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LETTER FROM THE EDITOR-IN-CHIEF

The third issue of the *Howard Law Journal* is dedicated to a symposium honoring the legacy of former Howard University School of Law Dean and notable civil rights leader Wiley A. Branton. Each year, students, scholars, faculty, staff, and family members and close friends of Wiley A. Branton come together to engage in productive discourse about a topic plaguing our society today. The focus of our discussions is what we can do about these issues as both current and future legal practitioners and social engineers.

The Nineteenth Annual Symposium was held on October 6, 2022, where scholars discussed Immigration Equality. This year, the *Journal* created a space where legal scholars could examine the effects of recent immigration policies on marginalized communities and the future of immigration equity legislation and litigation. We started the Symposium with a program entitled "A Conversation on Immigration Legislation and the Impact of State, Local, and Federal Laws." Speakers addressed issues on why immigration reform is so important and the impact of states creating immigration policies. Additionally, we hosted a program entitled "A Practical View on Immigration." Students from the Howard Law community could ask questions about refugee rights to education and healthcare. These programs created a weeklong discussion about the importance of Immigration Equity and how students can make an impact now.

It is a shame that there is a debate about whether a human should be afforded the necessities of life. No human being is illegal. As social justice advocates, legal scholars, and stewards of humanity, it is our duty to use our resources to promote change and advocate for the voices that are constantly unheard. Since its inception, the United States has been a nation of immigrants seeking freedom and economic opportunities. Our country is supposed to be one about opportunity, and neglecting to provide an equal chance for children and adults would contradict the very notion that America is the land of opportunity. However, there is no opportunity for the children left alone at the border without hope of education or healthcare. There is no opportunity for adults who cannot obtain gainful employment. There is no opportunity for refugees who live in fear every day of being deported back to inhumane circumstances. Action must be taken to stop this unfair treatment from continuing and to treat immigrants with the humanity they deserve.

The first article, written by Jonathan C. Augustine, explains that the xenophobia of Christian nationalism must be combatted with a faith-based ethic of welcome and resistance. Augustine is an ordained Christian minis-

ter and, in his article, challenges readers to adopt perspectives on immigration consistent with Scripture while simultaneously encouraging faith adherents to engage in civil disobedience when the laws of the land conflict with the laws of God. In his article, Augustine details that only Congress can enact meaningful reform laws in response to America's racial and ethnic discrimination. Finally, he closes by encouraging all to welcome those refugees already living in America and urging readers to contact their congressional representatives to demand that Congress act.

Next, Michael Vastine discusses the courts' use of "originalism" and the "categorical approach" to illustrate how firearms offenses are characterized as deportable offenses. He explains the two ways an immigrant can be deported due to firearms. Under the general firearms deportability ground, having any firearms conviction at any time triggers the problem. Next, Vastine clarifies that, under the Second Amendment, many immigrants do not have the same rights as citizens and permanent residents. Finally, he argues that given the loaded social context in which immigrants are prosecuted, discussions of law deserve full and honest dealings from the courts confronting them.

Evangeline G. Abriel, in her article, "The California Way: An Analysis of California's Immigrant-Friendly Changes to its Criminal Laws," analyzes California's changes to its criminal laws and the treatment of those changes by California courts and the federal immigration authorities. She discusses California laws that were enacted to protect California's noncitizen residents and their families from the severe immigration consequences resulting from relatively minor criminal conduct. Nonetheless, while California's legislation has the potential to provide significant relief from immigration consequences, the legislation's success depends on several factors beyond the legislature and the individuals concerned. She challenges the courts to recognize the critical role that state criminal cases play in the immigration context and the sovereignty of states in resolving criminal cases concerning their noncitizen residents.

Philip G. Schrag, Jaya Ramji-Nogales, and Andrew I. Schoenholtz coauthored the next article, where they discuss the asylum process and describe a more fair, accurate, and efficient border asylum adjudication system to ensure that the U.S. can comply with domestic and international refugee law. First, they describe the origins of the United States asylum system and provide a history of the laws and policies that have limited access to asylum through screening processes at the southern border. They discuss the 1996 Illegal Immigration Reform and Immigrant Responsibility Act that created the expedited removal process. Next, the article outlines the difficulties for the asylum seeker and their lawyer in obtaining evidence to corroborate their claim within the tight deadlines of the rule. Finally, they describe a system that will establish a new asylum process.

In our last article, L. Darnell Weeden addresses whether undocumented resident immigrants who entered the United States illegally should be granted a limited suspect classification when seeking a state driver's license. Weeden acknowledges that undocumented immigrants, also known as illegal immigrants, generally are not recognized as a suspect class under the Equal Protection Clause. However, he argues that an undocumented immigrant with an established residency in a state should be granted an opportunity to acquire a driver's license to help promote public safety. Finally, he asserts that a state's action in denying an undocumented resident immigrant a driver's license should trigger suspect treatment because family integrity is protected both as a fundamental substantive due process right and by the equal protection principle against undocumented immigrant hostility.

In my final letter as Editor-In-Chief and on behalf of the entire *Howard Law Journal,* I sincerely thank you for your support and readership. It has truly been my honor to serve as Editor-In-Chief for Volume 66. My hope is that as you read these articles, they make you aware of the issues that immigrants face daily. Injustice to anyone is an injustice to everyone. Whether you are directly or indirectly affected, my desire is that this issue galvanizes each audience member to take at least one actionable step toward TRUE liberty and justice for all. No human being is illegal. Thank you for your support.

Alexandria Mangum
Editor-in-Chief
Volume 66

Wiley A. Branton/ Howard Law Journal Symposium:

Each year, Howard University School of Law and the Howard Law Journal pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the Journal's spring issue following the Symposium. The expansive nature of Branton's work has allowed the Journal to span a wide range of topics throughout the years, and the Journal is honored to present this issue, Health Equity: Developments & Challenges of the COVID-19 Pandemic, in recognition of the great Wiley A. Branton. Past Symposium issues include:

An Environment of Justice: Developments & Challenges in Environmental Law

Unfinished Work of the Civil Rights Act of 1964: Shaping an Agenda for the Next 40 Years

The Value of the Vote: The 1965 Voting Rights Act and Beyond

What Is Black?: Perspectives on Coalition Building in the Modern Civil Rights Movement

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

From Reconstruction to the White House: The Past and Future of Black Lawyers in America

Collateral Consequences: Who Really Pays the Price for Criminal Justice?

Health Care Reform and Vulnerable Communities: Can We Afford It? Can We Afford to Live Without It?

Protest & Polarization: Law and Debate in America 2012

Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges

And Who is My Neighbor?: A Faith-Based Argument for Immigration Policy Reform in Welcoming Undocumented Refugees*

JONATHAN C. AUGUSTINE**

When an alien resides with you in your land, you shall not oppress the alien. The alien who resides with you shall be to you as a citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt.†

Abstract

The January 6, 2021 insurrection at the Capitol in Washington, DC, revealed several things about the United States. In addition to revealing that an appropriate national moniker might be the "Divided States of America," the insurrection also showed that Christian nationalism continues to play a pervasive role in the country. Indeed, in the aftermath of vigilante protestors wearing clothing and proudly waving flags that read, "Jesus is My Savior, Trump is My

* This Essay is dedicated to my daughter, Jillian Claire Augustine, an incredibly bright and talented college student who aspires to become a lawyer and pursue a career in social justice. Immigration policy is a social justice issue that will unquestionably occupy lawyers' attention for generations to come. It is my prayer that, in blending together her intellect, passion for justice, and Christian faith, Jillian will participate in bringing change for her generation, wherever it is most needed. Special thanks are also extended to the members of the *Howard Law Journal*, for inviting me to participate in the 2022 Wiley A. Branton Symposium, and for the hospitality and professionalism they shared, in association with my visit and presentation, as well as the subsequent editing of this Essay. Any errors that may exist are mine alone.

** Senior Pastor, St. Joseph AME Church (Durham, NC); General Chaplain, Alpha Phi Alpha Fraternity, Inc.; Visiting Assistant Professor, North Carolina Central University Law School; Consulting Faculty, Duke University Divinity School. More information about the author can be found at www.jayaugustine.com. He may also be reached on social media platforms *via* the handle @jayaugustine9.

† Leviticus 19:33-34 (NRSV) (hereinafter all scriptural references are from the New Revised Standard Version of the Holy Bible, unless specifically noted otherwise).

President," there has been no shortage of scholarly writings arguing that Christian nationalism is the greatest contemporary threat to American democracy.

Some leading sociologists highlight that Christian nationalism—also often referenced as *white* Christian nationalism—might be a misnomer because it has nothing to do with theology or any religious orthodoxy. Instead, with a basis in racialized power dynamics, it is a political framework that places America on par with the Bible's nation of Israel, regarding the original United States as manifesting God's intention for God's chosen people in God's chosen land. To therefore remain consistent with America's *original* power structure of white, Anglo-Saxon, and Protestant dominion, Christian nationalism seeks to restore America's order, with a particular national animus against Jews, minorities, and—to the focus of this Essay—*immigrants*.

The most recent nationalized animus against Jews has manifested with attempts to use Critical Race Theory as a wedge issue while concurrently attempting to ban books on the Holocaust from public schools and libraries. A nationalized animus has similarly manifested against minorities—especially in the wake of the Supreme Court's infamous decision in *Shelby County v. Holder* (2013)— as many Southern states have enacted voter suppression laws deliberately targeting African Americans. In *N.C State Conference of NAACP v. McCrory* (2016), for example, the U.S. Fourth Circuit Court of Appeal found unconstitutional a law from North Carolina that targeted Blacks with "almost surgical precision." With respect to America's failed immigration policies—especially since 2017, when the Trump Administration began with its direct appeal to Christian nationalism through its "Make America Great Again" policies—America has taken unabashed anti-Muslim and anti-Hispanic positions.

To support this Essay's central thesis, that the xenophobia of Christian nationalism must be combatted with a faith-based ethic of welcome and resistance, this Essay limits its immigration policy consideration to the long-term residents I call *neighbors*, the only class of immigrants the United Nations legally classifies as "refugees," or displaced immigrants legally seeking refuge from another country. Refugees are largely long-term U.S. residents who have lost their resident alien status because they missed the one-year window to apply for asylum. Because of the politics of Christian nationalism, however, along with the accompanying vile rhetoric

that vilifies so many hardworking members of society who contribute to the American economy, Congress has repeatedly failed to pass immigration reform legislation. Consequently, although refugees are meaningfully contributing to America, there is no legal mechanism for them to normalize their status within the country. It's time to pressure Congress to act.

In looking at refugees as neighbors, this Essay calls out the "otherism" and xenophobia of Christian nationalism while relying on the ethics of political theology in using the famed Parable of the Good Samaritan to explore "cosmopolitanism" and "communitarianism," two divergent social viewpoints that produce divergent immigration politics. Insofar as cosmopolitanism favors open borders, and communitarianism favors border regulation through the sovereignty of nation-states, I urge faith-based leaders to adopt a position that is a synthesis of the two while also arguing for the same scriptural ethic of civil disobedience that has so often successfully been used, to again fight against Christian nationalism and work toward an inclusive and egalitarian society. This Essay calls on morally equipped faith leaders to initiate a rebirth of the 1980s Sanctuary Movement and serve as exemplars in placing pressure on Congress to move past gridlock and act for the good of America.

I. INTRODUCTION

> For evangelicals, domestic and foreign policy are two sides of the same coin. Christian nationalism—the belief that America is God's chosen nation and must be defended as such — serves as a powerful predictor of intolerance toward *immigrants*, racial minorities, and non-Christians.[1]

I am both a law professor and an ordained Christian minister. I studied law and had the benefit of both seminary education and subsequent doctoral study. The consequence of my bi-vocational callings and service, to both legal education institutions and the Christian church, is that I see immigration and the United States' failure to enact meaningful immigration reform laws at a time when they are most certainly needed, through both a legal and faith-based lens. That dual perspective is exactly why this Essay calls out America's "otherism,"[2]

1. KRISTIN KOBES DU MEZ, JESUS AND JOHN WAYNE: HOW WHITE EVANGELICALS CORRUPTED A FAITH AND FRACTURED A NATION 4 (2020) (emphasis added).

2. I use the term "otherism" as a close derivative of xenophobia, in that it is rooted in a fear of the "Other." Although otherism acknowledges differences in the social construct of race and social differences, based on sex and/or gender, it should not be confused with either racism

and challenges readers to introspectively pose the question, "And Who is My Neighbor?"

Although I *do not* embrace the myth that America is a "Christian nation,"[3] I do believe Scripture should be a moral guide for Christianity's faith adherents in America.[4] As Glenn H. Utter writes in *Mainline Christians and U.S. Public Policy*, "Christian denominations express an openness to the immigration of people from other countries and a willingness to help them succeed in the United States. In justifying a humane immigration policy, members note a fundamental Christian value that strangers be made welcome. They cite scripture in support of this position."[5] Oddly enough, however, because of the reluctance of so many American pastors to be "political,"[6] many evan-

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or sexism. Otherism is more closely connected with the recently popularized "Great Replacement Theory" or "White Replacement Theory," whereby some whites have voiced more opposition to Jews, minorities, and immigrants, for fear that said groups are replacing them in America's social hierarchy and general population. *See, e, g*., Jonathan C. Augustine, *A Theology of Gumbo for the Divided States of America*, WHAT WENT WRONG (last accessed Jan. 13, 2023), https://www.whatwentwrong.us/a-theology-of-gumbo-for-the-divided-states-of-america (hereinafter Augustine, *A Theology of Gumbo*).

3. *See, e.g*., RICHARD T. HUGHES, MYTHS AMERICA LIVES BY: WHITE SUPREMACY AND THE STORIES THAT GIVE US MEANING 83 (2018) ("Nowhere does the Constitution mention God or any other religious symbol. And when, finally, the First Amendment to the Constitution speaks of religion for the very first time, it makes perfectly clear that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' In other words, while the American people would be free to practice any religion, they would also be free to practice no religion at all."); *see also* ANDREW L. SEIDEL, THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN 9 (2019). In making the argument that the United States *is not* a Christian nation, Seidel notes that politicians are especially fond of perpetuating this myth, for political expediency, in riding the wave of Christian nationalism. In relevant part, he writes:

> Politicians are some of the most vocal Christian nationalists. Presidential candidates seem particularly fond of repeating Christian nationalism claims. In the run-up to the 2016 election, Donald Trump was asked, point blank, 'Do you believe that America was founded on Judeo-Christian principles?' He replied in his prolix, disjoined fashion: 'Yeah, I think it was . . . I see so many things happening that are so different from what our country used to be.' . . . As president, he . . . often claimed that 'in America we don't worship government, we worship God.'

Id.

4. *See generally*, ELLEN CLARK CLÉMOT, DISCERNING WELCOME: A REFORMED FAITH APPROACH TO REFUGEES (2022); *see also* STEPHAN BAUMAN ET AL., SEEKING REFUGE: ON THE SHORES OF THE GLOBAL REFUGEE CRISIS 29 (2016) (providing that for those who profess to be Christians, the top authority on complex topics should be the Bible).

5. GLENN H. UTTER, MAINLINE CHRISTIANS AND U.S. PUBLIC POLICY 55 (2007).

6. With respect to clergy activism, I specifically distinguish between pastors who are "political" and the politics of "partisanship," by noting that pastors' engagement in politics is expected in Christian ministry. *See, generally*, JONATHAN C. AUGUSTINE, WHEN PROPHETS PREACH: LEADERSHIP AND THE POLITICS OF THE PULPIT (2023)(hereafter, AUGUSTINE, WHEN PROPHETS PREACH). Indeed, Jesus began his public ministry with a very *political* declaration:

> The Spirit of the Lord is on me, because he has anointed me to proclaim good news to the poor. He has sent me to proclaim freedom for the prisoners and recovery of sight for the blind, to set the oppressed free, to proclaim the year of the Lord's favor.

Luke 4:18-19. Moreover, in the wake of Martin Luther King, Jr.'s success in leading the Montgomery Bus Boycott, the genesis of the Civil Rights Movement, he addresses the nature of

gelical Christians only see immigration as a political, social or cultural issue, and have not considered the Bible's teachings on the subject as part of their faith journey.[7] This Essay challenges readers to adopt perspectives on immigration that are consistent with Scripture while simultaneously encouraging faith adherents to engage in civil disobedience or *divine obedience* when the "laws of the land" conflict with the "laws of God."[8]

With a nod toward Jesus's interaction with a fellow Jew, a lawyer, and one of the Bible's most popular discourse's deliberate ambiguity as to the definition of a "neighbor," this Essay applies lessons from the Parable of the (Good) Samaritan to argue that its American readers should be guided by Jesus's teachings and reject the otherism that has become so widespread in America, especially since the emergence of the "Make America Great Again" ("MAGA") political narrative,[9]

Christianity, and impliedly its *political* birth amid Jewish marginalization within the Roman empire, by writing, "[t]he Christian ought to always be challenged by any protest against unfair treatment of the poor, for Christianity is itself such a protest." MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 93 (2001)(1958). The English word *politics*, as derived from the Greek language, literally means "affairs of the cities." *See* AUGUSTINE, *supra* note 6, at 19.

7. BAUMAN, ET AL, *supra* note 4, at 29.

8. *See generally*, Jonathan C. Augustine, *A Theology of Welcome: Faith-Based Considerations of Immigrants as Strangers in a Foreign Land*, 19 CONN. PUB. INT. L.J. 245 (2020) (hereinafter, Augustine, *A Theology of Welcome*); *see also* Jonathan C. Augustine, *The Theology of Civil Disobedience: The First Amendment, Freedom Riders, and Passage of Voting Rights Act*, 21 S. CAL. INTERDISCIPLINARY L.J. 255 (2012)(hereinafter, Augustine, *A Theology of Civil Disobedience*).

9. Although the "Make America Great Again" (a/k/a "MAGA") narrative is widely associated with the 2016 and 2020 presidential campaigns of Donald Trump, my use of the term is by no means limited to any individual or particular political campaign. *See, e.g.*, AUGUSTINE, WHEN PROPHETS PREACH, *supra* note 6, at 18. Instead, my usage describes a socially regressive brand of politics often characterized by discrimination against immigrants, minorities, Jews, with roots in Christian nationalism. *See, e.g.*, OBERY M. HENDRICKS, JR., CHRISTIANS AGAINST CHRISTIANITY: HOW RIGHT-WING EVANGELICALS ARE DESTROYING OUR NATION AND OUR FAITH (2021). In specifically identifying the brand of identity politics I describe as Christian nationalism, how it is has been coopted by evangelical Christians, and how the same is deeply interwoven within the MAGA political narrative, Hendricks writes:

> Christian nationalism not only purveys the myth that America was founded as a Christian nation but also that it should be governed according to the biblical precepts that Christian nationalists themselves identify as germane . . . . Thus, Christian nationalism is best understood as a political ideology that holds that America's government is not legitimate, nor can it be, until its laws and policies are thoroughly consistent with the Christian nationalists' narrow, sometimes idiosyncratic, and at times convoluted readings of the biblical text. Thus, while the tenants of evangelicalism essentially comprise right-wing evangelicals' religious beliefs, Christian nationalism is the political ideology that guides and motivates the pursuit of their social interests in the world. The spectacle we see taking place in the public square today is right-wing evangelicals' Christian nationalist convictions taking precedence over their religious beliefs. This is fully reflected in right-wing evangelicals' voter turnout for Donald Trump . . . . Indeed, despite his well-earned reputation for racism and moral indecency, those who most enthusiastically supported his candidacy are numbered among the most ardent evangelical believers.

and the resurgence of Christian nationalism,[10] specifically, *white* Christian nationalism.[11] Indeed, this Essay's central thesis is that Christian nationalism's xenophobic otherism must be combatted with

Id. at 4. Further, in addressing MAGA's political significance, and the specific demographic it empowers, I also write:

> 'Make America Great Again,' Trump's 2016 campaign slogan, was aimed squarely at the bloc of voters who viewed the last half century's post-Civil Rights Movement changes as negative . . . . Trump promised to turn back the clock to a time when members of the white working class enjoyed greater influence and respect. Moreover, although racial divisions in the United States are anything but new, Trump's incendiary campaign rhetoric capitalized on the racial enmity that was simmering during the Obama presidency.

JONATHAN C. AUGUSTINE, CALLED TO RECONCILIATION: HOW THE CHURCH CAN MODEL JUSTICE, DIVERSITY AND INCLUSION 73 (2022).

10. Sociologists Andrew Whitehead and Samuel Perry argue that the United States currently has several cultural and political issues driving a wedge down the middle of its existence, including immigration reform, mass shootings, and racial injustice. ANDREW L. WHITEHEAD & SAMUEL L. PERRY, TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES ix (2020). In attempting to contextualize Christian nationalism, an often-misunderstood factor that contributes to the country's increasing polarization, the authors write the following:

> Though journalists and historians have bandied about the term a good deal in the past decade, we mean 'Christian nationalism' to describe an ideology that idealizes and advocates a fusion of American civic life with a particular type of Christian identity and culture. We use 'Christian' here in a specific sense. We are not referring to a doctrinal orthodoxy or personal piety. (In fact, we find some Christian nationalists can be quite secular.) Rather, the explicit ideological content of *Christian* nationalism comprises beliefs about historical identity, cultural preeminence, and political influence . . . . This includes symbolic boundaries that conceptually blur and conflate religion religious identity (Christian, preferably Protestant) with race (white), nativity (born in the United States), citizenship (American), and political ideology (social and fiscal conservative). Christian nationalism, then, provides a complex of explicit and implicit ideals, values and myths—what we call a 'cultural framework'—through which Americans perceive and navigate their social world.

Id. at ix-x (emphasis in original). Further, in *The Flag and the Cross*, the authors write, "[w]e define white Christian nationalism and identify white Christian nationalists using a constellation of beliefs. These are beliefs that, we argue reflect a desire to restore and privilege the myths, values, identity and authority of a particular ethnocultural tribe." PHILLIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY 14 (2022). Moreover, in describing that *particular* tribe (white, Anglo-Saxton Protestants) the authors go on to share that the tribe's political vision privileges it, to the exclusion of others, while putting the other tribes (*i.e*., immigrants, minorities, and Jews) in their "proper" place. *Id.*

11. Anthea Butler describes this phenomenon of Christian nationalism, and specifically *white* Christian nationalism, as, "the belief that America's founding is based on Christian principles [and that], white [P]rotestant Christianity is the operational religion of the land, and that Christianity should be the foundation of how the nation develops its laws, principles, and policies." Anthea Butler, *What is White Christian Nationalism?, in* CHRISTIAN NATIONALISM AND THE JANUARY 6, 2021 INSURRECTION 4 (FEB. 9, 2022), https://bjconline.org/wp-content/uploads/2022/02/Christian_Nationalism_and_the_Jan6_Insurrection-2-9-22.pdf. Butler also goes on to provide:

> Understanding this phenomenon requires an understanding of the basic ways white Christian nationalism has worked as a unifying theme for a particular type of narrative about America. That narrative can be summed up as follows:
>
> 1. America is a divinely appointed nation by God that is Christian.
> 2. America's founders, rather than wanting to disestablish religion as a unifier for the nation, were in fact establishing a nation based on Christian principles, with white men as its leaders.

a faith-based theology of welcome, *not* open borders, that sees immigrants, in general, and refugees, in particular,[12] as fellow human beings who are worthy of humane treatment.[13]

A. The Parable of the *Good* Samaritan and this Essay's Focal Question

In the popular parable, a lawyer—likely a pharisaic theologian who was well-schooled in Mosaic law, also known as the Torah—tries to trick Jesus with a question about how he would go about inheriting eternal life.[14] While deliberately not directly answering the lawyer's question, Jesus tells him about three passersby who meet a man left for dead on the side of the road.[15] Two of the passersby, a priest and a Levite, are both Jewish, just as is presumed about the wounded man in desperate need of assistance.[16] They each go to the other side of the road to avoid any contact with their fellow wounded Jew.[17] The third passerby, however, a *Samaritan* — someone of a different race and/or ethnicity—is moved to action.[18]

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3. Others (Native Americans, enslaved Africans, and immigrants) would accept and cede to this narrative of America as a Christian nation and accept their leadership.
4. America has a special place not only in world history, but in biblical Scripture, especially concerning the return of Christ.
5. There is no separation between church and state.

Id. at 4-5.

12. Within the United States' immigration system, there are five broad categories used to classify people: (1) a United States citizen; (2) a lawful permanent resident; (3) a nonimmigrant; (4) an undocumented or unauthorized foreign national; and (5) a refugee. AYODELE GANSALLO & JUDITH BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE 3 (2d ed. 2020). Within the foregoing classifications, a *refugee* is specifically categorized as:

> [A] foreign national who faces persecution in his or her home country and has been granted protection so that s/he does not have to return there. Those who enter the United States as refugees receive their status while outside the country; individuals already physically present in the United States who seek protection apply for asylum and, if granted, are known as asylees. Refugees and asylees are expected to apply for lawful permanent resident status after one year of the grant of their protective status and eventually can apply to become citizens.

Id. There is also an ethical issue of disconnect worth noting. The United Nation's Convention on the Status of Refugees of 1951 assures refugees seeking asylum in another nation-state that they will not be returned to the country from which they fled. Under the United States' policies, however, an unauthorized resident seeking asylum *is not* considered a refugee for purposes of applying the Convention. CLÉMOT, DISCERNING WELCOME, *supra* note 4, at 9 (internal citations omitted).

13. For a more comprehensive exploration of why Christian ministers are called to the work of social justice, through prophetic leadership, especially in responding to America's current immigration crisis. *See generally,* AUGUSTINE, WHEN PROPHETS PREACH, *supra* note 6, at 83-98.

14. *Luke* 10:25.

15. *Luke* 10:30-33.

16. *See Id.*

17. *Id.*

18. *See Luke* 10:33-35.

Considering the well-known differences between Jews and Samaritans, Jesus was obviously trying to prove a point about moving past otherism and unconscious bias and embracing an ethic of empathy. With this famous parabolic discourse, Jesus also recontextualizes what it means to be a "neighbor" to someone in need. Consider the following:

> Just then a lawyer stood up to test Jesus. 'Teacher,' he said, 'what must I do to inherit eternal life?' He said to him, 'What is written in the law? What do you read there?' He answered, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself.' And he said to him, 'You have given the right answer; do this, and you will live.'
>
> But wanting to justify himself, he asked Jesus, 'And who is my neighbor?' Jesus replied, 'A man was going down from Jerusalem to Jericho, and fell into the hands of robbers, who stripped him, beat him, and went away, leaving him half dead. Now by chance a priest was going down that road; and when he saw him, he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But, a Samaritan, while traveling, came near him; and when he saw him, he was moved with pity. He went to him and bandaged his wounds, having poured oil and wine on them. Then he put him on his own animal, brought him to an inn, and took care of him. The next day he took out two denarii,[*b*] gave them to the innkeeper, and said, 'Take care of him; and when I come back, I will repay you whatever more you spend.' Which of these three, do you think, was a neighbor to the man who fell into the hands of the robbers?' He said, 'The one who showed him mercy.' Jesus said to him, 'Go and do likewise.'[19]

Rather than directly responding to the lawyer's question, Jesus creates a space for introspective reflection on the duty people of faith have in responding to those in need. Indeed, Martin Luther King, Jr. addressed this parable while speaking the night before his assassination in Memphis, Tennessee, noting that although the priest and the Levite asked the question, "If I stop and help this man, what will happen to me?", the Samaritan appropriately reversed the question, "If I *do not* stop and help this man, what will happen to him?"[20]

19. *Luke* 10:25-37.

20. MARTIN LUTHER KING JR., *I See the Promised Land*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 285 (James M. Washington ed., 1986) (emphasis added).

As the *Howard Law Journal* 2022 Wiley A. Branton Symposium illustrates, so many immigrants are in the same position as the nameless man, "left for dead," in that they desperately need assistance, too. Moreover, because of the parable's background—the cultural and ethnic differences that existed between Jews and Samaritans—Jesus is also giving a lesson on human commonality and the necessity that we move past social constructs, like race, to help one another, as fellow members of the human race. As an action item, therefore, this Essay also urges readers to contact their respective congressional representatives and demand that Congress exercise its plenary authority to enact meaningful immigration reform laws that are guided by a spirit of welcome for both documented and undocumented refugees,[21] people in American communities who are already living as our "neighbors."[22]

B. This Essay's Structural Organization

To support this Essay's thesis, that the xenophobia of Christian nationalism must be combatted with a faith-based ethic of welcome and resistance, this Essay structurally proceeds in five parts. In building upon the foundation established in this Introduction, Part II contextualizes the xenophobic ideology of Christian nationalism by first looking at its most popular recent example, the January 6th insurrection, an illustration of how Christian nationalism attempts to preserve the status quo in America, with white Protestantism at its core. Further, with fear as a focal point, Part II also looks at America's practice of (un)welcome, in how immigrants have been treated in recent years,

21. In the American context, "Immigrants are typically classified as either documented or undocumented people who are nationals of another country but are living in the United States." Augustine, A Theology of Welcome, *supra* note 8, at 253. This Essay deliberately focuses on "refugees," a subset of immigrants. *See* AYODELE GANSALLO & JUDITH BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE 3 (2d ed. 2020). As Clémot makes clear, although refugees are a particular class of immigrants named by the United Nations, they have often engaged in the American *polis* as employees, taxpayers, and literal neighbors.

> Refugees who are long-term residents in the US, without authorized resident alien status, are typically people who have overstayed their immigrant visas. These refugees want to apply for asylum. They want to become naturalized, legally documented residents as fully members of society. But there is no legal mechanism to normalize their legal status. They often fly into the US from great distances and are initially given access to the country legally, and temporarily, as tourists. But many non-English-speaking refugees arriving in the US are not aware of the one-year window to apply for asylum—or fail to understand the procedures to follow when their tourist visas expire. If arriving refugees follow the procedure on how to be recognized as 'legal' refugees upon arrival, or soon thereafter, they could be on a pathway to US citizenship. But many refugees make tragic procedural missteps upon their arrival in the US, with irreversible consequences.

CLÉMOT, DISCERNING WELCOME, *supra* note 4, at xiv-xv.

22. *See id.*

partially because of economic fears and the MAGA narrative's race-based politics.

In building upon Part II's contextualization of *white* Christian nationalism, Part III pivots to explore examples of the practice of welcome evidenced in Scripture, with Jesus as the ultimate example of an immigrant refugee. Part IV transitions from a scriptural to historical perspective, providing a high-level overview of America's legal history in immigration, while also highlighting the racial and ethnic discrimination that has always existed within the American immigration system, to emphasize that only Congress can enact meaningful reform laws in response to America's dire need for the same. Part V serves as a synthesis by revisiting Jesus's lesson, in response to the lawyer's question, "Who is my neighbor?" by encouraging all to welcome those refugees already living in America, while also urging readers to contact their congressional representatives to demand that Congress act.

II. THE OTHERISM WITHIN WHITE CHRISTIAN NATIONALISM SEEKS TO PRESERVE THE STATUS QUO AND KEEP IMMIGRANTS OUT OF AMERICA

A. America's Two Perspectives on Immigration

The United States has two very different perspectives on immigration.[23] Inasmuch as both perspectives are literally as old as America itself, both perspectives also have a very relevant place, in terms of today's political dichotomy of attitudes towards immigrants. Consider the following:

> The history of the United States immigration policy reflects the tension of the two Americas that has been a part of the national debate since the founding of the country. As some colonists frowned upon German speakers, others attacked Catholics and Quakers. By the time the nation's second president, John Adams, took office, the debate was on between the two visions of America—one nativistic and xenophobic, the other embracing of immigrants. . . . As such,

23. The United States has a well-documented history of treating different immigrants—based on race, ethnicity, and socioeconomic status—*differently*. As the authors of *Immigration Law and Social Justice* remind us:

> There have always been two Americas. Both begin with the understanding that America is a land of immigrants. One America has embraced the notion of welcoming newcomers from different parts of the world, although depending on the era, even this more welcoming perspective may not have been open to people from certain parts of the world or different persuasions.

BILL ONG HING ET AL., IMMIGRATION LAW AND SOCIAL JUSTICE 12 (2d ed. 2022).

> the country has generally moved forward with policies that fall somewhere in the middle.[24]

I respectfully argue that at the center of these divergent perspectives — acting almost like a line of demarcation—is the Bible's perspective(s) on immigration.[25]

One American perspective of "enlightenment and welcome" has been supported by progressive, faith-based policies that seek commonality with geographic neighbors, especially those fleeing religious persecution from their countries of origin.[26] This perspective sees America as a place that provides refuge and hope to nationals of other lands, especially those who immigrate to America's borders in search of opportunity. Indeed, George Washington is reported to have said, "[t]he bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions."[27]

In yesteryear, as people began populating America in specific waves, and as those waves became associated with discernable racial and ethnic groups, this enlightenment and welcome perspective lent itself to the popular cliché that America is a "melting pot." As a physical reminder of this perspective, Ellis Island's Statute of Liberty, dedicated as a gift from France in 1886, includes the following words, from the Jewish-American poet, Emma Lazarus, as defined at the statute's base:

> Give us your tired, your poor, Your huddled masses yearning to breathe free, The retched refuse of your teeming shore, Send these, the homeless, tempest-tost to me. I lift my lamp besides the golden door![28]

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24. *Id*. at 13.

25. As an irony, the Bible also depicts two different perspectives on immigration, in the books of *Genesis* and *Exodus*, as Egypt was under the leadership of two different pharaohs. In *Genesis*, when Joseph's Hebrew father and brothers fled famine and sought refuge in Egypt, that pharaoh welcomed the Israelite immigrants and offered them the best of the land. *See Genesis* 47:6. Conversely, however, the pharaoh depicted in *Exodus* believed that Joseph's Hebrew descendants had "become far too numerous" and consequentially presented risks to national security. *See Exodus* 1:9. The same fear articulated by the *Exodus* pharaoh is the fear undergirding the White Replacement Theory's anti-immigrant bias, *see, e.g*., Augustine, *A Theology of Gumbo*, *supra* note 2, and the xenophobia behind Trump's immigration policies. *See generally*, Augustine, *A Theology of Welcome*, *supra* note 8, at 247-48.

26. *See, e.g*., CLÉMOT, DISCERNING WELCOME, *supra* note 4, at xi (introducing readers to Roby, an Indonesian refugee who fled religious persecution and was active as a member of the congregation Clémot serves, until Immigration and Custom Enforcement agents arrested him after dropping his daughter off at her New Jersey high school).

27. HING ET AL., *supra* note 23, at 11 (internal citations omitted).

28. *Id*.

With respect to that figurative golden door of entry into the United States, there is indeed a popular expression that provides, "America is a nation of immigrants."[29]

As a sharp contrast, however, the other perspective is one of (un)welcome. It is supported by a brand of *white* Christian nationalism that sees America as "set apart" by divine order and operating independently from the Jews, minorities, and immigrants who want to live in the American neighborhood where only *real* Americans are welcome. Based on my argument of how *white* Christian nationalism influences the immigration debate, consider the following:

> '[W]ho is American' has been defined and redefined throughout our history. When restrictionists—the standard bearers of the Eurocentric real American concept—have had their way, exclusionist rationales have been codified reflecting negative views toward particular races or nationalities, political views (e.g., communists or anarchists), religions (e.g., Catholics, Jews, Muslims), or social groups (e.g., illiterates, homosexuals). Those grounds for exclusion are every bit about membership in a Eurocentric American standard that requires that undesirables be kept out.[30]

Inasmuch as white Christian nationalism seeks to maintain the status quo of God's "intended order" for America, its most popularized example is arguably the infamous January 6, 2021 insurrection. It exemplifies the same politics of fear that undermine America's anti-immigrant animus.

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29. This general statement must be qualified, from an African American perspective, because America's foundational system of chattel slavery laid a foundation for the country's racially infused immigration system. Professor Rhonda V. McGee addresses this reality by writing:

> [S]lavery was, in significant part . . . an immigration system of a particularly reprehensible sort: a system of state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low economic cost.

Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 277 (2009). Professor Magee goes on to posit a compelling perspective that should be considered along with the popular saying that "America is a nation of immigrants."

> [V]iewing immigration as a function of slavery reveals an important irony: that with respect to immigration, slavery—our racially based forced migration system– laid a foundation for both a racially segmented, labor-based immigration system, and a racially diverse (even if racially hierarchal) 'nation of immigrants'. . .

Id. at 298.

30. HING ET AL., *supra* note 23, at 12.

B. The Politics of Fear: The January 6 Insurrection Was About Maintaining Power

In the aftermath of the November 2020 national elections—where more people voted than any time in American history—violent and vigilante MAGA loyalists stormed the Capitol, seeking to prevent certification of the presidential election results.[31] Their common ground was a passion fueled by Trump's unfounded allegations that the election was stolen.[32] Although Trump gave an incendiary speech to a mob of supporters just prior to the actual insurrection,[33] his allegations originated months and months before early voting began.[34]

Several of the insurrectionists were photographed in the crowd, either wearing clothing or holding up flags that read, "Jesus is My Sav-

31. While serving as vice president of the United States during the Trump administration, Mike Pence presided over the January 6, 2021 certification of Electoral College ballots, as mandated by the Twelfth Amendment. "The President of the Senate *shall*, in the presence of the Senate and House of Representatives, open all the certificates and the votes *shall* be counted . . . ." U.S. CONST. amend. XII (1804) (emphasis added). Then-President Trump put pressure on Pence to reject the election results, calling him a vulgar obscenity that suggested Pence lacked the courage to do something that wasn't within his discretion in the first place. Peter Baker et. al, *Pence Reached His Limit with Trump. It Wasn't Pretty: After Four-Years of Tongue Biting Silence that Critics Say Enabled the President's Worst Instincts, the Vice President Would Not Yield to the Pressure and Name-Calling from His Boss*, N.Y. TIMES (Jan. 13, 2021), https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html. Without apparently reading the Constitution, Capitol insurrectionists were rallied by Trump's baseless election fraud claims and attempted to "take back" the country and "take out" the vice president while they were at it. Dan Berry et. al, *Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html?auth=Login-google1tap&login=Google1tap.

32. The 2020 Democratic ticket of Joe Biden, vice president in the administration of Trump's predecessor, Barack Obama, and Kamala Harris, then-serving as a United States senator from California, won several states that Trump carried four-years earlier, in 2016. Included among them was Georgia, a state Democrats had not carried since 1992, when Bill Clinton and Al Gore defeated George H.W. Bush and Dan Quayle. *See, e.g.*, *1992 Presidential Election*, 270 TO WIN, https://www.270towin.com/1992_Election. Although Trump alleged Georgia was one of the states that was stolen because of election fraud, Georgia's Republican secretary of State definitively rebuked Trump's allegation as baseless. Quinn Scanlan, *"We've Never Found Systemic Fraud, Not Enough to Overturn the Election": Georgia Secretary of State Raffenspurger Says*, ABC NEWS (Dec. 6, 2020), https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956.

33. As a result of his incendiary January 6th speech to the Capitol insurrectionists, Trump was impeached, *for a second time*, by the United States House of Representatives. VICTORIA F. NOURSE, THE IMPEACHMENTS OF DONALD TRUMP: AN INTRODUCTION TO CONSTITUTIONAL INTERPRETATION 189 (2021). Trump's lawyers defended his actions, in a trial before the United States Senate, by arguing that in addition to being denied due process, his underlying remarks were protected by the First Amendment as free speech. *Id*. at 258 (citing 167 Cong. Rec. S667-S682 (daily ed. Feb. 12, 2021)).

34. Steve Inskeep, *Timeline: What Trump Told Supporters Months Before They Attacked*, NPR (Feb. 8, 2021), https://www.npr.org/2021/02/08/965342252/timeline-what-trump-told-supporters-for-months-before-they-attacked.

ior, Trump is My President."[35] Such items show both dual allegiances and conflated ideology, causing sociologists to categorize such people as (white) Christian nationalists. Although some argue the term *Christian* nationalism is a misnomer in that the identity politics of a "cross and country" conflation has nothing to do with any church-related orthodoxy, well-respected scholars recognize the practice as emanating from a national theology that regards America as God's chosen people.[36]

Further, in the eyes of some, any threat to God's "original" establishment of the hierarchy of America—including the inclusion of *immigrants*, minorities, and non-Christians as part of America's sociopolitical order—is antithetical to God's intention for God's "chosen nation."[37]

Although the most visible act of Christian nationalism is arguably the insurrection, the basis of its origins runs deep in America's social fabric.[38] In *The Flag and the Cross*, the authors explain the fear that

35. *See, e.g.*, Nathan Empsall, *Rejecting the January 6 Attack in Christ's Name, Opinion*, NEWSWEEK (Jan. 5, 2022), https://www.newsweek.com/rejecting-january-6-attack-christs-name-opinion-1666103.

36. English Protestants had long drawn a parallel between England and ancient Israel and, in the new colonial territory that would become the United States, the parallel was made even more compelling. Just as some believed God led the Israelites out of Egypt, in crossing the Red Sea and into the Promised Land, some drew a connection to the Puritans journey out of England and across the Atlantic Ocean, into another "promised land." HUGHES, MYTHS AMERICA LIVES BY, *supra* note 3, at 42.

37. Butler, *What is White Christian Nationalism?*, *supra* note 11, at 4.

38. The Puritans, a group of late sixteenth and seventeenth century English Protestants, regarded the English Reformation as incomplete and came to the American colonies seeking to "purify" the Church of England and society itself. In noting their cultural influence, consider the following:

> To the Puritans, the new land was not just a place where they could freely exercise their religion. It was literally the New Israel, the Promised Land on which the faithful could build a holy commonwealth unencumbered by Old World corruption. The Puritans called their mission an 'Errand in the Wilderness' and saw it as divinely ordained. To use the celebrated Puritan phrase, America was to be a 'city upon a hill,' a light to all nations. This sense of the nation's providential destiny has infused many aspects of American politics, from the 'manifest destiny' of westward expansion to various initiatives by presidents.

ALLEN D. HERTZKE ET AL., RELIGION AND POLITICS IN AMERICA: FAITH CULTURE AND STRATEGIC CHOICES 2 (2019). In *The Flag and the Cross*, the authors also argue that, although white Christian nationalism's roots run deep, it was largely obscured until the January 6 insurrection. In discussing the forces Trump was able to tap into in sparking the insurrection, they write, "[w]hite Christian nationalism is a 'deep story' about America's past and a vision for its future. It includes cherished assumptions about what America was and is, but also about what it *should* be.") (emphasis in original). The authors illustrate their "should be" by contrasting a place where, although they have been patiently waiting in line and working toward the American dream, politicians like Barack Obama and Hillary Clinton are helping immigrants, minorities, and other people who haven't paid their dues jump to the front of the line. GORSKI & PERRY, THE FLAG AND THE CROSS, *supra* note 10, at 3-4.

dominates and sometimes fuels Christian nationalism, especially as it relates to democratic structures in the United States.[39] Gorski and Perry argue that demographic changes are a key factor. In relevant part, they write:

> As white Christians approach minority status, white Christian nationalists are starting to turn against American democracy. After all, the basic principle of democratic government is majority rule. So long as white Christians were in the majority and could call the shots, they were willing to tolerate a certain amount of pluralism, provided that 'minorities' did not insist too much on equality. Now, faced with the prospect of minority status themselves, some members of the old white majority are embracing authoritarian policies as a means of protecting their 'freedom.'[40]

Just as the underlying fear of white Christian nationalism motivated the insurrectionists, the same fear motivates America's (*un*)*welcome* toward immigrants, too.

C. The MAGA Practice of (Un)welcome: How Xenophobic "Otherism" Fuels the Immigration Debate

In a day and age when many Americans are justifiably concerned about the economy, the politics of white Christian nationalism can use economic fears as a basis to practice (un)welcome policies towards immigrant refugees. Indeed, many Americans have been influenced by political rhetoric that immigrants not only drain the economy but are taking away American jobs.[41] "The presumption at the root of these concerns is that resettling refugees means a net *cost* to the national economy of the country that receives them. Interestingly, while many Americans believe that refugees and immigrants more broadly are a 'drain' on the economy, economists almost universally reach a different conclusion."[42] Research instead shows that immigrants have a *positive* impact on the economy of the country that receives them, partly because they are consumers, paying rent, buying food, cars, gas

39. *See id.*

40. *Id.* at 8 (internal citations omitted); *see also* ROLAND S. MARTIN, WHITE FEAR: HOW THE BROWNING OF AMERICA IS MAKING WHITE FOLKS LOSE THEIR MINDS 1 (2022) ("a 2018 Pew Research Study showed that almost half (49 percent) of post-millennials (ages six to twenty-one) are Hispanic, African American, and Asian. By 2043, these growth trends among people of color will continue, and it is expected that less than 47 percent of the country will be White Americans.").

41. BAUMAN ET AL., SEEKING REFUGE, *supra* note 4, at 66-67.

42. *Id*. at 66 (emphasis in original).

cell phones, et cetera, and their purchasing power leads to profits for American businesses that go on to hire more people.[43]

In specifically addressing the economic issue of immigration, and debunking the credibility of popular cultural fears that immigrants take away from the American economy, the authors of *The Everyday Crusade: Christian Nationalism in American Politics* document:

> In 2017, the Bureau of Labor Statistics estimated foreign-born workers constituted 16.9 percent of the American labor force. The nation would be unable to meet its economic needs without the presence of immigrants who fill a variety of occupations requiring either a certain skill level or that are undesirable to native-born workers. Immigrants have taken on physical labor occupations, such as farming and construction.[44]

Moreover, "[m]ost economists also agree that the average American-born worker actually sees their wages *positively* impacted by the presence of immigrants, because most immigrants tend to work in fields that *complement*, rather than compete with, the work that most Americans are either willing or able to do."[45] This shows that immigrants play a positive part in contributing to the American economy.

The fear of losing power, as exemplified by the January 6, 2021 Insurrection, along with economic fears, are only two aspects of America's historic practice of (un)welcome. As part of the United States' perspective of (un)welcome, immigrants have always been vilified in American culture.

> Immigrants become easy targets for harsh treatment because they have a distinctly negative image in popular culture . . . . [T]he emotion-laden phrase 'illegal aliens' figures prominently in popular debate over immigration. 'Illegal aliens,' as their moniker strongly implies, are law-breakers, abusers, and intruders, undesirables we want excluded from our society. The very use of the term 'illegal aliens' ordinarily betrays a restrictionist bias in the speaker. By stripping real people of their humanity, the terminology helps rationalize the harsh treatment of undocumented immigrants . . . .[46]

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43. *Id.* at 66-67.

44. ERIC L. MCDANIEL ET. AL., THE EVERYDAY CRUSADE: CHRISTIAN NATIONALISM IN AMERICAN POLITICS 114 (2022).

45. BAUMAN, ET AL, *supra* note 4, at 67. It also bears noting that, "[e]conomists also find that immigrants positively impact the fiscal well-being of the nation that receives them, paying more in taxes than they receive in benefits." *Id.* (citing Organization for Economic Cooperation and Development, "Is Migration Good for the Economy?", available at https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf (May 2014)).

46. HING ET AL., IMMIGRATION LAW AND SOCIAL JUSTICE, *supra* note 23, at 14.

This part of America's history, rooted in xenophobic otherism, was arguably never more pronounced than with the emergence of the MAGA political narrative and the presidential candidacy of Donald Trump.[47]

As part of Trump's 2016 presidential campaign rhetoric, he vilified Mexicans as "rapists and murders,"[48] and subsequently separated migrant children from their families at the US/Mexico Border.[49] As a central part of his 2016 campaign, Trump also promised to build a border wall, which was a promise that spoke to a specific segment demographic. "[A]s Americans more closely connect Christian identity with America civil belonging, they become more likely to believe that immigrants undermine American culture and increase crime rates. Unsurprisingly, they are also all the more eager to reduce immigration intro the United States."[50] Indeed, in addressing MAGA's impact on white evangelical Christians, Kristen Kobes Du Mez writes, "[w]hite evangelicals are more opposed to immigration reform and have more negative views of immigrants than any other religious demographic; two-thirds support[ed] Trump's border wall."[51]

In *When Prophets Preach*, I describe what some of the (un)welcome immigrants have experienced, certainly because of Trump, but more importantly because of the white Christian nationalism that was so heavily interwoven into Trump's MAGA politics:

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47. According to the authors of *Welcoming the Stranger*, most immigrants living in the United States—regardless of their classification, *see* GANSALLO & BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 3 —are legally in the country. "Of an estimated 44.7 million people born outside but living inside the United States, about twenty million are already naturalized US citizens, and roughly twelve million are Lawful Permanent Residents . . . Most foreign-born individuals—about three out of four—are present lawfully." MATTHEW SOERENS & JENNY YANG, WELCOMING THE STRANGER: JUSTICE, COMPASSION & TRUTH IN THE IMMIGRATION DEBATE 23 (revised & expanded) (2018).

48. *See, e.g.*, Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, THE WASHINGTON POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime.

49. While exploring some of the Trump administration's policies, and its MAGA governance, the popular evangelical author Jim Wallis writes, regarding the separation of migrant children from their families at the U.S/Mexico border:

> This inhumane practice was directly and admittedly part of the new administration's 'zero tolerance' immigration policy, designed to deter immigrant families from coming to America, and to systematically decrease immigration in the United States—not just undocumented immigrants but legal immigration too—especially from nations of color. All this derived from their overall white nationalist agenda, which appeals to their select political base . . . .

JIM WALLIS, CHRIST IN CRISIS: WHY WE NEED TO RECLAIM JESUS 34 (2019).

50. WHITEHEAD & PERRY, TAKING AMERICA BACK FOR GOD, *supra* note 10, at 92-93.

51. DU MEZ, JESUS AND JOHN WAYNE, *supra* note 1, at 4.

> Trump's campaign promised to build a border wall to prevent (illegal) immigration and ultimately stop the continued growth of the United States' immigrant population., which spoke to the worst impulses of a specific American demographic that longed for a return for the 'white rule' of yesteryear. Indeed, such rhetoric emboldens those white nationalists who embrace the so-called replacement theory, a fear that immigrants, minorities, and Jews are replacing white Protestants in America's social hierarchy. With a foundation supported by beliefs in the United States' 'manifest destiny,' such language of *unwelcome* goes hand in hand with the rise of white Christian nationalism in the United States.[52]

This is the type of rhetoric that goes to the heart of group polarity, as it capitalizes on fear to drive wedges of division between racial and ethnic groups in America.

In September 2017, during the Trump administration's first year, the government announced its intent to wind down the Deferred Action for Childhood Arrivals Program, popularly known as DACA.[53] Even more polarizing, however, before the administration's six-month mark, in July 2017, Trump was looking for a list of how many immigrants had received visas to enter the United States, after his outspoken campaign promises to limit immigration while arguing immigrants from Nigeria would ever "go back to their huts," only to be followed by a discussion on protections for immigrants from Haiti, El Salvador, and Africa, wherein Trump questioned "Why are we having all these people from shithole countries here?"[54]

Further, an August 2019 issue of *The New York Times* also highlights how Trump's immigration policies were disproportionately targeted at Mexican nationals.[55] Considering that the longest government shutdown in American history resulted from Trump's demand for $5.7 billion dollars to build a U.S.-Mexico border wall, it is safe to say that immigration was one of his administration's most controversial matters.[56] Most notably, the shutdown had little to do with na-

52. AUGUSTINE, WHEN PROPHETS PREACH, *supra* note 6, at 90 (emphasis in original).

53. *Id.* at 92 (internal citations omitted).

54. JOHN SIDES ET AL., IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA 201 (2018) (internal citations omitted).

55. Michael D. Shear et al., *Trump's Policy Could Alter the Face of the American Immigrant*, THE NEW YORK TIMES (Aug. 14, 2019), https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html; *see also* Claire Klobucista et al., *The U.S. Immigration Debate*, THE COUNCIL ON FOREIGN RELATIONS (July 25, 2019), https://www.cfr.org/backgrounder/us-immigration-debate-0.

56. Tessa Berenson, *Here Are the White House's Latest Demands to End the Shutdown*, TIME (Jan. 7, 2019) https://time.com/5496179/mike-pence-donald-trump-border-wall-proposal-

tional security. It was instead a consequence of Trump's race-based 2016 campaign rhetoric that was targeted at Mexican nationals and Muslims.[57]

By August 2019, immigration authorities raided seven food processing plants in small towns outside Jackson, Mississippi, leading to arrests of 680 mostly Latino workers.[58] Jackson's mayor, Chokwe Antar Lumumba, called on his city's churches and faith communities to provide sanctuary for immigrant neighbors.[59] This was not the first time Mayor Lumumba defied the Trump administration on the issue of immigration. In 2017, then-Attorney General Jeff Sessions referred to Jackson and 28 other localities as "sanctuary cities" because they offered protection to so many undocumented immigrants. Sessions also threatened Jackson, and other such cities, with losing eligibility to seek some $4.1 billion available in federal grant funding.[60] With these examples of how immigrants have been made unwelcome in the United States, I now pivot to explore only a few of the many examples of immigration in Scripture, the ultimate guide for how immigrants should be made welcome, and a moral authority that should play heavily into America's immigration debate.

III. A Theology of Welcome in Scripture: What Does the Bible Say About Immigration?

Although some sociopolitical issues *are not* directly addressed in Scripture, the Bible repeatedly speaks to immigration. "The Hebrew word *ger*—translated variously into English as *foreigner*, *resident alien*, *stranger*, *sojourner*, or *immigrant*—appears ninety-two times in the Old Testament. Many of those references mention God's particular concern for the foreigner . . . ."[61] The Bible is a sacred narrative of

shutdown-democrats ("The White House is holding form in its request for $5.7 billion for a border wall to end the shutdown, while also demanding billions of dollars more to address other priorities at the southern border, according to a proposal it gave Congressional Democrats . . . .").

57. *See generally*, ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP 125 (2018).

58. Justin Victory, *"Dehumanizing": Jackson Mayor Slams ICE Raids Asks Churches to Become Safe Havens*, MISSISSIPPI CLARION LEDGER (Aug. 7, 2019), https://www.clarionledger.com/story/news/politics/2019/08/07/immigration-raids-jackson-mayor-calls-church-leaders-shelter-immigrants/1946239001/.

59. *Id.*

60. *See generally*, NBC NEWS AND THE ASSOCIATED PRESS, *AG Sessions Threatens 'Sanctuary Cities,' Mayors Fight Back*, (Mar. 27, 2017, 6:25 PM), available at https://www.nbcnews.com/news/us-news/ag-sessions-threatens-sanctuary-cities-mayors-fight-back-n739171 (last updated).

61. BAUMAN ET AL., *supra* note 4, at 30.

God's interaction with humanity wherein migrants play key roles in an unfolding story. "Throughout Scripture God has used the movement of people to accomplish his greater purposes. Like immigrants today, the protagonists of the Old Testament left their homelands and migrated to other lands for a variety of reasons."[62]

A. Brief Considerations of Immigration in the Old Testament

"In Genesis 11, Abram, later Abraham, is introduced as an immigrant from Ur to Haran, later journeying to Canaan, with a stay in Egypt."[63] "[His] decision to leave Ur, and bring his family to Canaan, parallels the stories of many immigrants who leave [their homelands to] cross borders, [based on their faith."][64] Indeed, Abraham's immigrant faith journey—"a direct parallel to so many that have been detained and or deported under United States policies—is a critical foundation of America's three most popular religions, Christianity, Judaism, and Islam, all considered Abrahamic faith traditions."[65]

Additionally, the Genesis 18 narrative also shows Abraham extending hospitality and welcome to foreigners (immigrants). When three strangers arrived at his home, little did Abraham know they were messengers from God. He was simply eager to be hospitable. Consider the following:

> The Lord appeared to Abraham by the oaks of Mamre, as he sat at the entrance of his tent in the heart of the day. He looked up and saw three men standing near him. When he saw them, he ran from the tent entrance to meet them, and bowed down to the ground. He said, 'My lord, if I find favor with you, do not pass by your servant. Let a little water be brought, and wash your feet., and rest yourselves under the tree. Let me bring a little bread, that you may refresh yourselves, and after that you may pass on—since you have come to your servant.' So they said, 'Do as you have said.' And Abraham hastened into the tent to Sarah, and said, 'Make ready quickly three measures of choice flour, knead it, and make cakes.' Abraham ran to the herd, and took a calf, tender and good, and gave it to the servant, who hastened to prepare it. Then he took curds and milk and the calf that he had prepared, and sent it before them; and he stood by them under the tree while they ate.[66]

62. SOERENS & YANG, *supra* note 47, at 43.
63. Augustine, *supra* note 8, at 254.
64. *Id*.
65. *Id.*
66. *Genesis* 18:1-9.

Abraham's ready welcome to foreigners was no doubt the consequence of his own experiences as an immigrant. This dynamic is like modern-day immigrants in the United States being embraced by those who came before them, helping new immigrants to acclimate and orient to the American culture.

In further following the Genesis narrative, by chapter 37, Joseph, Abraham's great-grandson, also became an immigrant.[67] Unlike Abraham, however, Joseph's journey as an immigrant *was not* by choice. Much like the many enslaved Africans who began America's immigration system as victims of human trafficking,[68] Joseph was sold into slavery by his brothers.[69] This parallels the many Africans who came in shackles to what is now the United States. From an African American perspective, therefore, Joseph's forced immigrant journey parallels the origins of the Black entry into America.[70]

In *Exodus*, God used Moses to lead the Israelites from an oppressive dictatorial governmental rule in Egypt, essentially as migrant refugees, who were promised eventual habitation of the land of Canaan.[71] "The Israelites, under Moses' leadership, became refugees fleeing persecution in Egypt and escaping, with God's help, to a new land where, like many refugees today, they found new challenges."[72] In drawing a parallel between the Scriptures referenced herein and America's current immigration posture, it's apparent that many migrants also face significant challenges in the United States.

B. A Brief Consideration of Jesus, as a New Testament Refugee, and a Summary of Other Select Refugee Heroes from the Old Testament

As Canada was famously receiving a host of resettling Syrian refugees, in December 2015, an Anglican church in Newfoundland posted a sign that read, "Christmas: a Story About a Middle East Family Seeking Refuge."[73] That sign was a reminder that before Jesus's ministry began—a ministry rooted in an ethic of social jus-

67. *See Genesis*: 37:12-36.
68. *See* Magee, *supra* note 29, at 277.
69. *Genesis* 37:27-28.
70. Jake Silverstein, *Introduction*, *in* THE NEW YORK TIMES MAGAZINE: THE 1619 PROJECT 4 (Nikole Hannah-Jones ed., 2019).
71. *Exodus* 3:7-8.
72. SOERENS & YANG, *supra* note 47, at 44.
73. BAUMAN ET AL., *supra* note 4, at 31 (internal citations omitted).

tice,[74] given his status as an ethnically marginalized Jew, living under the Roman Empire's totalitarian regime — Jesus was born to refugee parents who were forced to flee their land of occupation. Their flight from persecution is the often-untold part of the Christmas story.

> When [the magi] had gone, an angel of the Lord appeared to Joseph in a dream. 'Get up,' he said, 'take the child and his mother and escape to Egypt. Stay there until I tell you, for Herod is going to search for the child to kill him.'
>
> So he got up, took the child and his mother during the night and left for Egypt, where he stayed until the death of Herod.[75]

Although this text provides no details about their journey, from Bethlehem to Egypt, or about how the refugee family was treated after arrival, "[i]f human history is an indicator . . . some would have met them with welcome and hospitality and others would have seen them as a threat."[76]

If they were perceived as a threat, as so many refugees have been in the United States, consider the following: "Were they able to find food and shelter? . . . Did local carpenters complain that Joseph would take work that they otherwise would have?" Were they harassed, as a fashionable exercise of the dominant culture?[77]

Although Jesus is unquestionably the most important example of a refugee in Scripture, many other biblical figures were forcibly displaced, too.

> Jacob fled his homeland under the threat of violence from his brother, Esau (Gen. 27:42-44). Moses fled from Egypt to Midian, initially because Pharoah sought to kill him (Ex. 2:15). When being persecuted unjustly by King Saul, David escaped on multiple occasions to the land of the Philistines, where he sought asylum under King Achish (1 Sam. 21:10; 27:1). Similarly, the prophet Elijah evaded the persecution of the evil King Ahab and Queen Jezebel by traveling out into the wilderness; so desperate he was in his situation that he 'prayed he might die (1 Kings 19:1-4). In the New Testament, we see how persecution in Jerusalem forced the earliest

74. *See Luke* 4:18-19 (highlighting biblical text often regarded as Jesus's inaugural sermon); *see also* OBREY M. HENDRICKS, JR., THE POLITICS OF JESUS: REDISCOVERING THE TRUE REVOLUTIONARY NATURE OF JESUS' TEACHINGS AND HOW THEY HAVE BEEN CORRUPTED 4 (2006) (discussing the oppressive political influences on Jesus and how his ministry began as a call for social justice).

75. *Matthew* 2:13-15.

76. BAUMAN et al., *supra* note 4, at 32.

77. *Id*.

> followers of Jesus to scatter—and also how God ultimately used this evil for good, as those apostles took the gospel with them and planted some of the earliest churches (Acts 8:1, 4-5).[78]

Indeed, with Scripture as a moral guide for both personal and social governance, I urge this Essay's readers to adopt a policy of welcome, with respect to refugees who are already living in the United States and contributing to the economy.

As we move now, to look broadly at some of the respective immigrant groups who have come to America, against the scriptural backdrop of welcome, please consider America's historic practice of (un)welcome. History shows that certain racial and ethnic groups that are considered subordinate to white, in terms of Christian nationalism's hierarchal ranking of "place" in America (who belongs and who does not), has been victimized by legalized discrimination in America's immigration history. Moreover, with the distinction between racial and ethnic discrimination drawn below,[79] it's easier to see the historic impact white Christian nationalism has, especially regarding the popular myths about the American existence.[80]

IV. A High-Level Overview of America's Legal History in Immigration

The United States Constitution is clear that only Congress has the plenary power to pass immigration laws. "Congress shall have the power to establish a uniform Rule of Naturalization . . . ."[81] In recognizing and elaborating upon this vast power, Professor Erwin Chemerinsky writes, "Congress has been accorded broad power to regulate immigration and citizenship. Indeed, the Court has held that 'over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'"[82] Professor Chemerinsky goes on to highlight that, "Congress has thus been recognized as having plenary power to set the conditions for entry into the country, the circumstances under which a person can remain, and the rules for becoming a citizen."[83] Congress has proven to use this constitution-

78. *Id*. at 32-33.

79. *See infra* note 84.

80. *See* HUGHES, *supra* note 3, at 83; *see also* SEIDEL, *supra* note 3, at 9.

81. U.S. CONST. art. 1, § 8, cl. 4.

82. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 289 (4th ed. 2011) (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977)) [hereinafter CONSTITUTIONAL LAW].

83. *Id.*

ally enumerated plenary power in ways that discriminate based on both race *and* ethnicity.[84]

A. The Discriminatory Origins of Congress' Plenary Power Over Immigration

Before the infamous Chinese Exclusion Act of 1882,[85] Congress proved to engage in racial discrimination as early as 1790, with the Naturalization Act. "Scholars generally trace the beginning of racially restrictive U.S. immigration policies to laws directed at various immigrant groups. Prior to 1870, the subordination of people of African descent was further underscored by the fact that people from Africa *could not* become U.S. citizens through naturalization."[86] Conversely, however, "[t]he Naturalization Act of 1790 established procedures for free *white* persons to achieve citizenship after just two years of residency, which later became five."[87]

Further, only eight years after the Naturalization Act of 1790, wherein Congress engaged in *racial* discrimination, it responded to perceived threats by foreign powers, particularly France, by engaging in *ethnic* discrimination.[88] Congress passed a series of individual laws, including the Naturalization Act of 1798, the Alien Friends Act, the Alien Enemies Act, and the Sedition Act (collectively known as the Alien and Sedition Acts of 1798),[89] that made it more difficult for immigrants to become U.S. citizens, while increasing the residency requirement to 14 years.[90] In elaborating on this history, Professor Gabriel Chin writes, "[t]he first naturalization act, in 1790, permitted only free white persons to become naturalized citizens; persons of Af-

84. *See* AUGUSTINE, WHEN PROPHETS PREACH, *supra* note 6, at 68-70 (citations omitted) (explaining the difference between racial discrimination and ethnic discrimination). Congress has engaged in both racial and ethnic discrimination, with respect to its sordid history in immigration. As I have previously highlighted, race is a social construct and discrimination based on race is based on immutable characteristic (*e.g.*, the Jim Crow segregation Blacks were forced to endure, in the American South, because of skin color). Ethic discrimination, however, is different. Rather than being based on immutable characteristic, ethic discrimination might be based on culture, religion, or national origin; *see also id*. at 70 ("To illustrate the difference between race and ethnicity, consider both the similarities and differences between whites and Jews in Nazi Germany. At face value, both groups shared common *racial* characteristics. Jews, however, shared certain distinct cultural and religious traits.") (emphasis in original).

85. Chinese Exclusion Act of 1882, H.R. 126, 47th Cong. (1st Sess. 1882) [hereinafter Chinese Exclusion Act].

86. HING ET AL., *supra* note 23, at 32 (emphasis added).

87. GANSALLO & BERNSTEIN-BAKER, *supra* note 12, at 5 (emphasis added).

88. Naturalization Act, 1 Stat. 103 (1790).

89. *Id.*

90. *See* GANSALLO & BERNSTEIN-BAKER, *supra* note 12, at 5 (internal citations omitted).

rican nativity and descent were added in 1870. When person of 'races indigenous to the Western Hemisphere' were added in 1940, only members of Asian races could not naturalize."[91] At face value, therefore, the genesis of American immigration law was rooted in both racial *and* ethnic discrimination.[92]

Inasmuch as Congress's enumerated power over naturalization has become recognized as "plenary,"[93] congressional power of the admission of aliens into the United States is absolute.[94] It comes from the Supreme Court's infamous ruling in *Chae Chan Ping,* also known as "The Chinese Exclusion Case,"[95] an opinion that is regarded as "the fountainhead of immigration law's plenary power doctrine."[96] The Supreme Court also further solidified the doctrine in *Fong Yue Ting v. United States*,[97] another racially troubled case that further complicates immigration law's history in the United States.

Immigration restrictions based on immutable characteristics began to build by 1875.[98] In 1882, Congress passed the Chinese Exclusion Act with language that excluded, "idiots, lunatics, convicts, and persons likely to be a public charge."[99] This language resulted in the first efforts to restrict Chinese migration.

> Chinese nationals arrived in America to work in gold mines, agriculture, or to build the western railroads and were considered legal residents. However, economic, cultural, and racial tensions related to the success and number of Chinese immigrants began to build, culminating in the Chinese Exclusion Act of 1882, which created a 10-year moratorium on Chinese labor immigration. It also denied citizenship to Chinese citizens already in the United States.[100]

Although migration from China was encouraged under the Burlingame-Steward Treaty of 1868, under the Chinese Exclusion Act, Chi-

91. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional law of Immigration*, 46 UCLA L. REV. 1, 13 (1998) (internal citations omitted) [hereinafter *Segregation's Last Stronghold*]; *see* Chinese Exclusion Act, *supra* note 84 (highlighting Congress's racialized discrimination against Asians that was the subject of the Chinese Exclusion Act of 1882and its upholding in *Chae Chan Ping v. United States.*

92. *See* AUGUSTINE, WHEN PROPHETS PREACH, *supra* note 6, at 69-70.

93. *See* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 81, at 289.

94. *See, e.g.,* Chin, *Segregation's Last Stronghold*, *supra* note 80, at 5.

95. Ping v. United States, 130 U.S. 581, 604 (1889).

96. David A. Martin, *Why Immigration's Plenary Power Endures*, 68 OKLA. L. REV. 29, 30 (2015).

97. Ting v. United States, 149 U.S. 698, 705 (1893).

98. *See* The Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477 (1875).

99. GANSALLO & BERNSTEIN-BAKER, *supra* note 12, at 6 (internal citations omitted).

100. *Id.*

nese immigrants were no longer welcomed.[101] This law was challenged by Chae Chan Ping, a Chinese immigrant who came to the United States under the 1868 treaty.[102]

Chae Chan Ping lived legally in San Francisco for many years and only briefly went back to China for a visit.[103] Although he possessed a lawful certificate that entitled him to reentry into the United States, Congress voided all such certificates, without exception, as he was sailing.[104] When Ping challenged the constitutionality of the Chinese Exclusion Act, the Supreme Court infamously upheld the law, ruling that Congress had exclusive authority to prohibit the immigration of people of Chinese ancestry.[105]

Four years later, in *Fong Yue Ting*,[106] the Court emphasized the plenary power doctrine by discriminately upholding a requirement that only Chinese residents of the United States register with the federal government upon pain of deportation.[107] Specifically, the Court held as follows:

> The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress to in the exercise of the powers confirmed to it by the Constitution over this subject.[108]

Accordingly, as the Court determined aliens could in fact be deported solely because of their race, *Chae Chan Ping* and *Fong Yue Ting* are both important cases. They firmly demonstrate the government's potential to engage in racial discrimination, through immigration law and policy, while justifying discriminatory treatment as an exclusive

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101. The following social and demographic analysis is of particular importance, in highlighting the racialized nature of this portion of America's immigration history:

> The discovery of gold in California in 1848 contributed to an influx of Chinese immigrants until 1882, when the Chinese Exclusion Act was passed. From 1851 to 1800, 228,899 Chinese entered, but this still represented less than 3 percent of the total (7.7 million) number of immigrants during that period which remained dominated by Europeans (88 percent). Obviously, after Chinese laborers were excluded in 1882, the number of Chinese entering declined; from 1891 to 1900, less than 15,00 entered out of a total of 3.7 million immigrants for the decade.

HING ET AL., *supra* note 23, at 11.

102. *See* Ping v. United States, 130 U.S. 581, 604 (1889).

103. *Ping*, 130 U.S. at 582.

104. *Id.*

105. *Id*. at 596.

106. *See* Ting v. United States, 149 U.S. 698, 718-19.

107. *Id.* at 732.

108. *Id*. at 731.

power reserved to the legislative, and by extension executive branches, as political arms of government.[109] Equally important, since those two decisions, the Supreme Court has affirmed its position that Congress' plenary power in immigration includes the right to exclude aliens based on race.[110]

B. Restrictions on Immigration Led to Discernable "Waves" of Immigrants

History recounts that prior to the other immigration restrictions detailed below, the white Christian nationalism undergirding America's immigration policy set the stage for debate as to who were "real Americans," considering the racialized demographics of those "original" immigrants to a land that was populated by Native Americans,[111] and the forced immigration of African peoples who were enslaved.[112] The initial wave of immigrants to America lasted until about 1803, bringing white, predominately English-speaking, and mainly Protestant Europeans.[113] The next wave, however, which began in the 1820s and lasted until the immigration restrictions detailed below, was more ethnically diverse and consequentially more controversial for "real Americans." There were "more Catholics and Jews, more Southern Europeans, and non-English speakers."[114] The stage

109. *Ping*, 130 U.S. at 606 ("The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all departments and officers.").

110. *See, e.g.,* Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952); *see also* Yamataya v. Fisher, 189 U.S. 86, 97 (1903); *see also* United States v. Toy, 198 U.S. 253, 261 (1905).

111. *See generally* Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L. J. 425 (1990) (highlighting America's sordid history with respect to its treatment of multiple Native American groups, including the Cherokees, Seminoles, Creeks, Choctaws, and Chickasaws. For an excellent but succinct chronicling of this history, with a particular emphasis on the Cherokee Nation's treatment in the Southeastern part of the United States, in comparison to the treatment of Chinese and Mexican migrant workers).

112. Dorothy Roberts, a law professor and sociologist, shares her thoughts on the racial dynamic of what it meant to be Black in early America by writing:

> In the early days of colonial America, the vast majority of people compelled to work for landowners were vagrant children, convicts, and indentured laborers imported from Europe. The wealthy settlers who benefited from their unfree labor did not at first distinguish between the status of European, African, and Indigenous servants. But as the slave trade mushroomed, Africans began to be subjected to a distinct kind of servitude: they alone were considered the actual property of their enslavers.

Dorothy Roberts, *Race*, *in* THE 1619 PROJECT: A NEW ORIGIN STORY 49 (NIKOLE HANNAH-JONES et al., eds., 2021).

113. *See* HING ET AL., *supra* note 23, at 12.

114. *Id*. at 11.

was therefore set for prejudice and discrimination in Congress' exercise of its plenary power in immigration.[115]

The next wave, however, which began in the 1820s and lasted until the immigration restrictions detailed below, was more ethnically diverse and consequentially more controversial for "real Americans."[116] There were "more Catholics and Jews, more Southern Europeans, and non-English speakers."[117] The stage was therefore set for prejudice and discrimination in Congress' exercise of its plenary power in immigration.[118]

From the late 1800s into the 1920s, over 22 million immigrants entered the United States, during a time when the country experienced major industrial growth. During the twentieth century's first two decades, as southern and eastern Europeans entered the United States in large numbers, "60 percent were from Italy, Austria, Hungary, and the area that became the Soviet Union."[119] As the xenophobic politics of fear became an issue, divisions also began to cement between whites and non-whites, as a part of *ethnic* discrimination. "As immigrant populations from eastern and southern Europe swelled, resistance also grew to new groups considered to be inferior, uneducated and economic competitors."[120] This resistance was arguably at least in part to the ethnic discrimination ingrained in white Christian nationalism.

In looking at population waves, and noting certain groups that were (un)welcome, the authors of *Understanding Immigration Law and Practice* note the following:

> In 1907, the Dillingham Commission, a bi-partisan congressional group, was formed to study the impact of immigration on the United States. The commission's work, which was completed in 1911, concluded that immigrants from Eastern and Southern Europe were a major threat to the United States economy and culture and proposed limiting immigrants from these regions. One vehicle to achieve this was a new literacy requirement that was enacted into law in the immigration Act of 1917.[121]

115. *See supra* notes, 82 & 110.

116. HING ET AL., *supra* note 23, at 12.

117. *Id*.

118. *See supra* note 82.

119. HING ET AL., *supra* note 23, at 12.

120. GANSALLO AND BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 7.

121. *Id.* (internal citations omitted).

Congress also passed the Emergency Quota Act in 1921,[122] limiting the number of immigrants from any region to three percent of that population already living in the United States in 1910. The impact of this legislation was to favor Northern and Western Europeans who were present in the United States in the largest numbers at the time.

Further, because of the Immigration Act of 1924, most Asian nationals *could not* immigrate to the United States.[123] Moreover, Asian nationals already in the country were barred from becoming citizens.[124] With passage of the Immigration and Nationality Act of 1952, although Congress lifted the absolute bars to the immigration and naturalization of Asians, it established "quota systems" for Asian countries.[125]

During this same time, things were very different, with respect to *temporary* migrant workers from Mexico.

> [I]n 1942, the United States negotiated a treaty with Mexico in the form of the Labor Importation Program, providing for the use of Mexicans as temporary workers in U.S. agriculture. The Labor Importation Program is more commonly referred to as the Bracero Program, a colloquial allusion to the men of strength . . . . Braceros were tied to American private employers by contracts guaranteed by the federal government . . . . The treaty, supplemented and slightly amended by subsequent legislative acts and international agreements with Mexico, governed the emergency farm and industrial program through December 31, 1947 . . . . From 1947, when the special wartime legislation expired, until 1951, when Public Law 78 was passed, the temporary workers program continued unabated . . .[126]

In 1964, following the program's termination, many migrant farm workers from Mexico neither had permission to be in the United States nor authorization for employment. The continuing need for

122. Emergency Quota Act of 1924, Pub. L. No. 67-5, § 42 Stat. 5, 2(a) (1921).

123. *See* Immigration Act of 1924, Pub. L. No. 139, § 43 Stat. 153 (1924).

124. *See generally* Immigration Act of 1924, Pub. L. No. 139, § 43 Stat. 153 (1924).

125. *See generally* Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175. Popularly known as the McCarran-Walter Act, Pub. L. No. 82-14 (1952), this legislation was a particle response to concerns about communists being present in the United States. It permitted the exclusion or deportation of noncitizens who were deemed to be subversive and engaged in activities that could be detrimental to the public interest. President Harry S. Truman regarded the 1952 legislation as discriminatory and it passed, over Truman's veto. *See* GANSALLO AND BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 8.

126. HING ET AL., *supra* note 23, at 18-19.

farm workers, however, resulted in large numbers of undocumented migrants who were unable to secure legal status.[127]

By 1965, during the height of the Civil Rights Movement, Congress eliminated the last vestige of anti-Asian racial policy with the passage of the Immigration and Nationality Act Amendments of 1965, a law that also eliminated quota systems.[128] In highlighting the significant effect of the 1965 amendments, while also cautioning readers and advocates, Professor Chin writes as follows:

> Under current law, no races are explicitly favored in the awarding of immigrant or nonimmigrant visas, and many believe that no particular nations are advantaged or disadvantaged as an indirect means of racial preference. Yet, the power to select immigrants on the basis of race is said to remain at the ready. *Chae Chan Ping* and *Fong Yue Ting* continue to be cited in modern decisions of the Supreme Court; because all constitutional immigration law flows from these cases, even decisions that do not cite them must rely on cases that do.[129]

It is therefore obvious that, given the impact of American immigration law's racialized and discriminatory history—a history rooted in the "us v. them" of white Christian nationalism—policy advocates must consider whether America's current policies are still undergirded by an anti-immigrant bias. If the question's answer is affirmative, it's obviously beyond time to call Congress to task and demand that lawmakers act to provide meaningful immigration reform legislation to recognize the humanity of all people, especially America's refugee neighbors.

C. The Post-1965 Diversity of Immigrants Who Entered America and the Xenophobic Politics of Fear

After the repeal of immigrant quota systems in 1965, the racial and ethnic backgrounds of immigrants to the United States became

127. GANSALLO AND BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 9.

128. Immigration and Nationality Act Amendment of 1965, Pub. L. No. 89-236, § 79 Stat. 911 (codified as amending several sections in 8 U.S.C.). Even the 1965 amendments were still "discriminatory" in that they retained per-country limits. *See* Immigration and Nationality Act § 202 (a)(2), 8 U.S.C. § 1152 (a)(2); *see also* Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2108 (1997). At the law's signing ceremony, President Lyndon Baines Johnson is reported to have said, that the new law "corrects a cruel and enduring wrong in the conduct of the American nation." GANSALLO AND BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 9.

129. Chin, *Segregation's Last Stronghold*, *supra* note 77, at 15 (internal citations omitted).

much more diverse. Indeed, rather than maintaining the status quo of the racial and ethnic minorities already in the United States, the Immigration and Nationality Act of 1965 opened the door for foreign nationals from all over the world to immigrate to the United States.

> [O]f all [United States] immigrants in in fiscal year 2000, 65 percent were from Asia and Latin America. The 2000 census found that one-third of the foreign-born population in the United States was from Mexico or another Central American country, and a quarter was from Asia. Fifteen percent were from Europe. As a result of the immigration policies since 1965, including new refugee laws in 1980 and a legalization (or amnesty) program for undocumented immigrants in 1986, the ethnic makeup of the country is changing.[130]

This demographic information is clearly part of what underlies the subject matter of Roland Martin's book, *White Fear*.[131]

Some argue the Immigration and Nationality Act of 1965's primary purpose was to reunite families, a purpose that became the driving force for increasing ethnic diversity, as more and more groups left their home countries to resettle in the United States.[132] The legislation also allowed immigration into the United States based on special work-related skills and refugee status, thereby contributing to the United States' current racial and ethnic composition. Indeed, since 1965, many more Asian immigrants came to America, including large numbers of Southeast Asian refugees in 1975, prompting fears about maintaining the "American way of life."[133] In order for the United States to meet its international law obligations, Congress passed the Refugee Act of 1980,[134] wherein it created a uniform method for new refugee immigrants to be admitted to the United States, while also creating a system for refugees already in the country to apply for asylum and seek protection from persecution.[135] 1980 was also the year that Ronald Reagan defeated Jimmy Carter to become president of the United States.

In 1986, with Reagan as president, Congress began to take an anti-immigrant position of (un)welcomeness toward foreign nationals from certain countries, as "the nation turned away refugees fleeing

130. HING ET AL., *supra* note 23, at 18-19 at 12-13.

131. *See generally*, MARTIN, WHITE FEAR, *supra* note 40.

132. GANSALLO AND BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 9.

133. HING ET AL., *supra* note 23, at 18-19 at 17.

134. *See generally* Refugee Act of 1980, Pub. L. No. 96-212, § 94 Stat. 102 (1980).

135. GANSALLO AND BERNSTEIN-BAKER, UNDERSTANDING IMMIGRATION LAW AND PRACTICE, *supra* note 12, at 9.

Haiti, Guatemala, and El Salvador while accepting similarly situated Cubans and Nicaraguans.[136] These very controversial and discriminatory actions led faith leaders to provide sanctuary to immigrant refugees in the form of a 1980s Sanctuary Movement, which was a direct response to Reagan-era policies making political asylum difficult for Central Americans fleeing civil conflict.[137] As part of a prophetic call to renew the Sanctuary Movement, consider the following:

> In March 2007, Alexia Salvatierra, executive director of Clergy and Laity United for Economic Justice and [a pastor in the Evangelical Lutheran Church in America] announced that religious leaders from various denominations, including the Catholic Lutheran, Methodist, and Presbyterian churches, were planning to revive the sanctuary movement to provide illegal immigrants with shelter and help them avoid deportation.[138]

What is a person of faith called to do when conflicted by civil laws they morally deem to be unjust? I argue that in the context of discriminatory and inhumane treatment toward immigrant refugees, the answer *must be* to engage in the type of civil disobedience that was typical in both the 1980s Sanctuary Movement and the 1950s and 60's Civil Rights Movement.[139]

V. And Who Is My Neighbor?: Synthesizing the Lawyer's Question, from the Parable of the Good Samaritan, While Exploring the Inherent Issues Presented by America's Discriminatory History in Immigration

Inasmuch as I have been clear in advocating for civil disobedience in the image of Martin Luther King, Jr.'s prophetic leadership,[140]

136. HING ET AL., *supra* note 23, at 18-19 at 1-2.

137. *See generally* Judith McDaniel, *The Sanctuary Movement, Then and Now*, in RELIGION & POLITICS (Feb. 21, 2017), available at https://religionandpolitics.org/2017/02/21/the-sanctuary-movement-then-and-now; Richard H. Feen, *Church Sanctuary: Historical Roots and Contemporary Practice*, 7 IN DEFENSE OF THE ALIEN 132, 133, 135 (1984) (tracing the origins of what we call "sanctuary cities," detailed in the Holy Bible's book of Leviticus as Levitical cities, wherein priests were designated as arbitrators and protectors of those seeking refuge. Feen also uses this Old Testament foundation to explain the development of "sanctuary" with respect to church-state relations in the New Testament's Greco-Roman world. This background helps underscore the clergyperson's unique position in the prophetic advocacy of civil disobedience, particularly with respect to providing sanctuary to immigrant refugees).

138. UTTER, MAINLINE CHRISTIANS AND PUBLIC POLICY, *supra* note 5, at 58-59 (internal citations omitted).

139. *See generally* AUGUSTINE, WHEN PROPHETS PREACH, *supra* note 6, at 93-98; *see also* Augustine, *A Theology of Welcome*, *supra* note 8, at 262-69.

140. Augustine, *A Theology of Civil Disobedience*, *supra* note 8, at 268-70. I discuss King's unwillingness to obey an "unjust" law, in 1963, after Birmingham, Alabama Police Commis-

I also deeply respect a similar position of advocacy taken by Ellen Clark Clémot. In *Discerning Welcome*, although Clémot arguably embraces the "spirit" of civil disobedience, she advocates for a more nuanced political theology of discernment that supports welcoming refugees as neighbors.[141]

I believe the ethical discernment for which Clémot advocates is critically important because, much in the spirit of King's direct-action campaigns during the Civil Rights Movement, civil disobedience in welcoming immigrant refugees—through very deliberate discernment—should be designed to compel the government to respond by acting. Moreover, the action I hope for from Congress is meaningful immigration laws, that will welcome refugees.

As part of her political theology of discernment, Clémot outlines two competing perspectives, *cosmopolitanism* and *communitarianism*, as well as a *new cosmopolitanism* that is a hybrid of the two perspectives.[142] I believe the hybrid is arguably the most palatable position at this point in the American chronology, considering the staunch divisions that have arisen as a result of the rise in white Christian nationalistic ideals. In considering the literal and figurative borders undergirding white Christian nationalism, in this synthesizing section, I call on readers to ask themselves the question at the heart of the parabolic discourse, "And who is *my* neighbor?"

Cosmopolitanism makes the case for "no borders," from both the ethical perspective, that all human beings should be treated with dignity and have access to other nation-states, and a Christian perspective, grounded in a Catholic Social Teaching that sees all refugees in the image of the Christ Child, who was also a refugee, as his family

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sioner Eugene "Bull" Connor refused to issue King a parade permit to protest against Birmingham's discriminatory treatment of Blacks. Rather than obey a law he deemed to be *morally* unjust, King decided to protest anyway. He was arrested and incarcerated on Good Friday and over Easter Weekend, in April 1963, he wrote the famous "Letter From Birmingham City Jail," a treatise on civil disobedience, wherein he cites the Holy Bible's *Daniel* 3 example of civil disobedience of the famed three Hebrew Boys. In relevant part, King writes:

> Of course, there is nothing new about this kind of civil disobedience. It was seen sublimely in the refusal of Shadrach, Meshach, and Abednego to obey the laws of Nebuchadnezzar because a higher moral law was involved. It was practiced superbly by the early Christians who were willing to face hungry lions and the excruciating pain of chopping blocks before submitting to certain unjust laws of the Roman Empire.

MARTIN LUTHER KING, JR., *Letter From Birmingham Jail*, in THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 194 (Clayborne Carson, ed. 1998).

141. CLÉMOT, DISCERNING WELCOME, *supra* note 4, at xiii.

142. *Id.* at 6-26.

fled governmental persecution shortly after his birth.[143] Consider the following:

> The *magna carta* on migrant welcome under Catholic Social Teaching came in the aftermath of World War II with the release of Pope Pius XII's constitutional document *Exsul familia*, promulgated in 1952. *Exul familia* (Exiled Family) gives instructions for the pastoral care of migrants. Its title refers to the Holy Family fleeing from Herod's rule to find safety in Egypt after the Christ child's birth. For the Catholic Church, the plight of the Holy Family became the archetype of every refugee family.[144]

The great irony is that in elevating Catholic Social Teaching, the 1952 *Exsula Familia* Clémot cites was issued the same year Congress passed the discriminatory Immigration and Nationality Act of 1952 (a/k/a the McCarran-Walter Act) over President Truman's veto.[145]

From the exact opposite perspective, *communitarianism* favors nation-state sovereignty and embraces the independence of each nation-state to regulate entry into its *polis,* or "city-state," as derived from Greek. "In our world of nation-states and bordered territories, every sovereign nation has established entrance policies toward migrants in order for the nation-state to maintain its culture, religion, and politics. Here lies the challenge for the refugee seeking a safe haven."[146] Several Christian ethicists who advocate for *communitarianism* also recognize an ethical quagmire the position creates: the nation-state must be able to set rules and policies that lead to protection, while this sense of protection, is exactly what draws immigrant refugees.[147] The inherent conflict to be resolved, therefore, is how the nation-state can support human flourishing by a safe place wherein relationships can be grown, in social solidarity.[148] Further, I most certainly agree that there must be limits on how many refugees a nation-state can admit to its membership to maintain its stability.

A hybrid perspective, falling somewhere between *cosmopolitanism* and *communitarianism* is the "welcoming wall" of *new cosmopolitanism*.[149] This "welcoming wall," or "porous wall," must go to the heart of identifying who is a neighbor. In a post-9/11 existence, the

143. *Id*. at 20-21; *see also*, SOERENS & YANG, *supra* note 47, at 61.
144. CLÉMOT, DISCERNING WELCOME, *supra* note 4, at 12 (internal citations omitted).
145. Ting v. United States, 149 U.S. 689, 718-19.
146. CLÉMOT, DISCERNING WELCOME, *supra* note 4, at 22.
147. *Id.* at 23.
148. *Id.*
149. *Id.* at 24.

reality is that the world is comprised of bordered nation-states. New Cosmopolitanism acknowledges the reality of borders, while also permitting space for welcome, along with the value of affirmed humanity that refugees seek through their presence in the United States. Indeed, "[a]dopting 'borders that welcome' remind us that the true end of humanity is not for a protected society, but rather the possibility of human flourishing in communion with God."[150]

Inasmuch as I believe *civil disobedience* should be done to comply with *divine obedience*, such actions should also be targeted to prompt Congress to act and pass meaningful immigration reform legislation, especially considering the current reality of the American state. Is there room for compromise? Given the rise of white Christian nationalism, and how it has most recently influenced American politics, I believe civil disobedience to help immigrant refugees is necessary to place pressure on Congress to act in the interest of America.

VI. Conclusion

The rise of xenophobic Christian nationalism in the United States, unquestionably embedded in the country's history and obviously exasperated by the Make America Great Again political narrative, has reinforced a culture of "us vs. them." The "us," or the "in crowd," has largely been white and Protestants. The "them," however—the proverbial Other—is comprised of minorities, Jews, and immigrants, the focus of this Essay.

By inviting readers to introspectively ask themselves the parabolic question, "And *who* is my neighbor?", I have expressly shared that, while rejecting the myth that America is a "Christian nation," I do embrace Christian teachings that foster human flourishing and create a space of welcomeness for immigrant refugees who are already living in America, as "neighbors," while paying taxes and contributing to the American economy. Indeed, the position of Catholic Social Teaching embraces a penchant for the poor, and those likely be to the most necessitous state, just like the unnamed and unidentified (presumably Jewish) man who received help from the *good* Samaritan.

I hope we will all answer the parabolic question by recognizing that, although all of humanity is our neighbor, for the purpose of a palatable action item, we should call on members of Congress to enact meaningful immigration reform legislation designed to offer pathways

150. *Id.*

to citizenship for the many refugee neighbors who are already living in our neighborhoods.

The Right to Deport Immigrants Bearing Firearms Convictions Shall Not Be Infringed? Contemplating the consequences for immigrants' firearm crimes, in light of *Bruen*

MICHAEL VASTINE[1]

Forward:

Eventually, this article will turn to the task at hand, using a critique of courts' use of "originalism" and the "categorical approach" to illustrate how firearms offenses are characterized as deportable offenses. Originalism and the categorical approach are two intellectual methods—theoretically, at least—for reducing arbitrary outcomes by relying on a fixed method for reading statutes. Of course, reality is more difficult than theory, as illustrated by the bending of history and rea-

1. *Michael Vastine* joined the faculty of St. Thomas University College of Law in 2004, where he is Professor of Law and Director of Clinical Programs. Michael has both represented individual clients and authored *amicus curiae* briefs in major litigation regarding immigration and crimes and the due process rights of immigrants, representing groups including American Immigration Lawyers Association (AILA) and Catholic Legal Services in cases before the United States Supreme Court, the U.S. Courts of Appeals, the Florida and Connecticut state supreme courts, and the Board of Immigration Appeals. Much of this litigation relates to the proper application of the "categorical approach" discussed throughout this article, including several published decisions before the U.S. Court of Appeals for the Eleventh Circuit, one of which pertains to firearm-related deportability, specifically. Michael publishes widely on these same topics and has made hundreds of presentations at conferences of the immigration bar. He is a graduate of Oberlin Conservatory of Music, Temple University Graduate School of Music, and Georgetown University Law Center. Among other recognition, in 2013, Michael received the AILA (National) Elmer Fried Award for Excellence in Teaching.

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soning in recent precedent in the firearms arena. As recent debates at the Supreme Court (raging during the writing of this article, including the very week of the accompanying talk at Howard Law School) highlight the weaknesses of modern outcome-oriented "originalism"—why does the conservative argument always win? How does cherry-picked history conveniently support the reactionary position?—this author found that debate to serve as a helpful entry point to discussion of occasionally intellectually disingenuous holdings in other contexts, namely the "categorical approach" for determining the immigration and sentencing consequences of crimes. All of this leads to a broader debate: how can our courts and society simultaneously be so incredibly permissive *and* punitive regarding firearms offenses, particularly as applied to immigrants.

Everyone has their own way of processing Supreme Court decisions, especially the big ones, those epic decisions that change some axis, the balance point around which society rotates. For me, the *Bruen* firearms case of last term is one of those that I have had to think about a lot in my capacities as both a citizen and a defense attorney.

First off, I will concede my deep unease and heightened sense of danger created by the court's endorsement of our society's most permissive attitudes toward guns, in which the danger of ubiquitous guns is expected to be countered, not by some state regulatory oversight, but by *more* private defensive gun ownership. At the most casual level of reflection upon the constitutional rights involved, it is natural to wonder if individuals have other rights that come into play, and should counter-balance the scales relative to this uniquely American celebration of firearms. What if a gun (and its owner) interferes with my life and/or my pursuit of happiness, or yours? The statistics confirm my good reason to worry, here in the U.S., more than anywhere else in the world.

Thus, given the news cycles, chilling images, and grim statistics memorializing our omnipresent gun violence, my reaction to *Bruen* was one of disappointment. Even still, I wanted an angle to process my feelings about the Supreme Court effectively endorsing universal concealed carry and painting this as a historically-consistent premise.

You see, in my real life, outside of law journals, I am an immigration defense lawyer, a clinical law teacher. With my students, I have in-

vested years fighting against the deportability of immigrants—both lawful residents and undocumented—with some cases resulting in significant precedent, including for firearms convictions. And in that universe, no legal minutiae, no technicality, no creative novel excuse is too minuscule for me to raise and argue in order to build a defense for someone convicted of criminal activity involving a firearm.

So which way do I want it? Both, of course. To channel my ambivalence productively in the following pages and to use lessons from defending against immigration consequences as a way of helping others look at *Bruen*. This requires a lot of context to make useful connections, whether one subscribes to the connections or not, so I can only hope that by compiling the context, that this article is useful to many.

But first, a digression is necessary.

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Prologue:

Arms. Firearms. Guns.

Second Amendment. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[2]

Columbine.
Sikh Temple of Wisconsin.
Tree of Life Synagogue.
Emanuel African Methodist Episcopal Church.
Sandy Hook.
Las Vegas.
Parkland.
Pulse.
Highland Park.
Uvalde.

Immigrants. Aliens. Deportability. Rapists and murderers?

2. U.S. Const. amend II.

Cruikshank.[3] *Heller.*[4] *Bruen.*[5]

Chairez-Castrejon.[6] *Chairez-Castrejon*?

The mythologies of the United States loom large, from our "Founding Father" origin stories, to the "long arc of the moral universe bending toward justice" that, nearly 200 years later, begat the progressive victories of the Civil Rights movement. With each epic tale, eventually a counternarrative has emerged, with one or the other being fact-correction or propaganda. Myths are difficult dragons to slay, propaganda perhaps harder.[7] Reactionary politics, seeming hardest of all.

As mass shootings have tragically held grip over successive news cycles over recent decades, the public has had the impetus to recall and reflect upon the nation's historic and unique relationship with firearms, rooted in our epic revolutionary defiance of Great Britain. At that time, there was no constitutional right to gun ownership; there was no Constitution. But there were guns (muzzle-loading muskets

3. United States v. Cruikshank, 92 U.S. 542 (1875) (the first Supreme Court case addressing the Second Amendment, in which the Court reversed the conviction of members of a Reconstruction-era white supremacist mob, private actors who forcibly deprived Black citizens of their right to bear arms (and then committed mass murder of them), with the Supreme Court finding that the Fourteenth Amendment did not apply the Second Amendment to the states, and as such, while the Second Amendment might apply to *federal* action to suppress access to guns, states and municipalities were proper bodies to regulate local gun access, as here, where Louisiana permitted the white mob to bar black firearm ownership). Interpreted, this meant that when white people were killing black people, the states were (conveniently) permitted the right to regulate ownership for self-defense . . . or not.

4. District of Columbia v. Heller, 554 U.S. 570 (2008) (Writing for the majority, Justice Scalia emphatically rejects Justice Stevens' argument, rooted in United States v. Miller, 307 U.S. 174 (1939), ("that the Second Amendment 'protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons'") and instead held that individuals possessed a constitutional right to keep and bear arms, which the DC total prohibition on possession violated. Apparently, Scalia (1936-2016) had better insight than the 1939 Supreme Court into the thoughts of the 1790's leaders).

5. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (rejecting as unconstitutional a 1911 statute by which New York required justification, via an application, for an individual to be licensed to carry a firearm in public).

6. Matter of Chairez, 26 I&N Dec. 819 (BIA 2016) (ruling on how immigrants are deportable for firearms offenses, and explaining the methodology, under the "categorical approach," for determining whether the firearm at issue necessarily triggered federal treatment).

7. Megan McArdle, *We finally know for sure that lies spread faster than the truth. This might be why*., WASH. POST, (Mar. 14, 2018), https://www.washingtonpost.com/opinions/we-finally-know-for-sure-that-lies-spread-faster-than-the-truth-this-might-be-why/2018/03/14/92ab1aae-27a6-11e8-bc72-077aa4dab9ef_story.html ("Mark Twain has said that that a lie can travel around the world and back while the truth is still lacing up its boots," and in the internet age, studies have shown that "[i]t took the truth about six times as long as falsehood to reach 1,500 people.").

that they were). The modern relationship of our society and its weapons manifests in myriad ways, from our apparent cultural tolerance of the 45,222 deaths by guns in 2020[8] or that our annual gun death rate per capita is presently about 13.2 per 100,000,[9] a rate massively higher than other advanced countries.[10] Just as the United States ranks first among developed nations in its rate of gun ownership (and, non-coincidentally, the rate of deaths by firearm), it led the world in mass shootings, as we have had more than 12 times as many mass shootings as France, the country with the second-highest mass shooting count.[11] Apparently, as a self-governing people, we have a tolerance for that distinction as well.

Infamously, against this backdrop, the U.S. Supreme Court has doubled down on its modern, permissive view of gun ownership and its hostility to the concept of state regulation of firearms, a wave punctuated by *Heller*'s view of the *individual* right to bear arms (rather than the public-militia-related right facially enunciated within the Second Amendment) and cresting most recently in *Bruen*'s rejection of state-imposed obstacles to aspects of gun-related conduct, in which New York citizens formerly were required to justify their need to carry a firearm in public, in order to be granted a license to do so. Of course, the Court found this screening mechanism to violate the Second and Fourteenth Amendments. Let there be unregulated carrying of guns.

Put another way, there were 1.5 million deaths by firearm in the United States between 1968 and 2017, higher than the number of soldiers killed in every U.S. conflict since the American War for Independence.[12] There are more guns than people in the country, with an estimated 393 million weapons in civilian hands, the equivalent of 120 firearms per 100 citizens. Considering that only about one-third of

8. John Gramlich, *What the data says about gun deaths in the U.S.*, Pew Rsch. Inst., (Feb. 3, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/.

9. *Id.*

10. For comparison, the United Kingdom's rate of gun deaths per capita is .23 per 100,000, so the United States' rate is 57 times that. *See Gun Deaths by Country, 2023*, World Population Review, https://worldpopulationreview.com/country-rankings/gun-deaths-by-country (last visited Apr. 9, 2023).

11. Jason R. Silva, *Global mass shootings: comparing the United States against developed and developing countries*, Int'l Journal of Comparative and Applied Criminal Justice, DOI: 10.1080/01924036.2022.2052126 (last updated June 9, 2022).

12. *How many US mass shootings have there been in 2023?*, BBC News, (May 25, 2022), https://www.bbc.com/news/world-us-canada-41488081.

citizens own firearms,[13] the numbers show that many of those who do are armed to the teeth.

In short, for many, gun ownership is a quintessential and encouraged aspect of American life. The Republican political party campaign platform is routinely predicated upon hostility to gun regulation,[14] even if the party's rank and file members are historically ambivalent.[15] Based on electoral and outsized political successes of the Republican party (despite its repeated recent minority shares in the overall public votes for national offices),[16] the federal courts it has

13. Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP, Nov. 13, 2020, https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx ("Thirty-two percent of U.S. adults say they personally own a gun, while a larger percentage, 44%, report living in a gun household. Adults living in gun households include those with a gun in their home or anywhere on their property. Gallup has tracked both metrics of gun ownership annually since 2007, showing no clear increase or decrease in gun ownership over that time").

14. *See, e.g.,* 2016 Republican Party Platform, THE AM. PRESIDENCY PROJECT, July 18, 2016, https://www.presidency.ucsb.edu/documents/2016-republican-party-platform.

The Second Amendment: Our Right to Keep and Bear Arms

We uphold the right of individuals to keep and bear arms, a natural inalienable right that predates the Constitution and is secured by the Second Amendment. Lawful gun ownership enables Americans to exercise their God-given right of self-defense for the safety of their homes, their loved ones, and their communities. We salute the Republican Congress for defending the right to keep and bear arms by preventing the President from installing a new liberal majority on the Supreme Court. The confirmation to the Court of additional anti-gun justices would eviscerate the Second Amendment's fundamental protections. Already, local officials in the nation's capital and elsewhere are defying the Court's decisions upholding an individual right to bear arms as affirmed by the Supreme Court in *Heller* and *McDonald*. We support firearm reciprocity legislation to recognize the right of law-abiding Americans to carry firearms to protect themselves and their families in all 50 states. We support constitutional carry statutes and salute the states that have passed them. We oppose ill-conceived laws that would restrict magazine capacity or ban the sale of the most popular and common modern rifle. We also oppose any effort to deprive individuals of their right to keep and bear arms without due process of law.

We condemn frivolous lawsuits against gun manufacturers and the current Administration's illegal harassment of firearm dealers. We oppose federal licensing or registration of law-abiding gun owners, registration of ammunition, and restoration of the ill-fated Clinton gun ban.

15. Madeline Halpert, *Support For Stricter Gun Laws—Including Among Republicans—Remains High, Poll Suggests*, FORBES, https://www.forbes.com/sites/madelinehalpert/2022/08/23/support-for-stricter-gun-laws-including-among-republicans-remains-high-poll-suggests/?sh=472b169a2a24 (Some 71% of Americans—including about half of Republican voters—say they want stricter gun control laws, a new *poll* from the University of Chicago Harris School of Public Policy and the Associated Press-NORC Center for Public Affairs Research suggests, two months after President Joe Biden signed the most major gun control legislation in decades to stem a rising tide of mass shootings in 2022. [. . .] Roughly 60% of voters also believe it's important to make sure people can have access to guns to protect themselves, the poll found. [. . .] The survey found 1 in 5 people have personally experienced gun violence within the last five years or have a close friend or family member who has experienced an incident, such as being a victim of a shooting or being threatened with a gun.").

16. *See, e.g.,* George Ingram and Annababette Wils, *Misrepresentation in the House of Representatives,* BROOKINGS INST., Feb. 22, 2017, https://www.brookings.edu/blog/fixgov/2017/02/22/misrepresentation-in-the-house/ (Despite its name, the House of Representatives is not so representative. [T]he total vote differential between the two parties for elections to the House in 2016 was 1.2 percent. But the difference in the number of seats is 10.8 percent, giving a total of 21

molded are increasingly aggressive against regulation of gun ownership.[17]

Against this backdrop, it may not be widely known that firearms offenses lead to deportation. Immigration is complicated. Collectively, individual immigration stories form another vital part of the American myth. The favorable view of the myth is largely Eurocentric and undeniably colonial, but the up-by-their-bootstraps rags-to-riches immigrant mythology (*see, e.g.,* Carnegie, Andrew) is quintessential American stuff.[18]

Immigration is misunderstood. Contrary to popular impressions, for many people, there is no "waiting in line" to come to the United States,[19] and for those who can, the "lines" are so impossibly long as

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extra seats to Republicans. [. . .] This aggregate over-representation of the majority party is considerably extreme when looked at state-by-state. In *red states* (see Figure 2), Republicans garnered 56 percent of the vote but 74.6 percent of representation. In *blue states*, Democrats won 60.3 percent of the vote but 69.1 percent of representation.); *What's Going on in This Graph? Senate Representation by State,* NEW YORK TIMES, (Dec. 5, 2022), https://www.nytimes.com/2022/10/27/learning/whats-going-on-in-this-graph-nov-9-2022.html (The sorting of liberals into large metropolitan areas and conservatives into more rural areas is only one reason. Another is that large states have grown much more quickly than small states. In 1790, the largest state (Virginia) had about 13 times as many residents as the smallest (Delaware). Today, California has 68 times as many residents as Wyoming; 53 times as many as Alaska; and at least 20 times as many as another 11 states. Together, these trends mean that the Senate has a heavy pro-Republican bias that will last for the foreseeable future. The Senate today is split 50-50 between the two parties. But the 50 Democratic senators effectively represent 186 million Americans, while the 50 Republican senators effectively represent 145 million. To win Senate control, Democrats need to win substantially more than half of the nationwide votes in Senate elections).

17. *See* John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER, (Jan. 13, 202), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ (Donald Trump leaves the White House having appointed more than 200 judges to the federal bench, including nearly as many powerful federal appeals court judges in four years as Barack Obama appointed in eight. [. . .] More than a quarter of currently active federal judges are now Trump appointees. As of Jan. 13, there were 816 active judges serving across the three main tiers of the federal court system: the Supreme Court, 13 regional appeals courts and 91 district courts governed by Article III of the U.S. Constitution. Trump appointed 28% of those judges. That includes three of the nine sitting Supreme Court justices, 30% of the nation's active appeals court judges and 27% of active district court judges.).

18. Not only was there rampant discrimination between successive European waves of immigrants of differing national origins, but the Chinese Exclusion Act (1882) permanently curtailed Asian Immigration until the Hart-Celler Act (known as the Immigration and Nationality Act) lifted discriminatory quotas in 1967, simultaneously initiating immigration from both Asian countries and the Western Hemisphere, and thereby launching massive demographic changes reflected in modern America, and the ongoing resulting backlash.

19. David J. Bier, *"Why Don't They Just Get in Line?" Barriers to Legal Immigration*, CATO INSTITUTE, Apr. 28, 2021, https://www.cato.org/testimony/why-dont-they-just-get-line-barriers-legal-immigration (The simple answer to the question that this hearing poses — why don't immigrants get in line? — is that immigrants cannot legally get into "the line" — that is, apply for legal permanent residence on their own. To the extent that the U.S. government allows legal immigration, it is based almost exclusively on selection or sponsorship by the U.S. government

to be functionally useless.[20] Despite half of the visa system being predicated upon family relationships,[21] families who use those visas may be derided as participating in "chain migration" (*c.f.* Trump, Melania),[22] where it is politically expedient. The other half of the visa system permits immigration of persons of varying levels of professional skills, in order to fill market-tested voids in the domestic workforce. Nonetheless, in some corners of the popular mind, professional immigration is often seen (and portrayed) as a threat to the domestic labor force rather than the complementary role that—by definition—it plays.[23]

What *is* understood is that immigrants must avoid criminality, as few are maligned quite like the criminal immigrant.[24] But the details of the consequences (rather than the rhetoric) can be murky.

Immigrants have little room for error. They must avoid criminality in order to be able to immigrate and to avoid removal once they arrive. To illustrate: even though Americans have adopted extremely permissive attitudes toward some drug use[25] and 49% of adults *admit*

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or U.S. families, employers, or other sponsors. Thus, the question could be restated: why can't Americans let immigrants get into "the line"? The answer to this question is that the government effectively bans them from doing so.).

20. David J. Bier, *Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and* Inequitable, CATO INSTITUTE, (June 18, 2019), https://www.cato.org/publications/policy-analysis/immigration-wait-times-quotas-have-doubled-green-card-backlogs-are-long#introduction (Whereas it may have taken immigrants an average of 5 years and 8 months to immigrate in 2018, the backlogs mean that immigrants who are applying for the first time *right now* may have to wait much longer. The government makes no attempt to estimate these future waits. [A]pplicants in several lines face multidecade waits if they stick it out indefinitely. In fact, EB2/EB3 Indian employees of U.S. businesses who entered the line in 2018 have an impossible half-century-long wait, and Mexican and Filipino married adult children of U.S. citizens and Mexican siblings of U.S. citizens face a full century in the backlog.).

21. 8 U.S.C. §§ 1152, 1153; *see also Factsheet: How the United States Immigration System Works*, https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works (explaining the process for allocating the maximum 480,000 family based visas and 140,000 employment-based visas, each prioritized across several sub-categories).

22. Meghan Keneally, *8 times Trump slammed 'chain migration' before it apparently helped wife's parents become citizens*, ABC NEWS, (August 10, 2018), https://abcnews.go.com/US/times-trump-slammed-chain-migration-apparently-helped-wifes/story?id=57132429 (following her acquisition of permanent residency through a professional immigrant visa, Melania Trump naturalized, then sponsored her own parents to immigrate through the family-based process. They subsequently naturalized, themselves.).

23. *Do Immigrants Steal Jobs from American Workers,* BROOKINGS INSTITUTE, August 24, 2017, https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/ (concluding "no, they don't").

24. *See e.g.,* Robin Meyer, *The Facts About Immigration: President Trump and his supporters claim illegal immigrants are bringing danger to America. They're not.*, UCLA BLUEPRINT, Fall 2019.

25. Jennifer De Pinto, *Large majority favor legal recreational marijuana under federal law - CBS News poll*, CBS NEWS, (Apr. 20, 2022) https://www.cbsnews.com/news/marijuana-recreational-legalize-opinion-poll-2022-04-20/ (finding a two-thirds majority favor legal cannabis); *Sup-*

trying cannabis,[26] any drug conviction[27] or admitted illicit drug use[28] bars a prospective immigrant from coming to the United States. Once here, nearly any drug crime—aside from a single minor possessory cannabis offense - makes an immigrant deportable from the United States.[29] So does (among a vast array of other offenses) any crime of domestic violence or child neglect, violation of a protective order, prostitution, or a felony offense that involves "moral turpitude."[30] According to the modern system, in place since 1996, if any of the above offenses take place during an immigrant's first seven years in the United States (*i.e.*, during the period of time in which they are likely *least* acculturated and aware of American norms, but are most likely to have not developed the necessary economic success to pay for a vigorous criminal defense), they will likely be barred from any form of discretionary relief from removal,[31] so their deportation is assured. Again, firearms offenses trigger deportability, specifically. How and why they trigger are complicated.

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port for Legal Marijuana Holds at Record High of 68%, GALLUP (Nov. 4, 2021), https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx.

26. Jeffery M. Jones, *Nearly Half of U.S. Adults Have Tried* Marijuana, GALLUP, (Aug.17, 2021) https://news.gallup.com/poll/353645/nearly-half-adults-tried-marijuana.aspx.

27. 8 U.S.C. § 1182(a)(2)(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 802 of Title 21), is inadmissible.

28. See Matter of K-, 7 I&N Dec. 594 (BIA 1957) (explaining how "admissions" may be used against an applicant to prove their inadmissibility, even in the absence of a conviction).

29. *See* 8 U.S.C. § 1227 Deportability

(2)(B)Controlled substances

(i)Conviction

Any alient who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a state the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

30. *See generally* 8 U.S.C. § 1227 (Classes of Deportable Aliens).

31. *See* 8 U.S.C. § 1229b - Cancellation of removal; adjustment of status (requiring seven years continuous presence in the United States following a lawful admission, prior to the commission of the disqualifying act, in order to be statutorily eligible for the discretionary waiver); 8 U.S.C. § 1182(h) (in the case of removable resident, eligible to defensively *reapply* for residency through an immigrant visa in conjunction with a discretionary waiver of inadmissibility (which in turn requires a showing of extreme hardship to a qualifying family member to establish statutory eligibility), the immigrant must have held residency for seven years immediately prior to the initiation of proceedings in order to qualify).

The following pages seek to explain the bases for firearms-related deportability and juxtapose a few cultural realities. Like in the context of drug deportability (marked by increasingly permissive social attitudes, yet harsh immigration consequences), firearms present a paradox—a collision course—of legal and practical realities. The highest level of jurisprudence promotes lax firearms control, yet immigration law promotes the harshest possible treatment for firearms offenses: deportability, regardless of how long the immigrant has resided within the United States; and ineligibility for discretionary relief from removal if the offense is (or is the state equivalent of) a federal felony. Firearms deportability also provides a vantage point—another collision course - into cultural perspectives, where law enforcement's penchant for policing and prosecuting poorer and browner persons manifest into disparate conviction rates along race-informed socio-economic lines, which in turn trigger more severe consequences for immigrants relative to similar native (and Whiter) offenders. Finally, a broad canvassing of appellate decisions—from the unheard-of-by-the-general-public *Matter of Chairez-Castrejon* (a significant precedent decision of the Board of Immigration Appeals discussing deportability for firearms offenses and other technical questions) to major decisions from the U.S. Courts of Appeals and mentions by the U.S. Supreme Court, each construing which and how state firearms offenses trigger immigration consequences—will serve to demonstrate a paradox of defense litigation: the tactics of defense counsel, using the analytical "categorical approach" are logically counter-intuitive, and the strict "textualism" of courts belies a sometimes outcome-driven approach. After developing these three themes, the author notes some recurring failings in the reasoning and equitable outcomes in cases impacting immigrant firearm offenders.

Do we believe in enforcement actions targeting firearms, or not?

Your average American can be pretty cavalier about gun ownership; if they want one, they can easily purchase one. Our non-citizen neighbors learn this behavior and can be similarly lackadaisical about these weapons, but the stakes for them are infinitely different, whether they know it or not, until it is too late.[32]

32. Padilla v. Kentucky, 559 U.S. 356 (2010) (extending the right of effective representation of counsel in a criminal proceeding to include, in the case of an immigrant, counseling regarding the obvious and certain immigration consequences that flow from a conviction, including the impact of a conviction on eligibility for discretionary relief from removal); *See* Lee v. United States, 568 U.S. 342 (2013); 133 S. Ct. 1103, 1107 (acknowledging constitutional distinction be-

Few people, citizen or not, know that any firearms-related conviction renders a non-citizen deportable from the United States. Congress has set up a two-level scheme. First, there is a general firearm ground of deportability, under which any conviction related to a firearm or explosive device (as defined by federal statute) is *prima facie* removable from the United States.[33] This means that following an immigrant's conviction, at any time, the Department of Homeland Security (DHS) may initiate removal proceedings[34] against the immigrant by issuing the noncitizen a Notice to Appear.[35] There is no statute of limitations. Immigration court proceedings might immediately follow the conviction or might be launched decades later, whenever the matter comes to the attention of DHS. The immigrant is also subject to mandatory detention[36] if they are released from criminal custody for firearms conviction or other removable offense, if sustained after October 8, 1998[37]

In the second half of the scheme, many firearms offenses are reclassified as "aggravated felonies" under the Immigration and Nationality Act. If an immigrant's offense fits this description, they are

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tween "certain deportation" consequence of uncounseled plea and "near certain" deportation in "Hail Mary" context of asserting right to trial, where overwhelming evidence of guilt).

33. 8 U.S.C. § 1227(a)(2)(C) (Certain firearm offenses).

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

34. In these adversarial administrative proceedings, which take place in the immigration courts of the Department of Justice's Executive Office for Immigration Review, the Department of Homeland Security plays the role of prosecutor and bears the burden of providing deportability, while a deportable immigrant bears the burden of proving their eligibility for discretionary relief. *See* 8 U.S.C. § 1229a(c).

35. The notice to appear is a simple document which must enumerate the factual history supporting an immigrant's removability, as well as the theory of removal, which, as pertinent here is usually for having a criminal conviction. The fundamental purpose of the document is to inform an immigrant when and where to appear to answer those charges. Curiously, the Department of Homeland Security has historically struggled to accomplish this basic task. *See, e.g.*, Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021); Pereira v. Sessions, 138 S. Ct. 2105 (2018) (both construing implications of an incomplete NTA).

36. An alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight. *See* Matter of Patel, 15 I&N Dec. 666 (BIA 1976). However, in IIRIRA, Congress mandated a wide class of persons whom an immigration judge lacks jurisdiction to consider for release, including those, *inter alia*, convicted of a controlled substance offense (save for a single offense of possessing under 30 grams of cannabis), multiple crimes involving moral turpitude, crimes classified as aggravated felonies, and firearms offenses. *See* 8 U.S.C. § 1226(c).

37. Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c) (Supp. II 1996), does not apply to aliens whose most recent release from custody by an authority other than the Immigration and Naturalization Service occurred prior to the expiration of the Transition Period Custody Rules; See Matter of Adeniji, 22 I&N 1102 (BIA 1999).

generally barred from discretionary relief,[38] and face a lifetime ban from returning to the United States post-deportation.[39] While the term "aggravated felony" certainly sounds serious and does require the underlying offense to be a federal felony (or its equivalent),[40] many of the offenses are not terribly serious or dangerous, in this author's view, including any firearm possessory offense by a felon, ad-

38. Since 2016, the primary way for a deportable lawful permanent resident to remain in the United States is by requesting Cancellation of Removal, and litigating the merits of that application (including live testimony of the applicant and character and expert witnesses) before an immigration judge, who ultimately weighs positive and negative equities presented in the case.

The rules are established by statute:

8. U.S.C. §1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

The weighing of discretion is defined through cases. *See, e.g.*, Matter of Matter of Marin, 16 I&N Dec. 581 (BIA 1978) (applicant loses relief where he had committed a drug offense and record showed a poor work history, lack of family ties in the United States Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998) (applicant wins where he committed a de minimis drug offense, but had the endorsement of prosecutors, had assimilated and learned English, previously fought along with U.S. and was consequently torture in Vietnam, leading to him fleeing as a refugee); Matter of Edwards, 20 I&N Dec. 191 (BIA 1990) (applicant loses where had committed serious drug offenses and could not establish rehabilitation, despite having support of ex-spouse and a child with developmental disabilities)

There is another form of relief, "waiving" the ground of deportability by applying for adjustment of status—another way of saying, applying for permanent resident status again. Via a convoluted set of rules, aggravated felonies don't necessarily serve as a bar to a waiver of "inadmissibility" attached to this application, for some immigrants who had originally acquired their residency in the United States, rather than having completed the immigrant visa process from abroad. More importantly, since many firearms offenses are regulatory crimes without any inherent moral element to them, they tend not to trigger inadmissibility as "crimes involving moral turpitude," yet another puzzling immigration-only distinction that requires disqualifying offenses to have elements of scienter and objectively reprehensible (inherently base, vile, depraved) conduct.

39. 8 U.S.C. § 1182 Inadmissibility.

40. 8 U.S.C. § 1227(a)(43) The term "aggravated felony" means-

[. . .]

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

[. . .]

(E) an offense described in-

[. . .]

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

dict, or foreign national with no permanent status in the United States (*e.g.*, those on temporary visas and the "undocumented").[41]

So, How Does A Firearms Defense Work, for Immigrants?

To get more specific, the basics of different ways in which firearms offenses intersect with immigration, there are distinctions known as "deportability" and "inadmissibility,"[42] the two ways immigration law blocks an immigrant from coming here or dooms them to removal, although we are mostly dealing with the latter, deportability, here, when discussing firearms. There are two ways people become deportable. Under the general firearms deportability ground, having any firearms conviction, at any time, triggers the problem. If the crime takes place seven years post-admission, the immigrant might be able to get removability "cancelled" after a trial, in an act of discretion by the Immigration Judge. Alternately there is the harsh reclassification, where deportation is certain, if the crime fits a defined "aggravated felony," and which applies to 1) being the wrong type of possessor (felons, fugitives, drug users, the mentally ill with past institutionalization, and non-immigrants, including the so-called "undocumented"), or 2) having the wrong type of firearm (one that is stolen, imported, exported, a machine gun, or an undetectable ("ghost") gun).

This is extremely general. The crime must involve a "firearm," which is more technical than one might think and introduces the question of who is it that cares sufficiently about the nuances of firearms convictions to litigate about such technical parameters? The first group (and most relevant here) is immigrants who were actually guilty

41. As the immigration statute cross-references the federal criminal statute, it is convenient to paste that here, so the reader can easily appreciate the original text:

> 18 U.S.C. § 922 (g) It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> (2) who is a fugitive from justice [defined as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding"];
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
> (5) who, being an alien—
> (A) is illegally or unlawfully in the United States; or
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)))[.]

42. Criminal inadmissibility is largely limited to controlled substance offenses and "crimes involving moral turpitude." Many crimes related to firearm possession are solely regulatory in nature, so avoid either means for triggering inadmissibility.

of having a firearm illegally, or—at minimum—those who were convicted—at trial or (more likely[43]) through a negotiated guilty plea or one of *nolo contendere*[44] of an offense that facially relates to a firearm. The second group that cares about nuance are those facing a long prison term, typically through 1) an enhancement under the Armed Career Criminal Act (ACCA)— of 15 years—for combinations of prior firearm, drug, or violent crimes or 2) for reentering the United States following a removal order. In the latter context, a 2-year maximum sentence is elevated to a 20-year maximum if a district court finds that the underlying offense (that led to deportation) is properly considered an aggravated felony.

Thus, facing permanent banishment, or long sentences, many people have brought challenges to whether their convictions are properly considered to relate to "firearms." The analysis is the same in both contexts, in immigration and criminal, and the courts borrow from, and apply the precedent of one context in cases involving the other.

THE CATEGORICAL APPROACH

The analysis we call the "categorical approach" is really formalistic—sort of a distant cousin of what both sides think "originalism" or textualism is, where modern statutes' constitutionality is judged against what the court thinks the "framers" might have intended the constitution to cover, in the 1780s. The categorical approach is a tool for determining the consequences of a conviction and entails comparing a modern statute to a set norm that establishes the immigration (or criminal) consequence. In the world of immigration and sentencing, we don't care what the defendant actually did,[45] we care only

43. Based on many factors, some of which are distinct to the United States criminal justice system, about 94 percent of felony convictions at the state level and about 97 percent at the federal level are the result of plea bargains. *See, e.g.*, *The Truth About Trials*, (Nov. 4, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials; L. Devers, *Plea and Charge Bargaining, Research Summary*, Bureau of Justice Assistance, U.S. Dep't of Just., (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf.

44. Deportability may only be triggered by a conviction, which in this context is a term of art that includes actual convictions, plus cases resolved via a withheld adjudication, in which the defendant has been punished in any way, regardless of minimality. *See* 8 U.S.C. § 1101(a)(48).

45. *See* Borden v. United States, 141 S. Ct. 1817, 1822 (2021) (emphasizing that under the categorical approach, "the facts of a given case are irrelevant," and the "focus is instead on whether the elements of the statute of conviction meet the federal standard"); Mathis v. United States, 136 S. Ct. 2243 (2016) ("Acts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. [. . .] They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defen-

about the nature of the statute under which they were convicted—the outcome is "categorical."

In the "categorical approach," we map out the elements of a "generic" crime—whatever crime Congress identified as the definitive standard to trigger the consequence. We locate these in the text of the Immigration and Nationality Act (INA) or in the ACCA, and we compare the elements of those offenses to the state statute of conviction. If the offender's crime necessarily matches the statute's generic norm, the conviction triggers the enumerated consequence. If the statute of conviction is overly broad, relative to the generic standard, then there is no consequence.[46] Why? Because the immigrant benefits from a presumption that their conviction rested on least culpable acts under the statute. This last point was settled in *Moncrieffe v. Holder,* a 2013 Supreme Court case about deportability for drugs.

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dant. And ACCA, as we have always understood it, cares not a whit about them." (internal citations omitted)).

46. There is a massive body of caselaw applying this technique, but for the uninitiated, cases construing "burglary" provide a recurring point of reference. A seminal moment in the "categorical approach" occurred in 1990, when the Supreme court overturned a federal sentence enhancement based upon the defendant's prior conviction for Missouri burglary where, at the time of conviction, not all of the Missouri second-degree burglary statutes included all the elements of generic burglary. In reaching its conclusion the Supreme Court also opined on what exactly "generic" burglary is, concluding that it must be construed in the generic sense, "in which the term is now used in the criminal codes of most States." *See* Taylor v. United States, 495 U.S. 575, 598 (1990). The court found that generic burglary required an action (unlawful entry or remaining), a locational element (limited to a structure or dwelling), and a *mens rea* (the intent to commit an offense). *See id.* At the time, Missouri's locational element applied to non-generic places including a booth, tent, boat, vessel, or railroad car, so Taylor escaped a sentencing enhancement because his conviction did not *necessarily* match the required standard.

More recently, the Supreme Court was called upon to consider California's burglary statute, which did not include an element of "unlawful entry or remaining," in a structure or dwelling, in a case also challenging a sentencing enhancement predicated upon a prior burglary conviction. *See* Descamps v. United States, 570 U.S. 254 (2013). Here, again, the Court concluded that a non-generic crime could not qualify as such a predicate, and the "missing element" of the California offense rendered the offense non-generic. Subsequently, the Court addressed the Iowa burglary statute in a similar challenge, in which a defendant's sentence for sex offenses committed upon a minor was improperly enhanced on the basis of his five prior convictions for Iowa burglary. Iowa's statute required that burglary occur in a structure, which the state went on to define non-generically, as "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an 'occupied structure' whether or not a person is actually present." Mathis v. United States, 136 S. Ct. 2243 (2016). Obviously "land, air, and water vehicle[s]" are non-generic locations for a burglary. While this outcome might seem dictated by *Taylor* and *Descamps,* the Court was required to go further, and ultimately held that in a case of a statute that provided a list of alternative means for perfecting the crime, if that state's precedent did not *require* the factfinder to decide which location was relevant in the instant offense, then for future purposes, that element of the crime was an "indivisible" list of alternatives, and pursuant to *Moncrieffe*, the defendant benefitted from the presumption that the conviction rested upon the least culpable (i.e. the non-generic) option.

Some illustrations may help. Sometimes this exercise *seems* fairly easy because Congress has been clear. For example, in the immigration statute, within the aggravated felony definition, Congress says, essentially, "treat the offense of felon-in-possession of a firearm as an aggravated felony."[47] Thus, it is pretty clear that Congress intended harsh immigration treatment where the federal or state offense included just two elements that the prosecution had to prove to a jury: 1) the defendant possessed a firearm, after 2) the defendant was convicted on any (state or federal) felony.

Sometimes the analysis is harder, such as the case in which Congress created a different category of aggravated felonies, "illicit trafficking in firearms," without defining what it meant by "illicit trafficking."[48] Here, litigants and the courts must engage in a time-intensive exercise of defining that generic norm by canvassing and discovering the majority view in the 50 states, plus significant case law that Congress (of which Congress would have been constructively aware)—at the time of creating the deportation ground.[49] Only after

47. *See* 8 U.S.C. § 1101(a)(43)(E)(ii) (the firearm aggravated felony definition), which cross-references 18 U.S.C. § 922(g)(1), which, in turn makes it "unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year [. . .] to possess any firearm.

48. *See* 8 U.S.C. § 1101(a)(43)(C) (establishing the aggravated felony of "illicit trafficking in firearms or destructive devices (as defined in *section 921 of title 18*) or in explosive materials (as defined in section 841(c) of that title)," thus clearly defining where to find definitions of "firearms," destructive devices," and "explosive materials" but not defining "illicit trafficking").

49. *See e.g.,* Esquivel-Quintana v. Sessions, 581 U.S. ___, 137 S. Ct. 1562 (2017). There, the Supreme Court was presented a case in which an immigrant was at risk of deportation for a statutory rape, so the Court undertook the task of defining who was a "minor" for the aggravated felony "sexual abuse of a minor," pursuant to 8 U.S.C. § 1101(a)(43)(A). The Court's opinion contains an appendix of its national survey, in which it found:

> When "sexual abuse of a minor" was added to the INA in 1996, thirty-one States and the District of Columbia set the age of consent at 16 for statutory rape offenses that hinged solely on the age of the participants. As for the other States, one set the age of consent at 14; two set the age of consent at 15; six set the age of consent at 17; and the remaining ten, including California, set the age of consent at 18. See Appendix, *infra*; cf. ALI, Model Penal Code §213.3(1)(a) (1980) (in the absence of a special relationship, setting the default age of consent at 16 for the crime of "[c]orruption of [m]inors"). A significant majority of jurisdictions thus set the age of consent at 16 for statutory rape offenses predicated exclusively on the age of the participants.

Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571 (2017).

This logic has been applied consistently in the context of other immigration consequences, in which Congress did not define a term via statutory reference. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) (aggravated felony of Murder, with generic approach required via Matter of M-W-, 25 I&N Dec. 748 (BIA 2012)); 8 U.S.C. § 1101(a)(43)(A) (aggravated felony of rape, with generic approach required via *Perez-Gonzalez v. Holder*, 667 F.3d 622, 625-26 (5th Cir. 2012) (finding an offense not "rape" where Montana statute proscribed non-generic conduct such as digital penetration); 8 U.S.C. 1101(a)(43)(G) (aggravated felony of "theft" with sentence is over one year, with generic approach required via Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000) (and requiring an element of "taking")); 8 U.S.C. § 1101(A)(43)(G) aggravated felony of Re-

doing that work can a court compare the elements of the defendant's actual conviction against that generic standard. The larger point is that by having a formal "approach," the courts conceive of a potentially objective system to render predictable results for immigrants and those attorneys litigating and courts deciding their cases. For better or worse, of course, that system requires lawyers and courts to put in the work to apply the approach in an intellectually honest way. Further examples require presentation.

EXAMPLES OF FIREARM DEFENSE THEORIES IN THE COURTS

A first defensive posture in cases alleging removability for a conviction related to a firearm is to identify some daylight in the statute, some space to argue that the crime was not *necessarily* a firearm offense. A classic masterpiece on this argument comes from a 1996 case published by the Board of Immigration Appeals, *Matter of Pichardo*.[50] Mr. Pichardo possessed a gun at the time of his offense. During the criminal proceedings in 1988, he admitted to the criminal judge he had a gun, leading to his New York conviction for Criminal Possession of a Weapon in the Third Degree. He later also conceded to the immigration judge, hearing Pichardo's case and about to order his removal, that he had a gun.[51] Pichardo was convicted under the New York Statute typically used to prosecute criminality involving guns, Section 265.02 of the New York Penal Law.[52] This statute makes some sixteen

ceipt of stolen property, with generic approach required via Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000)); 8 U.S.C. § 1101(a)(43)(S) (aggravated felony of perjury, with generic approach required via Matter of Alvarado, 26 I&N Dec. 895 (BIA 2016); 8 U.S.C. § 1101(a)(43)(K) (aggravated felony of offense "related to owning . . . a prostitution business," with generic approach required via Matter of Ding, 27 I&N Dec. 295 (BIA 2018)); 8 U.S.C. § 1101(a)(43)(Q) (aggravated felony of offense "relating to failure to appear by a defendant for service of [a criminal] sentence, punishable by sentence of 5+ years, with generic approach required via Matter of Adeniye, 26 I&N Dec. 726 (BIA 2016)); 8 U.S.C. § 1101(a)(43)(R) (aggravated felony of offense "relating to commercial bribery [. . .]"), with generic approach required via Matter of Gruenangerl, 25 I&N Dec. 351 (BIA 2010)); 8 U.S.C. § 1101(a)(43)(S) (aggravated felony of offense "relating to obstruction of justice [. . .]"), with generic approach required via Matter of Cordero-Garcia, 27 I&N Dec. 652 (BIA 2019)).

50. Matter of Pichardo-Sufren, 21 I&N Dec. 330 (BIA 1996).

51. *Id.* at 3313 ("The Immigration Judge relied upon the Certificate of Disposition, the respondent's admission that he had been convicted of a weapons violation, and the respondent's deportation hearing testimony that the weapon involved was a gun").

52. At the time Pichardo was convicted, section 265.02 provided as follows: A person is guilty of criminal possession of a weapon in the third degree when: (1) [He] commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; (2) [He] possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or (3) [He] knowingly has

references to firearms within its five sections, incorporating everything from machine guns to loaded guns, to modified and concealed guns to massive collections of guns.[53] It also has a recidivist feature, for persons previously convicted of other crimes, via reference to another weapons statute, Section 265.01 of the New York Penal Law, following conviction of yet another crime.[54]

Taking a look at Section 265.01 of the New York Penal Law[55] reveals several *more* illegal acts involving firearms, but those are obscured by a large list of some twenty-four non-firearm weapons (billy-clubs, "Kung Fu" stars, etc.) that could be the underlying basis for a conviction under either Section 265.01 or (by reference) 265.02 of the New York Penal Law. Mr. Pichardo successfully argued that while he factually had possessed a firearm, as a matter of law, his conviction did necessarily relate to a firearm, so he could escape deportability on that basis.[56]

A similar result recently emerged from the Eleventh Circuit in a case construing the nature of Florida's crime Felon-in-Possession of a Weapon or Firearm.[57] In *Simpson v. United States Attorney General*,[58]

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in his possession a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun; or [(4) He possesses any loaded firearm. Such possession shall not, except as provided in subdivision one, constitute a violation of this section if such possession takes place in such person's home or place of business.] (5)(i) [He] possesses twenty or more firearms; or (ii) [he] possesses a firearm and has been previously convicted of a felony or a class A misdemeanor defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person's home or place of business.

53. *Id.*

54. *Id.* at § 265.01.

55. Section 265.01 of the New York Penal Law establishes that "[a] person is guilty of criminal possession of a weapon in the fourth degree when: (1) He [ ] possesses any firearm, electronic dart gun, electronic stun gun, switchblade knife, pilum ballistic knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wristbrace type slingshot or slungshot, shirken or "Kung Fu star"; or (2) He [ ] possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, undetectable knife or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or (3) He [ ] knowingly has in his possession a rifle, shotgun or firearm in or upon a building or grounds, used for educational purposes, of any school, college or university, except the forestry lands, wherever located, owned and maintained by the State University of New York college of environmental science and forestry, without the written authorization of such educational institution; or . . . (5) He [ ] possesses any dangerous or deadly weapon and is not a citizen of the United States . . . ."."

56. *Id.*

57. FLA. STAT. § 790.23 (2016). Felons and delinquents; possession of firearms, ammunition, or electric weapons or devices unlawful.— (1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been: (a) Convicted of a felony in the courts of this state[.]

the court stressed a principle of the categorical approach, that to determine how a state statute might be charged (particularly if its components may be charged in the alternative), the courts must defer to the rulings of that state's own courts.[59] The court found that Florida's curious statute could be charged in only two ways, depending on whether the defendant allegedly 1) "owned" or "possessed" one of a certain range of prohibited items or 2) carried a concealed prohibited item.[60] Those prohibited items were a "firearm, ammunition, or electric weapon or device" or "a tear gas gun or chemical weapon or device." State precedent dictated that, as a matter of law, the specific identity of that prohibited item was not an element of the offense.[61] This was relevant because, in Florida, prosecutions routinely charge that the offense *factually* involved a firearm in an act that was superfluous detail since, *legally,* the conviction related to an unspecified item from the list.

Ultimately, the Eleventh Circuit came down with a logical decision that resembled the BIA's in *Pichardo*, first holding "the least culpable conduct for the possession offense is the possession by a felon of ammunition, and the least culpable conduct for the concealed carrying

58. *See generally* Simpson v. Attn'y Gen., 7 F.4th 1046 (11th Cir. 2021).

59. Justice Kagan recently offered a succinct clinic on the various ways play out in determining state intent in the multi-pronged criminal statute:

> This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question: The listed premises in Iowa's burglary law, the State Supreme Court held, are "alternative method[s]" of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle. When a ruling of that kind exists, a sentencing judge need only follow what it says. Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.

Mathis v. United States, 579 U.S. 500, 517-18 (2016).

60. *Id.*

61. *Simpson* provides a helpful illustrative example of how the categorical approach should apply the lessons of *Mattis.* There, the Eleventh Circuit pointed to Florida cases to support its contention that FLA. STAT. 790.23(1)(a) creates only two separate crimes, citing James v. State, 16 So.3d 322 (Fla. 4th DCA 2009) (conviction reversed where the trial court committed fundamental error by instructing the jury on the nonexistent crime of possession of a concealed weapon by a convicted felon instead of carrying a concealed weapon by a convicted felon); *Accord* Williams v. State, 48 So.2d 192, 193-194 (Fla. 2nd DCA 2010) (reiterating that the statute contains only two subparts and finding "the error in this case stems from the fact that the information intermingled these two subparts), and Wiggins v. State, 253 So.3d 1196, 1199 (Fla. 1st DCA 2018) (similarly finding the repeated mislabeling by the trial court of the offense as "possession of a concealed weapon by a convicted felon" which "made it possible for the jury to convict Appellant of the broader and nonexistent offense, thus making the erroneous instructions fundamental error, as 'no one may be convicted of a nonexistent crime'").

offense is the concealed carrying of a dirk or billy club.[62] The Court then concluded that since both of these scenarios are broader than the immigration statute's requirement, through its cross-reference to the definition of a firearm in the federal criminal code, that deportability turns on a crime involving a *firearm.*[63] Both of the Florida sub-offenses in 790.23(1) are broader than what the applicable federal law requires for deportability, so there is no consequence of that crime.[64] And that, for purposes of the categorical approach, is the end of the matter.[65]

By this point, the reader is hopefully catching on to the theory: so long as the elements of crime do not necessarily establish that the offense related to a firearm, the defendant has hope of avoiding an amplified consequence for that offense. Only slightly more technical among the cases illustrating this line of defense, the Seventh Circuit has recently explored the parameter of the Illinois felon-in-possession statute, 720 ILCS 5/24-1.1(a),[66] raising a more precise question of "what is a firearm?"[67] The crime was pretty simple. After having been convicted of a felony in Illinois, Mr. Rodriguez-Contreras was found in possession of a weapon, was convicted, and spent 30 months in prison for that crime.[68] If his weapon necessarily matched the elements of 18 U.S.C. § 922(g)(1), then Rodriguez-Contreras would also be removed from the United States.[69]

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62. Simpson v. United States Att'y Gen., 7 F.4th 1046, 1054 (11th Cir. 2021) (citing *Mathis*).
63. *Id.*
64. *Id.*
65. *Id.*
66. 720 ILCS 5/24-1.1(A) Unlawful Use of Possession of Weapons by Felons or Persons in the Custody of the Department of Corrections Facilities

> (a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act [*720 ILCS 5/24-1*] or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Illinois State Police under Section 10 of the Firearm Owners Identification Card Act [*430 ILCS 65/10*].

The curious reader may note that the list of weapons incorporated by reference is at least as exhaustive as in the New York statute at issue in *Pichardo. See* 720 Ill. Comp. Stat. Ann. 5/24-1

> (a) A person commits the offense of unlawful use of weapons when he knowingly:
> (1) Sells, manufactures, purchases, possesses or carries any bludgeon, black-jack, slung-shot, sand-club, sand-bag, metal knuckles or other knuckle weapon regardless of its composition, throwing star, or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or a ballistic knife, which is a device that propels a knifelike blade as a projectile by means of a coil spring, elastic material or compressed gas[. . .].

67. Rodriguez-Contreras v. Sessions, 873 F.3d 579, 580 (7th Cir. 2017).
68. *Id.*
69. *Id.*

Because the statute could be prosecuted as specifically relating to a firearm (rather than a "weapon," which would be obviously overinclusive), Rodriguez-Contreras had to look deeper, launching an inquiry into whether what Illinois called "firearms" might be overinclusive. The Seventh Circuit found that since Illinois' list of firearms including those powered by either explosive force (what we think of as firearms) or by compressed air (what we think of as air rifles), and since air rifles are by definition not "firearms," Rodriguez-Contreras must escape deportability.[70]

Very recently, the BIA took up a similar challenge to whether a federal statute triggered (federal) immigration treatment as a general firearms offense (not an "aggravated felony),[71] holding that it did not. In *Matter of Ortega-Quezada,* the immigrant respondent was convicted in 2020 of violating 18 U.S.C. § 922(d), which provides in relevant part: "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person [is included within one of nine categories of persons]."]." On its face, the statute covered two different actions (selling and disposing) involving two different things (either firearms or ammunition).[72] The variety of combinations presented a classic opportunity to apply the categorical approach, comparing those various options to the ground of deportability.[73] The BIA correctly found that since "disposing" is not on the list of deportable acts (which include purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying), and since "ammunition" is not on the list of deportable items (which are limited to firearms and

70. In a nice piece of theatre that deserves repetition, the Seventh Circuit invoked the Victorian Era's greatest fictional detective:

> Sherlock Holmes called Sebastian Moran the second most dangerous man in London (behind only Moriarty) because he killed at a distance with an air rifle, a quiet weapon that allowed him to avoid detection. See A. Conan Doyle, *The Adventure of the Empty House*, in *The Return of Sherlock Holmes* (1905). It does not surprise us that Illinois prosecutes felons who possess such weapons. This means that the state statute is indeed broader than its federal counterpart and, under the reasoning of *Esquivel-Quintana* and its predecessors, cannot be treated as an "aggravated felony."

Rodriguez-Contreras v. Sessions, 873 F.3d 579, 581 (7th Cir. 2017).

71. 8 U.S.C. § 1227(a)(2)(C), ""Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable."."

72. *Id.*

73. *Id.*

destructive devices),[74] the federal statute was doubly overinclusive on its face.[75] The BIA went on to conclude that the options were "indivisible" as they could be charged in the alternative in a single indictment; there was no distinction in the level of punishment depending on what action or objection was involved; and that federal precedent had found that double jeopardy prevented multiple convictions for the same act, if that act involved either both a gun and its ammunition or multiple guns.[76] Thus, in addition to resolving the question of deportability for this particular federal statute, the case reinforced the notion that multi-pronged chargeability is a hallmark of an indivisible statute.[77]

As earlier noted by the Fifth Circuit, in a case also addressing 18 U.S.C. § 922(d), although the general (non-aggravated felony) deportation provision encompasses a wide variety of conduct, that statute "does not state that 'any type of firearm offense' is a basis for deportation."[78] Further, the plain language immigration statute clearly fails to reach "the entire panoply of firearms offenses."[79] The Circuit made these comments in a typical scenario of a Mexican citizen, Mr. Flores-Abarca, who had lived in the United States without either lawful status or major drama from 1988 to 2004, when he pleaded guilty to the Oklahoma misdemeanor offense of transporting a loaded firearm in a motor vehicle, in violation of Oklahoma Statutes Title 21

74. It is a basic tenet of statutory interpretation that "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *See e.g.* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

75. The BIA offered definitions of the phrase "otherwise dispose of," which it interpreted to mean "to transfer a firearm [or ammunition] so that the transferee acquires possession of the firearm," including through gratuitous transfers that do not involve compensation," and noted that "disposal [of] occurs when a person 'comes into possession, control, or power of disposal of a firearm.'" That BIA found that, in contrast, 8 U.S.C. § 1227(a)(2)(C), does not reach gratuitous transfers without compensation.

76. *Id.*

77. *See also* Richardson v. United States, 526 U.S. 813, 817 (1999) (explaining that "a federal jury need not always decide unanimously . . . which of several possibilities means the defendant used to commit an element of the crime."); *Descamps*, 133 S. Ct. at 2288 (citing *Richardson*, 526 U.S. at 817) ("[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense[.]");[.]"); *see also* United States v. Shlei, 122 F.3d 944 (11th Cir. 1997); Matter of Chairez-Catrejon, 26 I&N Dec. 819, 824 (BIA 2016) (if state precedent shows that a jury *can* find a defendant guilty of violating the statute without coming to an agreement between competing options of how they did it, the statute must be indivisible)).

78. Flores-Abarca v. Barr, 937 F.3d 473, 480 (5th Cir. 2019).

79. *Id.*

§ 1289.13.[80] Ten years later, the Department of Homeland Security initiated removal proceedings against Flores-Abarca, alleging that he was present in the United States without having been admitted or paroled.[81] As a form of relief, he sought "cancellation of removal" based on the potential hardship to his four children if he was removed, but his eligibility turned on not being deportable for any enumerated criminal reason, including not having a firearms conviction.[82] Upon analysis, the Fifth Circuit determined that under Oklahoma law, one could be guilty of transporting a weapon that a passenger possessed, thus distinguishing between the act of transport and the act of possession.[83]

A couple of other examples of "plain reading of the statute" outcomes resulting in pro-immigrant precedent have occurred in the context of the federal felony definition. One required scrutiny of 18 U.S.C. § 922(g), which establishes the offense of being illegally in the United States with a firearm, with the elements of the crime being 1) possession and 2) lacking immigration status.[84] The immigrant defendant in *Rehaif v. United States* was unlawfully in the United States. He had, in fact, possessed a federally-defined firearm (the case was a federal prosecution, after all, launched after Mr. Rehaif apparently flunked out of college—thus compromising his student visa - and sometime later took some target practice at a gun range).[85] The Eleventh Circuit upheld the conviction, which was reliant upon a flawed jury instruction, in that the jury did not have to find *scienter* in both elements.[86] The Supreme Court reversed, applying decades of prece-

80. "The elements of Flores Abarca's Oklahoma offense were: (1) knowingly; (2) willfully; (3) transporting; (4) a specified firearm; (5) that is loaded; (6) in the interior/(locked exterior compartment)/trunk; (7) of a motor vehicle; (8) on a public highway or roadway."." *See* OKLA. UNIF. JURY INSTR. CR 6-37A. Flores-Abarca, 937 F.3d at 482 (5th Cir. 2019).

81. Unlawful Presence and Inadmissibility, U.S. Citizenship and Immigration Services (updated June 24, 2022), https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility.

82. *Id.*

83. *See* Flores-Abarca, 937 F.3d at 483 (5th Cir. 2019) "As we have been clear, 'dominion over the vehicle . . . alone cannot establish constructive possession of a weapon found in the vehicle, particularly in the face of evidence that strongly suggests that somebody else exercised dominion and control over the weapon.'"' United States v. Wright, 24 F.3d 732, 735 (5th Cir. 1994)); *see also* United States v. Melancon, 662 F.3d 708, 713 (5th Cir. 2011) ("("Where two people jointly occupy a space, dominion over the space is not enough by itself to establish constructive possession."). Although knowledge of a firearm's presence may be *evidence* of possession, knowing transportation does not conclusively establish constructive possession as a matter of law."

84. 18 U.S.C. § 922(g).

85. *See generally* Rehaif v. United States, 139 S. Ct. 2191 (2019).

86. *Id.*

dent that have consistently read *mens rea* into criminal statutes, *not* out of them.[87]

Similarly, the non-citizen prevailed in a challenge to a conviction under 18 U.S.C. § 922(g) in a case where he had not yet entered the United States.[88] The case was a matter of timing. The plain language of the statute required that the defendant be proven to be illegally within the U.S., but the defendant—a Mr. Lopez-Perera, of Mexico and without any apparent basis to lawfully enter, but his false claim to U.S. citizenship and California security guard identification card were unpersuasive to officers—was caught at the border and never passed through the control of Immigrations and Customs Enforcement.[89] The Circuit Court held that the defendant's lack of entry was dispositive in the case, in that he had failed to perfect an element of the crime.[90] To the extent that the case is remarkable, it is that the court took the time to examine 1) the legislative history of the offense, and thus discerned congressional intent (Congress' targeted concern was illegal gun sales to tourists, not smuggling weapons at the border) and 2) the Federal Register's notice and comments, including those from the former Immigration and Naturalization Service, to clarify terms and definitions, which resulted in incorporation of definitions from the Immigration and Nationality Act.[91] Following this exercise, the court determined that the term "entry" is a term of art requiring both physical and legal presence in the United States, and it would be disin-

87. *See* Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009) (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 79 (1994)) (Stevens, J., concurring) (in context of transmission of sexually illicit materials), referencing Liparota v. United States, 471 U.S. 419 (1985) (applying the "intent must adhere to each element" concept to a food stamp fraud statute); *See* Global-Tech Appliances, Inc. v. SEB S.A., 131 S.Ct. 2060 (2011) (imputing a "willful blindness" requirement into an element of a patent infringement statute that was silent on *mens rea*); to firearms offenses, *See* Rosemond v. United States, 134 S.Ct. 1240 (2014) (imputing *mens rea* requirement of knowing that conspirator would have a gun, in order to be convicted of aiding and abetting a firearm offense); to fraud crimes, *See* Loughrin v. United States, 134 S.Ct. 2384 (2014) (imputing an intent— specifically, the purpose to defraud *a bank*— to a fraudulent check scheme) (Alito, J., concurring in part and in the outcome argued that the *higher* mens rea of "willfulness" should be imputed to facially ambiguous elements); *See* Elonis v. United States, 135 S.Ct. 2001 (2015) in the context of interstate threats via the internet, noting "the basic principle that 'wrongdoing must be conscious to be criminal," Morissette v. United States, 342 U.S. 246, 250 (1952) ("mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it"); McFadden v. United States, 135 S.Ct. 2298, 2302 (2015) (requires proving that the defendant knew he was dealing with "a controlled substance . . . even if he did not know its identity").

88. *See generally* United States v. Lopez-Perera, 438 F.3d 932 (9th Cir. 2006).

89. *Id.*

90. *Id.*

91. *Id.*

genuous to criminalize conduct that did not satisfy that term of art.[92] Thus, the lack of entry was dispositive; Lopez-Perera had not committed the federal crime.

TROUBLING EXAMPLES

The foregoing examples hopefully illustrate that, in many cases, intellectual honesty leads to obvious holdings. The plain language of the statute,[93] particularly when illustrated by state cases, should lead to

92. In another context, the government would have surely argued that the defendant was not eligible for bond, as an "arriving alien," *see* 8 U.S.C. § 1226(c), based on his unsuccessful entry attempt, because he had not yet been "free from official restraint" and not completed the "entry" process, before being taken into custody.

93. The nuances of the "realistic probability" test are beyond the scope of this paper, but it serves as a check on arguments that outrageous hypothetical conduct *might* fit under the target statute. The majority view is that the plain language of the statute, alone establishes that the overbreadth was "realistic." *See* Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007) (In assessing whether a state statute is overbroad compared to the federal statute, courts must consider only conduct for which there is a "realistic probability" a person would actually be prosecuted under the statute); *See* Swaby v. Yates, 847 F.3d 62 (1st Cir. 2017) (where the state controlled substances schedule specifically listed a substance not included in the federal schedules, the prosecution of crimes involving that substance is automatically a realistic probability); Hylton v. Sessions, 897 F.3d 57, 63 (2d Cir. 2018) (The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense); Zhi Fei Liao v. Att'y Gen., 910 F.3d 714, 724 (3d Cir. 2018) ("Put simply, the elements leave nothing to the 'legal imagination,' because they show that one statute captures conduct outside of the other." United States v. Aparicio-Soria, 740 F.3d 152, 158 (4th Cir. 2014) (en banc), Gordon v. Barr, 965 F.3d 252, 260 (4th Cir. 2020) (the realistic probability test met where state supreme court decision held a defendant could be prosecuted for the non-generic conduct. Alternatively, review subsequent legislative action to determine the legislative intent of statute); United States v. Camp, 903 F.3d 594, 602 (6th Cir. 2018) ("[w]here the meaning of the statue is plain, the defendant need not provide a case to demonstrate a realistic probability that the statute is broader than the generic offense"); United States v. Ruth, 966 F.3d 642, 648 (7th Cir. 2020) (A facially overbroad state drug statute (there via Illinois' over-inclusivity of cocaine isomers relative to the federal Controlled Substances Act, could not serve as basis for sentence enhancement in an ACCA case); Gonzalez v. Wilkinson, 990 F.3d 654, 656 (8th Cir. 2021) (where "the state offense . . . is broader than the federal offense," there is no additional requirement of proving realistic probability through a prosecution), Lopez-Aguilar v. Barr, 948 F.3d 1143, 1147 (9th Cir. 2020) ("[a] state statute expressly defin[ing] a crime more broadly than the generic offense" demonstrates realistic probability and that "the relative likelihood of application to non-generic conduct is immaterial"); United States v. Cantu, 964 F.3d 924, 934 (10th Cir. 2020) ("[A] defendant need not come forward with instances of actual prosecution when the 'plain language' of the statute proscribes the conduct at issue." (citing United States v. Titties, 852 F.3d 1257, 1274 (10th Cir. 2017); Aspilaire v. United States Att'y Gen., 992 F.3d 1248, 1255 (11th Cir. 2021) ("[A] petitioner may demonstrate that 'statutory language itself, rather than the application of legal imagination to that language, creates [a] realistic probability that a state would apply the statute to conduct beyond' the reach of a favorable statute." (quoting Ramos v. United States Att'y Gen., 709 F.3d 1066, 1072 (11th Cir. 2013)). The minority view requires an exemplar prosecution in all instances, despite the fact that in the case of indivisible statutes, such a specific prosecution will never exist. *See* United States v. Castillo-Rivera, 853 F.3d 218 (5th Cir. 2017) (Without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'"); *See* Alexis v. Barr, 960 F.3d 722 (5th Cir. 2020) (Although the Texas cocaine statute includes isomers of cocaine not included in the federal statute, there is no realistic probability of prosecution for isomers because no exam-

accurate legal conclusions based on the elements of the crime, regardless of the underlying facts. If only that were always the case. For example, the Ninth Circuit has now overruled its 2011 decision in which it found that general firearm deportability applied to the case of a Mexican man who, fourteen years after unlawfully entering the United States, pleaded no contest to carrying a weapon concealed within a vehicle in violation of California Penal Code Section 12025(a).[94] There, the immigrant had even presented state case law to support his proposition that the state law was overinclusive: "Specifically, Gil notes that a state court has said, in regard to § 12025(a)(3), that it is "theoretically possible for a person to cause to be concealed a firearm that is not in his or her possession, custody, or control, such as by conduct that conceals from view a firearm that is in the possession and control of another person."[95]

In other troubling cases, the federal offense of "possession of ammunition by convicted felon," 18 U.S.C. 922(g) was found to trigger deportability as a firearms offense.[96] As discussed above, the "categorical approach" is dependent upon giving weight to the words used

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ple such prosecution was demonstrated); United States v. Burris, 912 F.3d 386, 397-98 (6th Cir. 2019) (requiring example cases even where statutes "appear to criminalize more conduct").

94. Gil v. Holder, 651 F.3d 1000, 1002-03 (9th Cir. 2011), reversed by United States v. Aguilera-Rios, 769 F.3d 626 (9th Cir. 2014). The relevant statute provides: (a) A person is guilty of carrying a concealed firearm when he or she does any of the following: (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person. (2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the per son. (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

95. The referenced case, People v. Padilla, 98 Cal. App. 4th 127, 133-38, 119 Cal. Rptr. 2d 457, 461 (2002), established various non-possesories in which a gun could be transported in a vehicle, by explaining the legislative history:

> The already existing subdivision (a)(1) and (2) punished those who (1) carried a gun "concealed within any vehicle which is under his or her control," or (2) carried a gun "concealed upon his or her person." The report of the Assembly Committee on Public Safety described the new provision, subdivision (a)(3), as follows: "Passengers Hiding Guns. a) Current law. Under current law, if a gun is carried concealed in a vehicle and it is not on the person of a passenger, then only the driver may be prosecuted for a concealed carrying violation. The Los Angeles District Attorney's office has had several cases wherein passengers who were gang member[s] hid guns in vehicles in such a manner that only the driver may be prosecuted. In addition, there have been cases wherein the passenger 'set up' the driver by hiding the gun unbeknownst to the driver. b) At the request of the Los Angeles District Attorney's office, this bill amends Section 12025 to specifically make it a crime applicable to the occupant when the occupant of the vehicle causes to be carried a concealed handgun within any vehicle in which he or she is an occupant."

96. 18 U.S.C. § 922(G).

both by the legislature defining a crime and by Congress in establishing a ground of deportability.[97]

NEXT GENERATION ARGUMENTS: COULD THE STATUTE RELATE TO A NON-FIREARM?

An entire generation of theories goes a step further than the above cases, which mostly turned upon identifying language within a criminal statute that incorporated non-firearms into the offense. Of course, many crimes explicitly refer to "firearms," only, as an element of the offense. Going a step further, one might wonder, "what is a firearm?" and, by extension, question if all firearms are equally bad. That would be an astute consideration.

"Firearm" is usually a term of art defined within the criminal statute, and sometimes the term is non-exclusive to firearms. In other words, some firearms are not "firearms." As discussed above, the Seventh Circuit has found that the Illinois firearms statute includes non-firearms such as air rifles. More typically, a state statute has some carve-outs for non-criminal treatment of "special" firearms. These often include antique firearms, replicas of antique weapons, and muzzleloading guns powered by black powder. Defendants and immigrants have expended considerable effort exploring the legal implications of such statutory schemes. A hugely important case for the immigration bar, addressing the proper functioning of the categorical approach and which the BIA had to decide five times, *Matter of Chairez-Castrejon,* involved a Utah firearm statute that lacked an "antique firearm" exception. There, the immigrant argued that since the Utah definition did not *exclude* antique weapons, it must apply to antique weapons.[98] Thus, the argument went, the statute was overinclu-

97. It is a basic tenet of interpreting texts that a legislature's use of a phrase in one place but not another indicates a purposeful distinction. This leads to readings that are internally consistent, true to the plain language of the text, and fully credit distinct language and avoid surplusage or superfluity. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (Thomson/West, 2012) (Explaining, *inter alia*, the Negative-Implication Canon, [that] [t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*); *see also* THE WRITING CENTER, Georgetown University Law Center, *A Guide To Reading, Interpreting And Applying Statutes* (2017), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf (explaining same).

98. The procedural history of Chairez's immigration case is remarkable and bears summarizing, to illustrate the price some immigrants pay in order to fully litigate their cases. Chairez became a lawful permanent resident of the U.S. in 1990 and was convicted of felony discharge of a weapon in 2012, resulting in 44 days served in jail, pursuant to an indeterminate sentence of up to five years imprisonment. Taken into custody in March 2013 under a theory that he was subject to mandatory detention for the firearms offense, Mr. Chairez denied his removability before

sive, and under the *Moncrieffe* presumption, the conviction must necessarily relate to a non-firearm.[99] The immigration statute explicitly references the federal definition of "firearm" as the standard upon which removability will be considered.[100] The term "firearm" means (A) any weapon (including a starter gun) that will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer or (D) any destructive device.[101] *Such a term does not include an antique firearm*.[102] The Utah statute[103] violated by Mr. Chairez happened not to include any exceptions to its

the immigration judge. Ordered removed, he appealed to the BIA which, after a round of supplemental briefing, remanded the case back to the Immigration Court in July 2014. The DHS sought reconsideration of that decision based on intervening law of the Tenth Circuit, which the BIA eventually granted, reversing itself in February 2015, and remanding the case again. Mr. Chairez denied the charges yet again and sought newly available relief before the immigration judge, who ruled against him again, so Chairez appealed again to the BIA. As luck would have it, in October 2015, the Attorney General would certify his case to herself in order to finally issue a decision resolving the question of the categorical approach and "divisibility." Eventually, the BIA would re-decide the case in late 2016, ruling for Chairez, based on yet another intervening decision, *Mathis,* from the Supreme Court. By then, Mr. Chairez was free from detention on a grant of habeas corpus by the U.S. District Court of Utah, based on the prolonged and disproportionate length of detention, which at the time of order was over 1,100 days "over twenty-five times his original sentence." *See* Chairez-Castrejon v. Bible, 188 F. Supp. 3d 1221, 1228 (D. Utah 2016).

99. *Id.*

100. 8 U.S.C. § 1227(a)(2)(C).

101. *Id.*

102. 18 U.S.C. § 921(a)(3) (emphasis added). In turn, the term "antique firearm" is defined at 18 U.S.C. § 1101(a)(16), as: (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or (B) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or (C) any replica of any firearm described in subparagraph (A) if such replica— (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or (D) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

103. UTAH CODE ANN. § 76-10-508.1 (1) Except as provided under Subsection (2) or (3), an individual who discharges a firearm is guilty of a third degree felony punishable by imprisonment for a term of not less than three years nor more than five years if: (a) the actor discharges a firearm in the direction of one or more individuals, knowing or having reason to believe that any individual may be endangered by the discharge of the firearm; (b) the actor, with intent to intimidate or harass another or with intent to damage a habitable structure as defined in Section 76-6-101, discharges a firearm in the direction of any individual or habitable structure; or (c) the actor, with intent to intimidate or harass another, discharges a firearm in the direction of any vehicle.

definition of a firearm.[104] Despite Mr. Chairez's argument that the Utah statute was *facially* overinclusive, the BIA held that Chairez had failed his burden to prove that Utah actually prosecutes these more "exceptional" weapons, *i.e.,* some weapons excused from the federal definition (such as muzzleloading rifles or pre-1898 rifles and/or their replicas), under its firearms statutes, since the Utah statute was silent in this regard.[105]

The "antique firearm theory" did not originate in *Chairez.*[106] The Supreme Court predicted this theory in *Moncrieffe* (2013) and even instructed how to address it, namely that a litigant arguing this theory would have to prove, via an exemplar prosecution, that their state notices, cares about, and prosecutes facts relating to these non-generic firearms.[107]

Subsequently, following the template of *Chairez,* immigrants have had some wins and some losses, some of which are logical, while others are unsettling. For example, in 2020, the Second Circuit struck down deportability based on Connecticut's definition of a "pistol or revolver."[108] New York's firearm definition suffered the same fate two months later.[109] Thus, those states joined California, as the Ninth

104. UTAH CODE ANN. § 76-10-501, Definitions

a) "Firearm" means a pistol, revolver, shotgun, short barreled shotgun, rifle or short barreled rifle, or a device that could be used as a dangerous weapon from which is expelled a projectile by action of an explosive.

105. "Was" being the operative word, as Utah ratified its antique firearm exception as of May 12, 2015.

106. *See generally* Moncrieffe v. Holder, 569 U.S. 184 (2013).

107. Moncrieffe, 569 U.S. at 205-06, 133 S. Ct. 1678, 1693 (2013) ("[T]he Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like §1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for 'antique firearm[s],' 18 U.S.C. §921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But *Duenas-Alvarez* requires that there be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.' 549 U.S., at 193, 127 S. Ct. 815, 166 L. Ed. 2d 683. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.").

108. *See* Williams v. Barr, 960 F.3d 68 (2nd Cir. 2020) (finding CONN. GEN. STAT. § 29-35(a), as amended in 1999, specifically criminalized possession and transportation of antique weapons, as explained by the Connecticut Supreme Court in State v. Lutters, 270 Conn. 198, 210 (Conn 2004)).

109. *See* Jack v. Barr, 966 F.3d 95 (2nd Cir. 2020) (rejecting deportability for conviction under N.Y. PENAL LAW §§ 265.03 (both attempted, and actual, unlawful possession of a weapon) and 265.11(2) (criminal sale of a firearm), in a decision in which the Circuit relied upon the New York statute's facial overbreadth, without requiring any exemplar prosecution, where New York excluded certain unloaded muzzleloading and antique weapons but criminalized loaded weapons, in obvious dissonance with the federal definition which excludes all muzzleloaders and also all pre-1898 guns and their replicas).

Circuit had found California's definition inclusive of antique firearms in 2014.[110]

NEGATIVE OUTCOMES

Not every intellectual argument goes according to the immigrant's litigation plan. Again, typically, if the statutory language establishes the inequivalence of the federal exception, the immigrant should win. Nearly every federal circuit has precedent to that effect, although some circuits require an exemplar state prosecution to demonstrate the statutory overbreadth. In *reality*, some courts might typically accept the statutory language—the "textual" path—but when the immigrant would win, the court slides in the extra "exemplar prosecution" test.[111] Sometimes even worse, as in a 2021 decision of the Eleventh Circuit.[112] Florida's firearm definition has an antique firearm exception[113] that is distinguishable from the federal exception, in some ways more inclusive, in some ways less. In Florida, an antique loses its "non-firearm" status if it is used in the commission of a

110. *See* United States v. Aguilera-Rios, 769 F.3d 626 (9th Cir. 2014) (Defendant's illegal reentry conviction reversed where underlying removal order was invalid as it was based on a conviction for unlawful firearms possession under CAL. PENAL CODE § 12021(c)(1) (repealed), which lacked an antique firearms exception and thus was not a categorical match for the Immigration and Nationality Act's firearms offense described in 8 U.S.C. § 1227(a)(2)(C)).

111. *See e.g.* United States v. Rodriguez-Gamboa, 972 F.3d 1148 (9th Cir. 2014) (In the context of drug deportability and the quest to find distinctions between the federal and state definitions of certain drugs—at the molecular level—the Ninth Circuit observed that California law prohibits the possession for sale of both the geometric and optical isomers of methamphetamine, via CAL. HEALTH & SAFETY CODE §§ 11033, 11055(d)(2), 11378 (1985). In contrast, the Federal definition includes only "optical isomers," per 21 U.S.C. § 802(14). There, the decision turned on the actual impossibility of prosecution for geometric methamphetamine isomers based on a scientific evidence that geometric isomers in meth do not exist); *c.f.* Aguirre-Zuniga v. Garland, 37 F.4th 446, 448 (7th Cir. 2022 (Indiana methamphetamine, defined at IND. CODE § 35-48-4-1.1 (2017), was found to be facially overbroad relative to the federal standard, at the time of petitioner's conviction, the Indiana legislature chose to limit the types of isomers defining other drugs but did not do so with methamphetamine. Thus, the court must read the schedules to define methamphetamine as including at least optical and positional isomers.).

112. *See* Aspilaire v. United States Att'y Gen., 992 F.3d 1248 (11th Cir. 2021).

113. FLA. STAT. § 790.001 (2016). Definitions. -

> 1) "Antique firearm" means any firearm manufactured in or before 1918 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1918, and also any firearm using fixed ammunition manufactured in or before 1918, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.
>
> . . .
>
> 6) "Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

crime.[114] In 1986, the Florida Supreme Court held that even the minimal offense of felon-in-possession of a firearm could be satisfied where the defendant possessed an antique weapon, opining that the opposite conclusion would be ridiculous.[115] Florida's appellate courts also later approved prosecutions of felons hunting with muzzleloading rifles.[116] The overbreadth was clear. Then, in 2016, Florida went mainstream with the reversal of those precedent decisions, thus ending thirty years of prosecuting antiques and muzzleloaders as firearms in Florida.[117]

Nonetheless, the Eleventh Circuit, a reliably conservative jurisdiction, recently held that Florida convictions, sustained during those 30 years and in trials governed by the prior controlling precedent, would still trigger deportability.[118] The court thus disregarded the prohibition on *ex post facto* laws, including the ban on effective *judicial ex post facto* repeatedly announced by the U.S. Supreme Court.[119]

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114. FLA. STAT. § 790.23 (2016). Felons and delinquents; possession of firearms, ammunition, or electric weapons or devices unlawful.— (1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been: (a) Convicted of a felony in the courts of this state[.]

115. Williams v. State, 492 So. 2d 1051 (Fla. 1986). The Court interpreted the statutory language of FLA. STAT. § 790.23 (2016) and emphatically rejected the argument that a felon was permitted to possess an antique firearm:

> Williams would have us construe the antique 'or replica' exceptions of section 790.23 in such a way as to condone the concealment, by a convicted felon, of a firearm which may possibly be a replica of an antique, but is obviously operable and loaded with live ammunition. . . We do not believe that the legislature, when enacting section 790.23, intended that a convicted felon could be acquitted when possessing a concealed, loaded weapon by using the excuse that the weapon is an antique or a replica thereof. This literal requirement of the statute exalts form over substance to the detriment of public policy, and *such a result is clearly absurd*" (emphasis added).

116. Bostic v. State, 902 So. 2d 225 (Fla. Dist. Ct. App. 2005), which was given statewide application, pursuant to Pardo v. State of Florida, 596 So. 2d 665 (1992).

117. *Id.*

118. *See* Aspilaire v. United States Att'y Gen., 992 F.3d 1248 (11th Cir. 2021) (Aspilaire was convicted in April 2016 and raised his arguments against his removability, pursuant to *Williams* and *Bostic* months prior to those cases being reversed by *Weeks.*

119. Although retroactivity theories can be complicated, "[p]erhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal . . . Under such circumstances, the overruling decision . . . is not applied retroactively." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.4(c), at 143 (West Pub. Co., 3d ed. 1986). This guiding principle is illustrated by the Supreme Court's decisions in James v. United States*,* 366 U.S. 213 (1961), and Marks v. United States*,* 430 U.S. 188 (1977), which establish that where the Supreme Court expands criminal consequences under a federal statute by overruling one of its own decisions construing the statute more narrowly, the more expansive construction may not be applied retroactively. The *Marks* court provided the history behind this essential principle:

> The Ex Post Facto Clause is a limitation upon the powers of the Legislature, *see Calder v. Bull*, 3 Dall. 386 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank v. Mangum*, 237 U.S. 309, 344 (1915). But the principle on which

Why Does the Immigrant Regularly Lose So Much in these Cases.

If the reader did not yet take notice from the foregoing discussion, many immigrants do not have the same rights as citizens and permanent residents under the Second Amendment. For non-permanent residents like visa holders and the undocumented, possessing a firearm is a federal crime.[120] Some states are more severe, such as Washington, where all non-citizens were formerly barred from owning firearms before that prohibition was lifted in 2009.[121]

Naturally, this prohibition has been challenged, as it is reasonable to wonder what were the 1780s constructs of personhood and citizenship and whether the nation's founders anticipated a second-tier firearms right for the undocumented and for visa-holders, given that those constructs were not yet conceived, in their day.[122]

Notably, the Second Amendment invokes the phrase "the people," not the word "citizen," but drafters used the word "citizen" elsewhere,[123] leaving an apparent distinction that the courts have found less than persuasive.[124] Nonetheless, the Second Amendment applies to an immigrant after they establish substantial connections to the U.S. Courts have held the right to bear arms is not unlimited, and

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> the Clause is based - the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty. *See United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), [. . .] the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court: '[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . .. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.'

Marks v. United States, at 191-93 (1977).

120. 18 U.S.C. § 922(g). It shall be unlawful for any person—(5) who, being an alien—(A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)))[.]

121. *See* United States v. Sandoval-Barajas, 206 F.3d 853 (9th Cir. 2000); *see also* WASH. REV. CODE § 9.41.010 (2022).

122. *See generally* United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015).

123. Well-known privileges of citizens include voting, serving in Congress and as President.

124. United States v. Perez, 6 F.4th 448, 453 (2d Cir. 2021) (explaining that "some circuits have relied on . . . *Heller* to conclude that undocumented aliens like Perez are not entitled to Second Amendment protections because they are not 'law-abiding.' Yet other circuits have held or assumed that unauthorized aliens are included in 'the people' but concluded that § 922(g)(5) is a permissible restriction"). Thus, the takeaway is that the crux of *Heller*'s reasoning—that the Second Amendment enshrined an individual right—highlights that: in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Heller,* 554 U.S. at 580.

Congress may circumscribe it[125] (even if it is counter-intuitive to permit the legislature to curtail the constitution), when it finds it convenient. That said, it remains rather harsh or misplaced for the Seventh Circuit to conclude that Congress' reasonable objective in passing 922(g) and ostensibly barring immigrants from possessing firearms was "to keep guns out of the hands of presumptively risky people and to suppress armed violence."[126]

Moving on, immigrants have also been disempowered by the courts approving of Congress' *ex post facto* laws impacting immigrants, with Congress changing the rules of deportability for firearms deportability and running them retroactively. While some changes have been challenged and their retroactivity reversed,[127] others have not.

When Congress amended and expanded the firearms ground of deportability in 1994, those changes were run retroactively. In the Immigration and Nationality Technical Corrections Act of 1994, Congress made more than "technical" changes, including adding the inchoate versions of firearms offenses, such as attempt or conspiracy, to be a deportable offense, and this rule would apply to convictions before, on, or after the October 25, 1994, enactment date.

Soon thereafter, the BIA had cause to address a challenge to this *ex post facto* deportability, approving charges in the case of an immigrant who had made a false statement to an arms dealer (he had given a false identification at a gun shop), even though this offense had no deportability at the time of the conviction.[128] The Second Circuit held the same in 2001, on the basis of an immigrant's 1980 conviction for conspiracy to export firearms without a license, committed 14 years prior to the creation of the deportability ground.[129]

The circular argument—Congress expands an aggravated felony and then says it must protect the Americans from people subject to that definition, to protect citizens from the dangerous— ultimately

125. *See e.g.* United States v. Carpio-Leon, 701 F.3d 974, 979-81 (4th Cir. 2012); United States v. Portillo-Munoz, 643 F.3d 437, 440 (5th Cir. 2011)); United States v. Flores, 663 F.3d 1022 (8th Cir. 2011); United States v. Torres, 911 F.3d 1253, 1261 (9th Cir. 2019); United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012).

126. *Meza-Rodriguez*, 798 F.3d 664, 666, 673 (7th Cir. 2015).

127. I.N.S. v. St. Cyr, 533 U.S. 289, 326 (2001) (finding the elimination of discretionary waiver under 8 U.S.C. § 1182(c) impermissibly retroactive given reliance interests of immigrants convicted of deportable offenses under the former rules, in which they might seek relief from removal for that conviction).

128. Matter of St. John, 21 I&N Dec. 593, 598 (BIA 1996).

129. Kuhali v. Reno, 266 F.3d 93, 111 (2d Cir. 2001).

survived in the courts, who agreed that Congress has a legitimate interest in protecting society from aggravated felonies (like attempting possession of firearm by visa holder). Again, this strikes this author as circular. And the punitiveness towards *de minimis* offenses stands in stark contrast to permissiveness towards firearms, generally, circa 2023, and the disregard of typical *ex post facto* tests and consideration of reliance interests is objectively unenlightened.

In another group of cases, the courts have read phrases out of the statute. Specifically, the courts have disregarded the jurisdictional element that an aggravated felony firearm offense relates to interstate commerce, despite Congress explicitly including it in numerous grounds of removal. In 2016, a 5-3 Supreme Court essentially cleared the field in this argument in *Luna-Torres v. Lynch*,[130] but a quick examination is illuminating.

The BIA had considered, *en banc*, the fact that the 8 U.S.C. § 1101(a)(43) aggravated felony definitions cross-referenced other federal crimes, but in order to confer federal jurisdiction, those crimes "described in" (by reference) the immigration statute, had elements of interstate commerce. In *Matter of Vasquez-Muniz*, the BIA addressed whether California's felon-in-possession statute[131] triggered the aggravated felony definition.[132] The divided BIA concluded that the element of "interstate commerce" was irrelevant to the deportation ground. While it is true that taking Congress at face value would nullify the vast majority of state offenses, the result of the case is that the BIA concluded that Congress meant the opposite of what it said, which is contrary to all norms of statutory interpretation. The Fifth Circuit (among others) followed suit in a case offering a brutal out-

130. Torres v. Lynch, 578 U.S. 452, 473 (2016) (holding that a state offense counts as an "aggravated felony" when it has every element of a listed federal crime except one requiring a connection to interstate or foreign commerce).

131. CAL. PENAL. CODE § 12021 (a)(1)(f) (West 2010).

132. In Re Vasquez-Muniz, 23 I. & N. Dec. 207, 210 (BIA 2002), with the statutes of comparison as follows:

Section 12021(a)(1) of the California Penal Code provides, in relevant part:

> Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, . . . who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

The federal statute at 18 U.S.C. § 922(g)(1) provides, in relevant part:

> It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

come— disqualification from discretionary relief - for an immigrant guilty of felon-in-possession (of a firearm), where the immigrant's underlying felony was cannabis possession, as in that case, the court reasoned that the reviewing court should only look to Congress' substantive elements.[133] This, of course, begs the question of what else ratified by Congress is "without substance" and thereby worthy of being ignored by the courts, but with *Luna-Torres*, the question is settled.

In another context, the courts have even expanded the term "firearm" to include non-firearms. Congress legislated that "firearms" trigger deportability, particularly in the context of "felon-in-possession,"[134] but the Second Circuit approved[135] of a BIA interpretation[136] that added "ammunition" to the mix. Here, Congress had referenced 18 U.S.C. § 922(g) (which does itself criminalize felon-in-possession of firearms or ammunition) but *labeled* the aggravated felony via reference to firearms only. The gist of these decisions was that if Congress did not want to include ammunition, it would have said so amid the confusion it created with the mislabeling. This reasoning begs a *different* question of the outer parameters of what other assumptions might be permissible of what Congress did *not* say.[137] Nonetheless, the Second Circuit settled the argument, for now.

Unequal Protection under Law

I don't have a "constitutional" practice, and I don't consider myself, even remotely, a constitutional scholar, much less an expert on the Second Amendment. In spite of this (or perhaps because of this)

133. Hernandez v. Holder, 592 F.3d 681, 686 (5th Cir. 2009).

134. 8 U.S.C. § 1101(a)(43)(E)(ii); 18 U.S.C. 922(g).

135. Oppedisano v. Holder, 769 F.3d 147, 150 (2d Cir. 2014) (Because the BIA's decision is a permissible construction of the Immigration and Nationality Act ("INA") entitled to *Chevron* deference from this Court, we deny the petition for review). No less an authority than Neil Gorsuch would hopefully beg to differ. *See e.g.* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, concurring) (calling for a more assertive role for courts to provide oversight, rather than recurring deference to politically motivated executive with changing views, depending on electoral outcomes).

136. Matter of Rocco Oppedisano, 26 I&N Dec. 202, 207 (BIA 2013). The immigrant here was convicted in January 2012, in the federal offense of unlawful possession of ammunition by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

137. As the BIA explained, "If the parenthetical was meant to limit the aggravated felony definition, Congress could have drafted it to state that it included 'only firearms offenses' or "firearms but not ammunition offenses." *See* Gourche v. Holder, 663 F.3d at 886 (noting that the "absence of limiting language in the parenthetical description of [section 237(a)(3)(B)(iii) of the Act] shows that Congress intended the parenthetical as a descriptive shorthand")." *Id* at 205-206.

disconnect with my practice area and expertise, I see a gateway to look at the Supreme Court's 2022 *Bruen* decision and the critique of its take-down of state regulations, as the full ramifications of the decision are just beginning to be understood. What resonates with an interloper like me is the nagging frustration of reading a decision that seems at odds with the fundamentals. Sometimes I don't like a decision, but I understand the reasoning, and the judiciary seems to have done its job. Other times, as in *some* cases detailed above, the opposite happens, which is truly disconcerting for someone who believes that a system of law should be intellectually consistent. With *Bruen* now being the *status quo*, I don't see the need to offer a balanced defense of it. Like all norms, I am more interested in the critique.

First of all, the volume of commentary by historians and journalists convincingly argues that history cuts against the so-called "originalist" *Bruen* majority opinion authored by Justice Clarence Thomas. Thomas' task, of course, was to find some history supporting his preferred outcome and ignore the rest of it. Such is the arrogance of originalists' view of the Constitution as a 230-year-old time capsule, with the modern justices supposedly *now* best positioned to view what was meant *then* in this novel methodology. The rich irony is that it took until 2022 for the court to figure out what the Founders "meant" in 1790, despite centuries of opportunities for every court—with each past justice *literally* better temporally positioned and more connected than any current one - to have passed on their historic opportunity to do the same.

The backdrop of *Bruen* was that New York had regulated the public carrying of handguns at least since the early 20th Century.[138] New York's 1905 Sullivan Act which stood for 117 years, was passed only thirty-seven years following the ratification of the Fourteenth Amendment in 1868 and thirty years after the *Cruikshank* Supreme Court had approved of state and local firearm regulation. For perspective, the Sullivan Act was passed 114 years after the Second Amendment was ratified in December 1791, but the Supreme Court had no cause to find it "out of touch" with the Second Amendment for the ensuing 117 years. Again, such revolutionary reasoning should give pause to any critical thinker before blindly accepting either the

138. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. at 2122 (noting that New York permitted carrying weapons if licensed).

methodology or supposed omniscience of the current Supreme Court majority.

There is considerable consensus that regulating the public carrying of firearms long predated the nation's founding.[139] However, with its historic rejection of regulation in *Bruen*, the Supreme Court has unleashed a Pandora's Box.

On one side, progressive states are not giving up. Post-*Bruen*, New York swiftly convened a special legislative session to pass a new law called the "Concealed Carry Improvement Act," imposing a good moral character requirement and identifying sensitive places in which firearms were banned. Immediate litigation ensued, with an injunction against enforcement (granted by the District Court[140]) presently stayed in the Second Circuit[141] and *certiorari* denied, for now, by the Supreme Court.[142] New Jersey followed in turn, updating its licensing and insurance requirements.[143] California is attempting to revive its

139. *See e.g.* Saul Cornell, *'Originalism' only gives the conservative justices one option on a key gun case*, THE WASHINGTON POST, Nov. 3, 2021, https://www.washingtonpost.com/outlook/2021/11/03/originalism-only-gives-conservative-justices-one-option-key-gun-case/ ("Regulations limiting armed travel in public, particularly in populous areas, stretch back over seven centuries. This history stands in stark contrast to the alternative version of the past concocted by gun rights' advocates over the past half century."); Saul Cornell, *Clarence Thomas' Latest Guns Decision is Ahistorical and Anti-Originalist*, SLATE, June 24, 2022, https://slate.com/news-and-politics/2022/06/clarence-thomas-gun-decision-bruen-anti-originalist.html ("It is hard to dispute [Justice Breyer's characterization of his colleagues [as engaging in "law office history] given that *Bruen* is an opinion filled with legal and historical errors that all cut in the same direction, expanding gun rights by rewriting the American past. [. . .] To illustrate the shocking and amateurish use of history in *Bruen*, one need only examine the way Thomas ignored and distorted the evidence of robust gun regulation during Reconstruction, the period of history that he and other originalists have claimed is the key to understanding the scope of legitimate gun regulation by states and localities. Thomas reluctantly conceded that Reconstruction-era Texas had laws of similar scope to New York's challenged laws. [. . .] In the Thomas originalist universe, apparently no amount of evidence is enough to support gun control, but no amount of evidence is too little to legitimate gun rights claims. In fact, millions of Americans were living with gun laws at least as restrictive as the New York law at issue in *Bruen* for many years during the period of history Thomas contends is crucial to understanding the application of the Second Amendment to states and localities." Cornell then documents ten large cities, with a combined population of nearly 9.5 million, with clear Reconstruction-era gun regulations).

140. Antonyuk v. Hochul, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944, at *14-15 (N.D.N.Y. Nov. 7, 2022) (noting at 14-15 that it would give more weight to historical laws whose origins immediately "predate[ ] or postdate[ ] either [1791 or 1868]," and those which were consistent in more jurisdictions or applied to more people).

141. Antonyuk v. Hochul, No. 22-2908(L), 22-2972(Con), 2022 U.S. App. LEXIS 36240, at *3 (2d Cir. Dec. 7, 2022).

142. *See generally* Antonyuk v. Nigrelli, 143 S. Ct. 481 (2023).

143. Daniel Han, *New Jersey governor signs wide-ranging restrictions on carrying guns; legal challenge filed*, POLITICO, Dec. 22, 2022, https://www.politico.com/news/2022/12/22/new-jersey-governor-gun-law-00075140 ("'What kind of state do we want to be? Do we want to be like Mississippi or Alabama, whose firearm death rates are nearly five times ours, or do we want to remain a state where people can actually be and feel safe?' [Gov. Phil Murphy said at a bill

concealed-carry law into something *Bruen*-compliant and is considering both tax-based solutions to gun violence and the ways in which its private-enforcement scheme (modeled on anti-abortion statutes in other jurisdictions that the Supreme Court views approvingly) can serve as a surrogate for state regulation.[144] Not be outdone, Illinois Governor JB Pritzker signed a new assault weapons ban into law on the first day of the 2023 Illinois General Assembly.[145]

On the other side, we can start to see the scope of *Bruen's* impact in lower court decisions. Taking *Bruen* literally, a federal judge in Mississippi has clearly delineated the strengths of the legal system and the study of history, suggesting that the parties agree that a historian build a complete record of the regulation of firearms in the 1790s so that the court would not rely on "cherry-picked" facts and build an erroneous record for an inevitable appeal.[146] At issue there is nothing less weighty than the prohibition, per 18 U.S.C. § 922(g)(1), of a felon to own a firearm.

Conservative courts have already "gone there" in the context of domestic violence.[147] In February 2023, the Fifth Circuit ruled that *Bruen* guarantees domestic abusers their unfettered Second Amendment rights, quoting the Supreme Court to hold that the federal law (banning firearm ownership by people subject to domestic violence

signing event flanked by gun control advocates[. . .]. 'This law ensures that no matter what Washington might throw at us, we will keep doing everything we can to ensure the safety of our citizens.'" Litigation followed immediately, "Not only will this legislation go down in flames in our lawsuit, but the Murphy administration will end up paying the very substantial legal costs of gun owners to bring it down," Scott Bach, executive director of the Association of New Jersey Rifle & Pistol Clubs, said in a statement.).

144. Owen Tucker-Smith, *California is working hard to pass gun laws — and even harder to defend them*, POLITICO, Jan. 6, 2023, https://www.politico.com/news/2023/01/06/california-is-working-hard-to-pass-gun-laws-and-even-harder-to-defend-them-00076835.

145. Shia Kapos, *Pritzker slays the gun lobby,* POLITICO, Jan. 11, 2023, https://www.politico.com/newsletters/illinois-playbook/2023/01/11/pritzker-slays-the-gun-lobby-00077403 (Illinois joined eight states in this type of ban of rifles and magazines, and prepares for inevitable litigation).

146. Mark Joseph Stern, *A Federal Judge Calls Clarence Thomas' Bluff on Gun Rights and Originalism*, SLATE, Nov. 11, 2022, https://slate.com/news-and-politics/2022/11/federal-judge-clarence-thomas-gun-rights-originalism.html ("Last Thursday, [in *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB] Judge Carlton Reeves of the Southern District of Mississippi charted a different course: He proposed appointing a historian to help him "identify and sift through authoritative sources on founding-era firearms restrictions" to decide the constitutionality of a federal law barring felons from possessing firearms. His proposal is the first positive development in Second Amendment law since the *Bruen* Revolution. At worst, it will demonstrate the absurdity and impossibility of Thomas' command. At best, it will restore sanity to an area of jurisprudence that is going completely off the rails).

147. *See* United States v. Rahimi, No. 21-11001, 2023 U.S. App. LEXIS 2693 at *179 (5th Cir. 2023) (vacating conviction, where government failed to demonstrate that 18 U.S.C. § 922(g)(8) fit within the nation's history of gun regulation).

restraining orders) is an "outlier that our ancestors would never have accepted" — borrowing a quote from the *Bruen* decision.[148] History mattered there, and since family violence was tolerated in the 1790s[149]—when women were denied suffrage, and chattel slavery was constitutional—that historic norm dictated modern law, according to the "originalist" court.[150]

Returning to the focus of this article, post-*Bruen,* I suppose the first task for deportable immigrants must be to retain criminal counsel and seek to reopen or vacate any conviction that is now assailable on constitutional grounds and then reopen any removal proceedings that resulted in an order of removal predicated upon such an unlawful conviction. The alternative, for others, might be to "reload" and challenge the prohibition for non-immigrants (visa holders) and the undocumented from owning a firearm, a question that has never reached the Supreme Court but now seems ripe. Finally, in light of the rejection of "good moral character" requirements for gun ownership, non-immigrants and the undocumented may consider whether 18 U.S.C. 922(g) prohibition of gun ownership is constitutional. As discussed, the logic against certain non-citizen's gun ownership was "to

148. *See e.g.* Brittany Newman, *Federal appeals court strikes down domestic violence gun law*, Feb. 2, 2023, https://www.nbcnews.com/politics/politics-news/federal-appeals-court-strikes-domestic-violence-gun-law-rcna68949.

149. *See e.g.* Ruth Marcus, *On guns, originalism as insanity*, THE WASHINGTON POST, Nov. 17, 2022, https://www.washingtonpost.com/opinions/2022/11/17/originalism-guns-supremecourt-domestic-violence/, (Noting, in similar case, U.S. v. Perez-Gallan, PE:22-CR-00427-DC (W.D. Tex. Nov. 10, 2022) , of "domestic abuser in possession of a firearm" since ruled unconstitutional, that "turns out, in Colonial times and beyond, authorities didn't take domestic violence seriously," so that the defendant's lawyer could argue that historically, "practices that protected women and children from maltreatment by male heads of house were discarded as incompatible with a newfound sanctity for the family. A private sphere outside the reach of the government." The court agreed that while domestic abuse was not new, governmental tools dealing with it are, so that one of those tools' intrusion on firearm ownership must be unconstitutional).

150. *See, e.g* Ian Millhiser, *It's now legal for domestic abusers to own a gun in Texas, Louisiana, and Mississippi*, VOX, Feb. 2, 2023, https://www.vox.com/policy-and-politics/2023/2/2/23583377/supreme-court-guns-domestic-abuse-fifth-circuit-second-amendment-rahimi-united-states; Eluira Nanos, *Federal Appeals Court Says Alleged Domestic Abusers Have Right to Firearms*, law and crime, Feb. 3, 2023, https://lawandcrime.com/second-amendment/federal-appeals-court-says-alleged-domestic-abusers-have-right-to-firearms/ ("Zackey Rahimi became the subject of a Feb. 2020 civil restraining order after his girlfriend accused Rahimi of assaulting her. Rahimi consented to the order, which prohibited him from harassing, stalking, or threatening his ex-girlfriend and their child, and also prohibited him from possessing a gun. Despite the restriction to which Rahimi agreed, he was involved in five Texas shootings between Dec. 2020 and Jan. 2021. In one, he fired multiple shots into the residence of a person to whom he had sold narcotics. The next day, Rahimi was in a car accident; he shot the other driver, fled the scene, and then returned to another vehicle and shot the other driver's car. A few weeks later, Rahimi shot at a constable's vehicle. Then two weeks after that, he fired multiple shots into the air after his friend's credit card was declined at a Whataburger restaurant.").

keep guns out of the hands of *presumptively risky people* and to suppress armed violence."[151] One could hardly reconcile that reasoning with that of the post-*Bruen* domestic violence-related cases.

While remaining focused on outcomes for immigrants, it is valid to question the attention given in these pages to getting legally accurate outcomes for convicted immigrants. Conversely, why defend them? The first answer is technical. Logical outcomes, intellectually honest and dictated by precedent, instill broad confidence in the legal system. This is why I have elected to pair a modest discussion of the pratfalls of "originalism" with the inconsistent efforts of the courts in the context of the "categorical approach."

The second, more social, concern goes to the amplifying effect that immigration status has on the shortcomings of our criminal justice system, in which marginalized persons—persons of color and the poor—are objectively disadvantaged in enforcement and judicial outcomes. While struggling to counter those ills, it is perhaps helpful to consider the larger debate in which "originalism" serves a hypocritical role in social engineering (in resolving the culture wars of the day) of the sort that its proponents supposedly disavow. Magnifying this role, it is hard not to consider whether courts are "courts" or lifetime-appointed policy arbiters, particularly when outcomes in supposedly "technical" legal debates have become fairly predictable, routinely consistent with party affiliation, and with final reviewability in a Supreme Court forum that manifests these traits in the extreme, with no effective democratic accountability.

At nearly 250 years old, our constitution—if viewed as a completely non-living document—creates challenges for confronting novel problems, as it is both the cure and the root of our inability to cope with legal questions in a society that rapidly innovates at a rate inconceivable in the 18th Century. That said, good faith interpretation of the document has steered our country fairly well over time. Good faith means historic accuracy. It means analytic consistency.

Against my pessimism in this conclusion, we can turn to the new wave of originalism. Justice Kagan noted at her 2010 confirmation hearing, "we're all originalists now,"[152] and Justice Jackson has re-

151. *Meza-Rodriguez*, 798 F.3d at 673 (7th Cir. 2015) (emphasis added).

152. Kagan has clarified her views in recent decisions and interviews. *See e.g.* K. Reichmann, COURTHOUSE NEWS SERVICE (September 14, 2022), https://www.courthousenews.com/with-jabs-at-her-colleagues-justice-kagan-warns-the-court-needs-to-act-like-a-court/ ("'My thinking about originalism is, I'm not sure what it means given that it seems to be sort of fluctuating over time

cently questioned, in what will surely be her decades-long quest, that using historic "context" should not always conveniently mean a conservative policy outcome. In the context of a flagrant race-based gerrymander in Alabama, Jackson remarked, "[W]hen I drilled down to that level of analysis, it became clear to me that the framers themselves adopted the equal protection clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race-conscious way." Radical, I suppose, to rely on actual history, to refute the common assumption that race-consciousness must be verboten in lawmaking. But the larger point, is that if "originalism" remains the term *de jour* in our modern judiciary, facts matter.

In conclusion, the better cases I introduce here show that with proper context, the answers to many of these legal questions become quite clear: a statute is either on-point or off, over-broad or focused. This can be discerned via statutory language, state interpretations, and stated Congressional intent.

Sure, the better view is for a court not to be held captive by the supposed views of a bygone era. Sure, getting to these answers sometimes takes the equivalent of legal archaeology, and the courts need to do a better job of history. However, given the loaded social context in which immigrants are prosecuted, the severe secondary consequences of an immigrant's firearms conviction, and given the stark distinction in rights of non-citizens to possess firearms relative to the now-extreme permissiveness for others, these questions deserve the full and honest dealings from the courts confronting them. Perhaps, given the mistakenly scapegoating of immigrants for crime, if more cases properly resulted in limiting deportability, their situation could serve as a foil for reconsideration of the anti-historic cases like *Bruen* itself.

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and over cases in ways that, again, makes you concerned that the rules change as the desired outcomes change,' Kagan said. [. . .] 'Originalism, as some of my colleagues understand it, doesn't work so well because it's just inconsistent, I think, with the way the Constitution is written,' Kagan said. [. . .] 'If you're a textualist, you're not a textualist just when it's convenient,' Kagan said. 'You're not a textualist just when it leads to the outcomes that you personally happen to favor'").

The California Way: An Analysis of California's Immigrant-Friendly Changes to its Criminal Laws

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CONTENTS

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Introduction

Immigration falls exclusively within the federal government's purview, and states are generally prohibited from legislating in the area of immigration. At the same time, however, a large number of individuals are subject to deportation, denial of admission, and denial of immigration benefits based upon convictions of state crimes, over which states generally have exclusive authority. At a time when both the federal government and some states seem determined to expand the immigration consequences of even relatively minor criminal conduct, is there anything states can do to protect their noncitizen residents? Surprisingly, yes, quite a bit. California, for example, considers the term "Californian" to cover all of its residents, whether they are citizens, lawful permanent residents, or present without lawful status. This approach has led the state to enact a series of changes to its criminal statutes to reduce, in thoughtful and innovative ways, the immigration effect of some criminal conduct. Because the California Legislature is not the final authority in determining whether a criminal history will result in immigration consequences, its changes are only as effective as their implementation by California courts and recognition by the federal immigration authorities.

This article will analyze California's changes to its criminal laws and the treatment of those changes by California courts and the federal immigration authorities. Section 1 of the article briefly reviews the scope of federal authority in the area of immigration and the treatment of state attempts to legislate in areas concerning immigration. Section 2 will summarize the immigration consequences of criminal conduct under United States immigration law. Section 3 explains the California laws enacted to reduce immigration consequences and the intended purpose of those laws: to protect California's noncitizen residents and their families from the severe immigration consequences resulting from relatively minor criminal conduct. These changes include laws designed to lower immigration consequences at an initial

trial level and those designed to support applications for post-conviction relief. Section 4 explores the implementation of the new laws by California courts and the extent that the changes have been recognized by the Board of Immigration Appeals (BIA or Board) and federal courts as affecting immigration consequences. This section also looks at why these laws may withstand preemption challenges where other immigration-resistant state legislation would not.

I. AN OVERVIEW OF STATE LEGISLATION IN THE AREA OF IMMIGRATION LAW

Although the U.S. Constitution does not specify that the immigration power is vested in the U.S. government, the Supreme Court has made clear that the power to regulate immigration belongs to the federal government rather than to the states.[2] The power has been viewed as an aspect of sovereignty[3] and as "necessary and proper" under the Commerce Clause[4] for carrying out the enumerated powers to, inter alia, "regulate commerce with foreign nations" and "establish a uniform rule of naturalization."[5] Allocating immigration authority to the federal government has also been seen as necessary for the "maintenance of a republican form of government."[6]

Since noncitizens residing in this country live in the physical jurisdiction of states, it is not surprising that states frequently have enacted legislation that impacts them. However, states are deeply divided on how they treat their noncitizen residents.[7] Some, like California, feel strongly that all of their residents should be afforded safety and security to the extent of the state's power to provide it.[8] Others have welcomed a close connection to immigration enforcement and have even

2. DeCanas v. Bica, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359, *as recognized in* Kansas v. Garcia, 140 S. Ct. 791, 797 (2020); Arizona v. United States, 567 U.S. 387, 394–95 (2012).

3. Ping v. United States, 130 U.S. 581, 604 (1889); *DeCanas*, 424 U.S. at 354.

4. U.S. CONST. art. I, § 8.

5. Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893); *DeCanas*, 424 U.S. at 354.

6. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952). Cases containing similar language include Plyler v. Doe, 457 U.S. 202, 225 (1982), Kleindienst v. Mandel, 408 U.S. 753, 765–67 (1972), and *Fong Yue Ting*, 149 U.S. at 711.

7. *See* Megan McCauley, *Reversing the Ice Age: Immigration Reform in California*, 49 U. PAC. L. REV. 481, 484 (2018) (revealing that state legislation has created a "deep, foundational divide" as some states have introduced restrictive legislation, while others introduce protection legislation); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 247 (2016) ("Localities have reacted in quite different ways to their role as crucial partners in immigration enforcement.").

8. McCauley, *supra* note 7, at 488.

enacted legislation to support cooperation with the federal immigration authorities.[9]

State legislation has historically fallen into three general categories.[10] The first is state legislation that imposes controls or regulations upon noncitizens, such as a separate registration system.[11] An "immigration regulation" is a determination of who should be allowed in the United States and the conditions under which entrants may remain.[12] The second historical type of state legislation is legislation that discriminates against noncitizens for purposes of employment,[13] public and professional licenses and permits,[14] education,[15] and public benefits and services.[16]

Yet, a third type of state regulation affecting immigration is state policies that affect the federal government's ability to operate, in violation of the Supremacy Clause. This was seen most recently in the

9. Arizona v. United States, 567 U.S. 387 (2012) (striking down, as field- and obstacle-preempted under the Supremacy Clause, Arizona's S.B. 1070, which would have, inter alia, made failure to comply with federal alien-registration requirements a misdemeanor, made seeking or engaging in work by unauthorized noncitizens a misdemeanor, and authorized state and local officers to arrest persons suspected of committing removable offenses).

10. *See* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 134–45 (1994). For a comprehensive summary of judicial determinations of whether state legislation concerning noncitizens is preempted or not, *see* Eric M. Larson, Annotation, *Preemption of State Statute, Law, Ordinance, Policy with Respect to Law Enforcement of Criminal Prosecution as to Aliens*, 75 A.L.R. 6th 541 (2012).

11. *E.g.*, Hines v. Davidowitz, 312 U.S. 52, 59–60, 74 (1941) (striking down Pennsylvania alien registration statute); *DeCanas*, 424 U.S. 351, 352, 362, 365 (finding the California state law that prohibited employment of noncitizens not authorized to work, where such employment would negatively impact resident worker, was not a regulation of immigration preempted by federal authority); *Arizona*, 567 U.S. at 387, 409, 416 (holding Arizona provisions making failure to comply with federal alien-registration requirements and seeking or engaging in work as an unauthorized alien misdemeanor offenses were preempted by federal authority).

12. DeCanas v. Bica, 424 U.S. 351, 355 (1976).

13. *See* Sugarman v. Dougall, 413 U.S. 634, 635, 646 (1973) (finding that the New York Civil Service provision limiting permanent positions to U.S. citizens violated the Fourteenth Amendment); Truax v. Raich, 239 U.S. 33, 40, 42–43 (1915) (holding that the Arizona statute limiting the percentage of noncitizens an entity might employ was preempted by federal law and violated the Fourteenth Amendment).

14. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 414, 419–20 (1948) (invalidating the California statute "barring issuances of commercial fishing licenses to persons ineligible for citizenship" because the statute was preempted by federal immigration authority and it violated equal protection under the Fourteenth Amendment).

15. *See* Toll v. Moreno, 458 U.S. 1, 3, 9–10 (1982) (denying in-state university tuition to non-immigrants violated Supremacy Clause); Plyler v. Doe, 457 U.S. 202 (1982) (prohibiting undocumented children from attending public school without payment of tuition violated the Equal Protection Clause).

16. *See* Graham v. Richardson, 403 U.S. 365, 366–67, 376 (1971) (striking down the Arizona residency requirements for noncitizen eligibility for welfare because it violated the Supremacy Clause and Equal Protection Clause).

Ninth Circuit's en banc decision in *GEO Group, Inc. v. Newsom*.[17] There the Ninth Circuit struck down California's Assembly Bill (A.B.) 32, which would have prohibited the operation of private detention facilities in the state.[18] The Ninth Circuit concluded that A.B. 32 violated the Supremacy Clause's prohibition on state interference with or control of the operations of the federal government because the federal government used only private facilities to house noncitizens in California, and A.B. 32 would have made federal immigration detention virtually impossible in California.[19]

While state legislation in immigration raises the issue of conflict with the federal power over immigration, not all state enactments that deal with noncitizens are regulations of immigration automatically preempted by the federal power.[20] A state statute does not regulate immigration merely because noncitizens are subjects of the statute. Instead, state legislation that impacts immigration is invalid if it conflicts with federal law under either the doctrine of intergovernmental immunity or the doctrine of federal preemption.[21] The "doctrine of intergovernmental immunity is derived from the Supremacy Clause" of the U.S. Constitution that provides that "the activities of the Federal Government are free from regulation by any state."[22] Under the doctrine of preemption, state laws are preempted when they conflict with federal law.[23] This includes cases where "compliance with both federal and state regulations is a physical impossibility," known as obstacle preemption, and "those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," known as conflict preemption.[24] State legislation has also been examined for compliance with equal protection under the Fifth and Fourteenth Amendments.[25]

17. GEO Group, Inc. v. Newsom, 50 F.4th 745 (9th Cir. 2022) (en banc).

18. *Id.*

19. *Id.* at 750–51, 763.

20. *See* DeCanas v. Bica, 424 U.S. 351, 355 (1976) (citing as examples of cases that upheld certain discriminatory state treatment of noncitizens Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 415–22 (1948) and Graham v. Richardson, 403 U.S. 365, 372–73 (1971)).

21. *See* United States v. California, 921 F.3d 865, 878–79 (9th Cir. 2019) (explaining both doctrines).

22. *Id.* at 878.

23. Arizona v. United States, 567 U.S. 387, 399 (2012).

24. *Id.* (internal citations omitted).

25. *DeCanas*, 424 U.S. at 355 (noting that some cases addressing state legislation in the area of immigration arose under the Equal Protection Clause); Plyler v. Doe, 457 U.S. 202 (1982) (prohibiting undocumented children from attending public school without payment of tuition violated the Equal Protection Clause).

In *De Canas v. Bica,* the Supreme Court set forth three tests to be used in reviewing the sorts of state legislation mentioned above. State legislation is federally preempted if it fails any one of the tests.[26] Under the first test, the court must determine whether a state statute is a "regulation of immigration."[27] Because the power to regulate immigration is exclusively a federal one, any statute that regulates immigration is proscribed.[28] Under the second test, even if the state law is not an impermissible regulation of immigration, it may still be preempted if Congress has indicated a "clear and manifest" intent to "complete[ly] oust[ ] . . . state power including state power to promulgate laws not in conflict with federal laws."[29] In other words, under the second test, a statute is preempted where Congress intended to "occupy the field" that the statute attempts to regulate.[30] Finally, under the third test, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31] "Stated differently, a statute is preempted under the third test if it conflicts with federal law, making compliance with both state and federal law impossible."[32]

But the California laws that this article examines are of a new breed, different from the sorts of regulations and limitations described above. The new state laws are designed to protect noncitizen residents from the harshest immigration consequences arising from state criminal prosecutions of its own residents, whether they are citizens or noncitizens. The legislation covers specific lowering of sentences under the California Penal Code, extending representation in removal proceedings for those who cannot afford to pay, restricting the federal government's ability to detain noncitizens in California, and more.[33]

These laws are part of a broader immigrant protection policy. In addition to the crime-related laws that are the subject of this article, states have enacted legislation permitting undocumented noncitizens to obtain driver's licenses, healthcare, particularly during the pan-

26. *DeCanas*, 424 U.S. 351, 356, 361 (1976).
27. *Id.* at 354–55.
28. *Id.* at 354–56.
29. *Id.* at 357.
30. *Id.* at 351.
31. *Id.* at 363 (citing Hines v. Davidowitz*,* 312 U.S. 52, 67 (1941)).
32. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995), *on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997).
33. *See* Ann Morse, *Report on State Immigration Laws 2020*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/immigration/report-on-state-immigration-laws-2020 (last updated Mar. 8, 2021).

demic, and admission to the state bar, to name just a few.[34] In fact, California's legislation has been called "The California Package" and described as creating a de facto state citizenship for California's noncitizen residents.[35]

California's changes to its criminal laws, designed to protect its noncitizen residents and their families, have been called "protective policies,"[36] and the states and localities that enact the legislation have been described as "sites of resistance and assistance."[37] The Ninth Circuit, sitting en banc, has described California as having "placed federal immigration policy within its crosshairs."[38] Are these types of statutes on a collision course with the Supremacy Clause, or do they demonstrate an outer limit of a state's authority to legislate on behalf of its noncitizen residents?

II. IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT UNDER THE IMMIGRATION AND NATIONALITY ACT

As the Supreme Court pointed out in *Padilla v. Kentucky*,[39] "[t]he landscape of federal immigration law has changed dramatically over the last [ninety] years."[40] In the early days of the country, there were no laws banning immigration or requiring deportation based on criminal conduct. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country.[41] In 1891, Congress added to the list of excludable persons those "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[42] Then, in 1917, "Congress made classes of noncitizens deportable based on conduct committed on

34. *Id.*

35. S. Karthick Ramakrishnan & Allan Colbern, *The "California Package" of Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 18 (2015), https://escholarship.org/content/qt6kt522jr/qt6kt522jr_noSplash_d458e2e68c58247354ca89b830181009.pdf?t=NYd7l5.

36. *See* David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 224 (2019) ("States and localities are asserting themselves as sites of resistance and assistance.").

37. *Id.*

38. GEO Grp., Inc. v. Newsom, 15 F.4th 919, 928 (9th Cir. 2021). *See also* United States v. California, 921 F.3d 865, 872 (9th Cir. 2019) ("[California] has enacted three laws expressly designed to protect its residents from federal immigration enforcement. . . .").

39. Padilla v. Kentucky, 559 U.S. 356 (2010).

40. *Id.* at 360.

41. *Id.* (citing Page Act of 1875, ch. 141, 18 Stat. 477).

42. *Id.* at 360–61 (citing Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084).

American soil."[43] However, along with making criminal conduct a basis for deportation, the 1917 Act also introduced the Judicial Recommendation against Deportation or JRAD.[44] Under the JRAD provision, a criminal court judge, whether federal or state, could, at the time of sentencing or within thirty days thereafter, recommend that the noncitizen not be deported.[45] The federal government was bound by this recommendation.[46] Thus, as the Supreme Court noted, from 1917 forward, there was no automatically deportable offense because criminal court judges "retained discretion to ameliorate unjust results on a case-by-case basis."[47]

Congress restricted the JRAD provision in the Immigration and Nationality Act (INA) of 1952[48] and entirely eliminated it in the Immigration Act of 1990.[49] In addition, Congress has added to the list of offenses that will make an individual deportable, in particular by adding the concept of "aggravated felony" in 1988[50] and by steadily increasing the list of offenses designated as aggravated felonies. While the original list of aggravated felonies included only murder, drug trafficking and illicit firearms trafficking, the list has now stretched to some fifty offenses,[51] including offenses such as theft or forgery with a

43. *Id.* at 361 (citing S. Rep. No. 81-1515, at 54–55 (1950)).

44. *Id.* at 361–62.

45. *Id.* at 361.

46. *Id.* at 362; Immigration and Nationality Act of 1952, 8 U.S.C. § 1227 (originally enacted as Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 889–90) . The text of the JRAD provisions was:

> That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.

Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 889–90.

47. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).

48. When Congress separated the deportation ground of crimes of moral turpitude and the deportation ground for narcotics offenses in 1952, it limited the JRAD provision to crimes involving moral turpitude. *Id.* at 363 n.5 (citing Immigration and Nationality Act of 1952, (Pub. L. 414, 66 Stat. 163 (creating a new Immigration and Nationality Act) (June 27, 1952).

49. Immigration Act at 1990, Pub. L. No. 101-649 (Nov. 29, 1990), § 505, 104 Stat. 4978, 5050. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344(a), 102 Stat. 4181, 4469.

50. *Id.* (amending the definition of aggravated felonies to include illicit trafficking in any controlled substance, money laundering, any crime of violence where the term of imprisonment is at least one year, or violations of foreign law for which the term of imprisonment was completed in the last fifteen years).

51. *Id.* §§ 1227(a)(2)(A)(iii), 1101(a)(43)(A)–(U).

conviction of at least one-year[52] and possession of a gun by an "alien . . . illegally or unlawfully in the United States."[53]

Criminal antecedents have several sorts of immigration consequences under current law. First, intending nonimmigrants and immigrants,[54] as well as a number of other categories of persons seeking U.S. immigration benefits,[55] must establish that they are admissible under the inadmissibility grounds found in Section 212 of the INA.[56] There are a number of crime-related inadmissibility grounds, including having been convicted of or admitting to essential elements of a crime involving moral turpitude,[57] or an offense relating to a controlled substance.[58] There are waivers for some of these crime-based inadmissibility grounds, but those waivers are granted in the exercise of discretion.[59]

Second, an individual who has been admitted to the U.S. as an immigrant, nonimmigrant, or refugee or who has obtained some other immigration status, such as asylum, may be subject to criminal deportation grounds. These include conviction of a crime involving moral turpitude committed within five years of admission for which a sentence of one year or longer could be imposed,[60] the conviction of multiples crimes of moral turpitude at any time,[61] the conviction of a controlled substance offense,[62] a conviction of specified firearms offenses,[63] and conviction of crimes of domestic violence or stalking.[64]

52. *Id.* § 1101(a)(43)(G), (R).

53. 18 U.S.C. § 922(g)(5)(A) (constituting an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii)).

54. Immigrant status refers to someone who lives permanently in the U.S., whereas nonimmigrant status is for someone entering the United States on a temporary basis. *See* Geoffrey Heeren, *The Status of Nonstatus,* 65 Am. U. L. Rev. 1115, 1122–32 (2015).

55. For example, refugees must establish that they are admissible. 8 U.S.C. § 1157(c)(1). Persons seeking temporary protected status. *Id.* § 1254a(c)(1)(A)(iii).

56. Immigration and Nationality Act, Pub. L. No. 414, § 212(a), 66 Stat. 163, 182 (1952); 8 U.S.C. § 1182(a).

57. 8 U.S.C. § 1182(a)(2)(A)(i)(I). There are exceptions to the inadmissibility ground of one crime involving moral turpitude for one petty offense and one juvenile offense. *Id.* § 1182(a)(2)(A)(ii).

58. *Id.* § 1182(a)(2)(A)(i)(II). The crime-based inadmissibility grounds also include, inter alia, conviction of multiple criminal offenses and an immigration agent's reason to believe that the individual is or has been a trafficker in controlled substances. *Id.* § 1182(a)(2)(B)–(C).

59. Non-immigrants may be eligible for a waiver of the crime-based inadmissibility grounds under *Id.* § 1182(d)(3)(A). Immigrants may be eligible for a waiver under *Id.* § 1182(h), if they meet the statutory requirements for that waiver. Refugees may benefit from the waiver found at *Id.* § 1157(c)(3).

60. *Id.* § 1227(a)(2)(A)(i)(I), (II).

61. *Id.* § 1227(a)(2)(A)(ii).

62. *Id.* § 1227(a)(2)(B)(i).

63. *Id.* § 1227(a)(2)(C).

One is also deportable for conviction of an aggravated felony.[65] The list of offenses designated as aggravated felonies includes murder, rape, and sexual abuse of a child,[66] as well as forgery with a sentence of one year,[67] theft with a sentence of one year,[68] and fraud with at least a $10,000 loss to the victim.[69]

A criminal record may also have serious negative effects on an individual's eligibility for certain forms of relief from removal during removal proceedings. For example, a conviction of an aggravated felony makes one ineligible for asylum[70] and voluntary departure,[71] and a conviction of an aggravated felony with a sentence of five years makes one ineligible for withholding of removal.[72] Conviction of a criminal inadmissibility or deportation ground, including an aggravated felony, results in statutory ineligibility for cancellation of removal.[73]

Moreover, a criminal record may affect an individual's ability to show good moral character, a statutory requirement for naturalization, and for some forms of relief from removal. "Good moral character" is defined principally by what it is not. The "what it is not" includes falling under certain criminal inadmissibility grounds,[74] having been convicted of an aggravated felony,[75] or having been confined, as a result of conviction, to an institution for an aggregate period of one hundred and eight days.[76] A criminal record may also result in mandatory immigration detention.[77]

The INA not only defines the substance of offenses that have immigration consequences but also prescribes the type of resolution that will have immigration consequences. Most of the inadmissibility grounds, deportation grounds, and statutory bars to relief mentioned above require a conviction. "Conviction" includes not only a finding of guilt by a judge or jury and a plea of guilty or nolo contendere, but

64. *Id.* § 1227(a)(2)(E)(i).
65. *Id.* § 1227(a)(2)(A)(iii).
66. *Id.* § 1101(a)(43)(A).
67. *Id.* § 1101(a)(43)(R).
68. *Id.* § 1101(a)(43)(G).
69. *Id.* § 1101(a)(43)(M)(i).
70. *Id.* § 1158(b)(2)(B)(i).
71. *Id.* § 1240.56.
72. *Id.* § 1231(b)(3).
73. *Id.* § 1229b(a)(3), (b)(1)(C).
74. *Id.* § 1101(f)(3).
75. *Id.* § 1101(f)(8).
76. *Id.* § 1101(f)(7).
77. *Id.* § 1226(c).

also a resolution under which the individual has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty, or restraint on the individual's liberty.[78] Thus, many of the first-offender pleas utilized by states to ameliorate the effect of a single conviction on an individual's life would still be a conviction for immigration purposes.[79] However, a vacatur of a judgment of guilt based on some legal error in the underlying criminal case will remove a conviction for immigration purposes.[80]

These immigration consequences of a criminal record are exacerbated by the low percentage of legal representation in removal proceedings. As of July 2022, about 53 % of respondents in removal proceedings had representation.[81] Asylum applicants had a higher rate of representation, at 84 %.[82] Representation is critical because statistics show that persons with representation are much more likely to prevail in their removal proceedings. For example, Immigration Judges granted asylum applications in about 44 % of represented

78. *Id.* § 1101(a)(48)(A)(i). "Conviction" is defined under the INA as:

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where— (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id. This definition was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(a)(1), 110 Stat. 3009-546, 628 (1996). Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), the Board had defined "conviction" to include the above definition and a third provision, "a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge." Matter of Ozkok, 19 I&N Dec. 546, 551–52 (BIA 1988). The Board interpreted Congress's deleting of Ozkok's third prong as Congress' intent to include deferred criminal adjudications within the definition of conviction. Matter Cardenas Abreu, 24 I&N Dec. 795, 799–800 (BIA 2009); Matter of Roldan-Santoyo, 22 I&N Dec. 512, 518 (BIA 1999); Matter of D-L-S-, 28 I&N Dec. 568, 572–73 (BIA 2022). "In so doing, Congress reflected its concern about the problems presented by the indeterminate nature of such proceedings and clearly expressed its disfavor with aliens' pursuit of avenues available under State laws to allow them to delay indefinitely the conclusion of immigration proceedings." Matter of D-L-S-, 28 I&N Dec. at 572–73.

79. There is one exception for convictions of simple possession of a controlled substance. An expungement following a plea under the Federal First Offender Act will remove a conviction for simple possession of a controlled substance. 18 U.S.C. § 3607(b)–(c). In addition, in the Ninth Circuit only, state rehabilitative relief that is an analog to the Federal First Offender Act will cure convictions for simple possession of a controlled substance that occurred on or before July 14, 2011. Nunez-Reyes v. Holder, 646 F.3d 684, 689–90 (9th Cir. 2011) (en banc).

80. Matter of Dingus, 28 I&N Dec. 529, 532–33 (BIA 2022); Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006); Matter of Thomas, 27 I&N Dec. 674, 676 (A.G. 2019).

81. Congressional Research Service, U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs (July 2022), https://crsreports.congress.gov/product/pdf/IF/IF12158/3. (Last visited May 27, 2023.)

82. *Id.*

cases, but in only about 15 % of unrepresented cases.[83] Similarly, as of the end of April 2023, over three out of four persons ordered removed by Immigration Judges during FY 23 had no representation.[84] Lack of representation reduces a respondent's ability to support applications for post-conviction relief and, for individuals with criminal records, to explain, under the complicated immigration laws, why their criminal record does not make them removable.

The Supreme Court's decision in *Padilla v. Kentucky* has indelibly linked immigration law and criminal law by recognizing that "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction" and "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[85]

III. CALIFORNIA'S IMMIGRATION-RELATED CHANGES TO ITS CRIMINAL LAWS

It bears mentioning that California has come a long way in its thinking about its relationship with its undocumented citizens. In 1994, California passed Proposition 187, which would have prevented "illegal aliens" from receiving benefits or public services in California.[86] Under the proposition, California would have restricted services such as publicly-funded health care benefits (except for emergency medical care), public elementary and secondary education, and public postsecondary education to U.S. citizens, lawful permanent residents, and noncitizens lawfully admitted for a temporary period of time.[87] The proposition would have also required state agencies to notify the Immigration and Naturalization Service (INS) of individuals who appeared to be in illegal status[88] and would have required social service agencies, schools, and medical care providers to verify

83. *Id. See also* Syracuse University, New Proceedings File din Immigration Court by State, Court, Hearing Location, Year, Charge, Nationality, Language, Age, and More, TRAC, https://trac.syr.edu/phptools/immigration/ntanew/ (last visited May 27, 2023).

84. Syracuse University, Despite Efforts to Provide Pro Bono Representation, Growth is Failing to Meet Exploding Demand, TRAC, https://trac.syr.edu/reports/716/ (last visited May 27, 2023).

85. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).

86. Illegal Aliens. Ineligibility for Public Services. Verification and Reporting., 1994 Cal. Legis. Serv., § 5, (Proposition 187).

87. *Id.* §§ 5–8.

88. *Id.* § 4.

immigration status and report findings to the INS.[89] The U.S. District Court for the Central District of California found that the statute's classification, notification, and cooperation/reporting provisions created an impermissible state scheme to regulate immigration and deter "illegal aliens" from entering or remaining in the United States and were therefore preempted by federal law.[90]

What has changed to encourage California to take up the banner of protecting its noncitizen residents in an area of law normally considered reserved to the federal government? Some of the motivation behind the legislation is explained by California demographics. California is home to almost eleven million immigrants.[91] As of 2021, 10,451,810 people living in California were foreign-born, while 28,786,026 were U.S.-born.[92] About twenty-two percent of the immigrants in California in 2019, were undocumented.[93] As of 2022, California has a total of 10.31 million foreign-born residents, accounting for 26.49% of its total population, making it the U.S. state with the largest immigrant population.[94]

Moreover, California is a state of blended immigrant families. "In 2019, [twenty] percent of all individuals under [eighteen years old] in California were living in mixed-status families, meaning they were [either] undocumented themselves or living with someone who was."[95]

89. *Id.* §§ 5–8. The Immigration and Naturalization Service, or INS, was replaced by three departments within the Department of Homeland Security: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). U.S. Citizenship and Immigration Services, *Overview of INS History*, USCIS HIST. OFF. & LIBR. 11 (2012) https://www.uscis.gov/sites/default/files/document/fact-sheets/INS History.pdf. The Department of Homeland Security was created by the Homeland Security Act of 2002. 6 U.S.C. § 111.

90. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995) (striking down the "classification, notification, and cooperation/reporting provisions in sections 4 through 9" of Proposition 187). Although California appealed the district court's decision, that appeal was eventually ended through agreement between the parties. *See* Huyen Pham, *Proposition 187 and the Legacy of its Law Enforcement Provisions*, 53 U.C. DAVIS L. REV. 1957, 1981 (2020).

91. State Immigration Data Profiles: California, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/state-profiles/state/demographics/CA (last visited Jan. 13, 2023).

92. *Id.*

93. Cesar Alesi Perez, Marisol Cuellar Mejia & Hans Johnson, *Immigrants in California*, PUB. POL'Y INST. CAL. (Jan. 2023), https://www.ppic.org/wp-content/uploads/jtf-immigrants-in-california.pdf.

94. *States with the Most Immigrants 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/states-with-the-most-immigrants (last visited Jan. 13, 2023); *see also* Perez et al., *supra* note 94.

95. *Mixed-Status Families: Many Californians Live in Households with Family Members Who Have Different Citizenship or Immigration Statuses*, CAL. IMMIGR. DATA PORTAL, https://immigrantdataca.org/indicators/mixed-status-families#/ (last visited Jan. 13, 2023).

Across California, in 2019, some 2,385,700 U.S. citizens and 711,285 lawful residents were living with an undocumented family member.[96] Fifty percent of California's children, or about 4.5 million children, have at least one immigrant parent.[97] "In congressional districts [seventeen], [thirty-four], and[forty-six] [that] represent parts of greater Los Angeles and the San Francisco Bay Area, more than [seventy-five] percent of children have at least one immigrant parent."[98] "For mixed-immigration-status families, family separation poses serious risks for children, including emotional trauma, housing insecurity, and food insecurity."[99]

Other factors affecting California's new legislation include a sense that Congress was not accomplishing comprehensive immigration reform.[100] California also has a substantial number of immigrant advocacy groups that "have worked tirelessly to educate the public and legislature about issues affecting the state's immigrant community."[101] And Proposition 187 itself may have added to the impetus, since the reaction[102] against it encouraged collective action and "awakened the political power of Latinos in the Golden [S]tate."[103]

96. *Id.*

97. *Half of CA Children Have Immigrant Parents,* KIDSDATA (Feb. 10, 2017), https://www.kidsdata.org/blog/?p=7804.

98. *Id.*

99. *Id.*

100. *See* Andrea Castillo, *Immigration Reformers' Hopes Dashed as Senate Fails to Act*, L.A.TIMES (last updated Dec. 22, 2022); Robert Suro, *Congress Has Killed Immigration Reform. It'll Regret That.*, WASH. POST (Dec. 19, 2022).

101. Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 26 (2017), citing Sameer M. Ashar et al, *Navigating Liminal Legalities Along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions*, U.C. IRVINE 3 (2015), https://scholarship.law.uci.edu/faculty_scholarship/581/. For example, the organizations supporting S.B. 1310 that resulted in reduction of the possible sentence for California misdemeanors to 364 days, include, inter alia, the American Civil Liberties Union, Asian Americans Advancing Justice, Children's Defense Fund – California, the California Immigrant Policy Center, Friends Committee on Legislation of California, the Latino Coalition for a Healthy California, and the Mexican American Legal Defense Fund (MALDEF). *See* S.B. 1310, S. Comm. on Pub. Safety, Bill Analysis, S. 113, Reg. Sess., at 1 (Cal. 2014).

102. Among the protests organized against Proposition 187, there was one on October 16, 1994, in which 70,000 protesters marched to Los Angeles City Hall to demonstrate their opposition. *Looking Back at Proposition 187 Twenty-Five Years Later*, CAL. STATE ARCHIVE, https://artsandculture.google.com/story/looking-back-at-proposition-187-twenty-five-years-later-california-state-archives/BwWRJ8CAUvmiLg?hl=EN (last visited Jan. 7, 2023).

103. *See* Libby Denkmann, *After Prop 187 Came the Fall of California's Once-Mighty GOP, and the Rise of Latino Political Power*, LAIST (Nov. 11, 2019), https://laist.com/news/prop-187-political-impact-california-latino-participation-power-surges-republican-party-fading; Suzanne Gamboa, *How an Anti-Immigrant Ballot Initiative Mobilized Latinos- and Turned California Blue*, NBC NEWS (Nov. 8, 2019), https://www.nbcnews.com/news/latino/how-anti-immigrant-ballot-initiative-mobilized-latinos-turned-california-blue-n1078361.

Padilla's clarification of the effect of deportation also resonated with the California Legislature:

> The immigration consequences of criminal convictions have a particularly strong impact in California. One out of every four persons living in the state is foreign-born. One out of every two children lives in a household headed by at least one foreign-born person. The majority of these children are United States citizens. It is estimated that 50,000 parents of California United States citizen children were deported in a little over two years. Once a person is deported, especially after a criminal conviction, it is extremely unlikely that he or she ever is permitted to return.[104]

The Senate Committee on Public Safety in California, considering legislation to ameliorate the effect of criminal history on noncitizens, also emphasized the social and human costs of deportation:

> Those deported often leave behind families and children who depend on them for support. From 2010 through 2012, the U.S. Immigration and Customs Enforcement deported 204,000 immigrant parents from the U.S., which accounts for [twenty-three] percent of the total number of deportations during that time period. Many of those deported for minor offenses are longtime legal permanent residents of California, with deep connections to their families and communities.[105]

This understanding of the effect of deportation is echoed by the California Supreme Court "deported alien who cannot return loses his job, his friends, his home, and maybe even his children, who must choose between their parent and their native country."[106]

The California Legislature's intent to shield its noncitizen residents is clear from much of the legislative history. For example, the bill analysis for Senate Bill (S.B.) 1310, reducing the maximum sentence for a California misdemeanor to 364 days, lists the federal immigration consequences of a sentence of a year or more and explains that "SB 1310 aligns state and federal law by reducing all California misdemeanors by one day for a maximum sentence of 364 days, not 365 days. This small change will ensure, consistent with federal law and intent, legal residents are not deported from the state and torn away from their families for minor crime."[107] The bill's authors pointed out that:

104. CAL. PENAL CODE § 1016.2(g).
105. S.B. 1310, Cal. S. Comm. on Pub. Safety, Bill Analysis, at 6.
106. People v. Martinez, 304 P.3d 529, 535 (Cal. 2013).
107. S.B. 1310, Bill Analysis, S. 113, Reg. Sess., at 2 (Cal. 2014) (Senate 3d Reading).

> This bill will not affect immigration enforcement and people who are in California unlawfully or have committed serious crimes will still face deportation. This bill will preserve judicial discretion and ensure legal residents who have committed minor crimes are not automatically subject to deportation and separated from their families.[108]

California's concern for its noncitizen residents is echoed again in the California Values Act.[109] There, the Legislature stated in its findings that "[i]mmigrants are valuable and essential members of the California community. Almost one in three Californians is foreign-born, and one in two children in California has at least one immigrant parent."[110]

The legislative history of section 1473.7 of the California Penal Code, allowing for post-conviction relief, shows a similar intent, particularly addressing concern over immigration consequences arising from lack of advisals during criminal proceedings.[111]

> AB 813 will give hope to those who have been wronged by an unlawful conviction by establishing a way to challenge it after their criminal custody has ended. Even though current law requires defense counsel to inform noncitizen defendants of the immigration consequences of convictions, some defense attorneys still fail to do so. Failure to understand the true consequences of pleading guilty to certain felonies, for example, has led to the unnecessary separation of families across California. AB 813 does not guarantee an automatic reversal of the conviction, but an opportunity to present their case in front of a judge, a procedure that already exists in most of the country.[112]

> This deficiency [the lack of a means for post-conviction relief for persons no longer in state custody] in current law has a particularly devastating impact on California's immigrant communities. While the criminal penalty for a conviction is obvious and immediate, the immigration penalty can remain 'invisible' until an encounter with the immigration system raises the issue. Since 1987, California law

108. S.B. 1310, Cal. S. Comm. on Pub. Safety, Bill Analysis, at 7.

109. CAL. GOV'T CODE § 7284.2(a).

110. *Id.*

111. *See* People v. Alatorre, 286 Cal. Rptr. 3d 1, 765 (Cal. Ct. App. 2021) ("In section 1473.7, the Legislature has expressed its particular concern for immigrants who suffer convictions without understanding that it will in the future result in their deportation or other adverse immigration consequences.").

112. A.B. 813, Bill Analysis, 2015-16 Legis., Reg. Sess., at 4 (Cal. 2016) (Assembly 3d Reading).

> has required defense counsel to inform noncitizen defendants about the immigration consequences of convictions. But, despite this requirement, some defense attorneys still fail to do so. Immigrants may find out that their conviction makes them deportable only when, years later, Immigration and Customs Enforcement initiates removal proceedings. By then, however, it is too late. Without any vehicle to challenge their convictions in state court, immigrants are routinely deported on the basis of convictions that should never have existed in the first place.[113]

The changes in California law addressed in this article are part of a larger package of protections for the immigrant community. These include allowing individuals to obtain driver's licenses, in-state college tuition, state professional licenses, and protections against immigration enforcement actions in California courthouses regardless of immigration status.[114] Other California laws protect against state, county, and local law enforcement cooperation with federal immigration officials, with the goal of increasing community safety by making all residents feel safe to report crime.[115]

These circumstances in California provided the setting for a systematic addition of laws aimed at reducing the worst immigration consequences that might result from state prosecution. California has responded with a thoughtful, wide-ranging set of new laws that address the immigration consequences of criminal conduct, from the seriousness of current charges, to devising resolutions that do not trigger the consequences of a conviction and to redressing the harm caused by old convictions. The new legislation also addresses surrounding issues, such as the consequences of collaboration with ICE, immigration detention following a California conviction, and the lack of representation in removal proceedings.[116] And California did this by using the

113. A.B. 813, S. Comm. on Pub. Safety, Bill Analysis, 2015-16 Legis., Reg. Sess., at 10 (Cal. 2016) (Hearing on May 10, 2016).

114. *See* Safe and Responsible Drivers Act, 2013 Cal. Stat. ch. 524; California Development, Relief, and Education for Alien Minors (DREAM) Act, 2011 Cal. Stat. ch. 93; 2001 Cal. Stat. ch. 814; California Values Act, S.B. 54, 2017 Leg., Reg. Sess. (Cal. 2017).

115. CAL. GOV'T CODE §§ 7284–7284.12; *see* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 280–82 (2016) (describing three central justifications conventionally advanced in support of immigrant protection in criminal justice policy: (1) fostering community trust in law enforcement, (2) integrating undocumented immigrants into society, and (3) saving scarce law enforcement resource for local, as opposed to federal, initiatives). *See also* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 542–43 (2017) (describing the motivation behind the City of Santa Ana's sanctuary policies).

116. CAL. GOV'T CODE §§ 7284–7284.12

simple, targeted, strategic vehicles described in the following subsections.

A. Reducing Maximum Misdemeanor Sentence Under Statute to 364 Days

California's first measure addressing the immigration consequences of crimes was to reduce the possible sentence of a California misdemeanor from one year, or 365 days, to 364 days.[117] This change affected the risk of deportation in two ways. First, it prevented an offense from being a "crime[ ] of moral turpitude" "for which a sentence of one year or more may be imposed."[118] Second, the reduction in the maximum sentence prevents the offense from being one of the aggravated felonies that requires a sentence of one year.[119] The legislative history of the bill makes clear that the "one year sentence deportation policy" is unfair because it results in deportation "due to minor crimes, such as writing a bad check."[120]

B. Alternatives to Conviction - Pre-Plea Diversions

In 2017 and 2018, California enacted two new pretrial diversion programs.[121] In each of these diversion programs, the defendant pleads not guilty, and after successful completion of diversion requirements, the charges are dropped without a conviction.[122] If the person does not complete the diversion program, they return to the criminal court process under the original charges.[123] These alternatives to a conviction allow the noncitizen defendant to avoid the criminal removal grounds that require a conviction, including deportation for crimes involving moral turpitude,[124] aggravated felonies,[125] and con-

117. CAL. PENAL CODE § 18.5(a).

118. 8 U.S.C. § 1227(a)(2)(A)(i)(II).

119. Offenses that require a sentence of one year to be an aggravated felony include crimes of violence, theft, commercial bribery, counterfeiting, forgery, crimes of violence, obstruction of justice, and perjury, among others. *Id.* § 1101(a)(43)(F), (G), (R), (S).

120. S.B. 1310, S. Comm. on Pub. Safety, Bill Analysis, S. 113, Reg. Sess., at 6 (Cal. 2014). http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1301-1350/sb_1310_cfa_20140401_130813_sen_comm.html.

121. CAL. PENAL CODE §§ 1000–1000.1, 1001.95.

122. *Id.*

123. Cal. Penal Code § 1001.95(d).

124. INA § 237(a)(2)(A)(i) and (ii), 8 U.S.C. § 1227(a)(2)(A)(i), (ii).

125. *Id.* § 1227(a)(2)(A)(iii).

trolled substance offenses,[126] and inadmissibility for multiple convictions.[127]

Amelioration of harsh immigration consequences was clearly one of the goals of the bill's authors:

> This bill seeks to limit harsh consequences to immigrants by changing the current process for nonviolent, misdemeanor drug offenses from deferred entry of judgment (DEJ) to pretrial diversion. While the current DEJ process eliminates a conviction if the defendant successfully completes DEJ, the defendant may still face federal consequences, including deportation if the defendant is undocumented, or the prohibition from becoming a United States citizen if the defendant is a legal permanent resident. This is a systemic injustice to immigrants to this country, but even U.S. citizens may face federal consequences, including loss of federal housing and educational benefits. This bill will keep families together, help people retain eligibility for U.S. citizenship, and also preserve access to other benefits for those who qualify.[128]

In 2021, California expanded the pretrial diversion options to allow judges to offer diversion to persons charged with misdemeanors offenses, even over the prosecutor's objection.[129] There are exceptions for more serious offenses. For example, diversion is not available to persons charged with a misdemeanor offense for which sex registration may be required (California Penal Code 290) or some commonly charged domestic violence or stalking offenses (California Penal Code 243(e), 273.5, and 646.9).[130] Further, Governor Newsom of California has said that he wants to exclude misdemeanor DUI from diversion eligibility as well.[131]

C. Post-Conviction Relief for Noncitizen Defendants

California's work to protect its noncitizen residents looks not only to prospective prosecutions but also to old ones that present immigration risks. The state first addressed this concern in 2015, when the Legislature enacted a provision allowing individuals to withdraw

126. *Id.* § 1227(a)(2)(B).
127. *Id.* § 1182(a)(2)(B).
128. A.B. 208, Assembly Floor Analysis, 2017–18 Legis., Reg. Sess., at 4 (Cal. 2017) (Sept. 12, 2017).
129. CAL. PENAL CODE § 1001.95(a).
130. *Id.* § 1001.95(e).
131. *See* Letter from Gov. Gavin Newsom, to Members of the Cal. State Assemb., Signing Statement for A.B. 3234 (Sept. 30, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/AB-3234.pdf.

guilty pleas entered under former section 1000 of the California Penal Code.[132] Prior to 2015, the Penal Code provided that if a defendant who pled under section 1000's deferred entry of judgment complied with probation requirements, the person would not have a conviction or arrest record and would suffer no loss of any legal benefits.[133] However, this turned out not to be accurate, since a plea under a post-plea deferred entry of judgment still met the federal definition of conviction for immigration purposes. The California Legislature stated:

> The Legislature finds and declares that the statement in Section 1000.4, that "successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of making pleas in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.[134]

Under section 1203.43 of the California Penal Code, for defendants who were granted deferred entry of judgment on or after January 1, 1997, who perform satisfactorily during the period of deferred judgment, and whose criminal charges were dismissed under section 1000.3 of the Penal Code, the courts must grant a request to withdraw the plea and shall dismiss the complaint or information against the defendant.[135]

California has continued to refine its post-conviction relief measures. In 2016, the Legislature approved S.B. 1242, which allowed persons previously sentenced to 365 days for a misdemeanor to ask the judge to reduce the sentence retroactively by one day.[136] In 2017, the Legislature approved A.B. 813, which allows noncitizens who are no longer in criminal custody to apply to vacate convictions "due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or poten-

132. A.B. 1352, 2015–16 Leg., Reg. Sess. (Cal. 2015) (enacted and codified as CAL. PENAL CODE § 1203.43).

133. CAL. PENAL CODE § 1000.4 (as enacted in 2017 Cal. Stat. ch. 680, § 5).

134. A.B. 1352, 2015–16 Leg., Reg. Sess. (Cal. 2015) (codified as CAL. PENAL CODE § 1203.43(a)(1)).

135. CAL. PENAL CODE § 1203.43(b). *See also* Equal Employment Opportunity Employer Fresno County, *Penal Code Section 1203.43*, https://www.co.fresno.ca.us/home/showdocument?id=1299 (form used by Fresno Public Defender's Office for clients seeking relief under section 1203.43).

136. S.B. 1242, 2016 Leg., Reg. Sess. (Cal. 2016) (codified as CAL. PENAL CODE § 18.5).

tial adverse immigration consequences of a plea of guilty or nolo contendere."[137] And again in 2018, the Legislature approved A.B. 208, a new pre-plea diversion program.[138]

D. Implementing *Padilla v. Kentucky* into the California Penal Code

The Supreme Court's decision in *Padilla v. Kentucky*[139] was a watershed decision for noncitizen defendants. It stressed the disproportionate consequence of a conviction upon noncitizens and the importance of providing noncitizen defendants with adequate advice about the possible immigration consequences.[140] California had required counsel to advise noncitizen defendants of immigration consequences prior to *Padilla v. Kentucky*.[141] However, in 2015, the California Legislature imposed new obligations concerning immigration consequences on judges, prosecutors, and defense counsel.[142] The Legislature explicitly stated its intent "to codify *Padilla v. Kentucky* and related California case law and to encourage the growth of such case law in furtherance of justice and the findings and declarations of this section."[143]

Under these provisions, prosecutors must consider the avoidance of adverse immigration consequences when negotiating pleas as one factor in an effort to reach a just resolution.[144] Thus, the California

137. A.B. 813, 2017 Leg., Reg. Sess. (Cal. 2017) (codified as CAL. PENAL CODE § 1473.7).

138. A.B. 208, 2018 Leg., Reg. Sess. (Cal. 2018) (codified as CAL. PENAL CODE § 1000). One other form of post-conviction relief that may be used to ameliorate a conviction is § 1018 of the California Penal Code, which provides that on application by the defendant, at any time before judgment or within "six months after an order granting probation is made [ ], the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . [The provision is to] be liberally construed to . . . promote justice." *See* CAL. PENAL CODE § 1018. "Good cause" includes a defendant's being unaware that the plea would result in deportation, People v. Superior Court of San Francisco, 523 P.2d 636, 638 (Cal. 1974), even where the defendant has received the required advisals under § 1016.5 of the Penal Code; *see* People v. Patterson, 391 P.3d 1169, 1172 (Cal. 2017). This is because the language of section 1016.5's standard advisal that requires the court to advise a defendant that a criminal conviction "may" have adverse immigration consequences is not sufficient to place the defendant on notice that under his particular circumstances, he faces an actual risk of deportation. People v. Superior Court (Zamudio), 999 P.2d 686, 699–700 (Cal. 2000); *Patterson*, 391 P.3d at 1176–77.

139. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).

140. *Id.* at 364.

141. People v. Soriano, 240 Cal. Rpt. 328, 336 (Cal. Ct. App. 1987); People v . Barocio, 264 Cal. Rptr. 573, 579 (Cal. Ct. App. 2016).

142. CAL. PENAL CODE §§ 1016.2, 1016.3.

143. *Id.* § 1016.2(h).

144. *Id.* § 1016.3(b).

Legislature included in its overall plan a figure who wields considerable power in a criminal case – the district attorney or prosecutor.[145]

In addition, defense counsel has strict requirements under current California law. They must provide accurate and affirmative advice about immigration consequences of a proposed disposition and "when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences."[146]

The obligations imposed by *Padilla* and the California Penal Code have resulted in the phenomenon of public defender offices increasingly employing immigration experts or establishing direct contact with immigration experts for consultation.[147] For example, sixteen of California's fifty-eight public defender county offices now have in-house immigration experts.[148] Some of those offices also provide representation in removal proceedings following the criminal prosecution.[149]

Finally, judges are required to give certain immigration advisals.[150] Before accepting a guilty or nolo contendere plea (except for one to an infraction), the judge must provide the defendant with the following advisement: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."[151] If the defendant requests, the court must allow him or her additional time to consider the plea in light of the advisement[152] and to negotiate with the prosecuting agency.[153]

145. *See* Eagley, *supra* note 7, at 265 (describing the "modern reality that criminal prosecutors are what Stephen Lee calls 'gatekeepers' in the immigration removal system") (*citing* Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 608 (2013)). *See also* Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEORGETOWN IMM. L.J. 141, 207–09 (2021) (suggesting specific measures prosecutors can take to limit the immigration consequences of prosecutions, including supporting legislative efforts such as sections 1203.43 and 1473.7 of the California Penal Code).

146. CAL. PENAL CODE § 1016.3(a).

147. *See, e.g.*, the Alameda County Public Defenders Immigration Unit, https://publicdefender.acgov.org/Immigration.page?; the Los Angeles County Public Defender Immigration Unit, https://pubdef.lacounty.gov/immigration/.

148. Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense after Padilla*, 74 STAN. L. REV. 30 (2022).

149. *See* Alameda County Public Defender, *Services: Immigration*, ACGOV, https://permits.acgov.org/defender/services/immigration.htm (last visited Jan. 26, 2023).

150. CAL. PENAL CODE § 1016.5(a).

151. *Id.*

152. *Id.* § 1016.5(b).

In addition, section 1016.5[154] of the California Penal Code provides for post-conviction relief. If, after January 1, 1978, the court fails to provide the advisement and the defendant shows that the plea may result in deportation, exclusion, or denial of naturalization, the court, on the defendant's motion, must vacate the judgment and allow the defendant to withdraw the guilty plea and enter a plea of not guilty.[155] If the record does not reflect that the court provided the advisement, there is a presumption that the defendant did not receive it.[156] In older cases, records may have been purged,[157] making the presumption especially important. Moreover, in moving to vacate, the defendant cannot be required to disclose his or her immigration status to the court.[158]

E. Funding for Representation in Removal Proceedings

One of the most critical factors in removal proceedings is whether the noncitizen has representation. Respondents in removal proceedings are entitled to representation but at no expense to the government.[159] Thus, they must either pay counsel or obtain representation pro bono or through a free or low-cost legal services provider. While the percentage of represented versus non-represented individuals varies over time by location, nationality, and, in particular, by whether the individual is detained, the result is that only about thirty-seven percent of the people in removal proceedings are able to obtain representation.[160]

Studies report striking differences in the likelihood of success in removal proceedings depending on whether or not the respondent had representation.[161] A report by the Transactional Records Access

153. *Id.* § 1016.5(d).
154. *Id.*
155. *Id.* § 1016.5(b).
156. *Id.*
157. *See* Kathy Brady & Carla Gomez, *Overview of California Post-Conviction Relief for Immigrants,* IMMIGR. LEGAL RES. CTR. 13 (2022), https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf.
158. CAL. PENAL CODE § 1016.5(d).
159. Hearing, 8 C.F.R. § 1240.1(a)(1).
160. Syracuse University, *Who is Represented in Immigration Court?*, TRAC, https://trac.syr.edu/immigration/reports/485/ (last visited Apr. 13, 2023). *See also* Ingrid Eagly & Stephen Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 2, 5, 11–14 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.
161. Syracuse University, *Representation is Key in Immigration Proceedings Involving Women with Children*, TRAC, https://trac.syr.edu/immigration/reports/377/ (last visited Jan. 13, 2023).

Clearinghouse (TRAC) found that, without representation, women with children almost never prevailed in removal proceedings.[162] The American Immigration Council found, studying data from 2007 to 2012, that, of detained individuals, two percent of unrepresented persons were successful in their removal proceedings, while twenty-one percent of represented persons were successful.[163] For persons who had been detained but released, the figures were seven percent and thirty-nine percent, while for individuals who had never been detained, the figures were seventeen percent and sixty percent.[164]

Recognizing the need for legal representation in removal proceedings, California enacted S.B. 6, codified as sections 13302 to 13306 of the California Welfare and Institutions Code, in 2014.[165] The act authorizes the California Department of Social Services (CDSS) to award Immigration Services Funding (ISF) to qualified nonprofit organizations to provide services in one or more of six categories: (1) Services to Assist Applicants seeking Deferred Action for Childhood Arrivals (DACA); (2) Services to Assist Applicants seeking Naturalization; (3) Services to Assist Applicants seeking Affirmative Immigration Remedies; (4) Legal Training and Technical Assistance Services; (5) Education and Outreach Activities; and (6) Services to Assist Individuals with Removal Defense.[166] For Fiscal Year 2021-2022, California awarded $35,678,030.00 to ninety-three organizations in California to provide pro bono legal representation.[167]

As can be seen, California's ISF covers the critical area of removal defense.[168] Funding for Fiscal Year 2022-2024 includes $22.5 million for the Removal Defense Program.[169] This allocation is significant because of the extensive resources required to provide removal defense services. With this funding, non-profit organizations and agencies that did not previously have the resources to offer removal defense will be able to expand their services to provide this critical legal service.

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162. *Id.*
163. Eagly & Shafer, *supra* note 160, at 19.
164. *Id.*
165. S.B. 6, 2017 Leg., Reg. Sess. (Cal. 2018) (codified as Cal. W.&I. Code §§ 13302-13306).
166. *Id.*
167. *Immigration Services Funding Award Announcement Fiscal Year 2021-2022*, CAL. DEP'T SOC. SERVS. (2022).
168. *Social Services: Immigration Services Funding*, CAL. DEP'T SOC. SERVS., https://www.cdss.ca.gov/inforesources/immigration/immigration-services-funding (last visited Jan. 5, 2023).
169. *Id.*

F. Limitations on State Cooperation with ICE

For a number of years, the Department of Homeland Security (DHS) has had a process of requesting state law enforcement agencies to advise DHS prior to release of individuals the DHS believes may be removable and to continue to detain those persons until DHS is able to take physical custody of the person.[170] One program, DHS's Secure Communities Program,[171] led to the deportation of over 90,000 individuals in California.[172] In the 2013 TRUST Act (Transparency and Responsibility in Using State Tools), the California Legislature voiced its concern over the effect of this practice on state resources and on individuals.[173] The Legislature noted that the requests, called

170. *Id.*

171. The Secure Communities Program "is a federal program under which fingerprints taken by local law enforcement are checked against federal immigration databases. The results of that check are sent to ICE, which may issue a hold against the person in custody." *Trust Act Toolkit: Trust Act Implementation and Local Immigration Enforcement,* IMIGR. LEGAL RES. CTR., HTTPS://WWW.ILRC.ORG/SITES/DEFAULT/FILES/RESOURCES/TRUST_INTERACTION_WITH_ICE_PROGRAMS_FINAL_0.PDF (last visited Apr. 14, 2023) [hereinafter *Trust Act Toolkit*]. *See also Secured Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, *https://www.ice.gov/secure-communities (last visited Apr. 14, 2023); see* Secure Communities: Fiscal Year 2021, First Quarter, U.S. Immigr. & Custovs Enf't 2 (2022) https://www.dhs.gov/sites/default/files/2022-04/ICE%20-%20Secure%20Communities%20-%20Fiscal%20Year%202021%20Q1.pdf; *see* Syracuse University, *Secure Communities, Sanctuary Cities and the Role of ICE Detainers*, TRAC, https://trac.syr.edu/immigration/reports/489/ (providing statistical information on the Secure Communities Program). A related DHS program, the Criminal Alien Program ("CAP") is the umbrella term for ICE's work in local jails, state prisons, and federal prisons. ICE searches those locations for individuals who may be subject to removal. Its primary purpose is to collect information on persons who come into state or federal criminal custody and, if ICE believes those persons to be removable, to take those persons into immigration custody upon their release from criminal detention and, if needed, to request that state or local law enforcement detain the individual beyond the release date until ICE can take physical custody of them. *See Trust Act Toolkit*, *supra*, note 173 at 2–3. The Secure Communities and related ICE information-sharing and detainer programs were widely condemned. *See, e.g.*, *Over 60 Members of Congress Push President Biden and DHS to End Programs that Conscript Local Police to Work as Federal Immigration Enforcement*, Immigr. Just. Ctr., (Feb. 12, 2021) https://immigrantjustice.org/press-releases/over-60-members-congress-push-president-biden-and-dhs-end-programs-conscript-local; *see* Dara Lind , *Why Cities are Rebelling Against the Obama Administration's Deportation Policies*, VOX, (Jun. 6, 2014, 11:00 AM), https://www.vox.com/2014/6/6/5782610/secure-communities-cities-counties-ice-dhs-obama-detainer-reform. In 2021, DHS replaced the program with the Priorities Enforcement Program (PEP). *See Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/pep (last visited Apr. 14, 2023) (describing the Priorities Enforcement Program and comparing it to Secure Communities). President Obama retired the program in 2015 replacing it with the Priorities Enforcement Program (PEP). However, President Donald Trump, by Executive Order 13768 (Jan. 25, 2017), ended the PEP program and revived Secure Communities. President Biden revoked Executive Order 13768 on January 20, 2021. *See* Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021). .

172. ACLU of Northern California, *TRUST Act (AB 4)*, https://www.aclunc.org/our-work/legislation/trust-act-ab-4 *(last visited Apr. 14, 2023)*; *see* ACLU of Northern California, *ACLU Applauds Gov. Brown for Signing the TRUST Act* (Oct. 5, 2013), https://www.aclunc.org/news/aclu-applauds-gov-brown-signing-trust-act.

173. TRUST Act, A.B. 4, 2013 Leg., Reg. Sess. (Cal. 2013).

"detainers," were agency requests rather than judicial warrants, and that [174] local and state law enforcement were not reimbursed for continuing to hold individuals for the DHS.[175] It also found that cooperation on the detainers affected community policing negatively by causing victims of crime and domestic abuse to refrain from reporting crime for fear that their report would place them under a DHS detainer.[176]

The TRUST Act was the first of three pieces of legislation designed to limit the use of state resources to comply with DHS detainer requests.[177] The law restricts the U.S. Immigration and Customs Enforcement (ICE) access to individuals detained by California law enforcement agencies by prohibiting those agencies from detaining an individual after that person becomes eligible for release from custody unless certain conditions are met, including the individual having been convicted of a serious or violent felony or certain misdemeanors, as identified by the act.[178]

Three years later, the California Legislature expanded the TRUST Act in the TRUTH (Transparent Review of Unjust Transfer and Holds) Act.[179] The Legislature, in its findings, noted that the ICE's Secure Community Program and its successor, the Priority Enforcement Program, had similar troubling aspects, including a lack of transparency.[180] The Legislature stated the purposes of the bill as addressing "the lack of transparency and accountability by ensuring that all ICE deportation programs that depend on entanglement with local law enforcement agencies in California are subject to meaningful public oversight."[181] A further purpose was "to promote public safety and preserve limited local resources because entanglement between local law enforcement and ICE undermines community policing strategies and drains local resources."[182]

174. *Id.* § 1(c).
175. *Id.* § 1(b).
176. *Id.* § 1(d).
177. *Id.*
178. CAL. GOV'T. CODE §§ 7282, 7282.5(a)(1), (3). The ILRC provides a helpful practice advisory on the TRUST Act. *See also The California TRUST Act: A Guide for Criminal Defenders*, Immigr. Legal Res. Ctr., (Jan. 2014) https://www.ilrc.org/sites/default/files/resources/ilrc_trust_act_memo_final_jan_6.pdf.
179. Transparent Review of Unjust Transfers and Holds (TRUTH) Act, A.B. 2792, 2016 Leg., Reg. Sess. (Cal. 2016) (codified as CAL. GOV'T. CODE §§ 7283, 7283.1, 7283.2).
180. A.B. 2792 § 2(g).
181. *Id.* § 2(h).
182. *Id.* § 2(i).

To achieve these goals, the TRUTH Act requires local law enforcement agencies to notify detained individuals of the agency's intent to comply with an ICE request for information.[183] In addition, under the act, local law enforcement agencies, prior to an interview between ICE and an individual in custody regarding civil immigration violations, must provide the individual a written consent form explaining, among other things, the purpose of the interview, that it is voluntary, and that the individual may decline to be interviewed.[184] The consent form must be available in specified languages.[185] In addition, records related to ICE access must be public records for purposes of the California Public Records Act.[186]

The California Legislature again addressed interaction between ICE and California law enforcement in the California Values Act.[187] In this bill, the Legislature specified that "[a] relationship of trust between California's immigrant community and state and local law enforcement agencies is central to the public safety of the people of California,"[188] and entanglements of state and local agencies with federal immigration enforcement threaten that trust, resulting in "immigrant community members fear [of] approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians."[189] The Legislature noted that entangling state and local agencies with federal immigration enforcement programs "diverts already limited resources and blurs the lines of accountability between local, state, and federal governments."[190] The Legislature also noted that state and local participation in federal immigration enforcement "raises constitutional concerns, including the prospect that California residents could be detained in violation of the Fourth Amendment to the United States Constitution, targeted on the basis of race or ethnicity in violation of the Equal Protection Clause, or denied access to education based on immigration status."[191]

183. *Id.* § 3 (codified as CAL. GOV'T CODE § 7293.1(b)).
184. *Id.* (codified as CAL. GOV'T CODE § 7293.1(a)).
185. *Id.*
186. *Id.* (codified as CAL. GOV'T CODE § 7283.1(c)).
187. S.B. 54, 2016 Leg., Reg. Sess. (Cal. 2016) (codified as CAL. GOV'T. CODE §§ 7284–7284.12).
188. CAL. GOV'T. CODE § 7284.2(b).
189. *Id.* § 7284.2(c).
190. *Id.* § 7284.2(d).
191. *Id.* § 7284.2(e). The law specifically cites the following decisions in support of the Legislature's concern about possible violation of constitutional rights: Ochoa v. Campbell, 266 F.

In pursuit of these concerns, the California Values Act specifies what California law enforcement agencies may and may not do in relation to federal immigration agencies.[192] Inter alia, California law enforcement agencies shall not: (1) use their funds or resources to investigate, detain, or arrest persons for immigration enforcement purposes; (2) place peace officers under the supervision of federal agencies; (3) "[t]ransfer an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination, or in accordance with section 7282.5;" (4) "[p]rovide office space exclusively dedicated for immigration authorities;" or (5) "[c]ontract with the federal government for use of California law enforcement agency facilities to house individuals as federal detainees for civil immigration custody," with some exceptions.[193]

G. Oversight of Detention Facilities and Restriction of Private Prison Facilities

ICE and Customs and Border Patrol detain a large number of individuals. For Fiscal Year 2023, DHS statistics show that immigration authorities were detaining 23,022 persons in adult facilities at the end of March 2023 and 19,991 at the end of April 2023.[194] In Fiscal Year 2021, DHS detained nearly 250,000 people.[195] California is one of the states in which DHS detains individuals. In 2021, the California Attorney General reported that through additional contracts with private prison operators, bed capacity for immigration detention within California had increased from approximately 4,160 to 7,408 between

Supp. 3d 1237, 1243, 1259 (E.D. Wash. 2017); Santoya v. United States, No. 5:16-CV-855-OLG, 2017 WL 2896021, at *1, *5, *8 (W.D. Tex. June 5, 2017); Moreno v. Napolitano 213 F. Supp. 3d 999, 1000 (N.D. Ill. 2016); Morales v. Chadbourne 793 F.3d 208, 211, 213, 222 (1st Cir. 2015); Miranda-Olivares v. Clackamas County, No. 3:12–cv–02317–ST, 2014 WL 1414305, at *1, **8–11 (D. Or. Apr. 11, 2014); Galarza v. Szalczyk, 745 F.3d 634, 638–40 (3d Cir. 2014).

192. *See generally* CAL. GOV'T CODE § 7284.6(a).

193. CAL. GOV'T CODE § 7284.6(a). *See generally* Memorandum from Kevin Gardner on Responsibilities of Law Enforcement Agencies Under the California Values Act, California TRUST Act, and the California TRUTH Act to the Executive of State & Local Law Enforcement Agencies 2–9 (Mar. 28, 2018), *DLE-2018-01 - Information Bulletin - Responsibilities of Law Enforcement Agencies Under the California Values Act, California TRUST Act, and the California TRUTH Act*. A.B. 54 was upheld against a preemption challenge in United States v. California, 921 F.3d 865, 890 (9th Cir. 2019).

194. *ICE Detention Data, FY2023: ICE Average Daily Population by Facility Type and Month*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management (last viewed Dec. 26, 2022).

195. *Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 (last viewed Dec. 26, 2022).

February 2019 and January 2021.[196] During Fiscal Year 2023, 1,779 individuals have been detained in civil immigration custody in California, placing California among the five states having the largest number of immigration detainees.[197]

California has enacted several laws relating to immigration detention facilities. The first of these, A.B. 103, impacted immigration detention in two ways. First, effective June 15, 2017, it prohibited California cities, counties, and local law enforcement from, "entering into contracts with the federal government or any federal agency to house or detain an adult noncitizen in a locked detention facility for purposes of civil immigration custody."[198] Moreover, the bill prohibited entities that had entered into a contract of that nature on or before June 15, 2017, from modifying or renewing the contract so as to expand the maximum number of spaces that could be used to house or detain adult noncitizens for purposes of civil immigration custody.[199] The bill contained similar provisions prohibiting contracts to house unaccompanied minors in the custody of federal agencies in a locked detention facility.[200]

A separate provision of A.B. 103 required the California Attorney General to conduct "reviews of county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California."[201] The review was to include "the conditions of confinement," "the standard of care and due process provided," and "the circumstances around [the] apprehension" of civil immigration detainees, and then prepare "a comprehensive report outlining the findings of the review."[202]

The second provision, known as A.B. 32, went further, prohibiting any person or entity from operating a private detention facility in California pursuant to a contract with a governmental entity.[203] This provision had a large impact on DHS, which houses immigration de-

196. XAVIER BECERRA, THE CALIFORNIA DEPARTMENT OF JUSTICE'S REVIEW OF IMMIGRATION DETENTION IN CALIFORNIA 5 (2021), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2021.pdf.

197. Syracuse University, *Immigration Detention Quick Facts*, TRAC, https://trac.syr.edu/immigration/quickfacts/ (last visited Dec. 26, 2022) (reporting that the other three states that DHS houses the highest number of detainees are Texas (10,008), Louisiana (4,454), Georgia (2,007), and Arizona (1,652)).

198. A.B. 103, 2017 Leg., Reg. Sess. (Cal. 2017) (codified as CAL. GOV'T CODE § 7310(a)).

199. CAL. GOV'T CODE § 7310(b).

200. *Id.* § 7311(a).

201. *Id.* § 12532(a).

202. *Id.* § 12532(b).

203. CAL. PENAL CODE §§ 9500-9501.

tainees in California almost exclusively through contracts with privately-operated, for-profit entities.[204]

The federal government challenged A.B. 103's inspection provisions and A.B. 32's prohibition on private detention facilities in federal court.[205] In both cases, the Ninth Circuit struck down the provision, A.B. 103 in part[206] and A.B. 32 in its entirety.[207] The Court concluded that one of A.B. 103's inspection requirements, the requirement that inspectors examine the circumstances surrounding detainees' apprehension and transfer to the facility, violated the doctrine of intergovernmental immunity because it differed from inspections required of other detention facilities.[208] However, the Court upheld the remaining inspection requirements as within the state's historic power to ensure the health and welfare of inmates and detainees in facilities within its borders and because there was no indication that Congress intended to supersede that authority.[209] The Court found A.B. 32 invalid on the basis of both intergovernmental immunity and obstacle preempted because the prohibition on private detention facilities in California made it impossible for the federal government to carry out its detention obligations.[210]

IV. THE RESPONSES OF CALIFORNIA COURTS AND THE FEDERAL IMMIGRATION AUTHORITIES TO CALIFORNIA'S NEW IMMIGRATION-RELATED CRIMINAL LAWS

The changes to California's criminal laws addressed in the preceding section, enacted to ameliorate the most serious immigration consequences of criminal conduct, fall into two basic categories. The first of these categories covers changes to criminal sentencing statutes and alternatives to convictions, applied prospectively to current and future cases. These sorts of statutes are ones to which the Board has historically given full faith and credit as within a state's exclusive authority to define offenses and sentences.[211] In the second category,

204. GEO Grp., Inc. v. Newsom, 50 F.4th 745, 751–52 (9th Cir. 2022).
205. *Id.*
206. United States v. California, 921 F.3d 885, 895 (9th Cir. 2019).
207. *GEO Grp., Inc.*, 50 F.4th at 763.
208. United States v. California, 921 F.3d at 885.
209. *Id.* at 886.
210. *GEO Grp., Inc.*, 50 F.4th at 758 (intergovernmental immunity), 762-63 (obstacle preemption).
211. Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378, 1380 (BIA 2000).

fall provisions that allow for post-conviction relief. Post-conviction relief under these provisions will be honored by the Board and federal courts if the relief does not conflict with established federal rules defining "conviction" for immigration purposes.[212]

The benefits of California's new legislation to its residents are only as strong as its application by state courts and its recognition by the immigration authorities, particularly the Board. Thus, Californians seeking the benefit of the legislation have a number of hurdles to overcome. First, they must negotiate with the prosecution to attempt to arrive at an appropriate plea and proposed sentence. They must then convince the state court hearing the case that they are eligible for the particular type of resolution in question. If they are applying for post-conviction relief, they must again negotiate with the prosecution and then convince the presiding court that they are eligible for the relief. As demonstrated below, California courts have shown that they apply the statutes in a conscientious manner, holding applicants to the statutory requirements.[213] Second, noncitizens must convince the immigration authorities that the resolution in the California criminal court precludes immigration consequences or would incur only some lesser immigration consequences.[214] Third, if the person has already been found removable or ineligible for some immigration relief or benefit, he or she must find a way to get the case back before the immigration authorities for a new decision.[215]

A. Application of California's Immigrant-Shield Post-Conviction Relief Statutes by California Courts

California's three principal post-conviction measures providing means for noncitizens to withdraw guilty pleas are sections 1016.5, 1203.43, and 1473.7 of the California Penal Code.[216] As described above, section 1016.5 allows withdrawal of a plea if the criminal court judge fails to provide the required advisal of immigration consequences.[217] Section 1203.43 was enacted to correct an error in the language of a previous deferred entry of judgment statute, section 1203.4 of the California Penal Code, that erroneously stated that a plea en-

212. *See infra*, text accompanying notes 292-297.
213. *See infra*, text accompany notes 229-282.
214. *See infra*, text accompanying notes 287-353.
215. *See infra*, text accompanying notes 355-367.
216. CAL. PENAL CODE § 1016.5, 1203.43, 1473.7.
217. CAL. PENAL CODE § 1016.5.

tered under it would have no immigration consequences.[218] As it turned out, that information was incorrect because a plea under section 1203.4 remained a conviction for immigration purposes.[219]

Section 1203.43 was designed as a simple procedure where judges may grant relief on the pleadings without a hearing since the only required showing is that the court, in fact dismissed the defendant's charges under section 1000.3 of the Penal Code.[220] "If court records showing the case resolution are no longer available, the applicant's declaration under penalty of perjury that the charges were dismissed after [they] completed the requirements for deferred entry of judgment" together with the state summary criminal history information maintained by the Department of Justice, are sufficient to support the application.[221]

The second major main post-conviction relief provision for noncitizens is section 1473.7 of the California Penal Code which became effective on January 1, 2017.[222] This section allows a person who is no longer in criminal custody to file a motion to vacate a conviction or sentence for either of the following reasons:

> (1) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.
>
> (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.[223]

The immigration-specific provision of section 1473.7 thus has two principal requirements. First, movants "must show that [they] did not meaningfully understand the immigration consequences of [their] plea."[224] Next, movants "must show that [their] misunderstanding constituted prejudicial error."[225]

218. See text accompanying note 134, *supra*.
219. *See id.*
220. CAL. PENAL CODE § 1203.43(b).
221. *Id.*
222. CAL. PENAL CODE § 1473.7.
223. CAL. PENAL CODE § 1473.7(a)(1)–(2).
224. People v. Espinoza, 522 P.3d 1074, 1079 (Cal. 2023).
225. *Id.*

As originally written, section 1473.7 applied only to convictions resulting from a plea.[226] However, the California Legislature amended the statute to make clear that it applies to convictions deriving from either a plea or a trial.[227]

Both the California Supreme Court[228] and the California Court of Appeal have spoken on section 1473.7. These decisions show that the courts have not granted section 1473.7 relief lightly, but have instead queried closely into the terms "prejudicial error," "the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences" of the plea, and "adverse immigration consequences."[229]

In determining whether a defendant meaningfully understood the immigration consequences of a guilty plea or trial, California courts look to factors such as explanations given by counsel or the court during criminal proceedings and the defendant's conduct thereafter.[230] In most section 1473.7 vacatur cases, California defendants whose convictions arose from a plea would have signed a plea form, known as a *Tahl* form, notifying them of the advisals required by California Penal Code section 1016.5.[231] California courts have rejected arguments that such an advisal satisfies defense counsel's duty to advise their clients of immigration consequences, even where the advisal used the word "will" rather than "may" in advising of potential deportation.[232]

On the other hand, a defendant was unable to show that he did not understand the immigration consequences so as to demonstrate the required error, when the trial court orally told him that a conviction would make him deportable, his attorney reviewed the immigra-

226. *See* CAL. PENAL CODE § 1473.7(a)(1), (e)(4), *amended by* Stat. 2021, ch. 420, § 1.

227. *Id. See also* People v. Singh, 296 Cal. Rptr. 3d 163, 166–63 (Cal. Ct. App. 2022) (explaining the history of and applying the amendment). The legislative history of the amendment confirms that the purpose of the amendment was to expand the statute to include convictions as well as pleas. A.B. 1259, Bill Analysis, 2021-22 Legis., Reg. Sess., at 3 (Cal. 2021) (Assembly 3d Reading) ("This bill expand the category of persons able to seek to vacate a conviction or sentence as legally invalid, whatever way that person was convicted or sentence[d], including a person who was found guilty after a trial.").

228. People v. Vivar, 485 P.3d 425, 436–37 (Cal. 2021).

229. CAL. PENAL CODE § 1473.7(e)(4).

230. *See generally* In re Tahl, 460 P.2d 449 (Cal. 1969); *see* People v. Manzanilla, 295 Cal. Rptr. 3d 836, 847 (Cal. Ct. App. 2022), (referring to the plea advisal form as a *Tahl* form).

231. *See generally* In re Tahl, 460 P.2d 449 (Cal. 1969); *see Manzanilla*, 295 Cal. Rptr. 3d 836, 847 (Cal. Ct. App. 2022, (referring to the plea advisal form as a *Tahl* form).

232. People v. Espinoza, 522 P.3d 1074, 1078–80 (Cal. 2023) (finding a lack of meaningful understanding despite the trial court's having provided general advisement under section 1016.5); *Manzanilla*, 295 Cal. Rptr. 3d at 847; People v. Soto, 294 Cal. Rptr. 3d 451, 456–57 (Cal. Ct. App. 2022).

tion consequences of the plea with him, and he "orally acknowledged that he understood the immigration consequences of his plea" and that he would "wait for immigration."[233] Similarly, a defendant's testimony, directly after his plea, that he could not "see his life in Mexico" was persuasive evidence that he understood the deportation consequences of his plea.[234] Hence, where the record demonstrates that the defendant was well aware of the immigration consequences and made a clear choice of what to do in the case, the defendant has not established error for purposes of Section 1473.7.[235]

Post-trial conduct may also demonstrate a lack of understanding of immigration consequences. When a defendant, following a criminal proceeding, started a new business, joined community organizations, became well-known in his local community, and took an international commercial flight out of the United States, the defendant's conduct was not consistent with the behavior of one who understood that his conviction had immigration consequences.[236] Similarly, an application for naturalization after a conviction constituted evidence that the noncitizen did not appreciate the consequences of his plea because "someone who understood his criminal conviction made him automatically deportable would not voluntarily contact immigration authorities and advise them of his presence in the country."[237] Swift action in bringing concerns to the trial court can also demonstrate a lack of original understanding of immigration consequences.[238]

An absence of understanding can also be shown through counsel's corroboration. For example, the "defendant's claims of error were supported by his former attorney's undisputed testimony . . . that he misunderstood the potential immigration consequences . . . and he did not explore possible alternatives to pleading to an aggravated felony."[239] Similar, error was established when the defendant presented counsel's e-mail correspondence and handwritten notes to establish that counsel did not "advise him as to the actual immigration consequences of a plea to the drug charge or any other plea."[240]

233. People v. Abdelsalam, 288 Cal. Rptr. 3d 658, 661 (Cal. Ct. App. 2022).
234. People v. Garcia, 295 Cal. Rptr. 3d 259, 264 (Cal. Ct. App. 2022).
235. People v. Odero, E077298, 2022 WL 2128841, at * 6 (Cal. Ct. App. 4th June 14, 2022).
236. *Espinoza*, 522 P.3d at 1079–80.
237. People v. Alatorre, 286 Cal. Rptr. 3d 1, 18–19 (Cal. Ct. App. 2021).
238. People v. Manzanilla, 295 Cal. Rptr. 3d 836, 851 (Cal. Ct. App. 2022).
239. People v. Camacho, 244 Cal. Rptr. 3d 398, 407 (Cal. Ct. App. 2019).
240. People v. Vivar, 485 P.3d 425, 430 (Cal. 2021).

The California Legislature and courts have defined two unique features of the sorts of error that could satisfy section 1473.7's requirements. The first of these is that where the claimed error was erroneous or defective advice by counsel, the error need not meet the *Strickland v. Washington* standard of ineffectiveness.[241] Prior to 2019, California courts interpreted section 1473.7, specifically or impliedly, to require a showing of ineffectiveness under *Strickland*.[242] In 2018, however, the Legislature amended section 1473.7 to add that "[a] finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."[243] The Legislature thus decoupled section 1473.7 from the *Strickland* standard.[244]

Instead California courts have looked to *Padilla v. Kentucky*[245] for guidance on defense counsel's obligations towards a noncitizen defendant. After *Padilla*, "defense counsel has had a duty to properly explain the adverse immigration consequences of a plea to a defendant. . . . Where immigration law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty."[246] A defense counsel's contemporaneous notes reflecting that counsel told the defendant that a proposed plea "would [change] his status [and] he [would] have [an] immigration hearing" were insufficient to meet this burden where deportation was virtually certain.[247]

Another example of attorney conduct that might qualify as an error for purposes of section 1473.7 is counsel's failure to counter a prosecution offer of a one-year sentence with a proposal of a 364-day sentence.[248] The lower sentence of 364 days would prevent the defendant's conviction for a crime of violence from being an aggravated felony and would thus maintain the defendant's eligibility for some

241. Strickland v. Washington, 466 U.S. 668, 686 (1984).

242. *Camacho*, 244 Cal. Rptr. 3d at 404 (citing as examples People v. Espinoza, 238 Cal. Rptr. 3d 619, 623 (Cal. Ct. App. 2018); People v. Tapia, 237 Cal. Rptr. 3d 572, 577 (Cal. Ct. App. 2018); People v. Olvera, 235 Cal. Rptr. 3d 200, 201–02 (Cal. Ct. App. 2018); People v. Ogunmowo, 232 Cal. Rptr. 3d 529, 535 (Cal. Ct. App. 2018); People v. Perez, 228 Cal. Rptr. 3d 95, 102–03 (Cal. Ct. App. 2018)).

243. *See also id.* at 405 (explaining legislative history of amendment).

244. *Alatorre*, 286 Cal. Rptr. 3d 1, 17 (Cal. Ct. App. 2023).

245. People v. Manzanilla, 295 Cal. Rptr. 3d 836, 846 (Cal. Ct. App. 2022).

246. *Manzanilla*, 295 Cal. Rptr. 3d 836, 846 (Cal. Ct. App. 2022) (quoting United States v. Rodriguez-Vega, 797 F.3d 781, 786 (9th Cir. 2015), citing Padilla v. Kentucky, 559 U.S. 356, 369 (2010)).

247. *Id.* at 847–48.

248. *Manzanilla*, 295 Cal. Rptr. 3d at 840.

form of relief from removal.[249] In failing to offer a plea to the lower sentence, counsel failed to follow *Padilla*'s instructions that defense counsel have a duty to "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce[s] the likelihood of deportation."[250]

A second unique feature of Section 1473.7 is that the required error need not be an error of counsel at all, but can be the movant's own mistake of law or inability to understand the potential adverse immigration consequences.[251] "The key to the statute is the mindset of the defendant and what he or she understood – or didn't understand – at the time the plea was taken."[252] Thus, to establish error sufficient to trigger a section 1473.7 petition, "a person need only show by a preponderance of the evidence [that] [they] did not 'meaningfully understand' or 'knowingly accept' the actual or potential adverse immigration consequences of the plea."[253] Under this principle, the "error" is that the petitioner subjectively misunderstood the immigration consequences of the plea, and there is no additional need to establish this mistake was caused by some third party.

"Because the errors need not amount to a claim of ineffective assistance of counsel, it follows that courts are not limited to the *Strickland* test of prejudice, [that is,] whether there was reasonable probability of a different outcome in the original proceedings absent the error."[254] Instead, showing prejudice for purposes of section 1473.7 means "demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences."[255] "A 'reasonable probability' does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.'"[256] It

249. *Id.*; *see also* People v. Vivar, 485 P.3d 425, 431 (Cal. 2021) (finding error where counsel warned that plea might have immigration consequences in circumstances where those consequences were certain).

250. *Manzanilla*, 295 Cal. Rptr. 3d at 848 (quoting *Padilla*, 559 U.S. at 373 (2010)) (providing examples of the "many ways" in which defense counsel can creatively bargain).

251. *Id.* at 850; *accord* People v. Camacho, 244 Cal. Rptr. 3d 398, 407 (Cal. Ct. App. 2019); People v. Soto, 294 Cal. Rptr. 3d 451, 456–57 (Cal. Ct. App. 2022); People v. Alatorre, 286 Cal. Rptr. 3d 1, 18–19 (Cal. Ct. App. 2021) (citing additional cases agreeing that the moving party's own mistake of law or inability to understand the potential adverse immigration consequences may be error sufficient for purposes of section 1473.7).

252. People v. Mejia, 248 Cal. Rptr. 3d 819, 824 (Cal. Ct. App. 2019).

253. *Id.* at 821.

254. *Camacho*, 244 Cal. Rptr. 3d at 407.

255. People v. Vivar, 485 P.3d 425, 437–38 (Cal. 2021).

256. *Soto*, 294 Cal. Rptr. 3d 451, 457–58 (Cal. Ct. App. 2022).

is not necessary to show that the defendant could have obtained a more favorable outcome at trial.[257] For example, prejudice is established if the defendant would have risked going to trial "even if only to figuratively throw a 'Hail Mary.'"[258] Where the conviction for which vacatur is sought resulted from a trial, prejudice might be shown by evidence that the defendant might have accepted a plea that did not have immigration consequences absent an error that affected the defendant's ability to understand the immigration consequences of going to trial.[259]

In assessing the reasonable probability that a defendant would have chosen a different resolution had the defendant been adequately informed of the immigration consequences, courts consider the totality of the circumstances.[260] "Factors particularly relevant to this inquiry include the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible."[261] "Also relevant are the defendant's probability of obtaining a more favorable outcome if [they] had rejected the plea, as well as the difference between the bargained-for term and the likely term if [they] were convicted at trial."[262]

The California Supreme Court has recognized that removal from the United States and one's ties to this country may constitute "the most devastating consequence" of a conviction.[263] Such ties may be established by length of residence, immigration status, lack of connection to one's country of origin, connection to family, friends, or the community in the U.S., work history or financial ties, or other forms of attachment.[264] The existence of strong community ties supports an assertion that a defendant would have chosen to go to trial rather than take a plea that would make the defendant removable, breaking those ties.

257. People v. Rodriguez, 283 Cal. Rptr. 3d 413, 420 (Cal. Ct. App. 2021).
258. *Id.*
259. People v. Singh, 296 Cal. Rptr. 3d 163, 167–68 (Cal. Ct. App. 2022).
260. *Vivar*, 485 P.3d at 438.
261. *Id.*
262. People v. Espinoza, 522 P.3d 1074, 1080 (Cal. 2023).
263. *Id.*
264. *Id.*

California courts emphasize the importance the defendant placed on immigration consequences at the time of the plea.[265] Evidence of this may appear in the transcript of the criminal proceedings themselves. For example, in *People v. Manzanilla*, the trial court transcript includes Mr. Manzanilla's statement that "'[i]f I'm going to be deported, no,' he did not want the deal" in response to a proposed plea bargain.[266]

Of equal importance in determining prejudice, that is, that a defendant would have chosen a different resolution, is whether alternative immigration-safe dispositions were available at the time of the defendant's plea.[267]

> Factors relevant to this inquiry include the defendant's criminal record, the strength of the prosecution's case, the seriousness of the charges or whether the crimes involved sophistication, the district attorney's charging policies with respect to immigration consequences, and the existence of comparable offenses without immigration consequences.[268]

The defendant must provide objective corroborating evidence of prejudice.[269] The sort of objective evidence that would meet this requirement "includes facts provided by declarations, contemporaneous documentation of the defendant's immigration concern or interaction with counsel, and evidence of the charges the defendant faced."[270] Examples include declarations and biographical evidence of long residence in the United States, ties to the community, family residing in the United States, lack of criminal record, and declarations from immigration law experts on immigration consequences and possible alternative immigration-safe dispositions.[271]

A recent decision shows that California courts are also scrutinizing the requirement of an "adverse immigration consequence."[272] In *People v. Gregor*, the Court of Appeal of California found that the applicant's inability to sponsor his father for a family-based immigrant visa was not an adverse immigration consequence for purposes of sec-

265. People v. Soto, 294 Cal. Rptr. 3d 451, 456–57 (Cal. Ct. App. 2022).
266. People v. Manzanilla, 295 Cal. Rptr. 3d 836, 850 (Cal. Ct. App. 2022).
267. *Espinoza*, 522 P.3d 1074, 1082 (Cal. 2023).
268. *Id.* at 1082 (Cal. 2023).
269. *Id.* at 1077; People v. Abdelsalam, 288 Cal. Rptr. 3d 658, 666 (Cal. Ct. App. 2022); *Soto*, 294 Cal. Rptr. 3d at 458.
270. *Espinoza*, 522 P.3d at 1080.
271. *Id.* at 1080–82.
272. People v. Gregor, 298 Cal. Rptr. 3d 238, 241 (Cal. Ct. App. 2022).

tion 1473.7.[273] The Court considered the statute's legislative history, in which legislators voiced their concern about convictions that would render a noncitizen removable or inadmissible.[274] The Court also noted that section 1473.7 was part of a larger statutory framework, including sections 1016.2, 1016.3, and 1016.5 of the California Penal Code, and that section 1016.2(c) referred to irreparable damage to a noncitizen's "current or potential lawful immigration status, resulting in penalties such as mandatory detention, deportation, and permanent separation from close family."[275] In addition, the Court looked to the language of *Padilla v. Kentucky,* where section 1016.2 was enacted to codify into California's law, and noted the U.S. Supreme Court's citing of cases involving deportation and exclusion.[276] The Court concluded that the "language of the statute, the existing statutory scheme, and the purpose of the statute demonstrate[d] [that] the Legislature[ ] inten[ded] 'adverse immigration consequences' to refer to removal or deportation, exclusion, or the denial of naturalization or lawful status."[277]

Section 1473.7 also contains a timeliness provision. While the motion to vacate is considered timely filed at any time that the applicant is no longer in criminal custody, it may be deemed "untimely if it was not filed with reasonable diligence after the later of:"

> (a) The [applicant's] receiv[ing] a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization [or]
>
> (b) Notice that a final removal order has been issued . . . based on the . . . conviction . . . that the [applicant] seeks to vacate.[278]

Thus, "for most immigration-related section 1473.7 petitions, diligence in bringing a motion is evaluated from the point in time that a petitioner faces a clear adverse immigration consequence as a result of the underlying conviction."[279] At least one California court has found "reasonable diligence [for section 1473.7 purposes] where the peti-

273. *Id.*
274. *Id.* at 251.
275. *Id.*
276. *Id.*
277. *Id.* at 252.
278. CAL. PENAL CODE § 1473.7(b)(2)(A)–(B).
279. People v. Alatorre, 286 Cal. Rptr. 3d 1, 5 (Cal. Ct. App. 2021).

tioner's triggering events predated [the enactment of] the law by determining whether or when the petitioner had a reason to inquire about new legal grounds for relief and assessing the reasonableness of the petitioner's diligence from that point forward."[280]

As these decisions illustrate, California courts are granting vacatur motions under section 1473.7, but they are not doing so lightly. Instead, California courts demand proof of the lack of meaningful understanding, prejudicial error, requirements.

B. Effects Given to Resolutions Under California's New Statutes by the Board of Immigration Appeals and Federal Courts

Because determinations on immigration status are ultimately made by the federal immigration authorities, a state's changes to its criminal laws are only as effective in reducing the immigration consequences of a criminal proceeding as their recognition by DHS and the Executive Office for Immigration Review (EOIR). The former houses Immigration and Customs Enforcement, which charges individuals with removability and actually adjudicates some special forms of removal.[281] The latter houses the Board of Immigration Appeals (BIA or Board) and the Immigration Courts.[282] If a state resolution of a criminal case does not satisfy the DHS and EOIR requirements, then the state's efforts to protect its noncitizen residents fail.

Dispositions under California's criminal laws may come before the Immigration Courts and the Board in any of several contexts. The case may present an initial criminal resolution, for example, a pre-plea diversionary program obtained prior to the removal proceeding. Alternatively, the resolution in question may be the result of post-conviction relief in the state court obtained prior to removal proceedings. The case may also present a resolution subject to California's universal retroactive reduction of misdemeanor sentences to 364 days.[283] In each of these contexts, the principal question is whether the criminal resolution involved meets the definition of conviction, since most

280. *Id.* at 15.

281. *See generally*, Migration Policy Institute, *Who Does What in U.S. Immigration* (Dec. 1, 2005), https://www.migrationpolicy.org/article/who-does-what-us-immigration (last visited May 27, 2023); *see also* U.S. Department of Homeland Security Public Organization Chart, at https://www.dhs.gov/sites/default/files/2023-02/23_0221_dhs_public-organization-chart.pdf.

282. *See generally*, Migration Policy Institute, *supra* n. 283.

283. See text accompanying notes 117-120, *supra*.

crime-based removal grounds and most statutory bars to relief from removal require a conviction.[284]

The Board has noted an obligation under the Full Faith and Credit Clause to recognize the acts of state legislatures, records, and judicial proceedings.[285] In addition, the Board's definition of state criminal laws, unlike its interpretation of federal immigration provisions, is not entitled to *Chevron* deference.[286] However, these restrictions do not preclude the Board from considering the language of the vacatur itself or the language of the state statute under which the vacatur is granted.[287] It may, and does, reject vacaturs based on the reason given in the implementing statute or in the record of the case before it.[288]

The Board's acceptance of criminal court resolutions depends on both the procedural status of the removal proceedings and the procedural status of the underlying criminal case. In initial removal proceedings, where an individual has a resolution of a pre-plea diversion or other disposition under California law that does not carry immigration consequences, the Board has recognized that there is no conviction.[289] In addition, for convictions that have been ameliorated through post-conviction relief, the Board has recognized that there is no conviction if a court having jurisdiction over criminal proceedings vacates a conviction based on a defect in the underlying criminal proceeding.[290] "If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes."[291] Thus, if a conviction is vacated "solely for immigration purposes," or for other

284. See generally text accompanying notes 57-73, *supra*.

285. Matter of Rodriguez-Ruiz, 22 I&N. Dec. 1378, 1379–80 (BIA 2000) (declining to go behind the state court judgment and question whether the New York court acted in accordance with its own state law). *See also* Matter of Cota-Vargas, 23 I&N Dec. 849, 850, 852 (BIA 2005) (holding the Board must accept the basis given by a state court for its legal judgments); Matter of Thomas, 27 I&N Dec. 674, 685–86 (A.G. 2019) (explaining that *Matter of Pickering* simply requires immigration judges to "make determinations about the reasons that certain state-court orders were entered" without "wad[ing] into the intricacies of state criminal law" that immigration judges "have little familiarity").

286. *See* Contreras v. Schiltgen, 122 F.3d 30, 32 (9th Cir. 1997); Ocon-Perez v. INS, 550 F.2d 1153, 1154 (9th Cir. 1977); Pinho v. Gonzales, 432 F.3d 193, 213 (3d Cir. 2005) (holding that DHS may not "arrogate to itself the power to find hidden reasons lurking beneath the surface of the ruling of state courts").

287. *See Pinho*, 432 F.3d at 213.

288. *Id.*

289. Matter of Pickering, 23 I&N Dec. 621, __ (BIA 2003).

290. *Id.* at 624.

291. *Id.*

reasons "unrelated to the merits of the underlying criminal proceedings," the conviction remains valid for immigration purposes.[292] Vacaturs that would not be valid for immigration purposes include post-conviction modifications under "rehabilitative" laws. Rehabilitative laws are laws that "reduce the long-term impact of criminal convictions on individuals who subsequently demonstrate a period of good behavior such as by 'serv[ing] a period of probation or imprisonment,' after which the 'conviction is ordered dismissed by the judge.'"[293] They also include state court orders that modify the subject matter of a conviction[294] or the criminal sentence.[295]

The Board has recognized that vacaturs under section 1473.7 of the California Penal Code remove a conviction for immigration purposes.[296] The Board reasoned that because a vacatur under section 1473.7 is "available only in cases of legal invalidity or actual innocence," a conviction vacated under that provision is no longer valid for immigration purposes.[297]

Vacaturs under section 1018 of the California Penal Code have also been successful in removing convictions for immigration purposes. Section 1018 requires "California courts to permit a criminal defendant to withdraw a guilty plea if [the person] [was] unrepresented by counsel at the time of [the] plea, upon a showing of 'good cause.'"[298] The Ninth Circuit reviewed the sorts of good cause that would support a section 1018 plea withdrawal and explained that the grounds that would allow withdrawal of a guilty plea under that section are substantive and procedural defects in the underlying proceeding and thus constitute a valid vacatur for immigration purposes.[299]

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292. *Id.* at 624–25.

293. Prado v. Barr, 923 F.3d 1203, 1206 (9th Cir. 2019) (quoting Ramirez-Altamirano v. Holder, 563 F.3d 800, 805 n. 3 (9th Cir. 2009)) (citations omitted). California's law retroactively reduces sentences for certain controlled substances, which allowed individuals who had completed their sentences under statutes criminalizing the sale, possession, production, or transportation of marijuana to have their convictions reclassified and reduced resembled statutes that have been deemed rehabilitative. Citation Needed.

294. Matter of Dingus, 28 I&N Dec. 529, 534–35 (BIA 2022). .

295. Matter of Thomas, 27 I&N Dec. 674, 683 (A.G. 2019).

296. *See* Letter from Rose Cahn, Greg Chen, and Sirine Shebaya to Kerry E. Doyle (Mar. 15, 2022), *in* Immigrant Legal Resource Center 5, https://www.ilrc.org/sites/default/files/resources/2022.03_letter-opla-1473.7.pdf (attaching a list of Board of Immigration Appeals cases holding that a vacatur under section 1473.7 meets the requirements of *Matter of Pickering*, and removes a conviction for immigration purposes).

297. Elpidio Mendoza Sotelo, AXXX-XX8-491, *2 (BIA Dec. 23, 2019).

298. Ballinas-Lucero v. Garland, 44 F.4th 1169, 1179 (9th Cir. 2022).

299. *Id.*

Similarly, the Board has recognized, in several unpublished cases, that vacaturs under section 1016.5 of the California Penal Code are based upon a defect in the proceedings and thus remove the underlying conviction for immigration purposes. For example, in an early unpublished decision, the Board found that it was bound by the trial court's decision that the respondent's criminal proceedings were not in compliance with section 1016.5 and that the conviction was, therefore, defective.[300] Indeed, where the Immigration Judge looked beyond the state court's section 1016.5 vacatur to find that the vacatur was invalid because the criminal court docket sheet reflected that the reporter's notes were lost or destroyed, the Board reversed the Immigration Judge's conclusion that the vacatur was invalid.[301]

However, dispositions under California Penal Code section 1203.43 and section 18.5's retroactive reduction in sentences have had a more difficult path towards removing a conviction for immigration purposes. The Board's reasoning concerning the two provisions varies, as explained below.

The Board has declined to recognize California's statutory retroactive reduction of misdemeanor sentences, at least in the context of specific immigration provisions. In *Matter of Velasquez-Rios*, the respondent had been convicted of possession of a forged instrument in violation of California law.[302] The Immigration Judge found that this made Velasquez-Rios statutorily ineligible for the relief of cancellation of removal because he had been convicted of a crime involving moral turpitude for which a sentence of one year or more could be imposed.[303] At the time of Mr. Velasquez-Rios' conviction, the maximum sentence for a misdemeanor was 365 days.[304] Subsequently, the California Legislature enacted section 18.5, reducing the maximum sentence for most California misdemeanors to 364 days and making

300. Gina Lobnotin Meala, AXX XX6 062, *1(BIA Aug. 2, 2004). *Accord*, Ignacio Javier Perez-Hernandez, AXXX XX9 726, *1 (BIA July 18, 2013); Jose Noel Meza-Perez, AXXX XX9 568,*1 (BIA Feb. 28, 2011). The Administrative Appeals Unit of U.S. Citizenship and Immigration Services has also recognized vacaturs under section 1016.5 as removing convictions for immigration purposes. *See* Applicant: (Identifying Information Redacted By Agency), 2009 WL 3066357, *3 (AAO June 26, 2009); *but see* Applicant: (Identifying Information Redacted By Agency), 2008 WL 5651999, *3 (AAO Nov. 6, 2008) (finding that a conviction remained valid despite vacatur under section 1016.5 because the record established no underlying procedural defect, where the applicant was clearly advised of the immigration consequences of entering a guilty plea to the charge of driving with a suspended license).

301. Sergio Gabriel Raya-Dominguez, AXXX XX8 730, *1 (BIA Oct. 22, 2015).

302. Matter of Velasquez-Rios, 27 I&N Dec. 470, 470 (BIA 2018).

303. *Id.* at 471.

304. *Id.*

the provision retroactive.[305] Section 18.5 did not become effective until after Mr. Velasquez-Rios' conviction.[306] This change would have prevented the conviction from being a removable offense because it would no longer be an offense for which a sentence of one year might be imposed.

The Board declined to give retroactive effect to the reduction in sentence in Mr. Velasquez-Rios' case and based its decision principally on the language of the federal statute in question. The federal statute states that the deportation ground for conviction of a crime involving moral turpitude requires that the offense be one "for which a sentence of one year or longer may be imposed."[307] The Board determined that California's change to its laws did not affect the immigration consequences of the conviction under federal law because determining the effect of the conviction required a "backward-looking inquiry into the maximum possible sentence the respondent could have received for his forgery offense at the time of his conviction."[308] The Board relied on two precedent decisions, *McNeill v. United States*[309] and *United States v. Diaz*.[310] In both cases, the courts declined to give retroactive effect to state statutes that retroactively reduced sentences, finding that the language of the statutes involved required a backward-looking inquiry to the initial date of conviction.[311]

On review, the Ninth Circuit upheld the Board's decision and arguably went beyond it.[312] The Court noted several reasons for declining to apply section 18.5 retroactively, including the desirability of national uniformity in application of immigration laws.[313] Allowing retroactive effect, said the Court, could result in variation both between jurisdictions, applying different state statutes, and making immigration results dependent on the timing of the removal proceeding.[314] It is debatable, however, whether giving retroactive effect to section 18.5 would result in the lack of uniformity the Court

305. *Id.*
306. *Id.*
307. 8 U.S.C. § 1227(a)(2)(A)(i)(II); Matter of Velasquez-Rios, 27 I&N Dec. 470, 473 (BIA 2018).
308. Matter of Velasquez-Rios, 27 I&N Dec. at 474.
309. McNeill v. United States, 563 U.S. 816, 820 (2011).
310. United States v. Diaz, 838 F.3d 968, 973 (9th Cir. 2016).
311. Matter of Velasquez-Rios, 27 I&N Dec. at 473–74.
312. Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1083 (9th Cir. 2021.).
313. *Id.* at 1086.
314. *Id.* at 1086–87.

feared. The result of removal proceedings based upon convictions of the various state offenses already varies depending on the precise language of the state statute involved, and there is already a lack of uniformity in terms of timing of removal proceedings, given the considerable backlogs in the immigration court.[315] Arguably, giving retroactive effect to changes that states intended to be retroactive would increase uniformity rather than lessen it.

The Ninth Circuit also highlighted a point that the Board had relegated to a footnote: California's purpose in enacting the law. The Board had cited to the legislative history of section 18.5, noting that it was enacted to "'align[ ] the definition of misdemeanor between state and federal law' and to ensure that aliens 'who committed low level and non-violent crimes [would not be] subject to deportation.'"[316] The Ninth Circuit pointedly stated, however, that:

> [W]e decline to give retroactive effect to the California statute in the cancellation of removal context where it appears that the purpose of that state-law amendment is to circumvent federal law. The legislative history of the amendment to § 18.5 of the California Penal Code reveals that the amendment's retroactive application was designed to prevent the deportation of aliens who had been convicted of misdemeanors before 2015.

The Court referred to a statement by State Senator Richard Lara:

> While SB 1310 aligned state and federal law on a prospective basis, it did not help those who were convicted of a misdemeanor prior to 2015 . . . SB 1242 will provide, on a retroactive basis that all misdemeanors are punishable for no more than 364 days and ensure that legal residents are not deported due to previous discrepancies between state and federal law.[317]

The Ninth Circuit went further, devoting an entire section of the decision to federalism and the proper roles of the federal government and the states.[318] "Historically," said the Court, "the states' police powers are broad in permitting state decisions that relate to public

315. *See* Syracuse University, *Immigration Court Backlogs Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC, https://trac.syr.edu/immigration/reports/675/ (last visited Apr. 7, 2023).

316. Matter of Velasquez-Rios, 27 I&N Dec. 470, 471 n. 2 (BIA 2018) (citing to legislative history); S.B. 1242, S. Comm. on Pub. Safety, Bill Analysis, 2016 Leg., Reg. Sess., at 2 (Cal. 2016).

317. Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1087 (9th Cir. 2021).

318. *Id.* at 1088–8-9.

health, safety, and welfare, so long as state laws do not violate the federal Constitution."[319]

> From this it follows that Congress may make laws defining the proper sphere in which a person who is not a citizen and is in the United States without proper authority and documentation may be removed from this country, and that Congress, but not individual states, can give an escape hatch for removal in certain cases where equitable circumstances are thought to warrant cancellation of removal as a matter of federal law.
>
> . . .
>
> We hold that those federal law standards cannot be altered or contradicted retroactively by state law actions[ ] and cannot be manipulated after the fact by state laws modifying sentences that at the time of conviction permitted removal or that precluded cancellation.[320]

Despite this language, the Ninth Circuit stopped short of finding that section 18.5 was preempted by federal law, at least in Mr. Velasquez-Rios' case.[321] Instead, the Court found that preemption was not at issue because the case presented no conflict between state and federal law.[322] This was because the Court's decision had "no bearing on whether California [might], for purposes of its *own* state law, retroactively reduce the maximum sentence for misdemeanors."[323]

In addition, the Court noted that section 237(a)(2)(A)(i)(II) differed from "provisions of the Act that require [consideration of] the actual sentence imposed, a fact-based inquiry into a [s]tate court judge's specific sentence or into subsequent modifications to that sentence."[324] Thus, California's reduction in sentences may have effect in the context of other immigration provisions, such as an aggravated felony offense "for which the term of imprisonment [is] at least one year."[325]

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319. *Id.* at 1088.

320. *Id.* at 1089. This concern with California's motives echoes language in the Ninth Circuit's initial decision in *GEO Grp., Inc. v. Newsom*: "In short, California's mantra-like invocation of 'state police powers' cannot act as a talisman shielding it from federal preemption, especially given that the text and context of the statute make clear that state has placed federal immigration policy within its crosshairs." GEO Grp., Inc. v. Newsom, 15 F.4th 919, 928 (9th Cir. 2021), *reh'g en banc granted, opinion vacated,* 31 F.4th 1109 (9th Cir. 2022), and *on reh'g en banc,* 50 F.4th 745 (9th Cir. 2022).

321. Velasquez-Rios v. Wilkinson, 988 F.3dId. at 1089.

322. *Id.* at 1088.

323. *Id.*

324. Matter of Velazquez-Rios, 27 I&N Dec. 470, 470 n. 9 (BIA 2018).

325. 8 U.S.C. § 1101(a)(43)(G) (indicating for an aggravated felony of a theft or burglary offense the term of imprisonment is at least one year).

Turning to section 1203.43 of the California Penal Code, the Board's acceptance of the effect of post-conviction relief under this provision depends on the facts of the individual case.[326] On June 27, 2018, the Board issued an invitation for amicus curiae briefs regarding section 1203.43.[327] The issues designated by the Board were:

> (1) Is the Board required to give full faith and credit to a judgment issued under Cal. Penal Code § 1203.43 in light of the conviction definition found at section 101(a)(48)(A) of the Immigration and Nationality Act? Is the Board required to give full faith and credit to such a judgment if an alien has actually been informed of the immigration consequences of his or her plea pursuant to Cal. Penal Code § 1016.5 or otherwise?
>
> (2) To what extent is Cal. Penal Code § 1203.43 rehabilitative in nature? In answering, please include a discussion of Matter of Adamiak, 23 I&N Dec. 878 (BIA 2006), Matter of Pickering, 23 I&N Dec. 621 (BIA 2003), Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000), Matter of Roldan, 22 I&N Dec. 512 (BIA 1999), and Matter of Punu, 22 I&N Dec. 224 (BIA 1998). Please also discuss to what extent relief under section 1203.43 is dependent on successful completion of a deferred adjudication program.
>
> (3) Does the legislative history of Cal. Penal Code § 1203.43 reflect that this statute was enacted for the purpose of providing courts with a mechanism to eliminate the immigration consequences of convictions? If so, is it preempted on the ground that it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," Arizona v. United States, 567 U.S. 387, 399-400 (2012)?
>
> (4) Please discuss the prospective application of Cal. Penal Code § 1203.43. Will criminal defendants continue to be "misinformed" about the consequences of accepting a deferred adjudication plea?[328]

These questions indicate that the Board was considering whether a vacatur under section 1203.43 would remain a conviction for immi-

326. Amicus Invitation, Validity of a Conviction for Immigration Purposes, No. 18-06-27, JUSTICE.GOV (July 27, 2018), https://www.justice.gov/eoir/page/file/1074676/download.

327. *Id.*

328. *Id.* A number of agencies responded to the invitation and filed amicus briefs. *See, e.g.*, Brief for Immigrant Legal Resource Center et al. as Amicus Curiae Responding to Invitation No. 18-06-27, (BIA Oct. 25, 2018) https://www.ilrc.org/sites/default/files/resources/ilrc_amicus_cal_120343_vacaturs-20181025.pdf.

gration purposes because it might constitute a rehabilitative measure or violate the Supremacy Clause.

Prior to the Board's issuance of the amicus invitation, it had issued at least four unpublished decisions finding that section 1203.43 effectively nullified criminal convictions.[329] In the first of those, *In re Soria-Alcazar*, on remand from the U.S. Court of Appeals for the Ninth Circuit, the Board considered a California court's dismissal of a conviction under section 1203.43.[330] The Board noted the Legislature's reason for enacting section 1203.43 was to correct the misinformation that a plea of guilty under California's old deferred entry of judgment program would not result in a conviction.[331] The Board, citing its obligation to extend full faith and credit to a California court order vacating a guilty plea, found that the erroneous information provided to persons who pled under the deferred entry of judgment program qualified as a substantive defect in the criminal proceedings, "notwithstanding its connection to the consequences of immigration enforcement."[332] The Board used similar language in a 2017 unpublished decision.[333] In two shorter 2018 unpublished decisions, one issued shortly after the Board's amicus invitation, the Board found that withdrawal of a guilty plea and dismissal under section 1203.43 nullified a conviction.[334]

In 2019, however, the Board reached the opposite conclusion, finding that a dismissal under section 1203.43 did not remove the conviction for immigration purposes.[335] The Board referred to the same language it cited in *Soria-Alcazar* that the California Legislature's explanation that vacatur was necessary because the old deferred entry of judgment statute erroneously informed defendants that a plea under it would not count as a conviction.[336] But here, the Board found that, despite the misinformation addressed by the statute, section 1203.43 "was not related to the merits of the underlying criminal proceeding and was for avoiding certain consequences, including immigration

329. Amicus Invitation, Validity of a Conviction for Immigration Purposes, No. 18-06-27, JUSTICE.GOV (July 27, 2018), https://www.justice.gov/eoir/page/file/1074676/download.

330. In re Soria-Alcazar (BIA Sept. 7, 2016) (Copy on file with author).

331. *Id.*

332. *Id.* at 3.

333. Juan Carlos Suazo-Suazo, AXX XX4 203, *1 (BIA Feb. 8, 2017).

334. Felipe Jesus Pacheco, AXXX XX9 225, *1 (BIA Mar. 1, 2018); Jose Pablo Hernandez Valdez, AXXX XX2 353, *1 (BIA July 18, 2018).

335. Elpidio Mendoza Sotelo, AXXX-XX8-491 (BIA Dec. 23, 2019), 2019 WL 8197756.

336. *Id.* at *3.

hardship" and thus, "this conviction remains valid for immigration purposes."[337]

In a more recent decision on section 1203.43, issued on June 27, 2020, following the submission of amicus briefs, the Board came to a middle-ground conclusion in an unpublished decision.[338] In it, the Board clarified that in order for a conviction to remain effective for immigration purposes after vacation, the vacation must be *solely* because of rehabilitation or immigration hardship.[339] The Board noted that the respondent's counsel had conceded the possibility that a defendant may withdraw a guilty plea under section 1203.4 even if the defendant had not been misinformed about the immigration consequences.[340] The Board concluded that a blanket retroactive vacatur under section 1203.43 that is unrelated to the respondent's particular case would not be sufficient to eliminate the immigration consequences of the conviction.[341] Thus, the Board imposed an additional evidentiary requirement under which the respondent must prove that the respondent himself or herself was misinformed of the immigration consequences of the original guilty plea.[342] In short, the decision requires that the question of whether a section 1203.43 vacatur effectively cures a conviction for immigration purposes must be decided on a case-by-case basis.[343] For the Board, the statutory language, clearly expressing that the information in the California Penal Code defendants would have relied upon, was insufficient to establish an underlying error in the proceedings.[344]

From the foregoing decisions, the Board's treatment of California's efforts varies depending on the state provision involved and the

337. *Id.*
338. BIA decision of June 27, 2020 (on file with author).
339. *Id.* at 3.
340. *Id.* at 3–4.
341. *Id.* at 4.
342. *Id.*
343. E-mail from Rose Cahn, Evangeline Abriel, Jan. 9, 2023. (on file with author). In response to the decision, the Immigrant Legal Resource Center advises that respondents take two steps. First, in post-conviction proceedings in criminal court, section 1473.7 is a safer route because of that section's statutory presumption that the prior plea was legally invalid. Second, the ILRC advised that, in immigration proceedings, the respondent should submit a declaration or testimony that 1) the respondent was told prior to the plea of guilty that it would not be a conviction for any purpose if there was successful completion of Deferred Entry of Judgment, and 2) that their attorney did not tell them otherwise, and 3) they did not know that it would still be a conviction for immigration purposes. Kathy Brady and Carla Gomez, Immigrant Legal Resource Center, Overview of California Post-Conviction Relief for Immigrants, at 11 (July 2022), ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf.
344. Equal Employment Opportunity Employer Fresno County, *supra*, note 137. https://www.co.fresno.ca.us/home/showdocument?id=1299.

underlying case. The Board and Ninth Circuit have recognized California's pre-plea diversion resolutions and its vacaturs of convictions under section 1473.7 and section 18.5 as not constituting convictions for immigration purposes. The Board has not foreclosed the conclusion that section 1203.43 may be an effective vacatur of a conviction. However, the Ninth Circuit's language in *Velasquez-Rios*, the Board's questions to amici, and the Board's required showing of actual misinformation for a section 1203.43 vacatur raises a Supremacy Clause specter. In particular, the Ninth Circuit, in its 2022 en banc decision in *GEO Group, Inc. v. Newsom,* directly found that California's ban on private detention facilities conflicted with the federal government's ability to carry out its statutory detention responsibilities.[345]

For several reasons, state laws on criminal offenses, sentences for those offenses, and post-conviction relief should not be found to be preempted by or in conflict with federal immigration law.[346] Principally, state decisions on what constitutes an offense, what the appropriate resolution of a criminal case should be, the proper sentence in a particular case, and the appropriate basis for any form of post-conviction relief have historically been considered within a state's historic police power.[347] There is a rebuttable presumption against preemption of laws that fall within that power.[348] That presumption "holds true" even if the state law "'"touches on" an area of significant federal presence,' such as immigration."[349] In addition, the INA is necessarily dependent on states and state courts as the only bodies that can make decisions concerning state criminal proceedings.[350] Because of this historic state authority, determinations concerning state court decisions on criminal matters differ significantly from a decision on a state statute, such as California's prohibition on private detention fa-

345. *GEO Grp.*, 50 F.4th at 761.

346. *See* David G. Blitzer, *Delegated to the States: Immigration Federalism and Post-Conviction Sentencing Adjustments in Matter of Thomas & Thompson*, 97 N.Y.U. L. Rev. 697, 726 (2022) (arguing that Congress has delegated to the states the determination of sentences under 8 U.S.C. § 1101(a)(48)(B)); *see also* Brief of Immigrant Defense Project as Amicus Curiae in Support of Petitioner at 12–13, Peguero Vazquez v. Garland, No. 21-6380 (2d Cir. Mar. 17, 2022) (describing ways in which the Immigration and Nationality Act relies upon state law and state processes in determining immigration consequences).

347. *See* Arizona v. United States, 567 U.S. 387, 398 (2012) ("Federalism . . . adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.").

348. *See* Wyeth v. Levine, 555 U.S. 555, 623–24 (2009).

349. GEO Grp., Inc. v. Newsom, 15 F.4th 919, 943 (9th Cir. 2022) (Murguia, J., dissenting).

350. *See, e.g.*, Mellouli v. Lynch, 575 U.S. 798, 805 (2015) (recognizing that Congress chose to rely on state court adjudications rather than on a noncitizen's conduct in making decisions under the INA).

cilities, which the Ninth Circuit has determined, under the facts, to be in violation of the Supremacy Clause.[351]

C. Reopening Old Removal Proceedings in Order to Submit Evidence of Post-Conviction Relief Under California's New Criminal Statutes

A separate question, with additional requirements, arises when an individual has already had a removal proceeding and then is able to successfully ameliorate a conviction through post-conviction relief. In such a case, the individual must figure out how to get the redone criminal case back before the immigration authorities for a new immigration result.[352] And this is not always, or even usually, a foregone conclusion.[353]

The ordinary procedural vehicle for seeking a new administrative decision based on a change such as a vacatur of a conviction is a motion to reopen before the administrative body that last had jurisdiction over the case.[354] Thus, the motion would be filed before either the Immigration Court or the BIA.[355] The motion must raise facts that were not available or discoverable at the time of the original removal proceedings.[356] With some exceptions, an individual is limited to one motion to reopen, which must be filed within ninety days of entry of a final administrative order.[357]

There are certain exceptions to the timing and number rules, for example, where there have been changed conditions that affect a claim for asylum,[358] where DHS joins in the motion to reopen,[359] or

351. *See GEO Grp.*, 50 F.4th 745.

352. The Board of Immigration Appeals has recently invited amicus briefs on the issue of "what factors [ ] the Board [should] weigh when considering an untimely motion to reopen that is premised on a vacatur of a criminal conviction?," *see* Amicus Invitation: Vacatur of a Criminal Conviction, No. 22-16-03, JUSTICE.GOV (Apr. 6, 2022), https://www.justice.gov/eoir/page/file/1483571/download.

353. *Id.*

354. 8 U.S.C. § 1229a(c)(7); see American Immigration Council, The Basics of a Motion to Reopen EOIR-Issued Removal Orders, at 5 (April 25, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf.

355. *Id.*; see also 8 C.F.R. § 1003.23 (Immigration Court); 8 C.F.R. § 1003.2 (BIA).

356. 8 U.S.C. § 1229aca)(7)(A); 8 C.F.R. § 1003.2(c)(1).

357. 8 U.S.C. § 1229a(a)(7, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf. (C)(i); 8 C.F.R. § 1003.2(c)(2).

358. 8 U.S.C. § 1229a(a)(7)(C)(ii).

359. 8 C.F.R. § 1003.2(a)(3)(iii). DHS attorneys are authorized to exercise prosecutorial discretion that could take the form of joining in a motion to reopen. *See Prosecutorial Discretion*

where a three-judge panel of the Board agrees to reopen due to a material change in fact or law underlying a removal ground that occurred after the removal order and vitiates all grounds of removability.[360] Until January 15, 2021, the Board was also able to reopen a removal proceeding sua sponte.[361]

In addition, the ninety-day period may be equitably tolled when a respondent is prevented from filing because of deception, fraud, or error.[362] Ineffective assistance of counsel has been held to support equitable tolling.[363] In an equitable tolling situation, the applicant must demonstrate due diligence in discovering the deception, fraud, or error,[364] and the Board and the Ninth Circuit have emphasized this requirement. For example, the Board found a lack of due diligence and, therefore, no equitable tolling to support an untimely motion to reopen, where the applicant failed to explain why he waited more than twenty-one years after a final removal order to file his motion to reopen.[365]

Conclusion

California is a new frontier in terms of a state's ability and willingness to protect its noncitizen residents from unduly harsh immigration consequences. From its efforts, we learn that states have a more robust ability to affect the risk of immigration consequences than was previously recognized. In effect, the state has created at least a partial cocoon for its noncitizen residents, sheltering them from many of the

and the ICE Office of Principal Legal Advisor, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last visited Apr. 7, 2023).

360. 8 C.F.R. § 1003.2(c)(3)(v)(A).

361. *Id.* § 1003.2(a). Under current regulations, the Board and Immigration Judges may reopen sua sponte only to correct a ministerial mistake or typographical error or to reissue the decision to correct a defect in service. *Id.* §§ 1003.2(a), 1003.23(b)(1).

362. *See,* Salazar-Gonzalez v. Lynch, 798 F.3d 917, 920 (9th Cir. 2015); *see, e.g.*, Perez-Camacho v. Garland, 42 F.4th 1103, 1110 (9th Cir. 2022).

363. Iturribarria v. INS, 321 F.3d 889, 896–97 (9th Cir. 2003); *Perez-Camacho*, 42 F.4th at 1110.

364. *Perez-Camacho*, 42 F.4th at 1110.

365. *Id.* at 1111–12. Pereida v. Wilkinson, 141 S. Ct. 754, 773 (2021) (demonstrating that a special difficulty arises where the individual seeks to reopen a case in order to apply for relief from removal. In applications for relief from removal, the applicant rather than the government bears the burden of proof). *See also* Ballinas-Lucero v. Garland, 44 F.4th 1169, 1178–79 (9th Cir. 2022) (demonstrating that in the context of a motion to reopen to demonstrate that a conviction has been vacated, that the movant must show that the conviction was vacated for substantive reasons).

disadvantages of undocumented status and lessening their risk of deportation.[366]

While the Board and the Ninth Circuit have indicated that there are limits to what California is permitted to do in areas related to immigration, California's efforts have for the most part achieved its goals. Courts and prosecutors have the tools to fashion dispositions in criminal cases that satisfy the goals of a criminal proceeding without ripping a noncitizen defendant from his home and family through deportation. In addition, noncitizens faced with convictions resulting from criminal proceedings whose consequences they did not meaningfully understand have several procedural vehicles through which to seek vacatur.

Nonetheless, while California's legislation has the potential of providing significant relief from immigration consequences, the legislation's success depends on a number of actors beyond the legislature and the individuals concerned. The ultimate decision on removability still rests with the federal immigration authorities. For this reason, defense counsel in both criminal and immigration proceedings must be familiar with the statutory provisions that might benefit their clients and urge prosecutors and courts to apply those provisions on their client's behalf. Applicants seeking post-conviction relief must closely follow the requirements of the California provisions and must also be conscious of documenting the reasons for vacaturs so as to prove that they were not obtained solely for rehabilitative purposes. If this is not done, the immigration authorities will not recognize the vacaturs as removing convictions. Finally, the Immigration Courts, BIA, an federal courts should recognize the important role that state criminal cases play in the immigration context and the sovereignty of states in resolving criminal cases concerning their noncitizen residents.

366. *See* S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 2 (Spring 2015), https://policymatters.ucr.edu/vol6-3-immigration/ (asserting that California has created a de facto regime of state citizenship that operates in parallel to national citizenship).

The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem

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In 2022, the Biden administration implemented what the New York Times has described as potentially "the most sweeping change to the asylum process in a quarter-century." This new adjudication system creates unrealistically short deadlines for asylum seekers who arrive over the southern border, the vast majority of whom are people of color. Rather than providing a fair opportunity for those seeking safety to explain and corroborate their persecution claims, the new system imposes unreasonably speedy time frames to enable swift adjudications. Asylum seekers must obtain representation very quickly even though the government does not fund counsel and few lawyers offer free or low-cost representation. Moreover, the immigration statute requires that asylum seekers must corroborate their claims with extrinsic evidence if the adjudicator thinks that such evidence is available – a nearly impossible task in the time frames provided by the new rule. As a result, the new rule clashes with every state's Rules of Professional Conduct 1.1 and 1.3, imposing duties of competence and diligence in every case that a lawyer undertakes. It will be extremely difficult for lawyers to provide competent and diligent representation under the new, excessively short deadlines. For immigration lawyers, the new rule exacerbates a challenge that they share with public defenders and other lawyers working within dysfunctional systems: how

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to provide even the most basic level of procedural due process for their clients, most of whom are people of color. In late April 2023, the Biden administration temporarily paused the enrollment of new asylum applicants into the process created by the new rule, which makes this a particularly opportune moment to fix the problems with the rule.

This article begins by describing the regular asylum process. It then summarizes the history of expedited removal, a screening system that limits access to that process for asylum seekers who arrive at the southern U.S. border without visas. The article next explains and assesses the Biden administration's first and second versions of the new asylum rule, highlighting the major flaw that will make the current version an unfairly formidable hurdle for asylum seekers subject to it. It concludes by setting out a way for the Biden administration to create a more fair, accurate and efficient border asylum adjudication system and ensure that the U.S. can comply with domestic and international refugee law.

I. INTRODUCTION

This article describes and critiques the Biden administration's new border asylum adjudication system, which some experts have described as "the most sweeping change to the asylum process in a quarter-century."[2] The U.S. asylum system has long been a site of contestation over whether populations of color fleeing violence in their home countries should receive legal protection in the form of humanitarian immigration status.[3] This new system, which severely limits the time frame for the asylum process, is one of the most recent in an ongoing series of efforts that have impeded access for migrants of color, particularly Central Americans and Haitians.[4]

The statute that created the U.S. asylum system, the Refugee Act of 1980, did not set out procedures for the executive branch to follow in establishing the asylum system. Responding to Indochinese protection seekers, the drafters primarily focused on the process for admitting refugees who would be resettled in the United States from overseas. It afforded asylum seekers who arrived on their own in the

2. Eileen Sullivan, *U.S. to Begin Allowing Migrants to Apply for Asylum Under a New System,* N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/us/politics/asylum-system.html?smid=url-share.

3. *See, e.g.*, ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES, AND PHILIP G. SCHRAG, THE END OF ASYLUM (2021). In principle, asylum is available equally to people from any country in which they are persecuted. In practice, the overwhelming majority of applicants and of people granted asylum are people of color. For example, in FY 2019, 46,508 individuals were granted asylum, but only 3860 of them (eight percent) came from countries in which the majority of the population would be classified as white (including former Soviet bloc countries and the Balkan countries); even some of those individuals may have been people of color. Tables 17 and 19 in *DHS Yearbook of Immigration Statistics 2020*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/yearbook/2020 (last visited Apr. 14, 2023).

4. Even more recently, the Biden administration issued a new rule, effective in May 2023, that made migrants who crossed over the southern U.S. border presumptively ineligible for asylum unless they had applied for it and been rejected in Mexico or some other country of transit or had managed to make an appointment to enter the United States at a port of entry. Dept's of Homeland Security and Justice, Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023).

United States the right to seek protection but was silent about procedures for adjudicating their claims. This gap became a concern during the 1980s when asylum seekers from Central America began arriving at the southern border in large numbers. Both Congress and the executive implemented increasingly harsh laws and policies that restricted access to the regular asylum system.

This article provides a history of the laws and policies that have limited access to asylum through screening processes at the southern border. It begins with a description of the regular asylum system as a point of comparison for expedited processes. The article next explains the expedited removal process that was created by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This process included a screening interview to determine whether arriving migrants had a plausible claim for asylum. In order to avoid returning refugees to persecution, Congress set a low bar for individuals eligible for this screening process. However, in recent years, the "credible fear" standard has been applied more strictly.

Since it began, the expedited removal process has been criticized by scholars for prioritizing speed over fairness and accuracy.[5] Other scholars have raised concerns with the ways in which expedited removal "effectively block[s] access to the immigration courts."[6] The nadir came with the Trump administration, which created even more

5. *See* Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 693-94 (1996) (offering an early critique of expedited removal's excessive emphasis on speed and highlighting the concern that less time for preparation amplified the risk of error, as asylum seekers were far less able to locate and retain counsel, obtain documentary evidence in support of their claims, and identify and secure witnesses to testify on their behalf). For more recent arguments that expedited removal favors speed over fairness, *see* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5.1 COLUM. J. RACE & L. 1 (2014); Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1341 (2018); s*ee also* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 230-31 (2017) (discussing concerns about the accuracy of excessively speedy hearings). Scholars have raised many other concerns with the process. *See, e.g.*, Stephen Manning and Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 699-701 (2018) (criticizing the lack of access to counsel); Lindsay Harris, *Withholding Protection*, 50 COLUM. H. RTS. L. REV. 1, 22-37 (2019) (exposing the failures of CBP officers to accurately undertake the first step of the process and raising concerns with the frequency of telephonic hearings); Michele Pistone and John J. Hoeffner, *Rules Are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006) (describing severe implementation problems); Jill Family, *A Broader View of the Immigration Adjudication Problem,* 23 GEO. IMMIGR. L.J. 595, 624-27 (2009) (decrying the lack of administrative and judicial review available to asylum seekers whose credible fear finding is negative).

6. Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 3 (2020).

expedited processes to screen out asylum seekers and enforced expedited removal in a draconian fashion.[7]

This article then offers a detailed examination of the new border asylum adjudication process created by the Biden administration, criticizing its prioritization of speed over fairness. It walks carefully through the first and second versions of the rule, describing both the positive aspects of these changes and the problems with each iteration of the rule. The article focuses on a serious flaw in the current version of the rule, namely the short period of time in which asylum seekers who present themselves or are apprehended at the southern U.S. border must find counsel and meet arduous evidentiary standards. Asylum seekers may be required to present their case before an asylum officer in as few as three weeks after a preliminary interview at which the government decides whether they have a credible asylum claim. Moreover, asylum seekers must submit any documentary evidence supporting their claim to the asylum office by mail ten days before that interview. If their case is sent to immigration court, which the government expects will happen in 85% of cases, the asylum seeker has at most an additional 70 days to submit further evidence.

The unrealistic time constraints laid out in the new border asylum adjudication rule present at least three major challenges. The article discusses the obstacles for the asylum seeker to secure a lawyer within the short time frame set out by the rule. It also outlines the difficulties for the asylum seeker and their lawyer of obtaining evidence to corroborate their claim within the tight deadlines of the rule. Finally, it walks through the ethical challenges faced by asylum lawyers who may be unable to prepare an asylum claim within the time constraints of the rule. The article ends with proposals to establish a border asylum process that is both efficient and fair.

II. THE ORIGINS OF THE U.S. ASYLUM SYSTEM AND EXPEDITED REMOVAL

Though our nation's commitment to refugee protection has been severely tested in recent years, the United States has been a destination for individuals fleeing religious and political persecution since its founding. The contemporary U.S. legal framework for asylum developed after World War II. In 1951, the United Nations (UN) Convention Relating to the Status of Refugees laid the foundation of the

7. *See* SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3.

contemporary international refugee law framework.[8] The United States bound itself to uphold the legal obligations set out in that treaty by ratifying the 1967 UN Protocol Relating to the Status of Refugees, which incorporated the refugee definition and mandatory protections of the Refugee Convention.[9] More than a decade later, Congress passed the Refugee Act of 1980, which adopted the Convention's definition of a refugee as domestic law: an individual who was unwilling or unable to return to their home country because of their well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[10] Another decade passed before the executive issued regulations to systematize the asylum process.[11]

A. Creating the Asylum Adjudication System

Although the 1980 Act provided that refugees could seek asylum in the United States, it did little to establish procedures for adjudicating claims. The Act focused on refugee admissions from overseas, which, at that time, was the mechanism through which most individuals seeking protection had arrived. Soon after the passage of the Act, the asylum process became another main avenue for seeking protection; the vast gaps in the statute's provisions on asylum procedures would subsequently prove problematic.[12]

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8. United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 198 U.N.T.S 137.

9. United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, at Art. I (1-2) (entered into force Oct. 4, 1967; for the United States, Nov. 1, 1968) ("The States Parties to the present Protocol undertake to apply Articles 2 through 34 inclusive of the Convention to refugees hereinafter defined").

10. 96 P.L. 212, 94 Stat. 102; 8 U.S.C. §§ 1101(a)(42), 1158 (2022). The Immigration and Nationality Act of 1952 authorized the Attorney General to offer withholding of removal to individuals subject to physical persecution under a clear probability standard. This provision was amended in 1965 to align more closely with the Refugee Convention's categories. Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17:2 Univ. Mich. J. L. Reform 243, 244, 247 (1984). "Although the right of asylum has been regarded as an historic tenet of American political policy, it has not been set forth in any statutory provision." Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. of the Judiciary, 96th Cong., at 186 (1979); Edward M. Kennedy, Refugee Act of 1980, 15 Int'l Migration Rev. 141, 150 (1981): "For the first time, the new Act establishes a clearly defined asylum provision in United States immigration law."

11. 8 CFR Ch. I, Subch. B, Pt. 208.

12. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1252-53 (1990).

In 1980, the situation of the Indochinese refugees had been foremost on the minds of the drafters, who were focused on ensuring that Congress played a role in deciding which and how many refugees could enter the United States.[13] Much of the 1980 Act was devoted to creating a formal resettlement process through which individuals located abroad who met the definition of a refugee could be brought to the United States for protection. At that time, the United States was rarely a country of first asylum;[14] as a result, the drafters provided far less guidance on the asylum adjudication system than they did on the overseas refugee resettlement process. Though the Act set out for the first time a statutory basis for the U.S. asylum process, it delegated to the Attorney General the creation of a procedure to adjudicate the claims of asylum seekers who requested protection inside or at the borders of the United States.[15]

In 1980, Cuban and Haitian asylum seekers fleeing political oppression and violence in their home countries began arriving by boat in the United States in large numbers. The existing asylum process was ill-equipped to manage so many applications, as the Refugee Act did not contemplate such arrivals. As thousands of Central Americans fled civil wars in their homelands in the 1980s, the asylum system faced increasing numbers of asylum seekers at the southern border.[16] Political pressure mounted to establish an adjudication system that functioned more effectively than the temporary regime then in place.[17] Professor David Martin noted in 1990 that the asylum system's "inability to cope effectively with growing numbers of asylum seekers . . . threatens [its] foundation."[18]

It took ten years for the Attorney General to promulgate a final rule establishing a formal asylum adjudication process.[19] Beginning in

13. SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3, at 8-9 (2021).

14. Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report,* 4(4) INT'L J. REFUGEE L. 455, 459 (1992).

15. 8 U.S.C. §208(d)(1) (1924). Before the Refugee Act, there was no statutory authority governing the process of asylum adjudication. The first regulations governing what we would now label withholding of removal, issued in 1953, provided for a non-adversarial interview by an immigration officer. Martin, *supra* note 12, at 1294. Regulations promulgated in 1962 created procedures for applicants to seek withholding of removal before a special inquiry officer, the predecessor to today's immigration judges. Martin, *supra* note 12, at 1294. New regulations codified in 1974 directed applicants within the United States or at an airport or seaport to apply for asylum to the INS District Director, who was required to seek advice from the State Department on every asylum claim. Beyer, *supra* note 14, at 455-56, 458.

16. Martin, *supra* note 12 at 1251; Helton, *supra* note 10, at 261.

17. Beyer, *supra* note 14, at 466-67.

18. Martin, *supra* note 12, at 1257, 1366-67.

19. 8 C.F.R., § 208 (1924).

1990, the Immigration and Naturalization Service (INS) created the Asylum Officer Corps, a group of asylum officers who underwent extensive professional training before adjudicating asylum claims.[20] This corps and its procedures remain in place. These asylum officers adjudicate affirmative asylum claims, that is, those filed by applicants who have not previously been apprehended by immigration authorities.[21] Asylum officers conduct non-adversarial interviews in which they are responsible for eliciting relevant information from the asylum seeker.[22] Although faced with a backlog within just a few years, the Asylum Office was guided by its dual goals of fairness and speed.[23]

The rule also required INS to establish an internal documentation center to provide officers with current and reliable information about human rights conditions in applicants' countries of origin.[24] Drawing from sources such as Amnesty International, Freedom House, the Library of Congress, and Human Rights Watch, as well as news media, this Resource Information Center (RIC) created country profiles, alerts, and information packets.[25] RIC staff also collaborated with their counterparts at the Canadian Immigration and Refugee Board Documentation Centre to share information resources.[26]

Until very recently, as described in Section V, infra, all defensive claimants (non-citizens who applied for asylum after being placed in removal proceedings) except unaccompanied minors have had their asylum claims heard in immigration court. In 1980, any non-citizen arriving at a port of entry, whether or not in possession of valid immigration documents, had the right to a hearing in immigration court to determine whether they should be granted asylum or ordered deported to their own countries.[27] In 1987, the Department of Justice proposed a final asylum rule that would allocate adjudication authority for all asylum claims to asylum officers, whose final decisions would bind immigration judges in the related removal (deportation)

20. Beyer, *supra* note 14, at 457, 471-72.

21. They also adjudicate asylum claims made by unaccompanied children who have been apprehended by immigration authorities. 8 U.S.C. § 1158(b)(3)(C) (2011).

22. 8 C.F.R. §208.9(b) (2011).

23. Beyer, *supra* note 14, at 484-85; Martin, *supra* note 12 at 1322.

24. Beyer, *supra* note 14, at 457, 460-61, 472-74; 8 C.F.R. §208.1(b) (2011).

25. Beyer, *supra* note 14, at 474.

26. *Id.* at 473.

27. Alison Siskin and Ruth Ellen Wasem, *Immigration Policy on Expedited Removal of Aliens*, CONG. RES. SERV. 3 (Sept. 30, 2005). Denials of asylum could be appealed to an administrative Board of Immigration Appeals and then to a U.S. Court of Appeals. 8 C.F.R. §1003.1(b)(9) (1958); 8 U.S.C §1252(a)(1).

hearings.[28] But refugee advocates opposed the rule. They were concerned that asylum officers would lack independence from the executive branch's immigration enforcement and foreign policy priorities and would not have sufficient training to perform their jobs professionally.[29] The proposed rule was not adopted. These concerns led to the creation of an asylum system in which immigration judges retain jurisdiction over asylum claims filed as a defense to removal.

B. The United States Asylum Adjudication System

For affirmative asylum seekers, those who request asylum before they have been apprehended, the first step of the process is to file what is known as Form I-589 with United States Citizenship and Immigration Services (USCIS).[30] This twelve-page form involves fourteen pages of instructions; in most cases, a successful application requires substantial supplemental information. After the application is filed, USCIS first sends the asylum seeker an appointment for fingerprinting.[31] Then USCIS sends notice of an interview, which is scheduled at the regional Asylum Office for the catchment area where the applicant resides.[32] The Asylum Officer conducts a non-adversarial interview; the asylum seeker may have a lawyer present, but it is the job of the asylum officer to elicit all information relevant to the asylum claim. Asylum officers generally conduct two interviews per day,[33] but the rate of new affirmative applications and credible fear cases at the border has frequently challenged the capacity of USCIS to adjudicate them in a timely manner. As of December 31, 2021, there was a backlog of over 430,000 affirmative asylum cases at USCIS.[34]

28. Philip G. Schrag, A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America 30 (2000). At the time, removal hearings were known as exclusion or deportation hearings.

29. Martin, *supra* note 12, at 1321-22.

30. *I-589, Application for Asylum and Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/i-589 (last visited Apr. 14, 2023). In 2003, the Homeland Security Act abolished the INS and reassigned most of its immigration functions to the new Department of Homeland Security (DHS). The asylum officers were transferred to United States Citizenship and Immigration Services (USCIS) within DHS, while the immigration judges remained in the Executive Office for Immigration Review (EOIR) in the Department of Justice.

31. The Affirmative Asylum Process, U.S. Citizenship and Immigr. Servs., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process (last visited Apr. 14, 2023).

32. *Id.*

33. U.S. Citizenship and Immigration Services Ombudsman, Annual Report 2022, DEP'T OF HOMELAND SEC., 49 (June 30, 2022) https://www.dhs.gov/sites/default/files/2022-07/2022%20CIS%20Ombudsman%20Report_verified_medium_0.pdf.

34. *Id.* at 8.

Both asylum seekers who are unsuccessful at the asylum office and those who are apprehended before filing for asylum can plead their cases in immigration court, asserting claims for protection, including asylum, withholding of removal, and/or relief under the Convention Against Torture, as defenses to being ordered removed from the United States. Department of Homeland Security (DHS) officials initiate a removal proceeding by serving a Notice to Appear (NTA), the equivalent of a summons, on the non-citizen and then filing it in immigration court.[35] Approximately 600 immigration judges serve in sixty-eight immigration courts across the nation;[36] DHS generally assigns non-citizens to immigration courts based on the location of apprehension or detention.[37] By January 2023, the immigration court system had an astonishingly large backlog of nearly 1.9 million pending cases, and the average wait time for an immigration court to complete a case was nearly four years.[38]

Unlike asylum office interviews, immigration court hearings are adversarial proceedings similar to bench trials. In immigration court, the government is represented by an Assistant Chief Counsel (ACC) employed by U.S. Immigration and Customs Enforcement (ICE), a DHS agency. An ACC usually contests the asylum claim, often by focusing on any inconsistencies in the application and/or testimony, material or otherwise, and asking challenging questions on cross-examination. Immigration court hearings where the asylum seeker is represented often take three or four hours, as asylum seekers may testify in languages other than English, requiring interpretation supplied by the court. Non-citizens may present documentary or oral testimony from fact witnesses who can vouch for the specific factual claims as well as the testimony of expert witnesses who can corroborate their medical and psychological claims and relevant human rights abuses in their country of origin. Immigration judge decisions in affirmative asylum cases are *de novo*, meaning that they are not a review of the asylum officer's decision but rather a fresh examination of

35. Commencement of Removal Proceedings, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/eoir-policy-manual/4/2 (last visited Apr. 14, 2023).

36. Office of the Chief Immigration Judge, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios (last visited Apr. 14, 2023).

37. *Commencement of Removal Proceedings*, *supra* note 35.

38. Executive Office for Immigration Review, Adjudication Statistics: Pending Cases, New Cases, and Total Completions, U.S. DEP'T OF JUST., (Jan. 16, 2023), https://www.justice.gov/eoir/page/file/1242166/download; TRAC Immigration, Immigration Court Processing Time by Outcome (through Jan. 2023), available at https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php

the claim.[39] The judge makes a decision based on the documentary evidence and testimony admitted in immigration court.

Both the applicant and the government can appeal the immigration judge's decision to the Board of Immigration Appeals (BIA), the administrative appellate body within the Executive Office of Immigration Review (EOIR) that sets nationwide precedent in immigration law. The BIA, which is currently comprised of twenty-three appellate immigration judges, decides the vast majority of cases on paper, rarely hearing oral argument.[40] An Attorney General who does not agree with the BIA's decision may overturn it.[41] The asylum seeker can appeal a negative decision by the BIA or the AG to the federal court of appeals in which their asylum case is heard. Petitions for certiorari in asylum cases are rarely granted by the U.S. Supreme Court, so the federal court of appeals is generally the end of the road for asylum appeals.

Through this process, asylum adjudicators determine whether applicants meet the definition of a refugee, namely that they are "unable or unwilling" to return to their country due to "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[42] Political opinion can be complicated to define, involving determinations of both actual political beliefs as well as political opinions imputed to victims by their persecutors; assessments of whether persecution for multiple reasons can be attributed to political opinion; questions about whether neutrality constitutes a political opinion; and shifting case law around whether feminism and opposition to corruption can be considered the expression of a political opinion.[43]

The particular social group ground is the most complex, with numerous circuit splits and administrative law contests over its scope. The seminal BIA decision on particular social group, *Matter of Acosta*,

39. 8 C.F.R. § 1240.17(i)(1) (2003).

40. Board of Immigration Appeals, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Apr. 14, 2023).

41. This is a power that Attorneys General rarely exercised until the Trump administration, but Trump's first three Attorneys General overturned 17 BIA precedents (many of them asylum cases) that had favored immigrants. ALISON PECK, THE ACCIDENTAL HISTORY OF THE IMMIGRATION COURTS 9, 14-26 (Univ. of Calif. Press 2021).

42. 8 U.S.C. §1101(a)(42)(A).

43. *See, e.g.*, *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996) (analyzing imputed political opinion and mixed motives); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) (treating neutrality as a political opinion); *Hernandez-Chacon v. Barr*, 948 F.3d 94, 104 (9th Cir. 2020) (treating feminism as a political opinion); *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010) (treating opposition to corruption as a political opinion).

defines it as one shared by individuals with a "common immutable characteristic" that includes at least sex, color, and kinship ties.[44] In recent years, the Board added two more elements to the *Acosta* definition: particularity and social distinction.[45] Those additional elements provoked extensive litigation in the federal courts of appeals and are still the source of substantial confusion even among experts in asylum law.[46] In recent years, the Attorney General, the BIA, and federal courts of appeals have been at odds over whether women fleeing domestic violence, LGBTQ+ individuals, family members, individuals who refuse to join gangs, and gang informants, among others, can constitute a particular social group.[47]

In addition to the complexities of the substantive standard for asylum, adjudicators must examine claims for protection under the Convention Against Torture, subject to a separate set of regulatory and case law definitions. Immigration judges and asylum officers must determine whether the one-year filing deadline applies to the claim and, if so, whether an exception to the deadline is warranted.[48] While some exceptions are laid out in the regulations, that list is intentionally illustrative, not exhaustive, meaning adjudicators have the authority to issue an exception for a reason not enumerated in the regulation.

Immigration judges and asylum officers must also make challenging decisions about whether the applicant is credible and, if not,

44. Matter of Acosta, 19 I. & N. Dec. 211, 232 (BIA 1985).

45. Matter of M-E-V-G-, 26 I. & N. Dec. 227 (BIA 2014). The "social distinction" requirement imposed on applicants the burden of showing that the "social group" being asserted was recognized as a group within the nation or at least the region in which the victim had resided. The Board specified that social distinction could be proved through, "[e]vidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like." *Id.*

46. *Id.* at 228-29.

47. SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3 at 32-36. *See also id.* (considering refusal to join a gang); Bringas-Rodrigues v. Sessions, 850 F.3d 1051 (9th Cir. 2017) (considering sexual orientation and identity [sic]); Vasquez v. Garland, 4 F.4th 213, 218 (4th Cir. 2021) (considering the nuclear family); Matter of H-L-S-A-, 28 I&N Dec. 228 (BIA 2021) (considering a gang informant as "prosecutorial witness"). *See also* Center for Gender and Refugee Studies, Matter of A-B-, https://cgrs.uchastings.edu/our-work/matter-b-0 (last visited Apr. 14, 2023); Particular Social Group & Asylum After Matter Of A-B- & Matter Of L-E-A-: Information And Resources, NAT'L IMMIGR. JUST. CTR. (July 22, 2021), https://immigrantjustice.org/for-attorneys/legal-resources/topic/particular-social-group-asylum-after-matter-b-matter-l-e.

48. This deadline, imposed by Congress in 1996, precludes the government from considering most applications for asylum that were filed more than a year after the applicant entered the United States. For an empirical study of its effects, *see* Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM & MARY L. REV. 651 (2010).

whether the corroboration provided is sufficient.[49] Adjudicators must also assess the applicability of statutory bars to asylum, including whether the applicant persecuted others; has been convicted of a particularly serious crime; committed a serious nonpolitical crime outside the United States; may be regarded as a danger to the security of the United States; has engaged in terrorist activity broadly defined; or is firmly resettled outside of the United States.[50] Of course, each of these bars is defined through case law and other statutory or regulatory provisions. The language of the terrorism bar offers one example of the complexity of the asylum adjudication process; it excludes from asylum a non-citizen:

> described in subclauses (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case, only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.[51]

In short, asylum adjudication is a complicated process involving a complex statute, detailed and numerous regulations, extensive case law that is not always a model of clarity, and the testimony of individuals fleeing serious harm who are often not able to express themselves fully in English and whose cultural mores may differ substantially from those of the adjudicator.

C. Expedited Removal's Predecessors

Almost as soon as the ink had dried on the Refugee Act, large numbers of asylum seekers began arriving in the United States, fleeing serious political violence in Central America, Cuba, and Haiti. In response, the INS created "summary exclusion" policies designed to differentiate quickly between those who fit within the refugee definition and those who did not. INS intended these policies to act as deterrents.[52]

By December 1988, more than two thousand asylum seekers, largely Central Americans, were applying for protection in South Texas each week. In deterrence mode, INS began deciding asylum

49. *See* Section V, *infra,* for a detailed discussion of the corroboration requirement.
50. 8 U.S.C.S. § 1158(b)(1)(B)(2)(a).
51. 8 U.S.C.S. § 1158(b)(1)(B)(2)(a)(v).
52. Siskin and Wasem, *supra* note 27, at 3.

cases within one day of application and detaining hundreds who were not granted asylum.[53] This policy was enjoined after three weeks.[54]

Following a September 1991 coup, the U.S. Coast Guard interdicted Haitians fleeing by sea. INS screened most of them on a ship docked at the U.S. Naval Base in Guantanamo Bay, Cuba. The substantive standard for this screening was whether the individual had a "credible fear" of persecution in Haiti. Under this standard, asylum officers undertook a two-step determination of whether it was more likely than not that the applicant's testimony was true and if so, whether there was a significant possibility that the applicant would be granted asylum.[55] Asylum seekers who could meet this standard were sent to the United States and placed in the asylum adjudication process; those who could not were returned to Haiti. The following year, President George H.W. Bush directed the Coast Guard to return all Haitians interdicted on the high seas, regardless of their eligibility for asylum, to Haiti.[56] In 1993, the U.S. Supreme Court upheld this policy as compliant with domestic and international law.[57]

The credible fear standard for certain "expedited" cases resurfaced in bills before Congress and finally became codified in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[58] One bill, introduced in July 1993, aimed to apply expedited exclusion procedures to all non-citizens encountered by federal authorities who had false papers or no papers.[59] In mid-1994, however, the Clinton Administration offered a new bill that envisioned expedited removal as a mechanism to be utilized only in situations of mass influx.[60] In other words, it would not be implemented during normal operations at or near the border. The "expedited removal"

53. Martin, *supra* note 12, at 1251-52. In 1992, INS implemented an asylum screening process at the airports; it was not successful and was terminated. SCHRAG, A WELL-FOUNDED FEAR *supra* note 28, at 34.

54. Peter Appelbome, *Judge Halts Rule Stranding Aliens in Rio Grande Valley*, N.Y. TIMES, Jan. 10, 1989.

55. Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1505-6 (1997).

56. Cooper *supra* note 55, at 1506-7.

57. The Supreme Court decision is *Sale v. Haitian Council*, 509 U.S. 155 (1993). For a more detailed description of the evolution of the expedited removal proposal from a bill in Congress in the early 1990s to its enactment in 1996, and of the process through which the regulations implementing it were negotiated, *see* SCHRAG, A WELL-FOUNDED FEAR, *supra* note 28.

58. Div. C of Pub. L. 104-208, 110 Stat. 3009-546, enacted Sept. 30, 1996.

59. David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 677 (2000).

60. *Id.*

section of the law that became IIRIRA was far broader in scope than the administration's proposal. It authorized the Attorney General to apply its special adjudication provisions to anyone who sought to enter the United States without proper documentation; to anyone apprehended near the border who had entered the United States without being inspected by an immigration officer; and to those uninspected migrants who were apprehended in the interior who could not prove that they had already been present in the United States for two years.[61] In order to ensure that the United States complied with its international and domestic laws regarding the protection of refugees, the new statute provided an exception to immediate removal for people fleeing persecution.

III. EXPEDITED REMOVAL ADJUDICATION PROCEDURES, 1997-2021

In 1997, the Clinton Administration implemented the expedited removal procedures established by IIRIRA.[62] The purpose of expedited removal was to identify undocumented migrants who did not have a plausible claim to asylum and deport them quickly. Unless they indicate an intention to apply for asylum, a U.S. Customs and Border Protection (CBP) officer can order individuals removed without any hearing or review, a process that takes about ninety minutes.[63]

61. The Attorney General's special adjudication provisions are described in Section II, *infra*. The Trump administration was the first to expand expedited removal to its statutory limits in 2019. The federal district court for the District of Columbia enjoined the expansion in September 2019, but the Federal Court of Appeals for the District of Columbia reversed that injunction in June 2020. Make the Road New York v. McAleenan, 405 F. Supp. 3d 1 (D.D.C. 2019); Make the Road New York v. Wolf, 962 F. 3d 612, 618 (D.C. Cir. 2020). In 2022, the Biden administration rescinded the expansion, returning the scope of expedited removal to anyone who entered without inspection and is apprehended within 100 miles of the border within 14 days of entry. DHS, Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 FR 16022 (Mar. 21, 2022).

62. As explained above, the provisions of this Act apply to a foreign national who arrives in the United States without a required visa. Unaccompanied migrant children (UACs) are not subject to expedited removal; a statute requires that they be placed into regular removal proceedings. 8 U.S.C. § 1232(a)(5)(D) (created by Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, § 235, 122 Stat. 5044, 5077 (2008)). The TVPRA also provided that USCIS has initial jurisdiction over UAC asylum applications, including those applications for UACs in removal proceedings. TVPRA § 235(d)(7)(B), *codified* at 8 U.S.C. § 1158(b)(3)(C).

63. 8 U.S.C. § 1225(b)(1)(A)(ii); Randy Capps, Faye Hipsman, & Doris Meissner, *Advances in U.S.-Mexico Border Enforcement: A Review of the Consequence Delivery System*, MIGRATION POL'Y INST. (2017) at 3, https://perma.cc/28XM-HSAR.

An expedited removal carries with it a five-year bar to future legal entry.[64]

If a non-citizen in expedited removal expresses a fear of persecution or an intent to apply for asylum, the statute requires that the CBP officer refer them for an interview by an asylum officer from USCIS.[65] At that point, the CBP officer generally transfers custody of the asylum seeker to ICE, which detains them.[66] An asylum officer undertakes a screening interview to determine whether the applicant's story is credible and, if so, whether there is a "significant possibility" that they could qualify for asylum.[67] A non-citizen who passes this "credible fear" screening test, which is by design a "low screening standard,"[68] is given a chance to prove to an immigration judge that they qualify for asylum.[69] ICE is authorized to keep the asylum seeker in jail for months until an immigration court hearing is held. However, it may, in its discretion, "parole" them into the United States on their own recognizance or subject to conditions such as wearing an ankle monitor and reporting periodically to an ICE official.

The few applicants lucky enough to retain attorneys can receive information and advice before the interview to help them understand what aspects of their histories are relevant to the credible fear determination, but they are not allowed to be represented by counsel during the interview. An asylum seeker who fails the screening test may appeal the decision immediately to an immigration judge, again with-

64. 8 U.S.C. § 1182(a)(9)(A)(i).

65. 8 U.S.C. § 1225(b)(1)(A)(ii).

66. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

67. Individuals who had committed certain crimes or who sought to re-enter the United States are barred from receiving asylum, but if they can prove that it is more likely than not that their life or freedom would be in jeopardy if they were removed to their home countries, they may receive the lesser protection of "withholding of removal." At least through the middle of 2022, such migrants were also interviewed by asylum officers during the expedited removal process but were required to meet a higher burden of "reasonable" fear rather than "credible" fear. 8 C.F.R. § 208.31(2021).

68. Statement of Senator Orrin Hatch, the floor manager of the IIRIRA legislation in the Senate. Asylum and Summary Exclusion Prots.: Hearing on H.R. 2202, 104th Cong. (1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch). *See also* Bo Cooper, Procedures for Expedited Removal and Asylum Screenings under the Illegal Immigration Reform and Responsibility Act of 1996, 29 CONN. L. REV. 1501, 1506, 1523 (1997) (INS Commissioner McNary explained to Congress that INS applied this standard to Haitians prior to the enactment of the expedited removal law in a way "to ensure that no genuine refugee is repatriated"; following enactment, the "INS's training materials indicate resolve by the agency to set the screening standard low").

69. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Before June 2022, this was the process for all non-citizens who were found to have credible fear. As described in Section V, *infra*, the Biden administration changed the procedure for some non-citizens who passed the credible fear screening test.

out representation by counsel. The immigration judge's decision is final. If the judge upholds a negative credible fear decision, the applicant cannot appeal to a federal court. Instead, they are quickly removed, either directly across the U.S.-Mexico border or on an "ICE Air" repatriation flight.[70]

Below we examine each of the three adjudications critical to the expedited removal process. Then we briefly describe changes to the expedited removal process implemented during the Trump administration.

A. The First Decision: Expedited Removal Adjudications by CBP Officers

In the first step of expedited removal, CBP officers apprehend a noncitizen at a port of entry or, for those who entered without inspection, near the border. If the noncitizen does not have valid admission documents or uses fraud or misrepresents a material fact to gain admission, the officer completes an inadmissibility determination.[71] The CBP Officer makes this decision by asking a series of questions to the applicant for admission.[72]

The regulation requires that the CBP officer read a notice regarding asylum to the applicant:

> U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should re-

70. *See* ICE Air Operations Prioritizes Safety and Security for its Passengers: Removing Non-US Citizens who are in the Country Illegally is a Core Responsibility in Support of the Agency's Mission, IMMIGR. AND CUSTOMS ENF'T., https://perma.cc/EN3X-GSM9 (last updated Nov. 15, 2021).

71. For helpful descriptions and analyses of the expedited removal and credible fear processes, *see generally* Lindsay M. Harris, *Withholding Protection*, 50.3 COL. H.R. L. REV., 1, 19-37 (2019); Stephen Manning & Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQUETTE L. REV. 673, 682-87 (2018); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 349-56 (2017); and Daniel Kanstroom, *Expedited Removal and Due Process: 'A Testing Crucible of Basic Principle' in the Time of Trump*, 75 WASH. & LEE LAW REV. 1323, 1328-43 (2018).

72. 8 C.F.R. § 235.3(b)(2)(i) (2022) sets out the procedure discussed here.

> main in the United States and not be removed because of that fear.[73]

The regulations also require that the CBP Officer record the response to four "fear" questions:

> Why did you leave your home country or country of last residence?
> Do you have any fear or concern about being returned to your home country or being removed from the United States?
> Would you be harmed if you are returned to your home country or country of last residence?
> Do you have any questions or is there anything else you would like to add?[74]

As research shows, some CBP officers ask the required questions to ascertain whether or not the foreign national might be a refugee, but others do not ask those mandatory questions. In 2005, the United States Commission on International Religious Freedom, established by Congress, found that:

> In more than half of the interviews observed . . ., OFO officers failed to read the required information advising the non-citizen to ask for protection without delay if s/he feared return. At least one of the four required fear questions was asked approximately 95 percent of the time, but in 86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered. And in 72 percent of the cases, asylum seekers were not allowed to review and correct the form before signing, as required. Thus, USCIRF found that, although they resemble verbatim transcripts, the I-867 sworn statements were neither verbatim nor reliable, often indicating that information was conveyed when in fact it was not and sometimes including answers to questions that never were asked.[75]

The examining officer is charged with creating a record of questions asked and answered, writing them out as if the "Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act" were a transcript, even though it is not one. As research has shown,[76] officers do not always accurately report the answers on Form I-867AB. In addition, the applicant may not understand the questions,

73. This language is found in Form I-867A.
74. These questions are found in Form I-867B.
75. *Report on Asylum Seekers in Expedited Removal*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM 6 (2005); *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM 7, 19 (2015). Office of Field Operations (OFO) officers are CBP inspectors at the ports of entry.
76. *Id.*

whether asked in English or via an interpreter. Nonetheless, they are required to initial each page of the completed form and sign the last page of this "record," which is written in English.

Following the examination, the CBP Officer writes up the "findings" and decision regarding expedited removal, which are then reviewed by the CBP Officer's supervisor. That review does not involve meeting with the applicant or asking them any additional questions. The supervisor—who is an enforcement official in the same agency rather than an impartial factfinder—is often asked to authorize a removal order. After the supervisor approves the order, the examining officer completes a "Notice and Order of Expedited Removal,"[77] and serves notice of the finding of removability and the removal order on the applicant, who must read and sign the Notice and Order form.

B. The Second Decision: Asylum Officer Credible Fear Screenings and Determinations

If the CBP officer asks the fear questions and the applicant indicates such a fear or an intent to seek asylum, the officer forwards the Notice and Order of Expedited Removal to the USCIS asylum office. An asylum officer then conducts a credible fear screening within a week or two of the CBP adjudication. The asylum officer is charged with eliciting relevant information regarding a credible fear of persecution in this non-adversarial, private interview,[78] which is often conducted through a video link or by telephone.

The regulations permit the asylum seeker to present evidence and to consult with "a person or persons" of their own choosing prior to the interview, as long as such consultations do not unreasonably delay the process.[79] Such consultations are not always possible because volunteers or consultants paid by nongovernmental organizations are not able to staff all of the ICE detention centers.[80] A consulted person may attend the interview and may be permitted—at the discretion of the asylum officer—to make a statement at the end of the interview.

At that interview, the asylum seeker must show a "significant possibility" that they can prove eligibility for asylum. Asylum officers

77. Form I-860.

78. 8 U.S.C. § 1225(b)(1)(B)(i); 8 C.F.R. § 208.30(d) (2022).

79. 8 C.F.R. § 208.30(d)(4) (2022).

80. There appears to be no published information on how frequently migrants who are scheduled to have credible fear interviews are able to have individual prior consultation with legal representatives, either in person or telephonically. Similarly, there appears to be no published information on how frequently consultants attend credible fear interviews.

are tasked with summarizing in writing the answers asylum seekers give to questions that probe such issues as why they left their countries, what harms they suffered there, and how they fled.[81] The officer also creates a short summary—again, not a verbatim record—of the material facts and must read that summary to the asylum seeker. The officer's "notes must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear." A supervisor reviews the asylum officer's record of the interview.[82]

Until late 2019, most applicants screened for credible fear met the "significant possibility" standard, and were referred by asylum officers to immigration court for hearings on their asylum claims in regular removal proceedings.[83] Critics have argued that both the Obama and Trump administrations tightened the requirements to meet the "significant possibility" standard in order to exclude families from northern Central America who were seeking asylum at the U.S. border in response to extraordinary levels of violence in those countries.[84]

81. *See* Form I-870, the USCIS Record of Determination/Credible Fear Worksheet.

82. 8 C.F.R. § 20 8.30(e)(8) (2022).

83. Andorra Bruno, CONG. RSCH. SERV., *Immigration: U.S. Asylum Policy* R45539, IMMIGRATION: U.S. ASYLUM POLICY 38 tbl.B-3 (2019). From FY 2016 through FY 2020, 83 percent of completed credible fear interviews resulted in positive findings of credible fear, but in FY 2020, the rate for completed cases was only 44 percent. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers, 97 Fed. Reg. 18078, 18200 tbl. 3 (Mar. 29, 2022). During the Biden administration, the percentage of asylum seekers in the expedited removal process who received positive findings of credible was higher than during the last year of the Trump administration but did not reach the higher levels of earlier years. During most months of 2022, fewer than 60 percent of applicants in the expedited removal process were found to have credible fear, compared with an average of 89 percent in the years 2016-2018. *Compare* USCIS, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions*, USCIS (Mar. 20, 2023) https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions, with data linked from *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, DHS (Dec. 12, 2022) https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

84. *See*, *e.g.*, Sara Campos & Joan Friedland, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, in AM. IMMIGR. COUNCIL 3-4 (May 2014); SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3, at 48-52. In addition to heightening the legal standard, as explained in THE END OF ASYLUM, the Trump administration tried to impose corroboration requirements and assigned CBP agents to conduct credible fear interviews, which until 2019 were only conducted by asylum officers specially trained in asylum law. *Id.*

C. The Third Decision: Immigration Judge Review of Negative Credible Fear Determinations

When an asylum officer makes a negative credible fear determination, the asylum seeker can ask an immigration judge to "review" that decision. An applicant who chooses not to request review is immediately removed. If an applicant requests review, the immigration judge receives the interview notes written by the asylum officer, the summary of material facts, and any other materials on which the determination was based.[85] The immigration judge can decide to conduct the review by telephone or videoconference, whether or not the asylum seeker agrees to a remote hearing.[86] In either case, the noncitizen testifies under oath or affirmation.[87] Under the statute, this review should take place within twenty-four hours to seven days of the supervisory asylum officer's approval of the asylum officer's negative credible fear determination.[88]

The regulations state that the asylum seeker may consult with "a person or persons" of their own choosing prior to the review but is silent on any role that lawyers may play at the review itself.[89] Immigration judges are authorized to make *de novo* decisions as to whether the asylum seeker meets the "significant possibility" standard based on their credibility, their statements, other evidence, and any applicable bars to asylum.[90]

There is no judicial review of the immigration judge's credible fear decision.[91] If the immigration judge confirms the negative credible fear determination, then the asylum seeker is removed from the country. If the immigration judge overturns the asylum officer's decision, then the asylum seeker may pursue the claim for protection before another immigration judge in a regular removal hearing.

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85. 8 C.F.R. § 1003.42(a) (2023).

86. 8 C.F.R. § 1003.25(c) (2019). For a thoughtful empirical critique of remote immigration hearings, *see generally* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN L. REV. 933 (2015).

87. 8 C.F.R. § 1003.42(c).

88. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

89. 8 C.F.R. 1003.42(c) (2023).

90. For those applicants who are barred from asylum, the immigration judge examines their eligibility for withholding of removal by determining whether the person can show a "reasonable possibility" of persecution or torture, which requires a higher degree of proof.

91. Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020).

D. Early Proposals to Expedite Asylum Grants

In the early 2000s, INS drafted regulations that would enable asylum officers to grant asylum at the credible fear interview to applicants who met the "well-founded fear" standard.[92] The rationale for those regulations was that asylum officers often elicit evidence sufficient for a grant of asylum at the credible fear stage.

Asylum advocates were not uniformly in favor of this proposal.[93] While the potential to minimize the detention of asylum seekers in expedited removal was appealing, advocates worried about negative inferences that immigration judges might draw against asylum seekers who are not granted asylum at the credible fear interview. This concern was compounded by the likelihood that this change could transform the credible fear interview into a far more involved proceeding, which could disadvantage many applicants due to the dearth of representation, as well as understandable hesitance to discuss any traumatic experiences so soon after arrival.[94]

In 2005, in a report critiquing DHS's administration of the credible fear process, the United States Commission on International Religious Freedom (USCIRF) recommended that, during credible fear determinations, asylum officers should be able to grant asylum to individuals with strong claims.[95] USCIRF also found that asylum seekers in expedited removal proceedings who were represented by an attorney at subsequent immigration court hearings on the merits of their claims had far higher success rates than unrepresented applicants.[96]

Five years later, the American Bar Association's Commission on Immigration Reform carefully analyzed the USCIRF proposal, including concerns raised abaout possible shortcomings, and recommend that it be given serious considertion.[97] In 2016, USCIRF issued a study that reiterated its recommendation that asylum officers should be au-

92. Karen Musalo et al., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal,* 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 20 (2001).

93. *Id.*

94. *Id.*

95. *Report on Asylum Seekers in Expedited Removal: Vol. I: Findings and Recommendations*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 10 (2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

96. *Id.* at 59.

97. Am. Bar Ass'n Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*, AM. BAR. ASS'N, 1-62 to 1-63 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.

thorized to grant asylum at the credible fear stage.[98] USCIRF acknowledged concerns presented in the Department of Homeland Security's official response to its 2005 report, namely that "allowing asylum officers to grant asylum after the credible fear interview could deprive applicants of the time and resources to develop a well-documented asylum claim or obtain legal counsel to assist them."[99]

E. The Trump Administration's Expedited Forms of Expedited Removal

From its earliest months in office, the Trump Administration decried the high proportion of asylum seekers who established a credible fear.[100] It also pursued many harsh strategies to restrict access to asylum at the border.[101] One of its efforts was the creation of an extremely expedited version of expedited removal, which it called Prompt Asylum Claims Review (PACR). In this process, credible fear interviews were conducted within 48 hours after non-citizens were apprehended while they were still in CBP custody at the border.[102] Only a fortunate few were able to connect telephonically with an attorney before the interview. Finding such lawyers soon after arrival in the United States and while detained was exceptionally difficult. Asylum seekers had limited access to phone communication while in CBP detention. Due to the challenges of connecting with their clients and

98. *See generally Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, U.S. Comm'n on Int'l Religious Freedom, (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.

99. *Id.* at 54.

100. Att'y Gen. Sessions, Remarks to the Executive Office for Immigration Review (2017), https://perma.cc/KZU4-8AQM.

101. At the behest of White House Senior Advisor Stephen Miller and Attorney General Sessions, CBP forcibly separated families as an exceptionally cruel deterrence effort. CBP also pushed back and metered noncitizens who presented themselves at ports of entry and forced asylum seekers to await their hearings in dangerous border towns in Mexico under Trump's "Migrant Protection Protocols." The Trump administration also tried to bar asylum to those who entered without inspection elsewhere along the southern border, and successfully barred asylum for those who had transited other countries unless they could show that they applied for and were denied asylum in Mexico or another country that they passed through. ICE removed certain noncitizens to Guatemala via an Asylum Cooperative Agreement even though Guatemala did not have a functioning asylum system. The Attorney General reversed legal precedent to restrict asylum claims from those who fled domestic violence and gang violence. Schoenholtz et al., The End of Asylum, *supra* note 3, at 33-36, 52-75. For a thorough review of how the family separation policy originated and was carried out, *see* Caitlin Dickerson, *We Need to Take Away Children*, The Atlantic (Sept. 2022), https://perma.cc/Y469-BLDR.

102. *See* First Am. Compl. for Declaratory and Injunctive Relief, Las Ams. v. Wolf, 507 F. Supp. 3d 1 (D.D.C. 2020) (hereinafter PACR Complaint), at ¶ 70, https://perma.cc/QU52-4F3Q. PACR applied to non-Mexicans; a similar program called Humanitarian Asylum Review Process (HARP) was applied to Mexican asylum seekers.

failures to provide attorneys with timely notice of the interview date, it was rarely possible for these lawyers to participate in telephonic interviews.[103] Among individuals subject to PACR, most were swiftly removed. Fewer than 20% were determined to have credible fear, compared with 78% of those subject to the credible fear process during the Bush and Obama administrations.[104]

In March 2020, using the COVID-19 pandemic as justification, the Trump administration created an expulsion program under a health statute (Title 42) regulated by the Centers for Disease Control and Prevention (CDC) never before used to deport immigrants at the border.[105] This proved to be speedier than any previous expedited removal process since it did not involve any examination of the noncitizen's credible fear of return—CBP deported foreign nationals on average in 96 minutes.[106] Using this health statute to very quickly deport asylum seekers without any consideration of their asylum claims, the Trump administration conducted over 440,000 expulsions through the Title 42 process.[107]

IV. CREATING A NEW BORDER ASYLUM SYSTEM

The election of 2020 brought to power a new President—Joseph Biden—who had campaigned on a promise to "reassert America's commitment to asylum-seekers and refugees."[108] Two weeks after entering office, Biden issued an Executive Order requiring the DHS Sec-

103. Pls.' Mot. for Summ. J. at ¶112-21, January 27, 2020, in Las Ams. v. Wolf, *supra* note 102.

104. Office of Inspector General, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs*, DEP'T OF HOMELAND SEC., 20 tbl. 4 (Jan. 25, 2021), https://perma.cc/97EV-DPQ8 [hereinafter DHS OIG PACR and HARP Report]; *Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees*, HUM. RTS. FIRST 7 (June 2020), https://perma.cc/RQJ5-A7TR.

105. *See* SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3, at 79-86.

106. Nick Miroff, *Under Coronavirus Immigration Measures, U.S. Is Expelling Border-Crossers to Mexico in an Average of 96 Minutes*," WASHINGTON POST (Mar. 30, 2020) https://www.washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html.

107. U.S. Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2023* (Mar. 4, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics, Note that it is likely that fewer than 440,000 individuals were subject to Title 42 removals, as individual applicants for entry can be removed under Title 42 more than one time.

108. *The Biden Plan for Securing our Values as a Nation of Immigrants*, BIDEN HARRIS (2020) https://perma.cc/WXE8-ANA5. This plan identified several changes that a Biden administration would make, including ending "the mismanagement of the asylum system, which fuels violence and chaos at the border" and "direct[ing] the necessary resources to ensure asylum applications are processed fairly and efficiently." *Id.*

retary to "begin a review of procedures for individuals placed in expedited removal proceedings at the United States border" and within four months to report "recommendations for creating a more efficient and orderly process that facilitates timely adjudications and adherence to standards of fairness and due process."[109]

In its first months in office, the Biden administration followed up with several important reversals of Trump administration policies[110] that had imposed major barriers to asylum.[111] At the border, however, little changed at first, due to Biden's continuing implementation of speedy removals under the authority of Title 42.

Notwithstanding Biden's continuation of the Title 42 program, the end of the Trump administration and many of its draconian poli-

109. Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

110. For a description of Trump's changes to the asylum system, *see generally* SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3.

111. Att'y Gen. Merrick Garland restored legal precedent enabling survivors of domestic violence to win asylum. *See generally* A- B-, 28 I & N Dec. 307 (BIA 2021). The Biden administration killed an expansive rule, issued by the Trump administration after it lost the 2020 election, that as a practical matter would have ended the possibility of asylum for Central Americans and many other asylum-seekers. It killed the rule by deciding not to appeal the preliminary injunction against it. The main features of this rule, called by asylum advocates the "monster rule" or the "omnibus rule," are described in SCHOENHOLTZ ET AL., THE END OF ASYLUM, *supra* note 3, at 87-97. Although the Biden administration did not appeal the preliminary injunction, neither did it agree to a permanent injunction, and at this writing the injunction is in force but the parties are trying to negotiate about its future. *See generally* Joint Status Rep. in Pangea Legal Servs. v. DHS, 512 F.Supp.3d 966 (N.D. Cal. 2022), https://perma.cc/LT8E-HS2W. Detention centers for migrant families with children, which had operated since the Obama administration, *see generally* PHILIP G. SCHRAG, BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA (2020), were transformed into detention centers for adults only. Andrea Castillo, *Biden Administration Halts Immigrant Family Detention For Now*, LOS ANGELES TIMES (Dec. 17, 2021) https://www.latimes.com/politics/story/2021-12-17/adults-only-biden-administration-repurposes-immigrant-family-detention-centers. The new president suspended Trump's agreements that had enabled DHS to send applicants to Central America without considering their asylum claims. *See* John Ruwitch, *Biden Moves to End Trump-Era Asylum Agreements With Central America Countries*, NPR (Feb. 6, 2021) https://www.npr.org/2021/02/06/964907437/biden-moves-to-end-trump-era-asylum-agreements-with-central-american-countries#:~:text=press-,Biden%20Moves%20To%20End%20Trump%2DEra%20Asylum%20Agreements%20With%20Central,asylum%2Dseekers%20to%20those%20countries. DHS ended the practice of "metering" and terminated rushed deportations under PACR and HARP. Memorandum from Troy A. Miller, Acting Comm'r, CBP, to William A. Ferrara, Executive Assistant Commissioner, Office of Field Operations (Nov. 1, 2021) https://www.aila.org/File/DownloadEmbeddedFile/9069521; Paul Ingram, *Biden Ends 2 Trump Programs Designed to Limit Asylum-Seekers*, TUCSON SENTINEL (Feb. 3, 2021) https://perma.cc/P3Y6-3AYH. Biden ended the "Migrant Protection Protocols" through which the Trump administration had forced asylum seekers into Mexico to await their hearings—an effort that was temporarily stymied by a federal court's injunction that required DHS to continue implementing the Protocols. *Termination of the Migrant Protection Protocols Program*, DEP'T OF HOMELAND SEC., (June 1, 2021), https://perma.cc/U3QH-AVEP; *see generally* Texas v. Biden, 554 F. Supp. 3d 818, (N.D. Tex. 2021) (enjoining the suspension of the program), aff'd 20 F. 4th 928 (5th Cir. 2021), rev'd inj. *sub nom.* Biden v. Texas, 142 S. Ct. 2528.

cies contributed to increased migrant arrivals at the southern border.[112] The number of apprehensions of migrants at the southern border grew from a range of about 69,000 to 75,000 during the last months of the Trump administration to more than 169,000 in March 2021.[113] Despite widespread recognition that expulsions of asylum seekers without any kind of due process was unfair and violated the Refugee Act of 1980,[114] the Biden administration continued to rely in many cases on Title 42 to expel large numbers of these migrants.

As the months passed, however, the Biden administration returned to the traditional Title 8 removal procedures alongside Title 42 expulsions.[115] In fact, by the fall of 2021, the administration was relying on traditional adjudication procedures (notwithstanding the long wait for immigration court adjudications in these cases) nearly as often as it expelled migrants under Title 42.[116] At least four factors account for this shift. First, two lawsuits threatened to curtail the expulsions program.[117] Second, valid critiques of the program from Democrats and advocates were of concern to the administration.[118] Third, individuals who were expelled under Title 42 had received no adjudications of their claims and were therefore subjected to no orders of removal. Unlike persons who left or were deported after their asylum claims were denied, they were free to try to re-enter the

112. *See* Claire Moses, *The Scene at the Border*, N.Y. TIMES (June 12, 2022), https://www.nytimes.com/2022/06/12/briefing/us-mexico-border-immigration.html ("Biden promised a more welcoming America, and asylum seekers were hopeful he would deliver.").

113. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021*, U.S. CUSTOMS AND BORDER PROTECTION, https://perma.cc/8L6E-3Z8N (last modified Mar. 27, 2023) [hereinafter CBP FY 2021].

114. *See, e.g.*, *Ten Reasons to End the Title 42 Policy*, HUM. RTS. FIRST (March 11, 2022), https://perma.cc/RMP2-JA3Q.

115. Title 8 of the United States Code is the immigration law; Title 42 pertains to public health. *See generally* 8 U.S.C.; 42 U.S.C.

116. CBP FY 2021, *supra* note 113. The use of traditional procedures, including expedited removal, continued into FY 2022. Between October 2021 and May 2022, when DHS first started using the accelerated expedited removal procedure discussed in Part V below, it applied the traditional procedures to more than 701,000 migrants. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions 2022*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited Sept. 6, 2022) [hereinafter CBP FY 2022].

117. *See generally* P.J.E.S. v. Wolf, 502 F. Supp. 3d 492 (D.D.C. 2020) (enjoined its application to unaccompanied minors); *see generally* Huisha-Huisha v. Mayorkas, 27 F. 4th 718 (D. C. Cir. 2022) (upholding an injunction, first entered in September 2021, but that injunction was stayed until the appeals court affirmed it in March 2022, preventing the administration from expelling migrants under Title 42 without interviewing them and adjudicating any claims they had that would probably suffer persecution or torture if returned to their home countries; the need to adjudicate those claims made summary expulsions impossible).

118. *See, e.g.*, *Ten Reasons to End the Title 42 Policy*, *supra* note 114.

United States without any penalty for having been forced out, and many of them made repeated attempts.[119] Fourth, some countries refused to accept the return of expelled migrants.[120]

As of April 2022, the Biden administration had conducted over 1.6 million expulsions under Title 42.[121] But that month, the CDC Director issued a Public Health Determination terminating the Title 42 Order, which was scheduled to be implemented starting on May 23, 2022.[122] Litigation by several states challenging the termination put that change on hold for nearly a year.[123] In 2023, the administration terminated the "state of emergency" on which the Title 42 order was based, effective on May 11, 2023.[124] It then notified the Supreme Court, which had scheduled an argument in the states' challenge, that the case would become moot in May.[125] The Court abruptly canceled oral argument on a procedural issue in the case, signaling that the use of the Title 42 procedures would, in fact, end as scheduled.[126]

Beginning in Biden's first months in office, Republicans claimed that the significant increase in border crossings was evidence that the new president had lost control over the southern border.[127] Moreo-

119. During the first quarter of FY 2022, "the recidivism rates of single adults from El Salvador, Guatemala, and Honduras processed under Title 42 was 49%." Decl. of Blas Nunez-Neto, Assistant Sec'y for Border & Immigr. Pol'y of Homeland Sec. at ¶ 10, filed in Arizona v. CDC, No. 6:22-cv-00885, 2022 U.S. Dist. LEXIS 80434 (W.D. La. Apr. 27, 2022).

120. Eileen Sullivan, Biden Administration Has Admitted One Million Migrants to Await Hearings, N.Y. TIMES (Sept. 6, 2022) https://www.nytimes.com/2022/09/06/us/politics/asylum-biden-administration.html.

121. CBP FY 2022, *supra* note 116.

122. *Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, CTR. FOR DISEASE CONTROL (April 1, 2022), https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/Final-CDC-Order-Prohibiting-Introduction-of-Persons.pdf.

123. *See generally* Louisiana v. CDC, 603 F. Supp. 3d 406 (W.D. La. 2022) (issuing a preliminary injunction preventing the termination of the CDC's Title 42 orders).

124. Office of Management and Budget, *Statement of Administration Policy*, EXEC. OFF. OF THE PRESIDENT (2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.

125. Brief for Respondents, Arizona v. Mayorkas, 143 S. Ct. 772 (2023) (No. 22-592), https://www.supremecourt.gov/DocketPDF/22/22-592/254246/20230207174850185_22-592bsUnited States.pdf.

126. Adam Liptak, *Supreme Court Cancels Arguments in Title 42 Immigration Case*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/us/politics/supreme-court-title-42-immigration.html.

127. *See, e.g.*, Sean Sullivan & Nick Miroff, *Biden Faces Growing Political Threat from Border Upheaval*, WASH. POST (Mar. 15, 2021, 7:35 PM), https://www.washingtonpost.com/politics/biden-immigration-political-threat/2021/03/15/bee8c83c-85a9-11eb-bfdf-4d36dab83a6d_story.html (House Minority Leader Kevin McCarthy stated that "There's no other way to claim it than a Biden border crisis"); Nicholas Fandos & Zolan Kanno-Youngs, *House Tackles Biden's Immigration Plans Amid Migrant Influx*, N.Y. TIMES (Mar. 15, 2021, updated Apr. 10, 2021), https://www.nytimes.com/2021/03/15/us/politics/biden-immigration-plan-

ver, delays in immigration court decision-making dragged out asylum decisions for years. During the summer of 2021, the administration announced a plan to "streamline" the adjudication process so that it could more quickly adjudicate claims and remove those who did not win asylum.[128]

As described in more detail above, actors ranging from INS to the ABA Commission on Immigration Reform to the U.S. Commission on International Religious Freedom had, in earlier years, offered ideas for adjudicating defensive asylum claims more efficiently and at lower expense than in removal hearings in immigration court.[129] In 2018, experts affiliated with the Migration Policy Institute (MPI), a non-profit research center, resuscitated the suggestion that asylum officers should adjudicate most or all asylum claims. They suggested that the breakdown in the immigration court system could be significantly mitigated by authorizing asylum officers to decide not only credible fear but also the full merits of border asylum cases, thereby reducing the stream of cases being added to the courts' overburdened dockets and shortening the time it takes to reach a decision.[130] Their suggestion received scant attention during the Trump administration, but MPI reissued the recommendation in a short report in February

bill.html ("Sensing a political opening, Republicans have moved quickly in recent days to reprise some of the most pointed attacks of the Trump presidency based on the deteriorating situation on the border, where thousands of unaccompanied children and teenagers are in U.S. custody."); *Biden's Out of Control Border Crisis*, REPUBLICAN NATIONAL COMMITTEE, (Oct. 22, 2021), https://gop.com/research/bidens-out-of-control-border-crisis-rsr/ (last visited Sept. 8, 2022). The Biden administration tried to fend off this criticism by publicly discouraging Central Americans and other migrants from trying to come to the United States. It dispatched Vice President Kamala Harris to Guatemala to advise intending migrants from northern Central America that "if you come to our border you will be turned back. Do not come. Do not come. The United States will continue to enforce our laws and secure our borders." Lauren Egan, *Harris in Guatemala Warns Potential Migrants: 'Do Not Come,'* NBC NEWS (June 7, 2021, 4:16 PM), https://www.nbcnews.com/politics/white-house/harris-guatemala-warns-potential-migrants-do-not-come-n1269892. The Vice President almost certainly knew that commands from political leaders would not discourage people who desperately sought to escape violence, very serious economic hardship often related to natural disasters and climate change events, and, in many cases, persecution.

128. "Streamlining" to shorten the time needed to adjudicate asylum cases was intended not only to deal with the criticism that the border was "out of control", see text at supra n.127, but also to enable the administration to "move away from" the Title 42 expulsion policy. Hamid Aleaziz, *Biden Is Planning To Make Big Changes To How The US Handles Asylum-Seekers At The Border*, BUZZFEED NEWS (May 28, 2021, 3:03 PM), https://www.buzzfeednews.com/article/hamedaleaziz/biden-new-asylum-process-plan.

129. *See* Commission on Immigration, *supra* note 97 at 61-63. One of the authors was a member of the ABA Commission on Immigration Reform when these proposals were advanced.

130. Doris Meissner, Faye Hipsman & T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward*, MIGRATION POLICY INST. (2018) at 26, https://perma.cc/W3P8-TQ9L.

2021, just as the Biden administration sought a way to process asylum cases more quickly.[131]

The devil, of course, lay in the details of a new adjudication system, but the MPI report had suggested no details, saying only that its proposal would require "a regulatory change."[132] It did warn, however, that, "An asylum system that is more timely must also be fair," and that legal representation was the key to fairness. It acknowledged that "representation is the single most important factor in determining case outcomes—asylum seekers are at least three times more likely to win relief when represented."[133] But it stopped short of suggesting that asylum seekers who could not afford legal counsel be provided with legal assistance at government expense.

The administration saw value in the idea of having asylum officers make the initial merits decision in border asylum cases, but as early as March 2021, senior White House officials became mired in disagreements on how to balance speed with fairness. In July 2021, about 200,000 migrants were apprehended near the southern border, the highest monthly total in more than twenty years.[134] The President, his chief of staff, and other top advisors insisted on finding ways to deter border crossings, concerned about "the intensifying attacks from Republicans characterizing him as an open-borders president."[135] They insisted that other senior officials, those who had been appointed to positions responsible for making immigration policy, find ways to process claims faster and swiftly deport migrants who did not win asylum. Those senior immigration policy officials, committed to seeking a fair and humanitarian system for adjudicating asylum claims, pushed back for months, and six of them finally left in frustration.[136]

131. Doris Meissner & Sarah Pierce, *Biden Administration Is Making Quick Progress on Asylum, but a Long, Complicated Road Lies Ahead,* MIGRATION POLICY INST. (Feb. 2021), https://perma.cc/Y6AA-869X.

132. Meissner et al., *supra* note 130, at 26.

133. Meissner & Pierce, *supra* note 130.

134. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Title 42 Expulsions FY 2021*, U.S. CUSTOMS & BORDER PROT., https://perma.cc/6SLF-ZFUU (last modified Oct. 13, 2022).

135. Zolan Kanno-Youngs, Michael D. Shear & Eileen Sullivan, *Disagreement and Delay: How Infighting Over the Border Divided the White House*, N.Y. TIMES (Apr. 9, 2022), https://www.nytimes.com/2022/04/09/us/politics/biden-border-immigration.html.

136. *Id.* (describing "furious debates" over dismantling the Trump administration's restrictive border policies). The six departing officials included the deputy director for immigration of the Domestic Policy Council and the director for border management at the National Security Council. Jaya Ramji-Nogales, *How an Internal State Department Memo Exposes "Title 42" Expulsions of Refugees as Violations of Law*, JUST SEC. (Oct. 5, 2021), https://www.justsecurity.org/

The internal battles left the administration with no "clear plan" for addressing the influx of migrants at the southern border.[137] It was determined to end the use of Title 42 to expel migrants, but did not have an adequate system in place to process asylum seekers fairly and quickly at the border.[138] Finally, in August 2021, it latched onto a version of the idea most recently advanced by MPI for a streamlined asylum adjudication system, and it issued a proposed regulation to implement it.[139] Its initial regulatory proposal, which we will call Rule 1.0, included some desirable features, but it was deeply flawed.

V. RULE 1.0: CURTAILED ADJUDICATION

In their explanation of Rule 1.0 in the Federal Register, the Departments of Homeland Security and Justice acknowledged that the overwhelmed asylum adjudication system, with its immense backlogs and long delays, was "in desperate need of repair."[140] The purpose of the plan was to replace the current system with one that "will adjudicate protection claims fairly and expeditiously" with "ample procedural safeguards" for individuals found to have a credible fear of persecution.[141] The main change was to assign all asylum adjudications, in the first instance, to asylum officers rather than to the vastly overbooked immigration courts, with a possible "appeal" to the immigration court for a non-citizen denied asylum by the asylum office.[142]

The basic idea of having asylum claims heard first by asylum officers was sound with respect to speed and cost because, at least in principle, an asylum officer adjudication was less expensive for the government and could be accomplished more quickly than an immi-

78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law/.

137. Nick Miroff & Sean Sullivan, *As Immigration Heats Up, Biden Struggles for a Clear Plan*, WASH. POST (July 17, 2021, 1:43 PM), https://www.washingtonpost.com/national/biden-immigration-policy-struggle/2021/07/17/5e8bb9b6-e67c-11eb-8aa5-5662858b696e_story.html.

138. The administration stated that the new procedures described in this article were an aspect of its plans to "prepare for the end of Title 42." *DHS Continues to Prepare for End of Title 42: Announces New Border Enforcement Measures and Additional Safe and Orderly Processes*, DEP'T OF HOMELAND SEC. (Jan. 5, 2023), https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

139. In its proposal for changing the adjudication system, the administration quoted with approval from the MPI's 2018 report. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46918 (proposed Aug. 20, 2021) [hereafter NPRM]; *see also* Meissner et al., *supra* note 130.

140. NPRM, *supra* note 139, at 46907.

141. *Id.*

142. *Id.* at 46910-11.

gration court hearing. The adjudication would be less costly because non-adversarial asylum office adjudications require only a single officer's time (plus a review of the officer's recommendation by a supervisor), while an immigration hearing is adversarial, involving both an immigration judge and an attorney from ICE who cross-examines the non-citizen. Immigration judges and ICE attorneys are paid much more than asylum officers, which also increases the cost of this more formal adjudication.[143] Also, in immigration court, interpreters are provided at government expense; in contrast, under Rule 1.0, as in affirmative asylum interviews by asylum officers, asylum applicants had to supply an interpreter at no expense to the government.[144] The adjudication could be more quickly completed because, although the asylum offices had a backlog of 400,000 pending cases when it proposed Rule 1.0,[145] that backlog was much smaller than the 1.6 million case backlog in the immigration court (resulting in an average case completion time of nearly four years).[146] DHS anticipated hiring 800 new asylum officers to adjudicate the cases that would otherwise go to immigration court.[147]

Rule 1.0 had a few other positive attributes. It recognized the reality that DHS lacked detention space for the large number of people claiming asylum who were waiting for credible fear interviews, so it authorized the agency to parole individuals out of detention before it could make a credible fear determination when "detention is unavailable or impracticable."[148] It deemed a positive credible fear de-

143. In 2021, asylum officers were paid between $66,829 and $86,881, depending on length of services, while immigration judges were paid a weighted average of $155,809. *Id.* at 46932 n. 91. The median pay for an ICE attorney was $148,086. *Salary Details for Assistant Chief Counsel, at US Immigration and Customs Enforcement,* GLASSDOOR, https://www.glassdoor.com/Salary/US-Immigration-and-Customs-Enforcement-Assistant-Chief -Counsel-Salaries-E41364_D_KO 39.62.htm (last visited Oct. 21, 2021).

144. NPRM, *supra* note 139, at 46942. This feature was eliminated in Rule 2.0, described in the next section. It is in line with affirmative asylum interviews, at which applicants must supply their own interpreters. 8 C.F.R. § 208.9(g)(1) (2023).

145. NPRM, *supra* note 139, at 46921 n. 60.

146. *Id.* at 46909.

147. *Id.* at 46921. The economic feasibility of hiring 800 new asylum officers plus supporting staff, at a likely cost of $413 million, was not clear, however. Unlike immigration judges, asylum officers are not paid from general revenues from taxpayers, but from fees assessed on persons seeking other immigration benefits such as naturalization. *See Id*. at 46922 tbl.8, n.61. It was not evident that as a political matter, DHS could raise fees on other benefits to the extent necessary to fund the new system.

148. *Id.* at 46926. DHS abandoned this explicit feature of the proposed rule when it issued its interim final rule (discussed as Plan 2 in the next section, but at that point it amended its regulation to make parole permissible, on a case-by-case basis, for persons who receive positive credible fear determinations and are scheduled for Merits Interviews by asylum officers.) *See* 8 C.F.R. § 235.3 (c)(2) (2023); *see also* 8 C.F.R. § 212.5(b) (2023).

termination to be an application for asylum (subject to later augmentation by the applicant).[149] For those in the new process under Rule 1.0, this solved a long-standing problem with the filing deadline for asylum applications. In 1996, Congress had passed a law barring asylum (with two exceptions) for persons who applied more than a year after entering the United States. Many individuals eligible for asylum had no knowledge of the asylum process, let alone the one-year deadline, and obtaining information about the asylum process was particularly difficult for non-citizens who did not speak English and did not have computer access.[150] Others missed the deadline because of the difficulty of completing the application form in English or because they paid unscrupulous individuals who promised to file applications for them but did not do so in time.[151] Many applicants, therefore, were denied asylum for reasons unrelated to the merits of their claims.[152] Under Rule 1.0, their applications would automatically be considered timely, because the credible fear determinations would be made soon after their entry.

Another positive feature of the Rule 1.0 proposal was its simplification of the standard to be applied in screening interviews. Previously, persons who were eligible to be considered for asylum would only have to show "credible" fear, meaning a significant possibility that they could win asylum at a later stage of the process.[153] Persons eligible only for the more restrictive "withholding of removal" would have to demonstrate "reasonable" fear, which meant showing that they had a "reasonable" rather than a "significant" possibility of success, an apparently higher standard of proof.[154] The proposal collapsed these standards into the standard for "credible" fear, defined as

149. NPRM, *supra* note 139, at 46909.

150. USCIS maintains a website with some basic information in Spanish (but no other languages) about the asylum process, but the application form and its detailed instructions, linked from that website, are available only in English. *See I-589, Solicitud de Asilo y de Supension de Remocion*, U.S. CITIZENSHIP AND IMMIGR. SERV. (last updated Feb. 28, 2023), https://perma.cc/GSD8-8MPT.

151. Some of these persons call themselves "notarios," a term used in Latin America to denote a class of lawyers. They are not actually U.S. licensed lawyers, and they thereby deceive Spanish-speaking non-citizens who think that they are getting legal advice from licensed, professional advocates. *See* Jean C. Han, *The Good Notario, Exploring Limited Licensure for Non-Attorney Immigration Practitioners,* 64 VILLANOVA L. REV. 165, 170 (2019).

152. For a detailed analysis, *see* ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES, & PHILIP G. SCHRAG, LIVES IN THE BALANCE 73, 82-85 (NYU PRESS 2014) (finding that 18 percent of all affirmative asylum applicants from FY 1998 through June 2009 were rejected because of the deadline and that nationals of certain countries were disproportionately affected).

153. NPRM, *supra* note 139, at 46914.

154. *Id*.

a "significant possibility" of success in a later adjudication.[155] The proposal also specified that certain bars to grants of asylum, such as a bar to asylum for a person who had been "firmly resettled" in another country before coming to the United States, would not be imposed during the initial credible fear screening.[156] These bars would be imposed only after detailed analysis during a full adjudication on the merits.[157]

All these reforms that would have made the adjudication process more efficient and fairer were, however, overshadowed by two other provisions of Rule 1.0 that would have been extremely unfair to noncitizens who were not granted asylum by the asylum office. The first significant flaw concerns review of the asylum officer decision by an immigration judge. Affirmative asylum applicants[158] who are not successful before the asylum office are not immediately deported. They are "referred" to immigration court for a *de novo* hearing on their asylum claim. They do not have to request such a hearing. Although this second proceeding is adversarial and the applicant is subject to cross-examination by an ICE lawyer, the immigration judge to whom their case is assigned must hear their oral testimony and must consider any new documentary evidence they provide. Only an immigration judge can issue a removal order.

Similarly, prior to Rule 1.0, a person found to have credible fear would have a full opportunity to present documentary and oral evidence to an immigration judge. The judge could not summarily decide to dispense with a hearing or to refuse to consider proffered documentary evidence.[159] In contrast, under Rule 1.0, asylum officers who did not grant asylum to individuals found to have credible fear would themselves issue removal orders.[160] Such an order would be final unless that applicant formally appealed the decision, thereby requesting that an immigration judge review the asylum officer's denial.[161] This would restrict review in a major way because many pro se asylum applicants, especially those with limited education, little understanding

155. *Id.*
156. *Id.*
157. *Id.*
158. This term refers to individuals who applied for asylum without first having been apprehended by ICE or CBP. *See* text at *supra* note 21.
159. 8 U.S.C. § 1229a(b), providing the right of respondents in immigration court to "present evidence in the alien's own behalf;" *See also* U.S. Dep't of Just., IMMIGRATION COURT PRACTICE MANUAL § 4.16(d) (2020).
160. NPRM, *supra* note 139, at 46919.
161. *Id.*

of American court procedures, and perhaps limited literacy, would not understand the appeals process or the requirement that an appeal be filed within 30 days.[162] Many of these individuals would lose the right to appeal simply because they did not understand what was required of them.[163]

The second flaw pertained to a curtailment of the right to present to the immigration judge new oral or written evidence; that is, evidence that had not been presented to the asylum officer. Unlike immigration court review of affirmative asylum claims,[164] the proposed immigration court hearing was not *de novo*.[165] Under Rule 1.0, the immigration judge would have been limited to basing their decision only on documents that the asylum applicant had submitted to the asylum office, and on a transcript of the conversation between the applicant and the asylum officer. The judge could refuse to read documents that the applicant had submitted after the asylum officer interview, and could refuse to hear testimony from the applicant, if the judge decided that the documents or testimony would be "duplicative" of the evidence considered by the asylum officer and not "necessary" to develop the factual record.[166]

The Departments that proposed Rule 1.0 indicated their expectation that a refusal by judges to accept documentation or testimony would be the norm, not a rare exception. The explanation accompanying the rule noted that, "[T]he Departments expect that the IJ [immigration judge] generally would be able to complete the de novo review solely on the basis of the record before the asylum officer."[167]

What was wrong with that procedure? It would have given the judge the power to decide not to consider additional evidence, even if the applicant wanted to present such evidence, and it would have en-

162. Nothing in the proposed regulation required an official to provide an explanation of the right to appeal in the applicant's own language or read it aloud to an illiterate applicant.

163. The Departments accurately summarized comments critical of the appeal requirement at Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18155-56 (Mar. 29, 2022) [hereafter IFR]. The contents of the IFR are explained in Section VI below. References to the "IFR" pertain to the Departments' 137-page explanation of the IFR in the Federal Register, at 87 Fed. Reg. 18078-18215. References to the interim final rule itself, which begins at page 18215, cite the codified section or subsection of the rule itself rather than the IFR.

164. Executive Office for Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections*, U.S. DEP'T OF JUST., (Jan. 15, 2009), https://perma.cc/7BPK-YKDG.

165. The proposal deemed the review by the judge to be "*de novo.*" NPRM, *supra* note 139, at 46911. But as explained in the text, this was not the reality imposed by the rule.

166. NPRM, *supra* note 139, at 46946-47.

167. NPRM, *supra* note 139, at 46920.

couraged the judge to refuse to hold evidentiary hearings. That power could have defeated the whole purpose of a review, which has always been necessary for more accurate decisions: in affirmative asylum cases from FY 2012 through 2016, immigration judges granted asylum in 72% to 83% of the cases where asylum officers had not granted asylum.[168]

Why do judges disagree with such a high percentage of denials by asylum officers? In some cases, immigration judges may interpret the law differently from the asylum officer who referred a case. But based on our own experience with immigration court cases[169] and that of other advocates,[170] much of the difference is attributable to the fact that asylum applicants are often not represented by counsel in asylum office interviews and only manage to get lawyers when their cases are referred to immigration court. In fact, in FY 2006-09, apparently, the latest period for which such statistics are available,[171] only 58 percent of asylum seekers who were interviewed by asylum officers in affirmative cases were represented at that stage of the process.[172] Competent lawyers approach asylum cases very differently than *pro se* applicants; they understand which facts are most relevant to establishing eligibility for asylum; they are conversant in the law and able to identify the most persuasive legal arguments; and they know how to research and present reliable factual information about human rights conditions in the applicant's country of origin. Some lawyers might even be able to obtain witness statements, evidentiary records from the applicants' countries, such as arrest warrants and medical documents, and expert opinions to persuade a judge that their client merits asylum.

168. Executive Off. for Immigration Review, *FY 2016 Statistics Yearbook*, U.S. Dep't of Just., p. K3, Fig. 17 (2017), https://www.justice.gov/eoir/page/file/fysb16/download. We are grateful to former Immigration Judge Jeffrey Chase for pointing this out.

169. All of us have supervised clinic students or represented clients in immigration clinics, some for more than 25 years.

170. For some specific examples of cases in which immigration judges granted asylum after erroneous denials by asylum officers, *see* Hum. Rts. First, First Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (May 31, 2022) (on file with the authors).

171. The annual reports by DHS on asylum statistics do not show the proportion of affirmative asylum applicants who were represented.

172. Schoenholtz, Lives in the Balance, *supra* note 152, at 25, fig. 2-11. According to government statistics, more than 90 percent of asylum applicants in completed cases had representation in immigration court in 2022. *Current Representation Rates* Executive Off. for Immigration Review, (July 15, 2022), https://perma.cc/5JQ2-F9D6. This may overstate the representation rate because the government determines a migrant to be represented if a representative files a notice stating that they are representing the asylum applicant, even if the representative misses some of the court appearances.

Public critique of these features of Rule 1.0 in more than 5000 formal comments to the two agencies[173] was withering. Human Rights First, one of the nation's leading organizations providing legal representation for asylum applicants, wrote that "limiting evidence permitted to be filed in immigration court is an outrageous barrier to due process."[174] In particular, it explained that asylum applicants may need to establish the cumulative harm of a series of incidents of persecution.[175] An immigration judge who has not heard an applicant testify about such a pattern of abuse might reject this additional new evidence as merely "duplicative."[176] Oral evidence also assists immigration judges in making one of the most important determinations in asylum cases—credibility.

The Center for Gender and Refugee Studies (CGRS) emphasized the fact that victims of trauma and torture "commonly use avoidance as a coping mechanism," causing them to be reluctant to share the details of their persecution with asylum officers.[177] They are often unable to speak about or recall details of the harms they have survived until they have processed their trauma over a period of weeks or months with mental health counselors or advocates who take a trauma-informed approach.[178] For the most severely traumatized applicants, denials of full hearings would increase the risk that they would be denied asylum and deported.[179] The Center also pointed out that the Rule 1.0 provided no guidance as to what constituted "duplicative" evidence, which would lead to "inconsistent outcomes from courtroom to courtroom" and make judicial review of rejections of evidence "virtually impossible."[180] In addition, it pointed out that the curtailed review procedure was inconsistent with the statute that cre-

173. The department received 1,347 comments through "mass mailing campaigns" and 3,790 "unique submissions." IFR, *supra* note 163, at 18109.

174. Human Rights First Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, REGULATIONS.GOV (Oct. 18, 2021), https://www.regulations.gov/comment/USCIS-2021-0012-1452.

175. *Id.*

176. *Id.* The organization also cited cases decided by federal courts of appeals to the effect that limiting apparently "duplicative" testimony violated due process because credibility determinations may depend on such testimony. *Id.*

177. Center for Gender and Refugee Studies, Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, REGULATIONS.GOV (May 26, 2022), https://www.regulations.gov/comment/USCIS-2021-0012-5326.

178. *Id.*

179. *Id.*

180. *Id.*

ated the expedited removal procedure; the authors and sponsors of that statute and the conference committee report had all stated that persons who received positive credible fear determinations would receive "full" and "normal" hearings in immigration court.[181]

The National Immigrant Justice Center emphasized the greater comfort of trauma victims when questioned during direct testimony by their own representatives in immigration court than when questioned by asylum officers. It provided an example:

> An NIJC attorney represented an unaccompanied child who had a five-hour [asylum office] interview, punctuated with one bathroom break. As customary [in the asylum office], the attorney was unable to direct questioning and the child was forced to repeat every aspect of his declaration with harrowing details, only to receive a denial. During his de novo hearing, the immigration judge relied on the record submitted (including the same declaration), the parties stipulated to limit the issues, and counsel directed thirty-five minutes of testimony on salient aspects of the child's asylum claim. The child expressed greater comfort with telling his story while questioned by his trusted attorney and promptly won asylum.[182]

The United Nations High Commissioner for Refugees (UNHCR) questioned whether the immigration judge's unilateral authority to decide not to admit further evidence would comply with international law, specifically the Protocol relating to the Status of Refugees. UNHCR insisted that "procedures to adjudicate individuals' claims for protection must uphold key due process safeguards."[183] It suggested that "pro se asylum-seekers, especially those in vulnerable situations, may lack the language, technical, or other skills needed to evaluate, address, or contest, potentially in writing, the position of DHS, which may be provided in written statements."[184]

To their credit, the departments acknowledged the validity of these critiques.[185] In its next iteration, the Interim Final Rule and

181. *Id.*

182. National Immigrant Justice Center, Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers *(Oct. 19, 2021)*, https://perma.cc/2D2W-SQJP.

183. United Nations High Commissioner for Refugees, Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, REGULATIONS.GOV (May 31, 2022), https://www.regulations.gov/comment/USCIS-2021-0012-5305.

184. *Id.*

185. "The Departments believe that providing streamlined [immigration court] hearings addresses nearly all of the commenters' concerns and requests on this topic. Applicants will not be required to affirmatively request review by an IJ, and applicants will not be referred to the

Proposed Final Rule, which we call Rule 2.0, they abandoned their plan to allow immigration judges to exclude additional evidence. But Rule 2.0 introduced a new and equally unfair shortcut of due process protections for asylum applicants: an unrealistic set of deadlines for submission of evidence.

VI. RULE 2.0: STREAMLINED ADJUDICATION

Unlike Rule 1.0, Rule 2.0 was not merely a new *proposal*; it was embodied in an "Interim Final Regulation" (IFR), effective May 31, 2022.[186] Even though it was markedly different from Rule 1.0, the government implemented Rule 2.0 without first receiving comments or critiques by individuals or organizations.[187] Thus, the Departments

limited IJ proceedings proposed in the NPRM." IFR, *supra* note 163, at 18156. In other words, the government was proposing "streamlined" hearings to replace the limited IJ proceedings contemplated by the NPRM. At the "streamlined" hearings, the immigration judges are directed to consider all of the evidence as they do in regular asylum hearings. The term "streamlined" refers to the speed of the new process.

186. *See generally Id.* Less than a month after the Departments issued Rule 2.0, and before it even took effect, the Attorneys General of Arizona and 19 other states sued to invalidate it and requested a federal district court to enjoin it while the case was pending. Brief for Petitioner, Arizona v. Garland, (W.D. La.) (No. 22-cv-1130). The complaint and other documents can be read without charge through recap, https://free.law/recap. The suit is based on several different legal theories, chief among them the assertion that assigning asylum applications by persons in expedited removal for adjudication by DHS asylum officers rather than DOJ immigration judges violates the Immigration and Nationality Act. The plaintiffs assert that 8 U.S.C. § 1229a(a)(3) provides that unless otherwise provided [by Congress] a proceeding in immigration court is to be the "sole and exclusive" procedure for determining whether a noncitizen may be admitted or removed from the United States, and that the only exception through which Congress permitted asylum officers to make that determination for inadmissible individuals is 8 U.S.C. § 1225(b)(3)(c) (which applies only to unaccompanied children). *Id.* at 3-4. The administration's view is that the expedited removal provisions of the Act, § 1225(b), creates special processes for noncitizens in these proceedings and is an additional legislative exception to the usual procedure of requiring non-citizens who file defensive asylum applications to have their claims adjudicated only in removal proceedings. IFR, *supra* note 163, at 18164 (noting that § 1225 states that persons found to have credible fear are only required to have their asylum applications given "further consideration," without specifying the agency that must provide that consideration. After the Supreme Court held in Garland v. Gonzalez, __ U.S. __, 142 S. Ct. 2057 (2022) that district courts could not enjoin the operations of provisions of the immigration laws as applied to a class of persons, plaintiffs withdrew their request for a preliminary injunction in favor of seeking vacatur of the interim final rule (Rule 2.0 in this article) and a declaration that the rule was not valid. *See* Complaint for Petitioner, Arizona v. Garland, (W.D. La.) (No. 2-cv-1130).

187. The government must usually publish proposed rules for notice and comment before making them effective. However, in this case, even though Rule 2.0 was radically different from Rule 1.0, the government did not seek public comments on the mechanics of Rule 2.0 before issuing it as an "Interim Final Rule." According to the Office of the Federal Register, "When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an 'interim final rule,' or 'interim rule.' Citation. This type of rule becomes effective immediately upon publication. Citation. In most cases, the agency stipulates that it will alter the interim rule if warranted by public comments. If the agency decides not to make changes to the interim rule, it generally will publish a brief final rule in the Federal Regis-

of Homeland Security and Justice lacked the benefit of knowing stakeholders' views on the rule before it became law. By August 2022, DHS had not only committed itself to using the new procedures but was applying them to some migrants who were apprehended at the border, found to have credible fear, and planned to relocate to one of six metropolitan areas: Boston, Los Angeles, Miami, New York, Newark, or San Francisco.[188] The Department sought suggestions from the public for changes in the Interim Final Regulation, to be embodied in a final regulation, even while it was applying that regulation to hundreds or thousands of asylum seekers.[189]

In this section, we first explain the system established by Rule 2.0. Then, we review its positive features. Next, we turn to the flaw that makes the system, on balance, extremely unfair to asylum applicants. As we explain, this flaw consists of the excessively short time periods for securing counsel and obtaining corroborating evidence. The two following subsections elaborate the problem in greater detail, exploring the collision between the time frame for adjudication under Rule 2.0 and statutory corroboration standards, as well as the ethical challenges for lawyers who consider accepting representation of asylum seekers subjected to the new procedure. The final subsection recounts the failures of prior attempts to accelerate the asylum adjudication

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ter confirming that decision." *A Guide to the Rulemaking Process*, Off. of the Fed. Register, https://perma.cc/PZH2-SNKK (last visited July 4, 2022).

188. DHS announced a "phased manner" of implementing the procedures, through which it would try to apply them to "a few hundred" persons a month who planned to go to those cities. *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, Dep't of Homeland Sec., (May 26, 2022), https://perma.cc/9JK7-294V. The phased approach was necessary because DHS currently lacks sufficient resources to apply the rule to all migrants who pass the credible fear test. IFR, *supra* note 163, at 18185. In addition, at the time it created Rule 2.0, it had a backlog of more than 430,000 affirmative cases that it had not adjudicated. USCIS Ombudsman, *supra* note 33, at 42. This backlog was twice as large as in 2016. Eric Katz, *The Biden Administration Begins Shifting Asylum Determinations to Federal Officers, Government Executive*, Gov't Exec. (June 1, 2022), https://perma.cc/V286-H8A4. DHS will have to hire 800 new asylum officers to conduct interviews, and funding for these officers (and office space and support staff) would have to come from imposing higher fees for other immigration benefits. IFR, *supra* note 163, at 18114; USCIS is funded almost entirely from user fees rather than the general tax base. *Id*. at 18187. When the Departments issued the new plan, the asylum office had 621 vacancies among an authorized complement of 1022 asylum officers. USCIS Ombudsman, *supra* note 33, at 44 n.266. It was not clear whether the anticipated hiring of 800 new officers referred to 800 more officers in addition to filling those vacancies, or whether USCIS would merely fill the vacancies and add 179 additional officers.

189. Two of the authors of this article submitted comments. *See generally*, Philip G. Schrag & Andrew I. Schoenholtz, Comment Letter on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, Regulations.gov (Mar. 29, 2022), https://www.regulations.gov/comment/USCIS-2021-0012-5274. The comment period closed on May 31, 2022. IFR, *supra* note 163, at 18078.

process even more than the expedited removal system that has been implemented since 1997.

A. The Contents of Rule 2.0

Rule 2.0 eliminates both the requirement that the applicant "appeal" a negative decision by an asylum officer and the ability of immigration judges to summarily reject additional evidence by deeming such evidence unnecessary. The applicants in the new expedited removal system are "referred" to immigration court for removal hearings without having to request a new hearing. The judge in the removal proceedings does not have the authority to refuse to consider evidence submitted by the applicant. The Departments recognized the validity of the concerns expressed by commentators on Rule 1.0—that its curtailed process would enable judges to "rubber-stamp" denials. They stated that their new plan will "ameliorate commentators' concerns,"[190] because judges will have to hold a full hearing in every case unless they *grant* asylum based on the record from the asylum officer.[191]

Rule 2.0, however, replaces the curtailed immigration court hearings with "streamlined" procedures that move cases through the adjudication system on an excessively speedy timetable.[192] Below we describe the Rule 2.0 procedures. Then, we discuss the positive features as well as the major problems of the new system.

Pursuant to Rule 2.0, the asylum officer adjudication is scheduled to take place within three to six weeks from the applicant's receipt of the positive credible fear determination. Within a few days of the positive determination, after ICE identifies a sponsor for the applicant, the applicant is released from detention.[193] The credible fear determi-

190. IFR, *supra* note 163, at 18162.

191. Such a grant is authorized by 8 C.F.R. § 1240.17(f)(4)(ii). *Id.*

192. Inevitably, giving calendar priority to expedited removal cases referred from the asylum office would push all other non-detained asylum applicants even further to the back of the queue for immigration court hearings. It was therefore difficult to discern whether the new procedure would accomplish the government's goal of reducing the immigration court backlog.

193. Nothing in the regulations promulgated under the IFR preclude DHS from applying Rule 2.0 to detained applicants. At least at first, the Biden administration released on parole all migrants that it selected for the process, giving some or all of them "alternatives to detention" (usually ankle bracelet monitors). *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, DEP'T. OF HOMELAND SEC. (May 26, 2022), https://perma.cc/9JK7-294V. Of course, under Rule 2.0, DHS could potentially continue to detain asylum seekers through the full asylum interview, with asylum officers conducting merits interviews by videoconference from their offices, just as video-conferenced hearings are often held by immigration judges for respondents in detention. Videoconferenced immigration court hearings are criticized

nation, with its accompanying summary of the asylum officer's questions and the applicant's answers, is sent to the regional asylum office closest to the applicant's intended destination after release from a border facility. That asylum office schedules a full merits interview on the application within a few short weeks; the clock starts ticking on the interview date when the applicant receives the credible fear determination, so the applicant will have less time to prepare if the government moves slowly to release them from detention or schedule their interview.[194]

Rule 2.0 allows asylum applicants to submit additional documentation to the asylum office and directs the asylum officer to consider that evidence.[195] This is a sensible approach given that, in most cases, the credible fear determination will have been based solely on the statements of the applicant at the credible fear interview. Few applicants are aware of the legal standards for asylum, understand which of their experiences will be most relevant to their asylum case, or have access to reports about human rights conditions in their home country that could buttress their claims.[196]

The additional evidence that an applicant wants the asylum officer to consider, however, must be submitted "no later than 7 calendar days" before the interview, or ten calendar days if the submission is made by mail.[197] On the appointed day, the asylum officer holds an asylum merits interview[198] with the applicant in person at the regional

in Ingrid V. Eagly, *Remote Adjudication in Immigration*, *supra* note 86; *see also* Aaron Haas, *Videoconferencing in Immigration Court Hearings*, 5 Pierce L. Rev. 59 (2006). Our critique of Rule 2.0 applies with even greater force if DHS were to begin applying it to detained applicants, because their access to counsel and to corroborating evidence is far more limited than the very limited access for non-detained applicants.

194. The regulation requires that the merits hearing be scheduled no sooner than 21 days and no later than 45 days after the credible fear determination is served on the asylum applicant. 8 C.F.R. § 208.9(a)(1).

195. 8 C.F.R. §208.9(e).

196. In addition, few applicants will carry with them any corroborating documentation such as witness affidavits, arrest warrants, or medical records. *See* Virgil Wiebe, Serena Parker, Erin Corcoran and Anna Marie Gallagher, *Asking for a Note From Your Torturer, Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, 1-10 Immigration Briefings 1 (2001). Many are robbed of their possessions and documents while traveling through Central America and Mexico on the way to the United States.

197. 8 C.F.R. § 208.4(b)(2)). An asylum officer "may" grant the applicant a "brief extension" for the submission of evidence. However, no extension could be granted if it would result in a decision being issued more than 60 days after the credible fear determination. 8 C.F.R. § 208.9(e)(2).

198. IFR, *supra* note 163, at 18096. This term distinguishes the proceeding from the earlier credible fear interview.

office closest to the applicant's new destination.[199] The asylum officer reviews the credible fear interview summary and any evidence the applicant has submitted before the oral interview. At the interview, the asylum officer asks questions of the applicant to determine their eligibility for asylum, and whether, in light of the testimony and the documentation, the applicant should receive asylum as a matter of discretion.[200] At the end of the interview, an unrepresented applicant may make a statement, and an applicant's representative, if there is one, may ask follow-up questions and make a statement.[201]

If the asylum officer grants asylum, the case is concluded. If the asylum officer denies the application, the applicant remains subject to removal and is referred to immigration court for what the agencies term "streamlined"[202] or "limited"[203] proceedings.[204] The referral to immigration court is triggered by service on the applicant of a "Notice to Appear" (NTA), which is the equivalent of a summons. The NTA is also filed with the immigration court.[205] An immigration judge is required to hold a scheduling hearing, known as a master calendar

199. Some who commented on the NPRM had objected to initial adjudications in asylum offices because, for many noncitizens, the asylum offices are much less accessible than immigration courts. There are 71 immigration courts spread across the country. *See generally Find an Immigration Court (and Access Internet-Based Hearings)*, DEP'T OF JUST., https://www.justice.gov/eoir/eoir-immigration-court-listing (last visited Apr. 4, 2023). But there are only ten asylum office locations. *See* FIND A USCIS OFFICE, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/about-us/find-a-uscis-office (last visited Apr. 5, 2023). The Departments replied to this criticism by saying that "Unfortunately, because USCIS has limited asylum offices and office space, it would be impossible to always ensure an applicant only has to travel two hours or less to appear at an interview." IFR, *supra* note 163, at 18143.

200. 8 U.S.C. § 1158 (b)(1)(A); 8 C.F.R. § 208.9(b).

201. 8 C.F.R. § 208.9(d)(1). The requirement that counsel must wait until the end of the interview to ask "follow-up" questions reverses the normal order of evidentiary proceedings, in which direct examination is followed by cross-examination. This reversal arguably makes an asylum interview lengthier than it would be if representatives who have prepared the claim and are very familiar with their clients' narratives could speak at the start and lay out the facts for an adjudicator who, having to conduct 16 interviews every two weeks, will have had limited time to study the case before the interview begins. The weekly workload of an asylum officer is reported in USCIS. Ombudsman, *supra* note 33, at 49.

202. IFR, *supra* note 163, at 18154.

203. IFR, *supra* note 163, at 18155.

204. Unlike persons in expedited removal proceedings, some affirmative applicants apply and have asylum officer interviews while still in status (e.g., while present in the U.S. with student visas). They are not referred for removal hearings because they continue to be in lawful status even though asylum was denied. But expedited removal is applied only to people who entered without visas and therefore have no lawful status. 8 U.S.C. § 1225(b)(1)(A). Therefore, all persons who are not granted asylum by an asylum officer under the new process are undocumented and are referred.

205. 8 C.F.R. § 209(c)(1); 8 C.F.R § 1240.17(b).

hearing, within about thirty days after the NTA is served.[206] No later than this date, DHS must file with the court and provide the applicant with a record of proceedings, including the credible fear summary, all evidence that the applicant submitted to the asylum office, a verbatim transcript of the asylum officer's interview of the applicant, and the asylum officer's decision.[207]

At the master calendar hearing, the immigration judge advises the applicant, now termed a "respondent" in the court proceedings, of various rights and then sets a "status conference" within the next thirty to thirty-five days.[208] One purpose of the status conference is to clarify which facts and legal issues are contested.[209] Asylum seekers must state whether they will testify orally, identify any witnesses they will call to testify, and, importantly, "provide any additional documentation in support" of their asylum application."[210] The ICE attorney

206. The rule requires that the immigration judge schedule the master calendar hearing between thirty to thirty-five days after the NTA is served. An applicant who does not appear for this scheduling hearing is ordered removed in absentia. 8 C.F.R. § 1240.17(d).

207. Memorandum from David L. Neal, Director of the Executive Office for Immigration Review, *The Asylum Procedures Rule,* DEP'T OF JUST., (Aug. 26, 2022) (https://perma.cc/YG6V-BT8K). It is not clear that the asylum office will have sufficient resources to make verbatim transcripts of interviews with applicants within thirty or thirty-five days. Asylum office interviews, at least for affirmative applicants, often last for several hours. *See* American Gateways, *Preparing for Your Affirmative Asylum Interview*, TEX. L. HELP (Jan. 12, 2022), https://texaslawhelp.org/article/preparing-for-your-affirmative-asylum-interview ("Asylum interviews can be very long, more than three hours in many cases."); University of Maine School of Law's Refugee and Human Rights Clinic et al., *Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers* 16 (2022), https://perma.cc/6RES-SNN6 (interviews in the Boston asylum office typically lasted for three to four hours). Several asylum office interviews observed by one of the authors of this article lasted more than six hours. The transcript requirement for asylum office interviews is new, originating in the IFR, but transcripts have long been required when immigration court cases are appealed to the Board of Immigration Appeals. In the experience of the authors, all of whom have supervised students in clinics, it takes several months for companies that transcribe immigration court hearings to produce the transcripts, and they sometimes are of poor quality.

208. 8 C.F.R. § 1240.17(f)(1). At the master calendar hearing, the immigration judge explains the charges and allegations contained in the NTA and the applicant admits or denies the charges, indicates any applications for relief from removal (such as asylum), and designates a country of removal. Regulations also require that the immigration judge explain to the applicant that they have a right to counsel at their own expense, provide information about free and low-cost legal service providers in the area, advise the applicant of the right to present evidence in support of their claim and contest the government's evidence, and inform the applicant of their right to appeal to the BIA. At the master calendar hearing, the judge sets deadlines for filing relevant documents and schedules an individual hearing to adjudicate the asylum application. 8 C.F.R. § 1240.10.

209. In many removal cases in immigration court, the main issue is the credibility of the applicant, as tested through direct and cross-examination. To the extent that ICE attorneys continue to want to hear direct testimony and challenge it through cross-examination, clarifying what facts and law are in dispute will not make immigration court hearings much less time-consuming or more efficient.

210. 8 C.F.R § 1240.17(f)(2)(i)(A)(1)(i).

must indicate whether the government concedes that asylum should be granted. If the government does not concede, it must identify any witnesses it will call and explain what elements of the respondent's claim it is contesting and why.[211] The government may, however, delay that explanation until 15 days before a hearing on the merits of the case,[212] and it may later retract its intention to concede part or all of the case.[213]

Unless the immigration judge can grant asylum on the basis of the record made in the asylum office without reviewing additional evidence or hearing testimony,[214] the rule directs the judge to set a hearing on the merits of the claim approximately sixty days after the initial scheduling hearing (in other words, approximately thirty days after the status conference).[215]

B. Rule 2.0's Improvements

Several features of Rule 2.0 could improve asylum adjudication compared to the regular asylum system. To begin with, the most basic change—to provide primary adjudication in the asylum office rather than the immigration court—is *in principle* a very good one, because the formal procedures (including adversarial cross-examination) of the immigration court can intimidate applicants, delay grants of asylum for years due to the backlog of almost 1.9 million cases in the immigration courts, and cost them more money if they have to pay for representation.[216]

Certain other aspects of Rule 2.0 are also improvements both for the applicants and the immigration court. The system is fairer in important ways. The more extensive and systematic use of parole to release asylum applicants from detention is beneficial not only because freedom is inherently preferable to incarceration for all humans, but also because non-detained applicants are much better able to prepare their claims. Non-detained asylum applicants are much more likely to secure counsel, and competent counsel provide the immigration judge

211. 8 C.F. R. § 1240.17(f)(2)(ii)(B).
212. 8 C.F.R. § 1240.17(f)(3)(i).
213. 8 C.F.R. § 1240.17(f)(2(C).
214. Such a grant is permitted by 8 C.F.R. § 1240.17(f)(4)(ii).
215. 8 C.F.R. § 1240.17(f)(2). In some cases, the merits hearing might be held up to 70 days after the scheduling hearing. 8 C.F.R. § 1240.17(f)(2).
216. *Adjudication Statistics: Pending Cases, New Cases, and Total Completions,* EXEC. OFF. FOR IMMIGR. REV., *https://www.justice.gov/eoir/page/file/1242166/download* (last visited Apr. 17, 2023).

and the ICE attorney with evidence and legal analysis that makes for a more efficient, accurate, and fair process.

In addition, the system is potentially speedier. At the immigration court stage, requiring an ICE attorney to explain the reasons for taking issue with any element of the applicant's case is a novel improvement in the adjudication system. This innovation could obviate the need for many hours of merits hearings if ICE has no substantive reason to challenge the applicant. The current system incentivizes ICE attorneys to spend hours of court time fishing for inconsistencies or other reasons to challenge the application for asylum during a protracted cross-examination. The advantage of requiring the government to state its concerns could be undercut, however, if judges allow ICE attorneys merely to say, without further explanation, that they don't believe an applicant or want to cross-examine the applicant to test credibility. The provision of Rule 2.0 allowing judges to grant (but not deny) asylum on the basis of the written record, without taking oral testimony, is also a worthwhile feature in that it can avoid unnecessary hearings.

Rule 2.0 also makes some desirable changes in the procedures for *all* credible fear interviews. In the supplementary information published with the rule, DHS indicated that it would collapse the standard for initial approval into a single "credible fear" determination, abolishing the higher "reasonable fear" standard for certain non-citizens seeking protection.[217] Though DHS suggested that it planned to make this change through a later rulemaking procedure,[218] it instead directed its asylum officers to continue to apply the higher standard during screening interviews to applicants who are deemed ineligible for asylum.[219] Rule 2.0 also restores a previous practice of not considering statutory bars to asylum at the credible fear interview, leaving those complex legal issues to be resolved during determinations of the merits of the case. It also creates a formal process through which a non-citizen could request reconsideration of a flawed negative credi-

217. IFR, *supra* note 163, at 18091-92.

218. *Id.* at 18091, 10895 n .18.

219. Dept' of Homeland Security and Justice, Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31355-57 (May 16, 2023). The "Circumvention of Lawful Pathways" regulation makes an asylum applicant presumptively ineligible for asylum if the applicant neither sought asylum in Mexico nor used a CBP app to make an appointment to enter the United States at a port of entry.

ble fear determination even after it had been affirmed by an immigration judge.[220]

Finally, Rule 2.0 also introduces an efficiency in cases in which an asylum applicant is eligible for humanitarian relief other than asylum, perhaps because of a disqualifying prior expedited removal.[221] The plan provides that an asylum officer may determine that the applicant is eligible for either "withholding of removal" (which imposes a high burden of proof and confers fewer benefits than asylum) or protection under the domestic regulations implementing the UN Convention Against Torture (which protects applicants from deportation to countries where they will more likely than not be tortured by, or with the consent or acquiescence of, the government). Although the case will then be referred to an immigration judge, the judge must grant that relief unless DHS demonstrates that the non-citizen is ineligible for it.[222]

C. Rule 2.0's Grievous Flaw

Notwithstanding these important improvements in the asylum adjudication system, Rule 2.0 contains a grievous flaw that outweighs all of those changes: the unrealistic timetable for providing evidence in advance of adjudication. This flaw applies with brutal force to the first proceeding – the merits interview at the asylum office, but it also presents a very serious problem for asylum-seekers at the second stage – the immigration court hearing.

The rule requires the asylum office to schedule the interview between twenty-one and forty-five days after the positive credible fear determination is delivered to the asylum seeker.[223] The asylum seeker must supply supporting evidence seven days before the interview, or ten days if by mail.[224] Because there are only eleven asylum offices

220. 8 C.F.R.§ 208.30(g)(1). This opportunity is limited, however, by a rule that a request for reconsideration has to be made within seven days after the immigration judge's ruling, and that only one request for reconsideration can be made by the non-citizen. 8 C.F.R. § 208.30(g)(1)(i) An informal version of the request for reconsideration process was previously in place at some detention centers.

221. 8 C.F.R. §§1208.16-1208.18; Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Pub. L. No. 105–277, 112 Stat. 2681.

222. 8 C.F.R. § 1240.17(f)(4)(ii) (provision for grants of asylum without holding a merits hearing); 8 C.F.R. § 1240.17(f)(5) (procedure for endorsing asylum office findings of eligibility for withholding of removal and protection under the Convention Against Torture).

223. 8 C.F.R § 208.9(a)(1).

224. 8 C.F.R. § 208.4(b)(2).

for the entire country[225] and few asylum seekers will have cars or driver's licenses, most will need to provide evidence by mail. This means, for example, that an asylum seeker's interview might be scheduled twenty-one days after they receive a positive credible fear determination. That applicant will have only eleven days in which to gather and mail the evidence unless DHS grants an extension. If the applicant is released from detention two days after the credible fear determination,[226] the time available will be only nine days, and if the first two days after release are spent on a cross-country bus to the asylum-seeker's ultimate destination, that time will be seven days or fewer.

Most asylum applicants will not prevail in their merits interviews, in part because they will not be able to gather sufficient corroborating evidence in time, as explained below. In fact, DHS made clear in the proposed rule itself that it expects that only fifteen percent of the asylum-seekers processed through Rule 2.0 will succeed in a merits interview.[227] Applicants will then be referred to immigration court.

If an asylum officer decides that an asylum-seeker in the new process does not merit a grant of asylum, they must refer the case to the immigration court. This referral could happen as soon as a week after a merits interview. The court must schedule a master calendar hearing within thirty to thirty-five days of that referral and a status hearing thirty to thirty-five days after that. The asylum seeker must submit any additional corroborating evidence "at the status conference."[228] In other words, an asylum seeker would have about sixty more days in which to obtain corroborating evidence after being referred to immigration court. (That asylum seeker would previously have had at least seven days for collection of evidence during the asylum office stage).

225. U.S.C.I.S., Refugee, Asylum and International Operations Directorate, https://perma.cc/32X3-UREL.

226. Migrants are not released from detention until DHS confirms that they have a sponsor with whom they can stay, and onward transportation. Sometimes sponsors such as friends or relatives named by an asylum seeker are hard to reach by telephone, delaying the process. In addition, nobody is released on weekends, at least not from the Pearsall, Texas detention center, the first one at which DHS decided to put asylum seekers into the new process. E-mail to Philip Schrag from Sara Ramey, Migrant Center for Human Rights, June 17, 2022.

227. IFR, *supra* note 163, at 18191 (discussing the expected reduction in the immigration court's caseload as a result of the new plan).

228. 8 C.F.R. § 1240.17(f)(2)(i)(A)(1)(iii). If DHS informs the court that it is opposing the application and files information and arguments in opposition to the asylum applicant's evidence, the applicant may file rebuttal documents five days before the scheduled merits hearing. 8 C.F.R.§ 1240.17(f)(2).

What is wrong with seven-day and sixty-day evidentiary deadlines in asylum cases?[229] They fail to account for three important factors. First, many applicants will not find legal representation, especially for the asylum office interview, which is a problem because represented cases are prepared more effectively, benefiting both the adjudicator and the applicant. Second, the 2005 REAL ID Act imposes significant corroboration requirements (which the Departments did not mention in their justification of Rule 2.0). Finally, for those who do manage to obtain lawyers, ethics rules impose a duty on lawyers to provide competent representation to each individual client, a standard that is nearly impossible to meet under Rule 2.0 because of the combination of the corroboration requirements and the short deadlines.

D. The Challenge of Securing a Lawyer

Scant public data exist on the degree to which asylum applicants were represented in asylum office interviews since FY 2009.[230] The most recent study of representation in that forum is our book, *Lives in the Balance*, which covers Fiscal Years 1996 through a partial Fiscal Year 2009.[231] In those years, representation ranged from 29.7 percent (FY 1996-98) to a high of 58.1 percent in FY 2006-2009.[232] In other words, even in the period with the highest rate of representation, more than 40% of the asylum applicants were unrepresented.

Two factors suggest that asylum applicants in the Rule 2.0 procedure would be much less frequently represented by legal counsel than these figures suggest. First, the only asylum-seekers in our study were affirmative applicants—those who entered with visas or had not entered with visas but had never been apprehended by DHS. Those individuals had at least one full year to obtain counsel, rather than only a few days.[233] That year—plus the fact that DHS and DOJ had long backlogs providing more time before adjudication—allowed many initially indigent asylum applicants time to save money for legal fees

229. As explained above, these deadlines could be slightly longer.

230. The Department of Homeland Security's annual yearbooks and Refugees and Asylees Flow Reports do not include this information. *See, e.g.*, *Yearbook of Immigration Statistics 2020*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/yearbook/2020; Ryan Baugh, Fiscal Year 2020 Refugees and Asylees Annual Flow Report, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/sites/default/files/2022-03/22_0308_plcy_refugees_and_asylees_fy2020_1.pdf.

231. *See* SCHOENHOLTZ ET AL, THE END OF ASYLUM, *supra* note 3.

232. *Id.* at 25 fig. 2-11.

233. 8 U.S.C. § 1158(a)(2)(B).

while working in the United States.[234] Moreover, not ever being detained meant much greater access to counsel, as research has demonstrated.[235] Second, the number of people who need legal representation in asylum cases has escalated sharply over the years, while the supply of pro bono lawyers has not kept pace. In FY 2010, there were about 34,000 affirmative asylum applications filed with USCIS,[236] but by FY 2020, that number had grown to more than 93,000.[237] The rate of increase in credible fear cases was much greater. In FY 2010, immigration courts decided only 2,659 asylum cases that had originated with credible fear claims, but by FY 2021, that number had increased to 17,090.[238]

During the years of our prior study, DHS granted asylum to represented asylum seekers fifty percent of the time, compared with forty-two percent of the time for unrepresented applicants.[239] The relative advantage of represented asylum seekers diminished over time, perhaps because of better training of asylum officers and increased access to legal and factual information on the internet.[240] Importantly, representation made much more of a difference for applicants who had crossed the border without visas than for those who had arrived with visas. (Rule 2.0, of course, applies only to individuals in expedited removal proceedings, none of whom arrived with visas.) In our prior study, pro se applicants without visas won asylum at a rate of thirty-two percent, while represented applicants without visas succeeded at the higher rate of forty-three percent.[241]

In immigration court proceedings, representation is even more critical to fair outcomes. Between 2007 and 2012, asylum seekers who were released from detention and were represented obtained relief

234. *See* David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1827 (2016).

235. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 30-36 (2015).

236. *ASYLUM: Additional Actions Needed to Assess and Address Fraud Risks,* Gov. Accountability Off.*,* (Dec. 2, 2015), https://perma.cc/Q37P-LX6G.

237. Baugh, *supra* note 230.

238. *Adjudication Statistics*: *Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim,* EXEC. OFF. FOR IMMIGR. REV. (Apr. 18, 2022), https://perma.cc/NGF4-LRGG.

239. SCHOENHOLTZ ET AL, THE END OF ASYLUM, *supra* note 3, at 134.

240. *Id.* at 135.

241. *Id.* at 137.

from the court at a rate of forty-eight percent, compared with fourteen percent of such asylum seekers who were unrepresented.[242]

Finding counsel in just a few days or even in several weeks or months is exceedingly difficult if not impossible for asylum seekers subjected to Rule 2.0. The first days or weeks of a recently arrived asylum seeker are often consumed with adjusting to life with a sponsoring relative, obtaining food and medical care, and recovering from trauma inflicted both by persecutors and by a harrowing journey to the United States, during which many have suffered violent extortion and other serious harms. The American Immigration Lawyers Association and the American Immigration Council noted that asylum seekers who recently arrived in the United States (which will include all those subject to Rule 2.0) "often have added vulnerabilities, including trauma, language barriers, and a lack of familiarity with the U.S. legal system."[243]

Once settled, an asylum applicant who begins to search for an attorney may be shocked to find out how difficult it is to secure one. Indigent asylum seekers, who face deportation unless they prevail in their claims, do not have the constitutional right to court-appointed counsel or public defender service that is afforded to indigent criminal defendants. Newly arrived asylum seekers do not have legal authorization to work, but many private attorneys charge $10,000 to handle an asylum case.[244] Many asylum applicants will be unable to afford to pay for a private attorney and will seek pro bono representation. But except in a few locations such as the New York City area, with its vibrant Immigrant Justice Corps and New York Immigrant Family Unity Project,[245] pro bono resources are scarce and waiting lists are

242. Eagly & Shafer, *supra* note 235, at 51 fig. 15. This study looked at all forms of relief in immigration court, not just asylum. For detained applicants, the contrast is as stark. *Id.* (showing pro se detained migrants who applied for relief from removal obtained it in 23 percent of cases, compared with a 49 percent success rate for detained, represented migrants). But representation also made a huge difference in whether a detained migrant ever applied for relief such as asylum. Only 3 percent of pro se detained migrants sought relief, compared to 32 percent of represented detained migrants. It is likely that some of those pro se detained migrants were eligible for asylum but did not know how to apply for it without a lawyer's guidance. As of this writing, DHS has not applied the Plan to any detained asylum seekers.

243. *Comment On Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers DHS Docket No. USCIS–2021–0012,* Amer. Immigr. Law.'s Ass'n and Amer. Immigr. Council (May 26, 2022), https://perma.cc/R7P5-VG3G.

244. *Id*. at 7.

245. *See generally About* IJC, Immigr. Just. Corps:, https://justicecorps.org/about/ (last visited Apr. 5, 2023). The Corps was founded by the late Second Circuit Judge Robert Katzmann. *Id.* It reports that through its lawyers, it "has delivered a 90% success rate in completed cases

long. "Only a smattering of PILOs [public interest law organizations]" exist in the poorer and less populated areas of the country.[246]

Even in large cities, service organizations that assist asylum seekers are overburdened and have long waiting lists for service. Asylum seekers who call the Georgetown Law clinic that two of this article's authors direct have often tried several other providers in the Washington, D.C. area and been told that their intake was closed.[247] Our clinic, too, must often turn them away.

Human Rights First, a leading asylum nonprofit, describes the delays that clients encounter even when the organization has found that they deserve representation:

> Human Rights First has a two-step case acceptance process for asylum cases, which involves a preliminary screening and a more detailed, hours-long intake interview. The availability of "intake" interview slots is very limited, as it is at many legal services organizations, by the small number of staff members. Once Human Rights First accepts a case for pro bono representation, it places the case with a law firm, legal clinic, or volunteer attorney and provides mentorship for the duration of the case. Law firms, clinics, and volunteers require additional time to review case materials and check for conflicts before accepting a case. Each of these steps—the screening, intake, and case placement—may take weeks or longer to complete, and the entire process takes a minimum of two months.[248]

[not all of them asylum cases]." *Id.* The New York Immigrant Family Unity Project "provides free, high-quality legal representation to every low-income immigrant facing deportation in the City of New York, as well as to detained New Yorkers facing deportation in the nearby immigration courts in New Jersey." The Bronx Defenders, Redefining Public Defense, https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/ (last visited Apr. 5, 2023).

246. Nadia Almasalkhi, *Immigrants Lack Access to Legal Representation*, https://perma.cc/6NT8-RADJ. *See also* map of legal services providers showing very few providers in rural areas, particularly in the non-coastal western United States. *Id.*

247. As an example, the Georgetown Law clinic recently received an urgent message from the Latin American Youth Center, requesting the clinic's representation of a potential client. The message said, "My team and I have been contacting countless organizations that supposedly help immigrants and refugees with legal services, but have been turned away by all of them because they aren't taking any new clients right now. We are starting to become concerned that we won't be able to find one in time as her court date is just around the corner." E-mail to Isabella Lajara, Center for Applied Legal Studies, from Lila Duvall, Latin American Youth Ctr., June 22, 2022.

248. Human Rights First, Human Rights First Comment on Department of Homeland Security & Executive Office for Immigration Review, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 FR 18078, https://perma.cc/GVA4-YYKB (last visited Apr. 5, 2023).

E. The Challenge of Obtaining Corroborating Evidence

Securing a lawyer is only the first hurdle in meeting Rule 2.0's deadlines. A lawyer for an asylum seeker will rarely be able to meet the seven-to-nine-day and sixty-day deadlines for submitting evidence. To enable the client to prevail, however, the lawyer will have to meet the evidentiary requirement for corroborating evidence imposed by the REAL ID Act of 2005, which is applicable both to merits interviews in the asylum office and to merits hearings in immigration court. That Act provides:

> Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[249]

Regardless of whether applicant testifies credibly, an adjudicator may deny the application simply because the applicant did not supply sufficient corroboration.[250]

Particularized evidence about the harm suffered by and/or faced by an individual applicant may be time-consuming to locate. First, it may take time for asylum applicants, many of whom have survived trauma, to be able to discuss with their new lawyers the harms they have suffered and their fear of returning to a country from which they fled. Several meetings with asylum clients, over a period of weeks,

249. 8 U.S.C. § 1158(b)(1)(B)(ii). The statute codified the corroboration requirement that had already been imposed by several circuits. *See* Tesfaye v. Att'y Gen., 183 Fed. Appx. 241, 244 (3d Cir. 2006); Diabate v. Att'y Gen., 206 Fed. Appx. 166, 169 (3d Cir. 2006).

250. Mohndamenang v. Garland, 59 F. 4th 211, 216 (5th Cir. 2023); Sanchez-Thomas v. Garland, 2022 U.S. App. LEXIS, at *18183 (5th Cir. 2022); Singh v. Holder, 602 F. 3d 982, 990 (9th Cir. 2010) (also holding that the adjudicator need not inform the applicant of the perceived need for corroboration on a particular issue), *aff'd en banc on other grounds*, Singh v. Holder, 439 F. App'x 665,666 (9th Cir. 2011) (en banc); Aden v. Holder, 589 F. 3d 1040, 1045 (9th Cir. 2009); Zhi Fang Ou v. Atty. General, 260 F. App'x 526, 530 (3d Cir. 2008); Kaitov v. Holder, 483 F. App'x 476, 480 (10th Cir. 2012); Anyambu v. Garland, 2022 U.S. App. LEXIS, at *12083 (5th Cir. 2022) ("The lack of corroboration was enough, standing alone, to support the BIA's decision that she was not eligible for relief"). A smattering of court of appeals cases reveals very little about the frequency with which asylum officers and immigration judges deny asylum claims because of a lack of corroboration. Because of the expense of appealing, only a very small percentage of denials reach the federal appellate courts. Board of Immigration Appeals decisions in asylum cases are very rarely published. Immigration judge decisions are usually oral, and even those few that are written are available only to the applicants and their attorneys, who have no incentive to make denials public. Asylum officers deciding affirmative cases have issued only a private decision granting or denying asylum or referring the case to immigration court, with no public opinion. Conversely, just as lack of corroboration can doom a claim based on past persecution, solid corroboration can also enable success, at least in the Fourth Circuit, for an applicant who, because of memory problems, the passage of time, or simple confusion, introduces some inconsistencies during oral testimony to an asylum officer or immigration judge. Camara v. Ashcroft, 378 F. 3d 361, 368-71 (4th Cir. 2004).

may be needed to uncover their full story and identify the facts most relevant to their asylum claim.[251] Additional time may be necessary if the client does not speak English or another language for which free interpretation can be found with relative ease, for then a lawyer must locate interpreters and the client must come to trust the interpreter as well as the lawyer.

To meet the corroboration requirement of the REAL ID Act quoted above, an attorney for an asylum applicant must obtain persuasive evidence or be able to persuade an adjudicator why it is not possible to produce such evidence. The process of obtaining corroborating evidence can take weeks.

To establish past persecution or a well-founded fear of persecution, asylum seekers may need to show that certain patterns of abuse are common in their home country, or even that a specific event at which they were harmed took place. While generalized reports such as the U.S. State Department's annual Country Reports on Human Rights Practices are easy to locate, those sources often lack sufficient detail to corroborate an asylum seeker's claim. It can take substantial time to track down reliable media sources and human rights organizations in an asylum seeker's home country whose publications may be crucial to support their claim. If those sources are not written in English, the applicant will need to locate a competent translator, which will add yet more time to the process.

For more complex cases, asylum lawyers may try to obtain even more specific corroboration. They might, for example, locate fact witnesses in the applicant's home country. Those witnesses may not initially trust the applicant's lawyer, and language barriers and time zone differences may interfere with communications. Communication is often impeded or slowed because witnesses who remain in the asylum applicant's home country may have been threatened with harm. Their safety could be jeopardized by interception of communications with the asylum seeker's lawyer. It can take time to ensure that the witness has access to and is willing to use encrypted communications systems to prevent interception from repressive regimes that may seek to harm them. If a witness is willing to speak to an applicant's lawyer, the statement of that witness must be drafted by the lawyer, sent to the witness (possibly in translation into the language understood by

251. Survey of asylum advocates conducted by the American Immigration Lawyers Ass'n [hereafter AILA survey], May and June 2022, on file with the authors.

the witness), corrected by the witness, sent back to the lawyer, returned to the witness for signature under oath, and again returned to the lawyer. This back-and-forth is often a weeks-long process, and it must be repeated for each fact witness in the applicant's home country.

In some cases, an asylum lawyer may need to obtain documentary evidence of past harms suffered by asylum seekers, which also requires a considerable amount of time and effort. Such evidence may consist of arrest warrants or medical records corroborating physical injuries that the perpetrator inflicted on the applicant. Arrest records or bail receipts may be difficult for relatives to retrieve from officials or elsewhere. Medical records may be in the possession of clinics or hospitals that may have dysfunctional record-keeping systems or may be unwilling to release records to someone other than the asylum seeker. Complaints of domestic violence made to a local police station may be equally hard to obtain, requiring many patient communications. Sometimes it is necessary to locate a reliable individual in the home country who will act as a go-between.

Expert testimony may also be an important factor in some asylum cases. This testimony generally takes two forms: medical or psychological evaluations, and individualized country conditions information. An indigent, uninsured applicant who needs a medical examination will have to find a physician or psychologist willing to conduct an examination and written report without compensation. The examination may require not only physical contact with a doctor or dentist who has experience in evaluating scars or tooth damage but also physical tests (such as x-rays to corroborate claims of broken bones) or cognitive tests to assess brain damage, severe depression, or post-traumatic stress disorder. Multiple visits to the doctor or psychologist may be necessary for a full evaluation. The few physicians willing to perform such examinations or to administer such tests without charging a fee have long waiting lists, and it may take months to get an appointment. Even after an examination occurs, these medical personnel are so busy that it may be weeks before they produce written reports with enough detail to satisfy an asylum adjudicator.

Expert testimony may be needed to describe past harms or explain the risk of persecution for a particular group of individuals. If the harm they fear or have faced is not sufficiently corroborated in human rights reports or local media sources, an asylum seeker may seek an expert anthropologist, historian, sociologist, or political scien-

tist, or a journalist who has substantial expertise in a particular society. Professors and other expert witnesses have full-time jobs; providing expert declarations, usually pro bono, is a time-consuming extra duty that is challenging to fit into those busy schedules. Many country conditions experts receive far more requests than they are able to fulfill.[252] It can take weeks for a pro bono expert to study the case and provide a sworn statement to support an asylum applicant.

An asylum seeker may need time to collect one, several, or all of these types of corroborating evidence to support their claim sufficiently to meet the judge's evidentiary demands. That is a daunting task during the time frame of a normal asylum case — six months to several years – and becomes all but impossible in the expedited schedule set out by Rule 2.0.

F. The Ethical Challenge for Asylum Lawyers

An asylum case is often a life or death matter, because a person threatened with persecution who is forced to return to their home country may, in fact, be killed.[253] An immigration judge famously suggested that asylum cases were "death penalty cases heard in traffic court settings."[254] A lawyer who considers representing an asylum seeker within the tight deadlines of Rule 2.0 will want to provide first-rate representation to the client, compiling as much corroborating information as possible rather than relying only on published human rights reports. Such a lawyer will also want to act consistently with two rules of professional conduct that are pertinent to the quality of representation. One requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably neces-

252. The Washington Office on Latin America, for example, which is a leading authority on country conditions in the Northern Triangle of Central America, regularly receives far more requests for expert testimony in asylum cases than it can fulfill. Email from Maureen Meyer, Washington Office on Latin America, Jan. 11, 2018 (on file with authors).

253. *See e.g.*, Maria Sacchetti, *Death is Waiting for Him*, WASH. POST, (Dec. 6, 2018), https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/; *See generally* Sara Stillman, *When Deportation is a Death Sentence*, THE NEW YORKER, (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence; Human Rights Watch, *Deported to Danger* (2020), https://perma.cc/JJ2J-4DM2 (138 Salvadoran asylum seekers deported by the U.S. were killed).

254. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN, (June 26, 2014), https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html.

sary for the representation."[255] Another insists that a lawyer act with reasonable diligence in representing a client.[256]

These rules prohibit lawyers from providing second-rate service to any client. They have been fleshed out in a formal opinion of the American Bar Association.[257] Rule 1.1 requires attorneys to turn down cases that they would have to handle in less than a competent way. Rules 1.1 and 1.3 require lawyers to "adequately investigate . . . and prepare cases" and to "control workload so each matter can be handled competently."[258] The opinion states that "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."[259]

EOIR has reinforced the obligation of immigration lawyers to provide "effective" representation to clients who handle cases in immigration court. It may impose sanctions ranging from censure to disbarment from appearing in immigration proceedings on a lawyer who "fails to provide competent representation to a client," defined to include "thoroughness, and preparation reasonably necessary for the representation."[260] EOIR can also impose sanctions on a lawyer who is determined to have provided the ineffective assistance of counsel.[261]

Given the duty to provide competent and diligent representation and the burdens of collecting the corroboration required by the REAL ID Act, lawyers will likely be reluctant to accept many cases from asylum applicants who are subject to the unrealistic deadlines of Rule 2.0. Reluctance to represent those clients is precisely what asylum lawyers demonstrated in a recent qualitative survey.[262] In June 2022, thirty-two members of the American Immigration Lawyers As-

255. Model Rules of Pro.f'l Conduct r. 1.1 (Am. Bar Ass'n 2023).

256. *Id.* at 1.3. Every state's highest court has adopted these rules or a close version of them. American Bar Association CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 1.1 (2021), https://perma.cc/X6KR-D4PW; American Bar Association, CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 1.3 (2018), https://perma.cc/TKS9-D5LZ.

257. American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, (2006), https://perma.cc/HH6G-QHEX.

258. *Id.*

259. *Id.* The duty to provide competent representation to each client, and to turn down new clients if competent and diligent representation can't be afforded to each one, extends even to public defenders whose jobs are to represent indigent criminal defendants with constitutional rights to representation, who will remain jailed without trial if not represented.

260. 8 C.F.R. § 1003.102(o).

261. 8 C.F.R. § 1003.102(k).

262. AILA survey of asylum advocates, *supra* note 251.

sociation (AILA) who handled asylum cases responded to a survey about how they handled expedited removal cases before Rule 2.0, and what they expected to do after Rule 2.0 took effect.[263] Several of the asylum lawyers who had been accepting a substantial number of clients in expedited removal proceedings stated that because of the short timelines, they would accept fewer than half as many clients once the new rule was being applied to their client populations. Some said that they would not accept any such cases. Many of them reported that they would have a hard time meeting the new deadlines. They estimated that it took at least four months for clients, who had received positive credible fear determinations, to contact them and for them to agree to the representation. Most of the lawyers who responded to the survey reported that it took at least four months and in some cases up to eight months, to collect the necessary corroborating evidence to support an asylum claim effectively. Most reported that they met at least four times with their clients before the merits hearing.

One of the asylum lawyers commented that "the system is already difficult enough but the timeline makes representation nearly impossible at scale."[264] Another said that "Expecting those fleeing violence to have all their paperwork with them at the border is contrary to our long-established practices, ignorant of the realities facing refugees, and contradictory to Due Process."[265] A third wrote:

> The timeline makes it almost impossible for people to get attorneys unless they are pro bono because the clients usually don't have the resources to pay for representation on such a short timeline and then pro bono resources are already excessively strained without taking into consideration the number of cases that will be on an expedited timeline. The timeline almost guarantees people without a straightforward case won't be granted relief because they don't have attorneys able to flush out the details necessary.[266]

Another explained:

> Asylum applicants are going through trauma, abuse, and extreme poverty. Working with survivors requires training on mental health issues that impact trauma-exposed people. It takes months and several sessions to gain the trust of your client for them to tell their

263. 32 lawyers provided responses to the survey. The results of the survey are not a representative sample of all asylum lawyers or even of all asylum lawyers who are members of AILA. They provide helpful insights but are not statistically robust.

264. AILA survey, *supra* note 251.

265. *Id.*

266. *Id.*

> story. That is something that is impossible to do in a few hours or days. Asylum applicants need to speak to someone who knows their language [and] body language[,] and cultural differences can be lost in translation.[267]

The interplay between the unrealistic deadlines of Rule 2.0, the REAL ID Act's corroboration requirements (which apply to pro se and represented asylum applicants), the ethical obligations of competent and diligent representation, and the already existing dearth of pro bono immigration lawyers will lead to less representation for asylum seekers on whom the new deadlines are imposed. As a result, asylum will be granted at lower rates because testimony alone will not meet the statutory burden of proof.

The Departments themselves seem aware that speeding asylum seekers toward deportation will require a sacrifice in fairness. In their justification for Rule 2.0, the Departments began by writing that its purpose was to "increase the promptness, efficiency, *and fairness*" of the adjudication process.[268] But in response to a comment from the public to the proposed Rule 1.0 to the effect that at least 90 days should be allowed between the credible fear determination and the merits interview in the asylum office,[269] the Departments retreated from claiming that its goals equally included fairness for applicants. They wrote that "to allow applicants [subject to Rule 2.0] a similar amount of time [to that given to affirmative asylum applicants] would undermine the *basic purpose* of this rule: To more expeditiously determine whether an individual is eligible or ineligible for asylum."[270]

G. Previous Experiments with Rapid Asylum Adjudication

Up to this point, our analysis has focused primarily on why Rule 2.0 will undermine the fairness of the asylum adjudication system. But it is also worth noting that our concerns are not merely based on research, practice, and a qualitative survey. Rapid adjudication schemes, sometimes called "rocket dockets," have been attempted in the past by three different administrations. In each case, they were either abandoned or have produced results that are dramatically unjust.

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267. *Id.*
268. IFR, *supra* note 163, at 18089 (emphasis added).
269. *Id.* at 18142.
270. *Id.* at 18143 (emphasis added).

Though the Biden administration is the first to establish an accelerated court docket as part of the expedited removal system, Democratic and Republican administrations alike have created "rocket dockets" to speed the processing of asylum claims in the regular immigration court removal system. In 2014, the Obama administration announced a policy of "prioritizing" asylum cases filed by unaccompanied children and families with children in the immigration courts.[271] EOIR mandated that within twenty-eight days after a child or family was summoned by a DHS official to immigration court, immigration judges had to schedule a master calendar hearing.[272] At master calendar hearings in ordinary immigration court cases, applicants commonly request continuances in order to secure legal counsel. However, in the Obama rocket docket for children and families, the Chief Immigration Judge discouraged the use of continuances, leaving asylum applicants only weeks rather than the months generally needed to retain a low-cost or pro bono immigration attorney.[273]

David Hausman and Jayashri Srikantiah conducted an empirical study of the impact of continuances on representation. They determined that "increasing the time between the first and second hearing from one to two months *doubled* children and families' chances of finding a lawyer."[274] They explained that asylum seekers need time to

271. Juan P. Osuna, Dir., Exec. Office for Immigr. Rev., *Statement Before the Senate Committee on Homeland Security and Governmental Affairs: Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border* 3 (July 9, 2014), https://www.hsdl.org/?view&did=756197.

272. Memorandum from Chief Immigr. J. Brian M. O'Leary to All Immigr. Judges, (Sept. 10, 2014), https://perma.cc/HHR5-WDQL; Memorandum from Chief Immigr. J. Brian M. O'Leary to All Immigr. JJ., (Mar. 24, 2015), https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf; Sarah Pierce, Commentary, *As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound*, Migration Pol'y Inst. (July 2019), https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants.

273. Safia Samee Ali, *Obama's 'Rocket Docket' Immigration Hearings Violate Due Process, Experts Say,* NBC News (Oct. 27, 2016), https://www.nbcnews.com/news/us-news/obama-s-rocket-docket-immigration-hearings-violate-due-process-experts-n672636; Rory Carroll, *Migrant courts' quick fix for recently arrived children brings new problems*, The Guardian (Aug. 8, 2014), https://www.theguardian.com/world/2014/aug/08/migrant-courts-quick-fix-recently-arrived-children-new-problems?wpisrc$^{N}_{L}$-wonkbk&wpmm=1; John Fritze, *Immigration court speeds review of cases involving children*, Baltimore Sun (Aug. 20, 2014) https://www.baltimoresun.com/maryland/bs-md-immigration-rocket-docket-20140820-story.html; Kirk Semple, *Advocates in New York Scramble as Child Deportation Cases Are Accelerated*, N.Y. Times (Aug. 4, 2014), https://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?_r=1.

274. David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court,* 84 Fordham L. Rev. 1823, 1825, 1828 (2016).

save money to pay for an attorney and that even with sufficient funds, overworked immigration lawyers can rarely take on cases immediately.[275] An empirical study by TRAC found that 70% of families in this rocket docket never obtained representation.[276] 81% of those unrepresented families were ordered removed *in absentia*, compared to 8% of represented families.[277] Only 6.5% of the unrepresented families managed to file an asylum claim, and 3.8% were granted asylum. In contrast, 70% of the represented families applied for asylum, and 40% received asylum.[278]

Though the Trump administration rescinded Obama's rocket docket in January 2017,[279] it created a new accelerated docket in the fall of 2018.[280] By July 2019, of 17,000 families whose cases were placed on that rocket docket, 80% had been ordered removed *in absentia*.[281] This *in absentia* removal rate was far higher than the 51% rate under the Obama administration's accelerated docket.[282] Moreover, only one percent of families in the Trump rocket docket received relief from removal in contrast to nine percent in the Obama accelerated docket.[283]

Despite this grim history and substantial outcry from immigration lawyers,[284] the Biden administration launched a new "Dedicated Docket" for families whom DHS placed in alternatives to detention after they crossed the southern border without inspection.[285] Beginning in May 2021, the "Dedicated Docket" was implemented in ten

275. *Id.* at 1827.

276. *With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported,* TRAC IMMIGR. (Oct. 18, 2016), https://trac.syr.edu/immigration/reports/441/.

277. *Id.*

278. *Id.*

279. Memorandum from Chief Immigr. J. MaryBeth Keller to All Immigr. Judges, Court Adm'r, and Immigr. Ct. Staff, (Jan. 31, 2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf.

280. This docket provided that cases of "family units" (adults released from detention with their children) should be adjudicated within one year. Memorandum from James McHenry, EOIR Dir. to "All of EOIR", (Nov. 16, 2018), https://perma.cc/XAD3-3JEW.

281. Pierce, *supra* note 272.

282. *Id.*

283. *Id.*

284. Letter from Legal Serv. Providers Serving Immigr. Courts in Ten Cities Named in May 28 Announcement to Att'y Gen. Garland, DHS Sec'y Mayorkas, and Domestic Pol'y Council Dir. Susan Rice (June 21, 2021), https://www.nwirp.org/uploads/2021/06/Letter_to_DOJ_DHS_WH_re_Dedicated_Dockets.pdf.

285. Alternatives to detention include release into the community with ankle monitors or obligations to report periodically to ICE.

cities,[286] with the stated goal of obtaining a decision in removal proceedings within 300 days of the master calendar hearing.[287] This time frame is five times longer than the 60-day period from a master calendar hearing to a merits hearing in immigration court under Rule 2.0.

In May 2022, the Center for Immigration Law and Policy at UCLA School of Law issued a blistering report on the early results of this accelerated docket.[288] The study highlights recurring problems found in prior rocket dockets, including lack of access to counsel and *in absentia* removals caused by rapid scheduling and unexpectedly moving up hearing dates by months.[289] The outcomes have been dire: through February 2022, 99.1% of cases resulted in removal, with the majority of removal orders issued *in absentia* and nearly half entered against children, most of whom were under seven years of age.[290]

With Rule 2.0, the DHS and DOJ have once again missed the mark. Yet there are ways to balance promptness, efficiency, and fairness that will not necessarily result in the U.S. violating its own statutory and international legal obligations by returning refugees to countries of persecution. The best ways to improve this new border asylum system are set out next in the concluding section.

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286. The ten cities are: Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle. U.S. Department of Justice, "DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings," May 28, 2021, available at https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings.

287. Press Release, Department of Justice, Office of Public Affairs, (May 28, 2021), [https://perma.cc/6KMX-TYR7]; Memorandum from Jean King, EOIR Acting Dir. to All EOIR, (May 28, 2021), https://www.justice.gov/eoir/book/file/1399361/download.

288. Immigrants' Rights Policy Clinic, *The Biden Administration's Dedicated Docket: Inside Los Angeles' Accelerated Court Hearings for Families Seeking Asylum*, CTR. FOR IMMIGR. L. AND POL'Y UCLA SCH. OF L., (May 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/
Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf.

289. The study found that only thirty percent of immigrants in the dedicated docket were represented, in contrast to sixty-seven percent of those on the regular docket in Los Angeles. *Id.* at 8. Moreover, "Attorneys reported that their clients' merits hearings have been rescheduled without warning for months earlier than their original date, leaving the attorneys with far less time to prepare the case than they had planned." *Id.* at 13.

290. *Id.* at 14. A nationwide study found that seven months into the new program, 1,557 asylum seekers put into the program had been ordered deported, and only 4.7 percent of them had been represented by counsel. Citation. Only 15.5 percent of the asylum seekers in the program with cases still pending had lawyers. *Unrepresented Families Seeking Asylum on "Dedicated Docket" Ordered Deported by Immigration Courts* TRAC, IMMIGR., https://perma.cc/P4KG-HN9V *(last visited Jan 13, 2022).*

VII. TOWARD RULE 3.0: PROPOSALS FOR A FAIR AND EFFICIENT BORDER ASYLUM SYSTEM

As a creature of the administrative state, the U.S. asylum process has long sought to balance efficiency and fairness. Given the high stakes of asylum adjudication, in which a wrong decision can return a human to serious harm, the system was designed to examine individual claims carefully. Subsequent legal and humanitarian developments placed substantial pressure on this system. In the decades since the Refugee Act was passed, Congress, the Board of Immigration Appeals, and the immigration courts have implemented more onerous evidentiary standards as the number of asylum seekers increased the demands on an underfunded system. Congress and the executive branch have repeatedly failed to provide the resources necessary to respond to these challenges; as a result, asylum adjudicators have long struggled to perform their duties effectively.[291] Enter the Trump administration, which made a concerted effort to destroy the asylum system, directing particular malice at migrants seeking to cross the southern border.[292] President Biden inherited a disastrous humanitarian situation at the southern border, as well as enormous backlogs in the immigration courts and the asylum offices.

The Biden administration has responded in a variety of ways,[293] including the establishment of the new asylum adjudication system discussed in this article. Some aspects of the new system respond effectively to long-standing challenges facing the asylum system, contributing to both fairness and efficiency, but its timetable for

291. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD LAW REVIEW 295 (2007); SCHOENHOLTZ ET AL. LIVES IN THE BALANCE *supra* note 152.

292. Schoenholtz et al, THE END OF ASYLUM, *supra* note 3.

293. Office of Public Affairs, U.S. Department of Homeland Security, Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration (Apr. 27, 2023). The administration is in the process of instituting a version of a new bar to asylum, first attempted by the Trump administration, for migrants who cross the southern border, or apply for asylum at ports of entry, who did not seek asylum in a country through which they transited on their way to the U.S. Dep'ts of Homeland Sec and Just., Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023). The proposed regulation provides two exceptions to this new bar: for individuals who use an app called "CBP One" to make an appointment to enter the U.S. at an official port of entry, and for individuals who cannot use the app for specified reasons such as illiteracy. However, the CBP One app is reportedly very flawed, in that it often crashes in part because of the vast numbers of migrants who try to use it. *See* Miriam Jordan, Biden Administration Announces New Border Crackdown, NY TIMES, (Feb. 21, 2023) https://www.nytimes.com/2023/02/21/us/biden-asylum-rules.html. (At one migrant shelter, "only two out of 240 people had managed to secure an appointment when they tried early that morning.") or because no more entry appointments are available.

adjudication sacrifices accuracy and compassion at the altar of speed. It creates a significant obstacle to effective representation of asylum seekers and imposes an ethical dilemma on lawyers who undertake to represent asylum seekers in this new process.

The new rule includes several elements that hold the potential to create an asylum process that is more fair *and* more efficient. Advocates, government officials, policymakers, and scholars have long called for the asylum office to expand its jurisdiction beyond affirmative asylum applicants.[294] Asylum officers are more highly trained in asylum adjudication than immigration judges, and the non-adversarial asylum interview is more conducive to soliciting testimony from trauma survivors than the more formal and intimidating court setting. These elements of asylum officer adjudication that contribute to fairness and accuracy also make the process more efficient and less costly. Only one asylum officer is needed to adjudicate the claim, as compared to the greater expense of an immigration judge as well as a government trial attorney. With a smaller backlog relative to the immigration courts, the asylum offices have the potential to adjudicate claims more quickly.[295] Moreover, in the new process, asylum seekers will be released from detention, increasing their ability to retain a lawyer. Representation can improve both efficiency and fairness, as lawyers can help asylum seekers locate and present the evidence that adjudicators need to decide their case accurately and narrow the issues.

Several other aspects of the new rule improve efficiency and fairness before and after the asylum officer interview. It explicitly eliminates the consideration of most bars to asylum at the credible fear stage, ensuring that the first step in the process for asylum seekers at the border is a quick screening that weeds out only those claims that do not have a significant possibility of meeting the legal standards for asylum. Since Rule 2.0 deems positive credible fear determinations to be applications for asylum, applicants in the new system will no longer have to prepare the complex I-589 form and comply with its daunting set of instructions.[296] This practice also ensures that migrants in the

294. Musalo et al., *supra* note 92.

295. Of course, immigration judge's review of these decisions is still important as this potential may not be fully realized in practice, as suggested by the high rate at which immigration judges grant asylum in affirmative cases in which an asylum officer denied relief. FY 2016 STATISTICS YEARBOOK, *supra* note 168.

296. Neal, "The Asylum Procedures Rule," *supra* note 207; 8 C.F.R. §§ 208.3(a)(2), 1208.3(a)(2).

new process will not miss the one-year deadline for asylum applications.[297]

If a claim is referred to immigration court, the rule requires a verbatim transcript of the asylum officer's interview, providing immigration judges with a more detailed and accurate record of the prior testimony and promoting both efficiency and fairness. That is a healthy reform, as no verbatim transcript is currently created when an asylum officer refers an affirmative asylum applicant for a hearing in immigration court. The new rule also requires that, for cases in immigration court, the ICE Trial Attorney provide a description of the basis of their opposition to the asylum claim. If the government lawyer is unable to provide legitimate justifications for opposing the asylum application, this approach holds the potential to eliminate lengthy merits hearings that simply waste the court's resources.

Finally, two other important changes promise to save substantial time in immigration court. First, asylum officers can find that an applicant is eligible for withholding of removal and/or relief under the Convention Against Torture, enabling the immigration judge to simply agree with the officer's decision rather than requiring them to hear the full merits claim anew.[298] Second, immigration judges can grant an asylum claim without taking testimony, saving substantial time and in many cases increasing accuracy by deciding the case on the written record.[299]

Yet, as explained in detail in Section VI, the new rule excessively favors speed at the expense of fairness. Scholars have demonstrated empirically that adjudicators forced to make decisions too quickly are more likely to come to inaccurate conclusions.[300] Prior rocket dockets for asylum seekers have led to horrifying results.[301]

297. The regulation would also have eliminated the higher "reasonable fear" screening standard for applicants who appeared by be barred from asylum, but this feature was rescinded by a later regulation. *See* Dept's of Homeland Security and Justice, "Circumvention of Lawful Pathways," supra n. 4.

298. 8 C.F.R. § Sec. 1240.17(f)(5), *supra* note 222.

299. Neal, "The Asylum Procedures Rule," *supra* note 207; 8 C.F.R. §§ 208.3(a)(2), 1208.3(a)(2).

300. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 5, 35-36 (2007) (explaining that reliance on "intuition is generally more likely than deliberation to lead judges astray" and that "Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier."); *see also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 190 (Farrar, Straus, and Giroux 1st ed. 2011).

301. *See* UCLA report, *supra* note 288.

The unreasonably short time frames mandated by the new rule place asylum seekers and their lawyers in an untenable position. The evidentiary requirements of the asylum adjudication system are difficult to meet. Applicants must testify about their most traumatic experiences. In addition, they must provide corroborating evidence that is challenging and time-consuming to gather. The asylum seeker may need to obtain this evidence from someone in the country from which they fled.[302]

The new rule traps asylum lawyers in an ethical and moral quandary. They cannot possibly explain the relevant law and legal process to their clients, collect the necessary documentation, and prepare affidavits and testimony from their clients as well as from any fact and expert witnesses within the draconian time frames required by the regulation. A lawyer who represents an asylum seeker in this process must honor the ethical duties to represent that client competently and diligently, and to avoid providing "ineffective assistance."[303] The lawyer will not want to contribute a veneer of legitimacy to a process that cannot be implemented fairly. On the other hand, if lawyers decline to represent many asylum seekers in the new process, fewer applicants will have any hope of preparing viable asylum claims.

In short, while it is understandable that the Biden administration is eager to address the large backlog of asylum claims, the short timeframes of the new rule represent a step in the wrong direction. After more than forty years since the Refugee Act was passed, we are still relying on an adjudication system that was not designed to process large numbers of applicants efficiently. The rule takes important steps towards a new approach that can fairly and accurately process these claims, but it does not go far enough. Asylum officer adjudications at an earlier stage for asylum seekers arriving in large numbers at the southern border or by sea is a promising start. The Biden administration should take more steps to simplify the asylum process for these non-citizens, making it at the same time more efficient, fairer, and more accurate.

Efficient asylum adjudication is desirable for both asylum seekers and the government. Given the stakes of asylum claims, however, any time limits should begin by recognizing the complexity and nuance of asylum cases.[304] To that end, the new rule should include notifications

302. AILA survey, *supra* note 251.
303. See text at notes 255-261, *supra*.
304. USCIS Ombudsman Report, *supra* note 33, at 43.

and time frames that offer asylum seekers a realistic opportunity to present their claims. It should require that an asylum officer who finds that an applicant does have credible fear but has some reservations about the claim should briefly describe those reservations in writing so that the applicant can better prepare for the merits interview that will follow. The rule should require that when ICE releases an asylum seeker for a merits interview with an asylum officer, either ICE or USCIS should provide the asylum seeker with contact information for all pro bono legal services in the region in which the asylum seeker will be interviewed, as well as link to a website providing a list of all such services nationally, in case the applicant has to move and the interview is scheduled for a different office.[305]

Most importantly, the rule should also be amended to give asylum seekers sufficient time to secure counsel, and to give asylum seekers and their counsel adequate time to prepare their case. We suggest that, for most asylum seekers, five months should be sufficient time to take these steps, though asylum officers should be granted discretion to provide for exceptions for good cause shown. This initial time frame should be the centerpiece of Rule 3.0.

A new rule should set out safeguards to prevent *in absentia* removals at the master calendar stage.[306] Moreover, asylum seekers who are referred to immigration court for removal proceedings should be provided with sufficient time to prepare for the merits hearing before the immigration judge.[307] We think that it is reasonable for the initial master calendar hearing to be held 30 days after an asylum seeker is summoned to court, but a status conference only 30 days after that is too soon, particularly for individuals who have not found representation by the time the master calendar occurs. If they also lacked representation at the asylum office interview, they are unlikely to have collected the necessary corroborating documentation at a status conference only 30 days after the master calendar hearing.[308] Indeed, they will be lucky even to have found a legal representative by then. The status conference should therefore be moved later, to three or four months after the master calendar hearing. The time frames that we propose, at least five months until an asylum office merits

305. This recommendation would not be difficult to implement, because every immigration court already maintains a list of such providers in its region.

306. *See* UCLA report, *supra* note 288.

307. *See* Center for Gender and Refugee Studies, Comment, *supra* note 177.

308. The corroborating documents must be filed at the status hearing. 8 C.F.R. § 1240.17(f)(2)(i)(A)(*iii*).

interview, and at least another four to five months before corroboration must be filed with the immigration court, are still much shorter than the current expedited removal process, in which most asylum seekers wait nearly four years for an immigration court hearing.[309]

Efficiency and fairness can also be improved in other ways as well, such as by eliminating asylum officer tasks that are redundant or could be performed by a different government official. Currently, many credible fear interviews are lengthy, demanding substantial detail from the asylum seeker.[310] This process is then repeated before an asylum officer at the merits stage. We suggest that the new rule should be amended to ensure that credible fear interviews return to being short screening interviews that determine quickly whether an asylum seeker meets a relatively low bar. Alternatively, if the credible fear interview remains lengthy and detailed, and the asylum seeker makes a sufficiently persuasive claim at that early stage, asylum officers should be authorized to grant asylum at the credible fear stage, making the subsequent merits interview unnecessary. Either approach would save substantial time in the process by eliminating redundancies. The new rule should also outsource security checks to a different USCIS office that is not also adjudicating the merits of asylum case. When we interviewed asylum officers for an earlier study, we learned that security checks are very time-consuming, and the hours used for those checks are drawn from the time allocated to adjudicating the asylum case – a zero-sum game.[311] To increase efficiency, asylum officers should be focused solely on adjudication and should be freed of tasks that can be performed by other officials.

Substantively, there are at least two important steps that the new rule should take to make the process more efficient. As the State Department does for refugee resettlement, the asylum office should identify groups with *prima facie* asylum claims, meaning that there is reliable evidence that members of that group are targeted for persecution.[312] Those groups are selected based on characteristics such as nationality, race, ethnicity, religion, and/or gender identity.[313] USCIS

309. *See* NPRM, *supra* note 139.

310. USCIS Ombudsman Report, *supra* note 33, at 48.

311. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE, *supra* note 152.

312. *See* U.S. DEP'TS OF STATE, HOMELAND SEC., AND HEALTH AND HUMAN SERVICES, *Report to Congress: Proposed Refugee Admissions for Fiscal Year 2022*, 12-16, (2022) https://www.state.gov/wp-content/uploads/2021/09/Proposed-Refugee-Admissions-for-FY22-Report-to-Congress.pdf. .

313. USCIS Ombudsman Report, *supra* note 33, at 45.

Ombudsman Phyllis Coven suggests that this assessment might be performed through Global, the Asylum Division's case management system; while she acknowledges the limitations of that system, the data on which to base such a decision should be relatively straightforward to gather.[314] Once the group has been designated, the process can be simplified to focus only on identification and security checks.[315] This approach will make the process much speedier and smoother for these groups, though of course safeguards must be put into place to ensure that these designations do not decrease grant rates for applicants outside of these groups.

Adjudicators can also make decisions more quickly without sacrificing accuracy if DHS and DOJ provide them with more comprehensive, detailed, and reliable country conditions resources. Federal regulations require that USCIS work with the State Department to "compile and disseminate to asylum officers information concerning the persecution of persons in other countries" and that it "maintain a documentation center with information on human rights conditions."[316] As explained in the USCIS adjudicator training manual on country conditions information, these resources can help adjudicators to ask more specific and well-informed questions, to more effectively evaluate the factual basis for the claim, and to assess credibility.[317] The current Research Unit (formerly the Resource Information Center)[318] located in the Refugee, Asylum, and International Operations Directorate (RAIO) of USCIS is woefully understaffed, with only four researchers to cover all of the countries from which asylum seekers originate. Congress, DHS, and DOJ should devote substantial resources towards a well-resourced Country of Origin information center that could provide comprehensive training, detailed reports, and specific responses to questions from adjudicators. The Canadian Immigration and Refugee Board's Research Directorate provides a

314. USCIS Ombudsman Report, *supra* note 33, at 44-45. Much of this information is available from U.S. State Department reports as well as the Canadian government's reports. See Country of origin information, IMMIGRATION OF REFUGEE BOARD OF CANADA, https://irb.gc.ca/en/country-information/Pages/index.aspx. Many of the other sources are linked from *Georgetown University's CALS Asylum Case Research Guide*, GEORGETOWN LAW LIBRARY https://guides.ll.georgetown.edu/CALSAsylumLawResearchGuide/country-conditions.

315. USCIS Ombudsman Report, *supra* note 33, at 45.

316. 8 C.F.R. § 208.1(b) (emphasis added).

317. REFUGEE, ASYLUM, & INT'L OPERATIONS DIRECTORATE (RAIO), U.S. CITIZENSHIP & IMMIGR. SERV., RAIO DIRECTORATE – OFFICER TRAINING: RESEARCHING & USING COUNTRY OF ORIGIN INFORMATION IN RAIO ADJUDICATIONS 10-19 (2019) https://www.uscis.gov/sites/default/files/document/foia/COI_LP_RAIO.pdf (hereinafter "RAIO COI TRAINING").

318. *See* Beyer, *supra* note 14.

useful example of how a research unit can effectively support adjudicators, enabling them to make substantive decisions more quickly and more accurately.[319]

In order to ensure more efficient and fair procedures, the Biden administration should minimize corroboration requirements if it continues to require the submission of evidence within a time frame that is unrealistically short. It should then instruct and train asylum officers not to demand the kind of corroboration that they expect in affirmative asylum applications, where asylum seekers have at least a year to prepare their cases. This training should be included in the Asylum Officer Basic Training Course and the RAIO Directorate Officer Training Course modules. The REAL ID Act requires asylum seekers to submit corroborating evidence "unless the applicant does not have the evidence *and cannot reasonably obtain the evidence*."[320] Asylum seekers who do not arrive at the border with corroborating documentation cannot reasonably be expected to obtain it in 11 to 35 days.[321] Therefore, the asylum office should not require the submission of evidence other than the testimony of the applicant and any documents that the applicant happened to possess. (Both the group-based status determination approach and a better-resourced research unit could support such a step by filling in some gaps in the information provided by the applicant.) Specifically, asylum seekers placed in the speedier process established by the Biden administration's new rule should not be expected to provide highly specific factual sources from the asylum seeker's home country, declarations, and documents from persons who are in other countries, medical and psychological examinations by U.S. doctors and psychologists, and expert witnesses on particular country conditions. DOJ should issue regulations requiring that in master calendar hearings, the immigration judge explain on the record what corroboration, if any, might reasonably be available to the applicant by the time of the status hearing and provide the applicant an opportunity to respond as to whether this expectation is reasonable. In any case, the regulation should allow the immigration judge to draw negative inferences only from corroboration they identified at the master calendar hearing; the absence of any other corroboration could not be weighed in the decision.

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319. *See* Immigration and Refugee Board of Canada, The Research Directorate and Country of Origin Information (2016), https://perma.cc/NB55-9FD5.

320. 8 U.S.C. § 1158 (b)(ii) (emphasis added).

321. See 8 C.F.R. § 208.4(b)(2), *supra* note 197 and text.

Finally, the Biden administration should take several steps to increase the fairness and accuracy of the new process. It should devote far more resources to supporting asylum seekers whose cases will be adjudicated, whether through the old or the new version of expedited removal or through removal proceedings that are not expedited. Ideally, the government would pay for legal representation of indigent defensive asylum seekers, or at least those who have been found to have credible fear.[322] Short of comprehensive representation, the government should fund counsel for certain vulnerable groups such as unaccompanied minors. DHS and DOJ should also fund educational institutions and non-profits to train non-lawyers such as accredited representatives, paralegals, and volunteer community members to assist asylum seekers in this process. While this approach should decrease costs and demystify the legal process, safeguards must be put into place to ensure that unscrupulous individuals do not take advantage of applicants in the process.[323]

The government should provide asylum seekers in the new process with interview orientation and know-your-rights training before they are required to participate in credible fear interviews. All asylum seekers found to have credible fear of persecution should be enrolled in a case management program, reviving the Obama administration's highly successful family case management program, to help them adjust to life in the United States and prepare for their interviews.[324] These programs should be paid for by the government and run by non-profits. The government should provide tailored support for specific groups of asylum seekers. For example, it should provide trauma survivors with psychological assistance, and unaccompanied minors with a guardian to help them navigate the process.

On the adjudication side, as we have been proposing for years, the process should be professionalized through more resources devoted to careful hiring, thorough training, and comprehensive quality

322. Unlike affirmative applicants, defensive asylum seekers are involuntary litigants.

323. Abuses of immigrants by "notaries" who pretend to be lawyers is significant. Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-attorney Immigration Practitioners*, 64 VILLANOVA L. REV. 165, 165 n. 3 and 171 (2019). State officials who investigate non-lawyers who are charged with the unauthorized practice of law singled out immigration fraud as the main area in which people are harmed by non-lawyer practitioners who have no right to represent clients. "In the typical case, an undocumented immigrant paid substantial sums and 'got nothing done.' Deborah L. Rhode and Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2595 (2014).

324. The Family Case Management Program, and its closure by the Trump administration, is described in SCHRAG, BABY JAILS, *supra* note 111, at 219-20.

assurance.[325] The Biden administration must hire more asylum officers and immigration judges to ensure the success of the new process. It should expend sufficient resources to train these adjudicators in relevant country conditions information and legal standards, as well as provide regular trainings on credibility determinations and other important aspects of asylum adjudication. The government must provide free interpreters and written transcripts at every level of the process. Both of these expenditures are key to accuracy as well as to fairness and can also serve to speed the process along.

From its earliest days, the asylum adjudication system has failed to adequately manage applications from undocumented asylum seekers at the southern border. Congress did not create detailed asylum procedures in the Refugee Act of 1980. The asylum process established by previous regulations has not provided a fair and effective response to large numbers of asylum seekers fleeing deadly violence in their home countries. The Biden administration has the opportunity to create a new border asylum adjudication system that could be both fair and efficient. Rule 2.0 offers important steps in that direction, such as enabling asylum officers to grant claims and releasing asylum seekers from detention while their cases are pending so that they have an opportunity to find representation and present their claims to the adjudicators. However, the excessively speedy time frames mandated by the rule are nearly impossible to meet and will result in unfair outcomes—namely the rejection of many of those who are eligible for asylum under domestic and international law. In April 2023, the Biden administration temporarily paused new enrollment in the asylum process created by Rule 2.0,[326] which provides it with an opportunity to address the problems we have identified with an updated rule. An effective Rule 3.0 would increase fairness by providing reasonable time frames for persecution claims to be presented and corroborated. It could also enable more efficient adjudications through several further reforms: identifying groups that merit protection, significantly improving country conditions resources, implementing reasonable corroboration requirements, and shifting responsibility for completing security checks to officials other than asylum officers. By incorporating these key changes, the Biden administration could

325. *See, e.g.*, Ramji-Nogales et al., *Refugee Roulette*, *supra* note 291, at 109-112.

326. Hamed Aleaziz, *Signature Biden Asylum Reform Policy is Now On Hold*, L.A. TIMES (Apr. 12, 2023).

create a new border asylum adjudication system that is both efficient and fair.

Undocumented Immigrant Residents Have a Limited Constitutional Right to a Limited Official Driver's License

L. Darnell Weeden[1]*

I. INTRODUCTION

The issue to be addressed is whether undocumented resident immigrants who entered the United States illegally should be granted a limited suspect classification when seeking a state driver's license. Steven A. Camarota, the director of research at the Center for Immigration Studies, and Karen Zeigler, a demographer at the Center for Immigration Studies[2], "estimate that in January 2022, there were 11.35 million illegal immigrants in the country — a 1.13 million increase over the 10.22 million in January 2021. Our preliminary estimate for February of this year is 11.46 million."[3] A continuing heated immigration debate involves whether undocumented immigrants should be allowed official driving privileges under state law.[4]

Giving undocumented immigrants access to an official driver's license is no ordinary matter in the immigration context because undocumented immigrants "need a law legalizing their driving privileges in order to live a meaningful life and complete everyday tasks, such as driving to work or school."[5] America's illegal immigration hot-button

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2. Stephen A. Camarota & Karen Zeigler, *Estimating the Illegal Immigrant Population Using Current Population Survey*, Ctr. For Immigr. Stud. (Mar. 29, 2022), https://cis.org/Report/Estimating-Illegal-Immigrant-Population-Using-Current-Population-Survey.

3. *Id.*

4. Dean W. Davis, *The Best Of Both Worlds: Finding Middle Ground In The Heated Debate Concerning Issuing Driver's Licenses To Undocumented Immigrants In Illinois*, 38 S. Ill. U. L. J. 93, 94 (2013) (citing Spencer Garlick, *License To Drive: Pioneering A Compromise To Allow Undocumented Immigrants Access To The Roads*, 31 Seton Hall Legis. J. 191, 192 (2006)).

5. Davis, *supra* note 4, at 95.

issue is now directly linked to the privilege of driving.[6] Many of the roughly speaking twelve million illegal immigrants who already reside in the United States actually drive without an official driver's license or receive appropriately recognized teaching.[7]

Supporters of granting access to state-issued driver's licenses to illegal immigrants commonly refer to the equal protection language in the Fourteenth Amendment of the U.S. Constitution, which requires a state to deliver equal protection to all people who reside in the state and is not limited to citizens of a state.[8] On the other hand, those who do not support granting access to official driver's licenses by a state to illegal immigrants contend that granting state-issued driver's licenses grants underserved legal standing to people who have knowingly violated U.S. immigration law.[9] Some who object to granting access to driver's licenses to illegal immigrants believe that granting them access demoralizes immigration laws by unfairly increasing the power of illegal immigrants with state-issued driver's licenses.[10]

Undocumented immigrants, also known as illegal immigrants, generally are not recognized as a suspect class under the Equal Protection Clause.[11] From equal protection, it is generally accepted that an undocumented immigrant does not have the same rights as a lawful resident alien.[12] Nevertheless, I support the argument that an undocumented immigrant with an established residency in a state should be granted an opportunity to acquire a driver's license in order to help achieve the goal of promoting public safety. When a state categorically denies an undocumented immigrant the public safety benefit of a driver's license, such a denial places public safety at such an unacceptable increase of harm that a categorical denial is improper. I believe a state should be required to show either a substantial or compelling justification when it categorically denies an undocumented immigrant residing in the state access to a driver's license. I think a substantial or compelling justification is necessary to overcome a presumption of intolerable hostility toward undocumented resident immigrants seeking a driver's license.

6. *Undocumented and Driving: A Debate of Citizenship and Privileges,* AM. SAFETY COUNCIL, https://blog.americansafetycouncil.com/undocumented-driving-2/ (last visited Apr. 3, 2023).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1373 (N.D. Ga. 2001).
12. *Id.*

It is my position that the Supreme Court has recognized that the Constitution's Fourteenth Amendment Equal Protection Clause applies the equality principle to undocumented resident immigrants when the lack of equality creates a systemic underclass of undocumented immigrants in a state.[13] The Court has rejected the claim that undocumented immigrants are categorically entitled to be recognized as a suspect class.[14] However, I believe undocumented immigrants residing in a state should be treated as a suspect or a quasi-suspect class when they are denied an opportunity to acquire a driver's license because such a denial substantially increases the risk that the undocumented immigrant will become members of a permanent underclass unable to take care of the health of her child adequately.[15]

Undocumented immigrants who are residents of the state in which they live should not be denied the generally available benefit of a driver's license because such a denial is very poor public policy. Many state lawmakers promote good public policy by making the case that granting undocumented immigrants access to a driver's license advances the improved safety for all drivers and foot travelers.[16] "A driver's license for undocumented immigrants would allow foreigners to cope more practically and safely with their daily activities. Things like taking their children to school and buying an insurance policy for their car would become easier and safer."[17] The categorical driver's license denial approach is poor public policy because that policy undermines traffic safety by making it unnecessarily burdensome for an undocumented immigrant driver to become a safe, licensed driver. "Immigrants who do not have the legal documents to reside in the United States can face significant restrictions. One of these is getting an identification card or a driver's license."[18]

Some contend "that the entire field of immigration law is preempted by the United States Constitution and is the exclusive province of the federal government."[19] Others contend that this comprehensive declaration of immigration preemption is not sup-

13. *See* Plyler v. Doe, 457 U.S. 202, 212 (1982).

14. *Id.* at 219.

15. *See id.*

16. *Can Undocumented Immigrants Get a Driver's License?*, LawInfo (June 19, 2021) https://www.lawinfo.com/resources/immigration/can-undocumented-immigrants-get-a-drivers-license.html#changing_laws_surrounding_drivers_licenses.

17. *Id.*

18. *Id.*

19. *John Doe No. 1*, *supra* note 11, at 1375.

ported by the Court's reasoning in *Plyler v. Doe*.[20] An argument can be made that *Plyler* does not allow a state statute to be upheld if it advances illegitimate undocumented immigrant hostility.[21] I agree with the statement that the Court's scrutiny evaluation in *Plyler* of how to apply the Equal Protection Clause to review laws that discriminate on the basis of undocumented alienage was a problematic treatment of the suspect classification issue.[22] "The Supreme Court stated in *Plyler* that it was applying rational basis review to the case. But *Plyler's* holding seemed to actually apply a form of heightened review to undocumented immigrants as a class."[23]

Simply put, I maintain immigrant hostility is not a legitimate state goal under the rationale of *United States v. Carolene Products Co*.[24] In footnote four of *Carolene Products*, the Court stated that it was predisposed to applying a form of heightened judicial scrutiny to regulations or governmental policies that targeted for discrimination "discrete and insular minorities."[25] I believe the Court should recognize undocumented immigrant residents living in the United States ("U.S.") who are categorically denied a driver's license as discrete insular minorities entitled to some degree of suspect classification from the judicial branch.[26]

"The reality is that undocumented immigrants are going to drive in this country whether or not they have a valid driver's license."[27] As a nation, we have a duty to provide safety on our roads while requiring drivers to have adequate insurance coverage.[28] Any driver's license benefit to an undocumented immigrant is not properly viewed as a reward for entering America illegally.[29] The undocumented immigrant with a driver's license can drive legally, and the license also may serve as appropriate identification.[30] A driver's license does not grant an undocumented improved status under federal immigration

20. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 212 (1982); DeCanas v. Bica, 424 U.S. 351, 355 (1976)).

21. *See id.* at 1376.

22. Ariel Subourne, Comment, *Alienage as a Suspect Class: Nonimmigrants and the Equal Protection Clause*, 10 SETON HALL CIR. REV., 199, 203 (2013).

23. *Id.* (citing *Plyler*, 457 U.S. at 222–23).

24. *See generally* United States v. Carolene Products Co., 304 U.S. 144 (1938).

25. *Id.* at 152.

26. *Id.*

27. Sharareh B. Hoidra, *State Driver's License Requirements for Undocumented Immigrants*, 2014 TRIAL REP. (MD.) 43, 43 (2014).

28. *Id.*

29. *Id.* at 45.

30. *Id.*

law. A state driver's license will probably make it easier for the U.S. government to locate an undocumented immigrant for appropriate federal processing.[31] A good reason for rejecting undocumented immigrant hostility and licensing undocumented immigrants is that it "will boost the safety of everyone else on the roadway. It is better to train these individuals to properly drive and know the rules of the road than to continue turning a blind eye in order to punish them for entering the country illegally."[32]

Part II of this article will discuss the widespread economic, societal, and human rights implications involved in a state's refusal to issue a driver's license to an undocumented resident immigrant. Part III provides an analysis of cases important to the undocumented immigrant driver's license issue. Part IV, in the conclusion of this article, asserts that a state's action in denying an undocumented resident immigrant a driver's license should trigger suspect treatment because family integrity is protected both as a fundamental substantive due process right and is pursuant to the equal protection principle against undocumented immigrant hostility.

II. ECONOMIC, SOCIETAL, HUMAN RIGHTS IMPLICATIONS OF DENYING DRIVER'S LICENSES TO UNDOCUMENTED IMMIGRANTS

It is my belief that the practical economic and social benefits of granting an undocumented immigrant a driver's license is so great that to deny an undocumented immigrant residing in the state a license should be presumed to be evidence of unjustifiable undocumented immigrant hostility. For example, the Colorado Fiscal Institute reveals that granting undocumented drivers the right to access a driver's license creates safer roads and significant savings in vehicle insurance payments for every driver in Colorado.[33] Licensed drivers are well-informed about traffic regulations, and they are eligible to buy insurance and register their automobiles.[34] Colorado drivers were projected to save $29.5 million in insurance premiums annually by

31. *Id.*

32. *Id.*

33. Thamanna Vasan, *The Impact of Allowing All Immigrants Access to Driver's Licenses*, COLO. FISCAL INST. 1, 5 (Mar. 2015), https://www.coloradofiscal.org/wp-content/uploads/2015/06/drivers-license-for-undocument-immigrants-cfi.pdf.

34. *Id.* at 1.

allowing all immigrants, including undocumented immigrants, to have an opportunity to get driver's licenses and buy car insurance.[35]

In general, the economic benefits of granting driver's licenses to both undocumented and documented immigrants are substantial and widespread in a state. According to a study from the Oregon Department of Transportation, undocumented immigrants with driver's licenses typically contribute more to the Colorado economy by working and spending more.[36] Undocumented immigrants denied an opportunity to possess driver's licenses are far less likely to generate dollars for the local economy.[37] Undocumented immigrants denied access to driver's licenses will probably spend less because of the lack of safe and reliable transportation available.[38] Licensed drivers are more likely to purchase larger items such as homes, vehicles, or household appliances.[39] About thirty-seven percent of undocumented residents in the United States reside in states where they are eligible to apply for a driver's license.[40] There are many practical reasons why all fifty states should offer the advantage of a driver's license to residents regardless of immigration status.[41] The benefits to all fifty states of granting eligibility to all immigrant residents living in that state include "improving road safety, advancing economic growth, and giving residents a chance to live independently and with dignity."[42]

An argument can be made when states grant limited-purpose driver's licenses to undocumented immigrants residing in the state that the state is promoting or accommodating federal immigration policy.[43] "The REAL ID Act is the federal law that establishes specific standards and procedures for states to issue driver's licenses and ID cards to people who are unable to provide proof of lawful presence in the United States."[44] According to the Department of Homeland Security the limited purpose driver's license "must clearly state they are not accepted for official purposes and must use a unique design to

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Why States Should Grant Driver's License to All Residents*, CLINIC LEGAL (Oct. 9, 2019), https://cliniclegal.org/resources/state-and-local/why-states-should-grant-drivers-license-all-residents.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

differentiate them from driver's licenses and IDs granted to citizens and individuals with lawful presence in the U.S."[45] It is my belief that the Department of Homeland Security requirement that limited purposes drivers licenses not be accepted for official purposes and given a unique design to distinguish them from other resident drivers actually creates a minority group status for those limited purpose drivers. Under the reasoning of footnote four in *United States v. Carolene Products,* the Department of Homeland Security's unique design requirement has converted residents who possess a limited-purpose driver's license to "discrete and insular minorities."[46] The Court is very likely to engage in a process of heightened judicial scrutiny when reviewing regulations or governmental policies that discriminate against "discrete and insular minorities."[47]

A society respecting the human dignity and rights of undocumented immigrants[48] should, at a minimum, offer the undocumented immigrant access to food, housing, and medical care.[49] Expanding access to a driver's license to undocumented residents would increase undocumented immigrants' ability to get food, housing, and medical care under less challenging circumstances.[50] The expanded mobility created by a state-issued driver's license would grant undocumented immigrants greater opportunities to support themselves and their families.[51] State-issued driver's license permits produce undocumented immigrant residents that contribute to the economic prosperity and development of the community in which they live as residents.[52]

In Massachusetts, a bill allowing undocumented immigrants to get driver's licenses was scheduled for debate in the state legislature.[53] If that bill is enacted, Massachusetts would become the seventeenth state to issue driver's licenses to undocumented state residents.[54] The

45. *Id; See* U.S. Department of Homeland Security, *REAL ID Frequently Asked Questions for the Public*.

46. United States v. Carolene Products Co., 304 U.S. 144, 155 (1938).

47. *Id.*

48. *Why States Should Grant Driver's License to All Residents*, *supra* note 40; *see* United States Conference of Catholic Bishops, *Catholic Principles of Migration*, JUSTICE FOR IMMIGRANTS.

49. *Why States Should Grant Driver's License to All Residents*, *supra* note 40; *see* St. John XXIII, Peace on Earth, No. 11.

50. *Id.*

51. *Id.*

52. *Id.*; *see Seven Themes of Catholic Social Teaching*, U.S. CONF. OF CATHOLIC BISHOPS.

53. Brooke Migdon, *16 states allow undocumented migrants to obtain driver's licenses*, THE HILL (Feb. 16, 2022), https://thehill.com/changing-america/respect/diversity-inclusion/594617-16-states-allow-undocumented-migrants-to-obtain.

54. *Id.*

District of Columbia also issues driver's licenses to undocumented immigrant residents.[55] Undocumented immigrants residing in the U.S. may now get a driver's license in these seventeen jurisdictions: California; Colorado; Connecticut; Delaware; District of Columbia; Hawaii; Illinois; Maryland; Nevada; New Jersey; New Mexico; New York; Oregon; Utah; Vermont; Virginia; and Washington.[56]

Under the proposed Massachusetts Work and Family Mobility Act, undocumented immigrants could get driver's licenses if they offer a foreign birth certificate, foreign passport, or proof of existing residency in Massachusetts.[57] In Massachusetts, supporters of the proposed law assert that the law "would improve public safety by increasing the number of insured drivers in the state and better public health by making public transportation less crowded."[58] Boston Mayor Michelle Wu (D) said, "I support the Family Mobility Act because it will make all of us safer."[59] In a statement in late January, Wu joined fourteen other Massachusetts mayors and city managers calling on state lawmakers to pass the bill, which they said would make Massachusetts communities safer and more equitable.[60]

In June 2021, the American Civil Liberties Union ("ACLU") stated, "[w]ithholding licenses from qualified drivers who depend on the ability to drive for their jobs and their families' wellbeing puts them in a desperate situation — they must choose either to severely limit their mobility and access to key services, or drive illegally, opening themselves up to arrest."[61] Opponents of the proposed legislation contend it is harmful because it is very likely to serve as a gateway to identity fraud.[62] Issuing driver's licenses to undocumented immigrants would "enable them to hide in plain sight with an official identification — either in their identity or one they decide to create,"[63] according to Jessica Vaughan, director of policy studies for the Center for Immigration Studies.[64] Massachusetts Governor Charlie Baker

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Brooke Migdon, *16 states allow undocumented migrants to obtain driver's licenses*, THE HILL (Feb. 16, 2022), https://thehill.com/changing-america/respect/diversity-inclusion/594617-16-states-allow-undocumented-migrants-to-obtain.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.

(R) is against granting driver's licenses to undocumented immigrant residents living in the state.[65] "A political committee began the process to repeal a new law to allow undocumented immigrants to apply for driver's licenses, just four days after legislators voted to make Massachusetts the seventeenth state to do that."[66]

Because America allows a categorical denial of driver's licenses to resident undocumented immigrants, an assertion has been made that the license denial serves as an obstacle to implementing human rights in the United States.[67] According to the International Covenant on Civil and Political Rights ("ICCPR"),[68] "[S]tate and federal laws denying driver's licenses to individuals without legal status are in direct conflict with the international human rights of undocumented people and their mixed-status families and communities. This type of law puts members of these communities in an impossible bind."[69] The undocumented immigrant in a mixed immigrant status family is said to be an impossible situation because the undocumented immigrant has the unjustifiable burden of "either sacrifice freedom of movement or else drive without licenses in violation of domestic law."[70] Either course of action results in violations of fundamental civil rights protected by the ICCPR, and the negative impacts of these violations affect entire communities and touch all aspects of people's lives."[71]

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65. Brooke Migdon, *16 states allow undocumented migrants to obtain driver's licenses*, THE HILL (Feb. 16, 2022), https://thehill.com/changing-america/respect/diversity-inclusion/594617-16-states-allow-undocumented-migrants-to-obtain.

66. Sarah Betancourt, *New Group Seeks to Overturn Undocumented Immigrant Driver's License Law*, GBH NEWS (June 13, 2022 4:37 PM), https://www.wgbh.org/news/local-news/2022/06/13/new-group-seeks-to-overturn-new-undocumented-immigrant-drivers-license-law.

67. *See generally Denial of Driver's Licenses to Undocumented Immigrants as a Barrier to Human Rights in the United States,* OFFICE OF THE HIGH COMMISSIONER OF HUM. RTS (on file with Howard University School of Law).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*; *see* ICCPR, art. 12(1) n.11 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."). The reporting organization considers that the text of Article 12 wrongly distinguishes between those lawfully and unlawfully present; however, the reporting organization is also cognizant that the jurisprudence surrounding generally restricts the application of article 12(1) to people who are "lawfully within the territory of a state" under domestic laws. Accordingly, while the denial of driver's licenses to undocumented people who are not lawfully within the U.S. may not directly violate article 12(1), restricting movement for undocumented people also impacts the freedom of movement of citizens and lawfully present immigrants who depend upon undocumented people for transportation. This violation of freedom of movement for citizens and lawfully present immigrants is frequent due to the high prevalence of mixed-status families. In 2009, the Pew Hispanic Center estimated that there were 8.8 million people living in mixed-status families in the United States. *See* Jeffrey Passel & D'Vera Cohn, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 8 (2009), available at http://

It has been said that the human rights costs of regulations denying driver's licenses to undocumented immigrants may create a situation where undocumented parents lack the ability to get lifesaving medical treatment for U.S. citizen children.[72] "For example, undocumented parents may be unable to quickly and safely reach a hospital, interfering with an entire family's ability to access health care services — especially in areas where public transportation is not easily available. Such situations can lead to devastating health outcomes and even death."[73]

A very good public policy and a practical reason to allow undocumented immigrants access to driver's licenses is to discourage the practice of racial profiling by law enforcement.[74] Legally refusing to grant "driver's licenses to undocumented people increase encounters between law enforcement and immigrant communities by providing yet another excuse to racially profile and police communities of color in the course of daily living."[75] Contact between mixed-status communities heightens the risk of devastating immigration consequences, including detention and deportation."[76] The risk of immigration hostility due to either a true traffic violation or racial profiling[77] increases

pewhispanic.org/files/reports/107.pdf. 12 ICCPR, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

72. *Denial of Driver's License to Undocumented Immigrants as a Barrier to Human Rights*, *supra* note 67.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*; *see* Racial Profiling: Definition, AM. CIV. LIBERTIES UNION, http://www.aclu.org/racial-justice/racial-profiling-definition (last visited Apr. 13, 2023) ("Suits have also been filed in Arkansas, California, Louisiana, and Ohio claiming racial profiling by the INS. A federal court in Ohio found violations of the rights of Latinos by that state's highway patrol's practice of stopping Latino drivers to question them about their immigration status, including officers even confiscated the green cards of legal migrant workers claiming they were counterfeit. In California, federal courts have found Fourth Amendment violations of Latinos in the stopping of Latinos on the basis of appearance and foreign-sounding names. The Supreme Court has held that INS agents working near the Mexican border may use Spanish ethnicity as a basis for detaining a person, but that it may not be the only basis."); *see also* Racial Profiling by Law Enforcement is Constant Threat, SOUTHERN POVERTY LAW CTR., http://www.splcenter.org/publications/under-siege-life-low-income-latinos-south/2-racial-profiling ("Just the simple acts of driving to work or taking a child to a soccer match can result in intimidation or abuse — regardless of a Latino's immigration status."); *see also* Russell L. Jones, A More Perfect Nation: Ending Racial Profiling, 41 VALPARAISO UNIV. L. REV. 621, 621–22 (2007) ("A recent Texas study indicates that in certain areas in the United States, blacks and Latinos are searched at higher rates than Anglos following a traffic stop. The traffic stop, the basis for most investigations resulting in racial profiling, although legal, is usually a pretext used by police officers to search for drugs in situations where there is no other legitimate basis to conduct the search. Additionally, cases indicate that border patrol officers stop people of Mexican descent more often than other ethnic groups.

significantly for those undocumented immigrants who do not possess driver's licenses. An undocumented immigrant's lack of ability to possess a driver's license very often motivates law enforcement officers to ask additional questions that have the effect of coercing undocumented immigrants to disclose their immigration status.[78] Because the discovery of a lack of legal status by law enforcement during a traffic stop repeatedly results in a form of racial profiling,[79] undocumented immigrant drivers are functionally treated as an insular and discrete minority entitled to limited suspect class protection.[80]

Since a categorical denial of a driver's license to undocumented residents undermines the unity of undocumented mixed-status families, a state should be required to show either a substantial or compelling justification to categorically deny an undocumented immigrant a driver's license.[81] A reasonable reading of *Plyler*[82] supports the argument that focusing on the vulnerability of mixed-status families with children requires, at a minimum, intermediate scrutiny before categorically denying an undocumented immigrant access to a driver's license. When one considers the denial of a driver's license to an undocumented parent, it increases the vulnerability of their children to health and safety risks. *Plyler*'s implicit intermediate scrutiny standard should apply to undocumented immigrants seeking access to a driver's license. I believe the rationale for the holding in *Plyler*[83] includes at least an implicit heightened intermediate level of scrutiny for the healthcare rights of undocumented children residing in the U.S. with their parents.

In fact, a "Mexican appearance" is the most salient factor considered when deciding whom to stop to investigate illegal border crossings.").

78. *Denial of Driver's Licenses to Undocumented Immigrants as a Barrier to Human Rights in the United States supra* note 67. *See* ICCPR, art. 17(1) n.14 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

79. *Id.*; *see* ICCPR, art. 23(1) n.15

80. United States v. Carolene Products Co., 304 U.S. 144 (1938).

81. *See Denial of Driver's Licenses to Undocumented Immigrants as a Barrier to Human Rights*, *supra* note 67; *see* ICCPR, art. 23(1) n.15 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

82. *See Plyler*, 457 U.S. at 223.

83. *See id.*

III. AN ANALYSIS OF CASES IMPORTANT TO THE UNDOCUMENTED IMMIGRANT DRIVER'S LICENSE ISSUE

Court Cases Against Granting Undocumented Immigrants Official Drivers Licenses

Facts: *John Doe No.1 v. Georgia Dept. of Public Safety*

The federal district court's decision in *John Doe No.1 v. Georgia Dept. of Public Safety* involved ligation challenging a Georgia law that prohibits the granting of Georgia driver's licenses to illegal aliens.[84] Plaintiff John Doe is an undocumented immigrant living in the state of Georgia.[85] Doe is an undocumented immigrant resident who really truly lives in Georgia.[86] Plaintiff claims that the application of O.C.G.A. §§ 40–5–1(15) and 40–5–20(a) denial of access to a Georgia driver's license is a violation of his right to equal protection under the law.[87] The Plaintiff contends that his established residence is in Georgia because he has resided in the state beyond 31 days.[88] The federal district court describes the plaintiff as an illegal alien who does not possess official permission from the federal government to reside in this country.[89] The Plaintiff contends that Georgia law deters his fundamental right of interstate travel.[90] He also contends that Georgia has no compelling interest which justifies the unequal treatment of undocumented immigrants regarding the issuance of driver's licenses.[91] Doe also asserts that the regulation of immigration is the exclusive field for the federal government and that the challenged Georgia laws are therefore preempted.[92]

Analysis of *John Doe No.1 v. Georgia Dept. of Public Safety*

A resident of Georgia needs a Georgia driver's license to legally drive a motor vehicle.[93] An individual has to be a state resident to qualify for access to a Georgia driver's license.[94] Under Georgia law, everybody living in Georgia for at least 30 days is presumed to be a state resident, but "no person shall be considered a resident for pur-

84. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1370 (N.D. Ga. 2001).
85. *Id.*
86. *Id.*
87. *Id.* at 1371.
88. *Id.*
89. *Id.*
90. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1371 (N.D. Ga. 2001).
91. *Id.*
92. *Id.*
93. *Id.* at 1372 (citing O.C.G.A. § 40–5–20(a)).
94. *Id.* (citing O.C.G.A. § 40–5–24).

poses of this chapter unless such person is either a United States citizen or an alien with legal authorization from the U.S. Immigration and Naturalization Service."[95] Unlike the court in *John Doe No. 1*, I believe the Georgia law denies the plaintiff equal protection of the law under the Fourteenth Amendment of the Constitution of the United States.[96] I support the plaintiff's argument that Georgia law requires strict scrutiny but not because of the right to travel violation advanced by the plaintiff.[97] Under the strict scrutiny standard, a compelling state interest is needed in order for Georgia law to survive an equal protection challenge.[98]

The defendant, Georgia's argument that the lesser standard of rational basis scrutiny applies to its law denying undocumented residents access to driver's licenses should be rejected.[99] In my view, the Court's 1948 holding in *Torao Takahashi v. Fish & Game Commission*[100] that any heightened equality principle review applies only to those lawfully in this nation based on federal immigration should be rejected when an undocumented resident with established state residency seeks access to a state's driver's license.[101]

Unlike the federal district court in Georgia,[102] I believe the Fourteenth Amendment's general policy of equality must now legitimately be understood to include all persons actually residing and recognized in the state of Georgia as residents, including undocumented immigrants seeking access to a state driver's license. Under the Equal Protection Clause, all people similarly situated must be treated the same.[103] Because of a state's compelling or substantial state interest in not impairing public safety among all drivers, undocumented immigrant drivers are similarly situated in relevant fact to other resident drivers in Georgia with access to a driver's license and the family rights benefits of a driver's license.[104] Substantive due process requires judicial intervention to prevent the state of Georgia from denying the protection of family rights by denial of driver's license access to its undocumented immigrant residents.

95. *Id.* (citing O.C.G.A. § 40–5–1(15)).
96. *Contra id.*
97. See *John Doe No.1*, 147 F. Supp. 2d at 1371.
98. *Id.* at 1372.
99. *Contra id.*
100. Torao Takahashi v. Fish & Game Commission, 334 U.S. 410, 420 (1948).
101. *Contra John Doe No. 1*, 147 F. Supp. 2d at 1372.
102. *Contra id.*
103. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
104. *See* Tigner v. Texas, 310 U.S. 141, 147 (1940).

An East Cleveland housing ordinance restricts residence in a dwelling unit to members of a single family.[105] Mrs. Inez Moore lives in an East Cleveland household together with a son, Dale Moore Sr., and two grandsons, Dale, Jr., and John Moore, Jr.[106] The two boys are first cousins. John started living with his grandmother and with the senior and junior Dale Moore when his mother died.[107] In 1973, Mrs. Moore was given a notice of violation from the city, declaring that her grandson, John, was an "illegal occupant" with the aim of getting her to comply with the ordinance.[108] When she refused to remove John from her home, the city filed a criminal allegation against her.[109]

"Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights."[110] The treacherous field of substantive process required judicial intervention to keep the city of East Cleveland from denying the protection of family rights by imposing an arbitrary limit on the nuclear family.[111] By analogy, the treacherous field of the substantive process clearly requires judicial intervention to prevent the state of Georgia from denying the protection of family rights by an arbitrary denial of a driver's license to an undocumented immigrant resident, although a driver's license denial undermines the basic morals of the nuclear family.[112] Mrs. Moore prevailed because she was able to show that the ordinance was an unconstitutional violation of the right of substantive due process because the Court's "decisions establish[ed] that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[113] It should come as no surprise that the sanctity of the family is violated if an undocumented immigrant parent in Georgia cannot fulfill her moral duty to get medical treatment for her sick child because of a lack of access to a driver's license.

105. Moore v. City of E. Cleveland, 431 U.S. 494, 495–96 (1977).
106. *Id.* at 496.
107. *Id.* at 496–97.
108. *Id.* at 497.
109. *Id.*
110. *Moore*, 431 U.S. 494, 502 (1977).
111. *Id.*
112. *Id.*
113. *Id.* at 503.

Because it is within the family that society instills and disseminates a great deal of society's highest moral values and acceptable cultural traditions, the Court correctly recognized family status as a substantive due process right entitled to suspect protection.[114] Undocumented immigrants, as a general matter, have not been given the status of suspect classification by the Court. Nevertheless, I argue when undocumented resident immigrants are denied any access to a driver's license by a state, the Court should apply the suspect classification to protect the sanctity of the family under the substantive due process liberty rationale.[115] Georgia's classification scheme denying driver's licenses based on immigration status rather than state residency status should be recognized as a presumptively invidious weakening of the sanctity of the family to trigger some form of suspect treatment. The total denial of access to a Georgia driver's license to a resident parent based solely on immigration status encroaches upon the fundamental due process liberty interest of the undocumented parent to protect the health and safety of her child living in her home.[116]

An undocumented resident of Georgia without a driver's license substantive due process liberty interest in protecting the health of her child living in her home is violated when a state's driver's license denial unduly burdens access to needed medical treatment by a doctor or in a hospital. Since Georgia's denial of access to a driver's license impairs the undocumented resident family member's fundamental substantive due process right to reasonable access to essential medical treatment for family members living in the same household, the state needs to provide either a compelling or substantial justification for the impairment.[117]

The Court has stated that the respect for family tradition deserving substantive due process protection is not limited to the nuclear family.[118] "The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[119] When Georgia denies an undocumented immigrant access to a driver's license, it is potentially undermining the substantive due

114. *Id.* at 503–04.
115. *Id.* at 503.
116. See Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).
117. *See id.*
118. *Id.* at 504.
119. *Id.*

process rights of uncles, aunts, cousins, and grandparents sharing a household with the undocumented driver to access healthcare.[120] "Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."[121] The Georgia law that categorically denies access to a driver's license to an undocumented immigrant is prohibited by the substantive due process liberty interest because the law interferes with the broader family living in the same household's fundamental right in times of difficulty to lawfully drive a sick child to needed medical treatment.[122] Georgia should be required to meet the suspect class standard to justify its undocumented resident immigrant license refusal policy that interferes with the substantive liberty interest of the broader family to come together to provide or restore a secure family life for children living in the household.[123]

According to a federal district court in Kansas, "it is well-established that Due Process protections inure to undocumented aliens residing in the United States."[124] The court in *John Doe No. 1 v. Georgia Dep't of Public Safety* believed that Georgia' no driver's licenses law for undocumented residents did not constitute an extensive enough burden upon national immigration practice to trigger preemption.[125] And a Texas federal district court[126] decided that the challenged Georgia law requiring proof of immigration status implemented enough of the federal immigration requirements to avoid federal preemption.[127] A Georgia law that requires proof of immigration status to obtain a driver's license may escape federal preemption. However, Georgia's proof of immigration status law for a driver's license is a substantial burden on the substantive liberty interest of family members in a shared household. Georgia should be required to show a compelling or substantial justification for a proof of

120. *See id.*
121. *Moore*, 431 U.S. at 505.
122. *Id.*
123. *Id.*
124. Day v. Sebelius, 227 F.R.D. 668, 674 (D. Kan. 2005) (citing Plyler v. Doe, 457 U.S. 202, 210 (1982)).
125. Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 771 (N.D. Tex. 2007) (quoting *John Doe No. 1*, 147 F. Supp. 2d at 1376).
126. *Villas at Parkside Partners*, 496 F. Supp. 2d at 771.
127. *Id.*

immigration status driver's law which is a proxy for interfering with the family integrity of undocumented immigrant families.[128]

The main goal of the verification of immigration status for a driver's license is to discourage undocumented immigrants from remaining as residents in the state of Georgia.[129] The Georgia law, which denies driver's licenses to undocumented residents, has made it unmistakably clear that undocumented residents are considered undesirables in the state of Georgia represents poor public policy.[130] Public policy includes a system of laws, regulations, plans of action, and funding power about a particular issue approved by a governmental unit or its agents.[131] A key part of public policy exists in the law.[132] A well-recognized, known controversial theory of public policy was stated by Thomas R. Dye.[133] In Dye's view, "public policy is whatever governments choose to do or not to do."[134] It should be unmistakably clear that Georgia has not adopted a good public policy by ignoring those unreasonable safety risks created by Georgia's refusal to grant undocumented drivers a license to drive. "Good public policy seeks to define issues and implement strategies that will produce a measurable and positive result for the general public."[135]

In an excellent 2021 article entitled *Green-Light Georgia's Driver's License For All Immigrants*,[136] Stephanie Angel urged the Georgia legislature to create good public policy by repealing its anti-immigrant driving restrictions in state law and granting all Georgia resident immigrants access to a driver's license because that would help lift some of the daily burdens faced by undocumented Georgia residents who do not possess federal legal immigrant status.[137] "Expanding driving privileges to immigrants without legal status would also align the Peach State with the commonsense practices of 16 other

128. Moore v. City of E. Cleveland, 431 U.S. 494, 505 (1977).

129. *See* Villas at Parkside Partners, 496 F. Supp. 2d at 771.

130. *See id.*

131. Dean G. Kilpatrick, Definitions of Public Policy and the Law, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RSCH. CTR., https://mainweb-v.musc.edu/vawprevention/policy/definition.shtml (last visited Apr. 13, 2023).

132. *Id.*

133. Public Policy, WIKIPEDIA, https://en.wikipedia.org/wiki/Public_policy#cite_note-9 (last visited Apr. 20, 2023); See Thomas R. Dye, UNDERSTANDING PUBLIC POLICY, 2 (1972).

134. *Id.*

135. What is Good Public Policy?, PEPPERDINE SCH. OF PUB. POL'Y BLOG (Jan. 28, 2020), https://publicpolicy.pepperdine.edu/blog/posts/what-is-good-public-policy.htm.

136. *See generally* Stephanie Angel, Green-Light Georgia Driver's Licenses for All Immigrants, GA. BUDGET & POL'Y INST., https://gbpi.org/wp-content/uploads/2021/01/Green-Light-Georgia-Drivers-Licenses-for-All-Immigrants.pdf (last visited Apr. 13, 2023).

137. *Id.* at 2.

states."[138] Angel correctly contends that Georgia law prohibiting undocumented immigrants from acquiring a driver's license generates a nonsensical repetition because it "forces undocumented Georgians to risk arrest on a daily basis just to go to work and conduct other essential activities to provide for their families."[139]

The unlicensed, undocumented Georgia driver is exposed to a greater risk of arrest when driving within any county where a local sheriff has entered into a 287(g) agreement with Immigration and Customs Enforcement ("ICE").[140] The 287(g) program allows state and local officials to act as deputy federal immigration agents.[141] Several local law enforcement offices additionally act in accordance with the voluntary, non-binding detainer appeals from ICE that permits local law enforcement to keep people at local county jails for forty-eight hours longer than the time they would have been freed.[142] "The voluntary agreements that the state and local law enforcement offices have with ICE lead to family separation and prolonged detention of many individuals whose initial contact with law enforcement stemmed from the mere lack of a driver's license."[143] When the voluntary agreements that the state and local law enforcement offices have with ICE lead to family separation and prolonged detention, which resulted from a lack of access to a driver's license, this separation violates the substantive due process liberty interest of a detained family member living in a resident with her children under the rationale of *Moore v. East Cleveland*.[144]

When Georgia denies an undocumented immigrant access to a driver's license, which leads to her arrest and jail detention, the substantive due process liberty interest in family unity of the household is set in motion.[145] The substantive due process liberty family interest rationale prohibits both ICE and its local law enforcement agents from interfering with the family unity interest of the undocumented

138. *Id.* at 1.
139. *Id.* at 2.
140. *Id.*
141. *Id.*
142. *See generally* Stephanie Angel, *Green-Light Georgia Driver's Licenses for All Immigrants*, GA. BUDGET & POL'Y INST., https://gbpi.org/wp-content/uploads/2021/01/Green-Light-Georgia-Drivers-Licenses-for-All-Immigrants.pdf (last visited Apr. 13, 2023); *see* Wesley Tharpe, *Voluntary Immigration Enforcement a Costly Choice for Georgia Communities*, GA. BUDGET & POLICY INST., https://gbpi.org/wp-content/uploads/2020/05/Voluntary-Immigration-Enforcement-a-Costly-Choice-for-Georgia-Communities.pdf (last visited Apr. 13, 2023).
143. Angel, *supra* note 136, at 2; *see also* Tharpe *supra* note 142.
144. *See* Moore v. E. Cleveland, 431 U.S. 494, 504 (1977).
145. *See id.*

driver household.[146] An undocumented unlicensed resident's substantive liberty interest prohibits either ICE or local Georgia law enforcement from keeping her from her family for an additional forty-eight hours without either a compelling or substantial justification.[147] The Court's treatment of family integrity deserving of substantive due process protection prohibits either ICE or Georgia from categorically detaining an undocumented immigrant for driving without a license an additional forty-eight hours beyond detention.[148] An additional forty-eight hours of detention is prohibited under an ordinary rationale basis standard because it interferes with the undocumented driver's fundamental substantive due process right to provide mutual assistance to family members living in the same home.[149]

When ICE detains undocumented parents in Georgia and elsewhere, their children are "forced to endure psychological trauma and mental health issues resulting from familial separation."[150] I advance the argument that undocumented children have a substantive liberty interest[151] in not being separated from their parents during their years as minors because there is an increased risk of abuse without their parents.[152] "Nationwide, ICE deported 27,080 parents of U.S. citizen children in 2017."[153] I believe because of the substantive liberty interest of a minor citizen child to continue to live in a shared household with her parents, ICE is prohibited from deporting her parents during her minor years without either a compelling or substantial justification.[154]

Stephanie Angel thinks that the results of the 2021 sheriff's races in Cobb and Gwinnett counties in Georgia may provide hope to immigrant residents for the promotion of family unity as good public policy because the winners in the two counties have declared their goal to end their agreements with ICE.[155] Stephanie Angel suggests the sher-

146. *See id.*
147. *See id.* at 504–05.
148. *See id.* at 504.
149. *See id.*
150. Angel, *supra* note 137, at 2.
151. *See Moore*, 431 U.S. at 504.
152. Angel, *supra* note 135, at 2.
153. *Id.*; *see* Mark Greenberg, Randy Capps, Andrew Kalweit, Jennifer Grishkin & Ann Flagg, *Immigrant Families and Child Welfare Systems: Emerging Needs and Promising Policies*, MIGRATION POL'Y INST. (May 2019), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrantFamiliesChildWelfare-FinalWeb.pdf.
154. *See Moore*, 431 U.S. at 504-05.
155. Angel, *supra* note 142, at 2. *See* Jeremy Redmon, *New Sheriffs to End Immigration Enforcement Program in Cobb, Gwinnett,* ATLANTA J.-CONST. (Nov. 6, 2020), https://

iffs in Cobb and Gwinnett counties were motivated to end their agreement with ICE because of the unreasonable risk of hardship for undocumented immigrant families due to the lack of access to an authorized driver's license in Georgia.[156]

Even if the undocumented resident in Georgia does not enjoy a fundamental right to travel because of a lack of federal citizenship,[157] the fundamental right that is properly at stake in this Georgia immigration status case is the substantive due process of family interest liberty. In my opinion, an undocumented immigrant's entitlement to a Georgia driver's license exists because the substantive due process liberty to render mutual assistance to a family member living in the same household is protected.[158] The Court has prohibited laws that might represent unfriendliness toward a fundamental right. The Court invalidated a Tennessee law requiring people to live in the state for one year before being eligible to vote in the state unconstitutional.[159] The rationale for invalidating Tennessee durational voting requirements is "because they might "chill" the fundamental right to interstate travel by discouraging migration to new areas."[160] The rationale for applying strict scrutiny to Georgia law denying access to driver's licenses to its undocumented resident is to keep the state from chilling the fundamental liberty interest in family integrity among those living in the same household.[161] An undocumented immigrant resident of Georgia is entitled to the substantive due process liberty interest in family relationships.[162]

The substantive due process family integrity liberty interest requires strict scrutiny regardless of immigration status.[163] The argument that the Georgia statutes in question further legitimate state goals must be rejected.[164] The argument should be rejected because the negative impact in Georgia of the state's failure to provide access to driver's licenses to its undocumented residents outweighs any inter-

www.ajc.com/news/new-sheriffs-to-end-immigration-enforcement-program-in-cobb-gwinnett/ZXNYCGJKWVE27A2FB7HCYPQGNQ/.

156. Angel, *supra* note 142, at 2.

157. John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1374 (N.D. Ga. 2001).

158. Moore v. E. Cleveland, 431 U.S. 494, 504-05 (1977).

159. *John Doe No. 1*, 147 F. Supp. 2d at 1374–75; *see* Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

160. *John Doe No. 1*, 147 F. Supp. 2d at 1375.

161. *See Moore*, 431 U.S. at 504.

162. *Id.*

163. *Id.*

164. *Contra John Doe No. 1*, 147 F. Supp. 2d at 1376.

est that Georgia has in confirming a resident immigrant's lawful presence in the United States.[165] Georgia does not have a legitimate interest in denying undocumented resident drivers an opportunity to acquire a license[166] because the denial has a demonstrated track record of significantly decreasing road safety.[167] "Allowing all immigrants, regardless of their legal status, to access a state-issued driver's card would enhance road safety for all Georgians. Currently, undocumented Georgians are forced to drive without a license when necessary and, as such, are barred from taking the state's road rules and driving exams."[168] The "report from the AAA Foundation for Traffic Safety found that one in five fatal crashes involve an unlicensed or invalidly licensed diver and those drivers are ten times more likely to leave the scene of a crash than validly licensed drivers."[169] I have concluded that Georgia does not have a legitimate interest in allowing its governmental machinery to be a facilitator for inspiring unlicensed drivers to escape accountability by leaving the scene of the accident.[170] "Aside from ensuring safer roads, access to a driver's card for all immigrant drivers also facilitates the purchase of car insurance, a benefit for all Georgia drivers. When more Georgians are insured, all drivers could see a modest decrease in annual car insurance premiums."[171] Can it reasonably be argued that Georgia has a legitimate interest during these inflationary times in denying authorized drivers an opportunity to save money?[172] "One recent study that analyzed a decade of state-level data found that the annual cost of insurance decreased by nearly $20 for drivers living in states that expanded driver's license access to undocumented residents."[173] Georgia has failed to demonstrate a legitimate interest in limiting access to driver's license to citizens and legal residents[174] because at the end of the day, "when

165. *Contra id.*

166. *Contra id.*

167. Angel, *supra* note 142, at 4.

168. *Id.*

169. *Id.*; *see Unlicensed to Kill*, AAA FOUNDATION FOR TRAFFIC SAFETY, https://www.adtsea.org/webfiles/fnitools/documents/aaa-unlicensed-to-kill.pdf (last visited Apr. 13, 2023).

170. *Contra* John Doe No. 1 v. Ga. Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1376 (N.D. Ga. 2001).

171. Angel, *supra* note 142 at 4.

172. *Contra John Doe No. 1*, 147 F. Supp. 2d at 1376.

173. Angel, *supra* note 142, at 4; *see* Mauricio Cáceres & Kenneth P. Jameson, *The Effects on Insurance Costs of Restricting Undocumented Immigrants' Access to Driver Licenses*, 81 S. ECON. J. 907 (Feb. 26, 2015), https://onlinelibrary.wiley.com/doi/10.1002/soej.12022.

174. *Contra John Doe No. 1*, 147 F. Supp. 2d at 1376.

all Georgians are able to learn the rules of the road and have access to car insurance, everyone on the road is better off."[175]

IV. CONCLUSION

A parent's right to care for their children is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[176] Because an undocumented resident immigrant's right as a parent to care for their children is a fundamental liberty interest, a state violates substantive due process when it denies that right without a compelling justification.[177]

Under substantive due process scrutiny, "[t]he right to family integrity must be balanced against the state's interests in protecting the health, safety, and welfare of children."[178] Because a state's denial of an official driver's license to otherwise qualified undocumented resident immigrants is an obstacle to protecting the health and safety of the child, the substantive due process family integrity liberty interest is violated. Reliable evidence demonstrates that the benefit in all fifty states of granting access to a driver's license to all immigrant residents living in that state, regardless of immigration status, includes advancing both road safety and the value of family integrity. Because the denial of a state resident access to a driver's license based on immigration status make the public roadways less safe while making it more difficult for a parent to take care of a child's health and safety needs; the lack of a driver's license violates the substantive due process right of family integrity. I believe both the substantive due process family integrity rationale as well as human rights reasoning support the position that granting driver's licenses to undocumented resident immigrants is humane and good public policy. The granting driver's license approach to resident immigrants is necessary to promote human rights and to avoid a situation where an undocumented parent lacks the ability to get lifesaving medical treatment for her children living in her household in the U.S.[179]

175. Angel, *supra* note 142, at 4.

176. Romero v. Brown, 937 F.3d 514, 519 (2019) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion)).

177. *Romero*, 937 F.3d at 519; *See* Moore v. E. Cleveland, 431 U.S. 494, 498–500, 503 (1977).

178. *Romero*, 937 F.3d at 520 (quoting Wooley v. Baton Rouge, 211 F.3d 913, 924 (5th Cir. 2000)).

179. *Denial of Driver's Licenses to Undocumented Immigrants as a Barrier to Human Rights*, *supra* note 67.

It is my opinion the approximately twelve million undocumented resident immigrants living in the United States should be treated as discrete and insular minorities when they are seeking a state-approved driver's license. Denying undocumented immigrants access to a driver's license is unacceptable undocumented immigrant hostility. In my view, immigrant hostility is not a legitimate state goal under the reasoning of *United States v. Carolene Products Co*.[180] In footnote four of *United States v. Carolene Products*, the Court stated that it was predisposed to applying a form of heightened judicial scrutiny to regulations or governmental policies that targeted for discrimination "discrete and insular minorities."[181] I believe the Court should recognize undocumented immigrants living in the United States denied a driver's license as discrete insular minorities entitled to a limited suspect classification from the Court in order to equally protect the family integrity of all residents in a state.[182]

180. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).
181. *Id.*
182. *Id.*