

THE CASE AGAINST PROSECUTING REFUGEES

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ABSTRACT—Within the past several years, the U.S. Department of Justice has pledged to prosecute asylum-seekers who enter the United States outside an official port of entry without inspection. This practice has contributed to mass incarceration and family separation at the U.S.–Mexico border, and it has prevented bona fide refugees from accessing relief in immigration court. Yet, federal judges have taken refugee prosecution in stride, assuming that refugees, like other foreign migrants, are subject to the full force of American criminal justice if they skirt domestic border controls. This assumption is gravely mistaken.

This Article shows that Congress has not authorized courts to punish refugees for illegal entry or reentry. While largely taken for granted today, the idea that refugees may be prosecuted for such acts is in tension with the full text, context, and purpose of the Immigration and Nationality Act. It is also inconsistent with traditional canons of statutory interpretation, such as the *Charming Betsy* canon, the canon on constitutional avoidance, and the rule of lenity. Therefore, federal prosecutors should abandon refugee prosecution, and federal courts should hold that the criminal prohibitions on illegal entry and reentry do not apply to refugees.

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INTRODUCTION

In September 2017, a Kafkaesque scene unfolded at the federal courthouse in El Paso, Texas. Three women from El Salvador who had traveled over two thousand miles in search of asylum found themselves facing criminal illegal entry charges in an American courtroom.¹ With tears in their eyes, they begged their public defender to contest the charges on the ground that they were asylum-seekers² fleeing persecution, only to be told that the exercise would be futile and counterproductive. The fact that they might be legally entitled to enter and live in the United States as refugees did not necessarily preclude their prosecution for illegal entry. Moreover, fighting the charges would likely only increase the amount of time they would spend in jail, their attorney explained. Visibly bewildered, but relying on the advice of counsel, all three pleaded guilty. The presiding magistrate

¹ See HUM. RTS. FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION’S MISUSE OF CRIMINAL PROSECUTIONS 9 (2018) [hereinafter HUMAN RIGHTS FIRST], <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf> [https://perma.cc/P2WG-SV69] (recounting court observation of Magistrate Judge Leon Schydlower, U.S. District Court for the Western District of Texas, El Paso, Texas, September 7, 2017). For economy’s sake, I have omitted one defendant, a male asylum-seeker from Nicaragua, from this anecdote.

² An “asylum-seeker” is a foreign national at or within the United States’ borders who seeks legal recognition as a refugee.

judge expressed sympathy for their position, lamenting, “[N]one of you are criminals.”³ Then, he proceeded to convict and sentence all three women.⁴

Sadly, this episode is no aberration. Within the past several years, both the U.S. Department of Homeland Security (DHS) and the Department of Justice (DOJ) have declared that asylum-seekers will receive “zero tolerance” if they enter the United States without inspection.⁵ This policy has led to the systematic prosecution of asylum-seekers at courthouses along the U.S.–Mexico border.⁶ Prosecutors have charged asylum-seekers with illegal entry⁷ and reentry,⁸ even in cases where the defendants, as bona fide refugees, were legally entitled to receive safe haven in the United States.⁹

To be sure, not every migrant who enters the United States without inspection qualifies as a refugee. Most migrants who cross the U.S.–Mexico border outside a port of entry never request asylum.¹⁰ Among the subset of irregular migrants¹¹ who do seek asylum, many are not legally entitled to protection in the United States as bona fide refugees. To qualify as

³ HUMAN RIGHTS FIRST, *supra* note 1, at 9.

⁴ *Id.*

⁵ See Press Release, Dep’t of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018) [hereinafter Zero-Tolerance], <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/R8GE-UT49>].

⁶ See HUMAN RIGHTS FIRST, *supra* note 1, at 9–16 (documenting cases).

⁷ See 8 U.S.C. § 1325(a) (imposing criminal sanctions against “[a]ny alien who . . . enters or attempts to enter the United States at any time or place other than as designated by immigration officers,” “eludes examination or inspection by immigration officers,” and “attempts to enter or obtains entry to the United States by a willfully false or misleading misrepresentation or the willful concealment of a material fact”).

⁸ See *id.* § 1326 (prohibiting “any alien” from “enter[ing], attempt[ing] to enter, or [being] at any time found in, the United States” if an alien “has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding . . . unless such alien shall establish that he was not required to obtain [the Attorney General’s] advance consent [to reapply for admission]”); *Immigration Prosecutions for June 2019*, TRAC REPS. (Aug. 9, 2019) [hereinafter TRAC], <https://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun19/fil/> [<https://perma.cc/3U23-UA6B>] (observing that illegal entry and reentry make up the vast majority of immigration prosecutions).

⁹ See 8 U.S.C. § 1231(b)(3)(A) (providing that refugees qualify for withholding of removal irrespective of their immigration status and regardless of whether they are at a designated port of arrival).

¹⁰ See DEP’T OF HOMELAND SEC., OFF. OF IMMIGR. STATS., EFFORTS BY DHS TO ESTIMATE SOUTHWEST BORDER SECURITY BETWEEN PORTS OF ENTRY 16–17 (2017) [hereinafter DHS STATISTICS] (observing that roughly one-third of arriving migrants are “minors, family units, Cubans, and individuals who request asylum”).

¹¹ Throughout this Article, I employ the terms “irregular entry” and “irregular migrants” to capture the phenomenon of foreign nationals entering the United States without inspection outside an official port of entry. I use this neutral terminology, rather than “illegal entry” and “illegal entrants,” to avoid prejudging whether particular migrants have entered the United States illegally. The thesis of this Article, after all, is that U.S. law does not prohibit bona fide refugees from entering the United States without inspection outside an official port of entry.

“refugees” under domestic and international law, asylum-seekers must demonstrate that they have a “well-founded fear of being persecuted” in their country of origin based on their “race, religion, nationality, membership of a particular social group or political opinion.”¹² Most asylum-seekers do not satisfy these criteria.¹³

Nonetheless, this does not mean that refugee prosecution is a rare phenomenon in the United States. The federal government prosecutes tens of thousands of migrants for illegal entry and reentry every year—including over 100,000 in the 2019 fiscal year alone.¹⁴ If a third of these irregular migrants are asylum-seekers, and if 20% of those asylum-seekers are bona fide refugees, as then-Secretary of Homeland Security Kirstjen Nielsen estimated in May 2018,¹⁵ it would still follow that thousands of refugees have served time for illegal entry or reentry within the past several years.

Prosecuting refugees in this manner violates the United States’ obligations under international law. Article 31 of the United Nations Convention Relating to the Status of Refugees (Refugee Convention) declares that governments

¹² United Nations Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; *see also* 8 U.S.C. § 1101(a)(42) (defining a “refugee” principally as a “person who . . . is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”). International policymakers sometimes reserve the term “refugee” for migrants who have already had their legally protected status confirmed by domestic authorities or an international organization. *See Asylum-Seekers*, UNHCR: THE UN REFUGEE AGENCY, <https://www.unhcr.org/en-us/asylum-seekers.html> [<https://perma.cc/H7QL-MQG4>]. For purposes of this Article, however, I follow the usage of the INA and the Refugee Convention, which define “refugee” objectively without regard to whether authorities have recognized this status. *See* UNHCR, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 18 (2017), <https://www.unhcr.org/en-us/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> [<https://perma.cc/JKL9-AKAP>] (“A person is a refugee as soon as the criteria contained in this [legal] definition are fulfilled. In other words, a person does not *become* a refugee because of a positive decision on an application for protection. Recognition of refugee status is *declaratory*: it confirms that the person is indeed a refugee.”).

¹³ *See* Anna Giaritelli, *80 Percent of Asylum Cases at Southwest Border Aren’t Legitimate*, *DHS Chief Says*, WASH. EXAM’R (May 16, 2018, 10:28 AM), <https://www.washingtonexaminer.com/tag/fox-news?source=%2Fnews%2F80-percent-of-asylum-cases-at-southwest-border-arent-legitimate-dhs-chief-says> [<https://perma.cc/48G8-ZYUG>].

¹⁴ In fiscal year 2019, federal prosecutors charged 80,866 defendants with illegal entry and 25,426 defendants with illegal reentry. Press Release, Dep’t of Just., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), <https://www.justice.gov/opa/pr/departments-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year> [<https://perma.cc/N9V9-NWAN>].

¹⁵ Giaritelli, *supra* note 13.

shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.¹⁶

Although the United States is not a party to the Refugee Convention, it agreed to be bound by Article 31 when it acceded to the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol).¹⁷ Thus, by prosecuting refugees for illegal entry and reentry, the United States has exposed itself to international censure.

Conventional wisdom suggests, however, that the Refugee Convention and Protocol do not pose an obstacle to refugee prosecution in domestic courts. The Immigration and Nationality Act (INA)¹⁸ does not expressly grant refugees immunity from criminal liability for entering U.S. territory without inspection. And because federal courts have determined that the Refugee Protocol is a non-self-executing treaty,¹⁹ they have concluded that refugees cannot rely on Article 31 as a defense to prosecution.²⁰ Prosecutors therefore assume that refugees who enter the United States outside an official port of entry are subject to the full force of American criminal justice.²¹ Judges, in turn, routinely convict and sentence refugees for immigration crimes, even as they occasionally express moral qualms about the practice.²²

¹⁶ Refugee Convention, *supra* note 12, art. 31(1).

¹⁷ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (1968) [hereinafter Refugee Protocol]. States-parties to the Refugee Protocol “undertake to apply articles 2 to 34 inclusive of the Convention to refugees.” *Id.* art. I(1). A key difference between the two treaties is that the Refugee Protocol eliminates certain temporal and geographic restrictions in the Refugee Convention’s “refugee” definition. *Id.* art. I(2).

¹⁸ Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, 229.

¹⁹ *See, e.g.,* Barapind v. Reno, 225 F.3d 1100, 1107 (9th Cir. 2000) (citing *INS v. Stevic*, 467 U.S. 407, 428–29 n.22 (1984)). A non-self-executing treaty does not generate judicially enforceable legal claims or defenses. *See* *Medellin v. Texas*, 552 U.S. 491, 504–05, 505 n.2 (2008).

²⁰ *See, e.g.,* *United States v. Malenge*, 294 F. App’x 642, 644 (2d Cir. 2008) (rejecting the argument that prosecution for violations of 18 U.S.C. §§ 1543, 1544, and 1546 violated the Refugee Protocol because the Protocol “is not a self-executing treaty” and therefore does “not provide [a refugee] with any judicially enforceable rights”); *United States v. Velasquez-Luna*, No. 18-mj-11463-WQH, 2019 WL 338947, at *2 (S.D. Cal. Jan. 28, 2019) (“The Protocol does not confer judicially enforceable rights that preclude . . . prosecution under [§ 1325(a)] for eluding inspection and examination.”).

²¹ *See* Natasha Arnpriester, *Trumping Asylum: Criminal Prosecutions for “Illegal” Entry and Reentry Violate the Rights of Asylum-Seekers*, 45 HASTINGS CONST. L.Q. 3, 16 (2017).

²² *See* *Malenge*, 294 F. App’x at 644–45 (characterizing refugee prosecution as “troubling” and urging that “[t]here is surely a more appropriate way to handle such cases, and to deter such conduct, short of criminal prosecution”).

This Article challenges the prevailing assumption that U.S. law permits the federal government to prosecute refugees. Contrary to conventional wisdom, the INA's provisions establishing criminal penalties for illegal entry and reentry do not apply to refugees. The idea that refugees may be held criminally liable for such acts, while largely taken for granted today, is inconsistent with Congress's statutory plan for refugee protection. Congress has never authorized the federal government to prosecute and convict refugees for illegal entry or reentry.

Part I of this Article traces the twisting path that has led the United States to prosecute refugees for immigration crimes. Congress has used criminal penalties to buttress civil and administrative immigration controls on unauthorized entry since the 1920s.²³ When Congress began to make special allowance for the protection of refugees after World War II, it conceptualized criminal immigration law and refugee law as separate regulatory regimes.²⁴ Congress's concern for refugees culminated in the Refugee Act of 1980, which established a legal right to safe haven for nearly all refugees who reach the United States.²⁵ A core purpose of the Refugee Act was to ensure that federal immigration law complied fully with the United States' commitments under the Refugee Protocol, and members of Congress vigorously debated what steps would be necessary to accomplish this objective. Yet, there is no evidence in the legislative record that either the Executive Branch or Congress contemplated the possibility that the INA's criminal provisions might be out of step with Article 31. Indeed, based on an exhaustive review of the relevant legislative history—from the INA's passage in 1952 through its numerous amendments over the past sixty-eight years—this Article demonstrates that members of Congress have never endorsed punishing refugees for illegal entry or reentry on the public record. To the contrary, on the rare occasions when the topic has arisen in congressional debates, legislators have rejected proposals to introduce civil or criminal penalties into the statutory regime for refugee protection.²⁶

²³ See *infra* Section I.A.

²⁴ See *infra* Section I.B.

²⁵ See 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). Consistent with the Refugee Convention, the INA now carves out exceptions from withholding of removal for, *inter alia*, persecutors, those who have committed serious nonpolitical crimes abroad or particularly serious crimes in the United States, and refugees who pose threats to U.S. national security. See *id.* § 1231(b)(3)(B).

²⁶ See *infra* notes 85–87 and accompanying text.

Following the 9/11 terrorist attacks, however, the federal government began to blur the line between ordinary immigration enforcement and refugee protection.²⁷ As national authorities reconceptualized border enforcement primarily as a national-security issue, DOJ focused more resources on prosecuting immigration crimes, causing illegal entry and reentry convictions to skyrocket. In response, critics at the time complained that DHS, in its zeal to prevent terrorists and criminals from entering the United States, was failing to screen undocumented migrants properly to prevent the inadvertent prosecution of refugees.

What started as an incidental byproduct of the United States' "War on Terror" eventually cemented into official agency policy.²⁸ In 2014, U.S. Customs and Border Protection (CBP) promulgated formal guidance that refugees were appropriate candidates for prosecution.²⁹ Four years later, Attorney General Jefferson Sessions announced that federal prosecutors would be required to prosecute all undocumented foreign migrants apprehended at the U.S.–Mexico border, irrespective of whether the migrants were refugees with valid claims to relief in immigration court.³⁰ As a result, the Executive Branch is currently committed to prosecuting refugees for illegal entry and reentry.

Part II delivers this Article's most important contribution by explaining why prosecuting refugees violates federal law. In the past, federal judges have assumed that the INA's criminal prohibitions on illegal entry and reentry apply fully to refugees because these provisions do not expressly exempt refugees from criminal liability. This superficial analysis is gravely mistaken. As the Supreme Court has recognized in other contexts, the fact that an INA provision does not expressly articulate an exception is not a sufficient basis to rule out that such an exception exists.³¹ This interpretive

²⁷ See *infra* Section I.C.

²⁸ See *infra* Section I.D.

²⁹ See OFF. OF THE INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-15-95, STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 17 (May 15, 2015) [hereinafter INSPECTOR GENERAL], https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf [<https://perma.cc/5JCW-43XC>].

³⁰ See Zero-Tolerance, *supra* note 5; Memorandum from the Att'y Gen. to Fed. Prosecutors Along the Sw. Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/7VRN-L9KA>] (discussing the "Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)" policy).

³¹ See, e.g., *Negusie v. Holder*, 555 U.S. 511, 514–20 (2009) (holding that a provision of the INA, which denies asylum and withholding removal to "any person" who has contributed to others' persecution, does not unambiguously foreclose a duress exception); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006) (concluding that a provision of the INA, which prohibits refugees from receiving "any relief" if they illegally reentered the United States, did not disqualify refugees from receiving withholding of removal).

principle is particularly salient when the whole text, context, and purpose of the INA indicate that exempting refugees from criminal liability is an implicit feature of the statute's overarching legislative design. At a minimum, the fact that Congress does not appear to have anticipated criminal penalties applying to refugees should counsel caution before courts attribute such a meaning to the INA. Instead, courts should bring their entire methodological toolbox to bear on the problem, including traditional canons of federal statutory interpretation.

Three venerable canons of statutory interpretation confirm that refugees are exempt from prosecution for garden-variety immigration crimes. First, the *Charming Betsy* canon advises courts to avoid interpreting the INA in a manner that would undermine the United States' international obligations.³² Remarkably, although federal courts have recognized that prosecuting refugees violates the United States' obligations under the Refugee Protocol, they have never addressed whether the INA could be interpreted in such a manner as to eliminate these conflicts, as *Charming Betsy* prescribes.³³ This oversight is regrettable. Applying *Charming Betsy* to exempt refugees from prosecution for illegal entry and reentry would further the Refugee Act's *raison d'être*: eliminating discrepancies between U.S. refugee law and international law.³⁴ It would also advance *Charming Betsy*'s primary purposes: minimizing the potential for friction with foreign powers³⁵ and ensuring that the President and Congress take the lead in deciding delicate questions about the United States' compliance with international law.³⁶

Second, courts should recognize that interpreting the INA to authorize refugee prosecution violates the U.S. Constitution. In *Robinson v.*

³² See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (counseling that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

³³ A few scholars have observed that the *Charming Betsy* canon offers a possible legal basis for challenging refugee prosecution, but they have not grounded this claim in a sufficiently rigorous study of the INA's text and legislative history. See Arnpriester, *supra* note 21, at 41; Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51 COLUM. HUM. RTS. L. REV. 1, 94–97 (2019). This Article supplies the missing textual and historical analysis to show why this claim is persuasive.

³⁴ See *infra* notes 204–209 and accompanying text.

³⁵ See *Serra v. Lapin*, 600 F.3d 1191, 1198–99 (9th Cir. 2010) (“[T]he purpose of the *Charming Betsy* canon is to avoid the negative ‘foreign policy implications’ of violating the law of nations.” (quoting *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982))).

³⁶ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 525 (1997) (emphasizing how the canon operates “as a means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government”).

California,³⁷ the Supreme Court held that the Eighth Amendment’s prohibition on “cruel and unusual punishment” does not permit the government to punish people based solely on narcotics addiction—a circumstance over which they presently have no control.³⁸ Lower courts have extended *Robinson* to other circumstances where an individual’s acts are inextricably linked to a status they cannot control. For example, they have held that states may not punish homeless people for sleeping in public without providing alternative accommodations where homeless people may spend the night.³⁹ Another logical application of the Eighth Amendment, I argue, is that it enjoins the federal government from punishing refugees—“the world’s homeless people”⁴⁰—for illegal entry and reentry when they lack adequate protection for their human rights abroad. As applied to refugees, criminal penalties for illegal entry and reentry violate *Robinson* because they punish acts that are inextricably linked to refugee status. The DOJ’s zero-tolerance policy is therefore unconstitutional as applied to refugees. Ultimately, however, federal courts need not reach the merits of this novel constitutional question: under the canon of constitutional avoidance, the mere fact that refugee prosecution raises grave constitutional concerns is reason enough to construe the INA’s criminal provisions to exempt refugees.⁴¹

Third, the rule of lenity militates against reading the INA to authorize refugee prosecution. When “reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute,” the rule of lenity dictates that courts must decide the interpretive question in favor of a criminal defendant.⁴² Applying the rule of lenity makes good sense in this context because it would advance the rule’s core purposes by safeguarding legislative supremacy,⁴³ promoting legislative accountability,⁴⁴ and constraining prosecutorial discretion to “minimize the risk of selective or

³⁷ 370 U.S. 660 (1962).

³⁸ *Id.* at 666–67.

³⁹ See, e.g., *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019) (“[T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.”), *cert. denied*, 140 S. Ct. 674 (mem.) (2019).

⁴⁰ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55 (1971).

⁴¹ See *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

⁴² *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

⁴³ See *United States v. Bass*, 404 U.S. 336, 348 (1971) (justifying lenity based on the principle that “legislatures and not courts should define criminal activity”).

⁴⁴ See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 887 (2004) (emphasizing “lenity’s role in advancing the democratic accountability of criminal justice”).

arbitrary enforcement.”⁴⁵ In addition, the Supreme Court has recognized that the rule of lenity merits special force in the immigration context in light of the fact that foreign nationals “cannot vote” in federal elections and therefore are “particularly vulnerable to adverse legislation.”⁴⁶

Part III assesses whether prosecuting refugees is morally defensible. Drawing on foundational principles from the philosophy of criminal law, I argue that refugees often have compelling moral justifications and excuses for violating domestic immigration controls in order to escape persecution abroad. Due to the exigent circumstances that necessitate their flight from persecution, refugees routinely lack passports, visas, and other documents that would confirm their identity and enable international travel through legally authorized channels. Indeed, the more desperate a refugee’s circumstances, the less likely it is that she will be able to escape her own country without violating other countries’ immigration controls. Refugees cannot reasonably be blamed, therefore, for entering the United States without authorization in order to avoid death, torture, or other serious harm.

Measures taken by the Trump Administration between 2017 and 2019 further strengthen the argument that prosecuting refugees is morally indefensible.⁴⁷ As the White House slashed the number of visas available to refugees and prevented refugees from accessing the United States through official ports of entry, many refugees found themselves with no practical alternative other than to attempt an unauthorized entry. Under these circumstances, refugees could reasonably conclude that violating U.S. immigration law was morally justified to facilitate their escape from death or other serious harm abroad. Indeed, the harder the White House worked to prevent refugees from presenting claims for asylum and withholding of removal, the stronger the argument has become that prosecuting refugees for immigration crimes was unconscionable.

In sum, this Article lays bare why prosecuting refugees is both morally and legally indefensible. By jettisoning this practice, federal prosecutors and judges may correct an ongoing miscarriage of justice, while realigning domestic immigration policy with Congress’s statutory plan and the United States’ international obligation to treat refugees with dignity and compassion.

⁴⁵ *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

⁴⁶ *INS v. St. Cyr*, 533 U.S. 289, 315 n.19 (2001).

⁴⁷ In March 2020, the United States joined other countries in drastically restricting the admission of all foreign nationals in response to the global spread of COVID-19. Recognizing that public-health emergencies like the COVID-19 crisis raise special legal and moral concerns, I do not address those questions in this Article.

I. THE PATH TO REFUGEE PROSECUTION

To understand why prosecuting refugees for illegal entry and reentry is inconsistent with U.S. law, some historical context is essential. This Part chronicles how Congress adopted provisions establishing immigration crimes, while also making special provision for refugee protection. Although Congress has imposed criminal penalties for illegal immigration for almost a century, it has never contemplated that refugees would be subject to those penalties. To the contrary, Congress designed the INA with the expectation that it would comply fully with the United States' obligations under international law—including the Refugee Convention's requirement to refrain from penalizing refugees for unlawful entry. However, far from implementing congressional policy, refugee prosecution emerged haphazardly as an incidental byproduct of the post-9/11 national-security state, when border agents—seeking to tighten border security—began to refer irregular migrants for prosecution without regard to their refugee status. Surveying the historical record as a whole, it is apparent that the United States has stumbled into refugee prosecution without significant public deliberation or congressional authorization.

A. *Creating Immigration Crimes*

Our story begins roughly a century ago. Prior to the 1920s, the federal government treated entry into the United States as a matter within the exclusive province of civil and administrative law. Violating immigration controls at the border could trigger serious legal consequences—including exclusion or deportation from the United States⁴⁸—but not criminal penalties.⁴⁹ After the First World War, however, a shifting political landscape prompted Congress to reconsider this approach. Public anxiety about increasing migration from China, Mexico, and Southern and Eastern Europe, coupled with declining demand for unskilled immigrant labor in the post-WWI economy, emboldened nativist politicians to demand stricter legal

⁴⁸ Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, U.S. immigration law distinguished between the “exclusion” of migrants at the border prior to a lawful admission and the “deportation” of previously admitted foreign nationals. See 5 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 64.01 (rev. ed. 2020). Subsequently, however, all inadmissible and deportable foreign nationals are subject to “removal.” 8 U.S.C. § 1229a.

⁴⁹ See *Flora v. Rustad*, 8 F.2d 335, 337 (8th Cir. 1925) (“It has never been the policy of this Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation has been the remedy.”).

constraints on immigration.⁵⁰ Against this backdrop, Congress in 1924 criminalized counterfeiting immigration documents and obtaining such documents by fraud.⁵¹ The following year, it allocated funding to establish a Border Patrol—the first “serious enforcement mechanism against unlawful entry.”⁵² When these measures failed to stem the flow of irregular migrants, Congress entertained proposals to make illegal entry itself a criminal offense.

Supporters of criminalization found their champion in South Carolina Senator Coleman Livingston Blease, a resolute segregationist and fierce opponent of Mexican immigration.⁵³ Senator Blease introduced draft legislation, the Undesirable Aliens Act of 1929, to establish the first criminal penalties for unauthorized immigration.⁵⁴ As amended, the bill made illegal entry a misdemeanor punishable by up to a year in prison, a \$1,000 fine, or both.⁵⁵ Reentry following deportation was designated a felony punishable by up to two years in prison, a \$1,000 fine, or both.⁵⁶

The Undesirable Aliens Act had far-reaching consequences. By the end of the 1930s, the federal government had prosecuted more than 44,000 irregular migrants, necessitating the construction of three new penitentiaries near the U.S.–Mexico border.⁵⁷ Yet, despite the considerable resources devoted to prosecuting irregular migrants, the Act eventually came to be viewed as a failure. Prosecution and mass incarceration did not “seem to have the deterrent effect expected” in stemming the flow of Mexican immigrants across the southern border,⁵⁸ while deportation and so-called “voluntary” departures coerced by local law enforcement officials proved to be more effective at suppressing unauthorized immigration.⁵⁹

Over the next four decades, the federal government deemphasized criminal enforcement in favor of exclusion, deportation, and voluntary

⁵⁰ Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 *LAW & HIST. REV.* 69, 75 (2003).

⁵¹ See Immigration Act of 1924, Pub. L. No. 68-139, § 22, 43 Stat. 153, 165, *superseded by* Pub. L. No. 80-772, § 1542, 62 Stat. 683, 771 (1948).

⁵² Ngai, *supra* note 50, at 76 & n.14 (discussing the Act of Feb. 27, 1925, 43 Stat. 1049).

⁵³ Kelly Lytle Hernández, *How Crossing the US-Mexico Border Became a Crime*, *THE CONVERSATION* (Apr. 30, 2017, 10:00 PM), <http://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604> [<https://perma.cc/9Q54-KUXA>].

⁵⁴ Act of March 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Hernández, *supra* note 53.

⁵⁸ SEC’Y OF LAB., ANNUAL REPORT 45 (1933).

⁵⁹ See JOSEPH NEVINS, OPERATION GATEKEEPER 33 (2002) (reporting that deportations and voluntary departures between 1929 and 1935 resulted in the departure of 500,000 Mexican nationals and suppressed immigration across the U.S.–Mexico border “to a negligible level”).

departure.⁶⁰ However, the prohibitions against illegal entry and reentry remained on the books, and in 1952 they were folded into the landmark INA.⁶¹ At the urging of federal officials, Congress reduced the maximum penalty for illegal entry from one year to six months, allowing for the crime to be reclassified as a “petty offense” that could be tried in fast-track procedures before a magistrate judge without grand jury indictment or jury trial.⁶²

As time went on, the criminalization of U.S. immigration law gained renewed popularity. During the late 1980s and the 1990s, legislators from both political parties jockeyed to establish their “tough on crime” credentials.⁶³ During this period, Congress repeatedly revised the INA, adding a variety of immigration-related crimes.⁶⁴ These statutory amendments perpetuated in revised form the longstanding criminal prohibitions against illegal entry and reentry. As a result, the INA continues to characterize these acts as crimes, with illegal reentry specifically designated as a felony punishable by ten or more years in prison.⁶⁵ Federal courts have upheld these criminal penalties as permissible applications of Congress’s constitutional power to regulate immigration.⁶⁶

B. Legislating Refugee Protection

Alongside the criminalization of U.S. border control, Congress has also established legal safeguards to protect refugees from persecution abroad. These safeguards emerged after World War II, inspired in part by

⁶⁰ See K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1917–23, 1933 (2019) (discussing these trends). Voluntary departure entails a foreign national exiting the United States prior to the issuance or enforcement of a removal order. Under current immigration law, voluntary departure has become a form of relief that allows those who qualify to avoid the adverse legal consequences of a removal order. See 8 U.S.C. § 1229c (authorizing the Attorney General to grant voluntary departure).

⁶¹ See INA, Pub. L. No. 82-414, §§ 275–76, 66 Stat. 163, 229.

⁶² See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1326–27 (2010).

⁶³ See Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2143–44 (2017) (emphasizing bipartisan consensus about a “tough on crime” approach to immigration). See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376, 419 (2006) (discussing the criminalization of U.S. immigration law).

⁶⁴ For a concise summary of these developments, see David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 164–175 (2012).

⁶⁵ See 8 U.S.C. §§ 1325(a), 1326.

⁶⁶ See *Wong Wing v. United States*, 163 U.S. 228, 235, 238 (1896) (stating that “it would be plainly competent for [C]ongress to declare the act of an alien in remaining unlawfully within the United States to be an offense punishable by fine or imprisonment, if such offense were to be established by a judicial trial”); *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1077 (9th Cir. 1998) (“[A]t no time during the last century has any court questioned or contradicted *Wong Wing*’s endorsement of Congress’s prerogative to enact criminal immigration laws.”).

international negotiations that produced the Refugee Convention.⁶⁷ Congress gradually strengthened the statutory safeguards for refugees, culminating in the United States' accession to the Refugee Protocol⁶⁸ and passage of the landmark Refugee Act of 1980.⁶⁹ A consistent theme in the legislative history of both the Refugee Protocol and the Refugee Act is Congress's concerted focus on ensuring that domestic law complied fully with the United States' obligations under international law.⁷⁰ The historical record therefore offers powerful evidence that prosecuting refugees for illegal entry and reentry is inconsistent with Congress's statutory plan.

Refugee law as we know it today began to take shape in the United States beginning with the Displaced Persons Act of 1948, which established a special immigrant quota for refugees.⁷¹ Although Congress discontinued this quota in 1957,⁷² it authorized the Attorney General to admit specific categories of refugees throughout the 1950s, 1960s, and 1970s, pursuant to special "parole" and "conditional entry" programs.⁷³ In 1950, Congress also authorized the Attorney General to refrain from deporting foreigners to countries where they would be threatened with physical harm.⁷⁴

As the United States was implementing these statutory frameworks, legal reform was also taking place at the international level. In 1951, the Refugee Convention established a new global regime for refugee protection. In relevant part, the Refugee Convention defines a "refugee" as

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.⁷⁵

States—parties to the Refugee Convention commit that they will not "expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

⁶⁷ See GORDON ET AL., *supra* note 48, § 33.01.

⁶⁸ Refugee Protocol, *supra* note 17.

⁶⁹ Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102.

⁷⁰ See *infra* text accompanying notes 91–95.

⁷¹ Act of June 25, 1948, Pub. L. No. 80-744, 62 Stat. 1009, 1010–11, *amended by* Acts of June 16, 1960, Pub. L. No. 81-555, 64 Stat. 219, and June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96.

⁷² Act of Sept. 11, 1957, Pub. L. No. 85-316, § 10, 71 Stat. 639, 642.

⁷³ See GORDON ET AL., *supra* note 48, § 33.01[1]–[2] (discussing the development of refugee policies in the United States after World War II).

⁷⁴ Subversive Activities Control Act of 1950, Pub. L. No. 81-831, § 23, 64 Stat. 987, 1010. Fifteen years later, Congress eliminated the requirement that persecution be physical. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918.

⁷⁵ Refugee Convention, *supra* note 12, art. 1(A)–(A)(2).

account of his race, religion, nationality, membership of a particular social group or political opinion.”⁷⁶

The Refugee Convention also anticipates that states might be tempted to use civil or criminal sanctions to deter or punish refugee immigration. To counter this temptation, Article 31 declares:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.⁷⁷

Several features of this text merit unpacking. As a general rule, Article 31 enjoins states—parties from imposing any penalties—civil or criminal—based on refugees’ irregular entry or presence. To claim this immunity, however, refugees must “com[e] directly from a territory where their life or freedom was threatened,” “present themselves without delay to the authorities,” and “show good cause for their illegal entry or presence.”⁷⁸ The Refugee Convention’s preamble and preparatory work (*travaux préparatoires*) underscore that these qualifications are to be construed liberally in favor of refugee protection, reflecting the Refugee Convention’s overarching objective “to assure refugees the widest possible exercise of [the] fundamental rights and freedoms” affirmed by “the Charter of the United Nations and the Universal Declaration of Human Rights.”⁷⁹ The purpose of these limitations clauses was not to compel refugees to pursue asylum in the first country of transit on pain of penalties elsewhere.⁸⁰ Rather, the preparatory work makes clear that these qualifications were designed to ensure that refugees who had already received asylum—a durable legal status⁸¹—in one receiving state would not thereafter have an unfettered right

⁷⁶ *Id.* art. 33(1) (emphasis added). The Convention qualifies this obligation by providing that it does not apply, *inter alia*, if “there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” *Id.* art. 33(2).

⁷⁷ *Id.* art. 31(1).

⁷⁸ *Id.*

⁷⁹ *Id.* pmbi.; *see also* Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 (authorizing recourse to preparatory work when other conventional means of interpretation leave a treaty “ambiguous or obscure”).

⁸⁰ *See* GUY S. GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION, AND PROTECTION 5–8 (2001), <https://www.unhcr.org/3bcfd164.pdf> [<https://perma.cc/NAJ7-5WVM>] (prepared at the request of UNHCR for an expert roundtable held in Geneva, Switzerland on November 8–9, 2001).

⁸¹ Unlike refugees who are granted only withholding of removal, a form of temporary relief that expires when refugees are no longer threatened with persecution abroad, those who receive asylum may

to violate other countries' border controls without legal repercussions.⁸² Hence, refugees do not forfeit their immunity from prosecution under Article 31 if they travel through other states, provided that they do not establish prolonged residence or receive a firm offer of asylum along the way.⁸³ As long as refugees travel continuously toward the country where they first seek asylum, they are understood to “com[e] directly” from their home country for purposes of Article 31, and are entitled to seek refuge without suffering civil or criminal penalties for illegal entry in their destination country.

Although the United States did not join the Refugee Convention, it agreed to be bound by Article 31 when it acceded to the Refugee Protocol in 1968.⁸⁴ At the time, neither the White House nor Congress appeared to have anticipated any conflict between Article 31 and the INA. In his letter transmitting the Refugee Protocol for advice and consent, President Lyndon B. Johnson assured the Senate that “[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States.”⁸⁵ In his view, there were only “two instances where divergences between the Convention and United States laws would cause difficulty”—Article 24 (addressing labor law and social security) and Article

apply for permanent residence after one year, bring immediate family members to the United States, and eventually qualify for U.S. citizenship. *See Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 8, 2018), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees> [<https://perma.cc/9MQV-NATW>].

⁸² *See* GOODWIN-GILL, *supra* note 80, at 5–8.

⁸³ *See* JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 396 (2005) (explaining that the “coming directly” language of Article 31 “does not disfranchise” refugees who have “passed through, or even [have] been provisionally admitted to, another country”); PAUL WEIS, *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYZED WITH A COMMENTARY* 215, 219, <https://www.unhcr.org/en-us/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> [<https://perma.cc/GVG6-TKMK>] (summarizing the Refugee Convention’s preparatory work as affirming that refugees are not to be penalized simply because they “could have sought asylum in another country” en route). Support for this reading can be found in Article 31(2), which requires states-parties to give refugees in transit “a reasonable period and all the necessary facilities to obtain admission into another country.” Refugee Convention, *supra* note 12, art. 31(2).

⁸⁴ *See* Refugee Protocol, *supra* note 17, art. 1(1) (“The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the [Refugee] Convention . . .”); *Protocol Relating to the Status of Refugees: Senate Consideration of Treaty Document 90-27*, CONGRESS.GOV <https://www.congress.gov/treaty-document/90th-congress/27?r=2&s=1> [<https://perma.cc/F3CM-98V7>] (noting that the Senate voted 59–0 in favor of ratification on October 4, 1968). The United States did not submit any reservations, understandings, or declarations with respect to Article 31. Nor has the Executive Branch ever offered a formal interpretation of Article 31 that would call into question the conventional understanding reflected in the Convention’s preparatory work.

⁸⁵ President Lyndon B. Johnson, Letter of Transmittal, Aug. 1, 1968, 114 CONG. REC. 27757, 27757 (1968) [hereinafter Johnson Letter].

29 (addressing taxation).⁸⁶ President Johnson stressed that he had proposed “appropriate reservations” that would address those differences between the Refugee Protocol and U.S. law.⁸⁷ Subsequent Senate hearings on the Refugee Protocol do not reveal any expressions of concern about possible tensions between Article 31 and the INA.⁸⁸ As far as can be discerned from the public record, none of the central players in the United States’ adoption of the Refugee Protocol contemplated the possibility that the INA could be used to prosecute refugees in violation of Article 31.

A decade later, Congress revisited the relationship between the Refugee Protocol and the INA in debates that culminated in the passage of the Refugee Act of 1980.⁸⁹ By the late 1970s, federal policymakers had come to recognize that certain aspects of the INA were out of sync with the Refugee Convention and Protocol. A primary purpose of the Refugee Act, therefore, was to ensure that the United States complied fully with its obligations under the Refugee Protocol.⁹⁰ In addition to amending the INA’s “refugee” definition to track the Refugee Convention (Article 1), the Refugee Act revised the INA’s provision on withholding of deportation (later restyled as “withholding of removal”) to parallel the Refugee Convention’s prohibition of *refoulement* (Article 33).⁹¹ Most relevant for present purposes, the Refugee Act conformed the INA’s withholding provision to Article 31 by providing that refugees would not be denied access to relief in immigration court if they had entered the United States unlawfully.⁹² Congress also

⁸⁶ *Id.*; U.N. HIGH COMM’R FOR REFUGEES, STATE PARTIES, INCLUDING DECLARATIONS AND RESERVATIONS, TO THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 5 [hereinafter STATE PARTIES], <https://www.unhcr.org/en-us/protection/convention/5d9ed66a4> [<https://perma.cc/RXE6-6QF5>].

⁸⁷ Johnson Letter, *supra* note 85; see also STATE PARTIES, *supra* note 86; S. COMM. ON FOREIGN RELS., PROTOCOL RELATING TO REFUGEES, S. REP. NO. 90-14, at 7 (1968) [hereinafter SENATE PROTOCOL REPORT] (“[T]he United States already meets the standards of the Protocol . . .”).

⁸⁸ See SENATE PROTOCOL REPORT, *supra* note 87, at 2 (expressing the Senate’s understanding that, subject to two unrelated exceptions, “the protocol would not impinge adversely upon the Federal and State laws of this country”).

⁸⁹ Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁹⁰ See *Negusie v. Holder*, 555 U.S. 511, 520 (2009) (“As this Court has twice recognized, one of Congress’ primary purposes in passing the Refugee Act was to implement the principles agreed to in the [Refugee Convention], as well as the [Refugee Protocol].” (citations and internal quotation marks omitted)).

⁹¹ See Refugee Act § 202(e); GORDON ET AL., *supra* note 48, § 33.01[3] (establishing that “[a] predominant goal of [the Refugee Act] was to implement the United Nations Protocol relating to the Status of Refugees”).

⁹² By authorizing withholding of removal not only for asylum-seekers in deportation proceedings (i.e., those who had previously been formally admitted), but also for asylum-seekers in exclusion proceedings (i.e., those who had entered previously without formal admission and would otherwise be

authorized the Attorney General to grant asylum on a discretionary basis to refugees who were either already in the United States or seeking entry at a land border or through a designated port of entry.⁹³ In each of these respects, the Refugee Act reflected Congress's concerted effort to harmonize U.S. refugee law with Article 31.

At no point during the three years of debates that preceded the Refugee Act did anyone involved indicate on the public record that additional legislative action might be necessary to harmonize the INA with Article 31. Though this omission is significant, it is not entirely surprising. Throughout this period, federal policymakers generally drew firm distinctions between refugees and other migrants, characterizing these categories as distinct populations to be handled through separate regulatory regimes. For example, Attorney General Griffin Bell emphasized in testimony to Congress that "refugee problems," which posed sensitive questions of foreign policy and international law, should not be conflated with the distinct challenge of "illegal immigration" by economic migrants, which Congress had endeavored to curb through a distinct regulatory regime based on exclusion, deportation, and civil and criminal penalties.⁹⁴ Having distinguished refugees from other migrants in this way, the idea that refugees might face prosecution for illegal entry and reentry does not appear to have occurred to anyone who participated in the congressional deliberations that produced the Refugee Act—not to members of Congress, critics of expansive refugee admission, refugee rights advocates, or even the Attorney General.

Congress's silence on this subject is particularly noteworthy given that irregular entry by refugees was a topic of sustained discussion at a critical juncture during these debates. Early on, as the House Judiciary Subcommittee on Immigration, Citizenship, and International Law considered proposals that would lead eventually to the Refugee Act, the

faced with "return"), the Refugee Act enabled irregular entrants to qualify for protection from *refoulement*.

⁹³ Refugee Act § 208.

⁹⁴ *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. of the Judiciary*, 96th Cong. 33 (1979) [hereinafter May 1979 Hearings] (testimony of Attorney General Griffin B. Bell); see also *id.* at 32 (asserting that the "problem of Mexican citizens coming across the border to work in our country" was not "a refugee problem"); JOYCE C. VIALET, CONG. RSCH. SERV., U.S. IMMIGRATION LAW AND POLICY: 1952-1979, at 71-78 (1979) (report prepared at the request of Senator Edward Kennedy for inclusion in the congressional record) (distinguishing the entry of aliens "illegally, as undocumented aliens" from entry "legally as refugees"); *Admission of Refugees into the United States Part II: Hearings Before the Subcomm. on Immigr., Citizenship, and Int'l L. of the H. Comm. on the Judiciary*, 95th Cong. 187 (1978) (testimony of Leo Cherne) [hereinafter Cherne] (observing that the United States has maintained a "decisive distinction between . . . refugees and the host of unfortunates who illegally cross our borders to seek work," given that the former "live lives of total repression, pervasive fear, arbitrary arrest and death").

subcommittee chair, Representative Joshua Eilberg of Pennsylvania, introduced a bill that would have disqualified refugees from receiving sanctuary if they failed to apply for withholding of deportation promptly after an illegal entry or if they failed to show good cause for their illegal entry.⁹⁵ Eilberg's proposal failed to attract sufficient support in Congress after the Immigration and Naturalization Service (INS) and the State Department opposed it as being "out of character with our traditional concern for refugees" and as potentially "result[ing] in a conflict with our obligations under section 33 of the refugee protocol."⁹⁶ After Eilberg's proposal was eliminated from consideration, but before Congress enacted the Refugee Act, representatives of Amnesty International applauded this decision in congressional testimony, observing that the proposal would have violated Article 31 through the "imposition of penalties on refugees who, under certain circumstances, enter the country illegally."⁹⁷

Given all the *Sturm und Drang* that surrounded Eilberg's proposal, one would expect that if members of Congress believed refugees were subject to criminal liability under the INA for illegal entry and reentry, they would have attempted to resolve this incongruity with international law in the Refugee Act. At a minimum, the issue surely would have received a passing mention at some point during the many lengthy hearings that preceded passage of the Refugee Act.⁹⁸ Eilberg's proposal demonstrates that INS, the State

⁹⁵ *Extension of Indochina Refugee Assistance Program: Hearings on H.R. 9133, H.R. 9134, and H.R. 9110 Before the Subcomm. on Immigr., Citizenship, & Int'l L. of the H. Comm. on the Judiciary*, 95th Cong. 1, 33 (1977). See generally Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 40–41 (1981) (discussing the legislative history of Representative Eilberg's proposal). Eilberg's proposal appeared in multiple bills before dropping out of the final Refugee Act.

⁹⁶ *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigr., Citizenship, & Int'l L. of the H. Comm. on the Judiciary*, 95th Cong. 60, 63 (1977) (testimony of John W. DeWitt, Deputy Administrator, U.S. State Department, opposing this provision); see also *Admission of Refugees into the United States, Part II: Hearings Before the Subcomm. on Immigr., Citizenship, & Int'l L. of the H. Comm. on the Judiciary*, 95th Cong. 216–20, 227 (1978) (testimony of INS Commissioner Leonel J. Castillo opposing this part of Eilberg's proposal as "too harsh," "entirely out of line with this country's humanitarian principles," and inconsistent with Article 33 of the Refugee Convention).

⁹⁷ See May 1979 Hearings, *supra* note 94 (testimony of A. Whitney Ellsworth and Hurst Hannum emphasizing how this change was necessary to harmonize the INA with Article 31 of the Refugee Protocol).

⁹⁸ For a taste of these hearings, see, for example, *U.S. Refugee Programs: Hearing Before the S. Comm. on the Judiciary*, 96th Cong. (1980) (416 pages); *The Refugee Act of 1979: Hearings on H.R. 2816, Before the Subcomm. on Int'l Operations of the H. Comm. of Foreign Affs.*, 96th Cong. (1979) (104 pages); May 1979 Hearings, *supra* note 97 (466 pages); *Refugee Act of 1979: Hearings Before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. on the Judiciary*, 96th Cong. (1979) (400 pages).

Department, and members of Congress were well aware that refugees were entering the United States outside official ports of entry. Yet, the legislative history of the Refugee Act does not indicate that members of Congress foresaw the possibility that federal prosecutors might try to use the INA to punish refugees for illegal entry or reentry. As far as Congress and the Executive Branch were concerned, the criminal penalties for illegal entry and reentry were designed solely for unauthorized economic migrants, not refugees.

After passing the Refugee Act, Congress continued to tinker with the definitions of immigration crimes and their associated penalties. It amended the criminal prohibitions against illegal entry and reentry through a series of legislative enactments that included the Anti-Drug Abuse Act of 1988,⁹⁹ the Immigration Act of 1990,¹⁰⁰ the Violent Crime Control and Law Enforcement Act of 1994,¹⁰¹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹⁰² Collectively, the legislative history for these acts runs tens of thousands of pages, reflecting Congress's sustained engagement with the challenge of containing unauthorized migration.¹⁰³ Yet, even as Congress repeatedly revised the INA in an effort to "address the problem of the 'revolving door' at the southern land border" for economic migrants,¹⁰⁴ no one involved in these debates ever raised the possibility that refugees might also be vulnerable to prosecution for illegal entry or reentry. The best reading of the historical record as a whole, therefore, is that Congress designed the INA's criminal prohibitions against illegal entry and reentry with ordinary economic migrants in mind, believing that refugees were subject to different rules.

C. Stumbling into Refugee Prosecution

Piecing together how and why the federal government began prosecuting refugees requires further detective work. The best available

⁹⁹ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4469–72.

¹⁰⁰ Immigration Act of 1990, Pub. L. No. 101-649, §§ 121(b)(2)–(3), 543(b)(2)–(3), 104 Stat. 4978, 4994, 5059.

¹⁰¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 13001, 108 Stat. 1796, 2023.

¹⁰² Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 307, 110 Stat. 3009-546, 3009-612.

¹⁰³ In preparing to write this Article, my research team reviewed the entire legislative history of 8 U.S.C. §§ 1325(a) and 1326, as well as the Refugee Protocol and the Refugee Act. A comprehensive list of the relevant materials, comprising tens of thousands of pages, is on file with the author.

¹⁰⁴ IMMIGRATION IN THE NATIONAL INTEREST ACT OF 1995, H.R. REP. NO. 104-469, pt. 1, at 155 (1996).

evidence indicates that federal agencies embraced refugee prosecution as official Executive Branch policy only relatively recently, after decades of rejecting the idea that refugees were criminally liable for illegal entry and reentry.

Prior to the twenty-first century, refugee prosecution appears to have been virtually nonexistent. During the 1980s and 1990s, a handful of cases popped up in the Federal Reporter and Federal Supplement featuring criminal defendants who asserted that they were refugees fleeing persecution. In nearly all of these cases, prosecutors contested the defendants' assertions that they were refugees, and courts agreed that the defendants had failed to prove a well-founded fear of immediate harm in their home countries.¹⁰⁵ Only two cases involved prosecutors deliberately bringing charges against refugees. Further, the record in those cases indicates that the defendants were not entitled to enter the United States because they had engaged in the persecution of others or had committed particularly serious crimes in the United States.¹⁰⁶ Thus, federal case law suggests that for at least two decades after the Refugee Act, federal prosecutors did not deliberately target admissible refugees for prosecution for illegal entry or reentry.¹⁰⁷

However, the 9/11 terrorist attacks brought about a sea change in the Executive Branch's approach to immigration enforcement. In the wake of the attacks, Congress committed civil immigration enforcement to a new agency, the Department of Homeland Security (DHS), reflecting a fundamental shift in emphasis toward a more security-focused approach to immigration policy.¹⁰⁸ DOJ also allocated more resources to the prosecution

¹⁰⁵ See, e.g., *United States v. Polanco-Gomez*, 841 F.2d 235, 238 (8th Cir. 1988); *United States v. Simo*, 68 F. Supp. 2d 706, 710–11 (E.D. Va. 1999).

¹⁰⁶ See *United States v. Joya-Martinez*, 947 F.2d 1141, 1142 (4th Cir. 1991) (noting that the defendant had been “a member of a death squad and that on eight occasions, under official orders, he murdered prisoners after brutal interrogations”); *United States v. Nwene*, 20 F. Supp. 2d 716, 717–18 (D.N.J. 1998) (considering the case of an asylum-seeker who had been removed previously based on an aggravated felony conviction for bank larceny).

¹⁰⁷ Given the prevalence of plea bargaining in federal criminal law, it is impossible to rule out the possibility that refugee prosecution may have been practiced to some degree during this period. Nonetheless, the absence of published decisions reflecting any such practice is noteworthy. At a minimum, the absence of any published evidence of refugee prosecution offers a good reason to reject the possibility that Congress might have implicitly endorsed the practice when it reenacted §§ 1325(a) and 1326 during the 1980s and 1990s.

¹⁰⁸ See Homeland Security Act of 2002, Pub. L. No. 107–296, §§ 101, 402(3), 116 Stat. 2135, 2142, 2153 (codified at 6 U.S.C. § 111). See generally Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1373, 1398–1404 (2007) (explaining “how national security concerns have come to dominate” immigration policy, sidelining other economic, political, and social concerns).

of immigration crimes, causing immigration-related convictions to skyrocket. By 2004, federal judges were sentencing over 30,000 people a year for immigration crimes—roughly a four-fold increase from a decade earlier.¹⁰⁹

In 2005, DHS rolled out a new initiative to tackle unauthorized migration across the southern border. Dubbed “Operation Streamline,” this program encouraged federal prosecutors to bring criminal charges against foreign migrants apprehended for entering the United States without inspection.¹¹⁰ First-time offenders would be held in federal prisons pending fast-track criminal hearings before magistrate judges, followed by expedited removal proceedings or hearings in immigration court.¹¹¹ For repeat offenders, federal prosecutors had a choice. They could charge a foreign national with felony illegal reentry and send her to federal district court. Alternatively, they could invite her to plead guilty to the lesser offense of misdemeanor illegal entry and route her to a magistrate judge for conviction and sentencing alongside first-time offenders.¹¹²

During this period, DOJ pressed charges against some refugees who entered the United States without inspection.¹¹³ For example, in *United States v. Vazquez-Landaver*, federal prosecutors brought criminal charges against an asylum-seeker from El Salvador who had used human smugglers to enter the United States without inspection after receiving threats from corrupt police officers in his home country.¹¹⁴ Similarly, in *United States v. Xian Long Yao*, a Chinese national who feared persecution for violating China’s one-child policy faced criminal charges for illegally reentering Guam.¹¹⁵ In both cases, the Ninth Circuit assumed that the defendants were vulnerable to prosecution and rejected the defendants’ necessity and duress defenses.¹¹⁶

¹⁰⁹ Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 139 (2009).

¹¹⁰ Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 125–27, 126 n.320 (2012).

¹¹¹ *Id.*

¹¹² AM. IMMIGR. COUNCIL, FACT SHEET: PROSECUTING MIGRANTS FOR COMING TO THE UNITED STATES (2018), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions> [<https://perma.cc/RKS5-BUT9>].

¹¹³ *See, e.g.*, *United States v. Vasquez-Landaver*, 527 F.3d 798 (9th Cir. 2008); *United States v. Xian Long Yao*, 302 F. App’x 586 (9th Cir. 2008); *cf.* *United States v. Malenge (Malenge II)*, 294 F. App’x 642 (2d Cir. 2008) (charged based on false personation, misuse of a passport, and false use of a passport); *United States v. Barry (Barry II)*, 294 F. App’x 641 (2d Cir. 2008) (same).

¹¹⁴ *Vasquez-Landaver*, 527 F.3d at 800–01, 806.

¹¹⁵ *Xian Long Yao*, 302 F. App’x at 587–88.

¹¹⁶ *See Vasquez-Landaver*, 527 F.3d at 800–01; *Xian Long Yao*, 302 F. App’x at 587–88.

In 2012, the Obama Administration expanded Streamline proceedings nationwide, producing another massive spike in the prosecution of immigration crimes.¹¹⁷ In 2013 alone, the Justice Department brought over 91,200 cases for illegal entry and reentry, a 500% increase from a decade earlier.¹¹⁸ The following year, half of all federal arrests were for immigration-related offenses.¹¹⁹ CBP, the division of DHS responsible for apprehending irregular migrants at the border, “made more arrests in 2014 (64,954) than all of the agencies within DOJ combined (58,265).”¹²⁰ Flooded with illegal entry and reentry cases, magistrates in some locations decided up to eighty cases per day,¹²¹ often combining a defendant’s initial appearance, arraignment, plea, and sentencing into a single hearing.¹²² Nearly three-quarters of a million people were prosecuted for illegal entry or reentry between 2005 and 2016, at an estimated cost of \$7 billion.¹²³ Ninety-nine percent of the defendants in these proceedings pleaded guilty.¹²⁴ As a result, federal courts delivered more convictions for illegal entry and reentry during this period than for all other federal crimes combined.¹²⁵ The era of mass immigration incarceration was now in full swing.

As criminal immigration enforcement gained momentum under the Bush and Obama Administrations, immigrant-rights advocates expressed

¹¹⁷ Keller, *supra* note 110, at 123–24. The Obama Administration eventually rebranded Operation Streamline as the “Criminal Consequence Initiative.” Lomi Kriel, *Streamlined: Trump Pressing for Mass Criminalization of Illegal Border Crossers*, HOUS. CHRON., <http://www.houstonchronicle.com/news/houston-texas/article/Trump-pressing-for-mass-criminalization-of-11962046.php> [<https://perma.cc/2C57-KGDH>].

¹¹⁸ Kriel, *supra* note 117. This spike in prosecutions coincided with a similarly explosive increase in deportations. See ACLU, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2* (2004) (observing that the United States conducted 438,421 deportations in 2013).

¹¹⁹ Kriel, *supra* note 117.

¹²⁰ John Gramlich & Kristen Bialik, *Immigration Offenses Make Up a Growing Share of Federal Arrests*, PEW RSCH. CTR. (Apr. 10, 2017), <https://www.pewresearch.org/fact-tank/2017/04/10/immigration-offenses-make-up-a-growing-share-of-federal-arrests/> [<https://perma.cc/Q2AJ-THVP>].

¹²¹ Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 486 (2010).

¹²² *Id.*; see also Eagly, *supra* note 62, at 1351 (quoting defense attorneys who described these procedures as a “cattle call” or “assembly line”).

¹²³ See JUDITH A. GREENE, BETHANY CARSON & ANDREA BLACK, *INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER*, at viii (2016); Sklansky, *supra* note 64, at 166.

¹²⁴ Lydgate, *supra* note 121, at 484.

¹²⁵ *Id.*; Sklansky, *supra* note 64, at 166.

dismay that Border Patrol agents and federal prosecutors were failing to screen out bona fide refugees.¹²⁶ DHS's Inspector General reported that

Border Patrol does not have guidance on whether to refer to Streamline prosecution aliens who express fear of persecution or fear of return to their home countries. As a result, Border Patrol agents sometimes use Streamline to refer aliens expressing such fear to DOJ for prosecution. Using Streamline to refer aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.¹²⁷

The Inspector General noted further that although some Border Patrol sectors¹²⁸ were referring asylum-seekers to federal prosecutors, others declined to do so, concluding that refugees were “not the ‘best candidates’ for Streamline prosecution.”¹²⁹ Moreover, CBP “officials at headquarters were unsure whether it is permissible to refer aliens expressing fear [of persecution] to Streamline.”¹³⁰

Spurred by the Inspector General's inquiry, CBP doubled down on refugee prosecution:

CBP . . . responded that it is imperative the criminal and administrative processes be separate avenues. Inclusion in one does not exclude inclusion in the other. CBP can prosecute an undocumented alien criminally, while at the same time the alien makes a claim to credible fear administratively. Neither process affects the outcome of the other. The fact that an undocumented alien is being prosecuted does not influence the outcome of his or her credible fear claim. The claim of credible fear cannot be used as a criterion to exclude an undocumented alien from a possible prosecution for a criminal act.¹³¹

Consistent with new policy, the Chief of Border Protection issued a guidance memorandum in November 2014 directing that unlawful entrants in Streamline proceedings should be referred for prosecution, irrespective of whether they claimed a credible fear of persecution abroad.¹³²

¹²⁶ Emily Puhl, *Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol*, 25 BERKELEY LA RAZA L.J. 87, 94 (2015).

¹²⁷ INSPECTOR GENERAL, *supra* note 29, at 16.

¹²⁸ Border Patrol sectors are centrally supervised CPB divisions comprised of stations from which Border Patrol agents operate. See *Border Control Sectors*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors> [<https://perma.cc/982Z-56GC>].

¹²⁹ INSPECTOR GENERAL, *supra* note 29, at 17.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

Refugee prosecution became further entrenched in Executive Branch policy after Donald Trump’s inauguration in January 2017. Just days after taking office, President Trump signed an executive order calling on the Attorney General to make prosecuting immigration crimes a “high priority.”¹³³ Attorney General Jeff Sessions later implemented this direction by issuing an official “zero tolerance” policy for irregular immigration along the southern border.¹³⁴ U.S. Attorney’s Offices would thereafter be required “to prosecute all Department of Homeland Security referrals of [illegal entry and reentry] violations, to the extent practicable.”¹³⁵

Immigration prosecutions once again rose dramatically.¹³⁶ Over the twelve months following Attorney General Sessions’s announcement of the zero-tolerance policy, DOJ initiated over 8,000 prosecutions for immigration crimes every single month.¹³⁷ Although not expressly targeted at refugees per se, the zero-tolerance policy established a department-wide expectation that prosecutors would endeavor (within the limits of available resources) to bring charges against every foreign national who attempted illegal entry or reentry, irrespective of refugee status.¹³⁸ Consequently, defense attorneys observed a spike in the number of asylum-seekers targeted for prosecution after the zero-tolerance policy arrived on the scene.¹³⁹

D. Misjudging Refugees

As criminal charges against asylum-seekers have flooded federal courts, district judges and magistrates who handle these cases have

¹³³ Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

¹³⁴ Zero-Tolerance, *supra* note 5.

¹³⁵ *Id.*

¹³⁶ See HUMAN RIGHTS FIRST, *supra* note 1, at 4 (“After implementing Sessions’ memos, the federal court in Tucson, Arizona went from hearing between 10 and 40 cases a day to regularly hearing 75 per day—an increase fueled by prosecutions of first-time entrants.”); Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1984–86 (2020) (documenting a sharp spike in prosecutions for illegal entry after the zero-tolerance announcement).

¹³⁷ See TRAC, *supra* note 8 (providing a chart tracking monthly immigration prosecutions during this period).

¹³⁸ See Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/C92V-9LHD>] (announcing that “the Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution” and that “the Department of Justice will take up those cases”).

¹³⁹ See HUM. RTS. FIRST, ZERO-TOLERANCE CRIMINAL PROSECUTIONS: PUNISHING ASYLUM SEEKERS AND SEPARATING FAMILIES 1 (2018) (“Criminal prosecutions of asylum seekers . . . have sharply increased since the implementation of the zero-tolerance policy, with many federal courts experiencing record high numbers.”).

concluded that a defendant's refugee status does not preclude criminal prosecution.¹⁴⁰ For example, Magistrate Judge Bernardo P. Velasco, who has presided over Streamline proceedings in Tucson, has asserted: "We have criminal courts and civil immigration courts. A credible claim of fear is no defense to a criminal prosecution."¹⁴¹ His colleague, Magistrate Judge Eric J. Markovich, has offered a similar assessment:

Defense lawyers will frequently say their client has a 'credible fear' of being returned to their home country. I tell people that they'll have to bring this up later in immigration court. I don't mean to cut people off, but I'm not an immigration judge and I have no real legal authority to do anything about this issue.¹⁴²

Comparable statements appear in recent opinions of the U.S. Court of Appeals and federal district courts.¹⁴³ These courts have simply assumed that refugees are vulnerable to prosecution for illegal entry and reentry without engaging in a rigorous way with the INA's text, context, and purpose. Nor have they considered whether refugee prosecution under the INA is consistent with traditional canons of federal statutory interpretation, such as the *Charming Betsy* canon, the canon on constitutional avoidance, and the rule of lenity. The conventional wisdom today, therefore, is that the prohibitions against illegal entry and reentry apply equally to refugees and nonrefugees alike.

One tragic consequence is that courts have allowed refugees detained at the border to be separated from their accompanying children. In *United States v. Vasquez-Hernandez*,¹⁴⁴ the Fifth Circuit held that asylum-seekers

¹⁴⁰ See HUMAN RIGHTS FIRST, *supra* note 1, at 9 ("While deciding an asylum claim in the first instance is beyond the jurisdiction of federal district and magistrate courts, Human Rights First did not observe a single case in which a federal judge hesitated to convict and sentence asylum seekers—other than occasionally offering brief words of sympathy . . .").

¹⁴¹ GREENE, CARSON & BLACK, *supra* note 123, at 110 (quoting Magistrate Judge Velasco). Notably, Judge Velasco has been a vocal critic of Operation Streamline. See Tom Roberts, *A 'Maddening' System, from Courtrooms to Shelters*, NAT'L CATH. REP. (July 1, 2011), <https://www.ncronline.org/news/maddening-system-courtrooms-shelters> [<https://perma.cc/KU9M-HZ5X>] (discussing Judge Velasco's criticisms).

¹⁴² GREENE, CARSON & BLACK, *supra* note 123, at 110 (quoting Magistrate Judge Markovich); see also Kriel, *supra* note 117 (describing how Magistrate Judge Collis White told asylum-seekers in Del Rio, Texas that "there was nothing he could do in this court," so "[t]hey would have to take up their claims with an immigration officer after serving their sentence").

¹⁴³ See, e.g., *United States v. Vasquez-Hernandez*, 924 F.3d 164, 1669 (5th Cir. 2019) (concluding that asylum-seekers are "alien[s]" under 8 U.S.C. § 1325(a), and that "[q]ualifying for asylum under 8 U.S.C. § 1158 would not change [their] alien status"); *United States v. Ramirez-Ortiz*, 370 F. Supp. 3d 1151, 1155 (S.D. Cal. 2019) (asserting that "a plain reading of the statutes suggests that . . . Congress chose not to grant immunity to asylum seekers who face criminal prosecution").

¹⁴⁴ 924 F.3d at 164.

from El Salvador and Honduras could not invoke their refugee status as a basis for avoiding criminal detention and family separation pending their prosecution for illegal entry.¹⁴⁵ The court explained that the defendants had not “shown that qualifying for asylum would be relevant to whether they improperly entered, since [the INA’s prohibition against illegal entry] applies to ‘[a]ny alien’ who ‘enters or attempts to enter the United States at any time or place other than as designated by immigration officers.’”¹⁴⁶ Because the defendants had previously “stipulated that they were aliens and entered the United States at a place that was not a port of entry,”¹⁴⁷ the court reasoned that they were proper targets for prosecution under the INA and that their separation from their children pending their criminal trials was therefore permissible.

When federal judges tell asylum-seekers that they cannot invoke their well-founded fear of persecution as a defense to prosecution, the vast majority simply plead guilty.¹⁴⁸ Occasionally, however, refugees have attempted to escape criminal liability by arguing that their well-founded fear of persecution abroad supports a necessity or duress defense. However, federal courts have not been kind to these arguments. Almost without exception, they have concluded that the harms refugees fear are not sufficiently “imminent” to qualify for common law necessity or duress defenses.¹⁴⁹ Moreover, courts have held that these defenses are not ordinarily available to refugees because refugees cannot prove that violating U.S. immigration controls was the only option reasonably available to them to guarantee their safety.¹⁵⁰ The upshot of these decisions seems to be that a

¹⁴⁵ *Id.* at 168–69.

¹⁴⁶ *Id.* at 169.

¹⁴⁷ *Id.*

¹⁴⁸ See HUMAN RIGHTS FIRST, *supra* note 1, at 5, 19–20.

¹⁴⁹ See, e.g., *United States v. Bonilla-Siciliano*, 643 F.3d 589, 591 (8th Cir. 2011) (holding that a defendant’s “generalized fear of harm from the government and gang members . . . did not make a *prima facie* showing” of “an imminent threat of harm”); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802–03 (9th Cir. 2008) (concluding that an asylum-seeker fleeing a threat of persecution in El Salvador had no duress defense because “[a] threat raising the possibility of action after thirty days does not meet the requirements of ‘immediacy,’” and he was not “escaping an immediate threat of harm” at the moment “he violated the law by crossing the border” (internal quotation marks omitted)); *United States v. Brizuela*, No. B-13-CR-476-1, 2014 WL 2257405, at *2 (S.D. Tex. May 29, 2014) (“Defendant’s testimony that he generally feared for his life in El Salvador . . . is insufficient to meet the imminent harm element of duress.”); *United States v. Ramirez-Chavez*, No. 13–00490 DAE, 2013 WL 3581959, at *4 (W.D. Tex. July 2, 2013) (“Fear of future harm does not satisfy the present, imminent, and impending threat requirement.”).

¹⁵⁰ See, e.g., *Bonilla-Siciliano*, 643 F.3d at 591 (holding that a defendant from El Salvador could not “show that he lacked a reasonable, legal alternative to illegally reentering the United States, because he did not exclude the option of going to a country other than the United States or the handful of others that

refugee cannot make out a successful necessity or duress defense unless her persecutors chase her literally all the way to the U.S. border.¹⁵¹

Surprisingly, the more basic predicate for refugee prosecution—the assumption that the INA’s criminal provisions apply to refugees—has yet to be subjected to rigorous judicial scrutiny. Federal judges simply take for granted that refugees can be prosecuted for illegal entry and reentry. On occasion, some have criticized refugee prosecution, lamenting that the practice “is fundamentally inconsistent with the policies and obligations of the federal government with regard to the treatment of refugees.”¹⁵² Thus far, however, legal scholars and defense attorneys have not presented courts with a successful argument for disallowing the practice entirely.

II. IS PROSECUTING REFUGEES LEGALLY DEFENSIBLE?

In this Part, I make the case that the INA does not, in fact, authorize federal courts to penalize refugees for illegal entry or reentry. Contrary to conventional wisdom, I show that the text, context, and purpose of the INA offer substantial grounds to question the legality of refugee prosecution. Moreover, traditional principles of federal statutory interpretation counsel against interpreting the INA to authorize criminal penalties against refugees for illegal entry and reentry. Federal prosecutors should therefore abandon refugee prosecution, and federal courts should hold that prosecuting refugees is legally indefensible.

A. Text, Context, and Purpose

In discerning whether Congress has authorized refugee prosecution, the natural starting point for analysis is the statutory text.¹⁵³ Specifically, our inquiry must begin with the two provisions in Title 8 of the United States Code that criminalize illegal entry and reentry: §§ 1325(a) and 1326.

he stated were dangerous”); *United States v. Grainger*, 239 F. App’x 188, 191–92 (6th Cir. 2007) (concluding that an asylum-seeker who could have taken refuge in Canada on his way to the United States could not establish a necessity defense). *See generally* *United States v. Bailey*, 444 U.S. 394, 410 (1980) (“[I]f there was a reasonable, legal alternative to violating the law, ‘a chance both to refuse to do the criminal act and also to avoid the threatened harm,’ the [duress and necessity] defenses will fail.”).

¹⁵¹ *Compare* *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1076 (9th Cir. 2004) (characterizing the defendant’s testimony that “chased by the police, he jumped over the 15-foot-high border fence” as “central to his duress defense”), *with* *Ramirez-Chavez*, 2013 WL 3581959, at *4 (rejecting the defendant’s duress defense because his kidnappers near the U.S.–Mexico border “were not in hot pursuit” when he “slipped away . . . unnoticed” and “crossed the Rio Grande river without anyone pursuing him”).

¹⁵² *Malenge II*, 294 F. App’x 642, 645 (2d Cir. 2008).

¹⁵³ *See* *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 283 (2011) (“We begin, as in any case of statutory interpretation, with the language of the statute.”).

Section 1326, which imposes criminal penalties for illegal reentry, contains language that easily can be interpreted as exempting refugees from prosecution. Although the text purports to authorize criminal penalties against “any alien” who illegally reenters the country, it immediately pivots to exclude from liability any foreign migrant who “establish[es] that he was not required to obtain [the Attorney General’s] advance consent [to admission] under this chapter or any prior Act.”¹⁵⁴ Since most refugees qualify to enter the United States without obtaining the Attorney General’s discretionary consent in advance,¹⁵⁵ the most natural reading of § 1326 is that refugees enjoy immunity from criminal liability for illegal reentry.¹⁵⁶ Thus, while the text of § 1326 is not free from ambiguity, there is a powerful argument that it does not apply on its face to refugees.

Section 1325(a) uses broad language to authorize criminal penalties against

[a]ny alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.¹⁵⁷

On first impression, the words “[a]ny alien” might appear to encompass refugees. When courts encounter the word “any” in federal statutes, they usually interpret it expansively in accordance with its ordinary semantic meaning.¹⁵⁸ In light of this established practice, it is not hard to see why

¹⁵⁴ 8 U.S.C. § 1326(a).

¹⁵⁵ See *id.* § 1231(b)(3)(A) (providing that withholding of removal is not subject to the Attorney General’s discretion); *cf. id.* § 1158(a)(1) (providing that refugees may qualify for asylum “irrespective of [their immigration] status” and regardless of whether “[they are] at a designated port of arrival”). Under the Refugee Convention and the INA, limited exceptions apply to refugees who are subject to exclusion based on their having participated in the persecution of others on account of a protected ground, their commission of a serious nonpolitical crime outside the United States, or where there are “reasonable grounds to believe that the alien is a danger to the security of the United States.” *Id.* § 1231(b)(3)(B); see also Refugee Convention, *supra* note 12, art. 1(F) (excluding refugees from the Convention’s protection for these reasons).

¹⁵⁶ See *Gomez-Lopez v. United States*, Nos. CV–14–0435–PHX–FJM (JFM), CR–12–0596–PHX–FJM, 2014 WL 4639517, at *1–2 (D. Ariz. Sept. 16, 2014) (noting that defendant had raised this argument, but dismissing the case as time-barred); Puhl, *supra* note 126, at 104–05 (advancing this argument). So far, this reading has not gained traction with federal prosecutors and judges. See, e.g., *United States v. Castro-Rivas*, 180 F. App’x 528, 528–29 (5th Cir. 2006) (concluding that refugees are subject to criminal liability for illegal reentry).

¹⁵⁷ 8 U.S.C. § 1325(a).

¹⁵⁸ See, e.g., *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))); *Hui Ran Mu v. Barr*, 936 F.3d 929, 933–35 (9th

judges and prosecutors have concluded time and again that § 1325(a) applies to refugees.¹⁵⁹

Nonetheless, this reading is too simplistic. As the late Justice Antonin Scalia and Bryan Garner have recognized, even “[s]eemingly absolute criminal prohibitions” that use capacious terms like “any” and “every” can sustain limiting interpretations.¹⁶⁰ This is most obviously true in the criminal context, where Congress legislates against a rich backdrop of substantive interpretive canons.¹⁶¹ It is also true of federal refugee law, where the Supreme Court has held that seemingly absolute prohibitions may support implicit exceptions that are necessary to fulfill the Refugee Act’s humanitarian purposes.¹⁶² This approach reflects the Court’s recognition that maintaining a blinkered focus on particular provisions of the INA, without attending to how those individual threads fit into the statute’s broader tapestry for refugee protection, can produce distorted readings that do violence to the INA’s overarching purposes.¹⁶³ For this reason, the Court has taken special care to avoid interpretive myopia by considering the INA’s full text, history, and purposes whenever it seeks to discern the meaning of particular provisions.

An illuminating example of this approach is *Negusie v. Holder*,¹⁶⁴ where the Supreme Court examined an INA provision that bars “any person” from receiving asylum or withholding of removal if she has contributed to the

Cir. 2019) (holding that the words “any alien” have a broad meaning that reaches derivative beneficiaries of a visa recipient); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012) (discussing the general-terms canon, which provides that “general words,” absent “some indication to the contrary,” should “be accorded their full and fair scope”).

¹⁵⁹ See, e.g., *supra* note 143.

¹⁶⁰ SCALIA & GARNER, *supra* note 158, at 106; see also *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1750–51 (2019) (concluding in an opinion authored by Justice Thomas that the “context” of the Class Action Fairness Act “demonstrates that Congress did not” mean for a provision authorizing “any defendant” to remove a class action to federal court to authorize removal by counterclaim defendants); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (“[W]e are not to read general words, such as [the words ‘[e]very person’] in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers.”).

¹⁶¹ See SCALIA & GARNER, *supra* note 158, at 106 (emphasizing that mens rea canons narrow even criminal prohibitions that are phrased in absolute terms (e.g., “no person may”).

¹⁶² See, e.g., *Negusie v. Holder*, 555 U.S. 511, 519–20 (2009).

¹⁶³ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor.”).

¹⁶⁴ 555 U.S. 511.

persecution of others.¹⁶⁵ The central question in *Negusie* was whether this “persecutor bar” applied “even if the [petitioner]’s assistance in persecution was coerced or otherwise the product of duress.”¹⁶⁶ The government asserted that because the statutory text did not articulate an express exception for acts committed under coercion or duress, no such exception could be inferred.¹⁶⁷ However, the Supreme Court disagreed:

The silence is not conclusive. The question is whether the statutory text mandates that coerced actions must be deemed assistance in persecution. On that point the statute, in its precise terms, is not explicit. Nor is this a case where it is clear that Congress had an intention on the precise question at issue.¹⁶⁸

The Court concluded therefore that it should “look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy,”¹⁶⁹ including the statute’s evident purpose “to implement the principles agreed to in the [Refugee Convention and Protocol].”¹⁷⁰ Because these contextual considerations did not definitively resolve the textual ambiguity, the Court remanded the case to the agency for further consideration.¹⁷¹

The Court followed a similar approach in *Fernandez-Vargas v. Gonzales*.¹⁷² The controversy in *Fernandez-Vargas* centered on the INA section that disqualifies refugees from receiving “any relief” from removal if they entered the United States outside a designated port of entry after having received a final order of removal.¹⁷³ Notwithstanding the seemingly absolute prohibition against “any relief,” the Supreme Court followed the Attorney General’s lead in construing the provision narrowly to disallow only *discretionary* forms of relief from removal (i.e., asylum), while leaving intact nondiscretionary relief (i.e., withholding of removal and protection

¹⁶⁵ *Id.*; 8 U.S.C. § 1101(a)(42).

¹⁶⁶ 555 U.S. at 514 (paraphrasing the BIA’s determination that the “persecutor bar” does apply to the circumstances in question).

¹⁶⁷ *Id.* at 518 (citing the government’s brief).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 519 (quoting *Dada v. Mukasey*, 554 U.S. 1, 16 (2008)).

¹⁷⁰ *Id.* at 520 (internal quotation marks omitted) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999)).

¹⁷¹ *Id.* at 523–25; *see also id.* at 525 (Scalia, J., concurring) (agreeing that the persecutor bar is materially ambiguous). Only Justice Clarence Thomas concluded that the absence of an explicit voluntariness requirement in the persecutor bar precluded interpreting the provision to include an implicit coercion or duress exception. *See id.* at 551–54 (Thomas, J., dissenting).

¹⁷² 548 U.S. 30 (2006).

¹⁷³ *Id.*; 8 U.S.C. § 1231(a)(5).

under the Convention Against Torture (CAT)).¹⁷⁴ Although the Court did not offer a robust defense of this interpretation, it apparently concluded that the provision was sufficiently ambiguous—given the INA’s overarching commitment to refugee protection—to justify deference to the Attorney General’s narrowing interpretation.¹⁷⁵ Consequently, the INA’s seemingly categorical bar to “any relief” has not prevented lower courts from declaring that “withholding from removal and CAT protection—both forms of [nondiscretionary] relief—are actually still available to individuals in reinstatement proceedings.”¹⁷⁶

Taking cues from these cases, federal courts should acknowledge that §§ 1325(a) and 1326 are ambiguous with respect to whether they apply to refugees. This is most evident in § 1326, which specifies that all those who need not gain advance consent from the Attorney General for admission are free from criminal liability for illegal reentry. Although § 1325(a) does not contain similar language, Congress’s “silence” on this score “is not conclusive” because “the statute, in its precise terms, is not explicit” as to whether refugees—who qualify for admission irrespective of where they enter the United States—are subject to criminal penalties for illegal entry.¹⁷⁷ Just like the *Negusie* petitioner, refugees can show that their acts were compelled by threats to their life or basic freedom, thereby justifying and excusing their irregular migration into the United States. At a minimum, these factors raise serious questions about whether refugees—a distinctive category of migrants who are eligible for admission under the INA—can be prosecuted for illegal entry or reentry.

¹⁷⁴ See *Fernandez-Vargas*, 548 U.S. at 35 n.4; 8 C.F.R. § 1241.8(e) (“If an alien [who] . . . has been reinstated . . . expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture . . .”); cf. *id.* § 1208.16(c)(4) (prescribing procedures for evaluating claims to CAT relief in such cases); *id.* § 1208.31(e) (prescribing procedures for evaluating claims to withholding of removal in such cases).

¹⁷⁵ See *Fernandez-Vargas*, 548 U.S. at 35 n.4 (“Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to § 241(a)(5) may seek withholding of removal . . . , or under [CAT] . . .”).

¹⁷⁶ *Cazun v. Att’y Gen.*, 856 F.3d 249, 256 (3d Cir. 2017).

¹⁷⁷ *Negusie v. Holder*, 555 U.S. 511, 518 (2009). When Congress includes an express exception “in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). This presumption makes little sense as applied to the relationship between §§ 1325(a) and 1326, however, because it would lead to the absurd result that refugees could be prosecuted for an initial irregular entry, but not for reentering immediately after a previous order of removal.

Expanding the frame of reference to the full text of the INA and related legislation offers further illumination.¹⁷⁸ The Refugee Act’s preambular statement of purpose emphasizes that the Act’s provisions—which do not mention penalties of any kind—constitute the United States’ “comprehensive” regulatory framework for refugee admissions.¹⁷⁹ This declaration is consistent with the INA’s historical development through its various amendments—a process that reflects Congress consistently distinguishing nonrefugee migrants (to whom the criminal prohibitions against illegal entry and reentry would apply) from refugees (who were to receive special solicitude, consistent with the Refugee Protocol). Moreover, the notion that §§ 1325(a) and 1326 apply to refugees is counterintuitive, given that the INA expressly permits refugees to access asylum and withholding of removal irrespective of where or how they entered the United States.¹⁸⁰ These features of the INA reflect Congress’s commitment to protect all refugees at or within the United States’ borders—including those who entered U.S. territory outside an official port of entry. Thus, even if the full text of the INA and the Refugee Act might not conclusively foreclose the possibility that refugees are criminally liable for illegal entry and reentry, at a minimum they offer substantial reasons to question that conclusion.

A defender of refugee prosecution might draw attention to other features of the INA’s full text. For example, the INA expressly authorizes the Attorney General to exempt refugees from civil fines for failure to present for inspection the travel documents they used to reach the United States through a common carrier.¹⁸¹ If Congress expressly provided for a waiver of civil liability in § 1324c, doesn’t this mean that other provisions in the INA that don’t provide a waiver, such as §§ 1325(a) and 1326, should be understood to authorize penalties against refugees (*inclusio unius est exclusio alterius*)?

Not likely. To be sure, the fact that one provision in an act contains an express exception while another in the same act does not often offers valuable insight into Congress’s intent.¹⁸² This inference is not persuasive as

¹⁷⁸ See SCALIA & GARNER, *supra* note 158, at 167 (observing that “no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and the physical and logical relation of its many parts”).

¹⁷⁹ See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

¹⁸⁰ Pursuant to the Refugee Act, refugees may qualify for asylum and withholding of removal “irrespective of [their immigration] status” and “whether or not [they are] at a designated port of arrival.” 8 U.S.C. § 1158(a)(1) (asylum); *id.* § 1231(b)(3)(A) (withholding of removal).

¹⁸¹ See 8 U.S.C. § 1324c(a)(6), (d)(7).

¹⁸² See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

applied to § 1324c, however, because it ignores a key difference between that provision and §§ 1325(a) and 1326. Namely, when Congress amended § 1324c(a)(6) of the INA in 1996 to authorize civil fines against foreign nationals who failed to present travel documents to immigration officers,¹⁸³ it targeted conduct *outside* the scope of the United States' obligations under the Refugee Protocol. The Refugee Protocol does not obligate the United States to refrain from penalizing refugees for failing to present the travel documents they used to reach a port of entry. Accordingly, the then-prevailing understanding that the INA exempted refugees from penalties for illegal entry and reentry would not have covered this conduct. If Congress wanted to exempt refugees from civil penalties under § 1324c(a)(6), it could not rely on courts to use the Refugee Protocol as an interpretive guide; rather, it would have to make this exception textually unambiguous. Congress therefore had special reason to make explicit that the Attorney General could waive these “new civil penalties” for refugees.¹⁸⁴ This “special need for an express provision undermines any temptation to invoke the interpretive maxim *inclusio unius est exclusio alterius*.”¹⁸⁵

The INA's legislative history further supports the view that Congress has not authorized refugee prosecution for illegal entry and reentry. As explained in Part I, a “primary purpose[.]” of the Refugee Act was to ensure that U.S. immigration law satisfied the United States' obligations under the Refugee Protocol.¹⁸⁶ Although Congress spent three years refining the Refugee Act to ensure that U.S. immigration law would satisfy the Refugee Protocol, no participant in these debates—including the Attorney General, the federal government's chief law enforcement officer—appears to have believed that §§ 1325(a) and 1326 were inconsistent with Article 31 of the Refugee Convention.¹⁸⁷ Viewed in historical context, therefore, the absence of any reference to refugee prosecution in the legislative record is a

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (alteration in original) (quoting *Russello*, 464 U.S. at 23)); *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (placing weight on the fact that Congress had included a voluntariness limitation in one provision of the Displaced Persons Act but not in another provision).

¹⁸³ IIRIRA, Pub. L. No. 104-208, § 212, 110 Stat. 3009-546, 3009-570-71 (1996).

¹⁸⁴ *Id.*

¹⁸⁵ *Holland v. Florida*, 560 U.S. 631, 648 (2010).

¹⁸⁶ *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from the legislative history of . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Refugee Protocol].”); see also H.R. REP. NO. 96-608, at 18 (1979) (memorializing the House Judiciary Committee's conclusion that the Refugee Act was necessary to ensure “that U.S. statutory law clearly reflects our legal obligations under international agreements”).

¹⁸⁷ See *supra* notes 94-98 and accompanying text.

paradigmatic example of “the [watch] dog that did not bark” in the night.¹⁸⁸ Had members of Congress foreseen that criminal penalties might apply to refugees, it is unimaginable that this would have escaped comment during the deliberations that produced the Refugee Convention—particularly given that members of Congress were keenly aware that refugees were entering the United States outside designated ports of entry.¹⁸⁹ On the rare occasion when members of Congress addressed the prospect of penalizing refugees for illegal entry, the idea excited fierce resistance from the Executive Branch and was soundly rejected by members of Congress based on concerns that it would be morally unconscionable and violate the United States’ international obligations.¹⁹⁰ Moreover, when Congress later amended §§ 1325(a) and 1326 in the 1980s and 1990s, legislators gave no sign that they anticipated refugees would be subject to prosecution. To the contrary, they appear to have contemplated that asylum-seekers at the border would receive refugee status determinations, only after which they might face prosecution for illegal entry or reentry if an asylum officer or immigration judge rejected their petitions for protection.¹⁹¹

¹⁸⁸ *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335 (1927)); *see also id.* at 396 (“We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history . . .”); *cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”). In *INS v. St. Cyr*, the Supreme Court relied in part on a similar inference from legislative history to support its holding that provisions of the Antiterrorism and Effective Death Penalty Act and IIRIRA did not apply retroactively to petitions for discretionary relief filed before these acts entered force. 533 U.S. 289, 320 n.44 (2001) (first citing *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); and then citing *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (supporting this proposition)). Outside the immigration context, the Court has applied similar inferences from legislative silence in a variety of cases. *See, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 91 (2007) (placing weight on the fact that “[n]o one” involved in deliberations over the federal Impact Aid Act “expressed the view that this statutory language . . . was intended to require, or did require, the Secretary to change the Department’s system of calculation”); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (“[T]he fact that [impacts on federalism] are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State.”).

¹⁸⁹ *See supra* text accompanying notes 95–97.

¹⁹⁰ *See supra* text accompanying notes 95–97.

¹⁹¹ *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. REP. NO. 104-828, pt. 2, at 209–10 (1996) (Conf. Rep.) (outlining these procedures for refugee status determinations and explaining that under IIRIRA, asylum-seekers who are unsuccessful in establishing their refugee status in immigration court may not collaterally challenge their removal orders in subsequent criminal prosecutions for illegal entry or reentry).

Taking this historical context into account, it seems reasonable to infer that when Congress last amended §§ 1325(a) and 1326, without changing the text of these provisions, it implicitly endorsed the contemporaneous understanding that refugees were not subject to criminal liability.¹⁹² Although this inference might not place the meaning of §§ 1325(a) and 1326 beyond all doubt, it bolsters the conclusion that prosecuting refugees for illegal entry and reentry would not reflect “a fair understanding of the legislative plan” for refugee protection as set out in the Refugee Act.¹⁹³

Thus, attention to the whole text, context, and purposes of the INA raises serious reasons to doubt whether §§ 1325(a) and 1326 apply to refugees. When seeking to resolve the lingering ambiguity in these provisions, the judiciary should bear in mind that “criminal laws are for courts, not for the Government, to construe.”¹⁹⁴ Hence, the interpretations that DHS and DOJ have offered for §§ 1325(a) and 1326 are not entitled to any deference in federal courts.¹⁹⁵ Instead, the courts should seek guidance from traditional tools of federal statutory interpretation.

B. *Canons of Statutory Interpretation*

Three interpretive canons, in particular, confirm that refugees are not criminally liable for illegal entry or reentry: the *Charming Betsy* canon, the canon on constitutional avoidance, and the rule of lenity.

1. *The Charming Betsy Canon*

Although conventional wisdom holds that the Refugee Protocol is a non-self-executing treaty,¹⁹⁶ courts may still use the Refugee Protocol as a

¹⁹² See *United States v. Cerecedo Hermanos y Compañía*, 209 U.S. 337, 339 (1908) (“[R]e-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction.”).

¹⁹³ *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“A fair reading of legislation demands a fair understanding of the legislative plan.”); cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 142–43 (2000) (concluding that although tobacco products could not be deemed “safe” within the meaning of the Food, Drug, and Cosmetics Act, the legislative record as a whole indicated that Congress implicitly exempted cigarettes from the Act’s coverage).

¹⁹⁴ *Abramski v. United States*, 573 U.S. 169, 191 (2014).

¹⁹⁵ See *United States v. Apel*, 571 U.S. 359, 369 (2014) (“[W]e have never held that the Government’s reading of a criminal statute is entitled to any deference.”).

¹⁹⁶ Federal courts have overwhelmingly rejected the idea that the Refugee Protocol endows migrants with rights that are enforceable in domestic courts. See, e.g., *United States v. Velasquez-Luna*, No. 18-mj-11463-WQH, 2019 WL 338947, at *2 (S.D. Cal. Jan. 28, 2019) (“The Protocol does not confer judicially enforceable rights that preclude his prosecution under [§ 1325(a)] for eluding inspection and examination.”); *United States v. Guevara-Medina*, No. 18-mj-9443 BTM, 2018 WL 3970092, at *1 (S.D. Cal. Aug. 20, 2018) (“Defendant cannot rely on Article 31(1) of the Protocol to challenge his [§ 1325(a)] prosecution.”); *United States v. Munoz*, No. CR-17-1078 PHX DGC, 2017 WL 4922047, at *3 (D. Ariz. Oct. 30, 2017) (holding that a defendant “acquired no rights under the 1967 Protocol” and “accordingly

guide to the meaning of §§ 1325(a) and 1326. According to the venerable *Charming Betsy* canon of statutory interpretation, which takes its name from the 1804 case *Murray v. The Schooner Charming Betsy*, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁹⁷ The *Charming Betsy* canon establishes a rebuttable presumption that when courts encounter statutory ambiguity, they should select an interpretation that satisfies the United States’ obligations under international law.¹⁹⁸ This presumption minimizes the potential for friction with foreign powers¹⁹⁹ and ensures that decisions about the United States’ compliance with international law remain firmly in the hands of the politically accountable President and Congress.²⁰⁰

Federal courts have expressed divergent views about what kind of evidence would be sufficient to rebut the *Charming Betsy* presumption. On some occasions, courts have asserted that the presumption can be overcome only by a clear statement from Congress.²⁰¹ In other cases, they have asked

cannot rely on these international agreements as a basis for dismissing his [§ 1326] indictment”). Some legal scholars have argued that some of the Refugee Protocol’s provisions are self-executing. See McDonnell & Merton, *supra* note 33, at 78–94 (arguing for the self-executing nature of Article 31); Carlos Manuel Vázquez, *The “Self-Executing” Character of the Refugee Protocol’s Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39 (1993) (arguing for the self-executing nature of Article 33). This conclusion has become less certain since the Supreme Court indicated in *Medellín v. Texas* that it might require a clear statement in a treaty’s text or ratification history before it will interpret the treaty to be self-executing. See *Medellín v. Texas*, 552 U.S. 491, 517 (2008). But see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 646–67 (2008) (disputing this reading of *Medellín*). But even if Article 31 is self-executing, a *Charming Betsy* analysis is still necessary to explain why later-in-time reenactments of §§ 1325(a) and 1326 do not deprive Article 31 of legal force.

¹⁹⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (affirming this principle); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (same). Although *Charming Betsy* looked to customary international law as a guide to statutory interpretation, the Supreme Court has taken the same approach to treaties of the United States. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 & n.12 (1963); *Cook v. United States*, 288 U.S. 102, 120 (1933) (citing *Chew Heong v. United States*, 112 U.S. 536, 549 (1884)).

¹⁹⁸ See *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003); Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1789 (2011).

¹⁹⁹ See *Serra v. Lappin*, 600 F.3d 1191, 1198–99 (9th Cir. 2010) (“[T]he purpose of the *Charming Betsy* canon is to avoid the negative ‘foreign policy implications’ of violating the law of nations.” (quoting *Weinberger*, 456 U.S. at 32)).

²⁰⁰ See *Bradley*, *supra* note 36, at 525 (describing *Charming Betsy* “as a means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government”).

²⁰¹ See, e.g., *Cook*, 288 U.S. at 120 (“A treaty will not be deemed to have been abrogated or modified by a later statute, unless such a purpose on the part of Congress has been clearly expressed.”); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 214 (S.D.N.Y. 2000) (stating that the *Charming Betsy* “presumption can be overcome only by a clear statement of intent to override international law”).

only for “some affirmative expression” in the statutory text or legislative history “of congressional intent to abrogate the United States’ international obligations.”²⁰² All appear to agree, however, that courts should require at least some affirmative evidence of congressional intent before construing an ambiguous statute to violate international law.²⁰³

The *Charming Betsy* canon applies with full force to §§ 1325(a) and 1326.²⁰⁴ The text of these provisions does not specify unambiguously whether the prohibitions against illegal entry and reentry apply to refugees.²⁰⁵ Nor does the relevant legislative history furnish any affirmative expression—much less a clear statement—that Congress intended to penalize refugees for irregular migration.²⁰⁶ Applying *Charming Betsy* to these provisions would also advance the canon’s core purpose—preventing the courts from generating friction with foreign governments and international organizations²⁰⁷—while also returning the sensitive question of immigration policy to Congress, where it belongs.²⁰⁸ Accordingly, §§ 1325(a) and 1326 are precisely the types of ambiguous statutory provisions that *Charming Betsy* serves to clarify.²⁰⁹

The case for applying *Charming Betsy* to the INA is especially compelling, given Congress’s oft-expressed objective to harmonize federal immigration law with the United States’ obligations under international law. Congress adopted early versions of §§ 1325(a) and 1326 decades before policymakers enshrined special protections for refugees in domestic and

²⁰² *Weinberger*, 456 U.S. at 32.

²⁰³ *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–18 (1993) (Scalia, J., dissenting in part) (citing *Charming Betsy* and “recogniz[ing] the principle that the scope of generally worded statutes must be construed in light of international law”).

²⁰⁴ The fact that the Refugee Protocol is not self-executing under domestic law makes no difference in this analysis. Courts routinely use non-self-executing treaties to elucidate the meaning of ambiguous statutes. *See, e.g., Khan v. Holder*, 584 F.3d 773, 782–83 (9th Cir. 2009); *Hyundai Elecs. Co. v. United States*, 53 F. Supp. 2d 1334, 1343–44 (Ct. Int’l Trade 1999). *See generally* Crotoof, *supra* note 198, at 1801–05 (discussing these and other cases).

²⁰⁵ *See United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003) (explaining that *Charming Betsy* applies only if a statute “employ[s] ambiguous or ‘general’ words”).

²⁰⁶ *See supra* notes 94–98 and accompanying text.

²⁰⁷ *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963) (emphasizing that the *Charming Betsy* canon prevents courts from causing “disturbance” and “embarrassment” to U.S. foreign relations).

²⁰⁸ *See Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”).

²⁰⁹ *See generally Khan*, 584 F.3d at 783 (explaining that under *Charming Betsy* a court should “interpret the INA in such a way as to avoid any conflict with the [Refugee] Protocol, if possible”).

international law.²¹⁰ When the United States joined the Refugee Protocol in 1968, however, both the President and the Senate approved the treaty on the understanding that the INA's criminal prohibitions against illegal entry and reentry were compatible with the Refugee Protocol.²¹¹ And when Congress revisited the United States' obligations under international refugee law a decade later, it enacted the Refugee Act with the express purpose of eliminating any lingering incongruities between the INA and the Refugee Protocol.²¹² The historical record suggests, in other words, that for at least fifty years Congress has been committed to ensuring that federal immigration law satisfies the United States' international obligations. Given this steadfast legislative commitment to international law compliance, courts have especially compelling reasons to apply the *Charming Betsy* canon in this context.

In the past, the Executive Branch has endorsed the *Charming Betsy* canon's guidance that INA provisions should be interpreted to avoid conflicts with Article 31. For example, in 1992, INS published a notice of proposed rulemaking detailing how it intended to implement a newly enacted INA section that authorized civil penalties for travel document fraud.²¹³ When a commentator expressed concern about the agency potentially penalizing refugees in violation of the United States' obligations under the Refugee Protocol, INS Commissioner Gene McNary agreed that this objection was "well taken."²¹⁴ To address this concern, Commissioner McNary offered the following pledge:

In order to avoid any conflict with the Convention, the Service will construe the document fraud penalties as inapplicable to a case in which the only presentation of the document was pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution. The Service will not issue a Notice of Intent to Fine for any such act of document fraud committed by an alien prior to the opportunity to present himself or herself without delay to an

²¹⁰ See text accompanying *supra* notes 49–74.

²¹¹ See text accompanying *supra* notes 84–88.

²¹² See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of . . . the entire [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 178 n.35, 179 (1993) (citing *Charming Betsy* and using the Protocol as a guide to the interpretation of domestic refugee law).

²¹³ See Penalties for Document Fraud, 57 Fed. Reg. 33,862, 33,863 (July 31, 1992) (discussing regulations adopted to implement the Immigration Act of 1990, Pub. L. No. 101-649, § 544, 104 Stat. 4978, 5059–61).

²¹⁴ *Id.* at 33,866.

INS officer and to show good cause for his or her illegal entry or presence in accordance with Article 31(1) of the Convention.²¹⁵

Although McNary's interpretation was not directed at §§ 1325(a) or 1326 specifically, his assertion that the INA's general penalty provisions should be interpreted to include implicit exceptions for refugees offers a model for how prosecutors and courts should construe §§ 1325(a) and 1326 today.

Defenders of refugee prosecution might raise at least two objections to this application of the *Charming Betsy* canon. First, they might argue that the Refugee Protocol entrusts the Attorney General with exclusive responsibility for determining how (or whether) the United States will comply with Article 31.²¹⁶ Perhaps the reason why the INA does not expressly exempt refugees from criminal liability is that members of Congress took for granted that, although refugees were technically liable for illegal entry and reentry, the DOJ would never actually bring those charges against them. This theory is plausible in the abstract, but mere plausibility is not enough to rebut the *Charming Betsy* canon. Instead, what is needed is actual evidence that Congress intended to empower federal prosecutors to violate the United States' obligations under the Refugee Protocol. No such evidence appears in the INA's text or its accompanying legislative history. Accordingly, mere speculation that Congress might have committed the task of international law compliance to federal prosecutors does not reflect the kind of "affirmative expression of congressional intent" that would displace the *Charming Betsy* canon's rebuttable presumption.²¹⁷

Another possible objection is that the *Charming Betsy* canon does not categorically prohibit refugee prosecution, because not all refugees are within the compass of Article 31. There is some force to this argument. To enjoy immunity from criminal penalties under Article 31, refugees must "com[e] directly from a territory where their life or freedom was threatened," "present themselves without delay to the authorities," and "show good cause for their illegal entry or presence."²¹⁸ Accordingly, refugees lose their immunity from prosecution under Article 31 if they have received a firm offer of resettlement elsewhere or unreasonably delayed presenting

²¹⁵ *Id.* Consistent with this interpretation, the INS adopted a rule excluding refugees from civil penalties under these circumstances. See 8 C.F.R. § 270.2(j) (2009).

²¹⁶ *Cf.* *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (suggesting that the United States was able to comply with the Refugee Protocol prior to the Refugee Act because "the Attorney General would honor the requirements of the Protocol" through the exercise of enforcement discretion).

²¹⁷ *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

²¹⁸ Refugee Protocol, *supra* note 17, art. 31(1).

themselves to authorities after crossing into the United States. This objection only goes so far, however, because it would not apply to the vast majority of refugees who have been prosecuted in the United States for immigration crimes, including Central Americans who have traveled through unsafe third countries where their lives and freedoms would be at risk.²¹⁹ The Refugee Convention’s preparatory work confirms that refugees may still claim immunity from prosecution under Article 31 if the countries through which they traveled did not make firm offers of “protection or asylum” or “constituted actual or potential threats to [their] life or freedom.”²²⁰ These are precisely the factors that have driven refugees from Central America to undertake their perilous journeys to the United States. Thus, the overwhelming majority of refugees who attempt illegal entry or reentry into the United States are immune from criminal penalties under Article 31.²²¹

Significantly, the Refugee Convention and Protocol are not the only international treaties that support exempting refugees from criminal penalties.²²² For instance, the United States is also a party to the 2004 Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), which prohibits prosecuting migrants who use smugglers to enter the United States illegally.²²³ Further, refugee prosecution

²¹⁹ For discussion of the risks Central American refugees face in transit states, see text accompanying *infra* notes 335–357.

²²⁰ GOODWIN-GILL, *supra* note 80, ¶ 28. Significantly, refugees enjoy immunity from criminal penalties for illegal entry under Article 31(1) without any requirement to show that transit states would threaten their “life or freedom” on account of their race, religion, or another protected ground. Refugee Convention, *supra* note 12, art. 33(1). Instead, “the expression ‘coming directly’ in Article 31(1) covers the situation of a person who enters . . . from another country where his protection, safety and security could not be assured [for any reason] . . . [or] who transits an intermediate country for a short period of time without having applied for, or received, asylum there.” UNHCR, REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS ¶ 4 (1999).

²²¹ On July 16, 2019, DOJ and DHS adopted an interim final rule that would disqualify migrants from receiving asylum if they “fail[ed] to apply for protection from persecution or torture while in a third country through which they transited en route to the United States.” See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,829–30 (July 16, 2019). A challenge to the rule is currently pending in federal district court. See *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019).

²²² See CATHRYN COSTELLO, YULIA IOFFE & TERESA BÜCHSEL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, PPLA/2017/01, at 8–10 (UNHCR Legal and Protection Policy Research Series 2017), <https://www.refworld.org/pdfid/59ad55c24.pdf> [<https://perma.cc/QW5M-FX7K>] (discussing the sources in this paragraph).

²²³ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime art. 5, 2241 U.N.T.S. 507, *entered into force* Jan. 2004 (“Migrants shall not become liable to criminal prosecution . . . for the fact of having been the object of [illegal smuggling across borders].”). The United States ratified the treaty in 2005. See *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, U.N. TREATY COLLECTION,

may also violate the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR) and other human rights agreements.²²⁴ Human rights treaty bodies have expressed concern that criminalizing illegal entry “prevent[s] victims from seeking protection, assistance and justice”²²⁵ and therefore “exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.”²²⁶ Hence, in addition to violating the Refugee Protocol, the Trump Administration's current zero-tolerance policy breaches other international obligations of the United States.

Of course, had Congress specified clearly and unambiguously that it intended to punish refugees for illegal entry and reentry, courts could not use the *Charming Betsy* canon to frustrate that legislative purpose—even if Congress's decision would violate the United States' obligations under the Refugee Protocol, the Smuggling Protocol, and the ICCPR. But Congress has not placed courts in this position. Sections 1325(a) and 1326 do not expressly target refugees, and the legislative history of the INA and the Refugee Protocol indicate that members of Congress would have disapproved of refugee prosecution. Courts should therefore interpret §§ 1325(a) and 1326 narrowly to avoid violating the United States' international commitments.²²⁷

2. *The Canon of Constitutional Avoidance*

Constitutional concerns also preclude applying §§ 1325(a) and 1326 to refugees. In the past, critics of immigration prosecution have raised a host of constitutional objections to the manner in which federal prosecutors and

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-b&chapter=18&lang=en [<https://perma.cc/ZX3K-QLTS>].

²²⁴ See International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171, 174 (“Each State Party to the present Covenant undertakes . . . to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . national . . . origin . . .”).

²²⁵ U.N. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking*, at 2–3, U.N. Doc CTOC/COP/WG.4/2010/4 (Dec. 9, 2009).

²²⁶ UNHRC, Rep. of the Working Grp. on Arbitrary Det. ¶ 58, A/HRC/13/30 (Jan. 18, 2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/102/94/PDF/G1010294.pdf?OpenElement> [<https://perma.cc/N5K7-ATCC>]; see also OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., ADMINISTRATIVE DETENTION OF MIGRANTS 13 (Migration Discussion Papers), <https://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf> [<https://perma.cc/24K9-V7HF>] (“[D]etention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.”).

²²⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (concluding that the ICCPR “was not self-executing” but “does bind the United States as a matter of international law”).

judges have handled cases involving illegal entry and reentry charges. These objections have focused primarily on due process concerns related to Streamline proceedings. In particular, critics have argued that these proceedings give defendants insufficient time to prepare for expedited hearings, do not afford adequate access to translation services and legal counsel, and extract guilty pleas from large groups of defendants en masse.²²⁸ What immigrant-rights advocates have overlooked is that refugee prosecution also violates another constitutional right: the Eighth Amendment’s prohibition against cruel and unusual punishment.²²⁹ Courts would do well, therefore, to interpret §§ 1325(a) and 1326 to avoid this possible constitutional infirmity.

“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man,” the Supreme Court has explained.²³⁰ “While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards,” as defined by “the evolving standards of decency that mark the progress of a maturing society.”²³¹

Applying these standards, the Court concluded in *Trop v. Dulles* that using expatriation—deprivation of citizenship and forced expulsion—as a criminal penalty would violate the Eighth Amendment.²³² The problem with this practice was that it would effect “the total destruction of the individual’s status in organized society,” placing “[h]is very existence at the sufferance of the country in which he happens to find himself.”²³³

While any one country may accord him some rights, . . . no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear

²²⁸ See, e.g., *United States v. Sanchez-Gomez*, 859 F.3d 649, 666 (9th Cir. 2017) (holding that the indiscriminate shackling of defendants violated constitutional due process), *vacated and remanded*, 138 S. Ct. 1532 (2018) (concluding that the case was moot because the defendants had pleaded guilty); *United States v. Diaz-Ramirez*, 646 F.3d 653, 658 (9th Cir. 2011) (concluding that taking guilty pleas in large group hearings does not violate the Fifth Amendment); HUMAN RIGHTS FIRST, *supra* note 1, at 5 (“The speed of the trial, lack of access to counsel, and insufficient efforts to overcome language barriers threaten the right to a fair trial and to effective counsel.”).

²²⁹ U.S. CONST. amend. VIII.

²³⁰ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

²³¹ *Id.* at 100, 101.

²³² *Id.* at 101–03.

²³³ *Id.* at 101.

and distress He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime In this country the Eighth Amendment forbids that to be done.²³⁴

Having “no choice but to enforce the paramount commands of the Constitution,” the Court declared in *Trop* that expatriation constituted cruel and unusual punishment.²³⁵

Although refugees who face prosecution for entering the United States illegally do not face expatriation, threatening them with prosecution for illegal entry or reentry delivers a similarly devastating blow to their “status in organized society.”²³⁶ When refugees are outside their home countries without a realistic option to return, they are reduced to a status of de facto statelessness.²³⁷ Until refugees receive a firm offer of asylum elsewhere, punishing them for illegal entry sends the message that they are not welcome anywhere—that their human rights are at the mercy of domestic law enforcement agencies and may be disregarded by the agencies for any reason or no reason at all. If all states were to adopt this approach, refugees’ presence anywhere would constitute an unavoidable trespass.²³⁸ It would mean, in short, that refugees had “lost the right to have rights.”²³⁹

Precisely for these reasons, the United States has joined with other members of the international community to condemn refugee prosecution as a cruel and inhumane practice. Article 31 of the Refugee Convention reflects a robust international consensus that penalizing refugees for illegal entry and

²³⁴ *Id.* at 101–03 (citations omitted).

²³⁵ *Id.* at 104. In a concurring opinion, Justice Brennan offered a decisive fifth vote in support of the Court’s holding that expatriation violates the Eighth Amendment. Without expressly rejecting the plurality’s focus on the Eighth Amendment’s “substantive limits,” Brennan proposed a different analytical framework for reaching the same conclusion. He asserted that expatriation was unconstitutional for the separate reason that it was disproportionate to Congress’s legitimate interest in deterring wartime desertion. *Id.* at 114 (Brennan, J., concurring).

²³⁶ *See id.* at 101 (plurality opinion).

²³⁷ *See* 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 78, 96 (1966).

²³⁸ *See* EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 267 (2016) (explaining how this concern underwrites the international prohibition against *refoulement*); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 279–80 (2009) (arguing that if all land were privately held and the landless were denied permission to be anywhere, “they would do wrong simply by being wherever they happened to be”).

²³⁹ *Trop*, 356 U.S. at 102.

reentry is inhumane.²⁴⁰ Both Congress and the Executive Branch have endorsed Article 31 in the past as a minimum standard of humane treatment for refugees,²⁴¹ and the Supreme Court has stressed that international agreements like the Refugee Convention constitute important benchmarks for evaluating whether domestic practices satisfy the Eighth Amendment's evolving standards of decency.²⁴² Prosecuting refugees for illegal entry and reentry thus violates the Eighth Amendment's prohibition on cruel and unusual punishment.

To be sure, there is an important difference between expatriation (the practice addressed in *Trop*) and refugee prosecution: the former is a constitutionally impermissible *method* of punishment, while the latter exceeds the “substantive limits on what [*conduct*] can be made criminal and punished as such.”²⁴³ This distinction matters because the Supreme Court has advised that the Eighth Amendment's substantive limits are “to be applied sparingly.”²⁴⁴ Courts rarely set aside criminal statutes on the ground that they overstep the Eighth Amendment's substantive limits. Even so, a growing body of federal jurisprudence supports the conclusion that refugee prosecution violates the Eighth Amendment's substantive limits.

The conventional starting point for mapping the Eighth Amendment's substantive limits is the Supreme Court's 1962 decision *Robinson v. California*.²⁴⁵ At issue in *Robinson* was a California statute that declared it a crime to “be addicted to the use of narcotics.”²⁴⁶ The Court observed that this formulation made the mere “‘status’ of narcotic addiction a criminal offense, for which the offender may be prosecuted ‘at any time before he reforms’”—even if the offender had never “used or possessed any narcotics within the

²⁴⁰ At present, 149 states are parties to one or both of the Refugee Convention and Refugee Protocol. See *Convention Relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en [https://perma.cc/ETM9-55E3]; *Protocol Relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5 [https://perma.cc/59TR-8NMQ].

²⁴¹ See, e.g., Johnson Letter, *supra* note 85 (endorsing the Refugee Protocol); Senate Protocol Report, *supra* note 88 (same).

²⁴² See, e.g., *Graham v. Florida*, 560 U.S. 48, 80–82 (2010); *Roper v. Simmons*, 543 U.S. 551, 577–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Trop*, 356 U.S. at 102–03. See generally Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1095–97, 1099–103 (2002) (discussing this principle).

²⁴³ *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

²⁴⁴ *Id.*

²⁴⁵ 370 U.S. 660 (1962).

²⁴⁶ *Id.* at 660 (quoting CAL. HEALTH & SAFETY CODE § 11721).

State.”²⁴⁷ Recognizing that narcotics addiction is “an illness which may be contracted innocently or involuntarily,” the Court held that punishing a person based solely on their addictive impulses—without requiring any overt acts—would constitute cruel and unusual punishment.²⁴⁸

A few years later, in *Powell v. Texas*,²⁴⁹ the Court evaluated a Texas statute that criminalized “get[ting] drunk or be[ing] found in a state of intoxication in any public place, or at any private house except his own.”²⁵⁰ This time, the Justices divided over the proper application of the Eighth Amendment. In a plurality opinion authored by Justice Thurgood Marshall, four Justices distinguished *Robinson*, asserting that the Texas statute could withstand constitutional scrutiny because it criminalized “public behavior,” not “mere status” or “an irresistible compulsion” that the defendant was “utterly unable to control.”²⁵¹ A separate plurality of four Justices dissented on the grounds that the Texas statute reflected the same “essential constitutional defect” as the California statute in *Robinson*: both criminalized “a condition which [the offender] ha[s] no capacity to change or avoid.”²⁵²

The decisive fifth vote in favor of the statute’s constitutionality came from Justice Byron White. Although White concurred in the result favored by Marshall, he disagreed with much of Marshall’s analysis. “If it cannot be a crime to have an irresistible compulsion to use narcotics,” White reasoned, then it must also be unconstitutional for a state to make it “a crime to yield to such a compulsion.”²⁵³ Thus, White endorsed the Marshall plurality’s holding only on the more limited basis that the defendant could have taken steps to avoid “the act of going to or being in a *public place*” while inebriated.²⁵⁴

Crucially, Justice White took pains to distinguish scenarios in which homeless defendants would have nowhere to consume alcohol other than in public. In White’s view, homeless alcoholics would have a valid constitutional defense to prosecution if they “have no place else to go and no place else to be when they are drinking.”²⁵⁵ Accordingly, if “resisting drunkenness is impossible” for some defendants due to their addiction, and if “avoiding public places when intoxicated is also impossible” due to the

²⁴⁷ *Id.* at 666.

²⁴⁸ *Id.* at 667.

²⁴⁹ 392 U.S. 514 (1968).

²⁵⁰ *Id.* at 517 (quoting TEX. PENAL CODE art. 477 (1952)).

²⁵¹ *Id.* at 532, 535.

²⁵² *Id.* at 567–68 (Fortas, J., dissenting).

²⁵³ *Id.* at 548 (White, J., concurring).

²⁵⁴ *Id.* at 550 (emphasis added).

²⁵⁵ *Id.* at 551.

defendants' homeless position, then the Texas statute would impermissibly target involuntary conduct in violation of the Eighth Amendment.²⁵⁶

As foreshadowed by Justice White's concurrence, lower federal courts have looked to *Robinson* and *Powell* for guidance when reviewing criminal laws that target the homeless.²⁵⁷ Consistent with Justice White's view, most lower courts have held that a state cannot "expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status" (i.e., sleeping, lying, or eating in public spaces)²⁵⁸ unless it also furnishes spaces where the homeless can perform these basic life functions off the streets.²⁵⁹ "As long as the homeless . . . do not have a single place where they can lawfully be," statutes that criminalize "sleeping, eating and other innocent conduct" "effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment."²⁶⁰

These cases offer important lessons for criminal laws that target refugees. As the Supreme Court has recognized, refugees are "the world's homeless people."²⁶¹ Their homelessness is generated by factors beyond their personal control: individualized threats to their "life or freedom" in their country of origin.²⁶² Moreover, these threats are based on aspects of refugees' social status that are either outside their control or that the state may not legitimately require them to change—i.e., their "race, religion, nationality,

²⁵⁶ *Id.*

²⁵⁷ See Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019) (discussing these developments); Hannah Kieschnick, Note, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Distinction to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569 (2018) (same).

²⁵⁸ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006).

²⁵⁹ See, e.g., *id.* at 1132–36; *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019) ("[T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."), *cert. denied*, 140 S. Ct. 674 (mem.); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) ("As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances . . . effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment—sleeping, eating and other innocent conduct."). *But see, e.g., Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994) (declining to apply the Eighth Amendment as a substantive limit on criminal laws that target the homeless based, in part, on the conclusion that homelessness is not a "status").

²⁶⁰ *Pottinger*, 810 F. Supp. at 1565. Under the Obama Administration, the DOJ supported this application of the Eighth Amendment. See Statement of Interest of the United States at 4, *Bell v. City of Boise*, No. 1:09-cv-00540-REB (D. Idaho Aug. 6, 2015), ECF No. 276, <https://www.justice.gov/crt/file/761211/download> [<https://perma.cc/3DGS-DHN6>] (asserting that when "sufficient shelter space is unavailable," enforcing criminal ordinances against sleeping in public spaces "amounts to the criminalization of homelessness, in violation of the Eighth Amendment").

²⁶¹ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55 (1971).

²⁶² 8 U.S.C. § 1231(b)(3)(A).

membership in a particular social group, or political opinion.”²⁶³ For a refugee, crossing an international border in pursuit of protection is therefore just as essential to her life and freedom as eating or sleeping in public is to a homeless person. In both contexts, criminal laws compel people, due to their vulnerable social status, to either accept unconscionable deprivations of their life or freedom (e.g., starvation, persecution) or commit otherwise innocent acts to escape those deprivations (e.g., eat in public, cross a border).²⁶⁴ As lower courts have held in homeless cases, the Eighth Amendment rescues people from this dilemma by invalidating laws like these that punish people for acts that are inextricably linked to their social status.²⁶⁵ Accordingly, to the extent that compliance with §§ 1325(a) and 1326 would prevent refugees from accessing refuge from persecution, penalties imposed under these provisions may constitute cruel and unusual punishment in violation of the Eighth Amendment.

There are important limits to this Eighth Amendment defense. In homeless cases, courts have held that the Eighth Amendment does not prohibit municipalities from penalizing eating or sleeping in public if municipalities furnish dining halls and shelters where the homeless may perform these acts.²⁶⁶ It is only when municipalities do not offer these accommodations that defendants may invoke the Eighth Amendment successfully as a defense to prosecution under vagrancy laws. Following the logic of these decisions, refugees likely cannot invoke the Eighth Amendment as a defense to prosecution for illegal entry or reentry unless an illegal border crossing is the only option reasonably available to them to protect their life or freedom. To satisfy this burden, a refugee would have to show that illegal entry or reentry was necessary because she could not

²⁶³ *Id.*; accord Refugee Convention, *supra* note 12, art. 1(A)(2).

²⁶⁴ See *Pottinger*, 810 F. Supp. at 1565 (observing that for the homeless “the lack of reasonable alternatives should not be mistaken for choice”).

²⁶⁵ See *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (“[J]ust as the state may not criminalize the state of being ‘homeless in public places,’ the state may not ‘criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.’” (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1137 (9th Cir. 2006))); *Pottinger*, 810 F. Supp. at 1565 (“As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment—sleeping, eating and other innocent conduct.”).

²⁶⁶ See *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (denying relief under the Eighth Amendment because Orlando’s “homeless shelter . . . has never reached its maximum capacity and . . . no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee”); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1167 (Cal. 1995) (rejecting an Eighth Amendment challenge on the ground that “it is far from clear that [the defendants] had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations”).

reasonably obtain timely relief through an authorized port of entry.²⁶⁷ A refugee might also have to show that other countries through which she traveled en route to the United States would not guarantee her safety.²⁶⁸ For those who satisfy these requirements, however, imposing criminal penalties under §§ 1325(a) or 1326 would violate the Eighth Amendment.

Some might question whether extending the Eighth Amendment to refugees in this manner stretches *Robinson* too far. Perhaps the Eighth Amendment's substantive limits should prohibit only pure status crimes and crimes that target irresistible compulsions, not those that address acts like border crossings, which people perform deliberately, albeit under threat of grave harm.²⁶⁹ In my view, this is not the most faithful reading of *Powell*, given the limiting principles articulated in Justice White's pivotal concurring opinion. Nor would this distinction be reasonable as applied to refugees, given that fleeing persecution is inextricably intertwined with refugee status. Yet, taking into consideration that none of the Justices who participated in *Robinson* and *Powell* remain on the Court today, it is impossible to rule out the possibility that the Court might eventually rein in the Eighth Amendment's substantive limits in a way that would exclude refugees from constitutional protection.

Despite these grounds for caution, the better view is that prosecuting refugees for illegal entry and reentry may, in fact, constitute cruel and unusual punishment. To uphold refugee prosecution, federal courts would have to take several audacious steps. First, they would have to disregard the fact that prosecuting refugees for illegal entry and reentry offends contemporary standards of decency enshrined in multilateral agreements to which the United States is a party, including the Refugee Protocol, the ICCPR, and the Smuggling Protocol. Second, they would have to reject the

²⁶⁷ This is not far-fetched. Between 2018 and 2020, DHS adopted measures that made it nearly impossible for refugees to obtain protection through ports of entry along the U.S.–Mexico border, thereby driving asylum-seekers to attempt hazardous crossings at unauthorized points along the border. I discuss these measures in Section III.B.1. Although not discussed in this Article, in recent months, U.S. ports of entry have essentially closed their doors to refugees in response to the COVID-19 pandemic. See Press Release, U.S. Citizenship & Immigr. Servs., USCIS Preparing to Resume Public Services on June 4 (May 27, 2020), <https://www.uscis.gov/news/alerts/uscis-preparing-to-resume-public-services-june-4> [<https://perma.cc/ABT3-K3LT>] (noting “some domestic offices” will reopen but “offices will reduce the number of appointments and interviews”); Press Release, U.S. Citizenship & Immigr. Servs., USCIS Temporary Office Closure Extended Until at Least May 3 (Apr. 1, 2020), <https://www.uscis.gov/news/alerts/uscis-temporary-office-closure-extended-until-least-may-3> [<https://perma.cc/EB98-J9DG>].

²⁶⁸ In Section III.B.1, I explain why it is ordinarily unreasonable to expect asylum-seekers from Central America to pursue relief in transit states.

²⁶⁹ See Kieschnick, *supra* note 257, at 1579–91 (observing that a few lower courts have drawn these distinctions in domestic homelessness cases); cf. *United States v. Cupa-Guillen*, 34 F.3d 860, 862–63 (9th Cir. 1994) (declaring that illegal entry by a nonrefugee migrant “cannot be categorized as a status crime”).

conclusion endorsed by the *Powell* majority that individuals cannot constitutionally face punishment for acts compelled by forces beyond their control. Third, they would have to disavow *Trop*'s guidance regarding the unconstitutional cruelty of consigning people to statelessness. Although refugees are not "stateless" in a formal sense, the fact that they cannot return safely to their home countries means that they experience de facto statelessness—a similarly dire "fate of ever-increasing fear and distress" that is "deplored [by] the international community."²⁷⁰ For all of these reasons, federal courts should hold that the Eighth Amendment does not permit courts to punish refugees—the world's homeless people—for entering the United States to preserve their lives and basic freedoms.²⁷¹

Defenders of refugee prosecution might try to argue in the alternative that the Eighth Amendment does not limit Congress's plenary power to regulate immigration,²⁷² but this argument would have little merit. Although the Eighth Amendment does not constrain Congress's power relative to the administrative detention and removal of foreign nationals,²⁷³ ordinary constitutional constraints apply whenever Congress imposes criminal sanctions on foreign migrants, including those related to illegal entry and reentry charges.²⁷⁴ Accordingly, the Eighth Amendment applies with full force to the criminal penalties associated with §§ 1325(a) and 1326.

²⁷⁰ *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958).

²⁷¹ Skeptics might argue that the availability of relief at official ports of entry undermines these Eighth Amendment arguments. In Section III.A, I explain why the nominal availability of relief at ports of entry is inadequate to afford meaningful relief to many refugees—particularly in light of DHS's recent efforts to prevent refugees from accessing U.S. soil through ports of entry.

²⁷² See *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."); *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1077 (9th Cir. 1998) ("[A]t no time during the last century has any court questioned . . . Congress's prerogative to enact criminal immigration laws.").

²⁷³ See, e.g., *United States v. Vasquez-Hernandez*, 924 F.3d 164, 170 (5th Cir. 2019) (rejecting defendants' Eighth Amendment claims because "they ha[d] not shown that deportation was caused by their § 1325(a) convictions"); *Bassett v. INS*, 581 F.2d 1385, 1388 (10th Cir. 1978) ("[T]he non-penal nature of Congress' plenary power to enumerate and enforce deportable offenses does not permit us to use the Eighth Amendment as a basis for setting aside the deportation order."); *Calderon-Rodriguez v. Wilcox*, 347 F. Supp. 3d 1024, 1037–38 (W.D. Wash. 2019) (holding that the Eighth Amendment does not apply to immigration detention). See generally *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

²⁷⁴ See *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–39 (1987) (holding that constitutional due process applies to prosecutions under § 1326); *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896) (holding that when Congress "declare[s] unlawful residence within the country to be an infamous crime," ordinary constitutional constraints on criminal punishment apply).

Should courts prefer to sidestep these delicate constitutional questions, the canon of constitutional avoidance offers a possible alternative solution.²⁷⁵ Rather than resolve the Eighth Amendment issue on the merits, courts could instead construe §§ 1325(a) and 1326 to avoid this problem by holding that the provisions do not apply to refugees. Given that refugee prosecution so clearly offends contemporary standards of decency, as reflected in the Refugee Protocol, courts would do well to avoid attributing this meaning to the INA's ambiguous text in the absence of a crystal-clear directive from Congress.²⁷⁶ Thus, whether applied directly on the merits or indirectly via the canon of constitutional avoidance, the Eighth Amendment bolsters the conclusion that the federal government may not prosecute refugees for illegal entry or reentry.

3. *The Rule of Lenity*

The rule of lenity further confirms that §§ 1325(a) and 1326 do not apply to refugees. Under the rule of lenity, courts must interpret ambiguous criminal statutes “in favor of the defendants subjected to them.”²⁷⁷ When a criminal statute can sustain more than one interpretation after courts have exhausted other traditional tools of statutory interpretation, the rule of lenity directs courts to choose the narrower interpretation.²⁷⁸ Thus, if “reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute,” the proper course is to decide the interpretive question in the defendant’s favor.²⁷⁹

²⁷⁵ See *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”). See generally *Zadvydas v. Davis*, 533 U.S. 678 (2001) (applying the canon of constitutional avoidance to another provision of the INA); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (observing that the canon on constitutional avoidance “has for so long been applied by this Court that it is beyond debate”). But see Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2163 (2015) (arguing that courts should eschew constitutional avoidance when they “articulate new constitutional norms”).

²⁷⁶ Cf. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (avoiding grave constitutional questions through interpretation).

²⁷⁷ *United States v. Santos*, 553 U.S. 507, 514 (2008).

²⁷⁸ See *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952) (“[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”).

²⁷⁹ *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)); see also *Universal C.I.T. Credit Corp.*, 344 U.S. at 224 (applying lenity to a case where “the history of [a statute] and the inexplicitness of its language” did not render its meaning “decisively clear on its face one way or the other”).

The rule of lenity serves several purposes in American criminal law.²⁸⁰ First, it safeguards legislative supremacy and promotes legislative accountability by ensuring that Congress takes responsibility for defining federal crimes.²⁸¹ Second, it promotes the rule of law by confirming that federal statutes give the public adequate notice about what conduct is criminal.²⁸² Third, it constrains prosecutorial discretion to “minimize the risk of selective or arbitrary enforcement.”²⁸³

The Supreme Court has also applied the rule of lenity outside the criminal context when interpreting federal immigration law. Recognizing that “the stakes are considerable for” foreign nationals in removal proceedings, the Supreme Court has cautioned that the Executive and Judicial Branches must “not assume that Congress meant to trench on [a foreign national’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used.”²⁸⁴ According to the Court, lenity is warranted in these contexts based, at least in part, on the fact that noncitizens “cannot vote” in federal elections and therefore are “particularly vulnerable to adverse legislation.”²⁸⁵ Thus, in addition to the concerns about legislative supremacy, notice, and arbitrary enforcement, the fact that foreign

²⁸⁰ See *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

²⁸¹ See *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“[The rule of lenity] is founded on . . . the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”). See generally Price, *supra* note 44, at 887 (emphasizing the role of lenity in “advancing the democratic accountability of criminal justice”).

²⁸² See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”).

²⁸³ *Kozminski*, 487 U.S. at 952.

²⁸⁴ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); see also *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (underscoring “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien” (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987))). The Court has indicated, in particular, that the rule of lenity applies to provisions of the INA that govern eligibility for asylum and other forms of relief from removal. See, e.g., *id.* at 321; *Cardoza-Fonseca*, 480 U.S. at 449; *INS v. Errico*, 385 U.S. 214, 225 (1966).

²⁸⁵ *St. Cyr*, 533 U.S. at 315 & n.39 (paraphrasing with approval the argument in Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)); see also Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1293 (2002) (drawing links between this rationale and the Supreme Court’s theory advanced in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (explaining that legislative targeting of “discrete and insular minorities . . . may call for a . . . more searching judicial inquiry”)); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 552, 552 n.34 (2003) (same).

nationals are a politically disenfranchised “discrete and insular minority” offers an important justification for applying the rule of lenity to ambiguous statutes that target foreigners for special criminal sanctions.²⁸⁶

Applying the rule of lenity to §§ 1325(a) and 1326 makes good sense, given the many compelling reasons courts have to doubt whether refugee prosecution would comport with Congress’s legislative plan. Although §§ 1325(a) and 1326 do not expressly mention refugees, the broader text, purpose, and legislative history of the INA indicate that Congress did not envision—and would not have approved—applying these provisions to refugees. Considered alongside the *Charming Betsy* canon and the canon of constitutional avoidance, these factors are amply sufficient to generate “reasonable doubt” as to whether prosecuting refugees for illegal entry and reentry would be compatible with Congress’s statutory plan for immigration and border control. Accordingly, the rule of lenity dictates that any residual ambiguity in §§ 1325(a) and 1326 must be resolved in favor of refugee defendants.

C. *Synthesis and Recommendations*

In sum, this Part has shown that the current conventional wisdom about refugee prosecution is wrong: the INA does not expose refugees to criminal penalties for illegal entry and reentry. Although § 1325(a) is cast in seemingly absolute terms, the full text, purpose, and legislative history of the INA strongly suggest that this provision does not apply to refugees. The case for refugee immunity is even stronger under § 1326, which expressly exempts those who are “not required to obtain [the Attorney General’s] advance consent” to admission—a category that arguably includes refugees.²⁸⁷ In addition, three well-established principles of federal statutory interpretation—the *Charming Betsy* canon, the canon on constitutional avoidance, and the rule of lenity—lend powerful support for interpreting both sections to exclude refugees from criminal liability. Courts would do well, therefore, to recognize that refugees are not subject to criminal penalties for illegal entry or reentry.

This conclusion has sweeping implications for American criminal justice.²⁸⁸ In particular, it suggests that DHS should abandon its recent

²⁸⁶ *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom heightened judicial solicitude is appropriate.” (citations omitted)).

²⁸⁷ 8 U.S.C. § 1326.

²⁸⁸ In the paragraphs that follow, I endorse several recommendations from Human Rights First’s excellent January 2018 report, *Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions*. See HUMAN RIGHTS FIRST, *supra* note 1, at 6–7.

practice of referring asylum-seekers for criminal prosecution immediately following their apprehension. Instead, DHS should restore its time-honored practice of referring asylum-seekers for credible fear interviews before asylum officers, thereby enabling refugees to seek relief in immigration court first. Federal prosecutors, in turn, should refrain from bringing criminal charges until after an asylum officer or immigration judge has made a final determination that an asylum-seeker does not qualify as a genuine refugee. If the Executive Branch refuses to abandon its zero-tolerance policy, federal courts should confirm that §§ 1325(a) and 1326 do not apply to refugees and require prosecutors to allow asylum-seekers to petition for relief through the immigration process before initiating criminal charges.

Sequencing immigration proceedings before criminal trials in this manner is essential to protect refugees from unwarranted convictions and due process violations.²⁸⁹ Federal courts are poorly equipped to make refugee status determinations by virtue of their distinctive procedures. This is obviously true for Streamline proceedings that combine a defendant's initial appearance, arraignment, plea, and sentencing in a single expedited hearing before a magistrate judge.²⁹⁰ These expedited proceedings are not designed to handle the fact-intensive inquiries that arise in refugee status determinations, which often entail significant witness testimony and documentary evidence. Moreover, it is no less true for ordinary criminal cases before federal district judges. Because refugees usually have limited access to evidence other than their own personal testimony, most are forced to rely on hearsay statements that would be admissible in immigration court²⁹¹ but not in a federal district court.²⁹² Requiring asylum-seekers to establish the factual basis for their refugee status in federal district court would therefore deprive many refugees of a full and fair opportunity to

²⁸⁹ See GOODWIN-GILL, *supra* note 80, ¶ 4 (“In most cases, only if an individual’s claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for ‘illegal’ entry), can the State be sure that its international obligations are met.”).

²⁹⁰ See Sklansky, *supra* note 64, at 169–70.

²⁹¹ See *In re Wadud*, 19 I. & N. Dec. 182, 188 (B.I.A. 1984) (“It is well established that the strict rules of evidence are not applicable in deportation proceedings.”).

²⁹² See FED. R. EVID. 802 (“Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”); UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 197 (2d ed. 1992, 2011 reissue), <http://www.refworld.org/docid/4f33c8d92.html> [https://perma.cc/24QQ-272E] (“The requirement of evidence should . . . not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.”); Puhl, *supra* note 126, at 103 (observing that applying the hearsay rule in criminal proceedings “eliminates a large portion of evidence that is used to prove asylum cases, which frequently rely only on hearsay testimony by the asylum seeker herself”).

mount an effective defense to prosecution, in violation of their constitutional right to due process and the United States' international obligations.²⁹³ Due process concerns dictate, therefore, that DHS must allow asylum-seekers to establish their refugee status in immigration court before DOJ pursues criminal charges based on illegal entry or reentry.²⁹⁴

Allowing immigration proceedings to conclude before prosecutors bring criminal charges is also necessary to respect Congress's statutory plan for refugee status determinations. The INA entrusts refugee status determinations to immigration courts, not federal district courts, in the first instance.²⁹⁵ The best way to respect this legislative choice, while preserving asylum-seekers' right to invoke their refugee status as a defense to criminal liability, is for prosecutors to wait to decide whether to bring charges under §§ 1325(a) and 1326 until after an asylum officer or immigration judge has determined whether foreign migrants are bona fide refugees.

Once prosecutors and courts recognize that refugees are not criminally liable for illegal entry and reentry, they will have to work through the implications of this conclusion for pending cases and past convictions. Refugees with convictions that are still pending should be able to invoke their actual innocence as a defense on appeal.²⁹⁶ Whether courts may entertain requests to vacate convictions that have already become final is less

²⁹³ See *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987) (holding that constitutional due process applies to prosecutions under § 1326); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042–43 (9th Cir. 2012) (same).

²⁹⁴ A refugee should not be precluded from collaterally challenging a negative status determination reached in immigration court, however, if “(1) [she has] exhausted any administrative remedies that may have been available to seek relief against the order; (2) the [removal] proceedings . . . improperly deprived [her] of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d); see also *Mendoza-Lopez*, 481 U.S. at 839 (“Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense.”).

²⁹⁵ 8 U.S.C. § 1229a(a)(3) (“Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States”); see also *United States v. Polanco-Gomez*, 841 F.2d 235, 238 (8th Cir. 1988) (“A criminal trial for the felony of illegal reentry . . . is not the proper forum to argue a case for political asylum.”). Further evidence of Congress's expectation that immigration proceedings would precede criminal proceedings can be found in § 1326 itself, which limits the circumstances under which criminal defendants may use criminal proceedings to challenge the validity of a deportation order. 8 U.S.C. § 1326(d).

²⁹⁶ Cf. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding “that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past”).

clear but merits further study.²⁹⁷ It might well be an abuse of discretion for the Attorney General to rely on past convictions under §§ 1325(a) and 1326 as grounds for denying refugees' petitions for asylum or other discretionary relief. Although this Article does not afford the space necessary to sort through all of these complexities, the scope of the challenge ahead underscores the need for an expeditious course correction.

III. IS PROSECUTING REFUGEES MORALLY DEFENSIBLE?

This Part bolsters the case against prosecuting refugees by explaining why the international community, members of Congress, and (until recently) federal prosecutors have rejected the practice as immoral. Advocates of restrictive immigration policies might find this idea counterintuitive. What is so wrong, some might ask, with using criminal penalties to establish an orderly process for admitting refugees and screening out other irregular migrants? Doesn't the United States have a legitimate sovereign interest in securing its borders and enforcing its law?

In this Part, I argue that prosecuting refugees for illegal entry and illegal reentry may be unconscionable for several reasons. First, prosecution is immoral when a refugee's decision to obviate U.S. border controls is objectively justified based on her well-founded fear of persecution abroad. Second, even if violating U.S. border controls is not objectively justified, an illegal entry may be morally excused based on a refugee's subjective fear of mistreatment or other individualized factors. Third, the United States' current approach to prosecuting refugees is inconsistent with the rule of law as a moral ideal. Fourth, the way that the United States handles criminal cases at the U.S.–Mexico border is morally indefensible because it often prevents refugees from accessing asylum and withholding of removal, thereby exposing refugees to persecution abroad. Thus, the factors that support refugee prosecution are manifestly outweighed by countervailing moral considerations.

To be clear, I do not argue here that the United States could never morally prosecute refugees for violating domestic border controls under any circumstances. My claim is narrower—namely, that the United States' *recent* approach to refugee prosecution is morally indefensible.²⁹⁸ By preventing all

²⁹⁷ See Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 925 (2006) (“Under current law, no serious problems are posed by cases in which a defendant’s conviction has become ‘final’ before the law-changing decision was announced”); *cf.* *Wainwright v. Sykes*, 433 U.S. 72, 87–89 (1977) (establishing a “contemporaneous-objection rule” to limit federal habeas review for issues that defendants failed to raise in state criminal proceedings).

²⁹⁸ As noted previously, this Part does not address the unique moral considerations and domestic regulatory responses associated with the COVID-19 pandemic.

but a tiny fraction of refugees from accessing relief through legal channels, the United States has undermined its moral authority to prosecute asylum-seekers who enter without inspection. The United States cannot have it both ways; it cannot in good conscience prevent refugees from accessing its territory through official ports of entry while simultaneously prosecuting those who enter elsewhere. This moral assessment has important legal consequences, because it strengthens the case for concluding that refugees have valid defenses to prosecution under the Eighth Amendment and federal common law.²⁹⁹

A few additional provisos are necessary at the outset. For purposes of the present discussion, I assume that states have morally compelling reasons to regulate migration across their borders through civil and administrative law, including for the purpose of safeguarding their national security.³⁰⁰ I also assume *arguendo* that the United States' criminal prohibitions on illegal entry and reentry are necessary to punish and deter unauthorized immigration by nonrefugee migrants.³⁰¹ Yet, even if both of these assumptions hold true, it still does not follow that the federal government can morally prosecute refugees who enter U.S. territory without inspection. As long as the United States prevents needy refugees from accessing protection through legally prescribed channels, it is immoral for the federal government to punish refugees who pursue refuge in the United States through irregular channels.³⁰²

A. *The Conventional Case for Prosecution*

Although the Executive Branch has not offered a robust moral justification for refugee prosecution, its reasons for embracing this policy can be deduced from a patchwork of sources, including CBP's response to the DHS Inspector General's report and arguments that federal prosecutors have advanced in criminal cases. The primary rationale appears to be that prosecution is necessary to establish an orderly and efficient process for

²⁹⁹ In particular, this Part reinforces the conclusion that refugee prosecution violates the Eighth Amendment, *see supra* Section II.C, and that refugees may present successful necessity and duress defenses to criminal liability, *see infra* Section III.D.

³⁰⁰ Accordingly, this Part does not address the morality of civil and administrative enforcement measures, such as deportation.

³⁰¹ For a general introduction to the legal and policy issues surrounding border criminalization, see Eagly, *supra* note 62.

³⁰² This Part does not address whether the United States may morally prosecute forced migrants who do not qualify as "refugees" under international and domestic law—including those displaced by civil unrest, famine, and environmental catastrophe. I hope to take up this question in future work.

admitting bona fide refugees while screening out asylum-seekers with baseless claims.³⁰³

This argument is plausible enough on its face. Every sovereign state has a legitimate interest in protecting its national security and conserving its limited administrative resources. To this end, criminalizing illegal entry and reentry demarcates a clear “baseline of desired conduct” that the United States can use to channel asylum-seekers into orderly screening processes.³⁰⁴ For example, refugees may apply for the United States’ overseas refugee resettlement program³⁰⁵ or request permission to travel to the United States through an immigrant or nonimmigrant visa program.³⁰⁶ Those who reach the United States’ territorial borders may apply for relief at official ports of entry.³⁰⁷ Using criminal law to incentivize participation in these orderly screening processes should enable the federal government to screen out asylum-seekers who are not refugees, as well as refugees who do not qualify for admission because they would endanger U.S. national security.³⁰⁸ An orderly admissions process could also empower DHS and DOJ to conserve administrative resources by concentrating asylum officers and immigration judges at designated ports of entry, freeing Border Patrol agents to focus their attention on apprehending and removing other foreign nationals who attempt to enter U.S. territory without authorization. Without question, these are significant governmental interests.

³⁰³ See INSPECTOR GENERAL, *supra* note 29, at 31–32 (stressing the need for orderly processing of criminal and administrative matters); Jessica Zhang & Andrew Patterson, *The Most Prosecuted Federal Offense in America: A Primer on the Criminalization of Border Crossing*, LAWFARE (July 25, 2019, 8:41 AM), <https://www.lawfareblog.com/most-prosecuted-federal-offense-america-primer-criminalization-border-crossing> [<https://perma.cc/BR68-VJMV>] (“Opponents of decriminalization . . . [emphasize] the meaning of sovereignty, international borders and the rule of law.”).

³⁰⁴ Juliette Kayyem, *Decriminalizing the Border Is Not in Anyone’s Interest*, WASH. POST (July 2, 2019, 12:04 AM), https://www.washingtonpost.com/opinions/decriminalizing-the-border-is-not-in-anyones-interest/2019/07/01/27292360-9c36-11e9-85d6-5211733f92c7_story.html [<https://perma.cc/T6C7-8ZDY>].

³⁰⁵ See *U.S. Refugee Admissions Program: Overseas Application and Case Processing*, U.S. DEP’T OF STATE, BUREAU OF POPULATION, REFUGEES, & MIGRATION, <https://www.state.gov/refugee-admissions/application-and-case-processing/> [<https://perma.cc/Z677-WVND>] (discussing overseas refugee resettlement).

³⁰⁶ See *U.S. Visas*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas.html> [<https://perma.cc/BJ7G-XR7Y>] (offering an overview of immigrant and nonimmigrant visa programs).

³⁰⁷ See INSPECTOR GENERAL, *supra* note 29, at 32 (defending illegal reentry prosecution on the ground that a refugee “always has the option of presenting themselves at the port of entry to make their claim”).

³⁰⁸ See 8 U.S.C. § 1231(b)(3) (permitting U.S. officials to exclude or deport refugees who have engaged in persecution, committed certain serious crimes, or otherwise pose “a danger to the security of the United States”).

B. *Exculpating Factors*

Notwithstanding these facially reasonable grounds for prosecuting refugees for illegal entry and reentry, there are a variety of important reasons why the threats that refugees face in their home countries should exculpate them from criminal liability. For ease of analysis, these exculpating considerations can be divided into two categories: justifications and excuses. These exculpating considerations clarify why U.S. lawmakers would exempt refugees from criminal penalties for illegal entry and reentry in the Refugee Protocol and the INA. As will become apparent later in this Part, these considerations also suggest that courts should allow refugees to raise common law defenses to prosecution under §§ 1325(a) and 1326.³⁰⁹

1. *Justifications*

In the moral philosophy of criminal law, justifications involve situations where a person's actions are morally warranted, despite the fact that they violate positive law. A legal violation is justified in this sense if it is morally appropriate, all things considered.³¹⁰ Justifications focus on the moral propriety of acts as such, not the volition or intentions of particular actors.

Legal theorists have offered competing philosophical theories to explain why criminal acts may be morally justified in this sense. Retributivists consider an act justified if legal sanctions would be “undeserved,” taking into account all relevant moral considerations.³¹¹ In contrast, utilitarians consider an act justified if it produces “consequences that are, on balance, socially desirable.”³¹² Under both theories, the fact that an act violates positive law may be an important factor weighing against the conclusion that it is morally justified, but an unlawful act may nonetheless be justified if it is supported by substantial, countervailing moral considerations.

³⁰⁹ See *infra* Section III.D.

³¹⁰ Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 89–91 (1986).

³¹¹ See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 943 (1978) (“An inference from the wrongful act to the actor’s character is essential to a retributive theory of punishment.”); JOHN GARDNER, *In Defence of Defences*, in *OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW* 77, 77 (2007) (asserting that both utilitarians and retributivists, such as Immanuel Kant, accept that the idea that an act is not “wrong unless it is wrong *all things considered*, i.e., taking into account of both the reasons in favour of performing it (the pros) and the reasons against performing it (the cons)”); Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 953 (1969) (observing that for retributivists, punishment is wrong if “undeserved”).

³¹² Greenawalt, *supra* note 311, at 938.

A classic example of a justified crime is a hiker who, having lost her way in the wilderness, steals food from an uninhabited cabin to ward off starvation.³¹³ Although the hiker commits a crime by stealing food, few would dispute that her act is justified under the circumstances. Retributivists would consider punishment undeserved in this scenario because the law could not reasonably fault the starving hiker for taking prudent steps to preserve life. Likewise, utilitarians would accept that the hiker's decision to steal food, rather than perish from starvation, achieves the best overall outcome for society.³¹⁴ Accordingly, courts and legal scholars have accepted without controversy that the starving hiker's criminal act is justified—and, therefore, exculpated—in light of her exigent circumstances.³¹⁵

The same logic of moral justification is implicit in Article 31 of the Refugee Convention. Article 31 was designed to prevent states—parties from placing refugees in the untenable position of having to choose between persecution in their home countries and criminal sanctions in countries where they seek asylum.³¹⁶ By prohibiting states from prosecuting refugees for ordinary immigration crimes, the Refugee Convention recognizes that refugees have sound moral justifications for violating domestic immigration controls. This is obviously true from a retributivist perspective, because a state cannot reasonably blame a refugee for crossing its borders illegally when this step is necessary to prevent death, torture, or other serious harm. It is no less true when viewed from a utilitarian perspective—violating U.S. border controls is clearly the lesser evil when compared with the serious threats that await refugees abroad. Moreover, the utilitarian argument for refugee prosecution is particularly weak given that DHS itself recognizes that the threat of criminal sanctions does not actually deter refugees from attempting illegal entry and reentry.³¹⁷

Some might object that prosecuting refugees could advance social welfare by deterring immigration crimes by *nonrefugee* migrants. This conjecture is suspect, to say the least. Opponents of the criminalization of immigration enforcement contend that there is no reliable evidence that

³¹³ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205–06, 1229 (1985).

³¹⁴ See Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1097 (1998).

³¹⁵ See, e.g., *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991); Robinson & Darley, *supra* note 314, at 1097; Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 258 (1987).

³¹⁶ See WEIS, *supra* note 83, art. 31, ¶¶ 1–4, at 201–03 (discussing this principle).

³¹⁷ See DHS STATISTICS, *supra* note 10, at 16 (describing asylum-seekers as “‘non-impactable’ by traditional enforcement policies”).

criminal penalties deter migrants from entering the United States,³¹⁸ let alone that *refugee* prosecution influences whether *nonrefugee* migrants do so. But even if refugee prosecution has some general deterrent effect on nonrefugee migrants, its marginal contribution is likely exceedingly small. There simply is no good reason to think that prosecuting refugees makes such a significant contribution to general deterrence that it would outweigh the countervailing social costs of refugee prosecution and incarceration.

More fundamentally, the general deterrence argument for refugee protection overlooks the salience of blameworthiness in moral justification. Criminal law theorists of all stripes tend to agree that public authorities must not punish a person whose conduct is otherwise blameless solely for the purpose of deterring others.³¹⁹ Although utilitarians do not accept the retributivist thesis that blameworthiness is a *sufficient* condition for criminal liability, most agree that it is a *necessary* condition for legitimate criminal penalties.³²⁰ If this conventional wisdom is correct, and if I am right that refugees are morally blameless for committing immigration crimes in order to access relief from persecution, then the general deterrence argument for refugee prosecution collapses, as the necessary condition of blameworthiness is absent.

A more serious argument against regarding refugee status as a moral justification for illegal entry or reentry is that irregular migration into the United States might not be strictly necessary to avoid the threat of persecution abroad. If a refugee could indeed avoid persecution without violating U.S. immigration controls, then it would be much harder to argue that her illegal entry or reentry was a morally appropriate action, all things considered. In particular, defenders of refugee prosecution might object that unauthorized border crossings are not strictly necessary to secure protection in the United States for two reasons: (1) refugees can access protection in the United States without committing immigration crimes, and (2) refugees can access protection in other countries without entering the United States.

Neither of the arguments can withstand close scrutiny because they are based on mistaken assumptions about refugees' options. In the real world, refugees who enter the United States outside an official port of entry

³¹⁸ See HUMAN RIGHTS FIRST, *supra* note 1, at 26–27 (observing that some federal agencies have called into question whether prosecuting unauthorized migrants for illegal entry and reentry moves the needle on deterring unauthorized migration); Keller, *supra* note 110, at 137 (concluding that “there is simply no evidence that the government is meaningfully deterring illegal immigration by prosecuting illegal entry and re-entry cases”).

³¹⁹ See Greenawalt, *supra* note 311, at 939–40.

³²⁰ See *id.*

typically do so only as a last resort, having no other realistic options for obtaining a safe refuge from persecution.

Consider first the argument that refugees can access protection in the United States without committing immigration crimes. While it is true that the United States does offer protection to some refugees through ordinary admissions processes, for the vast majority of refugees around the world these avenues for relief are chimerical. Only a tiny percentage of the twenty-six million refugees worldwide receive offers to resettle outside their home countries.³²¹ In the period since President Trump took office in January 2017 through September 2019, the United States admitted approximately 76,200 refugees through its overseas refugee resettlement program,³²² and the administration has announced plans to cut admissions even further to a maximum of 18,000 in 2020.³²³ Typically, refugees who are not accepted into the overseas refugee resettlement program have no other lawful avenue to access refuge in the United States. Most can reach an official U.S. port of entry only by air or sea, but they cannot board a commercial airplane or ship bound for the United States without a passport and visa.³²⁴ Due to the perilous circumstances that drive their flight, refugees often lack passports from their home country.³²⁵ To make matters worse, Congress has not established an immigrant visa program for refugees, and the State Department routinely denies temporary visitor visas to foreign nationals who reveal that they are seeking refuge from persecution.³²⁶ Hence, even when refugees have time

³²¹ In 2019, only 107,800 out of twenty-six million refugees were resettled. *Figures at a Glance*, UNHCR, <https://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/J67E-2GAL>].

³²² Jens Manuel Krogstad, *Key Facts About Refugees to the U.S.*, PEW RSCH. CTR. (Oct. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/09/13/key-facts-about-refugees-to-the-u-s/> [<https://perma.cc/6AU4-MA9X>].

³²³ See Michael D. Shear & Zolan Kanno-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html> [<https://perma.cc/A3GQ-3XM2>].

³²⁴ See 8 C.F.R. §§ 273.1–6 (2020) (specifying the procedures carriers must employ to screen passengers, promulgated under 8 U.S.C. § 1323 (specifying that it is unlawful for any carrier to bring to the United States any alien who does not have authorization to enter the United States)).

³²⁵ See Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185, 189 (1996) (“The purpose of Article 31 is to recognize in international law that refugees, owing to their hostile relations with their own governments, may be unable to obtain normal immigration documents and may resort to extra-legal measures in order to flee persecution and seek asylum.”).

³²⁶ See DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *FORCED MIGRATION LAW AND POLICY* 593 (1st ed. 2007) (noting that “the refugee definition is not a basis for receiving a U.S. visa” and that “U.S. law bars the issuance of a nonimmigrant visa in the most widely used categories . . . if there are indications that the person intends, for any reason to abandon his or her foreign residence” (citing Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(B), (F), 66 Stat. 163, 167–68 (1952))).

and resources to apply for visas, their chances of success are vanishingly slim. Cumulatively, these legal and practical constraints prevent the vast majority of refugees from accessing protection through the United States' orderly admissions process. Most refugees therefore have no way to access refuge in the United States other than to attempt an unlawful entry, sometimes with the aid of fraudulent documents.³²⁷

The obstacles that await refugees who reach the United States' borders are different, but scarcely less daunting. Asylum-seekers who arrive at a U.S. border are legally entitled to enter and receive refuge in the United States.³²⁸ In practice, however, the manner in which DHS regulates the U.S.–Mexico border belies its ostensible aspiration to establish an orderly and humane admissions process for refugees.

Within the past two years, DHS has established a “Remain in Mexico” program that physically excludes asylum-seekers from U.S. territory while they await a final adjudication of their petitions for asylum and withholding of removal.³²⁹ Remain in Mexico has two central features. First, pursuant to DHS's “metering” rules, CBP officers turn back arriving asylum-seekers before they reach the U.S. border³³⁰ to wait—for weeks, if not months—for an interview where they can request refuge.³³¹ Second, if asylum-seekers

³²⁷ See *Wu Zheng Huang v. INS*, 436 F.3d 89, 100 (2d Cir. 2006) (“[I]f illegal manner of flight . . . were enough independently to support a denial of asylum . . . virtually no persecuted refugee would obtain asylum.”); GOODWIN-GILL, *supra* note 80, at 5 (observing that “[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry” (quoting the Ad Hoc Committee on Statelessness and Related Problems)).

³²⁸ See 8 U.S.C. § 1158(a)(1) (“Any alien . . . who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum . . .”); *id.* § 1225(b)(1)(A)(ii) (providing that a foreign national “arriving in the United States” must be referred to an asylum officer for an interview if “the alien indicates either an intention to apply for asylum . . . or a fear of persecution”).

³²⁹ See generally HILLEL R. SMITH, CONG. RSCH. SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY’S REPORTED “METERING” POLICY: LEGAL ISSUES (2019), <https://fas.org/sgp/crs/homsec/LSB10295.pdf> [<https://perma.cc/FZJ7-DCRE>] (discussing the policy). This followed a presidential proclamation that suspended all admissions at the U.S.–Mexico border for ninety days. See Proclamation No. 9822, 83 Fed. Reg. 57,881 (Nov. 9, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/> [<https://perma.cc/R7RC-XYCR>] (President Trump’s Proclamation Addressing Mass Migration Through the Southern Border of the United States).

³³⁰ See Defendants’ Memorandum in Support of Their Motion to Partially Dismiss the Second Amended Complaint at 6–11, *Al Otro Lado v. Nielsen*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Nov. 29, 2018) (arguing that repulsing asylum-seekers from the United States pursuant to the “Remain in Mexico” policy is lawful because they lack constitutional and statutory rights under U.S. law as they have not reached U.S. territory).

³³¹ SMITH, *supra* note 329, at 3. To the consternation of refugee-rights activists, the Trump Administration has authorized Border Patrol agents to conduct credible fear interviews in some locations, sidelining asylum officers. See Molly O’Toole, *Border Patrol Agents, Rather than Asylum Officers*,

successfully demonstrate a credible fear of persecution during their initial interview, the so-called “Migration Protection Protocols” (MPP) ordinarily³³² require that they continue to wait in Mexico until the time arrives for their appearance before an immigration judge.³³³ Even if immigration judges determine that refugees qualify for asylum or withholding of removal, DHS may still exclude them until DOJ’s Board of Immigration Appeals (BIA) completes appellate review.³³⁴ All told, this process can result in refugees being excluded from U.S. territory for years as their immigration cases run their course.

DHS has described Remain in Mexico as a “humanitarian” solution to an immigration crisis that has overwhelmed the federal government’s administrative capacities.³³⁵ This characterization might be plausible if Mexico offered refugees a true safe haven, but it does not. Mexico has not promised MPP migrants asylum or even withholding of removal, but merely “temporary entrance” pending the resolution of U.S. immigration proceedings.³³⁶ Moreover, human-rights organizations have shown that Mexico “is not a uniformly safe country for all asylum-seekers” because

Interviewing Families for “Credible Fear,” L.A. TIMES (Sept. 19, 2019, 5:50 AM), <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear> [<https://perma.cc/PB4B-TYD3>].

³³² Press Release, Dep’t of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/W5M7-XGUY>] [hereinafter MPP] (explaining that the MPP does not apply, inter alia, to Mexican nationals who “more likely than not [would] face persecution or torture in Mexico” and unaccompanied children).

³³³ See Nicole Acevedo, *New Border Tent Courts Create a ‘Faux Process’ for Asylum-Seekers, Attorneys Say*, NBC NEWS (Sept. 12, 2019, 4:34 PM), <https://nbcnews.com/news/latino/new-border-tent-courts-create-faux-process-asylum-seekers-attorneys-n1053196> [<https://perma.cc/9FK6-SVDY>] (describing tent facilities established in Brownsville and Laredo, Texas, to handle these cases). DHS has argued that the MPP is a valid implementation of 8 U.S.C. § 1225(b)(2)(C), which authorizes the Attorney General to return foreign nationals “arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . pending a [status-determination] proceeding.” MPP, *supra* note 332.

³³⁴ See *First Remain in Mexico Refugee Granted Asylum, Yet Government Threatens to Return Him to Danger*, HUM. RTS. FIRST (Aug. 7, 2019), <https://www.humanrightsfirst.org/press-release/first-remain-mexico-refugee-granted-asylum-yet-government-threatens-return-him-danger> [<https://perma.cc/2HWN-6SJK>] (reporting that “the first individual forced to remain in Mexico under the [MPP had been] granted asylum” by an IJ, but was nonetheless being threatened with return to Mexico for the duration of DHS’s appeal to the BIA).

³³⁵ MPP, *supra* note 332; Memorandum from Kirstjen M. Nielsen, Sec’y, Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs. 1 (2019) [hereinafter Nielsen Memorandum], https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [<https://perma.cc/BAX4-GLTK>] (providing policy guidance for implementation of the Migrant Protection Protocols).

³³⁶ Nielsen Memorandum, *supra* note 335, at 2 (quoting an official statement of the Government of Mexico dated December 20, 2018).

“Mexican immigration officials routinely deport[] asylum-seekers to potential persecution in their countries-of-origin, in violation of Mexican and international law.”³³⁷ Indeed, critics have speculated that the Trump Administration has instituted the MPP to establish a process whereby refugees are returned indirectly to their home countries. According to Amnesty International, “senior Mexican immigration officials” have acknowledged “that US authorities encouraged [them] to detain and check the legal status of asylum-seekers whom CBP was forcing to wait in Mexico, with a potential view to deporting [asylum-seekers] to their countries-of-origin.”³³⁸ Moreover, an anonymous asylum officer has objected that the MPP “is calculated to prevent individuals from receiving any type of protection or immigration benefits in the future” by “ensur[ing] that a high number of applicants will” not receive notice “of changes to hearing dates and times” and will thereby “miss their [immigration] court dates.”³³⁹ If this allegation is accurate, it would mean that the Executive Branch has established the MPP not for the purpose of protecting asylum-seekers and promoting an orderly and humane screening process, but rather to achieve attrition through enforcement³⁴⁰ and indirect *refoulement* in violation of domestic and international law.³⁴¹

These are not the only reasons for concern. Human-rights organizations have expressed alarm that Mexico does not authorize MPP refugees to work, study, or receive social services within its borders.³⁴² Hence, refugees in

³³⁷ USA: “You Don’t Have Any Rights Here,” AMNESTY INT’L, <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/> [<https://perma.cc/X4XF-PFPP>].

³³⁸ *Id.*

³³⁹ E-mail from Asylum Officer to USCIS Mgmt. [hereinafter Asylum Officer], <https://www.washingtonpost.com/context/read-the-email-former-asylum-officer-blasts-trump-s-remain-in-mexico-policy/bd0e07ea-2b91-4d5b-9bc1-4fb01500359a/> [<https://perma.cc/3LST-CBFB>]. This e-mail was sent after an August 8, 2019 meeting with management concerning the officer’s refusal to participate in the Migration Protection Protocols (Remain in Mexico) Program. *Id.*

³⁴⁰ *Id.*

³⁴¹ Indirect *refoulement* occurs when states send refugees “to countries where protection against *non-refoulement* is not ensured, or to countries which may refuse entry, and which may *refoule* such persons to the country where they fear persecution.” 1 UNHCR, AN OVERVIEW OF PROTECTION ISSUES IN EUROPE: LEGISLATIVE TRENDS AND POSITIONS TAKEN BY UNHCR 96 (1995), <http://www.unhcr.org/46e65e1e2.html> [<https://perma.cc/C7R5-LFAA>]; see also Refugee Convention, *supra* note 12, art. 33 (“No Contracting State shall expel or return (‘refouler’) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (emphasis added)); Asylum Officer, *supra* note 339 (“[T]he MPP practically ensures violation of our international obligation of non-refoulement.”).

³⁴² See HUM. RTS. WATCH, “WE CAN’T HELP YOU HERE”: US RETURNS OF ASYLUM SEEKERS TO MEXICO 2 (2019), https://hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf [<https://perma.cc/3K84-CRJY>]; Levi Vonk, *Mexico Isn’t Helping Refugees. It’s Depriving Them of Their Rights*,

Mexico “have both immediate and long-term needs to access food, water, shelter, communication with family and lawyers, and other necessities, but have been left with no legal means to earn the income required to do so.”³⁴³ Although the Mexican government has established temporary shelters for asylum-seekers, shelters in Juárez have space for fewer than 10% of those returned to Mexico under the MPP,³⁴⁴ and this disparity is only increasing as the number of MPP returnees continues to rise. In July 2019 alone, the United States returned 11,804 migrants to Mexico under the MPP.³⁴⁵ By September 2019, 66,000 returnees were in Mexico awaiting MPP hearings or decisions in their cases.³⁴⁶ Meanwhile, many refugees in Mexico have been cast adrift on the streets of notoriously dangerous cities such as Ciudad Juárez, where they lack shelter and have become easy prey for criminal gangs.³⁴⁷ The MPP program thus exposes refugees in Mexico to intolerable conditions that violate their most basic human rights.³⁴⁸

Partially in recognition of these factors, the Ninth Circuit recently upheld a preliminary injunction to set aside the MPP.³⁴⁹ The court concluded that the MPP likely violates the United States’ obligation under both the INA

FOREIGN POL’Y (Feb. 8, 2019, 10:23 AM), <https://foreignpolicy.com/2019/02/08/mexico-isnt-helping-central-american-refugees-its-depriving-them-of-their-rights-caravan-1951-refugee-convention-non-refoulement-honduras-central-america-turkey-syria/> [<https://perma.cc/G5JF-2XU5>].

³⁴³ HUM. RTS. WATCH, *supra* note 342, at 18.

³⁴⁴ *See id.* at 2 (“[T]he number of asylum seekers marooned in Ciudad Juárez already outnumbered the spaces available in free humanitarian shelters by 11 to 1.”).

³⁴⁵ *Increasing Numbers “Remain in Mexico” Awaiting Immigration Court Hearings*, TRAC IMMIGR. (Aug. 26, 2019), <https://trac.syr.edu/immigration/reports/571/> [<https://perma.cc/XT9R-MB8U>].

³⁴⁶ *US Move Puts More Asylum Seekers at Risk*, HUM. RTS. WATCH (Sept. 25, 2019, 12:01 AM), <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk> [<https://perma.cc/2RJU-NQMU>].

³⁴⁷ *See* Debbie Nathan, *Trump’s “Remain in Mexico” Policy Exposes Migrants to Rape, Kidnapping, and Murder in Dangerous Border Cities*, INTERCEPT (July 14, 2019, 6:30 AM), <https://theintercept.com/2019/07/14/trump-remain-in-mexico-policy/> [<https://perma.cc/2T2K-VK3T>] (summarizing research suggesting that because Central Americans repulsed to Mexico “are transient, poor, and without local ties . . . [t]hey are at severe risk of being robbed, kidnapped for ransom, beaten, raped, [or] murdered” and offering examples); Andrea Pitzer, *Trump’s ‘Migrant Protection Protocols’ Hurt the People They’re Supposed to Help*, WASH. POST (July 18, 2019, 5:00 AM), https://www.washingtonpost.com/outlook/2019/07/18/trumps-migrant-protection-protocols-hurt-people-theyre-supposed-help/?utm_term=.946a663b5a88 (last visited Nov. 7, 2020) (“Without money or work permits, [MPP] migrants end up sleeping in abandoned housing or outside, at risk of rape, kidnapping, robbery and murder.”).

³⁴⁸ *See* Exec. Comm. of the High Comm’r’s Programme, *Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, No. 58 (XL), U.N. Doc. A/44/12/Add.1 (Oct. 13, 1989) (concluding that asylum-seekers may be returned to transit countries only if they are “treated in accordance with recognized basic human standards until a durable solution is found for them”).

³⁴⁹ *See* *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1077 (9th Cir. 2020).

and the Refugee Protocol to refrain from *refoulement*, because the MPP calls for Central American refugees to be driven back to Mexico where they face violence and other persecution on account of their non-Mexican nationality.³⁵⁰ In particular, the court upheld the district court’s findings that Central American refugees in Mexico were subject to “targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States.”³⁵¹ The court therefore held that DHS must suspend the MPP and allow asylum-seekers to receive safe haven within the United States while their applications for relief are pending. Ultimately, however, the Supreme Court agreed to stay the Ninth Circuit’s ruling, allowing the MPP to remain in force while DHS pursues Supreme Court review.³⁵²

Given the persecution that Central American refugees have endured in Mexico under the Remain in Mexico policy, is it any wonder that many have chosen to bypass the MPP, risking life and limb to enter the United States unlawfully?³⁵³ Can they reasonably be blamed for violating U.S. immigration controls when this course of action is necessary to address their well-founded fear of persecution? If the answer to these questions is “no,” then prosecuting refugees for such acts is morally indefensible.

Even if DHS eventually rolls back the Remain in Mexico policy, giving refugees unfettered access to relief at ports of entry, DOJ’s zero-tolerance policy would still be immoral as applied to refugees. As the Ninth Circuit has noted, “refugees fleeing imminent persecution do not have the luxury of choosing their escape route into the United States.”³⁵⁴ Without visas, most refugees overseas have no lawful pathway to access official ports of entry by air or sea. Many rely on smugglers to facilitate their flight to freedom and therefore are not in a position to dictate precisely where they will enter U.S. territory.³⁵⁵ When refugees finally arrive at a U.S. border, they often lack the

³⁵⁰ *Id.* at 1087–93.

³⁵¹ *Id.* at 1078.

³⁵² See *Wolf v. Innovation L. Lab.*, 140 S. Ct. 1564 (mem.) (2020).

³⁵³ See *Missing Migrants: Tracking Deaths Along Migratory Routes*, INT’L ORG. FOR MIGRATION, <https://missingmigrants.iom.int/region/americas?region=1422> [https://perma.cc/5KBV-9RSE] (providing estimates of the number of deaths resulting from illegal crossings of the U.S.–Mexico border, which were higher in 2019 than in the five years preceding).

³⁵⁴ *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1259 (9th Cir. 2020) (citing 125 CONG. REC. 35,813–14 (1979) (statement of Rep. Holtzman)).

³⁵⁵ See James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 6 (2008) (observing that cracking down on human smuggling is problematic, from a human-rights perspective, because “refugees must routinely rely upon smugglers and even traffickers in order to escape

financial resources and knowledge of local geography necessary to reach a distant port of entry.³⁵⁶ Indeed, the more vulnerable a refugee's position, the less likely it is that she will be able to travel to a designated port of entry from her first point of contact with a U.S. border.³⁵⁷ Accordingly, the idea that refugees are morally culpable for failing to pursue relief at an official port of entry is based on assumptions about refugee mobility that are at odds with most refugees' extreme vulnerability and highly constrained choices in the real world.

Taking a different tack, the federal government has argued that prosecuting refugees is morally justified if refugees fail to avail themselves of opportunities to seek asylum in third countries through which they passed en route to the United States.³⁵⁸ This argument rests on the dubious premise that refugees can find safe haven elsewhere. There are good reasons to doubt that this premise is accurate for many refugees, including those from Central America. The three Northern Triangle countries—El Salvador, Guatemala, and Honduras—have not established “full and fair” procedures for adjudicating asylum claims and have not allocated the resources necessary to protect refugees' human rights.³⁵⁹ Mexico likewise has a woefully

their own country because no state grants refugees legal authorization to travel for the purpose of seeking asylum”).

³⁵⁶ See *E. Bay Sanctuary Covenant*, 950 F.3d at 1276 (“Many migrants enter between ports of entry out of necessity: they ‘cannot satisfy regular exit and entry requirements and have no choice but to cross into a safe country irregularly prior to making an asylum claim.’” (quoting Brief for UNHCR as Amicus Curiae Supporting Plaintiffs-Appellees at 15, *E. Bay Sanctuary Covenant*, 950 F.3d 1242 (No. 18-17274), ECF No. 34)).

³⁵⁷ See *id.* at 1274 (“The most vulnerable refugees are perhaps those fleeing across the border through the point physically closest to them.”).

³⁵⁸ In July 2019, Attorney General William Barr issued an interim final rule disqualifying refugees who cross the U.S. border from receiving asylum (but not withholding of removal) if they failed to apply for protection in third countries through which they passed en route to the United States. See *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (proposed July 16, 2019) (to be codified at 8 C.F.R. pts. 1003, 1208). The U.S. District Court for the Northern District of California issued a preliminary injunction to prevent DHS from enforcing the rule, but the U.S. Supreme Court stayed the district court's order pending appellate review. See *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 3 (mem.) (2019).

³⁵⁹ See Nicole Narea, *Trump's Agreements in Central America Are Dismantling the Asylum System as We Know It*, VOX (Nov. 20, 2019, 3:08 PM), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained> [<https://perma.cc/2D49-DVHB>] (observing that “Northern Triangle countries lack anything resembling a legitimate asylum system”); *id.* (quoting Professor Karen Musalo's observation: “It's like saying, ‘Your house was just destroyed by an earthquake but there's a house down the street that is on fire. Why don't you seek refuge there?’”). Recently, the Trump Administration has struck deals with the three Northern Triangle countries to allow the United States to redirect refugees to those countries. See, e.g., John Washington, *Sweeping Language in Asylum Agreement Foists U.S. Responsibilities onto El Salvador*, INTERCEPT (Sept. 23, 2019, 8:58 PM), <https://theintercept.com/2019/09/23/el-salvador-asylum-agreement/> [<https://perma.cc/>

inadequate system for handling asylum petitions and has become notorious for returning asylum-seekers to their home countries in violation of international law.³⁶⁰ Accordingly, the Trump Administration's suggestion that it can morally punish refugees who do not pursue relief in these countries betrays either its ignorance of actual Northern Triangle state practices, or its indifference to the dangers that drive many Central American refugees to undertake their perilous passage to the United States.

In sum, refugees often have compelling moral justifications for illegally entering or reentering the United States. As long as refugees have not received an offer of firm resettlement elsewhere,³⁶¹ the United States cannot ethically prosecute them for sidestepping domestic border controls in pursuit of refuge.³⁶²

2. *Excuses*

Refugees may also have powerful excuses for violating domestic immigration controls. Unlike justifications, which address the morality of particular acts, excuses “focus on the actor” herself; “they exculpate even though the actor’s conduct may have harmed society because the actor, for whatever reason, is not judged to be blameworthy.”³⁶³ Acts that are not objectively justified may nonetheless be exculpated if, for example, the actor

DGF9-XCFH]. Implementing these agreements would be illegal, in my view, because the lack of “full and fair” asylum processes in the receiving states would threaten refugees with *refoulement* in violation of 8 U.S.C. § 1158(a)(2)(A).

³⁶⁰ See *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 953–56 (N.D. Cal. 2019) (summarizing reports from UNHCR, Doctors Without Borders, Human Rights First, and other organizations documenting how Mexico lacks credible procedures for conferring durable protection to refugees); AMNESTY INT’L, OVERLOOKED, UNDER-PROTECTED: MEXICO’S DEADLY *REFOULEMENT* OF CENTRAL AMERICANS SEEKING ASYLUM 5 (2018), <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf> [<https://perma.cc/AMQ7-DCGD>] (documenting widespread violations of the principle of *nonrefoulement* by Mexican authorities).

³⁶¹ See 8 U.S.C. § 1158(b)(2)(A)(vi) (providing that an alien is statutorily barred from asylum if she was “firmly resettled in another country prior to arriving in the United States”).

³⁶² DHS regulations codify this principle by stating that an alien will not be considered “firmly resettled” unless she “entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.” 8 C.F.R. § 1208.15 (2006). Even if such an offer has been extended, a refugee will not be considered “firmly resettled” if her “entry into [a transit] country was a necessary consequence of [her] flight from persecution,” she “remained in that country only as long as was necessary to arrange onward travel, and [she] did not establish significant ties in that country,” or if her conditions of residence were “substantially and consciously restricted” by the transit country. *Id.*

³⁶³ Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN’S L. REV. 725, 726 (2004).

acted involuntarily due to external coercion, cognitive incapacity, or other mitigating circumstances.³⁶⁴

Moral philosophers generally agree that criminal acts should be excused if an actor reasonably believed that the acts were necessary for her own self-preservation.³⁶⁵ For retributivists, self-preservation excuses criminal acts because no one could be blamed for refusing to sacrifice her own life or basic liberties for the sake of compliance with the law.³⁶⁶ Utilitarians, in turn, accept excuses as exculpating reasons for potentially criminal action because the criminal law cannot serve as an effective deterrent when an actor's own life or basic freedoms are on the line.³⁶⁷ Both schools should therefore be prepared to accept that when a refugee faces a credible threat of persecution abroad, her well-founded fear may excuse an irregular border crossing that is necessary to facilitate her flight to freedom.

Fear of future persecution is not the only subjective factor that may excuse violations of domestic immigration law. Habituated distrust of public officials may cause refugees to distrust law enforcement officials elsewhere—including in third countries where they seek protection.³⁶⁸ Federal courts have also recognized that because refugees frequently “receive misinformation, from smugglers and others, about the appropriate way to seek refuge in this country,” they are often “unaware that [they] could safely enter legally.”³⁶⁹ In such cases, criminal “prosecution penalizes [them] for [their] ignorance, in contradiction of our government’s policy of providing safe haven to refugees fleeing political violence and

³⁶⁴ See FLETCHER, *supra* note 311, at 803 (observing that criminal acts may be excused by “moral or normative involuntariness” or “physical involuntariness”); Greenawalt, *supra* note 311, at 938 (observing that criminal law excuses for “involuntary” acts cover not only acts that are “not deliberate,” but also those performed “under constraint or duress”).

³⁶⁵ See, e.g., 2 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. XIII, § 1, III (London, W. Pickering 1823) (concluding that “punishment ought not to be inflicted” where it would be “inefficacious” because it would not deter “mischief”); THOMAS HOBBS, LEVIATHAN 208 (Richard Tuck ed., 1996) (1651) (“If a man by the terrour of present death, be compelled to do[] a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation.”); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 36 (J. Ladd trans., 2d ed. 1999) (1797) (arguing that that crimes committed for self-preservation qualify for a “subjective exemption from punishment” (i.e., excuse), not an “objective legality” (i.e., justification)).

³⁶⁶ See, e.g., KANT, *supra* note 365, at 36.

³⁶⁷ See, e.g., BENTHAM, *supra* note 365, ch. VIII, § 1, III.

³⁶⁸ See *United States v. Malenge*, 294 F. App’x 642, 645 (2d Cir. 2008) (emphasizing “that some refugees, particularly those fleeing political violence, harbor a natural distrust of government officials”). To be sure, some refugees seek entry into the United States precisely because they *do* trust the U.S. government to protect their human rights. This does not necessarily mean, however, that they trust U.S. border agents to assist their flight from persecution.

³⁶⁹ *Id.* at 644–45.

persecution.”³⁷⁰ Combine these factors with the extreme emotional distress that many refugees experience due to past trauma,³⁷¹ and it becomes increasingly difficult to imagine how a zero-tolerance policy for immigration crimes could be applied ethically to all refugees, as there are clear excuses for their potentially criminal behavior.

C. *Refugee Prosecution and the Rule of Law*

Thus far, this Part has identified moral considerations that weigh against prosecuting refugees based on the justifiability of particular *acts* or considerations that excuse specific *actors*. A third factor weighing against refugee prosecution is the moral responsibility that *public authorities* bear to respect people subject to their jurisdiction as rational, self-determining agents. When well-founded fears of persecution drive refugees to violate U.S. border controls in search of safety, prosecuting them for such acts may be inconsistent with the United States’ moral obligation to respect the rule of law.

Skeptics might object that I have it exactly backwards. Doesn’t fidelity to the rule of law oblige public authorities to enforce the law’s proscriptions—even against refugees? Wouldn’t a state undermine the rule of law if it declined to punish refugees for unlawful entry? Not necessarily. To understand why this is so, it may be helpful to reflect briefly on why at least some legal philosophers have understood the rule of law to be morally consequential.

The rule of law draws attention to the manner in which public authorities exercise power over people subject to their jurisdiction. Many legal theorists resist the idea that the rule of law has a moral dimension.³⁷² An influential strand in rule-of-law discourse, however, is Lon Fuller’s

³⁷⁰ *Id.* at 644. Although “[t]he general rule that ignorance of the law . . . is no defense to criminal prosecution is deeply rooted in the American legal system,” *Cheek v. United States*, 498 U.S. 192, 199 (1991), moral philosophers do not uniformly endorse this maxim as an accurate assessment of moral responsibility. *See, e.g.*, DOUGLAS HUSAK, *IGNORANCE OF LAW: A PHILOSOPHICAL INQUIRY* 1–2 (2016) (arguing that when criminal laws do not target acts *malum in se*, ignorance of the law is a valid moral excuse and should be a complete excuse from criminal liability). Moreover, whatever force the maxim might have in other settings, it is less defensible as applied to refugees, who are often compelled to flee their home countries without advance warning and therefore typically lack the opportunity to become acquainted with U.S. criminal and immigration law before they reach a U.S. border.

³⁷¹ *See* UNHCR, *REFUGEE RESETTLEMENT: AN INTERNATIONAL HANDBOOK TO GUIDE RECEPTION AND INTEGRATION* 233 (2002), <http://www.refworld.org/docid/405189284.html> [<https://perma.cc/68EB-HSQR>] (citing clinical studies, which suggest that “rates of post traumatic stress disorder [among refugees] rang[e] from between 39% and 100% (compared with 1% in the general population)” (citations omitted)).

³⁷² *See, e.g.*, Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 224–25 (2d ed. 1979).

insight that legal directives must satisfy certain formal criteria to fulfill a state's moral obligation to respect people as rational, self-determining agents.³⁷³ For example, legal directives must express general, not ad hoc, commands; must not be contradictory; and must not "require conduct beyond the powers of the affected party."³⁷⁴ A directive that does not satisfy these desiderata would not comport with the rule of law because it would not afford a rational basis for people to orient their behavior in response to it.³⁷⁵ As Fuller explains,

[T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.³⁷⁶

When a legal directive does not appeal to a party's reason, Fuller suggests, the "bond of reciprocity" between the state and its people is "completely ruptured," negating "the citizen's duty to observe the rules."³⁷⁷

Fuller's conception of the rule of law suggests that states cannot morally prosecute refugees who violate domestic immigration controls in pursuit of safety from persecution. As states recognized during negotiations over the Refugee Convention, threatening a refugee with prosecution for illegal entry essentially entraps him "between two sovereign orders, one ordering him to leave the country [or face persecution] and the other forbidding his entry [under pain of criminal sanctions]."³⁷⁸ The refugee in this setting faces contradictory commands from multiple sovereigns; irrespective of which command he obeys, he will be consigned to "lead[] the life of an outlaw."³⁷⁹ With no legal option for safe residence, his very existence becomes an

³⁷³ See LON L. FULLER, *THE MORALITY OF LAW* 39–40 (rev. ed. 1969). Although not all scholars endorse Fuller's account of the rule of law as a moral ideal, Fuller's formal criteria have been cited by scholars of diverse theoretical orientations as an appropriate starting point for inquiry into the rule of law. See, e.g., T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 61–89 (2001); ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 6–10 (2007); N.E. SIMMONDS, *LAW AS A MORAL IDEA* 64–68 (2007); Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 *LAW & PHIL.* 533, 535–37 (2008); Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 *CAMBRIDGE L.J.* 65, 65 (2004).

³⁷⁴ FULLER, *supra* note 373, at 39.

³⁷⁵ *Id.*

³⁷⁶ *Id.* For further discussion of Fuller's reciprocity-based conception of the rule of law, see PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 74–77 (2016), and KRISTEN RUNDLE, *FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L. FULLER* 97–101 (2012).

³⁷⁷ FULLER, *supra* note 373, at 40.

³⁷⁸ WEIS, *supra* note 83, at 202.

³⁷⁹ *Id.*

illegality.³⁸⁰ “In this way,” domestic criminal prohibitions that are “intended to protect law and order” actually “achieve the opposite result”—subverting the rule of law within a global context “when an attempt is made to apply them to refugees without taking into account [refugees’] peculiar position.”³⁸¹

A more substantively robust conception of the rule of law offers additional reasons to reject refugee prosecution.³⁸² Some sovereign commands fail to respect human rationality and agency, not because they are formally contradictory or demand the impossible, but because they call for individuals to perform acts that no rational person could be expected to perform. To be sure, a state can reasonably demand that individuals act against their own immediate interests in a variety of circumstances. As Scott Shapiro has observed, obedience to inconvenient laws can be understood as “the moral *price* that parties must pay in order to secure the compliance of others.”³⁸³ Accordingly, a rational person could choose to submit to an authority who acts against her interests in some settings to secure reciprocal compliance from the state and other people for other aspects of the law’s grand bargain. But there are some acts that a state may never demand of its people because no rational person would accept such directives as part of a grand bargain. In particular, no rational person would voluntarily submit to a legal system that calls for or allows her own extrajudicial killing, torture, or prolonged arbitrary detention. Domestic laws that countenance such measures are anathema to a substantively robust account of the rule of law because they treat people as mere objects of state power, rather than as purposeful, self-determining agents who are entitled to secure and equal freedom.³⁸⁴ By the same reasoning, a state that uses criminal sanctions to

³⁸⁰ See RIPSTEIN, *supra* note 238, at 298 & n.48 (“If . . . you cannot safely return [to your home state] because its rulers are making war on their own people . . . , the right of any other state to exclude you runs up against its own internal limit.”); Mattias Kumm, *Constitutionalism and the Cosmopolitan State* 16–17 (N.Y.U. Sch. of L. Pub. L. & Legal Theory, Working Paper No. 13-68, 2013) (“In order to justify excluding someone from a state that person must have access to some other state that does not violate his or her rights.”).

³⁸¹ WEIS, *supra* note 83, at 202.

³⁸² See Fox-Decent, *supra* note 373, at 535, 538–39 (arguing that respect for human rights is an essential component of the rule of law).

³⁸³ See Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 433 (Jules Coleman & Scott Shapiro eds., 2002).

³⁸⁴ See Fox-Decent, *supra* note 373, at 576–78. Significantly, international law characterizes the prohibitions on extrajudicial killing, torture, slavery, and prolonged arbitrary detention as “peremptory norms” (*ius cogens*) that states may never violate under any circumstances. See RESTATEMENT (THIRD) OF FOREIGN RELS. OF THE U.S. § 702 cmts. d–i, § 102 cmt. k (AM. L. INST. 1987). In previous writings, Evan Fox-Decent and I have explained how these norms are integral to a substantively robust conception of the rule of law. See, e.g., Evan Fox-Decent & Evan J. Criddle, *The Internal Morality of International*

deter refugees from accessing protection, or to punish those who do, assumes an attitude of hostility or indifference toward refugees that is incompatible with the rule of law. Therefore, there can be no rational ground for asserting that people have a moral obligation to obey laws that prohibit crossing borders when such acts are necessary to escape persecution.

Considered alongside refugees' powerful justifications and excuses for entering the United States outside an authorized port of entry, these rule of law concerns help to explain why the United States has joined with other states to outlaw refugee prosecution in the Refugee Protocol. They also clarify why Congress has refrained from penalizing refugees for illegal entry and reentry in the INA, and they strengthen the case for concluding that prosecuting refugees constitutes cruel and unusual punishment in violation of the Eighth Amendment.

D. Reviving Necessity and Duress

Although federal courts have been slow to recognize the moral stakes of refugee prosecution, the same ethical considerations that support exempting refugees from criminal liability under the Refugee Protocol and the INA also arguably support allowing refugees to raise successful necessity and duress defenses. Under the common law, necessity and duress eliminate criminal liability in settings where a defendant lacks moral culpability for otherwise criminal acts. Necessity applies when a defendant's acts are morally justified,³⁸⁵ while duress excuses criminal conduct when a defendant lacked sufficient voluntariness to incur moral culpability.³⁸⁶ As safeguards against unwarranted punishment, these defenses also contribute to ensuring that criminal penalties are compatible with a morally robust conception of the rule of law. Although some legal and ethical aspects of necessity and duress defenses remain controversial, the better view is that federal courts should allow refugees to use these defenses in many cases to escape criminal liability for illegal entry and reentry.³⁸⁷

Law, 63 MCGILL L.J. 765, 767–68 (2018); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 332–33 (2009).

³⁸⁵ See *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991) (explaining that necessity “justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime”).

³⁸⁶ See MODEL PENAL CODE § 2.09 (AM. L. INST. 2019) (providing that duress applies if an “actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist”).

³⁸⁷ The Supreme Court has recognized that traditional common law defenses are available under federal criminal law unless precluded by statute. See *Dixon v. United States*, 548 U.S. 1, 17 (2006)

A classic scenario where necessity and duress defenses apply is a prison fire. Although escaping from prison is a crime, the Supreme Court has explained that a prisoner can avoid liability for this crime “when the prison is on fire—‘for he is not to be hanged because he would not stay to be burnt.’”³⁸⁸ In the prison fire scenario, an otherwise criminal act is morally justified under the circumstances to the extent that it is necessary to preserve the inmate’s life (i.e., necessity). Moreover, even if breaking prison were not objectively justified, the inmate’s reasonable perception of the gravity of the threat may excuse her failure to comply with the law (i.e., duress).³⁸⁹

By the same logic, refugees should be able to assert successful necessity and duress defenses to prosecution for illegal entry and reentry. Threatening a refugee with prosecution for an unauthorized border crossing is akin to forcing a prisoner to choose between burning or hanging. The refugee similarly must choose between two evils: either endure persecution in her home country or be branded a criminal if she bypasses U.S. border controls in pursuit of asylum. Given this choice, a refugee’s decision to escape persecution in her home country (the greater evil) may justify and excuse her transgression of U.S. border controls (the lesser evil).

Notably, in the dozens of reported cases where refugees have asserted necessity and duress defenses to prosecution for illegal entry and reentry, no court has ever held that §§ 1325(a) and 1326 foreclose these defenses. Instead, courts have tended to reject these defenses on a case-by-case basis because refugees could not satisfy two requirements: (1) a threat of imminent harm, and (2) exhaustion of alternative remedies.³⁹⁰

(establishing the federal evidentiary burden for a duress defense); *United States v. Bailey*, 444 U.S. 394, 410, 415 n.11 (1980) (“We . . . recognize that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . .”). To date, however, the Court has not had occasion to decide definitively whether refugees may rely on necessity or duress as a defense to prosecution for illegal entry or reentry. *See generally* *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 490 (2001) (“[I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute.”). For purposes of this discussion, I assume that necessity is available as a defense to illegal entry and reentry charges because Congress has not indicated to the contrary in the INA’s text or legislative history.

³⁸⁸ *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868) (quoting EDMUND PLOWDEN, ON 1 EDWARD I (1307)); *see also Bailey*, 444 US at 415 (quoting this passage from *Kirby* with approval); *Baender v. Barnett*, 255 U.S. 224, 226 (1921) (same).

³⁸⁹ *See People v. Lovercamp*, 118 Cal. Rptr. 110, 116 (Ct. App. 1974) (endorsing these principles).

³⁹⁰ *See, e.g., United States v. Bonilla-Siciliano*, 643 F.3d 589, 591 (8th Cir. 2011) (concluding that the defendant could not establish a necessity defense because he “failed to identify any specific threat to his safety, and relied only on a generalized fear of harm from the government and gang members” and “did not exclude the option of going to a country other than the United States”); *United States v. Grainger*, 239 F. App’x 188, 190–92 (6th Cir. 2007) (concluding that a refugee who traveled through Canada could not establish a necessity defense to illegal reentry); *United States v. Fashola*, No. 94-5769, 1995 WL 686329, at *2 (4th Cir. Nov. 20, 1995) (rejecting a Nigerian asylum-seeker’s justification defense, in part,

Conventional wisdom suggests that the imminence and exhaustion requirements for necessity and duress serve a common purpose: incentivizing people to seek assistance from public officials before they take the law into their own hands.³⁹¹ For example, if a prison inmate faces a threat of physical abuse from other prisoners, she must ordinarily request protection from prison officers or the courts before resorting to a prison break. If a prisoner cannot demonstrate imminence or exhaustion of remedies, she cannot show that public officials would have been unwilling or unable to render timely assistance.³⁹² Consequently, she cannot meet her burden to prove that breaking prison was justified under the circumstances, nor can she demonstrate that her actions were morally excused on the ground that a person of reasonable firmness would have been unable to resist the temptation to break prison. Without a viable moral justification or excuse, her necessity and duress defenses to criminal charges for breaking prison would likewise fail.³⁹³

In the past, federal courts have concluded that refugees cannot satisfy the imminence requirement without showing that they faced an immediate threat of persecution at the very moment when they crossed into the United States.³⁹⁴ Although this approach lies well within the mainstream of federal

because the defendant “has not presented any evidence . . . as to why he could not have fled to another country”); *United States v. Brizuela*, No. B-13-CR-476-1, 2014 WL 2257405, at *2 (S.D. Tex. May 29, 2014) (concluding that because “a generalized fear of harm in the future is insufficient to meet the imminent harm element” for duress, “[d]efendant’s testimony that he generally feared for his life in El Salvador . . . is insufficient to meet the imminent harm element of duress”); *United States v. Crown*, No. 99 CR. 1044 (AGS), 2000 WL 709003, at *3 (S.D.N.Y. May 31, 2000) (rejecting a necessity defense for a defendant who reentered the United States to gain access to a life-sustaining treatment for HIV/AIDS that was unavailable in his own country because “defendant had the option of traveling to a country other than the United States in order to seek treatment”).

³⁹¹ Cf. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) (“[T]he imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent and unavoidable, . . . the police are no longer in a position to intervene and exercise the state’s functioning of securing public safety.”).

³⁹² See *Bailey*, 444 U.S. at 410–11 (“Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, [breaking out of prison] was his only reasonable alternative.”).

³⁹³ See *United States v. Michelson*, 559 F.2d 567, 570 (9th Cir. 1977) (holding that because “the task . . . of protecting prisoners from assaults within prisons rests [primarily] with correctional officials,” a necessity defense applies only in the “few and very limited circumstances” when it is not “possible for an endangered inmate to secure protection from correctional officials or from the courts”); *Lovercamp*, 118 Cal. Rptr. at 115 (suggesting that a defendant must show that there was “no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory”).

³⁹⁴ See, e.g., *United States v. Ramirez-Chavez*, No. 13-00490 DAE, 2013 WL 3581959, at *4 (W.D. Tex. July 2, 2013) (rejecting a defendant’s duress defense because his kidnappers near the U.S.–Mexico

case law, it arguably cuts too narrowly. Some criminal law theorists have argued that imminence analysis should focus not on whether *harm* was imminent at the time a defendant acted, but rather whether the defendant had an immediate *need* to take action in order to prevent the threatened harm.³⁹⁵ An otherwise unlawful act may be morally permissible, in other words, when it is immediately necessary to avert harm, irrespective of whether the anticipated harm is proximate in time or place.³⁹⁶ Consistent with this thinking, one federal district court has held that an Ethiopian refugee who escaped from immigration detention could assert a valid necessity or duress defense to criminal charges based on the “ultimate harm” awaiting him abroad, even if that harm would occur in a distant location at an unknown future date.³⁹⁷ In another case, a refugee faced prosecution for assaulting DHS officers on an airplane in order to prevent them from returning him to Togo, where he feared persecution.³⁹⁸ The district court agreed that the defendant could assert a necessity defense even if the “persecution . . . or danger” awaiting him in Togo “was not physically present at the precise moment” when the altercation occurred.³⁹⁹ Although these two decisions are outliers in federal case law, they reflect a common moral calculus. In both cases, the district courts reasoned that criminal violations could be morally justified or excused—even if the threat was not physically or temporally immediate at the time—as long as refugees needed to act swiftly to avoid a serious risk of persecution in their countries of origin.

This approach to imminence would reframe how federal courts approach necessity and duress defenses in the context of refugee prosecution under §§ 1325(a) and 1326. When evaluating necessity, courts would determine whether a refugee had to enter the United States at the time she did to avoid a serious risk of harm in her home country or a transit country.

border “were not in hot pursuit” when he “slipped away . . . unnoticed” and “crossed the Rio Grande river without anyone pursuing him”).

³⁹⁵ See, e.g., Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 69 (“Immediate necessity, not imminence of harm, should be considered essential to self-defense claims . . .”); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL’Y 105, 127 (1990) (“Imminence is relevant only because it helps identify cases where flight or legal intervention will be impossible, so that violent self-help becomes truly necessary. The decisive factor is necessity, not imminence *per se*.”). But see Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 247 (2004) (critiquing this approach to self-defense on the ground that the use of force requires special justification).

³⁹⁶ Of course, in most self-defense cases a defendant will struggle to prove that the use of force was strictly necessary if her assailant’s attack had yet to commence.

³⁹⁷ *United States v. Dagnachew*, 808 F. Supp. 1517, 1523 (D. Colo. 1992).

³⁹⁸ *United States v. Kpomassie*, 323 F. Supp. 2d 894, 896–97 (W.D. Tenn. 2004).

³⁹⁹ *Id.* at 901.

If so, the anticipated harm would be sufficiently imminent, in the relevant sense, to justify the refugee's circumvention of U.S. border controls. Similarly, when a refugee reasonably believes that traveling to the United States is immediately necessary to escape persecution, this belief would be sufficient to establish a duress defense without a refugee having to show that her persecutors chased her all the way to the U.S. border. Under this "immediate need" approach to imminence, many refugees would have valid necessity and duress defenses to illegal entry and reentry charges.

The exhaustion of remedies requirement for necessity and duress defenses should be even easier for refugees to satisfy. Keep in mind that asylum-seekers cannot qualify as refugees in the first place without demonstrating that public officials in their country of origin would be either the source of their persecution or unable or unwilling to protect them from nonstate actors.⁴⁰⁰ By definition, therefore, all refugees can show that they have exhausted the remedies available to them in their home country.

The suggestion that a refugee cannot satisfy the exhaustion requirement without showing that no other country in the world would grant her asylum is morally suspect. As long as a refugee has not received a firm offer of resettlement elsewhere, faulting her for seeking protection in the United States is like blaming a starving hiker for breaking into one unoccupied cabin rather than another in order to obtain life-sustaining provisions. When a starving hiker stumbles upon several cabins but has not received an invitation to enter any of them, her otherwise unlawful act of breaking and entering into any particular cabin may be morally justified and excused to preserve her life. Similarly, when a refugee has the option to pursue protection in multiple countries, her decision to enter any particular country should not be punishable on the ground that asylum might have been available elsewhere. As long as a refugee has not received a firm offer of resettlement abroad, the mere hypothetical possibility that she might be able to access relief somewhere else in the world should not prevent her from asserting successful necessity and duress defenses in the United States. The common law's moral foundations thus arguably support the view that refugees have valid necessity and duress defenses to criminal charges under §§ 1325(a) and 1326.

⁴⁰⁰ See *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (holding that term "persecution" in Refugee Act encompasses only harm inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control"), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

E. How Prosecution Undermines Protection

Perhaps recognizing the weight of these moral objections, defenders of refugee prosecution sometimes advance another argument: the prejudicial impact of this practice is limited because refugees are still free to seek asylum and withholding of removal in immigration court.⁴⁰¹ This argument is unconvincing for several reasons.

First, in practice, refugees are not always free to petition for asylum and withholding of removal after they complete their criminal sentences.⁴⁰² According to one recent report, defendants near the U.S.–Mexico border who are sentenced to time served are typically “taken straight to the bridge or deported after court.”⁴⁰³ Hence, if criminal defense counsel is not “forceful” in asserting their clients’ desire to apply for relief from removal (a matter outside their official purview), refugees may be summarily expelled without receiving an opportunity to communicate their fear of persecution to an asylum officer or immigration judge.⁴⁰⁴ Further, after a refugee has been removed from the United States, she cannot qualify for asylum following a subsequent reentry if the government requests to have the first removal order summarily “reinstated.”⁴⁰⁵ The Attorney General might also invoke an asylum-seeker’s illegal entry or reentry as a factor weighing against a favorable exercise of discretion to grant asylum.⁴⁰⁶ Cumulatively, these

⁴⁰¹ See, e.g., *United States v. Barry*, 500 F. Supp. 2d 125, 128 (N.D.N.Y. 2007) (arguing that “equity does not support” exempting a refugee from criminal liability because “criminal prosecution does not prevent her from seeking asylum, and . . . [does not] diminish the success of an asylum application”); INSPECTOR GENERAL, *supra* note 29, at 17 (citing CBP’s assertion that “[t]he fact that an undocumented alien is being prosecuted does not influence the outcome of his or her credible fear claim”); cf. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (holding that the Attorney General may not deny asylum based on a refugee’s unlawful entry or presence in the United States).

⁴⁰² See, e.g., Arnpriester, *supra* note 21, at 6 (recounting the story of an Eritrean torture survivor who entered the United States through the U.S.–Mexico border and served time for illegal entry before receiving asylum in immigration court).

⁴⁰³ GREENE, CARSON & BLACK, *supra* note 123, at 65 (quoting immigration attorney Jodi Goodwin); see also Kriel, *supra* note 117 (describing Mexican asylum-seekers who were not afforded an opportunity to seek relief in immigration court after their prosecution for illegal entry).

⁴⁰⁴ GREENE, CARSON & BLACK, *supra* note 123, at 65; see also HUMAN RIGHTS FIRST, *supra* note 1, at 13–14 (describing the case of two Mexican asylum-seekers who were summarily removed when their legal counsel failed to assist them in seeking asylum and withholding of removal).

⁴⁰⁵ See *Mejia v. Sessions*, 866 F.3d 573, 579–87 (4th Cir. 2017).

⁴⁰⁶ See *Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, PM-602-0162, U.S. CITIZENSHIP & IMMIGR. SERVS. 8 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [<https://perma.cc/7T34-ML9S>] (“USCIS personnel may find an applicant’s illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion.”).

practices have transformed criminal law enforcement into a de facto “immigration screener” that prevents refugees from accessing relief in immigration court.⁴⁰⁷

If this were not bad enough, some U.S. Attorneys’ Offices now require that refugees waive their statutory rights to petition for asylum and withholding of removal as a precondition for pleading to a reduced charge or sentence.⁴⁰⁸ Refugees in these jurisdictions therefore face a stark choice: either they may plead guilty in exchange for time served and face *refoulement*, or they may assert their statutory right to seek relief in immigration court and receive a de facto penalty in criminal sentencing. Neither option is consistent with the notion that criminal charges do not prejudice a refugee’s access to relief from removal.

Second, even if refugee defendants were actually free to pursue asylum and withholding of removal in immigration court, it would be a mistake to overlook how criminal sentences can wreak havoc on their lives. Although some first-time offenders are sentenced only to time served,⁴⁰⁹ others remain behind bars for as long as six months.⁴¹⁰ Prison terms for illegal reentry range

⁴⁰⁷ Eagly, *supra* note 62, at 1289. Sadly, even when asylum-seekers receive credible fear interviews, they are sometimes removed inappropriately without being referred for a hearing in immigration court. See ALLEN KELLER, ANDREW RASMUSSEN, KIM REEVES & BARRY ROSENFELD, STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EVALUATION OF CREDIBLE FEAR REFERRAL IN EXPEDITED REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES 20 (2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/evalCredibleFear.pdf [<https://perma.cc/A2ZV-Z9JY>] (reporting the results of a study in which observers noted that “in roughly one sixth of cases in which an alien expressed a fear of returning to his or her native country, no referral for a Credible Fear interview was made and the alien was either ordered removed or allowed to withdraw his or her application for entry”). Moreover, the risk of an errant determination at the credible-fear-interview stage has become greatly exacerbated since June 2019, when DHS authorized Border Patrol agents to conduct credible fear interviews. Before this change, asylum officers had recommended over 90% of asylum-seekers for hearings in immigration court; subsequently, only 10% have received such referrals, prompting lawsuits challenging the new process. Amanda Holpuch, *Asylum: 90% of Claims Fall at First Hurdle After US Process Change, Lawsuit Alleges*, GUARDIAN (Nov. 13, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/nov/13/asylum-credible-fear-interview-immigration-women-children-lawsuit> [<https://perma.cc/8C7A-E2LE>]. After a refugee has been removed from the country once, a subsequent illegal entry will render her ineligible for asylum. See 8 U.S.C. § 1231(a)(5) (“If the Attorney General finds that an alien has reentered the United States illegally after having been removed . . . the prior order of removal is reinstated . . . [and] *the alien is not eligible and may not apply for [asylum] . . .*” (emphasis added)); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999) (clarifying that aliens subject to reinstated removal orders are “ineligible for asylum”).

⁴⁰⁸ See HUMAN RIGHTS FIRST, *supra* note 1, at 3 (documenting a case in which the “DOJ told [an asylum-seeker’s] lawyers it would increase the recommended criminal sentence if he refused to waive his right to seek asylum”); *id.* at 20 (observing that some federal prosecutors refused to strike plea deals with defendants who insisted upon retaining their rights to seek asylum and withholding of removal).

⁴⁰⁹ See *id.* at 19.

⁴¹⁰ Keller, *supra* note 110, at 131–32.

from six months (the federal advisory guideline) to twenty years (the statutory maximum).⁴¹¹ Consequently, refugees who are prosecuted for illegal entry or reentry may languish in prison for a lengthy period.⁴¹²

Third, the collateral consequences of criminal convictions can be calamitous for refugees. Adult defendants in criminal custody are routinely separated from their accompanying children. Detained children, in turn, have suffered serious emotional and physical distress while in immigration detention.⁴¹³ Criminal convictions also remain on refugees' permanent criminal records, potentially impacting their ability to secure gainful employment for decades to come.⁴¹⁴

Thus, criminal charges can have a variety of devastating consequences for refugees. Some never receive a fair opportunity to petition for asylum and withholding of removal, while others face family separation, diminished employment prospects, and other collateral consequences on top of their prison term and fines. Cumulatively, these factors lend powerful support for the conclusion that prosecuting refugees for illegal entry and reentry is morally indefensible.

CONCLUSION

The opening scene of this Article describes how a magistrate judge sought to console several grief-stricken asylum-seekers by acknowledging that “none of [them] are criminals.”⁴¹⁵ Little did he know how right he was. As this Article shows, refugees are not criminally liable for illegal entry or reentry. Since Congress adopted the Refugee Act in 1980, it has taken care to distinguish ordinary migrants from refugees. This distinction reflects

⁴¹¹ 8 U.S.C. § 1326(b)(2).

⁴¹² One study determined that the average sentence for illegal reentry was twenty-one months. See Keller, *supra* note 110, at 132. However, sentences as long as five years are apparently not uncommon. See GREENE, CARSON & BLACK, *supra* note 123, at 45.

⁴¹³ See *Examining the Failures of the Trump Administration's Inhumane Family Separation Policy: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 116th Cong. (2019) (statement of Cristina Muniz de la Pena, Terra Firma Mental Health Director, on behalf of the American Psychological Association), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Muniz%20Testimony%20FINAL_0.pdf [<https://perma.cc/E2HM-TDTT>] (explaining how family separation causes psychological trauma); U.S. DEP'T OF HOMELAND SEC., OIG-19-47, OFF. OF THE INSPECTOR GEN., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (June 3, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/HWS3-4TPT>] (documenting inadequate care at immigration detention facilities).

⁴¹⁴ See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 299–300 (2011) (identifying “a multitude of statutory and regulatory bars to employment at the local, state, and federal levels for convicted persons” and noting that “many employers . . . use the information to avoid hiring anyone with any type of record”).

⁴¹⁵ HUMAN RIGHTS FIRST, *supra* note 1, at 9.

Congress's recognition that the United States bears special moral and international legal obligations to refrain from penalizing refugees for irregular migration. Although §§ 1325(a) and 1326 of the INA do not articulate this distinction between refugees and ordinary migrants expressly, the broader text, context, and history of the INA reveals that Congress did not contemplate—and would not have approved—courts using these provisions to punish refugees for acts associated with their flight from persecution. Moreover, traditional canons of federal statutory interpretation—including the *Charming Betsy* canon, the canon on constitutional avoidance, and the rule of lenity—counsel that these sections should be interpreted to spare refugees from criminal penalties. In the final analysis, therefore, the observation that refugees are not “criminals” is accurate not only in a moral sense, but also strictly as a matter of U.S. law.