

WHAT SHOULD IMMIGRATION LAW BECOME?*¹

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1. Note that the present essay was written in 2020 before the changes to immigration policy were implemented by the current Biden administration,

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3. This essay is dedicated to Professor Steve Zamora. It is on a subject he would have enjoyed discussing and debating. Steve and Lois warmly welcomed my family and me when I first came to Houston, in 2009, to head the immigration clinic at the University of Houston Law Center. I remember him hosting an outing at an Indian restaurant and having us over for a pool party at his home. I frequently saw Steve riding his bike,

INTRODUCTION

This essay addresses the future of immigration law. What should it become in light of the recent drastic changes that have impacted the field?⁴ The question's importance at this time cannot be overstated or ignored. Given the state of affairs before the 2020 election, and in view of the devastating events for immigrants of the last several years, a re-evaluation of the entire field is in order.⁵ While the aspirations of any field may be underappreciated or undervalued, immigration law's goals and objectives are often mired in confusion and undertheorized. Given

exercising, laughing, and engaging with everyone he met. We saw each other frequently at the Rec Center, where he encouraged me to swim more. He visited my office to drop in and give me "chotskies" from his frequent trips. His great expertise in international law and NAFTA meant that his interests overlapped with mine, and as a result we discussed the latest developments in immigration law and policy. I enjoyed my talks with Steve. I will always miss him and his kind demeanor, warm personality, and welcoming spirit!

4. This is a prescriptive project. Given that fact, I want to state my presuppositions up front. In these introductory remarks, I make clear that immigration law in my view should be premised on humanitarian considerations and, most especially, the protection of vulnerable populations and people. It is important to note this is not antithetical to those who wish to protect American citizens and foreign nationals alike. The current state of affairs, I argue, shows that the current paradigm has been based on anything but this premise of protection and indeed has been overshadowed by a more nationalistic, isolationist, and restrictionist agenda premised on bigotry and ignorance. While there can be genuine debate about the appropriate starting point for any field, it should not be objectionable or even controversial that protecting others should be an important goal in any legal regime.

5. In addition to the political turmoil of the last several years, it bears mentioning that the COVID-19 pandemic itself has exacerbated the problems with the immigration system, leading to monumental changes to immigration adjudication and enforcement. Those changes include the recent travel bans, bars to entry, and further restrictions on asylum-seekers. These changes have been used as a pretext under the guise of "protecting" public health. See, e.g., Jorge Loweree & Aaron Reichlin-Melnick, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system>; see also *Immigration-related Executive Actions During the COVID-19 Pandemic*, NAT'L IMMIGR. F. (Nov. 18, 2020), <https://immigrationforum.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic/>; Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (July 2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> (providing a good overview of the changes under the Trump Administration); In addition, Professor Lucas Gutentag at Stanford Law School is currently working on a project with his students relating to cataloguing the various changes.

the complex and confusing nature of the immigration laws, disparate and conflicting interests have taken hold.⁶ Practicing lawyers, those most conversant with immigration law's problems, and by extension the possible solutions, find it difficult to effectuate change. In recent years, when change happens it may be through piecemeal litigation and not comprehensive reform. While important and even essential to progress, the changes brought about by individual or class-based representation many times are incremental, not to mention subject to reversal by the U.S. Attorney General and courts.⁷

Practitioners had to contend with oppressive rules and restrictions issued by the former administration on a daily basis.⁸ Others, such as anti-immigrant factions and the voices of those then in power, attempted to obfuscate policy, as a strategy to prevent what they perceive as an expansion of immigrants' rights

6. The complexity and Byzantine nature of immigration law is widely recognized. *See, e.g.*, *Mezo v. Holder*, 615 F.3d 616, 621 (6th Cir. 2010); *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."); *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 75 (2014) ("Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme"); *Cf.*, A discussion in a recent co-authored article, R. Parker Sheffy & Geoffrey A. Hoffman, *Appellate Exceptionalism?*, U. OF ILL. L. REV. Online (July 21, 2020), <https://illinoislawreview.org/online/appellate-exceptionalism/>.

7. The Attorney General has exercised enormous powers under the current administration to literally shape immigration adjudication by certifying certain cases directly to himself. Although this power existed under previous administrations it was rarely used. *See, e.g.*, *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009) ("Matter of Compean I"), that decision was vacated less than six months later in *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009). In a series of recent cases, the Trump administration's Attorney General certified cases to himself, overturning previous precedents on a number of different issues. *See, e.g.*, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A*, 27 I&N Dec. 581 (A.G. 2019); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

8. For a good discussion of changes needed with respect to employment-based immigration and a good proposal surrounding the caps on various categories of visas, *see* Resolving Extended Limbo for Immigrant Employees and Families (RELIEF) Act of 2019, S. 2603, 116th Cong. (2019), also known as the Durbin-Leahy bill, that would help keep American families together by classifying spouses and children of LPRs as immediate relatives and exempting derivative beneficiaries of employment-based petitions from annual green card limits, protect "aging out" children who qualify for LPR status based on a parent's immigration petition, and lift country caps. For further information on the bill, *see* *Durbin, Leahy Introduce New Legislation To Increase Number Of Green Cards Available, Eliminating the Backlog*, DICK DURBIN U.S. SENATOR ILL. (Oct. 16, 2019), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-leahy-introduce-new-legislation-to-increase-number-of-green-cards-available-eliminating-the-backlog>.

and forms of relief. A cadre of immigration restrictionists or those who support a reduction in immigration have greatly altered the field.⁹ Their changes have been wide-ranging, surgically targeted, as well as subtle, and not-so-subtle. Unfortunately and sadly, the measures were effective in eroding legal protections for immigrants.¹⁰

The first step in beginning to think about a recalibration of the field is to reframe the overarching “paradigm”—the framework of a discipline or field—and to determine the assumptions of that paradigm. The underlying presuppositions of a field must necessarily prefigure and pervade any ensuing analysis, as well as the perception of the field as a whole. The paradigm must encompass those on the “inside,” i.e. those whose lives are impacted and altered by immigration law, as well as those on the “outside,” those bystanders who may never have represented an immigrant but often voice their intense feelings and thoughts upon which scaffold their arguments. If we cannot agree, as a polity, as a people, as a society, and as political parties, on an

9. See Micahel D. Shear & Maggie Haberman, *Trump's Temporary Halt to Immigration Is Part of Broader Plan, Stephen Miller Says*, N.Y. TIMES (April 24, 2020), <https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-immigration-stephen-miller.html>; Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, THE NEW YORKER (Feb. 21, 20220), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession>; see also Zachary Mueller, *Immigration 101: Who is Kris Kobach*, AM. VOICE (Jun. 22, 2018), <https://americasvoice.org/blog/kris-kobach/>.

10. I am thinking here of very specific changes dealing with the rules, procedures, and policies affecting areas of immigration law, such as asylum, H1-B visas, student visas, DACA, etc. versus the system-wide more passive and less-publicized changes that have impeded the ability of immigrants to obtain relief, such as the executive orders of President Trump in the early days of his presidency fundamentally changing the priorities of immigration enforcement, the over 1 million court backlog, the delays in adjudications by USCIS, such as relating to U visas, Special Immigrant Juveniles, naturalizations, and more. In some cases, litigation has been (partially) successful in meeting head-on these changes, such as with developments in the *Flores* litigation, recent COVID-related student visa rules, and an injunction against the public charge rule. See, e.g., <https://www.clearinghouse.net/detailResource.php?id=2116>; *U.S. abruptly drops new visa rules for international students*, HARV. GAZETTE (Jul. 14, 2020), <https://news.harvard.edu/gazette/story/2020/07/u-s-abruptly-drops-new-visa-rules-for-international-students/>; Tom McParland, *2nd Circuit Blocks Trump Administration's 'Public Charge' Rule, But Limits Scope of Injunction*, N.Y.L.J. (Aug. 4, 2020), <https://www.law.com/newyorklawjournal/2020/08/04/2nd-circuit-blocks-trump-administrations-public-charge-rule-but-limits-scope-of-injunction/?slreturn=20200724124748>.

initial starting point, then we are talking past one another. In such a case, as we have seen for decades, no progress, no legislative change is possible.

In thinking about a starting place for immigration law, one can and should begin with human rights, ensuring international norms and protections are met, providing the most vulnerable urgent protections, as well as responding to humanitarian crises and concerns. In addition, and also simultaneously, immigration law can be viewed as a facet or subset of national security law, administrative law, or constitutional law, and at times all these sources acting at once upon a particular immigrant or set of immigrants. Other areas also of course impact the field.¹¹ In reality, all these paradigms pull immigration law in different directions simultaneously, sometimes with disastrous consequences. That immigration law is pulled in so many directions is not surprising, as many fields of law can be similarly described.¹² However, the number of passionate voices doing the pulling is so great in this field that it feels special, with frustrating and frequent revisions to existing restrictions.

11. Increasingly, for example, environmental law and the rights of environmental refugees will need to be factored into the equation. See, e.g., [http://www.globalization101.org/environmental-refugees/#:~:text=%E2%80%9CEnvironmental%20refugee%E2%80%9D%2C%20a%20term,seriously%20effects%20the%20quality%20of;UN Migration Agency, Head of Migration, Environment and Climate Change, Dina Ionesco, *Let's Talk About Climate Migrants, Not Climate Refugees* \(June 6, 2019\), <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/>. Other areas such as health law, public benefits law, technology, artificial intelligence, machine learning and many other issues will shape the future of immigration-related relief and enforcement. See Stuart Anderson, *Top Legal Scholar: Trump Team Radically Restricted Immigration*, FORBES \(Sept. 8, 2020\), <https://www.forbes.com/sites/stuartanderson/2020/09/08/top-legal-scholar-trump-team-radically-restricted-immigration/#7c80d08a764c> \(discussing among other things the connections between immigration law and other fields\).](http://www.globalization101.org/environmental-refugees/#:~:text=%E2%80%9CEnvironmental%20refugee%E2%80%9D%2C%20a%20term,seriously%20effects%20the%20quality%20of;UN%20Migration%20Agency,Head%20of%20Migration,Environment%20and%20Climate%20Change,Dina%20Ionesco,Let's%20Talk%20About%20Climate%20Migrants,Not%20Climate%20Refugees)

12. Fundamental tensions of course exist within every legal field. Consider proponents of law and order and their goals of punishment, retribution, deterrence, or restoration within the criminal law versus the goals of rehabilitation and effectuating a positive reentry into society for those convicted of crimes. Consider intellectual property law which aims to protect inventors' and authors' rights while at the same time encouraging innovation, experimentation and progress. Consider the tension in evidence law, which must balance the goal of seeking the truth through discovery and at trial against privacy rights and protecting claimants from overly burdensome or requests for production. All these fields have found ways to proscribe rules that allow for an agreeable balance. Immigration law has yet to find its solution or balance.

Another way of asking the same question is: *How do we begin to explore imaginative possibilities at fixing the broken immigration system?*¹³ In determining what immigration law should become, this essay examines the possibilities inspired by three distinct “buckets” or categories:

- (1) Supreme Court decisions;
- (2) proposed and, thus far, unsuccessful legislation, including the immigration plan of President Joe Biden; and

13. Given the pandemic, the Trump administration exacerbated the situation, seizing on the opportunity to formulate breathtaking new policies and restrictions. Instead of expanding protections administratively, such as through DACA and other policies during the Obama era, including the use of prosecutorial discretion, the Trump administration worked incessantly in an opposite direction. It used its powers to reinterpret and re-implement the immigration laws in a variety of new ways. The resulting morass includes a series of largely unlawful asylum-related bans, executive orders banning certain groups of lawful immigrants, resting on the success of President Trump's previous travel ban (in 2018), as well as other disastrous policies such as for international students studying under F-1 visas as mentioned above. Some of these attempts have been struck down, or stayed. Some have been upheld. However, most recently the Supreme Court in the DACA rescission case of June 18, 2020, through the opinion of Chief Justice Roberts issued a very clear admonition that the government must consider legitimate “reliance interests” of vulnerable immigrants. The Supreme Court announced unequivocally that the agency acted “arbitrarily and capriciously” in attempting to rescind DACA. It has been forced to go back to the drawing board and start anew. Even the census has been politicized. *See Why a Shorter Census Timeline Hurts Immigrant Communities*. President Trump signed an order in July 2020 stating that he would not count undocumented immigrants as “persons” in the census data he presents to Congress. Several lawsuits were filed challenging the legality of the policy. Recently, the government was the subject of a motion seeking a contempt ruling in the *Casa De Maryland v. DHS*, No. 8:17-cv-02942-RWT (D. Md. Mar. 5, 2018), *daca remand case*, given the way it has handled the aftermath of the DACA rescission decision from the Supreme Court, because it has failed, among other things, to allow for new applications despite the striking down of the DHS' rescission attempt in 2017. *See Sheri-kae McLeod, Court May Hold Trump Administration In Contempt For Failing to Process New DACA Applications*, <https://www.caribbeannationalweekly.com/legal-news/court-may-hold-trump-administrati-on-in-contempt-for-failing-to-process-new-daca-applications/>. In a class action, in federal district court, dealing with special immigrants, the court held the government in civil contempt recently, *see J.L. v. Lee Francis Cissna*, No. 5:18-cv-04914 (N.D. Cal. Dec. 18, 2019); *Order Holding Defendant's in Civil Contempt and Ordering Sanctions* (Feb. 14, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/02/ImmigrationOrder-Granting-contemptagainstgovtofficials.pdf>.

(3) remedies and approaches inspired by other fields of law.

These buckets are chosen with the recognition that we will not be changing the system in a vacuum. In other words, the system, although broken has a history, numerous processes, and practices which will not be and cannot be changed instantaneously. We should build on the good and throw out the bad.

Moreover, former President Trump and his administration's efforts at restricting immigration also must be considered. What the former president did in terms of changing the immigration system is unprecedented. It is therefore obvious that any template for future change and for remedying current injustices requires grappling with and remedying the many obstacles to immigration, as well as the restrictions to adjudicatory review over immigration decisions of the Trump administration.¹⁴ That said, we must also not make the mistake of working solely at a project of piecemeal "fixes" concerning the changes brought about by the Trump administration, but instead (in my opinion) we should begin anew with a more robust conception of what we are trying to achieve: the protection of others, by effectuating humanitarian relief and considerations.

One further consideration before moving to categories as sources for change, as they inform our thinking about immigration law's future. During the COVID-19 pandemic, immigration law took a backseat to the enormous public health "emergency powers" of the president. While using public health as a justification for enacting restrictions is not unprecedented, the ways that President Trump used the pandemic as a pretext for furthering political ends should not go unnoticed. For example, virtually all asylum seekers were blocked at the border under the pretext of "protecting" Americans from the pandemic. Student visa holders would have been forced to leave the country if their schools had transitioned to online classes, despite a

14. Professor Lucas Gutentag at Stanford started a project with his students cataloguing the changes from the Trump administration. See also Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGR. POL'Y INST. (July 2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency>.

previous policy allowing them to stay. The new policy was fortunately partially abandoned due to the effective use of litigation by Harvard and MIT, in federal district court.¹⁵ Other attempts to politicize and weaponize the immigration system can be found in the widespread delays in naturalization, as well as immigration court backlog both of which have been well-documented.

II. FINDING SOURCES FOR CHANGE IN SUPREME COURT AND OTHER COURT CASES

Although the history of immigration law has reflected blatant racism and prejudice, the Supreme Court cases can be scoured for effective ideas underpinning immigration reform.¹⁶ Courts have come a long way (some cases—to be sure—prove the opposite) since the grandfather of all immigration cases, “The

15. For the complaint, see Complaint, President and Fellows of Harvard College v. Dep’t of Homeland Sec., No.1:20-cv-11283 (D. Mass July 8, 2020), https://www.harvard.edu/sites/default/files/content/sevp_filing.pdf; see also Anemona Hartocollis & Miriam Jordan, *Harvard and M.I.T. Sue to Stop Trump Visa Rules for Foreign Students*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/08/us/harvard-mit-trump-ice-students.html>; Camille G. Caldera & Michelle G. Kurilla, ‘Devastating’ and ‘Impossible’: Harvard, MIT Students Submit Declarations in ICE Lawsuit, THE HARV. CRIMSON (July 15, 2020), <https://www.thecrimson.com/article/2020/7/15/harvard-mit-ice-lawsuit-student-declarations/> (reaching a settlement in July 2020); see Jon Brodtkin, *Trump Admin caves to Harvard and MIT, won’t deport online-only students*, ARSTECHNICA (July 14, 2020), <https://arstechnica.com/tech-policy/2020/07/trump-admin-caves-to-harvard-and-mit-wont-deport-online-only-students/> (discussing the lawsuit and the settlement).

16. Examples of the racist history in the United States are found in a number of immigration programs, laws and cases before the Supreme Court. See, e.g., *The Impact of Racism on U.S. Immigration Past and Present*, NETWORK, <https://networkadvocates.org/recommittoracialjustice/impact/>; see also *The Racist history of US immigration policy*, VOX (Jan. 15, 2016), <https://www.youtube.com/watch?v=6yiQAmgI5s4>. For a recent discussion of equal protection and immigration, see Justice Sotomayor’s opinion concurring in part, and dissenting in part in the 2020 DACA rescission decision, in *Regents v. DHS*, No. 18–57, slip op. (June 18, 2020), https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf. For further discussion about issues surrounding racial injustice and immigration law, see the scholarship of Gabriel Jackson Chin, *Gabriel “Jack” Chin*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=201529; see also the scholarship of Frank H. Wu, *Frank H. Wu*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1704741, among others.

Chinese Exclusion Act” case, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). There, the justices expressly relied upon racial stereotypes toward Asian immigrants and their families. The Supreme Court at that time enunciated a “Plenary Power Doctrine” held by Congress over immigration. The court upheld and justified the exclusion of Mr. Ping, despite the fact that when he left the United States he had a valid re-entry permit, and it was not until he was outside the country that the laws were changed to prohibit his return. With an expansive reading of Congressional power over immigration regulation and enforcement, the source of the immigration power is grounded in national sovereignty. There was not one specific plenary power over all immigration which was identified in the Constitution.

The plenary power doctrine is an *implied* power derived from the structure of the Constitution as opposed to explicitly stated. It can be cobbled together from the working together of different Constitutional provisions, such as, the “Take Care” Clause, which requires the president to obey and enforce all laws, though the president retains some discretion in interpreting the laws and determining how to enforce them;¹⁷ several possible other sources have emerged in subsequent case law, e.g., the Naturalization Clause, the interstate Commerce Clause, as well as the necessary and proper clause and the spending power. These all have been implicated as a possible source of Congressional power over immigration.¹⁸

It is essential to reiterate the amorphous nature of the immigration power. The fact that it does rely on so many different sources strengthens the argument for latitude and leeway with regard to the implementation and administration of Congressional mandates. This is most relevant when considering the well-entrenched existence of “prosecutorial discretion” as a tool for enforcement policy.¹⁹ Another important consideration is

17. See TODD GARVEY, CONGR. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW (2014), <https://fas.org/sgp/crs/misc/R43708.pdf>.

18. See discussion of plenary power and its sources in the leading immigration law textbook, STEPHEN LEGOMSKY & DAVID THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY (University Casebook Series) (7th ed. 2019).

19. For an excellent recitation of the history of prosecutorial discretion, see the letter to President Trump relating to the legality of DACA by law professors and scholars, with

that the plenary power over immigration resides with Congress and not the president. Although Congress has delegated authority to the federal executive to act through its agencies to implement the immigration laws, the executive is not unlimited and is bound by Constitutional constraints in the ways it administers its power.²⁰

The June 2020, Deferred Action for Childhood Arrivals (DACA) rescission decision, *Regents of the University of California v. DHS*,²¹ is instructive. There, the Supreme Court was not considering the former president's ability to promulgate DACA in the first instance (that was not the issue before the court), but rather the ability of the president to rescind the enforcement policy. Chief Justice Roberts in his decision self-consciously refused to opine on the "soundness" of DACA but had much to say about the lack of a reasoned consideration for rescission. Most essentially, the court found that the Department of Homeland Security (DHS) acted "arbitrarily and capriciously" in failing, among other things, to consider the "legitimate reliance interests" of those currently with DACA. At the same time, Chief Justice Roberts gave us a roadmap forward for a possible future for DACA.²²

principal author as Professor Shoba S. Wadhia, Penn State Law School, Letter from Shoba S. Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law Director, Center for Immigrants' Rights Clinic, Penn State Law, et al., to President Trump (Aug. 14, 2017) (on file with Penn State Law), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/LawProfLetter-DACAFinal8.13.pdf>.

20. A lot has been written about a lack of rights for immigrants at the border and also while residing abroad. See, e.g., *The Constitution in the 100-Mile Border Zone*, ACLU (Aug. 21, 2014), <https://www.aclu.org/other/constitution-100-mile-border-zone>. While it is true that immigrants may have significantly fewer rights outside the United States, i.e. extraterritorially, it must be emphasized that in the interior of the United States where most enforcement action is being directed, immigrants enjoy many rights, including under the 5th Amendment due process and other protections, the 4th Amendment and 1st Amendment. While their claims may be limited by case law, see *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), and other cases, it is incorrect to allege that immigrants lack Constitutional rights.

21. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

22. See, e.g., my recent online article in Yale J. on Regulation Notice & Comment blog, Geoffrey A. Hoffman, *Chief Justice Roberts Gave Us a Roadmap for a Way Forward on DACA*, by Geoffrey A. Hoffman, YALE J. ON REGUL. (July 7, 2020), <https://www.yalejreg.com/nc/chief-justice-roberts-gave-us-a-roadmap-for-a-way-forward-on-daca-by-geoffrey-a-hoffman/>.

Prosecutorial discretion is a facet of several Supreme Court cases, in addition to the recent DACA rescission case. Other connections to important cases in the history of immigration jurisprudence include *Arizona v. United States* 567 U.S. 387 (2012). That case considered a state's ability to enforce immigration law. The court largely rejected the state's power to do so with a limited exception for a state officer asking about one's immigration status during a lawful stop. In their discussion, the justices relied on the fact that the federal government has the ability to exercise prosecutorial discretion. The prime example of a population most deserving of this discretion, according to the justices, are students. As expressly pointed out by Justice Kennedy, in *Arizona v. United States*, removal from the United States "is a civil, not criminal, matter . . . [and a] principal feature of the removal system is the broad discretion exercised by immigration officials."²³ The majority also recognized that the ability to enforce immigration law without federal oversight could lead to the "unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed."²⁴

Another obvious connection to prosecutorial discretion that exists toward those who may have valid future claims for relief is *Plyler v. Doe*, 457 U.S. 202 (1982), where the Supreme Court struck down the State of Texas' attempt to withhold funds from local school districts for children who were not "legally admitted" into the United States, while authorizing the districts to deny enrollment to such children. The high court found such a state statute violated the Equal Protection Clause of the Fourteenth Amendment.

Plyler has had the most impact in recognizing the fact that undocumented immigrant children may be subject to deportation but also may have relief. There are possibilities for remedies in the Immigration and Nationality Act (INA), whether through future claims for potential relief, or possibilities for future lawful re-entry to the United States with an approved waiver, if required. As noted by the court, to bar this vulnerable population

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

24. *Id.*

from an education necessarily leads to the creation of an underclass, a “shadow population,” without rights and lacking voting power. As eloquently stated by former Justice Sandra Day O’Connor, “The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”²⁵

Even in the so-called “Travel Ban,” also known by plaintiffs and advocates as the “Muslim Ban” case, *Trump v. Hawaii*, where the Supreme Court found the statute, INA 212(f), 8 USC 1182(f), “exuded deference,” the court still recognized that the president’s power was *not* unlimited.²⁶ In that case, as in the DACA rescission case, *Regents v. DHS*, the government argued for no judicial review over its decision to restrict immigration, or in the case of *Regents*, no review of the discretionary decision to rescind a previous president’s immigration enforcement policy. The Supreme Court rejected an unlimited right or “plenary power” over immigration asserted by the executive. It was most clearly rejected in *Regents*, where Chief Justice Roberts relied on the basic presumption of judicial review under the Administrative Procedure Act (APA) and noted that the APA “requires agencies to engage in ‘reasoned decision making.’”²⁷

Trump v. Hawaii also is noteworthy in that the Supreme Court did not reject outright immigrants’ right to seek redress under the First Amendment. Although their claim was ultimately rejected, the Chief Justice’s opinion considered it and applied the very deferential “rational basis” test for the Establishment Clause, finding in the end that the present administration’s rationales of national security were sufficient and he did not credit plaintiffs’ allegations that the president was motivated by religious animus toward Islam. The government has argued that immigrants were not even entitled to raise such a First Amendment claim, a position rejected in prior cases such as *Kleindienst v. Mandel*, 408 U. S. 753 (1972).

As a leading immigration textbook has described it, the “plenary power” doctrine has been “chipped away” at by

25. *Plyler v. Doe*, 457 U.S. 202 (1982).

26. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

27. *Regents v. DHS*, No. 18–57, slip op. at 9 (June 18, 2020) (Roberts, J.).

subsequent cases in the Supreme Court.²⁸ Although admittedly there are many “bad” cases that have attempted to stifle the rights of immigrants, such as the recent *Thuraissigiam v. DHS*,²⁹ limiting habeas jurisdiction over expedited removal proceedings under INA 242(e), 8 USC 1252(e), as one example, there are also numerous other “good” cases. Those include cases standing for due process, equal protection, as well as (at least in the interior of the United States) the fact that immigrants enjoy an array of Constitutional protections, even if those protections are routinely violated where no legal counsel is around to ensure their client’s rights are protected.

As far back as the 1880s, there have been Constitutional cases finding in favor of immigrants’ rights. In the famous *Yick Wo v. Hopkins*,³⁰ in 1886, the high court applied the Equal Protection Clause of the Fourteenth Amendment to strike down a racially discriminatory law. The city of San Francisco enacted a rule making it illegal to operate a laundry in a wooden building without a permit. The problem there was that most laundries were operated by Chinese people but only one permit was granted to any Chinese owner. Virtually all non-Chinese applicants however were afforded a permit. Justice Matthews wrote, “the guarantees of protection contained in the Fourteenth Amendment to the Constitution extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, of color, or of nationality.”

That racially discriminatory laws cannot be allowed to stand, whether enacted through local ordinance, state legislatures or Congress itself should not be in question. Indeed, in 1983, the Supreme Court made clear in *INS v. Chadha*, “Congress can exercise its plenary power over immigration only if it ‘does not offend some other constitutional restriction.’”³¹ However, the ability of former President Trump to make questionable policy

28. See LEGOMSKY & THRONSON, *supra* note 18.

29. See Dept. of Homeland Sec. v. Thuraissigiam, No. 19–161, slip op. (June 25, 2020), https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

30. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

31. *Id.*; *INS v. Chada*, 462 U.S. 919, 941 (1983); see also *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272 (1973) (no act of Congress can authorize a violation of the Constitution); *Wong Wing v. U.S.*, 163 U.S. 228 (1896) (Congress cannot criminally penalize aliens without due process).

(and some would say, overtly racial, religious or national origin-based discriminatory policy) suggests the Supreme Court has been unable to reign in abuses of presidential power. Indeed, as we saw in *Trump v. Hawaii*, the government's arguments and assertions of national security were enough to circumvent the clear mandate in the INA itself against nondiscrimination.³²

The first obvious needed reform, therefore, is the addition to the Immigration and Nationality Act of a provision that *expands* and clarifies that the nondiscrimination provision in section 1152(a) applies to all decisions, policies, and practices, by the government surrounding immigration, and not just the allocation of "immigrant visas." Indeed, Chief Justice Roberts observed in *Trump v. Hawaii*, "Had Congress instead intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end."³³ This seems like a much needed and possibly important legal foothold for future litigation attempting to prevent former President Trump (and future presidents) from violating immigrants' rights.

Other protections for immigrants' due process rights should not be ignored or forgotten. The rules surrounding access to legal counsel, use of language interpreters in cases where the immigrant does not understand English, or even where their native language is not Spanish (such as for some indigenous respondents, who may speak Quiche or other language) may be honored more in the breach than in the observation.³⁴ Nevertheless, it is important to work into future immigration reform efforts provisions that strongly support such rights to ensure due process is satisfied. Also, the future provisions must have "teeth" or punishment imposed against agencies where immigrants' rights are violated. Now, the statute and attendant regulations have a weak privilege to counsel of one's choice, as

32. See 8 U.S.C. §1152(a)(1)(A) (providing that "no person shall receive any preference or priority or be discriminated against in the issuance of an *immigrant visa* because of the person's race, sex, nationality, place of birth, or place of residence") (emphasis added).

33. *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018).

34. I have personally observed particular immigration courts struggle and fail to accommodate such respondents in a manner consistent with due process and fairness, often with disastrous results for the respondents.

well as interpreters, but no consequences are built-in to the rules and regulations ensure that these important rights are protected.³⁵

III. FINDING SOURCES FOR CHANGE IN PROPOSED LEGISLATION

Just as the current cases relating to immigration law have a lot to offer in terms of providing insight for a better possible future for immigration law, another important source of ideas for change is found in past efforts at proposed legislation. A full recitation of the multitude of legislative proposals surrounding comprehensive immigration reform could take volumes. In addition, President Biden has his own agenda and proposal. Suffice it to say, the recent (partially successful but ultimately failed) attempt at such comprehensive reform, S.744, was in 2013, and had many commendable aspects.³⁶ Many of these could be replicated to lead to a reorientation or reframing of current immigration law. Although the bill represented a “merits-based” attempt at reform and was soundly criticized as failing to protect family-based immigration, many provisions in the bill, such as the inclusion of a DREAM Act-type mechanism, protections for asylees, victims, and others should be highlighted and replicated.

For example, S.744, entitled the “Border Security, Economic Opportunity, and Immigration Modernization Act,” provided for a mandated right to appointed counsel at no cost to the immigrant for certain “vulnerable” populations. In the version ultimately passed by the Senate, the bill would have authorized counsel in certain circumstances, provided immigration judges the opportunity to make more discretionary, case-by-case

35. See 8 USC §1362 (Right to counsel. “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government by such counsel, authorized to practice in such proceedings, as he shall choose”). In addition, there is a regulation that provides that “any person acting as an interpreter in a hearing shall swear or affirm to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath or affirmation shall be required.” 8 CFR 1003.22; see also 8 CFR 1240.5.

36. Another example pointed out by Prof. Shoba S. Wadhia is S. 2611, titled, the “Comprehensive Immigration Reform Act” that passed the full Senate in 2006. Prof. Wadhia, now at Penn State, worked during her time on the Hill significantly on this bill.

determinations relating to removal, and streamlined the asylum program. The bill contained the following language providing for counsel (at the expense of the government "if necessary") in the following cases:

- (1) "to represent an alien in a removal proceeding who has been determined . . . to be an unaccompanied alien child,"
- (2) "is incompetent to represent himself or herself due to a serious mental disability . . . [under] section 3(1) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(1)), or
- (3) "is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings." S.744, section 3502.³⁷

Advocates have raised legitimate questions as to whether this provision goes far enough. It does not. The laudatory goal of providing representation to "vulnerable" populations of immigrants leaves many questions unanswered. Potentially, the definition of "vulnerable" could be interpreted so narrowly as to limit the class of non-citizens so that almost no one could qualify for appointed counsel. Even if one were to fall within one of the three categories, there is the problem of navigating the panoply of immigration remedies on one's own without counsel that any indigent respondent faces. As argued by Matt Adams in his insightful article, "Advancing the 'Right' to Counsel in Removal Proceedings," although the majority of respondents are unrepresented, the current "morass" of immigration laws is difficult to navigate even for those fortunate enough to be able to afford counsel or receive pro bono assistance. Mr. Adams makes compelling arguments for a right to counsel in the immigration context based on analogous Supreme Court cases such as *Lassiter*

37. This section is entitled, "IMPROVING IMMIGRATION COURT EFFICIENCY AND REDUCING COSTS BY INCREASING ACCESS TO LEGAL INFORMATION."

v. Department of Social Services, 452 U.S. 18 (1981), *Mathews v. Eldridge*, 424 U.S.319 (1976), among others.

Another important aspect of S.744 was its attempt at revising certain current asylum procedures. The one-year bar to asylum was rescinded. In addition, the bill eliminated some of the barriers to family reunification and authorized USCIS officers to conduct full asylum interviews at or near the border and also to grant such cases. Such a streamlining of the process is a much-needed development, as we now face historic backlogs both in terms of asylum affirmative applications as well as in the immigration courts. In addition, the president may designate certain persecuted groups with common characteristics refugee status. Unfortunately, since 2013, there has been a variety of attacks on the asylum process perpetrated by the former administration, including but not limited to the Migrant Protection Protocols (MPP) which would have asylum seekers await their hearings in Mexico, despite passing a credible or reasonable fear interview, as well as 3rd country transit bar, not to mention the bars to entry placed on virtually all asylum seekers under the pretext of COVID-19

Other aspects of S.744 would have strengthened protections for those suffering from workplace abuse and human trafficking. The provisions in this regard of the bill expanded the availability of the U-visa for certain victims of crime to those who were victims of workplace abuse, slavery, or other serious violations of workers' rights. The bill also would increase penalties for violations of human smuggling and includes a pilot program to combat child trafficking. The bill also provided for protections for J-visa recipients (exchange visitors), as well mandated disclosures to immigrants of the terms of their employment, bonds, and audits of exchange programs. All of these are much-needed reforms. They evidence a step in the right direction to reorienting the immigration laws to protect the people coming to the United States, enable and effectuate enforcement against those who prey on immigrants, and allow for greater efficiencies and streamlining of the immigration process.

In evaluating proposals for legislation, it is important also to be aware of President Biden's "Plan for Securing our Values as a

Nation of Immigrants.”³⁸ In his plan, several points deserve special recognition. The first is the “reassertion” of America’s commitment to asylum-seekers and refugees. The plan provides for a surge of asylum officers who will effectively review the cases of recent border crossers and keep cases with positive credible fear determination within the Asylum Division of USCIS, so they are not referred directly to immigration judges. This provision mirrors the proposal in the 2013 bill and also is important to prevent duplication and inefficiencies in the system, streamline the process, and deal with the over 1 million case backlog we currently are experiencing. Importantly, the Biden plan “restores asylum eligibility to domestic violence survivors,” as a way to take on head-on the partisan ruling of former Attorney General Sessions which put roadblocks in the way of such claims through his partisan decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), among other cases.

In addition, Biden’s plan proposes to double the number of immigration judges, court staff and interpreters.³⁹ He also proposes ending “for-profit” immigration detention centers and increasing the number of refugees we welcome into the United States.⁴⁰ The plan also includes much needed expansion of the rights of farm workers and domestic workers, although the details are unclear. In addition, the plan expands protections for undocumented immigrants reporting labor violations, as well as increasing the availability of visas for domestic violence survivors.⁴¹

The “Biden-Sanders Unity Task Force Recommendations”⁴² is another document that outlines changes to immigration law and puts us on a path to a more humane, efficient, and rights-oriented immigration system. It is a 110-page document that does not solely relate to immigration, but a number of sections relate directly to our question, “What Should Immigration Law

38. *The Biden Plan for Securing our Values as a Nation of Immigrants*, JOEBIDEN.COM, <https://joebiden.com/immigration/>.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Biden-Sanders Unity Task Force Recommendations*, JOE BIDEN <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

Become?” and address head-on how the law should be changed to deal with specific restrictions and policies perpetrated by the former president’s administration. In a section entitled, “Undoing the Harms of the Trump Administration and Righting the Wrongs,” the document proposes several beneficial steps in the right direction. To highlight just a few, the document proposes to maintain Deferred Action for Childhood Arrivals (DACA), and support the American Dream and Promise Act, as well as streamline the process for DACA recipients.

It is beyond the scope of this article to discuss every proposal in the Biden-Sanders plan, but it is important to emphasize that the plan seeks to formulate reform measures in terms that address the changes perpetrated upon the field by the Trump administration. This approach is needed because wholesale change in the future will not be possible if it does not recognize ways to undo and redo the Trump administration’s immigration restrictionist goals and policies, for example, the Border Wall, the Travel Ban, asylum, and refugee restrictions, curtailing lawful immigration, use of the Attorney General to restrict claims, to name just a few.

The Biden-Sanders plan also is most important in its recognition of the need for an Article I immigration court, as opposed to the then-current state of affairs, which provides that immigration judges are merely Department of Justice employees and thus under the direct control of the Attorney General. The Federal Bar Association, for example, has endorsed transitioning to an Article I immigration court, arguing that establishing such a court would “substitute for an overstuffed, bloated bureaucracy a new structure, modeled on the federal courts, their case management expertise, and their demonstrated record for delivering prompt, effective justice. Cheaper, faster, better justice is possible through an Article I immigration court.”⁴³ Other groups, such as AILA, the ABA, and even the immigration judges’ union have been staunch proponents for such a change.⁴⁴

43. Policy Priorities, FED. BAR. ASS’N, <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/>.

44. *Alliance for Justice Calls for Independent Immigration Courts*, AILA (Mar. 30, 2020), <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts>; *ABA Again Calls for an Independent Immigration Court*, ABA (July 23, 2019),

IV. FINDING SOURCES FOR CHANGE IN OTHER FIELDS OF LAW

A final category to utilize in thinking about much-needed changes to immigration law concerns other fields, their remedies, and procedures. Any discussion of other fields must be connected to the introductory remarks at the beginning of this article regarding the “paradigms” or inherent starting presuppositions behind any conception of immigration law. The most obvious development has been the focus on administrative law, and specifically the APA, as a source of remedies against federal agencies that act arbitrarily and capriciously, contrary to law, in violation of the Constitution or in other ways that violate the rights of immigrants. Other sources of law also have special relevance to immigration law. Criminal law and its procedures and protections may be instrumental in providing important ideas for arguments to expand immigrants’ rights. Scholars have made connections between the two fields and argued for a greater applicability of criminal protections on the theory the consequences of deportation and detention are just as (and may even be more) severe than a criminal sentence.⁴⁵ In addition, the U.S.’ international legal obligations are already binding under certain circumstances on immigration agencies, especially as they relate to asylum and other persecution-based forms of relief. The recent emphasis upon (“turn to”) administrative law in cases such as *Regents v. DHS* and *Trump v. Hawaii*, among others, should be noted. Some would argue that immigration law itself is a sub-species of administrative law, but such an assumption is inherently misleading. It may be surprising that immigration judges are not Administrative Law Judges (ALJs) and thus not subject to the APA, at least according to case law rejecting such claims. In addition, as noted by several immigration scholars, the government has used Administrative Law principles to attempt to shield agency decisions from judicial review, under cases such as *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,

https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july_2019_washington_letter/immigration_article_0719/.

45. See e.g., the excellent scholarship of Alina Das, Christopher Lasch, César Cuauhtémoc García Hernández, Bill Ong Hing, Hiroshi Motomura, Daniel Morales (at the University of Houston Law Center), among others, such as Matt Adams, at the Northwest Immigrant Rights Project.

Inc., 468 U.S. 837 (1984), and *Heckler v. Chaney*, 470 U.S. 821 (1985)⁴⁶ Justice Kennedy in a recent case about cancellation of removal and the definition of a Notice to Appear, in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), wrote a powerful concurrence which focused on *Chevron*. In that concurring opinion, he lambasted certain circuit courts of appeals for their “unreflexive deference” and predicted in the future that *Chevron* would be “reconsidered.”⁴⁷

Perhaps the most effective way to expand rights of immigrants is based on the insight, as recognized in a variety of Supreme Court cases, that deportation certainly may be viewed by some as a “punishment” or even banishment from the United States, and with dire consequences for many of the immigrants involved, including in some cases death, injury and/or family separation. As the high court noted in the Sixth Amendment right to effective counsel case, *Padilla v. Kentucky*, “We have long recognized that deportation is a particularly severe “penalty,” . . . but it is not, in a strict sense, a criminal sanction.”⁴⁸ Although removal proceedings are civil in nature, as the court recognized in the Fourth amendment suppression case, *INS v. Lopez-Mendoza*, deportation is nevertheless “intimately related” to the criminal process.⁴⁹ Other ways that criminal law protections can be applied to immigration proceedings, include scholars’ efforts to apply “cruel and unusual punishment” Eighth Amendment protections, strengthen the minimal due process Fifth Amendment right to counsel which currently exists by making it more analogous to the stronger Sixth Amendment right, and recognize that the use of

46. Alina Das, *Unshackling Habeas Review*, 90 N.Y.U. L. REV. 143 (2015), <https://www.nyulawreview.org/issues/volume-90-number-1/unshackling-habeas-review/>; see also Michael Kagan, *Immigration Law Is Torn Between Administrative Law and Criminal Law*, by Michael Kagan, YALE J. ON REGUL. (Feb. 12, 2016), <https://www.yalejreg.com/nc/immigration-law-is-torn-between-administrative-law-and-criminal-law-by-michael-kagan/#:~:text=Notice%20%26%20Comment,Immigration%20Law%20Is%20Torn%20Between%20Administrative,Criminal%20Law%2C%20by%20Michael%20Kagan&text=Share%3A&text=As%20Alina%20Das%20has%20observed,immigration%20decisions%20from%20judicial%20scrutiny.>

47. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018).

48. See *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

49. *Id.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see also *Padilla*, 559 U.S. 356 (2010) (citing *Lopez v. Mendoza*).

civil detention is a deprivation of "life, liberty and property" as those terms are conceived of in the Fifth and Fourteenth Amendments.

Finally, the use of immigration law as a source is at once essential to immigrants and deeply problematic. We have as a landmark precedent, *The Paquete Habana*, 175 U.S. 677 (1900), standing for the proposition that:

"international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."⁵⁰

In that case the Supreme Court opined that "resort must be had to the customs and usages of civilized nations," even in those circumstances where there is no treaty in effect.⁵¹ But the effect of *The Paquete Habana*, is tempered by other considerations, one of which is that some justices have been reluctant to apply international legal norms to actors in the United States. In addition, not all treaties are "self-executing," but require the passage of implementing domestic legislation, such as the Refugee Act of 1980, for the international legal norms to be applied as a remedy in the United States.

That the United States is not a member of several important treaties related to migration and migrants' rights need not hamper efforts at legislative reform, if (as is possible) Congress takes note of these protections and incorporates them into proposed legislation. For example, the United States is not a signatory of a 1990 treaty, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁵² But this instrument contains many provisions which should be and can be incorporated into Comprehensive Immigration Reform. Other examples, include the Domestic

50. *Id.*

51. *Id.*

52. G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>.

Workers Convention (2011); as well as the Convention on the Elimination of All Forms of Discrimination against Women (1979).

The United States is a member of other important treaties that could be much better implemented in more effective and powerful ways by domestic legislation. Examples of this group include: the 2002 Optional Protocol to the Convention on the Rights of the Child (U.S. is a state party); the 1987 U.N. Convention Against Torture ("CAT") (same); as well as the 1967 Protocols relating to the Status of Refugees (same). Other examples of important treaties that can be reviewed for further ideas about ways for protections would include: the 1969 International Convention on the Elimination of All Forms of Racial Discrimination (U.S. does not accept competence under Art. 14), and the 1976 International Covenant on Civil and Political Rights ("ICCPR", ratified by the United States but with a number of reservations).

V. CONCLUSION

This essay has discussed some ways the former administration has transformed the field of immigration law, and ways that these changes may be fixed (and reimagined) in a new administration. Necessarily, this is not an exhaustive study. This essay took as its starting point several of the most visible (and a few not so visible) changes in the last few years. The legal landscape has been twisted in ways that attorneys and advocates could scarcely have recognized five or ten years ago. Some of the changes were anticipated. But the extent of the damage to immigrants' rights and protections has been so pervasive that it could not have been predicted.

Given my thesis *ab initio* that protection of others is the natural starting point, I offer the following proposal for a new system of adjudication in the immigration courts. Track 1 would encompass immigrants without any criminal records and would also be expanded to include no one with any "serious" misdemeanors (e.g., no violent crimes) nor felonies. In addition, there should be some kind of statute of limitations on older convictions to allow for cases where the convictions happened years ago and rehabilitation has been accomplished. Track 1

respondents would not be subject to detention. This “serious” misdemeanor language will be familiar to everyone from the DACA requirements. Because the vast majority of immigrants are law-abiding and good people, many can be prioritized for relief (and many will qualify for relief available and which we already have with universal competent counsel assisting them to present their claims).

Track 2, on the other hand, could encompass those with violent felonies and/or “serious” misdemeanor convictions. Again, DACA can be a guiding template here. Based on my experience, I believe only a small proportion of all immigrants would fall into Track 2. Therefore, scarce judicial resources will be preserved. By dividing the cases this way, justice will be better served. Right now, there is a *de facto* but poorly run and conceived of track 1 and track 2 “division of labor” driven by a mismanaged system of detained versus non-detained dockets.

By reslicing the pie in a way that honors the fact that the vast majority of immigrants are good people, a better and more humane system can be implemented. This new proposed Track 1 and 2 division also should satisfy those who are concerned with the protection of society from violent offenders, as well as those concerned with the protection of immigrants’ rights. It is not much different than the thrust behind the Obama-era prioritizing of enforcement in terms of ICE and other agencies. This proposal, however, would extend the prioritization (with a thumb on the scale for expediting relief for those “track 1” immigrants) to the immigration courts. Of course, whom to place in which track will be an important and difficult issue, as well as where to draw the line. But with clear rules we will gain a lot more traction over the 1 million-plus cases backlogged, at the moment, and find ourselves granting a lot more much-needed relief to many immigrants and their families.

I will end with a reference to one of my favorite books on legal analysis, Roberto Mangabeira Unger’s pivotal work, *What Should Legal Analysis Become?* There, Professor Unger seeks to reconceptualize “legal analysis” as a whole, and thus his project is necessarily more abstract and generalized than the specific

question before us.⁵³ But his approach is nevertheless instructive. When approaching what any particular field of law should become it is essential to recognize ways that "legal analysis" itself entrenches outmoded ways of thinking. In the present context, we must clarify what the goals of immigration law should be in a way that protects immigrants' rights and people's rights, writ large. They should be founded upon the core values toward immigrants that our nation holds dear: justice, fairness, weighing the equities, allowing for discretion in appropriate cases, family reunification, protecting asylees and other vulnerable groups, ensuring due process, equal protection under law, and allowing for the intelligent and humane use of prosecutorial discretion.

53. ROBERTO M. UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME* (Verso 1996). As a starting point, Unger focuses our attention on the concept of "rationalizing legal analysis" which can be utilized and questioned to broaden our "institutional imagination" to create a more just and fair legal system. As he says, "[t]he initial step is to show how the original genius of contemporary law . . . has remained caught within the constraints imposed by institutional structures and superstitions." (p.2) Unravelling those "institutional structures and superstitions" therefore is key to determining how to proceed to revolutionize immigration law and address its deficiencies, current limitations, and inequities. What he says next about legal analysis generally could not be more apt to the plight of immigration law at the moment: "A summary statement of our troubling predicament . . . is that we no longer have available to us a credible account of structural change." (p.3). Unger champions a kind of "democratic experimentalism" (p.7) which is lacking from views about reform and efforts to change or reinterpret the law. For him, "[o]ne of the enemies of democratic experimentalism is institutional fetishism." (p.7). In many fields of law, I am sure we would find it easy to catalogue instances of such "institutional fetishism," but in immigration law especially lately we find ourselves more and more mired in such fetishism, resulting in the miasma of human rights abuses, due process violations, and a lack of concern for humanity.

