

Trumping Asylum: Criminal Prosecutions for “Illegal” Entry and Reentry Violate the Rights of Asylum Seekers

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Introduction

As a candidate for President of the United States, Donald Trump promised to bring “law and order” back to the U.S. immigration system¹—a claim that was and has been undergirded by inflammatory and racially charged vitriol.² Donald Trump launched his presidential bid by stating, “when Mexico sends its people, they’re not sending their best. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I

* Rule of Law and Human Rights Fellow, Refugee Protection, Human Rights First. This Article draws on ongoing research with Human Rights First on asylum and criminal prosecutions for immigration-related infractions. Uncited facts and claims are based on firsthand research. Special thanks is owed to Olga Byrne for her guidance and supervision in investigating and researching this topic. Appreciation is also owed to Eleanor Acer for her advice and counsel on various issues contained in this piece. Sincere gratitude is extended to Adam Glenn for his immeasurable support and continual encouragement. This piece would not be possible without those who have shared their knowledge and experience, especially the End Streamline Coalition and the various defenders and advocates fighting on behalf of those caught up in this system. A great deal of appreciation is extended to Kelsey Campbell for her patience and assistance through this editing process. Thank you to the entire *Hastings Constitutional Law Quarterly* Editorial Board for their work and diligence from which this piece has tremendously benefitted. This Article is dedicated to Swietlana Garbarska who fled to America from Poland in 1967 and was granted asylum. In 2015, she lost a fierce battle with lung cancer and she is missed every day.

1. See OFFICE OF THE PRESS SEC’Y, PRESIDENT DONALD J. TRUMP TAKING ACTION AGAINST ILLEGAL IMMIGRATION, (June 28, 2017), www.whitehouse.gov/the-press-office/2017/06/28/president-donald-j-trump-taking-action-against-illegal-immigration (stating “While running for President, Donald Trump promised the American people that he would bring law and order back to our broken immigration system.”); see also Josh Zeitz, *How Trump Is Recycling Nixon’s ‘Law and Order’ Playbook*, POLITICO (July 18, 2016), <http://www.politico.com/magazine/story/2016/07/donald-trump-law-and-order-richard-nixon-crime-race-214066> (arguing that like Nixon, Trump used fear of crime to tap into popular anxiety, including anxieties associated with immigration).

2. See e.g., Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

assume, are good people.”³ He bookended these sentiments in the final presidential debate, when he responded to a question on immigration stating, “we have some bad *hombres* here and we’re going to get them out.”⁴ On his fifth day in office, President Trump signed an executive order on border security and immigration enforcement, directing a “high priority” be accorded to “prosecutions of offenses having a nexus to the southern border”⁵ and similar policies under his administration have followed.⁶

Despite the misconception that so-called “illegal” immigrants are a major source of crime in the United States, study upon study reveals that those considered to be in the country without authorization actually commit crimes at far lower rates than the general population, and in fact the crime rate in cities with large immigrant populations has fallen disproportionately in recent years.⁷ Nonetheless, promulgating a myth linking immigrants to crime has been used to justify a significant ramp up of immigration enforcement measures that have become a key focus of the Department of Justice (“DOJ”) under Trump—despite the fact that “illegal” immigration is at its lowest point since the Great Depression, according to libertarian think tank the Cato Institute.⁸

3. *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

4. Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments> (the English translation of *hombres* is “men”).

5. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

6. *See infra* Part II.A.

7. *See e.g.*, Ramiro Martinez Jr. & Matthew T. Lee, *On Immigration and Crime*, 1 CRIM. JUST. 485 (2000); Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014); Elina Treyger et al., *Estimating the Effects of Immigration Enforcement on Local Policing and Crime: Evidence from the Secure Communities Program*, 13 CRIMINOLOGY & PUB. POL’Y, 285 (2014); Robert Stribley, *Undocumented Immigrant Does Not Equal Violent Criminal*, HUFF. POST (Aug. 30, 2016), http://www.huffingtonpost.com/entry/illegal-immigrant-does-not-equal-violent-criminal_us_57be3cc5e4b06384eb3e27ef; Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO INST.: IMMIGR. RES. AND POL’Y BRIEF 1, Mar. 15, 2017; Walter Ewing, et al., *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL: SPECIAL REPORT, July 13, 2015.

8. *See* David Bier, *How Much Credit Can President Trump Take for the Secure Border?*, CATO INST.: CATO AT LIBERTY (Aug. 8, 2017), <https://www.cato.org/blog/how-much-credit-can-trump-take-secure-border>; *see also* Press Release, Department of Homeland Security, Department is Better Targeting Its Enforcement Efforts to Prioritize Convicted Criminals and Threats to Public Safety, Border Security, and National Security (Dec. 22, 2015) (stating that “with the exception of one year, apprehensions along the southwest border — a key measure of illegal border crossings — are at their lowest level in more than 40 years”). Furthermore, the Department of Homeland Security analyzed border security data collected through 2016, prior to Trump assuming the presidency, and concluded that the southern border “is more difficult to illegally cross today than

Under U.S. law, immigrants can be criminally charged with *illegal entry* (8 U.S.C. § 1325 – “improper entry by alien”) if they enter, or attempt to enter, the United States at a place or time other than as designated by immigration; if they elude inspection by immigration; or if they attempt to enter by misrepresenting a material fact.⁹ Immigrants can also be criminally charged with *illegal reentry* (8 U.S.C. § 1326 – “reentry of removed aliens”) if they have been previously denied entrance into the United States, or formally removed, and thereafter enter, or attempts to enter, or are found in, the United States without authorization.¹⁰ In Fiscal Year (“FY”) 2013, more than 60,000 individuals were deported whose most serious criminal conviction was for entering or reentering the United States “illegally.”¹¹

Given that these two immigration infractions are defined as “crimes” under U.S. law, the idea of rampant criminality by immigrants is circular logic made real, as immigration is defined as a criminal offense—a phenomenon Professor Juliet Stumpf termed “crimmigration.”¹² Stumpf argues that “as criminal sanctions for immigration conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals.”¹³ Thus, by making it a “crime” to cross a country’s border, a person stepping over an international line is made a criminal—regardless of whether that person is an otherwise law-abiding member of society. Nevertheless, the United States has created criminals—i.e., “illegal aliens”—because the government has chosen to construct laws that construe those who violate immigration infractions as such. Therefore, by bringing more “law and order” to the immigration system, invariably it will appear that there are more *criminal* immigrants in the country.

Some of those deemed “criminal” are also asylum seekers. Under U.S. law, an asylum seeker is a person “present in the United States” and is seeking protection “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

ever before.” DEP’T OF HOMELAND SEC. OFFICE OF IMMIGR. STATISTICS, EFFORTS BY DHS TO SOUTHWEST BORDER SECURITY BETWEEN PORTS OF ENTRY 19 (Sept. 2017), https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf.

9. 8 U.S.C. § 1325.

10. 8 U.S.C. § 1326.

11. See *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, ACLU, Dec. 2015, https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf.

12. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149 (2004).

13. Stumpf, *supra* note 12, at 380.

particular social group, or political opinion.”¹⁴ An asylee is a person who meets the definition of refugee, but unlike a refugee who applies for protection outside the country, an asylum seeker seeks protection once present in the United States.¹⁵

U.S. law requires persons applying for asylum to be physically present in the United States, yet many fleeing persecution and danger have been apprehended, charged for the act of crossing into the United States “illegally,” and subsequently processed through the criminal justice system. For instance, a torture survivor in need of protection, entered the United States via the southern border and presented himself to Border Patrol agents, explaining his experiences in Eritrea, his fear of torture if returned, and his desire to seek asylum. Border agents nevertheless referred him to criminal prosecution for *illegal entry*, and he was criminally convicted. After serving his sentence in a federal prison, he was transferred to immigration custody, where an immigration judge determined that his eligibility for asylum was so clear that it was granted mid-hearing. Yet, the United States had already needlessly penalized this refugee for *illegal entry*.¹⁶

The principal legal document on asylum is the 1951 United Nations Convention Relating to the Status of Refugees (“Refugee Convention”) and its 1967 Protocol.¹⁷ The United States ratified the Protocol, thereby legally

14. *Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>; *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>; *Refugees and Asylees*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/refugees-asylees>.

15. See *Refugees & Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum>.

16. Case notes are on file with Human Rights First who represented this individual on his asylum (civil immigration) case. This individual was an Eritrean citizen who after fleeing torture was a target of repeated police abuse in the first country where he tried to settle. After police poured fuel over his house in the middle of the night and threatened to burn it down, he then fled on to a second country. There he was also subjected to repeated beatings and extortion by police and feared deportation back to Eritrea. He was compelled to pay a smuggler to help him fly to Latin America, where he was shuttled through several countries to Mexico. There he was held hostage and threatened with death unless he paid a ransom. He was finally released and crossed the Rio Grande into the U.S., where he presented himself to U.S. Border Patrol. He explained that he wanted to seek asylum, described his experiences in Eritrea and his fear of torture if returned (this according to the Border Patrol notes). He was promptly referred for prosecution for *illegal entry*. Only after being convicted was he transferred back into immigration custody and after passing a credible fear interview, allowed to make his application for asylum in immigration court.

17. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol].

binding itself to the central protections contained in the Convention.¹⁸ Of particular relevance for this discussion is Article 31 of the Convention, which states that parties to the treaty “shall not impose penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization.”¹⁹ As will be discussed, both international and U.S. law has recognized that criminal prosecution constitutes a “penalty.” Despite this, the United States does not recognize asylum as a defense to *illegal entry* or *reentry*, and asylum seekers are not excluded from being charged and criminally prosecuted for either immigration infraction.

Notwithstanding the United States’ longstanding leadership in protecting and welcoming refugees and asylum seekers, over the years it has instead elected to prosecute an untold number of those seeking protection—a number that is only set to grow due to the Trump administration’s focus on escalating criminal prosecutions for immigration infractions at a time when the population coming to the U.S. southern border is largely seeking safety from danger and persecution.²⁰

The U.S. Constitution mentions immigration but once (restricting Congress from imposing limits on the slave trade), and is otherwise largely quiet on which branch of government holds authority over immigration.²¹ The Supreme Court instead has interpreted the Constitution as granting plenary power over immigration to Congress and the President,²² allowing

18. See *Legal Obligations of the United States Under Article 33 of the Refugee Convention*, 15 OP. OFF. LEGAL COUNSEL 86 (1991) (stating that “The United States adheres to Articles 2 through 34 of the Refugee Convention by virtue of the Protocol Relating to the Status of Refugees . . . to which the United States acceded on November 1, 1968.”).

19. Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S. 174; *Legal Obligations of the United States Under Article 33 of the Refugee Convention*, *supra* note 18.

20. See *infra* Part I for discussion regarding the increase of asylum seekers and vulnerable immigrants crossing the border.

21. U.S. CONT. art 1, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”); *cf.* U.S. CONT. art 1, § 8, cl. 4 (granting Congress the power to establish a “uniform Rule of Naturalization”).

22. See *e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953) (internal quotation marks omitted))); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009) (“Since the doctrine was first formulated in the late nineteenth century, the Supreme Court has emphasized that immigration represents an issue best left to the political branches” (citing *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889))); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (“The plenary power doctrine’s contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and

Congress to hold the authority to make laws related to immigration and the President and the relevant executive agencies (e.g., Department of Homeland Security whose law enforcement arm includes the U.S. Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”)) the authority to enforce these laws.

This division of power becomes convoluted when integrating the civil immigration system, involving executive power, with the criminal system, overseen by the judiciary. As will be discussed, this comingling has serious consequences for immigrants whose criminal prosecutions have an adverse impact on their civil immigration opportunities. Furthermore, the process becomes entangled when the system processes inherently civil immigration infractions in way that implicates and violates the constitutional protections entitled to those charged with crimes in the United States—including immigrants.

This Article will outline the ways that the criminal justice system violates the rights of asylum seekers and other vulnerable immigrants—including the constitutional rights violated for exercising the right to seek asylum and the legal right itself to seek asylum. While significant and critical scholarship has been devoted to the entanglement of civil immigration law and criminal law, less has been published on how this interconnection adversely impacts asylum seekers specifically, and even more precisely their constitutional rights and its interplay on asylum.²³

Part I provides a brief summary of the refugee and displacement crisis south of the United States border that is ravishing Central America and Mexico, resulting in hundreds of thousands fleeing in search of protection. Part II explains how the Trump administration is implementing policies that unnecessarily increase criminal prosecutions for the immigration infractions of *illegal entry* and *reentry*, without safeguards for asylum seekers and at a time when refugees make up a large proportion of the population affected. Part III reviews how such prosecutions violate constitutional entitlements and protections for those charged, including asylum seekers and vulnerable immigrants. Part IV describes how asylum seekers’ ability to seek asylum

often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.”).

23. See e.g., JOANNA LYDGATE, *THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 4* (2010); ACLU, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM* (2014); JUDITH GREENE ET AL., *INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER, GRASSROOTS LEADERSHIP* (2016) [hereinafter *INDEFENSIBLE*]; HUMAN RIGHTS FIRST, *THE RISE IN CRIMINAL PROSECUTIONS OF ASYLUM SEEKERS* (2017); HUMAN RIGHTS WATCH, *TURNING MIGRANTS INTO CRIMINALS* (2013).

and their right to remain safely in the United States is impeded when they are criminal prosecuted. Finally, this Article concludes by explaining how the United States legacy of providing protection and refuge to the world's most vulnerable is at risk under the Trump administration, which should not implement policies that contravene America's legal obligations, but instead uphold its promise of protecting the persecuted.

I. The Refugee Situation South of the U.S. Border

Since 2014, a significant number of asylum seekers and vulnerable people have fled violence and instability south of the U.S. border, primarily from El Salvador, Guatemala, Honduras (a region collectively referred to as the "Northern Triangle"), and Mexico.²⁴ The United Nations High Commissioner for Refugees ("UNHCR") has called the situation a "protection crisis,"²⁵ noting that violence has surged to levels not seen since the region was wracked by armed conflicts in the 1980s, which has resulted in asylum application numbers from these countries reaching levels not seen since that time.²⁶

Current murder rates in the Northern Triangle are among the highest ever recorded in these countries, with the cities of San Salvador, Tegucigalpa, and San Pedro Sula ranking as three of the most dangerous cities in the world.²⁷ This has led many to classify the Northern Triangle as the world's most deadly region outside an official war zone.²⁸ In addition to

24. See *Central Americas Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Jan. 19, 2016), <https://www.cfr.org/background/central-americas-violent-northern-triangle>; *Five Facts About Migration from Central America's Northern Triangle*, WASH. OFF. OF LATIN AM. (Jan. 15, 2016), <https://www.wola.org/analysis/five-facts-about-migration-from-central-americas-northern-triangle/>.

25. Nora Sturm, *UNHCR Calls for Urgent Action as Central America Asylum Claims Soar*, U.N. HIGH COMM'R FOR REFUGEES (Apr. 5, 2016), <http://www.unhcr.org/en-us/news/latest/2016/4/5703ab396/unhcr-calls-urgent-action-central-america-asylum-claims-soar.html>.

26. U.N. HIGH COMM'R FOR REFUGEES, *GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016* (2017).

27. *Where We Work*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unrefugees.org/where-we-work/central-america/>.

28. See e.g., Adriana Belran, *Children and Families Fleeing Violence in Central America*, WASH. OFF. LATIN AM. (Feb. 21, 2017), <https://www.wola.org/analysis/people-leaving-central-americas-northern-triangle/> (noting that Guatemala and Honduras "remain among the world's most violent countries not at war."); *'All You Can Do Is Run': Central American Children Fleeing Violence Head for Mexico*, THE GUARDIAN (Feb. 10, 2016), <https://www.theguardian.com/global-development/2016/feb/10/central-american-children-fleeing-violence-mexico-guatemala-el-salvador-honduras>; *Central America's Northern Triangle World's Most Deadly Region Outside Warzones*, TELESUR (Jan. 6, 2016), <http://www.telesurtv.net/english/news/Central-America-Worlds-Most-Deadly-Region-Outside-Warzones-20160106-0009.html>; *On the Road in Mexico*,

rising homicide rates, there has also been a stark escalation in the level of human rights abuses perpetrated, including child recruitment into gangs and gender-based and sexual violence.²⁹ Moreover, it is well-documented that those fleeing the region in an effort to reach the United States are victimized by criminal enterprises, sometimes in collusion or complicity of national authorities, and subjected to violence and other abuses, including abduction, extortion, torture, and rape.³⁰ According to a survey conducted by Doctors Without Borders, of migrants and refugees fleeing Central America, approximately seventy percent of those interviewed reported being victims of violence in transit to the United States, with one-third of women reporting that they had been sexually assaulted.³¹

Additionally, Mexico is grappling with one of its worst periods of violence. In the past decade, approximately 150,000 people have been murdered and another 30,000 are missing.³² According to the U.S. State Department, the “most significant human rights” abuses in Mexico were related to those perpetrated by law enforcement and the military, as well as organized criminal groups killing, kidnapping and threatening citizens, immigrants, journalists, and human rights defenders.³³ These abuses have also been well-reported by United Nations officials, as well as human rights organizations, who have found that impunity for these crimes and other harms “remain almost absolute.”³⁴ Furthermore, gender-based violence and abuse due to sexual orientation is widespread.³⁵

Central American Migrants Face an Uncertain Future, PUB. BROAD. SERV. (Apr. 13, 2017), <http://www.pbs.org/newshour/bb/road-mexico-central-american-migrants-face-uncertain-future/>; *Report: Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis*, DOCTORS WITHOUT BORDERS (May 11, 2017) [hereinafter *Forced to Flee*], <http://www.doctorswithoutborders.org/article/report-forced-flee-central-americas-northern-triangle-neglected-humanitarian-crisis> (stating that Doctors Without Borders “teams have witnessed and documented a pattern of violent displacement, persecution, sexual violence, and forced repatriation akin to the conditions found in the deadliest armed conflicts in the world today”).

29. See generally, AMNESTY INT’L, *HOME SWEET HOME? HONDURAS, GUATEMALA AND EL SALVADOR’S ROLE IN A DEEPENING REFUGEE CRISIS*, (2016).

30. See e.g., Diana Solomon & Lizbeth Diaz, *U.N. Official Urges Mexico and U.S. to Boost Refugee Protection*, REUTERS (Aug. 25, 2017), <http://www.reuters.com/article/us-mexico-refugees-un-idUSKCN1B52QS>; *Forced to Flee*, *supra* note 28.

31. *Forced to Flee*, *supra* note 28.

32. See Solomon & Diaz, *supra* note 30.

33. DEP’T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *MEXICO 2016 HUMAN RIGHTS REPORT* (Apr. 7, 2017).

34. See e.g., *Mexico: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/mexico> (including statements made by United Nations’ mechanisms); *Mexico 2016/2017*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/>.

35. See e.g., *Mexico: Events of 2016*, *supra* note 34; *Mexico 2016/2017*, *supra* note 34.

People fleeing the Northern Triangle to seek refuge in surrounding countries (e.g., Belize, Costa Rica, Mexico, Nicaragua, Panama) increased by 2,249% between 2011 to 2016—the majority of which were women and children.³⁶ In 2016 alone, 388,000 people fled Northern Triangle countries, and UNHCR expects these numbers to rise.³⁷

Hundreds of thousands of individuals have fled to the United States, including tens of thousands of children who have made the dangerous journey alone. According to CBP, the “characteristics of illegal migration across our southern border have changed significantly” as those crossing *illegally* are more likely to be “families and unaccompanied children . . . fleeing poverty and violence in Central America” as compared to others.³⁸ In FY 2016, CBP reported that nearly 140,000 unaccompanied children and families crossed the U.S. border “illegally,” but noted that a “growing share of unauthorized migrants are surrendering to law enforcement to seek humanitarian protection rather than trying to evade detection or apprehension.”³⁹

United Nations’ statistics reveal that the United States received 262,000 asylum applications in 2016, an increase of fifty-two percent from the previous year and more than double the number it received in 2014.⁴⁰ Over half are from those fleeing the Northern Triangle and Mexico.⁴¹ In a recent report, the Department of Homeland Security (“DHS”) specified that more individuals sought asylum from the Northern Triangle in the last three years (2013-2015) than in the prior fifteen years combined,⁴² with the number of children seeking asylum from this region being the highest on record.⁴³ According to DHS data, the number of individuals granted asylum from these countries in the United States, has risen astronomically, increasing by 2,534% for asylum seekers from El Salvador, 936% for asylum seekers from

36. *Where We Work*, *supra* note 27.

37. *Claims from Central America*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/en-us/claims-from-central-america.html>.

38. CBP BORDER SECURITY REPORT: FY 2016, HOMELAND SEC. (Dec. 30, 2016), <https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/CBP-fy2016-border-security-report.pdf>.

39. *Id.*

40. *Global Trends: Forced Displacement in 2016*, U.N. HIGH COMM’R FOR REFUGEES (2017), <http://www.unhcr.org/5943e8a34>.

41. *Id.*

42. NADWA MOSSAAD, DEP’T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2015 5 (Nov. 2016), https://www.dhs.gov/sites/default/files/publications/Refugees_Asytees_2015.pdf (referring to affirmative asylum).

43. *Id.*

Honduras, 638% for asylum seekers from Guatemala, and 230% for asylum seekers from Mexico.⁴⁴

Despite Trump's inflammatory rhetoric about criminals pouring into the United States, the truth is that the population coming to our southern border is increasingly comprised of those seeking asylum and safety. Notwithstanding that fact, U.S. border authorities have been instructed to apprehend and prosecute all who cross without regard for the reality of this situation.

II. Trump Administration Policies Have Ramped Up Criminal Prosecutions for Immigration Infractions, Without Safeguards for Asylum Seekers

A. The Trump Administration Has Intensified Prosecutions for “Illegal” Entry and Reentry

For most of America's history, immigrants could enter the United States without fear of prosecution.⁴⁵ This changed in 1929—amid an immigration boom from Mexico, couched in racial animus—when Senator Coleman Livingstone Blease, a pro-lynching, white supremacist from South Carolina,⁴⁶ proposed a bill that made unlawfully entering the United States (i.e., *illegal entry*) a misdemeanor and unlawfully returning to the United States after deportation (i.e., *illegal reentry*) a felony.⁴⁷ Despite this introduction of immigration infractions as criminal offenses, they went largely unused in the decades that followed.⁴⁸ Border crossers apprehended for *illegal entry* or *reentry* were by and large processed through the civil

44. *Id.* at 6. Affirmative asylum applications:

El Salvador: From 71 in 2013, to 1,870 in 2015.

Guatemala: From 232 in 2013, to 1,713 in 2015.

Honduras: From 107 in 2013, to 1,109 in 2015.

Mexico: From 202 in 2013, to 667 in 2015.

45. It was not until 1929 that it became a “crime,” rather than a civil offense, to enter the United States without inspection or official government authorization. For a historical review of *illegal entry* and *reentry* see Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65 (2012).

46. See William v. Moore, *Blease, Coleman Livingston*, S.C. ENCYC., <http://www.scencyclopedia.org/sce/entries/blease-coleman-livingston/>.

47. See Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles*, THE CONVERSATION (2017), <http://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604>.

48. See David A. Sklandky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 164 (2012). See generally Keller, *supra* note 45; see also Kelly Lytle Hernández, *The History of How Crossing the U.S.-Mexico Border Became a Crime*, NEWSWEEK (May 1, 2017), <http://www.newsweek.com/history-crossing-us-mexico-border-crime-592252>.

immigration system and granted voluntary departure, bypassing the criminal system.⁴⁹

Prosecutions for these “crimes” remained relatively low until the Bush administration implemented a more stringent immigration policy tied to the War on Terror.⁵⁰ In response to the attacks on September 11, 2001, immigration control became more closely entwined to criminal law enforcement, thereby intensifying the criminalization of immigration.⁵¹ This significant shift greatly increased the number of individuals charged with illegal entry and reentry, which was in large part assisted by an initiative called “Operation Streamline”—a partnership program between DHS and DOJ which prosecutes hundreds of border crossers a day for these “crimes” through a fast-track, mass hearing that remains active today.⁵² Initiated in Del Rio, Texas, in 2005, Operation Streamline reached its height in 2008, operating in eight federal district courts along the border. In one year, criminal prosecutions soared from nearly 40,000 in FY 2007 to 80,000 in FY 2008, and peaked to nearly 98,000 in FY 2013 during Obama’s tenure.⁵³ Since this peak, prosecutions had been steadily declining, falling under 70,000 in FY 2016.⁵⁴

President Trump used his first week in office to sign an executive order calling on DOJ to make the criminal prosecution of immigration offenses a “high priority.”⁵⁵ To implement this order, in February 2017 then-Secretary of Homeland Security John Kelly subsequently directed CBP and other DHS agencies to target people for offenses that included “illegal entry and

49. Keller, *supra* note 45, at 80–81.

50. Jeffrey S. Passel et al., *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RESEARCH CTR. (Apr. 23, 2012), <http://www.pewhispanic.org/2012/04/23/iv-u-s-immigration-enforcement/>.

51. See Keller, *supra* note 45 (furthering the discussion of the increasing interconnection of the criminal justice system and civil immigration systems); see also Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEXAS L. REV. 245 (2016); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010).

52. See *infra* Section IV (discussing Operation Streamline and other *en masse*, fast-track procedures).

53. See Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POL’Y INST. (Apr. 29, 2010), <http://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes>; see also *At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013*, TRACIMMIGRATION (Nov. 25, 2013), <http://trac.syr.edu/immigration/reports/336/>.

54. CARLA N. ARGUETA, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY (2016).

55. Exec. Order No. 13,767, *supra* note 5.

reentry.”⁵⁶ These orders were followed by memoranda from Attorney General Jeff Sessions in April and May instructing all federal prosecutors to make “immigration offenses higher priorities,” target “first-time improper entrants,”⁵⁷ and “charge and pursue the most serious, readily provable offense” in all charging decisions.⁵⁸

Consequently, the number of criminal prosecutions for immigration infractions have escalated again. In the month following Sessions’ April memorandum, calling for the prioritization of immigration prosecution, charges for illegal entry and reentry soared by a dramatic twenty-seven percent.⁵⁹ By the following month, these prosecutions had increased another eighteen percent.⁶⁰

To implement the Administration’s directives, the federal government is now aggressively prosecuting first-time entrants and Border Patrol, in at least one sector, has confirmed that it has moved to implement a “zero-tolerance” policy towards those crossing the border.⁶¹ This means that everyone apprehended within the sector, with few exceptions (e.g., minors), will be prosecuted for immigration infractions—which Border Patrol has confirmed includes asylum seekers.⁶²

Additionally, federal public defenders working in interior states have indicated an increase in charges for illegal reentry prosecutions.⁶³ Asylum

56. Memorandum: Implementing the President’s Border Security and Immigration Enforcement Improvements Policies, DEP’T OF HOMELAND SEC. (Feb. 20, 2017).

57. Memorandum from Attorney General Jefferson Sessions for All Federal Prosecutors, Renewed Commitment to Criminal Immigration Enforcement, DEP’T OF JUSTICE (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download>.

58. Memorandum from the Attorney General Jefferson Sessions for All Federal Prosecutors, Department Charging and Sentencing Policy, DEP’T OF JUSTICE (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

59. *Immigration Prosecutions for May 2017*, TRAC IMMIGR. (July 6, 2017), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlymay17/fil/>. For a discussion of the interplay of this increase on asylum seekers see e.g., NATASHA ARPRIESTER, *As Prosecution Rise, Trump Admin Penalizes Asylum Seekers*, HUM. RTS. FIRST, *supra* note 23; NATASHA ARPRIESTER, *Seeking Asylum is Not a Crime, but Trump is Prosecuting Them Anyway*, HUM. RTS. FIRST (July 20, 2017), <http://www.humanrightsfirst.org/blog/seeking-asylum-not-crime-trump-prosecuting-them-anyway>.

60. *Immigration Prosecutions for June 2017*, TRAC IMMIGR. (July 26, 2017), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun17/fil/>. For a discussion of the interplay of this increase on asylum seekers see e.g., NATASHA ARPRIESTER, *As Prosecution Rise, Trump Admin Penalizes Asylum Seekers*, HUM. RTS. FIRST (Aug. 4, 2017), <http://www.humanrightsfirst.org/blog/prosecutions-rise-trump-admin-penalizes-asylum-seekers>.

61. Press Release, U.S. Customs and Border Patrol, U.S. Border Patrol’s Tucson Sector Prosecuting First-Time Offenders (July 13, 2017).

62. Meeting with Border Community Liaison, Tucson Sector Border Patrol, in Tucson, Ariz. (June 21, 2017).

63. Email correspondence with Federal Public Defender, District of Nebraska (July 20, 2017). Telephone conversation with New York immigration attorney (July 11, 2017).

seekers living in non-border states have also been arrested for illegal reentry despite having active asylum applications. For example, a New York immigration attorney reported that her asylum-seeking client from El Salvador was arrested in July 2017 for illegal reentry, despite already passing his fear screening and being assigned a date for his immigration court hearing on this matter.⁶⁴

In response to the backlash over his inflammatory statements on immigration, President Trump claimed that his administration's policies would target and prioritize the removal of "criminal aliens"—the "bad hombres."⁶⁵ However, President Trump and his administration's policies have not been so discerning.⁶⁶ Absent from all the Trump administration's directives are any safeguards, or even a mention, of asylum. Former Deputy Assistant Attorney General under President Obama, Leon Fresco, noted concern regarding this omission, stating that such an "aggressive approach" could "lead to the arrest of valid asylum seekers"⁶⁷

B. Asylum Does Not Prevent Criminal Prosecution

To apply for asylum in the United States, a person must be physically present in the country. However, neither illegal entry nor illegal reentry stipulate exclusions for those who cross to seek asylum, and to date, there is neither an asylum defense to either criminal charge, nor does an asylum claim bar prosecution, conviction or sentencing for these offenses.⁶⁸

64. This individual's trial date was pending at time of writing and the immigration judge had issued a continuation until his criminal matter had been determined. Email correspondence with immigration attorney (July 6, 2017 & Sept. 7, 2017); telephone conversation (July 11, 2017).

65. *Donald Trump: We Need to Get Out 'Bad Hombres,'* CNN (Oct. 19, 2016), <https://www.youtube.com/watch?v=AneeacsvNwU>.

66. See e.g., David Bier, *Unpublished ICE Memo Allows Arrests of Non-Criminal Immigrants Who Trump Did Not Prioritize*, CATO INST. (July 7, 2017), <https://www.cato.org/blog/unpublished-memo-allows-arrests-non-criminal-immigrants-who-trump-did-not-prioritize>.

67. Ted Hesson, *Sessions signals immigration crackdown: 'This is the Trump era'*, POLITICO (Apr. 11, 2017), <http://www.politico.com/story/2017/04/jeff-sessions-immigration-crackdown-237109>.

68. See OFFICE OF INSPECTOR GEN., DEPT. OF HOMELAND SEC., *STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING* 16–7 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf ("Border Patrol officials in these two Streamline sectors explained the Streamline process for aliens who express fear of persecution is the same as for aliens who do not. In these sectors, aliens are processed through the U.S. Courts on illegal entry or re-entry charges, receive sentences, and serve sentences in DOJ custody . . . CBP also responded that it is imperative the criminal and administrative processes be separate avenues. Inclusion in one does not exclude inclusion in the other . . . The claim of credible fear cannot be used as a criterion to exclude an undocumented alien from a possible prosecution for a criminal act.); 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 LA RAZA L.J. 88, 90 (2015).

According to Magistrate Judge Bernardo P. Velasco, who presides in Tucson's Operation Streamline, "We have criminal courts and civil immigration courts. A credible claim of fear is no defense to a criminal prosecution."⁶⁹ Instead, an asylum seeker—who has already fled horrific danger and likely experienced a dangerous journey to the United States—must endure pretrial detention, a trial, and a prison sentence, all before she can undertake her asylum claim in the civil immigration system—provided that immigration authorities allow her such access.

Criminal defense attorneys report that many of their clients in criminal proceedings for immigration infractions are asylum seekers. According to a Human Rights First ("HRF") survey sent to defense attorneys nationwide who have represented individuals on these charges, all reported that they had represented an asylum seeker for a charge of illegal entry or reentry—including attorneys in non-border states.⁷⁰ Furthermore, advocates have witnessed numerous asylum seekers state a fear of return or persecution in their home country during their criminal proceedings.⁷¹ When asylum seekers or their attorneys explain that the motivation for entering the United States was to seek asylum, federal judges regularly respond that criminal court is not the place to handle such matters.⁷² For instance, Magistrate Judge Eric J. Markovich, who also presides in Tucson's Streamline, lamented that,

("an asylum claim is not a valid defense to criminal charges in federal court"); INDEFENSIBLE, *supra* note 23, at 110 (quoting Judge Bernardo Velasco who confirms that seeking asylum is not a defense to criminal prosecution).

69. INDEFENSIBLE, *supra* note 23, at 110.

70. Response to an active Human Rights First nationwide survey launched in July 2017 and disseminated to federal public defenders and private criminal defense attorneys in who have represented clients charged with illegal entry or illegal reentry [hereinafter HRF Survey Responses].

71. Observations by End Streamline Coalition, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (2014-2017). End Streamline Coalition is a conglomerate of organizations, community groups, and individuals who are working to end mass criminalization and deportation of immigrants from the United States. They regularly monitor Operation Streamline in Tucson and collect their observation in a database on file with the author; Observations by author, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (May-July, 2017); U.S. District Court, in Las Cruces, N.M. (Sept. 2017); U.S. District Court, in El Paso, Tex. (Sept. 2017). *See also* INDEFENSIBLE, *supra* note 23, at 109 ("Many observers are shocked to learn that migrants who may have a valid claim for asylum under our immigration laws are just shunted through the prosecution process with no seeming regard for their plight.").

72. Observations by End Streamline Coalition, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (2014-2017); Observations by author, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (May-July, 2017); U.S. District Court, in Las Cruces, N.M. (Sept. 2017); U.S. District Court, in El Paso, Tex. (Sept. 2017).

A lot of really unfortunate things are going on in Mexico that force people into crossing the border I don't give many lectures to them about why they should not be coming back, because I just don't think that what I have to say has much impact compared to, "But my wife and my children are up in Kansas," or "I was about to be killed back in Michoacán." 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.⁷³

Since President Trump took office, there have been regular reports of asylum seekers claiming fear of return in criminal court. For instance, in mid-August 2017, a defense attorney reported that his client, a 20-year-old man from Guatemala, had fled to the United States to seek asylum after those who murdered his father came for him.⁷⁴ Despite Border Patrol's notation in his file that the man requested asylum, he was nevertheless processed for *illegal entry*, sentenced to time-served and was transferred to immigration custody to be processed for removal from the United States.

The *Houston Chronicle* reported on a case of a father, mother, and fifteen-year-old daughter who fled government threats in Venezuela in May 2017 and arrived in Presidio, Texas. Upon apprehension, the family handed Border Patrol U.S. government paperwork requesting asylum. Despite this formality, the daughter was sent to a federal foster care facility and her parents were referred to criminal prosecution where they pled guilty to illegal entry.⁷⁵

As the Trump Administration ramps up these prosecutions, inevitably more asylum seekers will be subjected to unnecessary and ultimately harmful penalties simply for exercising their legal right to come to the United States to seek asylum. Criminal defense lawyers have reported that since Trump took office they are "seeing more first-time crossers without criminal or immigration history being prosecuted" and that CBP agents "have told my clients that now that Trump is in office, their asylum petitions will be

73. INDEFENSIBLE, *supra* note 23, at 91.

74. This asylum seeker was prosecuted through Operation Streamline in Tucson, Ariz. Email correspondence with Criminal Justice Act ("CJA") criminal defense attorney (Aug. 14, 2017).

75. Lomi Kriel, *Streamlined: Trump Pressing For Mass Criminalization of Illegal Border Crosser*, HOUS. CHRON. (Aug. 25, 2017), <http://www.houstonchronicle.com/news/houston-texas/article/Trump-pressing-for-mass-criminalization-of-11962046.php>.

denied.”⁷⁶ Criminal defense attorneys also report that under the Trump administration the “ability to get reasonable outcomes is very limited these days,” noting that “we no longer get enhancements dismissed, and negotiations have disappeared.”⁷⁷

In 2008, then-President of National Border Patrol Council, T.J. Bonner, stated that criminalizing immigration “go[es] after desperate people who are crossing the border in search of a better way of life”⁷⁸ Nearly a decade later, this statement still holds true. As Ninth Circuit Judge Stephen Reinhardt recently opined in *Ortiz v. Sessions* (2017), under Trump’s immigration policies “even the ‘good hombres’ are not safe.”⁷⁹

III. Criminal Prosecutions for Immigration Infractions Raise Substantial Constitutional Concerns

While some constitutional rights are expressly limited to U.S. citizens—i.e., the right to vote and run for federal elected office⁸⁰—other constitutional protections were written without limitation, making no “distinction between citizens and [noncitizens].”⁸¹ The Supreme Court has long-held that noncitizens charged with crimes in the United States are entitled to such rights as are enshrined in the Fourth, Fifth, Sixth, and Fourteenth Amendments, which include among others, entitlements, due process, right to counsel, and freedom from unnecessary restraint.⁸²

There are strong normative reasons for the Framers’ intent to extend these rights to noncitizens. Firstly, James Madison, a principal author of the Constitution, reasoned that because noncitizens in the United States are

76. HRF Survey Responses, *supra* note 70 (responses to the question, “Have you seen a shift in how asylum seekers or other immigrants are treated/affected in the criminal process since the Trump Administration took office?”).

77. HRF Survey Responses, *supra* note 70 (responses to the request: “Please provide details of any other changes you have witnessed or anticipate with regards to criminal prosecutions and/or its effect on individuals also seeking asylum in light of the Trump Administration.”).

78. Spencer S. Hsu, *Immigration Prosecutions Hit New High*, WASH. POST (June 2, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/01/AR2008060102192.html>.

79. *Ortiz v. Sessions*, 857 F.3d 966, 968 (9th Cir. 2017).

80. U.S. CONST. art. I, §§ 2–3; U.S. CONST. art. II, § 1; U.S. CONST. amend. XV.

81. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 (1953).

82. *See e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that Fifth Amendment forbids the Government from depriving *any* person of liberty without due process of law); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that due process applies to migrants whose presence is “unlawful, involuntary, or transitory”); *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973) (holding that a noncitizen had right to be free from unwarranted search and seizure); *Wong Win v. U.S.*, 163 U.S. 228 (1896) (holding that *all* persons within the territory of the United States are entitled to Fifth and Sixth Amendment protections); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment is not confined to the protection of citizens).

subject to the obligations of the U.S. legal system, they too ought to be entitled to its “protection and advantage.”⁸³ Secondly, when the Bill of Rights was adopted, it was viewed as containing “inalienable natural rights that found their provenance in God,”⁸⁴ a concept that in the modern, more secular world is known as *human rights*.⁸⁵ The same rights that the Framers believed should be guaranteed to all, are embodied in several international human rights treaties that the United States has signed and ratified, and apply to all persons in the country, regardless of citizenship or immigration status.⁸⁶

Even though noncitizens, including asylum seekers, are guaranteed these constitutional rights, protections for those criminally charged with immigration infractions are frequently violated,⁸⁷ and these violations are escalating under the Trump Administration. What follows is not an exhaustive list of these violations, but an overview of some of the most salient.

83. See *Fong Yue Ting v. U.S.*, 149 U.S. 698, 749 (1893) (Field, J., dissenting) (quoting James Madison’s report on the Alien and Sedition Acts); see also *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787: TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN’S LETTER, YATES’S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF ‘98–‘99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION* 556 (Jonathan Elliot ed., 2d ed. 1863) (further discussion of the historical context of extending constitutional rights to noncitizens). See generally David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367–388 (2003).

84. Cole, *supra* note 83, at 372 (citing Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987)).

85. See Simon Hope, *Common Humanity as a Justification for Human Rights Claims*, *THE PHIL. OF HUM. RTS.: CONTEMP. CONTROVERSIES* 211 (Gerhard Ernst & Jan-Christoph Heilinger eds.) (2012). The normative idea is that all persons are entitled to these fundamental rights which should be honored no matter where one finds oneself, and no matter what form of government that country has chosen to implement. Such rights justified by human dignity are especially essential for migrants who do not have a voice in the political process.

86. See e.g., G.A. Res. 217 A (III) (Dec. 10, 1948); United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

87. See e.g., Juan Rocha, *Operation Streamline and the Criminal Justice System*, ARIZ. ATT’Y, Nov. 2011, at 30–34; *Executive Office for United States Attorneys, Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter Statement of Heather Williams] (statement of Heather E. Williams, Federal Public Defender, District of Arizona Tucson).

A. *En Masse*, Fast-Track Proceedings, Operation Streamline, and Due Process

While constitutional protections are guaranteed to noncitizens criminally charged with immigration infractions, prosecutions for the “crimes” of illegal entry and illegal reentry are riddled with encroachments on these protections. As will be discussed, such infringements are most evident in the *en masse*, expedited hearing procedure called “Operation Streamline,” a process that represents a significant portion of prosecutions for these offenses.

As a purported method of deterrence, DHS and DOJ initiated Operation Streamline in Del Rio, Texas, in 2005, which aimed to prosecute all border crossers in that sector for entering the country “illegally.”⁸⁸ Operation Streamline spread across the border districts by 2008 (except for California)⁸⁹ and remains operational in Del Rio and Laredo, Texas and Tucson, Arizona.⁹⁰ Though Streamline is technically no longer active as it once was in Las Cruces, New Mexico; Yuma, Arizona; and El Paso, McAllen, and Brownsville, Texas, these courts still retain the same *en masse*, fast-track hearing style to prosecute border crossers for entering the United States “illegally.”

This type of hearing enables judges to take pleas from up to 100 defendants at a time, rather than requiring judges to try each case individually.⁹¹ To do this, each defendant’s “initial appearance, arraignment, plea, and sentencing” are combined into one hearing that lasts less than one minute per defendant.⁹² One judge claimed a personal record of sentencing 70 individuals in 30 minutes.⁹³ Former Magistrate Judge Felix Recio, who presided over Streamline in Brownsville, noted that combining these

88. See OFF. OF INSPECTOR GEN., DEPT. OF HOMELAND SEC., OIG-15-95, STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 4 (2015) [hereinafter OIG REPORT].

89. With regards to California not implementing Operation Streamline, Federal Public Defender Kara Hartzler noted that, “I don’t think California has the stomach for Operation Streamline—the idea of parading people through a chute like cattle. There is no tolerance for that here.” INDEFENSIBLE, *supra* note 23, at 44.

90. In FY2016, Operation Streamline was renamed the “Criminal Consequence Initiative.” See *Hearing on Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration Before the Subcomm. on Immigration and the National Interest of the S. Comm. on the Judiciary* (2016) (statement of Ronald Vitiello, Acting Chief, U.S. Border Patrol).

91. See OIG REPORT, *supra* note 88, at 36.

92. LYDGATE, *supra* note 23, at 4.

93. Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, N.Y. TIMES (Feb. 11, 2014), <http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html>.

hearings into one “is unique to Operation Streamline. We don’t do this for other misdemeanors.”⁹⁴

Illegal entry is a petty misdemeanor that carries a maximum prison sentence of six months, and a felony carrying up to two years for a subsequent illegal entry.⁹⁵ Illegal reentry (i.e., “Reentry of removed aliens”) differs from illegal entry in that it requires that the person have had a prior, official removal and thereafter reentered.⁹⁶ Illegal reentry is considered a felony that carries a maximum sentence of two years, and up to ten years if the defendant’s prior removal occurred after a felony conviction, or up to twenty years if the defendant’s prior removal occurred after an aggravated felony conviction (which include *inter alia* receipt of stolen property or offenses relating to perjury).⁹⁷ In FY 2016, 97.7% of those convicted of illegal reentry were sentenced to imprisonment, and given an average sentence length of fourteen months.⁹⁸ The percentage of those convicted for illegal reentry who were sentenced to imprisonment was higher than the imprisonment rate for those convicted of sexual abuse, assault, drug trafficking, firearms, burglary, auto theft, larceny, fraud, embezzlement, forgery/counterfeiting, tax, money-laundering, racketeering/extortion, and civil rights.⁹⁹ The federal prosecutor in these cases are often Border Patrol attorneys, or even Border Patrol agents, that have been deputized as “special attorneys” by the DOJ to prosecute these cases.¹⁰⁰

These hearings place basic due process rights at risk on account of procedural shortcuts taken to rush, or “streamline,” the process. Streamline and *en masse*, fast-track hearings use magistrate judges who have limited statutory authority to prosecute only petty misdemeanor offenses.¹⁰¹ Additionally, plea agreements are the bedrock of this system because they

94. INDEFENSIBLE, *supra* note 23, at 55–6.

95. 8 U.S.C. § 1325(a) (1996).

96. 8 U.S.C. § 1326(a) (1996).

97. *Id.* at (a)-(b); 8 U.S.C. § 1101(43)(G) (“theft offense”); 8 U.S.C. § 1101(43)(S) (“perjury”).

98. U.S. SENT’G COMM’N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2017).

99. U.S. SENT’G COMM’N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2016 NINTH CIRCUIT 1,8 (2016).

100. 28 U.S.C. § 543 (2010). *See* Rocha, *supra* note 87.

101. FED. R. CRIM. P. 48; 18 U.S.C. § 3401 (2010); 28 U.S.C. § 636(a)(3)-(5) (2009). “In all petty offense cases . . . a magistrate judge may conduct the trial and impose the sentence without the defendant’s consent. In Class A misdemeanor cases, a magistrate judge may conduct the trial, either with or without a jury, and impose the sentence only with the defendant’s consent and where the defendant has waived the right to adjudication by a district judge. The defendant’s consent and waiver may be made in writing or orally on the record.” LYDGATE, *supra* note 23, at 1, 4 (noting that magistrate judges conduct Operation Streamline proceedings).

provide for a quick conclusion to the case.¹⁰² Using magistrate judges frees up district judges to hear other cases and allows for an expedited process that bypasses many of the procedural steps and entitlements, such as the right to a jury trial, as the Supreme Court has held that petty offenses (potential sentence of less than six months' imprisonment) do not invoke this right.¹⁰³

In this system, pleas proceed in one of two ways. First by “flip-flop,” whereby the defendant pleads down from felony illegal reentry to misdemeanor illegal entry. A “flip-flop” plea allows a felony offense (i.e., illegal reentry) to be turned into a misdemeanor (i.e., illegal entry) that the magistrate then has the authority to hear. Second, a straightforward plea of guilty to the misdemeanor illegal entry charge in return for a lower prison sentence. Depending on the district, these proceedings take different forms. For instance, in the El Paso and Las Cruces *en masse*, fast-track hearing, the court only processes the second plea-type, reserving illegal reentry charges for district judges. Until May 22, 2017, Tucson’s Streamline court only processed “flip-flops,” though it has since begun processing both plea types.¹⁰⁴ This shift was purportedly in response to Attorney General Sessions’ April 11 memorandum calling on all districts to deter “first-time improper entrants.”¹⁰⁵

In Tucson’s implementation of Streamline, defendants are placed before the judge in rows of five to eight defendants and asked to plead guilty as follows:¹⁰⁶

Judge: “[*Defendant’s name*], do you understand the rights you are giving up, the consequences of pleading guilty and the terms of your written plea agreement?”

Defendant: “*Sí*. (Yes.)”

102. See Thomas E. Gorman, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. R. 479 (2010) (explaining that pleas are “used to quickly process an over-whelming caseload of immigration offenses”). See also, *infra* Part III.C.

103. *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

104. Observation by End Streamline Coalition, Honorable Jacqueline M. Rateau, Magistrate Judge, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (May 22, 2017). Operation Streamline Calendar (May 22, 2017) (on file with Human Rights First reflecting the shift).

105. Roque Planas, *Prosecutors Already Cracking Down on Undocumented Immigrants in Arizona*, HUFF. POST, June 2, 2017, http://www.huffingtonpost.com/entry/prosecution-undocumented-immigrants-arizona_us_59316a41e4b0c242ca232d24; Conversations with Federal Defenders, in Tucson, Ariz. (June 2017).

106. Example of Magistrate Judge Bruce G. MacDonald presiding over Operation Streamline in Tucson, Ariz., on May 11, 2017. Each magistrate judge conducts the hearing differently, however the questions largely follow the sample script.

Judge: “Are you pleading guilty voluntarily and of your own free will?”

Defendant: “*Sí*. (Yes.)”

Judge: “Are you a citizen of the United States?”

Defendant: “No.”

Judge: “On or about [month day, year] did you enter the United States from Mexico near [city] without coming through a designated port of entry?”

Defendant: “*Sí*. (Yes.)”

Judge: How do you plea to the charge of illegal entry?

Defendant: *Culpable*. (Guilty.)”

Upon asking these questions to each defendant in the row, the judge then asks the defendants’ attorneys if there are “any legal reasons why the court should not accept the pleas” and if not (which is almost always the case), the judge then sentences each defendant to a prison term of up to 180 days and excuses the row to usher in the next.¹⁰⁷ A defender, who has represented many clients in Operation Streamline noted that the proceeding, does not recognize “these human beings as people with a story and a life. Stipulated sentences have silenced these people’s voices. That’s a grave human cost.”¹⁰⁸

B. Right to Counsel, Adequate Preparation, and Duty of Confidentiality

Anyone charged with a crime in the United States has the constitutional right to counsel.¹⁰⁹ The Supreme Court has held that this right is not met solely because an attorney is assigned to a defendant, but that “timely appointment and opportunity for adequate preparation are absolute prerequisites.”¹¹⁰ For defendants processed through *en masse*, fast-track hearings however, these requirements routinely go unmet. Instead, defendants typically meet their attorneys for the first time on the same day they appear in court.¹¹¹ Lawyers generally have less than 30 minutes—in

107. *Id.* Observations by author, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (May–July 2017).

108. INDEFENSIBLE, *supra* note 23, at 115 (quoting Tucson CJA panel attorney Eréndia Castillo).

109. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”).

110. *Brescia v. New Jersey*, 417 U.S. 921, 924 (1974).

111. *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, *supra* note 11; Human Rights First Interviews with Tucson Defense Attorneys (April–June 2017).

some districts only mere minutes¹¹²—to meet and educate their client on the charges against them. During this short time, attorneys must establish that the client is competent to appear before the court; determine if any defenses are available, including that of U.S. citizenship;¹¹³ ascertain if any obvious due process violations have taken place; uncover any mitigating factors or legal relief; and advise their client on whether to accept a plea agreement—all with negligible to no time to research and investigate.

Moreover, each individual attorney is assigned to represent multiple clients (the number dependent on the district) in a single day. In Tucson's Streamline, the maximum is usually six defendants per attorney,¹¹⁴ whereas in Del Rio, the number has reached an untenable eighty defendants to an attorney.¹¹⁵ As a result, the lawyer must provide counsel in a sort of "seminar style,"¹¹⁶ stripping individuality from the process. This impedes an attorney's ability to provide sound legal advice, which depends upon the attorney being fully informed by the client of all relevant information.¹¹⁷ Furthermore, the logistical nightmare that requires group attorney-client meetings, forces lawyers to act contrary to their duty of client confidentiality, and may raise issues with regard to attorney-client privilege.¹¹⁸ In addition to the time

112. LYDGATE, *supra* note 23, at 4, 15.

113. In some cases, defendants have been found to be U.S. citizens or legal permanent residents. *See e.g.*, Statement of Heather Williams, *supra* note 87, at 10; Kriel, *supra* note 75 (citing Maureen Franco, a federal public defender in the Western District of Texas, who worries that expanding fast-tracked prosecutions will inevitably sweep up potential American citizens. She stated that, "We have seen a real uptick in clients who have legitimate claims to citizenship through the birth of their mother and father or grandparents, but those cases take a lot of time. . . . The wider you cast the net, the more chances that's going to happen." The article also cites a study in which of the one-third who had been criminally prosecuted through Operation Streamline, only one percent "said their attorneys had inquired into their legal status and whether they had rights to U.S. citizenship.").

114. INDEFENSIBLE, *supra* note 23, at 35 (according to Judge Pyle, "Judge Velasco insisted that in our court there would be no more than six defendants per lawyer. . . .").

115. LYDGATE, *supra* note 23, at 1. According to Judge Pyle, "In Laredo and Del Rio, our court staff had observed that judges were appointing a single lawyer to represent all 80 defendants in a single hearing. Obviously if you've got 80 clients, all you're doing is lecturing to a mass of people." INDEFENSIBLE, *supra* note 23, at 35.

116. Hailey Anne Sheldon, *Operation Streamline: The Border Patrol Prosecutions Initiative*, 11 THE PUB. PURPOSE 89, 104 (2013).

117. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (The attorney-client privilege's "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

118. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016). *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998) ("The attorney-client privilege is one of the oldest recognized privileges

constraints that may leave a lawyer unapprised of each client's circumstances, being in earshot of another defendant can affect a client's level of comfort to speak openly and honestly, which is essential to a full and fair defense. This is especially concerning for asylum seekers, who may feel uncomfortable expressing fears and the trauma they experienced when others are within earshot.

Due to case overload, as well as low morale from participating in this system, some public defender offices try to limit their participation in these cases.¹¹⁹ As such, much of the caseload has been transferred to private attorneys contracted by the court to help handle the docket (i.e., Criminal Justice Act ("CJA") Panel attorneys).¹²⁰

The Supreme Court has also held that a defense attorney must inform her client of potential immigration consequences associated with her charges.¹²¹ However, many defense attorneys explain that due to the very limited time they are given to prepare their client's case, there is simply not enough time to both prepare and advise their client on their criminal matter while trying to also determine all the immigration aspects.¹²² According to one federal public defender, since the court is "prosecuting as many people as the system will bear . . . [i]t's very hard to keep up with."¹²³

for confidential communication."); Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, AM. BAR ASS'N: CTR. FOR PROF. RESP, May 2007.

119. See e.g., INDEFENSIBLE, *supra* note 23, at 145 ("From the program's inception in Tucson, there were strong dissenting voices, such as that of Jon Sands, the head public defender who, according to Judge Charles Pyle, "called [Streamline] a moral outrage; that it violated the Constitution. He vowed that his office would contest it vigorously with litigation."); one federal defender is present in Operation Streamline only once per week, the other attorneys are CJA-court appointed private defense attorneys. Conversations with Tucson Federal Defenders, in Tucson, Ariz. (May 11-12, 2017). In El Paso and Las Cruces federal defenders only represent those charged with illegal reentry, CJA-court appointed private defense attorneys represent those charged with illegal entry. Conversation with El Paso Federal Defender, in El Paso, Tex. (Sept. 7, 2017); conversations with Las Cruces Federal Defenders, Las Cruces, N.M. (Sept. 5-6, 2017).

120. Interviews by Human Rights First with Federal Public Defenders, in Tucson, Ariz. (May & June 2017). See also Statement of Heather Williams, *supra* note 87, at 5, 9; Criminal Justice Act (CJA) Guidelines, <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines> (explaining the Criminal Justice Act and private attorneys on behalf of the court).

121. See *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that counsel must inform a client whether a plea carries a risk of deportation); *infra* Part III.C.

122. HRF Survey Responses, *supra* note 70; conversations with defense attorneys, in Ariz., N.M., and Tex. (May-Sept. 2017); see also Rocha, *supra* note 87, at 32 (explaining the hurdles faced by "a great majority" of the attorneys in Operation Streamline who "do not practice immigration law.")

123. Kriel, *supra* note 75 (quoting Chris Carlin, Assistant Federal Public Defender in the Alpine/Pecos division).

C. Plea Agreements Contain Provisions that Can Have Adverse Implications on Asylum and Protection Claims

Federal Rule of Criminal Procedure 11 governs plea agreements and requires the court to “inform the defendant of, and determine that the defendant understands” the rights she is giving up, the consequences of pleading guilty, and that the plea is entered voluntarily.¹²⁴ Yet, as discussed above, in one brief meeting that may last mere minutes, which may not be individualized, an attorney has limited time to explain and advise the defendant on whether to accept a plea. Pleas for immigration infractions require a defendant to forfeit fundamental rights and protections including the presumption of innocence, right to a trial, right to remain silent, right to confront and cross-examine, right to subpoena—and in some pleas, immigration consequences, including negative consequences for asylum claims.

Given the hasty nature of these proceedings, defense attorneys routinely state that defendants appear confused. Observers have witnessed defendants openly state such things as they felt forced to plea, they did not understand the process, one defendant even stating in English “I am not really guilty, but I’ll plead guilty anyway.”¹²⁵ According to one federal defender, “No individual defendant can afford to challenge the system,” as often “the risks don’t outweigh the chance for due process.”¹²⁶

According to defense attorneys, given the lengthy prison terms defendants may face if they take a charge of illegal entry or reentry to trial,¹²⁷ ninety-nine percent of defendants plead guilty in return for promises of

124. FED. R. CRIM. P. 11(b). See also *Missouri v. Frye*, 566 U.S. 134, 142 (2012) (“At the plea entry proceedings a trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea.”).

125. Observations by End Streamline Coalition, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (2014-2017). End Streamline Coalition is a conglomerate of organizations, community groups, and individuals who are working to end mass criminalization and deportation of immigrants from the United States. They regularly monitor Operation Streamline in Tucson and collect their observation in a database on file with the author. The quoted defendant was observed during Operation Streamline before Magistrate Judge Bruce G. McDonald on December 14, 2015.

126. Amanda Sakuma, *Operation Streamline: An Immigration Nightmare for Arizona Courts*, (July 1, 2014), <http://www.msnbc.com/msnbc/operation-streamline-immigration-nightmare-arizona-courts>.

127. 8 U.S.C. § 1325(a) (Defendants can be sentenced up to six months for illegal entry, and up to two years for a subsequent illegal entry offense). 8 U.S.C. § 1326(a-b) (Defendants can be sentenced up to two years for illegal reentry, and up to ten years if the defendant’s prior removal occurred after a felony conviction, or up to twenty years if the defendant’s prior removal occurred after an aggravated felony conviction.).

shorter sentences.¹²⁸ In fact, in FY 2016, 99.5% of all defendants for immigration infractions took plea agreements.¹²⁹

Rule 11 requires the court to “address the defendant personally” to “ensur[e] that a plea is voluntary.”¹³⁰ In *U.S. v. Roblero-Solis*, the Ninth Circuit held that taking pleas *en masse* violated this requirement.¹³¹ To comply, Tucson’s Streamline adjusted questioning to address each defendant personally regarding their plea.¹³² However, the Ninth Circuit’s decision does not bind other border districts, namely the Fifth (Texas) and the Tenth (New Mexico).

Furthermore, federal laws require that sentencing “consider the nature and circumstances of the offense,” “the history and characteristics of the defendant,” and “the need for the sentence imposed . . . to provide just punishment for the offense”¹³³ Yet sentencing guidelines for illegal entry and reentry are standardized and rarely take into consideration a defendant’s personal situation. The United States Sentencing Commission has noted that courts “have generally held that the defendant’s motive for reentry is not a basis for a downward departure”¹³⁴ and that mitigation “must generally be exceptional.”¹³⁵

128. HRF Survey Responses, *supra* note 70. See also LYDGATE, *supra* note 23, at 3–4.

129. U.S. SENT’G COMM’N, *supra* note 99, at 6 tbl.3.

130. *U.S. v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009).

131. *Id.* at 693–94. (“[T]he district court for the District of Arizona (Tucson) has adopted a procedure for the taking of pleas en masse intended to preserve the rudiments of Fed. R. Crim. P. 11 and the constitution. . . . The procedure has been in practice for at least two years and is apparently followed in several other federal courts whose districts border on Mexico. The problem generated by the massive caseload on the court understandably led the court to adopt a shortcut. Abstractly considered, the shortcut is not only understandable but reasonable. The shortcut, however, does not comply with Rule 11. We cannot permit this rule to be disregarded in the name of efficiency nor to be violated because it is too demanding for a district court to observe Accordingly, . . . we hold the procedure to be contrary to Rule 11.”).

132. See *supra* Part III.A. for sample script that is asked to each defendant individual during Operation Streamline in Tucson, Arizona. Prior to this holding, all defendants were addressed collectively and the court received a general “yes” response or a general “no” response consistent with guilt. For a description of this prior practice, see *Roblero-Solis*, 588 F.3d at 694–97.

133. 18 U.S.C. § 3553.

134. U.S. SENT’G COMM’N, PRIMER ON IMMIGRATION CONSEQUENCES 35 (March 2017) (citing *United States v. Saucedo-Patino*, 358 F.3d 790 (11th Cir. 2004) and *United States v. Dyck*, 334 F.3d 736 (8th Cir. 2003) (stating purported lack of criminal intent in reentering the country is not a valid basis for departing downward)).

135. U.S. SENT’G COMM’N, *supra* note 134 (citing *United States v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006) (finding motivation to be reunited with family and fact that prior conviction was fourteen years old, though relevant, did not require a nonguideline sentence); *United States v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. 2005) (holding departure based on family circumstances was not appropriate where defendant returned to care for his sick wife but did not show that he was the only person capable of caring for his wife); *United States v. Carrasco*, 313 F.3d 750 (2d Cir.

Since sentencing guidelines for plea agreements on these charges are rigid, judicial discretion is impeded, leaving little room for variance based on individual circumstances—including asylum claims. For instance, when asylum seekers state in open court that the only reason they came to the United States was to seek asylum, the judge routinely replies that there is nothing she can do because the criminal court is not the place to handle immigration matters or that the plea agreement already stipulates the sentence to be given. In this regard, Magistrate Judge Bernardo Velasco of Tucson’s Streamline stated, “I don’t have much discretion. I have to trust the defense lawyers as the ones actually spending time with the defendants. A judge’s function is to satisfy the minimum criteria of due process: to make sure a person understands what they’re giving up for what they’re getting, and the possible consequences of doing so.”¹³⁶ Likewise, fellow Tucson Magistrate Judge Charles Pyle stated, “the judge only has discretion to reject a plea outright. We cannot lower or raise the agreed upon sentence. I have rejected some pleas when a defendant wanted to accept the plea without actually admitting their guilt. Otherwise, Streamline sessions are pretty brainless for me.”¹³⁷

Judges often must explain to defendants that they lack authority in immigration matters—particularly asylum matters—and that the current proceeding is only to resolve the criminal charge. For instance, a man from Mexico recounted to the judge that twelve members of his family had been killed in Acapulco and that he had managed to escape to the United States and was seeking protection. The judge responded that there was nothing he could do and that the defendant should speak to immigration after serving his sixty-day sentence.¹³⁸ The judge in another case tried to explain to a defendant, who was steadfast that he wanted to seek asylum, that “this is not the place to adjudicate asylum, but I hope you are not sent to a dangerous, deadly situation. I wish you and your family the best of luck.”¹³⁹

In another case, an elderly man begged the judge to reduce his sentence for illegal entry, or deport him immediately, explaining that he had only six months to live due to a cancer diagnosis and that he “didn’t want to die in

2002) (finding departure not warranted where defendant was separated from his wife; provision of financial support for three children was not an exceptional circumstance).

136. GRASSROOTS LEADERSHIP, INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER 48 (2016).

137. *Id.* at 47–48.

138. Observation by End Streamline Coalition, Honorable Charles R. Pyle, Magistrate Judge, Operation Streamline, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (Feb. 5, 2016).

139. Observation of Sentencing Proceedings, Honorable Robert C. Brack, District Judge, U.S. Courthouse, in Las Cruces, N.M. (Sept. 4, 2017).

prison.” The judge stated that he could not reduce the term due to the plea agreement, and ordered a one-hundred-fifty-day sentence.¹⁴⁰

In another instance, a defendant cried and apologized for entering “illegally,” but stated that he came only to make money to help his wife in Guatemala who had cancer. The judge explained he had no authority to change the sentence.¹⁴¹

And still in another case, a woman who was living in the country with her husband and two U.S. citizen children was sentenced to thirty days after crying and begging for forgiveness, explaining that she needed to care for her children while her husband works. She stated that she only went to Mexico to see her father who was dying from cancer.¹⁴²

Some plea agreements for immigration infractions also contain serious immigration consequences, especially on asylum or other protection claims. In *Padilla v. Kentucky*, the Supreme Court held that defense attorneys violate their Sixth Amendment obligation to provide effective assistance of counsel if they do not inform their clients of the deportation risks of a guilty plea.¹⁴³ The Court noted that “[a]lthough removal proceedings are civil, deportation is intimately related to the criminal process” as “our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”¹⁴⁴ The Court also noted that “[i]mmigration law can be complex and it is a legal specialty of its own” and that many attorneys “who represent clients facing criminal charges . . . may not be well versed in it.”¹⁴⁵ Correspondingly, many defense attorneys state that they are unfamiliar with immigration law—let alone asylum—including those working in southern border states where immigration charges are prevalent.¹⁴⁶

140. Observation by End Streamline Coalition, Honorable D. Thomas Ferraro, Magistrate Judge, Operation Streamline, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (Nov. 2, 2015).

141. Observation by End Streamline Coalition, Honorable D. Thomas Ferraro, Magistrate Judge, Operation Streamline, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (Mar. 3, 2016).

142. Observation by End Streamline Coalition, Honorable Eric J. Markovich, Magistrate Judge, Operation Streamline, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (Aug. 30, 2016).

143. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less. (citations omitted).

144. *Padilla*, 559 U.S. at 365–66.

145. *Id.* at 369.

146. Interviews with defenders, in Phx. and Tucson, Ariz. (May–June 2017), in El Paso, Tex. (Sept. 2017), and in Las Cruces, N.M. (Sept. 2017). HRF Survey Responses, *supra* note 70.

This lack of knowledge is concerning given that many plea agreements for immigration infractions include provisions that compel individuals to waive their asylum or protection claims, which would prevent them from being expelled to a country where they would face persecution or torture. As such, if asylum seekers are not well-informed of the immigration consequences implicit in the plea, they may agree to a plea that states they will not seek protection or will abandon such a claim if one has been made. Many criminal defense attorneys are unaware that some plea agreements contain provisions which could influence their clients' protection claim.

For example, a "fast-track" plea agreement used for those charged with illegal reentry¹⁴⁷ in the Eastern District of Virginia, requires that:

[T]he defendant agrees to waive the defendant's rights to apply for any and all forms of relief or protection These rights include, but are not limited to, the ability to apply for . . . asylum . . . withholding of deportation or removal . . . [and] protection under Article 3 of the Convention Against Torture. As part of this agreement, the defendant specifically acknowledges and states that the defendant has not been persecuted in, and has no present fear of persecution in, [insert country of return] Similarly, the defendant further acknowledges and states that the defendant has not been tortured in, and has no present fear of torture in [insert country of return].¹⁴⁸

The plea also requires that the agreement is binding for purposes of removal proceedings. Similar provisions are contained in pleas used in other states, such as Kansas, Nebraska, and Minnesota.¹⁴⁹

147. To increase the number prosecutions along with a lack of resources, federal districts introduced "fast-track" that allowed federal prosecutors to offer defendants who are charged with illegal reentry "extremely favorable sentences, outside of the federal sentencing guideline parameters, for willingness to almost immediately accept a guilty plea." Jane L. McClellan & Jon Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 517–8 (2006).

148. FEDERAL DEFENDERS OFFICE: TRAINING DIVISION, FAST-TRACK PLEA AGREEMENTS, https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/fast-track-plea-agreements.pdf.

149. FEDERAL DEFENDERS OFFICE: TRAINING DIVISION, *supra* note 148.

Kansas: The defendant must admit he or she has no fear of returning to the country designated in the previous order, will submit no argument asserting an application of the Convention Against Torture or any claim for asylum, and he or she will not contest, either directly or by collateral attack, the reinstatement of the prior order of removal, deportation, or exclusion.

Nebraska: The defendant admits that defendant does not have a fear of returning to the country designated in the previous order. If this plea agreement is accepted by the court, defendant agrees not to contest, either directly or by collateral attack, the reinstatement of the prior order of removal, deportation, or exclusion.

In a signed plea agreement received from an immigration attorney in Phoenix, Arizona, whose asylum-seeking client from El Salvador had escaped years of torture, rape, and sexual abuse by the cartel, it stipulated that she “admits that she does not have a fear of return[]” and that she “agrees not to contest” removal.¹⁵⁰ Upon serving her prison sentence under this plea, she was transferred to immigration custody where she requested asylum. According to the attorney, DHS moved to have the plea pretermitted¹⁵¹ her asylum claim, arguing that she did not have a real fear. The motion was ultimately deferred by the judge, but only because of other procedural issues in the case.¹⁵²

A former immigration judge who served in Virginia confirm that the practice of DHS threatening to pretermitt asylum seekers’ applications is something he experienced while presiding under the Obama administration. He stated that though there is no precedent that immigration judges must deny such motions, he always chose to dismiss. However, he expressed concern that other immigration judges, especially those newly appointed under the Trump administration, may not be as discerning and instead grant these requests.¹⁵³

While defense attorneys can sometimes persuade prosecutors to remove immigration provisions from the plea agreement, this is neither guaranteed nor standard practice, and can result in a less favorable offer. In an *illegal reentry* case in Phoenix of an asylum seeker who experienced severe abuse in Mexico due to his sexual orientation, the prosecutor told the attorney that she could remove the immigration provision from the plea agreement, but in return would increase the guideline she submits to the judge for sentencing.¹⁵⁴ According to defense attorneys, “[s]ometimes we can get the ‘no fear of’ language removed from the plea, but it comes at a cost,” “[t]he government will want [increased sentencing] levels in exchange for removal of the asylum language,” thus language removal “will result in a less

Minnesota: The defendant admits that he does not have a fear of returning to the country designated in the previous order. If this plea agreement is accepted by the Court, the defendant agrees not to contest, either directly or by collateral attack, the reinstatement of the prior order of removal, deportation or exclusion.

150. Plea agreement on file with author (received June 20, 2017).

151. *Pretermitt*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“1. To ignore or disregard purposely 2. To neglect, overlook, or omit accidentally”).

152. Meeting with immigration attorney, in Tucson, Ariz. (June 20, 2017) (notes on file with Human Rights First).

153. Meeting with former immigration judge, in New York, N.Y. (July 13, 2017) (notes on file with Human Rights First).

154. Email correspondence with private criminal defense attorney (July 14, 2017).

favorable plea agreement.”¹⁵⁵ Other attorneys report that prosecutors do not entertain exceptions to the pleas used in Streamline, as the process is meant to be just that—“streamlined.”¹⁵⁶

Lastly, requiring individuals to plead in a group setting creates a situation in which individuals may feel uncomfortable to stand out and therefore feel pressured to stay silent. The courtroom is already an intimidating place, but such intimidation is greatly enhanced when a person is placed into a situation in which repetitive and mechanical answers are expected.

D. Prosecutions are Riddled with Language Problems and Barriers

The Court Interpreters Act of 1978 provides the statutory right to an interpreter in judicial proceedings.¹⁵⁷ This right is also implied in the Fifth, Sixth, and Fourteenth Amendments and U.S. courts have held that an interpreter is necessary to effectuate these constitutional protections as “a competent translation is fundamental to a full and fair hearing.”¹⁵⁸ Indeed, the rights of due process, a fair trial, and equal protection would be markedly hampered, if not altogether denied, if defendants are unable to understand the charges and associated consequences levied against them.¹⁵⁹

Most defendants in proceedings for immigration infractions are non-English-speaking and rely entirely on court interpreters to understand their criminal proceedings. Defense attorneys have expressed concern about the quality of in-court translation, noting that at times court interpreters do not translate the proceedings or defendants’ statements precisely.¹⁶⁰ Translations in *en masse*, fast-track hearings are only English-to-Spanish and transmitted via headset to the defendant. However, these headsets routinely are not turned on or set to English.¹⁶¹

155. HRF Survey Responses, *supra* note 70.

156. HRF Survey Responses, *supra* note 70; telephone conversation with CJA attorney, in Tucson, Ariz. (Aug. 2017).

157. 28 U.S.C. § 1827.

158. *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000); *see also* *United States v. Edouard*, 485 F.3d 1324, 1338 (11th Cir. 2007); *United States ex rel. Negron v. State*, 434 F.2d at 389 (2d Cir. 1970); *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980).

159. *See* Elizabeth Imbarlina, *The Right to an Interpreter for Criminal Defendants with Limited English*, JURIST (Apr. 15, 2015), <http://www.jurist.org/dataline/2012/04/iryna-dasevich-criminal-justice.php>.

160. HRF Survey Responses, *supra* note 70. *See e.g.*, Statement of Heather Williams, *supra* note 87, at 25; Rocha, *supra* note 87.

161. Observations by author, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (May-July, 2017); observations by author, U.S. District Court, in Las Cruces, N.M. (Sept. 2017); observations by author, U.S. District Court, in El Paso, Tex. (Sept. 2017).

Defense attorneys have also expressed concern about the language proficiency of fellow defense attorneys.¹⁶² While English-Spanish court interpreters are used during the hearing, defendants must rely on their attorneys during the pretrial and presentencing phases to translate the criminal complaint, and the plea agreement, as well as explain the procedural aspects of what is happening, and the consequences of pleading guilty. According to a former public defender who practiced in Streamline proceedings in Tucson and Yuma, since “the responsibility of translating the criminal complaint . . . falls to the attorney . . . each defendant receives a different translation of the criminal charges [] against him, even though they are all charged with the same offense.”¹⁶³

Language problems regularly occur in *en masse*, fast-track hearings. A common occurrence is a defendant answering a judge’s question incorrectly (assuming she is pleading guilty). For instance, the defendant will answer “no” when she should answer “*sí* (yes)” or vice versa; or answer “no” when asked by the judge “How do you plead, guilty or not guilty?” when she should answer “*culpable* (guilty).” When this happens, the judge usually asks the attorney to confer with her client and then try again. After a few moments or several minutes, the attorney either tells the judge that the client speaks an indigenous language, or states that their client “speaks enough Spanish to plead guilty” or when asked by the judge, the defendant states that she speaks Spanish “*un poco* (a little).” It is not uncommon to watch the attorney stand next to the client and nod her head in the direction of the *correct* answer when the judge re-asks the questions. Usually the defendant is then sentenced, though at times the case is dismissed.

Furthermore, since *en masse*, fast-track proceedings are conducted in a very repetitive and mechanical nature, it is difficult to ascertain whether defendants understand the questions and their answers, or if they are only repeating what was heard before them. As a typical hearing was described in Tucson’s Streamline, the same five questions are asked in the same sequence, to which there is only a binary answer of “yes” or “no” and a final question of “guilty or not guilty.” As one attorney who has practiced in both Del Rio and Tucson’s Streamline stated, “clients merely answer ‘yes’ or ‘no’ one after the other almost like parrots repeating one after the other without meaningful understanding. [The process is] lacking in human dignity.”¹⁶⁴

162. HRF Survey Responses, *supra* note 70. Rocha, *supra* note 87. Also, not all defense attorneys who work in these *en masse*, fast-track courts speak Spanish. Observations by author, U.S. District Court, in Las Cruces, N.M. (Sept. 2017); observations by author, U.S. District Court, in El Paso, Tex. (Sept. 2017).

163. Rocha, *supra* note 87.

164. HRF Survey Responses, *supra* note 70.

A collective concern has been raised by defense attorneys regarding translations for clients who speak indigenous languages—especially asylum-seeking clients who may be unable to translate their fears.¹⁶⁵ One defense attorney stated “I worry a lot about the indigenous language speakers. I sometimes encounter indigenous language speakers with almost no grasp of Spanish who may have been through Streamline two or three times with no interpreter provided. Some of them don’t even know they were in criminal proceedings at all.”¹⁶⁶

A particularly egregious incident occurred in Tucson’s Streamline in August 2017. Ten of the defendants processed that day were an entire family who all spoke an indigenous language. This fact only became known to the court after three had already been prosecuted and sentenced. The fourth defendant’s attorney told the judge that his client’s wife was also in the group to be processed, and requested that they not be returned near the port of entry where they crossed as they were worried they would be killed. This client was the only Spanish-speaking family member. After sentencing the man, the judge requested that he remain in the courtroom so that he could translate sentencing for the rest of his family.¹⁶⁷

Even when interpretation is properly provided, there are difficulties understanding the contents of the proceedings due to their speed and the difficulty in translating complex legalese.¹⁶⁸ Explaining the mechanics of the U.S. justice system to a nonnative defendant is difficult in English, let alone in another language. Chief Judge of the District of New Mexico, Martha Vázquez, acknowledged the difficulty in conducting “hearings in a way that is understandable to defendants . . . in a legal system entirely foreign to them.”¹⁶⁹ As explained by one defense attorney, “[c]ourt proceedings involve complex legal language which, even if accurately translated, means little to many defendants. Defendants tend to just agree with questions asked, and go with the flow.”¹⁷⁰

The consequences that a conviction can have on an asylum seeker are troubling, and at the very least, the person should be able to understand

165. HRF Survey Responses, *supra* note 70 (answers in response to the question “Do you have concerns related to the quality of translation provided to non-English-speaking defendants during criminal proceedings?”).

166. HRF Survey Responses, *supra* note 70.

167. Operation Streamline, Honorable Jacqueline M. Rateau, Special Proceedings Courtroom, in Tucson, Ariz. (Aug. 10, 2017) (telephone conversation with observer who wished to remain anonymous due to professional conflicts necessitating confidentiality (Aug. 18, 2017)).

168. See LYDGATE, *supra* note 23, at 12–13; Rocha, *supra* note 87.

169. LYDGATE, *supra* note 23, at 12–13.

170. HRF Survey Responses, *supra* note 70.

linguistically the case against him or herself. As was noted by the Second Circuit, what is “[p]articularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.”¹⁷¹ The Court further commented that ensuring one understands the proceedings is not only a constitutional matter, but “a matter of simple humaneness.”¹⁷²

E. Unnecessary Restraint is Used

Although the Fifth Amendment guarantees the right to be free of unwarranted restraints,¹⁷³ those charged with immigration infractions are shackled, with hands and feet cuffed, with a chain connecting one or both to another chain wrapped around the waist. In *en masse*, fast-track hearings such as Operation Streamline, the sound of clanking shackles fills the courtroom as defendants, with a limited range of motion, shuffle up to a row of microphones before a judge to enter their plea. Individuals have tripped on these chains, sometimes falling to the floor; restraints are often too tight, causing difficulties with standing and walking, and cutting into defendants’ wrists and ankles.¹⁷⁴ Furthermore, restraints have been used on those with broken bones and handicaps or disabilities, including individuals using the assistance of a cane, crutches or wheelchair.¹⁷⁵

Defendants processed through Operation Streamline and shackled for crossing the border have expressed sadness with the system and the procedure, stating “they treat you like an animal,” “I felt bad when it happened . . . I have never been chained up like that,” and “they put chains on us really tight . . . the whole time in there they made me feel like I killed someone.”¹⁷⁶

171. United States *ex rel.* Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

172. *Id.*

173. See *e.g.*, Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (“[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”).

174. Observations by author, in Tucson, Ariz. (May-June 2017); observation by End Streamline Coalition, Operation Streamline, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (2014-2017).

175. See *e.g.*, United States v. Sanchez-Gomez, 859 F.3d 649, 654 (9th Cir. May 31, 2017); observation by End Streamline Coalition, Operation Streamline, Evo A. DeConcini U.S. Courthouse, in Tucson, Ariz. (2014-2017).

176. Daniel Martinez & Jeremy Slack, *What Part of “Illegal” Don’t You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States*, 22 SOC. & L. STUD. 535, 545 (2013).

In May 2017, the Ninth Circuit opined that a “presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.”¹⁷⁷ It reasoned that the right to be free of unwarranted restraints requires the court—not law enforcement or court security personnel—to decide on a case-by-case basis whether the restraints serve a compelling government purpose; in other words, the court cannot “institute routine shackling policies reflecting a presumption that shackles are necessary in every case.”¹⁷⁸ For several weeks following the decision, judges in Tucson’s Streamline declined to implement the judgment. However, by mid-July 2017, the shackling policy changed, allowing defendants to enter the courtroom unshackled in small groups of seven—a significant shift from years of practice.¹⁷⁹ Still, defendants are shackled before entering the courtroom and immediately upon leaving.¹⁸⁰ While Tucson’s new procedure is a welcomed and more humane application of the Fifth Amendment right, the Ninth Circuit’s decision does not bind other border districts, namely Texas and New Mexico, where this practice remains rampant.

IV. Criminal Prosecutions Impede the Right to Asylum

The interconnection between the criminal justice system and the civil immigration system is convoluted, and the interplay of these systems and their bearing on one another, can have a devastating impact on noncitizens—especially asylum seekers. The Second Circuit has recognized this dynamic, finding it “reasonable” for an asylum seeker to worry that a criminal immigration conviction could prejudice her asylum claim.¹⁸¹ The Circuit also emphasized that the DOJ’s “blanket policy of immediately prosecuting asylum seekers . . . is troubling,” as prosecuting asylum seekers is “in contradiction of our government’s policy of providing safe haven to refugees fleeing political violence and persecution.”¹⁸²

Subjecting asylum seekers to the criminal system for crossing a border is not only an affront to America’s legacy of providing refuge to the most vulnerable, it also unnecessarily punishes individuals for pursuing their legal right—to seek asylum. Furthermore, it contravenes our international legal

177. *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. May 31, 2017) (en banc).

178. *Id.*

179. See Curt Prendergast, *Shackles No Longer Required on All Federal Defendants*, ARIZ. DAILY STAR (July 26, 2017), http://tucson.com/news/local/shackles-no-longer-required-on-all-federal-defendants-in-tucson/article_d75314b7-b8c9-5fec-a646-d3a95ae0dd85.html.

180. *Id.*

181. *United States v. Malenge*, 294 Fed. Appx. 642, 644 (2d Cir. 2008).

182. *Malenge*, 294 Fed. Appx. at 644

obligation under the Refugee Convention to abstain from penalizing asylum seekers “on account of their illegal entry or presence.”¹⁸³ While “[f]ederal law prohibits foreign nationals from entering the United States without permission,”¹⁸⁴ under both international and U.S. law, those fearing persecution in their home country do not need prior approval to enter and seek asylum here.

Furthermore, asylum seekers subjected to the U.S. criminal justice system face additional hurdles in their pursuit of safety, thereby interfering with their ability to seek asylum and ultimately gain protection.¹⁸⁵ Likewise, prosecutions can lead to violations of the principle of *non-refoulement*—a cornerstone of asylum law that prohibits the return of a person to a country where she “fears threats to life or freedom”—enshrined in both U.S. and international law.¹⁸⁶

A. Criminal Prosecutions Penalize Asylum Seekers and Violate the Law

To manage the refugee crisis that ensued in the wake of WWII, states adopted the Refugee Convention in 1951, which created state obligations towards refugees and committed states to cooperate with the Convention’s supervisory body, UNHCR.¹⁸⁷ Though only a signatory to the Convention, the United States bound itself to the Convention’s central provisions (articles 2-34) by ratifying the treaty’s 1967 Protocol in 1968.¹⁸⁸

183. Convention Relating to the Status of Refugees art. 31(1), July 28, 1951, 189 U.N.T.S 174.

184. U.S. SENT’G COMM’N., IMMIGRATION GUIDELINES, 16 (2017).

185. HUM. RTS. WATCH, TURNING MIGRANTS INTO CRIMINALS 63–64 (2013).

186. *See, e.g.*, Domestic: INA § 241(b)(3)(A) provides that the “Attorney General may not remove an alien to another 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.” Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G., Title XXII, § 2242 (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subject to torture, regardless of whether the person is physically present in the United States.”); Convention Relating to the Status of Refugees art. 55, July 28, 1951, 189 U.N.T.S 176; *See, e.g.*, Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 538 (2001) (“[I]t is clear that the norm prohibiting refoulement is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”).

187. Jean Galbraith, *Temporary International Legal Regimes as Frames for Permanent Ones*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY (2015); Convention Relating to the Status of Refugees arts. 33 & 35, July 28, 1951, 189 U.N.T.S 176.

188. “The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees.” Protocol Relating to the Status of Refugees, art. 1(1), Oct. 4, 1967, 606 U.N.T.S. 267. By acceding to the Protocol, the United States bound itself to the obligations contained in Articles 2 through 34 of the Refugee Convention.

According to the U.S. Constitution's Supremacy Clause, "all treaties made . . . under the authority of the United States, shall be the supreme law of the land."¹⁸⁹ Legislative history reflects that the Senate was assured that domestic law in place at the time of ratification (i.e., the 1952 Immigration and Nationality Act) would not require modification in order for the United States to be in compliance with international law under the Refugee Convention.¹⁹⁰ In fact, after the Senate's unanimous vote to consent to the President's ratification of the treaty,¹⁹¹ Senator William Proxmire made a statement noting that "the ratification . . . demonstrates clearly that these various international conventions, designed to internationalize human rights and their protection, can be ratified without prejudice to national or state law,"¹⁹² signifying an understanding that the United States was already in compliance with the protections provided for in the Refugee Convention.¹⁹³ In 1980, Congress doubled down on these commitments by enacting the Refugee Act to give "statutory meaning to our national commitment to human rights and humanitarian concerns" that are embodied in the Convention¹⁹⁴ and to "insure a fair and workable asylum policy . . . consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law"¹⁹⁵

Article 31 of the Refugee Convention prohibits state parties from imposing "penalties" on refugees "on account of their illegal entry or presence"—a protection created following WWII, after many nations had treated refugees who sought asylum in their countries as "illegal" entrants.¹⁹⁶

189. U.S. CONST. art. VI, cl. 2.

190. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 4 (1997).

191. U.S. CONST. art. II, sec. 2, cl. 2 (the Constitution provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"); 114 CONG. REC. 29577 (daily ed. Oct. 4, 1968) (statement of Sen. Proxmire) (59 years; 0 days; 41 not voting).

192. 114 CONG. REC. 29577, *supra* note 191.

193. See Kendall Collins, *Rethinking the Employment Status of Refugees in the United States*, 55 COLUM. J. TRANSNAT'L L. 1519, 1531–32 (2016) (citing Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 4 (1997)).

194. S.Rep. No. 256, 96th Cong., 2d Sess. 1, 1, reprinted in 1980 U.S. Code Cong. & Ad. News 141, 141; see also Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1 (1997); see also *Marincas v. Lewis*, 92 F.3d 195, 198 (3d Cir. 1996) ("the Refugee Act was enacted to fulfill our treaty obligations under the U.N. Protocol for the benefit of aliens . . . who claim to be fleeing persecution.").

195. H.R. Rep. No. 96-608, at 17–18 (1979).

196. Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, <http://www.refworld.org/docid/470a33b20.html>. Article 31(1) requires that refugees shall not be penalized solely for unlawful entry or penalized for their illegal stay on grounds that they are by reason of unlawful entry or because in need, being in need of refuge and protection,

Drafters of the Convention, including the United States, recognized “that the seeking of asylum can require refugees to breach immigration rules,” therefore governments should be prohibited from imposing penalties such as “being charged with immigration or criminal offences relating to the seeking of asylum.”¹⁹⁷ Even the Second Circuit noted that “if illegal manner of flight and entry were enough independently to support a denial of asylum . . . virtually no persecuted refugee would obtain asylum.”¹⁹⁸

Likewise, U.S. courts have recognized that criminal prosecution for an immigration infraction constitutes a penalty¹⁹⁹ and independent agencies of the U.S. government have acknowledged that such prosecutions of asylum seekers violate U.S. treaty obligations. In its investigation of Operation ‘Streamline in 2015, the DHS’ Office of Inspector General (“OIG”) found that prosecutions of “aliens who express fear of persecution is the same as for aliens who do not . . . aliens are processed through the U.S. Courts on illegal entry or re-entry charges, receive sentences, and serve sentences in DOJ custody.” As such, the OIG concluded that “referring such aliens to prosecution . . . may violate U.S obligations under the Convention.”²⁰⁰ In 2016, the U.S. Commission on International Religious Freedom (“USCIRF”) expressed similar concern about the practice, noting that it “may violate the United States’ international obligations.”²⁰¹ Additionally, many United Nations groups and officials have criticized the use of criminal prosecution

they remain illegally in a country. Protections afforded to refugees, include asylum seekers—i.e., individuals whose claims have not yet been decided—since whether a person qualifies for refugee status cannot be fully determined at apprehension or point of entry.

197. See U.N. HIGH COMM’R FOR REFUGEES, *Introductory Note by the Office of the United Nations High Commissioner for Refugees* at *3 (Dec. 2010), <http://www.unhcr.org/3b66c2aa10.html>; U.N. HIGH COMM’R FOR REFUGEES, *Travaux Préparatoires for the 1951 Refugee Convention* (demonstrating the U.S. participation).

198. *Wu Zheng Huang v. INS*, 436 F.3d 89, 100 (2d Cir. 2006).

199. See e.g., *United States v. Malenge*, 294 Fed. Appx. 642, 644 (2d Cir. 2008) (“If Malenge has a credible asylum claim (and there are no facts before the Court to suggest otherwise), then she is legally entitled to enter and remain in the United States. She apparently entered the country illegally because she was unaware that she could safely enter legally. This prosecution penalizes her for her ignorance, in contradiction of our government’s policy of providing safe haven to refugees fleeing political violence and persecution. Moreover, this prosecution appears to place this United States Attorney’s Office at odds with the Executive Branch as a whole, which has committed, through the above-cited international agreements, to avoid such penalties.”); *United States v. Joya-Martinez*, 947 F.2d 1141, 1144 (4th Cir. 1991) (“Section 1326 imposes a penalty on reentering the United States without the consent of the Attorney General at any time after a person has been arrested and deported.”).

200. See OIG REPORT, *supra* note 88, at 15–16.

201. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL* (2016).

for immigration infractions, conveying particular concern about the practice in the United States.²⁰²

Despite this, the U.S. government has chosen to prioritize criminalization over upholding its legal obligations to protect asylum seekers' rights. According to CBP, criminal prosecution "does not influence the outcome" of one's asylum claim and as such, seeking asylum "cannot be used as a criterion to exclude an undocumented alien from a possible prosecution for a criminal act."²⁰³ Border Patrol has confirmed this position, noting that asylum is not a criterion for exclusion from prosecution.²⁰⁴

This practice is in opposition to guidance from UNHCR, the Refugee Convention's supervisory body whom the United States has agreed to cooperate with in this role.²⁰⁵ In addressing the United States' use of criminal prosecution of asylum seekers for illegal entry, UNHCR stated that authorities need to "make a determination on refugee status before seeking to prosecute or penalize asylum-seekers for their unlawful entry or presence."²⁰⁶ USCIRF also concluded that referring asylum seekers "for prosecution for illegal entry or illegal re-entry without first . . . assess[ing] their fear claim is problematic" and recommended that an asylum seeker be allowed to access the asylum system before a criminal charge is pursued.²⁰⁷

While the Supreme Court has yet to make a substantial holding on this matter, it has affirmed that the "legislative history of the United States'

202. See e.g., OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., *Hungary Violating International Law in Response to Migration Crisis* (Sept. 17, 2015) ("[s]eeking asylum is not a crime, and neither is entering a country irregularly"). The Committee on the Elimination of Racial Discrimination has called on the United States to abolish Operation Streamline and address "any breaches of immigration law through the civil, rather than criminal immigration system." Francois Crepeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) ("irregular entry or stay should never be considered criminal offences"). *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/7/4 20 (Jan. 10, 2008) ("criminalizing illegal entry . . . exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention"); U.N. HIGH COMM'R FOR REFUGEES, *UNHCR Advisory Opinion on Criminal Prosecution of Asylum-Seekers for Illegal Entry* [hereinafter *UNHCR Advisory Opinion*] (Mar. 2, 2006).

203. OIG REPORT, *supra* note 88, at 17. According to CBP, "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."

204. Meeting with Border Community Liaison, Tucson Sector Border Patrol, in Tucson, Ariz. (June 21, 2017).

205. *UNHCR Advisory Opinion*, *supra* note 202.

206. *UNHCR Advisory Opinion*, *supra* note 202.

207. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 201.

accession to the [Convention] discloses that the President and Senate believed that the Protocol was consistent with existing law.”²⁰⁸ Given that the offense of illegal entry and reentry existed at the time the country acceded to the Convention, it would imply that the United States understood that prosecution for these charges was not to apply to those entrants seeking asylum. Moreover, at the time of ratification, the United States made reservations (i.e., statements by a country meant to exclude or modify the legal effect of a treaty provision) to some articles of the Convention, however, it placed no reservations on Article 31.²⁰⁹ Furthermore, U.S. courts have long relied on the principle of interpretation known as the *Charming Betsy* canon, in which a domestic statute is to be construed so as not to conflict with international law and U.S. treaty obligations.²¹⁰ Thus, interpreting these offenses as not applying to asylum seekers, or excluding them from prosecutions, would prevent such a conflict between America’s domestic law and its international agreement.

B. Criminal Prosecutions Place Asylum Seekers at Risk of Persecution and Danger

Not only does criminal prosecution constitute a penalty under the law, it also undermines one’s legal right to seek asylum. A criminal conviction, and its impending prison sentence, makes it all the more challenging for a person to sustain an asylum claim and ensures that if asylum is ultimately granted, the asylee will start her life in the United States with a criminal record.²¹¹

For instance, a transgender woman from Honduras initially came to the United States in 2014 after experiencing numerous instances of rape and sexual violence in her home country due to her gender identity. Immigration officials failed to respond to her requests for asylum and she was deported back to Honduras without ever seeing an immigration judge. She fled to the United States again in 2015, and was apprehended upon entry and prosecuted and convicted for illegal reentry due to her previous deportation. After she was transferred to immigration custody, she was deemed a refugee who

208. *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 409 (1984).

209. *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267 (Oct. 4, 1967).

210. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (Feb. 22, 1804).

211. *See HUM. RTS. WATCH, supra* note 185, at 63–64 (arguing that “prosecutions impede the asylum process, which is intended to assist the most vulnerable migrants. Criminal prosecution and incarceration can delay asylum applications, exacerbate trauma or psychological problems, and potentially discourage people from pressing their asylum claims at all. Thus, illegal entry and reentry prosecutions can be at cross purposes with another goal of US immigration law—the recognition and protection of genuine refugees.”).

qualified for withholding of removal from the country, yet her conviction remained on her record.²¹²

Under U.S. immigration law, this woman was no longer eligible for asylum upon her return to the United States due to her prior removal. Those who return seeking asylum after a formal removal are only eligible to apply for another, lesser form of protection, such as “withholding from removal” or protection under the Convention Against Torture. These protections require a higher standard of proof for one to demonstrate that she qualifies, and provide a narrower scope of benefits than asylum—e.g., no derivative protection for eligible family members, no ability to eventually obtain lawful permanent residence or U.S. citizenship, and does not prevent removal to a safe third country.²¹³

Under both international and U.S. law, expelling asylum seekers to places where they may be persecuted or tortured is prohibited. When the United States passed the Refugee Act of 1980, it formally incorporated into domestic law this principle of non-refoulement, which is codified in Article 33 of the Refugee Convention.²¹⁴ Non-refoulement is also enshrined in the United Nations Convention against Torture, to which the United States is also a party, and which it has formalized into domestic law.²¹⁵ Even countries that are not party to either treaty must comply with this prohibition on return to persecution as it constitutes a tenet of customary international law.²¹⁶ Yet, despite a clear prohibition against returning asylum seekers to

212. Asylum seeker was a client of Human Rights First (case notes on file).

213. U.S. DEP’T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS* (2009). Asylum benefits include: permission to remain in the United States; asylum relief is granted to family members who are in the United States and were included in their asylum application; may petition to bring eligible family members to the United States, and may apply for lawful permanent residence and, ultimately, citizenship.

214. “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.” Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954 (“the Refugee Convention”) (implemented in U.S. law through INA § 208(c)(1)(a), “In the case of an alien granted asylum under subsection . . . the Attorney General . . . shall not remove or return the alien to the alien’s country of nationality . . .”).

215. “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984 (entered into force June 26, 1987) (ratified by the United States on Oct. 21, 1994, and implemented in U.S. law through INA § 241(b)(3)(B) withholding of removal under the Convention Against Torture).

216. *See, e.g.*, Allain, *supra* note 186, at 538 (“[I]t is clear that the norm prohibiting refoulement is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention.”); Executive Committee of the High Commissioner’s

places where they may be persecuted and tortured, criminal prosecutions for immigration infractions have led to this.

Upon serving a prison sentence for illegal entry or reentry, individuals are transferred to immigration custody where they are processed for removal from the United States.²¹⁷ Since plea agreements for these charges result in shorter sentences, including that of time served, defendants are sometimes immediately surrendered to the custody of immigration after their criminal hearing, and promptly removed—sometimes that same day. For instance, a man from Guerrero, Mexico who had tried to seek asylum at a California port of entry in October 2016, was turned away by CBP officers after being told that the U.S. was “sick of these claims.” When he instead tried to enter through Arizona in May 2017, he was apprehended by Border Patrol and referred for criminal prosecution in Operation Streamline for illegal entry. Even though he stated his fear of return in federal court, the judge convicted him of illegal entry, sentenced him to time served, and deported him to Mexico that night.²¹⁸

In another case, a Mexican family of three, who was apprehended near the border in Texas in April 2017, was told by a Border Officer that they could not seek asylum in the United States. The family explained to the officer that they had been extorted, beaten, kidnapped, and shot by members of a cartel that had also targeted other members of their family. Nonetheless, the family was referred for criminal prosecution and were all charged with illegal entry. Prior to the hearing, the court interpreter told the defendants, along with fifteen others, that they were to accept their sentence and were not allowed to say anything about asylum or their reasons for entering the United States. The three family members were then brought before the judge, convicted of illegal entry, sentenced to time-served, and then swiftly returned to Mexico.²¹⁹

Unfortunately, this type of case is not exceptional, and happens regularly to an untold number of asylum seekers sent back to countries where

Programme, *Non-Refoulement, Conclusion No. 6 – 1977*, U.N. HIGH COMM’N ON REFUGEES, Oct. 12, 1977 (“[T]he fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.”). Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, U.N. HIGH COMM’R FOR REFUGEES GLOBAL CONSULTATIONS ON INT’L PROT. 158 (Erika Feller et al., eds., 2003).

217. The U.S. Marshals Service (“USMS”) transports and takes custody of defendants during their sentences. After defendants have served their sentences, ICE, ERO, or Border Patrol takes custody from USMS and processes defendants for removal. See OIG REPORT, *supra* note 88.

218. Email correspondence with Joanna Williams, Advocacy Director, Kino Border Initiative, Nogales, Ariz. (June 2, 2017).

219. Interviews conducted by a Human Rights First staff attorney with one of the family members (May 2017) (notes on file with author).

they fear persecution and have already fled danger—a clear violation of non-refoulement. As noted by the Supreme Court, while “[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.”²²⁰

In theory, those wishing to seek asylum can raise their claim with immigration authorities once in their custody, however these claims are often ignored. In fact, USCIRF has raised concerns about “CBP officers’ outright skepticism, if not hostility, toward asylum claims”²²¹—something which many criminal defense and immigration attorneys have also expressed concerns. Defense attorneys have also explained that they do not trust Border Patrol to note asylum seekers’ fear at the time of apprehension, and have concerns that due to this, immigration authorities will remove asylum seekers after they have served their criminal sentence. Many stress that the form which Border Patrol completes after apprehending individuals crossing the border, routinely contain boiler plate language stating that the individual only came to the United States to pursue economic opportunities and did not state fear or an intention to seek asylum, despite their clients telling them otherwise. In fact, advocates hiking in the Arizona desert reported that they came across prefilled, blank forms, all noting the reason for entry was “economic.”²²² This troubling practice can have ramifications on asylum claims, as immigration judges can give deference to these forms in determining the strength of one’s asylum claim.²²³

Furthermore, there is concern regarding asylum seekers’ awareness of how to request asylum once in immigration custody. Unlike the Sixth Amendment right to counsel afforded to those who are criminally charged, there is no legal right to counsel in civil immigration proceedings and evidence demonstrates that legal representation is statistically necessary for the granting of asylum. In FY 2016, ninety percent of unrepresented asylum seekers were denied asylum as compared to forty-eight percent of those represented, meaning that over five out of every ten represented asylum seekers is successful in their claim versus one out of every ten unrepresented asylum seekers.²²⁴ Thus, the likelihood of gaining asylum protection is five times higher if one has an attorney. This is especially troubling given that if

220. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

221. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 201.

222. Interview with Pima Country Defender and local advocates, in Tucson, Ariz. (May 2017).

223. U.S. Dep’t of Just., *Form I-213-Summary of Cases*, <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/form-I-213-summary-cases.pdf>.

224. *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, TRAC IMMIGR. (Dec. 13, 2016), <http://trac.syr.edu/immigration/reports/448/>.

an asylum seeker is improperly or unjustly deported, there is no procedure to appeal or gain a second chance unless the person can once again escape their situation and make it back to the United States.

Conclusion

In July 2017, Attorney General Sessions stated that, “The people of this country have been pleading with their leaders for decades for a lawful system of immigration that serves our national interest and in which we can take pride.”²²⁵ However, a system which increasingly prioritizes the criminal prosecution of asylum seekers over welcoming them—thereby falling short of both America’s longstanding legacy of providing refuge to the world’s most vulnerable and also upholding its legal obligations—is a system that neither serves the U.S. interest, nor one in which to take pride.

In 1783, President George Washington declared, “[t]he bosom of America is open to receive not only the opulent & respectable Stranger, but the oppressed & persecuted of all Nations & Religions; whom we shall wellcome [sic] to a participation of all our rights & privileges [sic]”²²⁶ For the two centuries that followed, America largely projected this spirit of welcome,²²⁷ and recapitulated this in the Refugee Act of 1980, declaring “it the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”²²⁸

Throughout its history, America has endeavored to be “great.” However, the Trump administration’s policies on criminalizing immigration regrettably backtrack on this legacy. This administration is wrong to mandate blanket prosecutions that ultimately criminalizes one’s legal right to seek asylum and violate other associated protections in the process. As such, the United States should cease the practice of prosecuting asylum seekers for matters relating to their illegal entry or presence, as protection claims and constitutional rights are not adequately safeguarded in this

225. Attorney General Jeff Sessions Delivers Remarks to the National District Attorneys Association (July 17, 2017).

226. *From George Washington to Joshua Holmes*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-12127>.

227. See Kristine Phillips, *What the U.S. learned from turning away refugees who fled the Nazis*, WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/what-the-u-s-learned-from-turning-away-refugees-who-fled-the-nazis> (explaining that the United States has resettled millions of refugees fleeing persecution and championed the passage of the Refugee Convention. However, at a few low points, the United States did act contrary to its leadership on welcoming refugees, such as when the United States turned away the St. Louis Voyage that transported hundreds of Jewish refugees fleeing Nazi Germany during WWII and interdicted Haitians in the 1980s).

228. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980), Sec. 101(a).

system. This is especially important now, as a large number of asylum seekers are arriving at the southern border. The United States has the capacity—and responsibility—to effectively manage its borders, while protecting those who seek asylum and ensuring that their rights are respected and upheld.