

# **THE NOT-SMUGGLING PROBLEM: THE EFFECTS OF THE UNITED STATES' OVERBROAD DEFINITION OF MIGRANT SMUGGLING ON MIGRANT FAMILIES**

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## **ABSTRACT**

By signing and ratifying the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, the United States promised to the international community and to its citizens that it would adhere to a legal criminal definition of migrant smuggling that protects migrant families by only targeting in its language the organized offenders that aim to benefit financially or materially. After it made this promise, the United States did not amend 8 U.S.C. § 1324 to conform fully with the protocol. Contrary to the demands of the protocol, the statute does not establish as an element of the base offense of migrant smuggling intent for financial or material benefit. Instead, a prosecutor can decide whether to charge as a migrant smuggler one family member who assists another in entering unlawfully to the United States. The repercussions of this overbroad understanding of migrant smuggling are felt most in the immigration context in which a mother entering unlawfully into the United States while holding her infant is barred from seeking legal admission to the United States. This Article analyzes the protocol and finds that the United States falls short of its promise. I argue for amending 8 U.S.C. § 1324 and I propose that the United States extend the protocol's targeted migrant smuggling definition to its immigration statutes.

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## INTRODUCTION

Maribel is a young single mother.<sup>1</sup> Public sector corruption, widespread poverty, and gang violence plague her home country. She can turn to neither strained social assistance programs or the police for help. She lacks a secondary education but is unable to return to school, as she and the education system are underresourced. There are no gainful employment prospects. Hoping to find work to build a better life for her infant son, she opts to take the treacherous path to the US-Mexico border. Leaving her newborn behind is not an option. She has no one else that could care for the baby in her absence, and she is still nursing. With the guidance of a “coyote,” or smuggler, she crosses the desert into the United States without authorization, holding her infant close to her chest.<sup>2</sup>

Years pass, and Maribel is now married to a US citizen. Her husband petitions for her to become a US permanent resident. United States Citizenship and Immigration Services (USCIS) approves the first and second steps of the multiyear process, the I-130 Petition for Alien Relative and the I-601A Application for Provisional Unlawful Presence Waiver.<sup>3</sup> In the third step, Maribel returns to her home country to attend an immigrant visa interview at the US Consulate.<sup>4</sup> However, the consular officer denies her immigrant visa. The consular officer finds that Maribel “smuggled” her son into the United States years ago when she carried him across the border. US immigration law bars her from admission and permanent residence because she unlawfully brought her child across the border and paid for the coyote.<sup>5</sup> While there is a waiver available for those

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<sup>1</sup> Maribel is a fictional character based on real cases this author has witnessed.

<sup>2</sup> Maribel is not eligible for Asylum in the U.S. because she is not persecuted based on her race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. § 1158(b)(1)(A) (eligibility for asylum); 8 U.S.C. § 1101(a)(42)(A) (definition of refugee).

<sup>3</sup> *Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-130> [<https://perma.cc/K9RN-F79Y>]; *Application for Provisional Unlawful Presence Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-601a> [<https://perma.cc/SFQ5-KFDJ>].

<sup>4</sup> Because Maribel entered the U.S. without inspection, she cannot adjust her status in the U.S. and must undergo the consular process. *Chapter 2 – Eligibility Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2> [<https://perma.cc/H3AL-7NVM>]; *Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card-processes-and-procedures/consular-processing> [<https://perma.cc/PF42-B5ZH>].

<sup>5</sup> 8 U.S.C. § 1182(a)(6)(E)(i) (inadmissibility for smuggling). The broad language of the statute, “[a]ny person who knowingly has encouraged, induced, assisted, abetted, or aided” another to enter the U.S. encompasses situations such as when siblings help each other cross the border or when a family member contacts or pays for a coyote to bring another family member. Alison Kamhi & Rachel Prandini, *Alien Smuggling: What it is and How it can Affect Immigrants*, IMMIGR. LEGAL RSCH. CTR.: PRAC. ADVISORY (July 18, 2017),

accused of smuggling their children,<sup>6</sup> it is discretionary.<sup>7</sup> Maribel must pay a \$1,050 filing fee and legal fees<sup>8</sup> as well as remain in her home country for over a year while USCIS processes the application.<sup>9</sup> Local conditions have not improved since she last lived in her home country, and her US citizen-spouse now carries the burden of sending remittances to support Maribel abroad. Yet, Maribel is lucky: she evaded criminal prosecution for migrant smuggling. An overzealous federal prosecutor could have charged her for bringing her child into the United States unlawfully.<sup>10</sup>

It does not have to be this way for Maribel or migrants like her. Migrating families are not smugglers. The problem is that the United States defines migrant smuggling too broadly in immigration and criminal statutes, implicating migrant families instead of narrowly targeting true migrant smugglers: criminals who seek profit. The United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol), a treaty the United States ratified,<sup>11</sup> narrowly defines smuggling as an act committed for the purpose of financial or other material benefit (FoMB), and it obligates its signatories to adhere to its definition.<sup>12</sup> In response to an implementation survey of states party to the protocol, the United States claimed that allowing

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[https://www.ilrc.org/sites/default/files/resources/alien\\_smuggling\\_practice\\_advisory-20170718.pdf](https://www.ilrc.org/sites/default/files/resources/alien_smuggling_practice_advisory-20170718.pdf) [<https://perma.cc/JSV3-7WNK>].

<sup>6</sup> The waiver is only applicable if the smuggled person is a spouse, child, or parent of the accused smuggler. 8 U.S.C. § 1182(d)(11) (waiver of inadmissibility for migrant smuggling); *Application for Waiver of Grounds of Inadmissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-601> [<https://perma.cc/HAJ9-JEXX>]. Some have argued for expanding the categories of family members who could serve as qualifying relatives. *E.g.*, Rebecca M. Abel, *Who's Bringing the Children?: Expanding the Family Exemption for Child Smuggling Offenses*, 110 MICH. L. REV. FIRST IMPRESSIONS 52, 53 (2012).

<sup>7</sup> “The Attorney General *may*, in his *discretion* for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive” the smuggling inadmissibility. 8 U.S.C. § 1182(d)(11) (emphasis added).

<sup>8</sup> U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 89 Fed. Reg. 6201 (Jan. 31, 2024) (to be codified at 8 C.F.R. pt. 106).

<sup>9</sup> *Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/PK5F-L6HG>]. This time does not include the months attorneys need to prepare the filing.

<sup>10</sup> 8 U.S.C. § 1324 (bringing in and harboring aliens).

<sup>11</sup> *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XVIII-12-b&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-12-b&chapter=18&clang=_en) [<https://perma.cc/8J42-2TTM>].

<sup>12</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127, 2241 U.N.T.S. 507 [hereinafter “Migrant Smuggling Protocol” or “Protocol”].

prosecution in situations lacking the FoMB element does not dilute the protocol but, rather, exceeds its standards.<sup>13</sup>

I disagree. The Migrant Smuggling Protocol clearly requires party-states to include the intent to benefit financially or otherwise materially as an element of the base offense. I propose that the United States extend the protocol's approach to migrant smuggling to its immigration statutes as well. Part I of this Article defines migrant smuggling, contextualizes the activity, and paints a real-world picture of the common migrant smuggler. Part II describes the domestic and international legal instruments to combat migrant smuggling and introduces the Migrant Smuggling Protocol. Part III analyzes the protocol's text and supplementary documents to demonstrate how the United States fails to comply fully by not establishing as an element of the base offense intent for FoMB. Part IV argues that using discretion when choosing which acts to prosecute does not solve the gap in compliance, and it offers an amendment to the US criminal law as a solution. Finally, Part V makes a case for the United States to extend the protocol's definition to its immigration statutes.

## I. MIGRANT SMUGGLERS ARE MOTIVATED BY FINANCIAL OR MATERIAL BENEFIT.

Let us begin by defining migrant smuggling. The Migrant Smuggling Protocol defines migrant smuggling as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not national or a permanent resident."<sup>14</sup> FoMB includes tangible remuneration, such as smuggling fees, labor, or sexual acts.<sup>15</sup>

To fully comprehend migrant smuggling, one must avoid conflating migrant smuggling and human trafficking.<sup>16</sup> A key distinction is consent. Human trafficking involves exploiting an individual, whether

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<sup>13</sup> U.N. OFF. ON DRUGS & CRIME, THE CONCEPT OF "FINANCIAL OR OTHER MATERIAL BENEFIT" IN THE SMUGGLING OF MIGRANTS PROTOCOL, at 58 (2017) [hereinafter UNODC ISSUE PAPER], [https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC\\_Issue\\_Paper\\_The\\_Profit\\_Element\\_in\\_the\\_Smuggling\\_of\\_Migrants\\_Protocol.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/UNODC_Issue_Paper_The_Profit_Element_in_the_Smuggling_of_Migrants_Protocol.pdf) [<https://perma.cc/8SFT-NZLV>].

<sup>14</sup> Migrant Smuggling Protocol, *supra* note 12, art. 3(a).

<sup>15</sup> UNODC ISSUE PAPER, *supra* note 13, at 9–10.

<sup>16</sup> *Human Trafficking & Migrant Smuggling: Understanding the Difference*, U.S. DEP'T OF STATE (2017), <https://www.state.gov/wp-content/uploads/2019/02/272325.pdf> [<https://perma.cc/76CH-ZXE9>].

for sex or labor, by using force, fraud, or coercion.<sup>17</sup> In contrast, smuggled individuals have consented for the smuggler to transport them across an international border without legal authorization.<sup>18</sup> In certain circumstances, smuggling can lead to trafficking. But, being two distinct acts, not all smuggling leads to trafficking, and not all trafficking begins with smuggling.<sup>19</sup> Furthermore, international law considers trafficked individuals victims,<sup>20</sup> but there is no victim of migrant smuggling.<sup>21</sup> Instead, smuggling affects a sovereign state's border control.<sup>22</sup> Lastly, traffickers profit by exploiting the victim, whereas migrant smugglers profit by charging service fees for facilitating unauthorized entry into a country.<sup>23</sup>

Another noteworthy distinction is the one between migrants and refugees, both of whom might contract migrant-smuggler services. A refugee is a person outside their home country who fled following a well-founded fear of persecution because of their race, religion, nationality, political opinion, or membership of a particular social group.<sup>24</sup> Some refugees seek smuggler services to flee to safety in another country,<sup>25</sup> but

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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

<sup>21</sup> Of course, a migrant can become a victim of another crime during smuggling. U.N. OFF. ON DRUGS & CRIME, GLOBAL STUDY ON SMUGGLING OF MIGRANTS 2018, at 19, U.N. Sales No. E.18.IV.9 (2018),

[https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM\\_2018\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf) [<https://perma.cc/WGX8-5V8N>].

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

<sup>23</sup> U.N. OFF. ON DRUGS & CRIME, SMUGGLING OF MIGRANTS: A GLOBAL REVIEW AND ANNOTATED BIBLIOGRAPHY OF RECENT PUBLICATIONS, at 6 (2011), [https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling\\_of\\_Migrants\\_A\\_Global\\_Review.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf) [<https://perma.cc/FNT4-SKBW>].

<sup>24</sup> Convention Relating to the Status of Refugees art. 1., *opened for signature* July 28, 1951, T.I.A.S. No. 6577, 189 U.N.T.S. 137. The Refugee Convention did not define “particular social group” (PSG) and states interpret it differently. U.N. High Comm’r for Refugees, *Guidelines On International Protection: “Membership of a Particular Social Group” Within the Context of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 1–6, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> [<https://perma.cc/PQ3E-ZSSE>]. Asylum seekers are displaced people that meet the definition of a refugee but have not yet gained legal recognition as a refugee. *Refugees, Asylum Seekers, and Migrants*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/#:~:text=An%20asylum%20seeker%20is%20a,asylum%20is%20a%20human%20right> [<https://perma.cc/9L6Y-CWUM>].

<sup>25</sup> U.N. OFF. ON DRUGS & CRIME, *supra* note 23, at 20–21.

not all smuggled individuals fit the definition of a refugee. This excluded class of mobilized individuals are often referred to as migrants.<sup>26</sup>

To demonstrate the absurdity of a migrant smuggling law that can apply to migrating families, let me describe the profile of a migrant smuggler upon which we can juxtapose a migrating family. Migrant smugglers offer a range of services, including organization of smuggling routes, transportation, accommodations, guidance during the journey, and/or counterfeit travel documents.<sup>27</sup> They are geographically connected to the territory through which the migrants traverse and/or are ethnically related to migrants themselves.<sup>28</sup> Migrant smugglers can form several types of organizational structures, including well-organized hierarchical transnational organizations with countless members, loose networks of collaborative smuggling groups, opportunistic individual smugglers, or a mix of the latter two.<sup>29</sup> Migrants meet smugglers in or near “hubs,” which are large cities or remote towns where much of the economy is based on smuggling.<sup>30</sup> Migrant smuggling is a successful, in-demand business: evidence shows migrant smugglers transported 2.5 million people across international borders in 2016, earning over \$5 billion.<sup>31</sup> In June 2019, nearly 272 million people globally were in the process of migrating—that is one out of every thirty humans on earth.<sup>32</sup> As of June 2022, one hundred million people were forcibly displaced, or one out of every seventy-eight people on earth.<sup>33</sup>

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<sup>26</sup> Many migrants are unable to return home due to a credible fear of individualized danger, but still do not meet the narrow definition of a refugee. Scholars have long called for an expanded or updated refugee framework to account for this reality. See, e.g., Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES & INT’L RELS. 373, 387, 392–97 (Gil Loescher & Laila Monahan, eds., 1989) (noting that the refugee approach was devised for a particular geographical problem at a particular time and that broadening the scope of the refugee approach is an urgent task).

<sup>27</sup> U.N. OFF. ON DRUGS & CRIME, *supra* note 21, at 6.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> See INT’L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 2020 at 20, 41, PUB2019/006/L WMR 2020, (2020), [https://publications.iom.int/system/files/pdf/wmr\\_2020.pdf](https://publications.iom.int/system/files/pdf/wmr_2020.pdf) [<https://perma.cc/KVC6-S3MT>].

<sup>33</sup> *More Than 100 Million People Now Forcibly Displaced: UNHCR Report*, U.N. News (June 16, 2022), <https://news.un.org/en/story/2022/06/1120542> [<https://perma.cc/6AWK-BQV2>].

## II. MIGRANT SMUGGLING INSTRUMENTS IN US AND INTERNATIONAL LAW

### A. US CRIMINAL STATUTE

The US Congress enacted a migrant smuggling criminal statute, the Reform and Control Act, in 1986.<sup>34</sup> Later, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) enhanced the criminal penalties for migrant smuggling.<sup>35</sup> The statute that IIRIRA amended, 8 U.S.C. § 1324, is titled “bringing in and harboring certain aliens.”<sup>36</sup> Relevant to this Article are subsections (a)(1) and (a)(2), which describe the elements and penalties for the conduct.<sup>37</sup>

Subsection (a)(1)(A) defines five offenses: (i) the “brings to” offense for anyone “knowing that a person is an [undocumented foreigner], [who] brings to or attempts to bring to the United States in any manner whatsoever such person” through an unregulated area of the border;<sup>38</sup> (ii) the “transport” offense for anyone who knows or recklessly disregards that the migrant is undocumented and “transports, or moves or attempts to transport or move” that migrant within the United States;<sup>39</sup> (iii) the “harbor” offense for anyone who, knowing or recklessly disregarding that the migrant is undocumented, “conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection” that migrant;<sup>40</sup> (iv) the “encourage or induce” offense for anyone who “encourages or induces an [undocumented foreigner] to come to, enter, or reside in the United States, knowing or in reckless disregard” that their entry and residence is unlawful;<sup>41</sup> (v) an offense for those who either (I) conspire or (II) aid or abet any of the preceding four offenses.<sup>42</sup>

Along with potential fines, subsection (a)(1)(B)(i) imposes a ten-year maximum imprisonment on those who unlawfully bring a migrant to

<sup>34</sup> Immigration Reform and Control Act of 1986, Pub. L. No 99-603, § 112, 100 Stat. 3445 (1986) (amending 8 U.S.C. § 1324 (1981)).

<sup>35</sup> H.R. Rep. No 104-828, at 19–20 (1996) (Conf. Rep.).

<sup>36</sup> 8 U.S.C. § 1324.

<sup>37</sup> *Id.* § 1324(a).

<sup>38</sup> 8 U.S.C. § 1324(a)(1)(A)(i).

<sup>39</sup> *Id.* § 1324(a)(1)(A)(ii).

<sup>40</sup> *Id.* § 1324(a)(1)(A)(iii).

<sup>41</sup> *Id.* § 1324(a)(1)(A)(iv); Recently, the US Supreme Court ruled that the provision was not overbroad and therefore did not violate the First Amendment because they interpreted “encourage or induce” narrowly to mean the purposeful solicitation and facilitation of specific acts known to violate law, not otherwise protected speech. *United States v. Hansen*, 599 U.S. 762, 780 (2023).

<sup>42</sup> 8 U.S.C. § 1324(a)(1)(A)(v).

the United States or conspires to do so.<sup>43</sup> The ten-year maximum also applies when, “for the purpose of commercial advantage or private financial gain,” (ii) the actor transports, (iii) harbors, or (iv) encourages or induces the migrant to enter the United States unlawfully.<sup>44</sup> Without the purpose of financial gain, the statute authorizes a maximum imprisonment of five years.<sup>45</sup>

Subsection (a)(2) is like the “bring to” offense in (a)(1)(A)(i), but it includes a broader mens rea.<sup>46</sup> Namely, subsection (a)(2) applies when the actor brings, or attempts to bring, a migrant to the United States while knowing or recklessly disregarding that the migrant is undocumented.<sup>47</sup> The penalty for (a)(2) is a fine and/or at most a year imprisonment.<sup>48</sup> But if the actor brings or attempts to bring an undocumented migrant for the purpose of commercial advantage or private financial gain, then they face a statutory minimum of three years and a maximum of ten years imprisonment for a first and second offense.<sup>49</sup> Any additional repeated offense will land them a statutory minimum of five years up to a maximum of fifteen years imprisonment.<sup>50</sup>

US courts and survey respondents interpret “commercial advantage or private financial gain” in § 1324(a)(2)(B)(ii) to include minor compensation for fuel costs as well as for sexual, labor, or drug-trafficking services.<sup>51</sup> This broad scope matches the definition of FoMB in the Migrant Smuggling Protocol.<sup>52</sup> US respondents elaborated that if a migrant cannot afford the smuggler’s services and instead offers to assist the smuggler in lieu of payment, they, too, act for FoMB.<sup>53</sup> In this situation, courts consider the migrant to have become part of the smuggling conspiracy to encourage or induce others to enter the United States illegally.<sup>54</sup>

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<sup>43</sup> *Id.* § 1324(a)(1)(B)(i).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* § 1324(a)(1)(B)(ii).

<sup>46</sup> Compare *id.* § 1324(a)(1)(A)(i), with *id.* § 1324(a)(2). Mens rea refers to the mental state or mental culpability of the actor. Brian Duignan, *Mens Rea*, ENCYCLOPEDIA BRITANNICA (Sept. 26, 2023), <https://www.britannica.com/topic/mens-rea> [https://perma.cc/6YY8-GPB8].

<sup>47</sup> 8 U.S.C. § 1324(a)(2).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 1324(a)(2)(B).

<sup>50</sup> *Id.*

<sup>51</sup> UNODC ISSUE PAPER, *supra* note 13, at 58.

<sup>52</sup> *Id.* at 9–10.

<sup>53</sup> *Id.* at 58.

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

Broad statutory language makes it possible to prosecute migrants who bring along unauthorized family members for reasons other than FoMB. The plain language of 8 U.S.C. § 1324(a) indicates that Maribel could be liable under several different subsections. Take the “bring to” clause as an example and let us divide it into 5 elements:

1. knowing that a person is an [undocumented foreigner],
2. brings to or attempts to bring to the United States in any manner whatsoever such person
3. at a place other than a designated port of entry or place other than as designated by the Commissioner,
4. regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States
5. and regardless of any future official action which may be taken with respect to such [undocumented foreigner]; shall be punished.<sup>55</sup>

Having just given birth to her son in a foreign country, Maribel knew that her son was not a US citizen, permanent resident, or other lawful status holder, so she knew he was an undocumented foreigner. Element one, check. She indeed brought him to the United States by physically carrying him into the country. Element two, check. They crossed through the desert and avoided a port of entry and any official immigration checkpoint. Element three, check. Her son had not received authorization, but, in any case, the statute also disregards any prior or future authorization, so his authorization would not negate her culpability. Elements four and five, check and check.

She could also find herself liable under: (a)(1)(A)(ii) for transporting her undocumented son within the United States, (a)(1)(A)(iii) if she shielded him from detection of border agents after crossing, (a)(1)(A)(iv) for inducing her son to come to the United States without authorization and for paying for a coyote to smuggle them, and (a)(2)(B)(iii) for not presenting him at a port of entry.

Regarding her sentence, Maribel could face up to ten years imprisonment for violating the “brings to” offense and (a)(2)(B)(iii),<sup>56</sup> and she could face up to five years for violating the “transports,” “harbors,” and “encourages or induces” offenses.<sup>57</sup> However, the most likely sentence is lower. Federal judges consult the Federal Sentencing Guidelines to

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<sup>55</sup> 8 U.S.C. § 1324(a)(1)(A)(i).

<sup>56</sup> *Id.* § 1324(a)(1)(B)(i); *id.* § 1324(a)(2)(B)(iii).

<sup>57</sup> *Id.* § 1324(a)(1)(B)(ii).

determine appropriate sentences that comply with statutory mandates.<sup>58</sup> The guidelines are a nonbinding yet heavily followed set of rules that promote standards upon which to judge a sentence's reasonableness.<sup>59</sup> Under the Federal Sentencing Guidelines, a federal judge would sentence her to four to ten months of imprisonment.<sup>60</sup>

Section 1324(a) by and large does not provide statutory exceptions for cases involving humanitarian concerns or family reunification,<sup>61</sup> but prosecutors generally practice discretion.<sup>62</sup> US respondents noted that US attorneys were unlikely to prosecute family reunification cases, but, if pursued, the case would result in relatively lenient penalties compared to a case against a professional migrant smuggler.<sup>63</sup> Indeed, the Federal Sentencing Guidelines result in a lower sentence where "the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child."<sup>64</sup>

US attorneys assured the UN Office of Drugs and Crime (UNODC) in survey responses that the United States' approach to migrant smuggling does not simply meet but exceeds the minimum requirements

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<sup>58</sup> Charles Doyle, Cong. Rsch. Serv., R41697 How the Federal Sentencing Guidelines Work: An Abridged Overview 1 (2015).

<sup>59</sup> *Id.*

<sup>60</sup> First, we calculate the offense level. Assuming Maribel had no prior convictions, her base offense level would be twelve. U.S. SENT'G GUIDELINES MANUAL § 2L1.1(a)(3) (U.S. SENT'G COMM'N 2023). She qualifies for a three-level reduction because the smuggling involved her child, putting her at level nine. *Id.* § 2L1.1(b)(1). Next, we compare her offense level and criminal history points in the Sentencing Table. *Id.* at 5A. Again, because she has no previous conviction, her criminal history level is one and the table recommends four to ten months of imprisonment. *Id.*

<sup>61</sup> 8 U.S.C. § 1324(a); The only similar exception is very narrow: it is not unlawful under this statute for a religious nonprofit to transport or harbor an undocumented minister or missionary so long as that worker has worked for the organization for one year and they are unpaid. *Id.* § 1324(a)(1)(C).

<sup>62</sup> UNODC ISSUE PAPER, *supra* note 13, at 57.

<sup>63</sup> *Id.* This author consulted with Raphaella Friedman, a former federal defender in the Southern District of California who worked on cases involving immigration violations. In her time there, Mrs. Friedman never personally encountered a prosecution of 8 U.S.C. § 1324 against a defendant who brings to the United States a family member without authorization. Interview with Raphaella Friedman, Remington Ctr. Fellow, Univ. Wis. L. Sch., in Madison, Wis. (Aug. 10, 2023); *see also* *Raphaella Friedman*, UNIV. WIS. L. SCH., <https://law.wisc.edu/profiles/raffi.friedman@wisc.edu> [<https://perma.cc/GMT4-HAWW>]. Data from Syracuse University's TRAC program shows that most prosecution under § 1324 occur in the Southern and Western Districts of Texas. *Immigration Prosecutions for September 2023*, TRAC IMMIG., <https://trac.syr.edu/tracreports/bulletins/immigration/monthlysep23/fil/> [<https://perma.cc/Y5AM-V9P8>]. Convictions under § 1324 are expected to reach an all-time-high under the Biden administration. *See generally* TRAC IMMIG., CONVICTIONS FOR TRANSPORTING OR HARBORING UNDOCUMENTED IMMIGRANTS JUMP UNDER BIDEN, <https://trac.syr.edu/reports/721/> [<https://perma.cc/4T3X-XP7M>]. Because of sealed or restricted factual documents unavailable on PACER, determining which if any of these cases involve family is difficult. This author contacted the Southern District for Texas for comment and is awaiting response.

<sup>64</sup> U.S. SENT'G GUIDELINES MANUAL §§ 2L1.1(b)(1), 5A (U.S. SENT'G COMM'N 2023).

of the protocol.<sup>65</sup> Prosecutors can charge known migrant smugglers with the offenses that do not require a financial motive if they lack sufficient evidence to prove the motive beyond a reasonable doubt; but if any evidence exists, prosecutors may use it to convince reluctant juries that the defendant is indeed a migrant smuggler.<sup>66</sup>

## B. US IMMIGRATION STATUTES

Migrant smuggling can render a migrant legally inadmissible<sup>67</sup> to and deportable<sup>68</sup> from the United States and thus prevent the migrant from obtaining legal status. The migrant-smuggling inadmissibility and deportability laws appeared in the Immigration and Nationality Act of 1952 (INA), forty-eight years before the United Nations Convention Against Transnational Organized Crime (UNTOC) and the Migrant Smuggling Protocol.<sup>69</sup> The INA originally required that, to become inadmissible or deportable, a migrant smuggler needed to act “knowingly and for gain.”<sup>70</sup> Congress removed the gain requirement,<sup>71</sup> thus implicating any noncitizen who assisted another migrant to enter the United States regardless of potential humanitarian or familiar motives. The language of the inadmissibility and deportability statutes appear nearly identical to one another. The immigration statutes combined generally read:

Any [undocumented foreigner] who [“at any time” for inadmissibility or “prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry” for deportability] *knowingly has encouraged, induced, assisted, abetted, or aided any other* [undocumented foreigner] to enter or to try to enter the United States in violation of law is [inadmissible/deportable].<sup>72</sup>

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<sup>65</sup> UNODC ISSUE PAPER, *supra* note 13, at 57–58. Pages 81 to 83 list all respondents. *Id.* at 81–83. This author verified that the U.S. respondents included attorneys and judges from the U.S. Departments of Justice, State, and Defense.

<sup>66</sup> *Id.* at 59.

<sup>67</sup> 8 U.S.C. § 1182(a)(6)(E)(i).

<sup>68</sup> *Id.* § 1227(a)(1)(E)(i).

<sup>69</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 228 [hereinafter INA 1952]. Section 212(a) describes classes of migrants excluded from admission and section 212(a)(31) addresses migrant smugglers. Section 24(a)(13) describes the migrant smuggling deportability ground. Note that the migrant smuggling inadmissibility and deportability grounds used to require an element of gain, an element no longer present in the current provision. *Compare* 8 U.S.C. § 1182(a)(6)(E)(i), *with* INA 1952 § 241(a)(13).

<sup>70</sup> INA 1952 §§ 212(a)(31), 241(a)(13).

<sup>71</sup> *See* 8 U.S.C. § 1182(a)(6)(E)(i); 8 U.S.C. § 1227(a)(1)(E)(i).

<sup>72</sup> *Compare* 8 U.S.C. § 1182(a)(6)(E)(i) (emphasis added) (inadmissibility), *with* 8 U.S.C. § 1227(a)(E)(i) (emphasis added) (deportability).

The conduct required for liability under either the inadmissibility or deportability provisions overlaps substantially with that required under the criminal statute<sup>73</sup>—that is an undocumented foreigner bringing another undocumented foreigner, even family, to the United States through an unregulated part of the border.

### C. MIGRANT SMUGGLING PROTOCOL

The United Nations General Assembly adopted the Migrant Smuggling Protocol together with UNTOC on November 15, 2000, and it entered into force on January 28, 2004.<sup>74</sup> The United States signed the Migrant Smuggling Protocol on December 13, 2000, and Congress ratified the protocol on November 3, 2005.<sup>75</sup> The Migrant Smuggling Protocol supplements UNTOC, and, per the protocol, it must be interpreted in light of UNTOC.<sup>76</sup> Specifically, provisions of UNTOC apply to the protocol *mutatis mutandis* meaning UNTOC's application requires modifications to the protocol as necessary for it to share the essential meaning of UNTOC.<sup>77</sup> Conversely, when applying the Migrant Smuggling Protocol against UNTOC, the provisions in the protocol are treated like those in

<sup>73</sup> Compare 8 U.S.C. § 1182(a)(6)(E)(i) (inadmissibility), and 8 U.S.C. § 1227(a)(E)(i) (deportability), with 8 U.S.C. § 1324(a) (criminal).

<sup>74</sup> U.N. TREATY COLLECTION, *supra* note 11.

<sup>75</sup> *Id.* There is no question that by its signature and ratification, the Protocol creates an international law obligation for the United States. *Medellin v. Texas*, 552 U.S. 491, 504 (2008). The United States raised no objections and its only reservations pertained to criminalizing attempts to commit migrant smuggling, the use of fraudulent documents and statements, and interstate dispute resolutions. See U.N. TREATY COLLECTION, *supra* note 11; S. EXEC. DOC. NO. 109-4, at 8-9 (2005).

<sup>76</sup> Migrant Smuggling Protocol, *supra* note 12, art. 1.

<sup>77</sup> “The phrase *mutatis mutandis* indicates that whilst it may be necessary to make some changes to take account of different situations, the main point remains the same.” *Mutatis Mutandis*, Lexis Nexis: Legal Glossary, <https://www.lexisnexis.co.uk/legal/glossary/mutatis-mutandis#:~:text=‘Mutatis%20mutandis’%20translates%20to%20‘,main%20point%20remains%20the%20same> [https://perma.cc/A2KT-NH4J]. The meaning is also clarified in the Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnat'l Organized Crime on the Work of Its First to Eleventh Sessions, Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 87, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) [hereinafter Interpretive Notes]. For more information regarding the relationship of the Protocol to the UNTOC, see U.N. Off. on Drugs & Crime, Legislative Guides for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, ¶¶ 11-15, U.N. Sales No. E.0000000 (2005) [hereinafter Legislative Guides], [https://www.unodc.org/pdf/crime/legislative\\_guides/04%20Legislative%20guide\\_Smuggling%20of%20Migrants%20Protocol.pdf](https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf) [https://perma.cc/472X-BLQV].

UNTOC.<sup>78</sup> Given the relationship between UNTOC and the protocol, it is important to examine each instrument's scope and purpose.

First, UNTOC does not leave much ambiguity in its purpose: it explicitly states that its purpose "is to promote cooperation to prevent and combat transnational organized crime more effectively"<sup>79</sup> by promoting international cooperation and working to eliminate hubs, or "safe havens," facilitating organized criminal activities.<sup>80</sup> Organized crime occurs at the hands of an organized criminal group, which UNTOC, in sum, defines as a structured group, acting in concert, aiming to commit one or more serious crimes to obtain FoMB directly or indirectly.<sup>81</sup> UNTOC defines "serious crime" in terms of the potential severity of the sanction: a serious crime is conduct punishable by a maximum deprivation of liberty of at least four years.<sup>82</sup>

UNTOC straightforwardly defines its scope: it applies to the prevention, investigation, and prosecution of certain crimes: participation in an organized criminal group (Article 5), laundering of criminal proceeds (Article 6), corruption (Article 8), obstruction of justice (Article 23), and other "serious crime[s]" (Article 3(1)(b)).<sup>83</sup> State parties must criminalize, prosecute, and sanction these behaviors.<sup>84</sup> In criminalizing these behaviors, state parties must also take measures to assist and protect victims of the offenses.<sup>85</sup>

Importantly, UNTOC offers some flexibility. When implementing UNTOC, states may domestically criminalize some of the offenses independent of their transnational nature or the involvement of an organized criminal group.<sup>86</sup> Additionally, states may adopt stricter measures for preventing and combating transnational organized crime.<sup>87</sup>

Second, the Migrant Smuggling Protocol supplements UNTOC for the purpose of preventing and combating transnational organized migrant smuggling while protecting the rights of smuggled migrants.<sup>88</sup>

<sup>78</sup> Migrant Smuggling Protocol, *supra* note 12, art. 1.

<sup>79</sup> U.N. Convention Against Transnational Organized Crime art. 1, *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 [hereinafter UNTOC].

<sup>80</sup> Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 Hum. Rts. Q. 975, 978–79 (2001).

<sup>81</sup> UNTOC, *supra* note 79, art. 2(a).

<sup>82</sup> UNTOC, *supra* note 79, art. 2(b).

<sup>83</sup> *Id.* art. 3.

<sup>84</sup> *Id.* art. 11.

<sup>85</sup> Gallagher, *supra* note 80, at 980.

<sup>86</sup> UNTOC, *supra* note 79, art. 34(2).

<sup>87</sup> *Id.* art. 34(3).

<sup>88</sup> Migrant Smuggling Protocol, *supra* note 12, art. 2.

Applying *mutatis mutandis* to UNTOC, the migrant smuggling offense in the protocol mimics the essence and treatment of the offenses established in Articles 5, 6, 8, and 23 of UNTOC.<sup>89</sup> The protocol's scope is narrow: it is aimed at preventing, investigating, and prosecuting migrant smuggling where the offenses are transnational in nature and/or involve an organized criminal group.<sup>90</sup>

The United Nations Office on Drugs and Crime states that the purpose of migrant smuggling is to benefit financially or materially, which, in turn, fuels the dangerous trade that places migrants at risk of death or exploitation.<sup>91</sup> For that reason, the protocol compels states to criminalize migrant smuggling committed intentionally to gain FoMB.<sup>92</sup> It does so by defining migrant smuggling as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not national or a permanent resident."<sup>93</sup> The protocol's drafters intended for state parties to define FoMB broadly and to include benefits such as monetary profit, sexual gratification resulting from exploitation of children in pedophile rings or cost-sharing among ring members,<sup>94</sup> paid transportation, and even property.<sup>95</sup> In sum, migrant smuggling is a crime of specific intent that requires that the perpetrator intended to gain FoMB.<sup>96</sup>

Like UNTOC, the protocol provides state parties with limited flexibility in implementing its provisions. Aside from migrant smuggling, the protocol allows states to criminalize attempts at migrant smuggling and participation as an accomplice or as an organizer of the crime.<sup>97</sup> It also encourages state parties to criminalize the enabling of an unauthorized person to remain in the state party without legal means.<sup>98</sup> The protocol clarifies that nothing in the instrument "shall prevent a state party from taking measures against a person whose conduct constitutes an offense under its domestic law."<sup>99</sup> Additionally, the UNTOC provision allowing

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<sup>89</sup> *Id.* art. 1.

<sup>90</sup> *Id.* art. 4.

<sup>91</sup> UNODC ISSUE PAPER, *supra* note 13, at iii.

<sup>92</sup> Migrant Smuggling Protocol, *supra* note 12, art. 6(1).

<sup>93</sup> *Id.* art. 3(a).

<sup>94</sup> UNODC ISSUE PAPER, *supra* note 13, at 9.

<sup>95</sup> *Id.* at 10.

<sup>96</sup> *Id.* at x–xi.

<sup>97</sup> Migrant Smuggling Protocol, *supra* note 12, art. 6.

<sup>98</sup> *Id.* art. 6(1)(c).

<sup>99</sup> *Id.* art. 6(4).

for stricter measures to prevent and combat transnational organized crime could apply to the protocol, *mutatis mutandis*.<sup>100</sup> Further interpretation of the Migrant Smuggling Protocol and UNTOC is guided by the Vienna Convention on the Law of Treaties.

#### D. VIENNA CONVENTION ON THE LAW OF TREATIES

The framework for making and interpreting treaties, such as the Migrant Smuggling Protocol and UNTOC, comes from a fundamental treaty called the Vienna Convention on the Law of Treaties.<sup>101</sup> Any analysis of a treaty must begin with the Vienna Convention, and, here, a handful of rules related to state party obligations and treaty interpretations are pertinent. First, state parties to a treaty are obligated to honor the purpose and object of the treaty (Article 18).<sup>102</sup> Second, states must perform the treaty obligations in good faith (Article 26).<sup>103</sup> Third, domestic law cannot justify a failure to adhere to a treaty (Article 27).<sup>104</sup> Fourth, a treaty must be interpreted in light of the treaty's object and purpose, which is ascertained from its preamble, annexes, and other agreements or instruments accepted by the state parties as relating to the treaty (Article 31).<sup>105</sup> Fifth, when ambiguities arise, the preparatory work of the treaty and the circumstances of its conclusion become interpretive resources (Article 32).<sup>106</sup>

The United States signed the Vienna Convention on April 24, 1970, but has not yet ratified it.<sup>107</sup> Upon signing, the United States raised no reservations related to the substantial provisions of the convention.<sup>108</sup> However, the international community accepts as customary law<sup>109</sup> many

<sup>100</sup> UNTOC, *supra* note 79, art. 34(3); Migrant Smuggling Protocol, *supra* note 12, art. 1.

<sup>101</sup> See Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 VA. J. INT'L L. 281, 285–86 (1988).

<sup>102</sup> Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>103</sup> *Id.* art. 26.

<sup>104</sup> *Id.* art. 27.

<sup>105</sup> *Id.* art. 31.

<sup>106</sup> *Id.* art. 32.

<sup>107</sup> *Vienna Convention on the Law of Treaties*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en) [https://perma.cc/8NLX-D9VD].

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

<sup>109</sup> International customary law is a source of law created when states believing that a practice is required by law, generally comply with that practice. See JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 23–30 (8th ed. 2012).

of the Vienna Convention's provisions, including Articles 31 and 32.<sup>110</sup> The United States' hesitation to accept customary international law domestically does not absolve it of its obligations at the international level arising from its signature, and regardless, customary law binds non-party states.<sup>111</sup>

### III. THE UNITED STATES IS NOT COMPLYING WITH ITS INTERNATIONAL OBLIGATIONS UNDER THE MIGRANT SMUGGLING PROTOCOL WHILE OMITTING FINANCIAL OR MATERIAL BENEFIT AS AN ELEMENT OF THE OFFENSE.

When Maribel brought her baby across the US border seeking a safe and stable life, she did not become a migrant smuggler under international law. The United States should not classify her as one in any way. She did not engage in a criminal enterprise, nor did she act for FoMB. The protocol's text and *travaux préparatoires*, or preparatory works,<sup>112</sup> demonstrate that when it retains the possibility to prosecute the assisted entry of unauthorized migrants unmotivated by FoMB, the United States defies the purpose of the Migrant Smuggling Protocol and is not compliant with its international obligation to narrowly criminalize migrant smuggling.<sup>113</sup>

The flexibilities that UNTOC and the Migrant Smuggling Protocol provide do not allow the United States to omit the FoMB element from criminal statutes. Therefore, the United States should narrow its definition of migrant smuggling. When UNODC inquired into the United States' implementation of the protocol, US attorneys defended the United

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<sup>110</sup> Jean Galbraith, *What Should the Restatement (Fourth) Say About Treaty Interpretation?*, 2015 BYU L. REV. 1499, 1508 (2015).

<sup>111</sup> Vienna Convention, *supra* note 102, art. 38.

<sup>112</sup> *Travaux préparatoires* is the French and official term for the official records of treaty negotiations. *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Organized Crime and the Protocols Thereto*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html> [https://perma.cc/GA6P-ES3E].

<sup>113</sup> The U.N. Office on Drugs and Crime (UNDOC) noticed that the U.S. and other countries left out the FoMB requirement but stopped short of declaring the omission an act of non-compliance. Instead, the UNODC left the question open for discussion which helped to inspire this piece. See UNODC ISSUE PAPER, *supra* note 13. However, in a subsequent report, the lead investigator, Anne Gallagher, stated that it was possible to conclude that states that omit the FoMB requirement have "effectively dismantled one of the central tenants of the international legal framework. . . well beyond that intended by the drafters." Anne T. Gallagher, *Whatever Happened to the Migrant Smuggling Protocol?*, in *IDEAS TO INFORM INT'L COOP. ON SAFE, ORDERLY & REGULAR MIGRATION* 105, 107 (Marie McAuliffe & Michele Klein Solomon eds., 2017).

States' statutes and argued that, by omitting the requirement, the United States furthers the protocol's goals because it provides flexibility to charge smugglers despite lacking sufficient evidence to meet the evidentiary burden necessary to prove intent for FoMB.<sup>114</sup> UNODC did not provide a full explanation of the United States' stance, but anticipating potential arguments from the United States, the US respondents are misguided to think the United States' approach furthers the protocol for two reasons. First, the protocol's purpose, travaux préparatoires, financial-or-other-material benefit requirement, and supplemental guidance documents support the drafter's intent to expressly exclude migrant families from any potential criminal liability. Second, none of the four areas of flexibility described below support the United States' conclusion that retaining the ability to prosecute all situations of assisted unauthorized entry furthers the protocol.

A. THE MIGRANT PROTOCOL'S TEXT, PURPOSE, TRAVAUX PRÉPARATOIRES, AND SUPPLEMENTARY GUIDES DO NOT SUPPORT A STATE RETAINING DISCRETION TO PROSECUTE THOSE WHO ASSIST THE UNAUTHORIZED ENTRY OF ANOTHER WITHOUT INTENT TO BENEFIT FINANCIALLY OR MATERIALLY.

Plainly reading the object and purpose<sup>115</sup> of the Migrant Smuggling Protocol refutes the idea that migrant smugglers include migrants like Maribel who carry their children across the border in hopes of a better life. The stated object and purpose of the Migrant Smuggling Protocol is to combat transnational organized crime "while protecting the rights of smuggled migrants."<sup>116</sup> Maribel, too, is a smuggled migrant because the coyote smuggled her into the United States. It was people like Maribel who the protocol sought to protect.

The United States might argue that because a coyote smuggled Maribel into the country, and because she brought her child, she is both a smuggled migrant and a migrant smuggler. However, the travaux préparatoires regarding the definition of migrant smuggling resolves that she is not a migrant smuggler. The drafters intended to exclude from the migrant smuggling definition "the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family

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<sup>114</sup> UNODC ISSUE PAPER, *supra* note 13, at 58–59.

<sup>115</sup> Remember that state parties must honor the object and purpose of the treaty. Vienna Convention, *supra* note 102, art. 18.

<sup>116</sup> Migrant Smuggling Protocol, *supra* note 12, art. 2.

ties.”<sup>117</sup> They clarified that “it was not the intention of the Protocol to criminalize the activities of family members.”<sup>118</sup> US Secretary of State Colin Powell acknowledged this intention in his message to President George W. Bush regarding the ratification of UNTOC and its protocols.<sup>119</sup> Honoring this intention requires that we sever the chain of smuggled to smuggler at the family and humanitarian line.

The drafters chose to emphasize the protocol’s purpose by requiring FoMB in two provisions. The protocol states that state parties “shall adopt such legislative and other measures as may be necessary to establish as criminal offences [the smuggling of migrants], when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.”<sup>120</sup> The protocol also defines migrant smuggling in terms of FoMB.<sup>121</sup> Put simply, the drafters reiterated the financial or material requirement in both the elements of the criminal act and in the definition of migrant smuggling. Comparing the interpretive notes of the travaux préparatoires regarding the definition and offense of migrant smuggling, the instructions clearly target profit seekers:

The reference to “a financial or other material benefit” as an element of the [definition or the offense] was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.<sup>122</sup>

The drafters intended the dual appearance of the FoMB requirements and clarified their intent to exclude family acts by way of repetition. The United States ignoring both instances of this instruction demonstrates a bad faith effort to disregard the clear language of the protocol.<sup>123</sup>

Additionally, the intangible benefits migrants may gain by assisting family in unauthorized entry are not enough to justify prosecuting them as migrant smugglers. Naturally, some might point out that family members who assist each other in crossing into another country without

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<sup>117</sup> Interpretive Notes, *supra* note 77, ¶ 88.

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

<sup>119</sup> S. TREATY DOC. NO. 108-16, at xxix (2004) (transmitting UNTOC and Protocols for ratification).

<sup>120</sup> Migrant Smuggling Protocol, *supra* note 12, art. 6(1) (emphasis added).

<sup>121</sup> *Id.* art. 3(a).

<sup>122</sup> Compare Interpretive Notes, *supra* note 77, ¶ 88, with Interpretive Notes, *supra* note 77, ¶ 92.

<sup>123</sup> See Vienna Convention, *supra* note 102, art. 26.

authorization intend to benefit from family reunification and economic or educational opportunities. Its corollary is, then, that because the protocol's drafters aimed to cast a wide net when defining FoMB,<sup>124</sup> such benefits fall within the protocol's scope. However, the drafters explicitly included the modifier "material" before the word "benefit." As commonly understood, the adjective "material," when preceding a noun, relates to "physical objects or money rather than emotions or the spiritual world."<sup>125</sup> Potential and indefinite economic, familial, and educational benefits are not sufficiently tangible to amount to "material" benefits.

For example, a humanitarian or religious nongovernmental organization's mission might entail assisting unauthorized migrants on their treacherous journeys to other countries by providing food, water, or shelter. An element of potential financial benefit arises when the organization is partially motivated to assist migrants by the desire to satisfy donors' expectations or to boost reputation and solicit further funding. Despite interests in potential benefits, the protocols' drafters did not intend to criminalize the activities of support groups.<sup>126</sup> In the same vein, allowing criminal liability for migrant smuggling based on family assistance to gain indefinite benefits is beyond the drafters' intent and the protocol's scope.

B. THE FOUR AREAS OF FLEXIBILITY IN THE PROTOCOL AND UNTOC DO NOT ALLOW FOR STATUTORY LANGUAGE THAT ENABLES PROSECUTION FOR MIGRANT SMUGGLING OF A FAMILY MEMBER WHO ASSISTED A RELATIVE TO ENTER WITHOUT AUTHORIZATION.

The United States undermines the protocol when it retains statutory language under which it can prosecute a migrant who assisted the unauthorized entry of a relative. The following four areas of flexibility found in the protocol and UNTOC do not provide an exception for such statutory drafting.

1. *Article 34(3) of UNTOC*

The first flexibility lies in the scope of the protocol's definition of "migrant smuggling" when read alongside Article 34(3) of UNTOC. The

<sup>124</sup> UNODC ISSUE PAPER, *supra* note 13, at 9–10.

<sup>125</sup> *Material*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/material> [https://perma.cc/PK39-2JZK].

<sup>126</sup> Interpretive Notes, *supra* note 77, ¶¶ 88, 92.

protocol defines migrant smuggling as the “procurement” of the illegal entry of a person,<sup>127</sup> meaning the smuggler completes the crime when the migrant successfully enters the country illegally with the smuggler’s assistance. However, UNTOC, which the protocol supplements, allows states to criminalize transnational offenses more strictly than UNTOC and—applying its *mutatis mutandis*—the protocol allow.<sup>128</sup> Stricter measures can include the inchoate offenses.<sup>129</sup> Subsequently, one might claim that even if omitting the FoMB requirement is outside the scope of the protocol, the omission is nonetheless consistent with the protocol because UNTOC permits states to establish stricter regulation of offenses, and removing the requirement makes the enforcement more strict.

Close, but not quite. UNODC clarified that the Migrant Smuggling Protocol does not provide a legal basis to prosecute migrant smuggling without proof of a purpose to gain FoMB.<sup>130</sup> Using the treaty the protocol is meant to supplement to instead undermine the protocol would defeat the protocol’s purpose and demonstrate bad-faith implementation.

Moreover, Article 34(3) of UNTOC, on its face, seemingly permits states to criminalize all assisted unauthorized entry. But this is not the case. Article 34(3) of UNTOC states:

Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.<sup>131</sup>

One reading of Article 34(3) could result in an interpretation in which the phrase “for preventing and combatting transnational crime” modifies the phrase “than those provided for in this Convention.” This would mean that state parties could adopt more severe measures than they could under the UNTOC provisions, which drafters created to prevent and combat transnational crime. This first interpretation describes the obvious idea that states can sternly criminalize completely unrelated crimes like domestic violence. However, reading UNTOC in light of the treaty’s scope and purpose,<sup>132</sup> it makes more sense that “for preventing and combatting transnational crime” modifies “each State Party may adopt more strict or

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<sup>127</sup> Migrant Smuggling Protocol, *supra* note 12, art. 3(a).

<sup>128</sup> UNTOC, *supra* note 79, art. 34(3).

<sup>129</sup> Migrant Smuggling Protocol, *supra* note 12, art. 6(2)(a).

<sup>130</sup> UNODC ISSUE PAPER, *supra* note 13, at 71.

<sup>131</sup> UNTOC, *supra* note 79, art. 34(3).

<sup>132</sup> Vienna Convention, *supra* note 102, art. 31.

severe measures.”<sup>133</sup> This second interpretation mandates that when states adopt stricter measures, those measures must themselves relate to the scope and purpose of the treaty: to target transnational organized crime. The criminalization of crossing a border, without authorization and while accompanied by at least one other person, by itself does not combat transnational organized crime. An element of criminal FoMB or syndicate involvement is necessary to target such issues; therefore, the United States cannot base its broad smuggling law on an interpretation of Article 34(3) that honors the protocol’s purpose.

## 2. Article 34(2) of UNTOC

Second, a proponent of the claim that the United States advances the protocol might point to Article 34(2) regarding the implementation of UNTOC, which compels states to criminalize the offenses of UNTOC that occur independent of any transnational nature or involvement of an organized criminal group.<sup>134</sup> For example, a party state should create an offense for laundering of criminal proceeds even if the act occurs domestically between two individuals. Since the supplementary relationship of the protocol requires treating migrant smuggling like the offenses in UNTOC,<sup>135</sup> a proponent might interpret the flexibility in Article 34(2) to criminalize migrant smuggling that does not occur while participating in a criminal organized group, thus implicating a broader array of actors. Indeed, the protocol does allow for this,<sup>136</sup> and for that reason, the sole coyote who smuggled Maribel and her child could face prosecution under US law consistent with the protocol. But the flexibility does not mean Maribel is also a migrant smuggler.

In fact, that migrant smugglers can be individuals helps to prove that when states omit the criminal organization requirement per Article 34(2) of UNTOC, states still must not implicate families. According to UNTOC’s definition, organized criminal groups consist of at least three individuals working in concert.<sup>137</sup> Omitting this requirement would eliminate the numerical threshold required for liability, but it does not follow that the drafters meant to hold small families liable. For this

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<sup>133</sup> Stricter measures could include a lower *mens rea* such as negligence or recklessness. LEGISLATIVE GUIDES, *supra* note 77, ¶ 61(d).

<sup>134</sup> UNTOC, *supra* note 79, art. 34(2).

<sup>135</sup> Interpretive Notes, *supra* note 77, ¶ 87; Migrant Smuggling Protocol, *supra* note 12, art. 1.

<sup>136</sup> LEGISLATIVE GUIDES, *supra* note 77, ¶ 20.

<sup>137</sup> UNTOC, *supra* note 79, art. 2(a).

flexibility to sensibly criminalize individuals like Maribel, it must be true that migrant smugglers are only ever nonfamilial criminal organizations or large families migrating together. If those were the only two options, then removing the criminal organization requirement would necessarily mean the drafters intended to allow states to consider as migrant smugglers individuals who assist a family member's unauthorized entry. In reality, there is a third option: migrant smugglers might be opportunistic individuals or pairs of individuals who smuggle migrants for FoMB without taking part in organized crime.<sup>138</sup> In light of the protocol's purpose to avoid criminalizing family actors, it is most likely that the drafters merely intended to allow states to criminalize nonfamilial individuals or pairs of migrant smugglers by encouraging the criminalization of migrant smuggling independent of involvement in a criminal organization.

Moreover, families helping each other enter through an unregulated part of the border are never migrant smugglers irrespective of Article 34(2)'s flexibility or the size of the family. If a state requires involvement in a criminal organization, then spouses assisting each other, or a mother like Maribel carrying her baby across a border, fail to meet the numerical threshold to qualify as an organized criminal group. This leaves liability for families of three or more. However, it is senseless to posit that only when a family larger than two migrates together are they criminals. A large family could avoid sanction by embarking upon the journey in groups of two or less. Again, considering the protocol's purpose to avoid punishing family actors, it is most likely that the size of a family is irrelevant. Whether or not the requirement for involvement in a criminal group is omitted, no family situations fall within the protocol's scope, and the United States does not further the protocol when its statutes allow the possibility for sanctions in this situation.

Putting aside the FoMB issue, Article 34(2) is not limitless. It recognizes that Article 5 of UNTOC criminalizes participation in an organized criminal group; therefore, involvement in an organized criminal group is inevitably required, because it is itself the crime.<sup>139</sup> The remaining crimes—laundering of criminal proceeds (Article 6), corruption (Article 8), obstruction of justice (Article 23), and other serious crime (Article 3(1)(b))—can occur domestically without involvement in an organized criminal group and, hence states could criminalize them independently.<sup>140</sup> This is not true of migrant smuggling. There is no way to decouple the

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<sup>138</sup> U.N. OFF. ON DRUGS & CRIME, *supra* note 21, at 7–8.

<sup>139</sup> UNTOC, *supra* note 79, art. 34(2).

<sup>140</sup> *Id.* art. 3.

transnational nature of migrant smuggling. Migrant smuggling, by anyone's definition, necessitates cross-border activity.<sup>141</sup>

### 3. Article 3(1)(b) of UNTOC

Third, a proponent of the United States' position might argue that because UNTOC applies to the prevention, investigation, and prosecution of "serious crime"<sup>142</sup> per Article 3(1)(b), the United States can criminalize nonorganized assistance of unauthorized entry that does not occur for FoMB, because bringing an unauthorized migrant to the United States is per se a serious crime. This argument also fails. Indeed, the United States' statute against aiding an unauthorized migrant to enter the United States meets UNTOC's definition of a "serious crime" because of its statutory maximum of ten years imprisonment.<sup>143</sup> However, a state party cannot establish a "serious crime" as an offense independent of involvement in an organized criminal group as can the other UNTOC offenses.<sup>144</sup> Article 34(2), described in the previous subsection, explicitly identifies in its scope Articles 5, 6, 8, and 23.<sup>145</sup> It does not name Article 3(1)(b) regarding "serious crime,"<sup>146</sup> suggesting that "serious crime" must always include elements of transnational and organized group activity as to never apply to individuals like Maribel.

Another sign that "serious crime" must always involve an organized criminal group appears in the contrasting language of Articles 5, 6, 8, and 23 against 34(2). Each of the former articles describe their respective offenses without acknowledging any potential transnationality or organized criminal group involvement.<sup>147</sup> The lack of acknowledgement of those two requirements in Articles 5, 6, 8, and 23 paves the way for Article 34(2) to apply smoothly without contradicting any explicit text of Articles 5, 6, 8, and 23. The same is not true for the "serious crime" provision. By comparison, Article 3(1)(b) on "serious

<sup>141</sup> LEGISLATIVE GUIDES, *supra* note 77, ¶ 61(a). Clandestinely transporting a migrant internally is just that, transporting. 8 U.S.C. § 1324(a)(1)(A)(ii).

<sup>142</sup> UNTOC, *supra* note 79, art. 3(1)(b).

<sup>143</sup> For an offense to constitute a serious crime, it must be punishable with a maximum restriction of liberty of at least 4 years. UNTOC, *supra* note 79, art. 2(b); 8 U.S.C. § 1324(a)(1)(B)(i).

<sup>144</sup> UNTOC, *supra* note 79, art. 34(2).

<sup>145</sup> "The offences established in accordance with *articles 5, 6, 8 and 23* of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group. . ." UNTOC, *supra* note 79, art. 34(2) (emphasis added).

<sup>146</sup> *Id.*

<sup>147</sup> UNTOC, *supra* note 79, arts. 5, 6, 8, 23.

crime” explicitly states that its scope applies “where the offense is transnational in nature and involves an organized criminal group.”<sup>148</sup> It is precarious to apply Article 34(2) if doing so requires negating specific instruction laid in a substantial provision of UNTOC, such as Article 3(1)(b). All this to say that any other “serious crime” a state establishes must apply to transnational organized criminal groups, not individuals who assist a family member in their unauthorized entry.

#### 4. Article 6(4) of the Migrant Smuggling Protocol

Fourth, a defender of the United States’ migrant smuggling criminal statute might point to a flexibility in the Migrant Smuggling Protocol, as opposed to flexibilities in UNTOC that could apply *mutatis mutandis* to the Migrant Smuggling Protocol. Article 6(4) of the protocol states that nothing in the protocol “shall prevent a State Party from taking measures against a person whose conduct constitutes an offense under its domestic law.”<sup>149</sup> They might argue that because US law criminalizes anyone who, “knowing that a person is [an undocumented foreigner], brings to or attempts to bring to the United States in any manner whatsoever such person” in an unregulated area of the border<sup>150</sup> the United States can comply with the protocol while maintaining liability for migrant families who lack intent for FoMB. In other words, because there is a relevant domestic law, migrants are liable, end of story. Nevertheless, states must act in good faith to implement treaty obligations.<sup>151</sup> Knowingly retaining domestic law that circumvents the core purpose of the treaty meets no definition of good faith implementation and domestic law cannot justify a failure to adhere to the protocol.<sup>152</sup>

Additionally, the protocol works to reduce or eliminate applications of the offenses otherwise applicable to “mere migration.”<sup>153</sup> Specifically, the goal is “to prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration, even if illegal under other elements of national law.”<sup>154</sup> The legislative guide for the protocol provides one

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<sup>148</sup> Compare *id.* art. 3(1)(b) (emphasis added), with *id.* arts. 5, 6, 8, 23.

<sup>149</sup> Migrant Smuggling Protocol, *supra* note 12, art. 6(4).

<sup>150</sup> 8 U.S.C. § 1324(a)(1)(A)(i).

<sup>151</sup> Vienna Convention, *supra* note 102, art. 26.

<sup>152</sup> *Id.* art. 27.

<sup>153</sup> LEGISLATIVE GUIDES, *supra* note 77, ¶ 54.

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

example of how states should implement the protocol to protect mere migration: “a migrant caught in possession of a fraudulent document would not generally fall within domestic offences adopted pursuant [to the protocol], whereas a smuggler who possessed the same document for the purpose of enabling the smuggling of others would be within the same offence.”<sup>155</sup> This example illustrates that, consistent with the protocol, a migrant smuggler could find themselves liable for something a migrant could not.

Furthermore, Article 6(4) must not offend Article 5 of the protocol, which clarifies that “migrants shall not become liable to criminal prosecution under this Protocol for having been the object” of migrant smuggling.<sup>156</sup> The plain interpretation of Article 5 is that the individual smuggled, despite consenting to the act, is not criminally liable for taking part in smuggling. The legislative guide comments on this provision further:

As noted above, the fundamental policy set by the Protocol is that it is the smuggling of migrants and not migration itself that is the focus of the criminalization and other requirements . . . Article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organized criminal groups.<sup>157</sup>

Migrants who do not migrate alone are still “mere migrants,” not affiliates of organized criminal groups. While some migrants do embark alone,<sup>158</sup> migrating with family is common<sup>159</sup> and is “conduct likely to be engaged in by mere migrants.”<sup>160</sup> Therefore, states must not interpret anything in the protocol as providing a legal basis for prosecuting migrant families as migrant smugglers without any purpose of obtaining FoMB.<sup>161</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> Migrant Smuggling Protocol, *supra* note 12, art. 5.

<sup>157</sup> LEGISLATIVE GUIDES, *supra* note 77, ¶ 50. The Protocol is neutral as to whether states can criminalize other acts migrants might offend under their domestic law. *Id.*

<sup>158</sup> For example, unaccompanied minors often risk the dangerous trek to the U.S./Mexico border to flee gang threats, economic deprivation, and more. See generally U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN (2016), <https://www.unhcr.org/56fc266f4.html> [<https://perma.cc/9E5V-QM5H>].

<sup>159</sup> See generally ORG. FOR ECON. COOP. & DEV., *A Portrait of Family Migration in OECD Countries*, in INTERNATIONAL MIGRATION OUTLOOK 2017 (2017), <https://www.oecd.org/els/mig/IMO-2017-chap3.pdf> [<https://perma.cc/B4V4-NNMS>].

<sup>160</sup> LEGISLATIVE GUIDES, *supra* note 77, ¶ 50.

<sup>161</sup> UNODC ISSUE PAPER, *supra* note 13, at 71.

#### IV. RELYING UPON PROSECUTORIAL DISCRETION IS NOT COMPLIANCE: THE CASE FOR AMENDING THE US CRIMINAL STATUTE.

When a prosecutor decides against charging a family for smuggling when they unlawfully bring a family member to the United States, the prosecutor's discretion protects the family. However, prosecutorial discretion is insufficient to meet the demands of the protocol, and the United States cannot rely on the decisions of individual prosecutors to rectify its failure to comply.

First, the Migrant Smuggling Protocol does not exempt states that practice prosecutorial discretion. Whether prosecutors are selective in their decisions is irrelevant for the purposes of the protocol.<sup>162</sup> The protocol's key demand involves creating statutory language—that states “shall . . . establish as offences” the smuggling of migrants for FoMB.<sup>163</sup> This language leaves no room for discretion. It does not instruct when states must prosecute acts that fall within the scope of the protocol. Conceivably, in exchange for critical information about the leaders of the defendant's criminal organization, a US prosecutor could decline to bring migrant smuggling charges against a defendant who smuggled dozens of nonfamilial migrants. On the other hand, the United States could choose to prosecute a criminal migrant smuggler who smuggled a family member for pay as they would any other migrant client. As long as the law is drafted in compliance with the protocol's demands, including the element of intent for FoMB, this type of prosecutorial discretion would not offend the protocol. The United States maintains a statute upon which prosecution is possible even without a financial motive, and no amount of prosecutorial discretion corrects the statute in a way that would comply with the protocol.<sup>164</sup>

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<sup>162</sup> See generally Migrant Smuggling Protocol, *supra* note 12.

<sup>163</sup> *Id.* art. 6(1) (emphasis added).

<sup>164</sup> In an overbreadth challenge to a federal criminal statute which plainly outlawed the portrayals of animal cruelty regardless of whether an animal was harmed, the government asserted it had never pursued, nor did it intend to pursue, a case implicating First Amendment protected portrayals. *United States v. Stevens*, 559 U.S. 460, 480 (2010). Yet, the US Supreme Court remained concerned that the statute permitted such prosecution and ruled the statute facially invalid. *Id.* In a subsequent overbreadth challenge to a criminal statute, Justice Jackson identifies the problem with relying on prosecutorial discretion to correct overbroad statutes: “In its role as prosecutor, the Government often stakes out a maximalist position, only later to concede limits when the statute upon which it relies might be struck down entirely and the Government finds itself on its back foot. *United States v. Hansen*, 599 U.S. 762, 810 (2023).”

Second, prosecutors do not always exercise discretion when merited. Just as the Migrant Smuggling Protocol aims to avoid criminalizing conduct of a migrating family, it also aims to avoid criminalizing humanitarian or religious support groups.<sup>165</sup> Yet, the United States prosecuted volunteers of No More Deaths,<sup>166</sup> a religious nonprofit that operates along the US-Mexico border with a mission to prevent migrant deaths during their journey through the desert by leaving food, water, and other supplies in the desert as well as providing medical care and shelter to migrants in need.<sup>167</sup> Scott Daniel Warren, a volunteer with the organization, faced felony harboring charges under 8 U.S.C. § 1324(a)(1)(A)(iii) for providing two migrants food, water, beds, and clean clothes for three days.<sup>168</sup> In another No More Deaths example, volunteers Daniel Strauss and Shanti Sellz faced a federal felony charge for transporting<sup>169</sup> undocumented migrants to receive medical attention.<sup>170</sup> Under § 1324 and other federal and state laws, prosecution of humanitarian action remains an ongoing problem.<sup>171</sup>

The United States may see a return of harsh exercise of prosecutorial power against unauthorized migrants in the future. Former

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<sup>165</sup> Interpretive Notes, *supra* note 77, ¶ 68.

<sup>166</sup> #DropTheCharges, NO MORE DEATHS, <https://nomoredeaths.org/legal-defense-campaign/drop-the-charges/> [<https://perma.cc/UZ6X-T85V>].

<sup>167</sup> *About*, NO MORE DEATHS, <https://nomoredeaths.org/about-no-more-deaths/> [<https://perma.cc/YR6V-3SCU>].

<sup>168</sup> Crim. Complaint, United States v. Warren, No. 4:18-cr-00223 (D. Ariz. Jan. 1, 2018), <https://ia800108.us.archive.org/21/items/gov.uscourts.azd.1081102/gov.uscourts.azd.1081102.1.0.pdf> [<https://perma.cc/Q5XF-F3GU>]. He faced twenty years in prison for his kindness but in a retrial a jury found him not guilty. Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, TIME (Nov. 20, 2019), <https://time.com/5732485/scott-warren-trial-not-guilty/> [<https://perma.cc/569G-KTNP>].

<sup>169</sup> This is most certainly under the transport clause, 8 U.S.C. § 1324(a)(1)(A)(ii), though the case is no longer available on Bloomberg PACER to verify. A federal judge dismissed the charges on estoppel grounds without ruling whether the defendants behaved lawfully. Order at 6, United States v. Strauss, CR 05-1499-TUC-RCC (D. Ariz. Sept. 1, 2006).

<sup>170</sup> Press Release, Amnesty Int'l, USA: Amnesty International's Concerns About Criminal Charges Filed Against Two Human Rights Activists Who Assisted Migrants in Desert (Dec. 13, 2005), <https://www.amnesty.org/en/wp-content/uploads/2021/08/amr512012005en.pdf> [<https://perma.cc/975X-W2P7>].

<sup>171</sup> See generally Amnesty Int'l, *'Saving Lives Is Not a Crime': Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA*, AI Index AMR 51/0583/2019 (2019), [https://www.amnestyusa.org/wp-content/uploads/2019/06/Amnesty-Report\\_SLINAC\\_FINAL005.pdf](https://www.amnestyusa.org/wp-content/uploads/2019/06/Amnesty-Report_SLINAC_FINAL005.pdf) [<https://perma.cc/EA88-U23J>]. Recently, a group of congresspeople, led by Representative Gooden advised three religious organizations to preserve work documents and communications in anticipation of an investigation regarding whether the organizations harbored, transported, or encouraged unauthorized migrants to resettle in the United States. Brief for Religious Organizations et al. as Amici Curiae Supporting Respondents at 34, United States v. Hansen, 599 U.S. (No. 22-179), 2023 WL 2333952, at \*34.

President Donald Trump is seeking a second term has become the presumptive Republican nominee.<sup>172</sup> and vows to continue to expand draconian immigration enforcement.<sup>173</sup> In his first term, his administration separated 5,636 children<sup>174</sup> from their parents as part of the Zero Tolerance Policy, which aimed to prosecute all instances of unlawful entry under 8 U.S.C. § 1325(a).<sup>175</sup> While the government transferred parents to federal custody for criminal proceedings, they designated their children as unaccompanied minors and transferred them to the Office of Refugee Resettlement for release to an authorized guardian or foster home in compliance with a settlement agreement, still in force, regarding the treatment of children in immigration custody.<sup>176</sup> Senior Policy Advisor Stephen Miller stated then that “a nation cannot have a principle that there will be no civil or criminal immigration enforcement for somebody traveling with a child.”<sup>177</sup> Miller is expected to continue to serve in a senior role if Trump wins reelection.<sup>178</sup> In the meantime, convictions under §1324 are poised to reach an all-time high under the Biden administration.<sup>179</sup> For these reasons, the United States should not rely on future benevolent prosecutors to adhere to the Migrant Smuggling Protocol’s goal to protect migrants.

<sup>172</sup> Jill Colvin & Associated Press, *Trump Clinches 2024 Republican Nomination*, PBS (Mar. 12, 2024, 11:27 PM), <https://www.pbs.org/newshour/politics/trump-clinches-2024-republican-nomination> [<https://perma.cc/6Q7Q-ZWMJ>].

<sup>173</sup> Charlie Savage et al., *Sweeping Raids, Giant Camps, and Mass Deportations: Inside Trump’s 2025 Immigration Plans*, N.Y. TIMES (Nov. 11, 2023), <https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html> [<https://perma.cc/TK84-X8G9>].

<sup>174</sup> Myah Ward, *At Least 3,900 Children Separated From Families Under Trump ‘Zero Tolerance’ Policy, Task Force Finds*, POLITICO (June 8, 2021), <https://www.politico.com/news/2021/06/08/trump-zero-tolerance-policy-child-separations-492099> [<https://perma.cc/G3SZ-S9VP>].

<sup>175</sup> Press Release, U.S. Dept. Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/652E-TJD2>].

<sup>176</sup> *Family Separation and Detention*, A.B.A., [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/immigration/familyseparation/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/) [<https://perma.cc/G9UQ-3Y5H>]; Kelsey Y. Santamaria, Cong. Rsch. Serv., IF11790 Child Migrants at the Border: The Flores Settlement Agreement and Other Legal Developments (2021).

<sup>177</sup> Julie Hirschfeld Davis & Ron Nixon, *Trump Officials, Moving to Break Up Migrant Families, Blame Democrats*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/trump-democrats-immigrant-families.html> [<https://perma.cc/674K-SLAP>].

<sup>178</sup> Savage et al., *supra* note 173.

<sup>179</sup> TRAC. IMMIGR. CONVICTIONS FOR TRANSPORTING OR HARBORING UNDOCUMENTED IMMIGRANTS JUMP UNDER BIDEN, <https://trac.syr.edu/reports/721/> [<https://perma.cc/EF5V-2NHX>]. For more information, see *supra* text accompanying note 63.

To comply fully with the Migrant Smuggling Protocol, the United States must adopt as a base element for migrant smuggling the intent for FoMB. This would reduce the possibility that anyone other than those criminal actors targeted by the protocol could be prosecuted for migrant smuggling under US law. Two states UNODC surveyed, Mexico and Indonesia, have done so and thereby fully conform with the protocol's definition of migrant smuggling.<sup>180</sup> Going further, the United States could follow Greece, Italy, Mexico, and the United Kingdom and create an explicit exception for humanitarian action.<sup>181</sup>

## V. THE OVERBROAD SMUGGLING DEFINITION IN IMMIGRATION STATUTES SHOULD ALSO MATCH THE PROTOCOL.

As Maribel's story demonstrated, improper definitions of migrant smuggling that encompass behavior unmotivated by FoMB affect immigrant visa applicants who migrated with their families. Recall that a noncitizen who "knowingly has encouraged, induced, assisted, abetted, or aided any other" to enter the United States unlawfully is barred from admission or, if present in the country, is deportable.<sup>182</sup> No arrest, prosecution, or conviction is needed for the inadmissibility or deportability consequence to apply—an adjudicator or officer need only discern enough facts that insinuate that the applicant helped bring someone to the United States unlawfully.<sup>183</sup> If the applicant allegedly smuggled their parent, child, or spouse, then they may qualify for a waiver of inadmissibility.<sup>184</sup> Limited waivers of deportability are also available.<sup>185</sup> But requiring evidence of intent to reap FoMB, or categorically exempting cases of family from the migrant smuggling statutes, is the most effective option for protecting migrants.

Neither the Migrant Smuggling Protocol nor UNTOC create any duties upon state parties regarding the treatment of migrants under their domestic immigration laws. The closest provision regarding domestic

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<sup>180</sup> UNODC ISSUE PAPER, *supra* note 13, at 18–22.

<sup>181</sup> *Id.* at 64.

<sup>182</sup> 8 U.S.C. § 1182(a)(6)(E)(i) (inadmissibility); 8 U.S.C. § 1227(a)(E)(i) (deportability).

<sup>183</sup> Kamhi & Prandini, *supra* note 5, at 7. In a removal proceeding the burden falls on the government to prove the migrant smuggling deportability applies by clear and convincing evidence. 8 C.F.R. § 1240.8(a) (2023).

<sup>184</sup> 8 U.S.C. § 1182(d)(11) (waiver of inadmissibility for smuggling). To qualify the petition must be a family-based immigrant petition but not including those from citizen siblings. Kamhi & Prandini, *supra* note 5, at 4.

<sup>185</sup> *Id.* § 1227(a)(E)(ii)–(iii).

laws like those concerning immigration may be Article 6(4) of the protocol, which allows states to take “measures”<sup>186</sup> against those who offend the party’s domestic laws. Immigration sanctions could consist of such “measures.” Despite the protocol’s lack of directive on the matter, the United States would advance its goals of facilitating family unity and promoting efficient judicial and administrative processes if it changed its immigration migrant smuggling definition to match the protocol, or alternatively, if it created a family exemption.

#### A. PROMOTING FAMILY UNITY

The US government has demonstrated its goals to unite families in various ways. For example, Congress carefully defined the grounds of deportability in consideration of family unity. Congress made migrant smuggling a stand-alone ground for deportation but authorized a waiver program for those that “smuggled” a child, parent, or spouse.<sup>187</sup> A conviction for an “aggravated felony” is also another ground for deportation.<sup>188</sup> Yet, Congress chose to exempt from the definition of an “aggravated felony” instances where the “smuggled” is a child, parent, or spouse of the defendant.<sup>189</sup> Then, in response to the Zero Tolerance Policy and the US government’s separation of thousands of migrant children from their parents, a federal court enjoined the government from further separating families and ordered their reunification.<sup>190</sup> The Biden administration formed the Family Reunification Task Force to reunite separated families and provide for their lawful return to the United States.<sup>191</sup> Furthermore, the Board of Immigration Appeals (BIA) wrote in a decision that “the legislative history . . . clearly indicates that the

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<sup>186</sup> “Measures” is distinct from “prosecution” used elsewhere in the Protocol and its supplementary materials. Migrant Smuggling Protocol, *supra* note 12, art. 6(4). Article 6 of the protocol directs states to take legislative and other “measures” to criminalize migrant smuggling and certain aggravating factors. *Id.* This implies that “measures” are distinct from and/or precedes criminalization. Consequently, when the protocol allows for a state to take measures against a migrant under its domestic law, civil immigration penalties could conceivably constitute such a measure, but ultimately the protocol does not contemplate the matter of immigration.

<sup>187</sup> 8 U.S.C. § 1227(a)(E)(i)–(iii).

<sup>188</sup> *Id.* § 1227(a)(2)(A)(iii).

<sup>189</sup> *Id.* § 1101(a)(43)(N).

<sup>190</sup> *Ms. L. v. U.S. Immigr. & Customs Enf’t.*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

<sup>191</sup> *Family Reunification Task Force*, DEP’T. HOMELAND SEC., <https://www.dhs.gov/family-reunification-task-force#:~:text=President%20Biden%20ordered%20the%20formation%20of%20the%20Interagency%20Task%20Force,including%20under%20the%20Zero%20Tolerance> [<https://perma.cc/5HL6-CVDH>].

Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”<sup>192</sup>

One of the key reasons that people migrate is to reunite with family across the border or to remain united if one decides to migrate.<sup>193</sup> Notably, 49,520 people at the US-Mexico border in November of 2022 migrated with their families.<sup>194</sup> In Maribel’s case, she made the most humane decision for her child by deciding to bring him with her, rather than abandoning him once she chose to travel to the United States. The United States should recognize the morality behind her decision. Laws that punish families for trying to remain together whilst they seek better lives for themselves, albeit without proper documentation, are not ones that support family unity.

## B. PROMOTING EFFICIENCY

Second, the efficiency goal is evidenced by Congress’s emphasis on harshly punishing—through the use of sentence enhancers—those who smuggle migrants in a manner that endangers the migrants’ lives.<sup>195</sup> Prosecutors opting not to pursue cases that involve family furthers this goal.<sup>196</sup> Despite these efforts, migrant-smuggling cases arise in federal court through appeals from immigration courts based on denials of the migrant-smuggling deportability waiver. A 2012 survey of only Ninth Circuit and BIA cases involving “migrant smuggling” with family ties revealed 124 cases.<sup>197</sup> Defining migrant smuggling in immigration statutes to match that of the protocol would enhance efficiency and relieve court dockets by preventing the need for the government to defend immigration appeals.

Properly tailoring the migrant-smuggling statutes to target transnational criminals or those with FoMB intent would also promote

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<sup>192</sup> Abel, *supra* note 6, at 55 (citing *In re G*, 8 I. & N. Dec. 355, 358 (B.I.A. 1959)).

<sup>193</sup> *Id.* at 56–58; *Family Migration*, MIGRATION DATA PORTAL, <https://www.migrationdataportal.org/themes/family-migration> [<https://perma.cc/64EB-4SM3>].

<sup>194</sup> John Gramlich, *Monthly Encounters with Migrants at the U.S.-Mexico Border Remain Near Record Highs*, PEW RSCH. CTR. (Jan. 12, 2023), <https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/#:~:text=But%20that%20is%20no%20longer,%2C%20Nicaragua%2C%20Peru%20and%20Venezuela> [<https://perma.cc/Q8GV-QMK8>].

<sup>195</sup> Abel, *supra* note 6, at 54; 8 U.S.C. § 1324(a)(1)(B)(iii).

<sup>196</sup> UNODC ISSUE PAPER, *supra* note 13, at 57.

<sup>197</sup> Abel, *supra* note 6, at 57.

administrative efficiency by helping to alleviate USCIS's backlog of inadmissibility waivers. By the final quarter of 2021, USCIS decided 45,685 waivers, including an unknown portion of I-601 waivers, scratching the surface of the 232,228 total pending waivers at that time.<sup>198</sup> In fact, the agency received more new waiver applications than it decided.<sup>199</sup> The backlogs USCIS faces have pushed the agency to implement initiatives to reduce the backlogs,<sup>200</sup> but given the current processing times, there is a long way to go. Currently, 80 percent of I-601 waivers take 22.5 months to adjudicate.<sup>201</sup> It formerly required merely 7.6 months to process a waiver.<sup>202</sup> Eliminating the need for a Form I-601 to waive the grounds of inadmissibility based on family smuggling accelerates total USCIS processing times by reducing the classes of people who must apply.

Categorical exemptions are a familiar concept in immigration law. For example, the United States does not always require an independent waiver application to forgive certain immigration violations. Notably, 8 U.S.C. § 1227(a)(1)(E)(ii) exempts from the smuggling ground of deportability some who "encouraged, induced, assisted, abetted, or aided only" their spouse, parent, or child, but only if both the applicant was present in the United States and the alleged smuggling occurred before May 5, 1988.<sup>203</sup> Alleviating the backlog with an exemption would simply require removing the temporal requirement of this existing statute.

Requiring FoMB intent would be unlikely to lead to increased family migration or remove a deterrent. Risk of arrest and sanctions do not

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<sup>198</sup> U.S. CITIZENSHIP & IMMIGR. SERV., NUMBER OF SERVICE-WIDE FORMS, FISCAL YEAR 2021 QUARTER 4 (2021), [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) [<https://perma.cc/4YGG-CL5Z>].

<sup>199</sup> *Id.*

<sup>200</sup> Press Release, U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS Releases New Data on Effective Reduction of Backlogs, Support for Humanitarian Missions, and Fiscal Responsibility (Dec. 7, 2022), <https://www.uscis.gov/newsroom/news-releases/uscis-releases-new-data-on-effective-reduction-of-backlogs-support-for-humanitarian-missions-and> [<https://perma.cc/SW4Y-3H9E>]; Press Release, U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders (Mar. 29, 2022), <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> [<https://perma.cc/B7DG-TZ5U>].

<sup>201</sup> *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/3N2F-W4HH>].

<sup>202</sup> *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://egov.uscis.gov/processing-times/historic-pt> [<https://perma.cc/3C6C-H2UU>].

<sup>203</sup> 8 U.S.C. § 1227(a)(1)(E)(ii).

significantly deter unauthorized entry.<sup>204</sup> A sociological study suggests that undocumented immigrants recognize the illegality of unlawful entry but view the violation as a net benefit for the US economy.<sup>205</sup> To them, and even to many Americans, immigration laws are morally different than criminal laws, and observed racial and wealth biases in immigration enforcement create a perception of their illegitimacy.<sup>206</sup> Research shows a significant relationship between these perceptions and a migrant's intention to cross illegally,<sup>207</sup> thus swaying the decision more than any risk of retribution. Specific knowledge of immigration laws, like that of the migrant smuggling inadmissibility, is unlikely to play a role in the consideration to migrate illegally. It is unrealistic for the average migrant to know of, understand, anticipate, and consider the intricacies of US immigration law enough to weigh them against the immediate and predominant concerns for a safe, secure, and stable environment. Even if a mother like Maribel knew of the migrant smuggling law, the risk of sanctions would likely not motivate her to abandon her child if she had already accepted the need to flee her home country.

## VI. CONCLUSION

Imagine the following alternative to Maribel's story: Years pass, and Maribel is now married to a US citizen. Her husband petitions for her to become a US permanent resident. USCIS approves the first and second steps of the multiyear process. In the third step, Maribel returns to her home country to attend an immigrant visa interview at the US Consulate there. Her immigrant visa is approved without further delay, and she returns to the United States as a permanent resident to reunite with her son. Three years later, she acquires citizenship and continues to be a productive member of society. She and her son enjoy a safe and stable life with opportunities. This ending could be true if the United States' definition of migrant smuggling required intent for FoMB.

The UN Migrant Smuggling Protocol instructs that state parties shall establish as a criminal offense the smuggling of migrants which

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<sup>204</sup> Patt Morrison, *Why do People Cross the Border Illegally? It's Not What You Think*, L.A. TIMES (Nov. 25, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-morrison-ryo-immigration-20141126-column.html> [<https://perma.cc/WK54-YBTN>]. For the full study discussed in the column, see Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574 (2013).

<sup>205</sup> Morrison, *supra* note 204; *see generally* Ryo, *supra* note 204.

<sup>206</sup> Morrison, *supra* note 204; Ryo, *supra* note 204, at 577, 590.

<sup>207</sup> Morrison, *supra* note 204; Ryo, *supra* note 204, at 590.

occurs for FoMB. Despite signing and ratifying the protocol and committing to its demands, the United States maintains an overly broad criminal statute, which, read plainly, implicates the actions of migrant families who assist each other's unauthorized entries without intending to gain FoMB. As long as the statute maintains this possibility, the United States fails to comply fully with the protocol. The United States would benefit from adopting the FoMB requirement in its immigration statutes because it would promote family unity and judicial and administrative efficiency.