorization.<sup>174</sup> The statute lays out the mens rea standard as “knowingly or in reckless disregard.”<sup>175</sup> While there is a mens rea standard already in the language of the statute, a reviewing court is unlikely to try to infer and apply a different standard.<sup>176</sup> If the Supreme Court decides to remedy the circuit split, it is likely that congressional intent along with the plain language of the statute will lead the court to declare that knowledge *or* reckless disregard is sufficient to establish a violation and conviction under United States immigration law.

*c. Statutory Revision May Provide Resolution to the Circuit Split*

If the Supreme Court does not resolve the circuit split, there are a few other possible

remedies that Congress can implement. One approach is to revise the language of the statute to include definitions of the different terms that have proven to be confusing to the different federal courts, mirroring the structure of the United Kingdom statutes in its Immigration Act of 1971. Terms included in statutes may not be intended to be interpreted through the word’s common usage, and such a statute might include definitions for the terms that have been points of confusion for courts. An example of this would be a clear definition of what the word “bring” means in the context of a § 1324(a)(2) smuggling offense.

Another potential revision to § 1324(a)(2) would be to add a list of aggravating and mitigating factors in the sentencing language. This would not change the meaning of the statute, but would make clear that the different levels of mens rea would be punished differently. In amending the statute to include these additional factors, Congress should

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<sup>171</sup> See generally 132 CONG. REC. S16879-01 (Daily Ed. Oct. 17, 1986) (providing various senators’ opinions on immigration concerns and the proposed immigration legislation reform); see also 132 CONG. REC. S16374-04 (Daily Ed. Oct. 15, 1986).

<sup>172</sup> H.R. REP. No. 99-682, 65, *supra* note 22, at 5669.

<sup>173</sup> *United States v. Dominguez*, 661 F.3d 1051, 1070 (11th Cir. 2011).

<sup>174</sup> H.R. REP. No. 99-682, 65, *supra* note 22, at 5669.

<sup>175</sup> 8 U.S.C. § 1324 (a)(2) (2012).

<sup>176</sup> *Dominguez*, 661 F.3d at 1070.

look to models such as the Model Penal Code for an understanding of the types of factors that may properly be considered aggravating or mitigating.<sup>177</sup> In the case of capital punishment for murder, aggravating and mitigating circumstances are taken into consideration for sentencing.<sup>178</sup> Aggravating circumstances include prior convictions for murder, committing another murder at the same time, and the murder having been committed for financial gain.<sup>179</sup> Mitigating circumstances include having no significant criminal record, committing the murder under the influence of extreme mental or emotional disturbance, or the defendant being a youth at the time of the crime.<sup>180</sup>

An approach that draws from the Model Penal Code may be optimal for equitable concerns.<sup>181</sup> Further, an approach that draws from the Model Penal Code's example would allow for increased judicial guidance, predictability, and a reduction in the "disparity in application and the potential abuse of discretion,"<sup>182</sup> issues that the current statute and circuit split are prone to. Furthermore, adopting a more clear system of graded punishment based on increasing levels of mental intent is another nuance from the Model Penal Code<sup>183</sup> that could be used to refine the current statute, providing punishment that differs not only based upon whether the act was done for commercial gain, but also whether it was done knowingly, in reckless disregard, or if the mental state of the actor does not rise to the level of either. The Model Penal Code is structured based on principles of criminal law and punishment, which may cause criticism if § 1324 (a)(2) were revised to adopt a similar structure and principle. While immigration law offenses are of a different severity and nature than capital offenses, the principle of using aggravating and mitigating circumstances to inform sentencing can help provide a punishment that takes into account all relevant circumstances and reflects culpability more accurately. As previously noted, recent revisions of immigration law have leaned toward an increased degree of

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<sup>177</sup> MODEL PENAL CODE § 210.6(3) & (4) (1980) (providing aggravating and mitigating circumstances which will impact determination of culpability and sentencing).

<sup>178</sup> MODEL PENAL CODE § 210.6 (2) (1980).

<sup>179</sup> MODEL PENAL CODE § 210.6 (3) (1980).

<sup>180</sup> MODEL PENAL CODE § 210.6 (4) (1980).

<sup>181</sup> Paul H. Robinson & Markus Dirk Dubber, *An Introduction to the Model Penal Code*, <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>, PAGE (1999) ("Structurally, the Model Penal Code asks three questions: 1) is the actor's conduct a crime? 2) if it is a crime, was it wrongful under these facts? 3) if it was wrongful, is the actor blameworthy? These questions acknowledge that a crime can be done by an actor who is not blameworthy.").

<sup>182</sup> *Id.* at 334.

<sup>183</sup> *Id.* at 334–35.

criminalization,<sup>184</sup> and a Model Penal Code-inspired approach may not only be informative but would be appropriate in addressing the criminal elements of immigration smuggling offenses.

*d. A New Approach: the Point System*

Another approach to immigration crimes and penalties that has not yet been commonly used in the past, if ever, is a point-system to balance the various factors that can inform the culpability and punishable nature of an immigration offense. A point system reflects aggravating and mitigating factors through a point value, and the aggregate of the points accumulated determine the level of punishment that is applied. A point system would take in to account that bringing an alien into the United States without authorization is against the letter of the law, but also reflect that in some circumstances entry is facilitated for reasons that may not necessarily violate the spirit of the law by assigning to each factor a positive or negative amount of points.

The language of the proposed statute would be similar to that of § 1324 (a)(2). The point-based statute would provide that:

“A person is guilty of assisting illegal entry into the United States if they bring a person who has not had prior authorization into the country to any place within the United States.”

A. Point Values<sup>185</sup>

—(0) points assigned for actually committing the act;

—(1) point for committing the act in reckless disregard<sup>186</sup> of the fact that the alien did not have prior authorization to enter the United States;

—(2) points for committing the act knowing<sup>187</sup> that the alien did not have prior authorization to enter the United States;

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<sup>184</sup> Legomsky, *supra* note 136, at 471–72.

<sup>185</sup> The proposed use of a point system, in the context of immigration policy and enforcement, is an original idea, guided by the relevant immigration case law and policy concerns. Point systems have been used in other contexts, for example, in Federal Sentencing Guidelines.

<sup>186</sup> See *United States v Perez*, 443 F.3d 772, 781 (11th Cir. 2006). The point system is implemented using the same interpretation of “reckless disregard” as courts have previously used regarding § 1324 (a)(2).

—(2) points if the act was done for commercial gain<sup>188</sup>;

—(2) points if the act was done with the intention to pursue commercial +gain once entry was achieved<sup>189</sup>;

—up to (3) points if violence<sup>190</sup> was involved in the commission of the act;

—(2) points if illegal substances were involved;

—and an additional (1) point is assigned if this is in furtherance of a larger or more substantial operation;

—(-.50) points if the person is a child<sup>191</sup>;

—(-.50) points if the person qualifies for asylum status or intends to apply;

—(-.25) points if the person is presented to immigration officials directly;

—(-.25) points assigned if the person is a family member.

B. Based on the points accrued: the penalties can be a fine and/or probation (up to (1) point), a fine and/or 6 months imprisonment

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<sup>187</sup> See *Bryan v. United States*, 524 U.S. 184, 193 (1998). The point system is implemented using the same interpretation of “knowing/knowingly” that the Supreme Court has previously defined.

<sup>188</sup> See 8 U.S.C. § 1324(a)(2)(B)(ii) (2012) (including an increased punishment for a violation perpetrated for commercial advantage or private financial gain).

<sup>189</sup> *Id.*

<sup>190</sup> This was selected as an aggravating factor because there are numerous cases in which bringing aliens into the country illegally results in violence and even death. See generally Jacqueline Armendariz, *Agencies tell of immigrant deaths, rescues*, VALLEY MORNING STAR (December 25, 2012, 6:30 PM), [http://www.valleymorningstar.com/news/article\\_27f7991c-4ef3-11e2-9e7a-0019bb30f31a.html](http://www.valleymorningstar.com/news/article_27f7991c-4ef3-11e2-9e7a-0019bb30f31a.html); see also John MacCormack, *Immigrant deaths soar in South Texas*, MY SAN ANTONIO (December 30, 2012), [http://www.mysanantonio.com/news/local\\_news/article/Border-woes-no-longer-just-on-the-border-4155003.php](http://www.mysanantonio.com/news/local_news/article/Border-woes-no-longer-just-on-the-border-4155003.php).

<sup>191</sup> These factors were developed based on general principles of immigration law. See generally the INA, which includes provisions for asylum and refugee seekers, those who enter the country illegally but present themselves to officials immediately, and policies such as withholding of removal which reflect the consideration of children and the family unit.

(1-1.5 points), and prison sentences increase as the points increase with a maximum of 10 years imprisonment.

In its application, a statute applied through a point system can increase the efficiency of courts in making decisions, and also narrow the scope of potential factors to look at during an appeal. A point system, however, might seem arbitrary, as the value of certain factors, such as whether the alien was a family member, can play a larger role in different circumstances. For example, if that family member was a person's young daughter and was subject to female genital mutilation in her native country,<sup>192</sup> some might question whether the points allotted to the family member should be the same as the point value for a person who smuggles a distant cousin into the United States as a part of a drug operation. However, the point value assigned to all of the other factors considered will reflect the wide range of persons and motives. While it may seem inequitable that both of these offenders receive the same amount of points for such divergent family connections, each offender would also receive positive or negative points for other factors—such as if they performed the act in connection with another crime or for financial gain—and as such concerns of equity are minimalized.

An increase in prosecutorial discretion, particularly in cases that involve children, family members, and asylum-seekers, among others, can help to remedy the potential damage that the arbitrary enforcement of immigration laws can have on aliens and families.<sup>193</sup> In immigration cases that involve the illegal entry of children, some courts have allowed the best interests of the child to inform their decisions, particularly in the case of asylum-seekers.<sup>194</sup> But increased prosecutorial discretion can lead to abuses of this discretion in cases that are particularly sympathetic or relatable. Using a point system helps to standardize the process but take into consideration the family and children involved.

A variety of individuals commit immigration offenses for a wide range of reasons. In a large, complicated system, concerns of efficiency are at the forefront of factors that must inform the decision to implement a law or system to control immigration. Even the combination of

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<sup>192</sup> See generally Meredith Aherne, *Olowo v. Ashcroft: Granting Parental Asylum Based on a Child's Refugee Status*, 18 PACE INT'L L. REV. 317 (2006) (discussing female genital mutilation ("FGM"), and the need for a more workable immigration policy, specifically asylum law, that promotes family unity and recognizes FGM as a worldwide problem).

<sup>193</sup> Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN.PUB. INT. L. J. 243, 245–46 (2010).

<sup>194</sup> Mary-Hunter Morris, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 296 (2008).

consideration of the totality of circumstances, prosecutorial discretion, and individual consideration on a case-by-basis will not guarantee a balanced outcome in every case. But by implementing a point-system, there is room for both subjective and objective analysis, and an opportunity for the justice system to provide each person with both efficiency and fairness in the consideration of their offenses.

#### IV. CONCLUSION

A significant problem with the current state of § 1324 (a)(2) is the fact that the federal circuit courts are split on the mental intent necessary to violate the statute. This disagreement means that two persons committing identical offenses would be subject to entirely different outcomes under the same federal law simply based on what part of the United States they assisted an illegal entry into.<sup>195</sup> In the Eleventh Circuit, this means that two people who helped an unauthorized alien enter the country are subject to criminal penalties regardless of the reasons behind their actions.

The criminalization of immigration offenses has become an emerging trend in the United States.<sup>196</sup> Within the last twenty years, there has been a growing anti-immigrant<sup>197</sup> and anti-immigration sentiment emerging in American society, which has in turn informed the development of immigration laws and policies.<sup>198</sup> Although stricter immigration policies may be necessary to manage the logistics of increasing immigration into the United States, it is important that Congress and the courts implement and foster policies that punish only those who are culpable, and not those who innocently or unknowingly violate the law. Furthermore, it is significant that there is a degree of predictability to immigration laws so that individuals are put on notice of the law and whether actions they may engage in could result in compromising their freedom through criminal punishment.

Consider again the case of Eduin Rordriguez. Abandoned by his parents at a young age, Eduin traveled through several countries in

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<sup>195</sup> Sabbag, *supra* note 16, at 501–02.

<sup>196</sup> Legomsky, *supra* note 136, at 475.

<sup>197</sup> See generally Roque Planas, *Jose Antonio Vargas Restarts 'Illegal' v. 'Undocumented' Debates, Highlighting Role of Latino Media*, HUFFINGTON POST, Sept. 27, 2012, available at [http://www.huffingtonpost.com/2012/09/27/jose-antonio-vargas-illegal-undocumented\\_n\\_1918631.html](http://www.huffingtonpost.com/2012/09/27/jose-antonio-vargas-illegal-undocumented_n_1918631.html); see also Ilona Bray, *supra* note 115 (speaking to the general anti-immigrant sentiment that has been clearly expressed in the media).

<sup>198</sup> Dawn Marie Johnson, *Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 479–80 (2001).

dangerous conditions to arrive in the United States.<sup>199</sup> Presumably, a child such as Eduin must have received help from well-meaning people along the way. Under the language of § 1324(a)(2), the people who helped Eduin travel safely and cross the border would be subjecting themselves to criminal punishment under § 1324(a)(2) in the Eleventh Circuit by doing so. Eduin is not the first innocent person in need of help to reach safety in the United States, and he will not be the last. Allowing for some flexibility and predictability in the enforcement of § 1342(a)(2) is one way to be sure that those who helped Eduin find his way out of danger are not punished unreasonably, and those who encounter vulnerable, hurt people in need of assistance in the future do not feel as though they have no choice but to turn a blind eye.

The current circuit split regarding § 1324(a)(2) presents both Congress and the Supreme Court with a unique opportunity to remedy an issue regarding a very specific subsection of a large body of law, and at the same time speak to the larger issue of immigration control and reform in the United States. Addressing this circuit split is an opportunity for the government to remedy some of the existing tension and confusion regarding immigration law, preventing the unnecessary and unwarranted encroachment on the liberty of those individuals who may commit immigration violations innocently and perhaps even accidentally. By clarifying this one aspect of immigration law and policy, we have an opportunity to help control future unauthorized entry, encourage immigration through the proper channels, acknowledge that immigration and the concerns surrounding it are both complex and constantly evolving, and require policies and laws that can improve and evolve with it.

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<sup>199</sup> Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, August 25, 2012, available at [www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted](http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted).