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Index

Refugee-turned-lawyer helps others start the path in Portland

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By Casey Parks

The Oregonian/OregonLive

***** 2 p.m. *****

She came to the airport as a lawyer. She soon became a ringmaster, a one-stop welcome committee, legal representative and menu-planner.

Chanpone Sinlapasai ushered the TV news crews to one side, volunteer greeters to another. She lined bags of donations against a partition outside the arrivals gate. She tapped out messages on her cell phone, her fingernails the same shade of pale pink as her iPhone.

She looked up from her phone and waved her arms. Five Iraqi refugees had arrived.

"This family has nobody," Sinlapasai told a crowd of 30 people waiting to greet the newcomers. "We are their family now."

The Iraqis had spent the past three years in a Turkish refugee camp. Their flight had been delayed by President Donald Trump's executive order barring citizens of seven majority-Muslim countries and all refugees.

Refugees have settled in the United States since the end of World War II. Most came silently, rebuilding their war-torn lives with the help of a few religious nonprofits. Trump's executive order changed that.

And it changed Sinlapasai.

"Welcome," Sinlapasai told the bleary-eyed travelers. "We'll take care of you from now on, OK?"

The Iraqi boys looked like other Portland middle schoolers in faded haircuts, tapered pants and plastic frame glasses. The father wore a white button down tucked into jeans. The mother's maroon headscarf was the only hint of the lives they led before.

Volunteers handed over chocolate, new Nike tennis shoes and bags of food. Two news crews stepped forward at the arrivals gate, microphones pointed.

"What were his concerns after President Trump put the travel ban into effect?" one anchor asked the Iraqis' interpreter. "Can you ask him what he wants to do in the U.S.?"

The boys dropped their bags and blinked in disbelief. America, after all.

"OK," Sinlapasai said. "It's been a long day for them. We're going to take them downstairs."

As a Catholic Charities van drove the Iraqis toward their new home, Sinlapasai reached into an oversized purse and dug out two zip-top plastic bags. Inside each was a wallet-sized, black-and-white portrait.

Sinlapasai was 4 when her family fled the Communist takeover of Lao. They crossed the Mekong River into Thailand and spent 18 months in a camp with open sewers and little food. Immigration officials shot the photographs just before Sinlapasai's family left Thailand.

For decades, the 41-year-old had kept the pictures hidden. After the executive order, she decided she needed to show them.

She held the photographs up for the volunteers to see.

"This is me," she said. "And this is my mother. This is why I do what I do."

***** 3 p.m. *****

Friends describe Sinlapasai as a 5-foot-tall tornado, an Energizer bunny and a ninja. Her long brown hair flows when she buzzes through the airport. Her smile is big and constant.

Sinlapasai grew up near California's Bay Area and moved to Oregon two decades ago to attend Lewis & Clark Law School. She spent a few years working at nonprofits then started her own firm, Marandas Sinlapasai, with a partner.

For years, friends begged Sinlapasai to join the Catholic Charities' airport greeting team.

Sinlapasai always said no. She was too busy with her firm, a small outfit that specializes in immigration cases. She had young lawyers to mentor and three children to raise. Sinlapasai offered to do paperwork or write grant applications, but every time the airport came up, Sinlapasai had an excuse.

After the Iraqis left, Toc Soneoulay-Gillespie reminded Sinlapasai of her reluctance.

"I told you, if you go once, it's going to be addicting," she said.

Sinlapasai smirked and checked her watch -- the same pink as her phone and nails. It was 3 p.m. She planned to meet a Sudanese woman arriving at 6 p.m. and a Bhutanese family coming at 8.

"Food?" she said.

She led the small group to the Bangkok XPress cart. A few airport workers nodded at Sinlapasai, recognizing the woman who seemed to spend as much time there as they did.

For much of February, she had set up a makeshift office in the food court. Her voice was loud and effusive, her table always covered in desserts.

At Bangkok XPress, Sinlapasai ordered and paid for everyone's food, a meal that included almost everything on the menu.

"We got three noodles, really?" Soneoulay-Gillespie said when the food appeared.

"We ate dirt growing up," Sinlapasai said. "Rice and dirt."

They spent the next few hours eating. They finished the noodles then refilled cups of pickled jalapenos four times.

Between bites, Sinlapasai worked the phones. A family coming in didn't have pillows. The Bhutanese people arriving that night needed groceries.

Sinlapasai cleared the table then plucked chocolates and steamed buns from her purse. The truth was even rice had been a luxury in the camp. Many days, she didn't eat. Once, her family split a single egg.

"Eat," she told the volunteers.

The group had polished off only a few chocolates before Sinlapasai went in search of more food. She drank a Thai iced tea, a coffee and an espresso. She bought cookies and half a dozen Blue Star donuts to share with the two volunteers who remained.

"Food is love," she said.

She spread the desserts out and eyed her phone again. She had been glued to the device since Trump passed the executive order. But her husband, Rick Okamura, had made her promise to turn it off that night after the airport.

Okamura worked as a lawyer, too. He also kept the house running while Sinlapasai logged 14-hour days at the office and the airport. He picked up the kids from school and cooked dinner. She could spend Friday night at the airport, he said, but he wanted to see her that weekend.

"He said, 'You've got to have one day where it's just the family," she said. "He's turning off the phone until Sunday. We're going to play (Settlers of) Catan for four hours. I told him people need to drop off clothes and donations and might need me."

She sighed. When she was a child, her parents told her the most important thing she could do was find a good husband. They had intended for her to be a housewife, someone who cooked and

made a man happy. They were not pleased, she said, when she announced she was going to college.

"When I told my mom I was a lawyer, she was like, 'Why are you just reading books all the time?'" Sinlapasai said.

Her parents live with her in Southwest Portland, but Sinlapasai doesn't talk to them about what sorts of cases she works on. They are too disturbing, she said.

Her clients are almost always immigrants who've been victimized. That morning, Sinlapasai had gone into the office at 7 a.m. to meet with a sex trafficking victim. Before she left for the airport, Sinlapasai spent six hours talking to clients and reviewing files for child abuse and neglect cases.

"I deal with violent crime, the most vulnerable human trafficking cases," she said. "That's my day job."

It was her immigration law work that first sent her to the airport. Hours after Trump signed the first executive order, clients called to say their loved ones had been stopped in airports across the country. Sinlapasai worried immigrants flying into Portland with visas might face pushback, too.

Sinlapasai joined a group of lawyers who called themselves "the first responders." They spent the days after the executive order standing outside Portland's international arrivals gate, volunteering to help travelers from the seven banned countries.

Most made it through soon after landing, Sinlapasai said. Only an Iranian family sat waiting without word. The patriarch of their family, a legal U.S. resident, had flown back for a visit. His plane had landed, but he still hadn't shown up hours later.

"The wife came to us crying," Sinlapasai said. "The panic had set in."

Sinlapasai called Customs and Border protection officials. She stuttered with nervousness as she pressed for an answer for the family.

After three hours, the man emerged from secondary interrogation. He seemed shaken but insisted Portland workers had treated him fairly.

A week after Trump signed the order, a Seattle judge banned enforcement nationwide of the travel ban. Immigrants from the seven countries were free to travel to the United States again.

Sinlapasai figured she wasn't needed at the airport anymore.

Her friend, Soneoulay-Gillespie, told her she was. Most news crews had focused on the seven countries, the immigration piece of Trump's order. But the refugee program was still in jeopardy.

Trump had announced he would decrease the number of refugees the country would accept this year, allowing in only 50,000 instead of the 110,000 President Barack Obama had projected.

"There's nothing unconstitutional about that," explained Soneoulay-Gillespie, who runs Catholic Charities of Oregon's refugee resettlement program. The president decides each year how many applications to approve.

Trump's decrease meant budget cuts for Portland's resettlement agencies. Without as much federal aid, Soneoulay-Gillespie told Sinlapasai, Catholic Charities would have to lay off some workers.

The nonprofits wouldn't have enough money to help those who had already settled in Oregon. Because refugees, unlike immigrants, do not come with jobs, the nonprofits historically have paid to house and feed refugees their first few months in America. Catholic Charities needed volunteers to fill in the gaps, Soneoulay-Gillespie said.

That night, Sinlapasai pulled out the two photographs, the ones migration officials had taken of her and her mother before they flew to America.

"I know where these families have been," she said. "How they slept on dirt floors and ate nothing, how their only hope was to get someplace where they could sleep without fear of bombs going off or losing another family member."

She said she'd do it.

***** 6 p.m. *****

As the afternoon edged into night, Sinlapasai searched for updates on the next flight she planned to meet. A Sudanese woman was supposed to land soon.

Sinlapasai worried. The woman had been scheduled to arrive the night before. Sinlapasai had spent the day before in the food court waiting, but the woman never showed.

"Her plane keeps posting delays," Sinlapasai said. "She's been in airports for two days. Hopefully she makes it."

Catholic Charities workers tell Sinlapasai which flight numbers to watch, but Sinlapasai doesn't have phone numbers for the refugees coming to America.

At 6 p.m., she grabbed legal papers just in case then led two dozen people to the arrivals gate.

A dark, 6-foot-tall woman sped by the group. Sinlapasai recognized the white tag that all refugees wear and raced after her. She was the Sudanese woman they were there to greet.

"You walked so fast," Sinlapasai told her. "Where were you going?"

"I don't know," the woman said in English. "I see people going, so I go."

The woman, Adout Luwar, grew up in Abyei, an oil-rich area between North and South Sudan, a violent town between two violent countries. She applied for help in 2006. When it didn't come, she fled to Egypt in 2010. She waited in Cairo another six years, going before half a dozen government agencies for vetting.

Volunteers stepped up with bags of gifts.

"This is an um-brell-a," one woman said, enunciating each syllable. "You will need it."

Volunteers suggested a round of photographs. Luwar bent down and whispered to Sinlapasai that she hadn't showered.

"It's OK," Sinlapasai said. She hadn't showered either. "You're beautiful."

Luwar started to speak, but a woman and three boys interrupted. Each was holding a corgi puppy.

"Are you selling them?" Sinlapasai asked.

"Yeah," the woman said. "What are you doing?"

"She just flew here," Sinlapasai said, pointing to Luwar. "She's from Sudan."

"Hmm," the woman said. "Do they have corgis there?"

"Corgi?" Luwar asked, the word and everything else unfamiliar.

***** 7 p.m. *****

The crowd headed for the elevators to deliver Luwar to her car. Sinlapasai took the stairs. On the way up, she stopped to help a Latino man with his luggage. Afterward, she raced back down and skipped toward the food court.

Outside Bangkok XPress, an airport worker was cleaning the table Sinlapasai had left behind.

"Let us clean it," Sinlapasai said.

"Just give us a rag and some Clorox, we can do it," Soneoulay-Gillespie said.

"We don't use Clorox at the Portland Airport," the man said. "Let me ask you something. Do you work for this business?"

He pointed to the Bangkok XPress. Sinlapasai explained that she was a refugee and a lawyer helping people settle in the country.

The maintenance worker eyed her with suspicion. Plenty of refugees worked at the airport. He knew none who ran their own law firms.

He moved on to another table and Sinlapasai pulled out the wallet-sized photographs again. Hers showed a serious, 4-year-old child with a fresh haircut.

"I almost died in the camp," she said. "I had worms, malaria. It was the kindness of strangers, an American doctor, who saved me at the last minute."

In the photo, her tiny hands clutched a sign with her name and identification number written in chalk. The resettlement process had defined some of the most fundamental things about her. Government officials had assigned her a birthday -- May 5, the same one they gave many of her family members -- and accidentally give her a new name.

The officials didn't know how to spell Chan Peng Odomsouk, the name her parents had given her. So they approximated. She'd been Chanpone Sinlapasai ever since.

Her parents told her to accept the name and the birth date. It was best to assimilate, they said. Like many Lao elders, Sinlapasai's parents never described themselves as refugees. The word had too many bad connotations, suggested they were poor and vulnerable, rejects from their own countries.

Sinlapasai had never shied away from the word, but she hadn't proclaimed it either. The night Trump signed executive order, Sinlapasai watched news coverage of the travel ban from her Lake Oswego law office. She saw the stranded refugees on TV, and she remembered the way dirt tasted.

That night, for the first time, she posted the black-and-white portrait of her younger self on Facebook.

"Refugee from Laos," she wrote.

***** 8 p.m. *****

Sinlapasai stashed the photographs and worked the phones again. She needed someone to stop by Costco's ethnic foods section. Catholic Charities had found plenty of volunteers to come to the airport, but needed people to donate or shop for food familiar to the new arrivals.

"We ate dog food when we first came to America," she said. "My grandma was like, 'I'm going to get cereal for everybody.' She came back and said, 'I got the biggest bag.' It had a picture of a dog on it. That's what we were taught to do. When you get cereal, look for cartoons. In our countries, you don't go and buy food for your animals. None of us could read. We ate it."

She checked her watch: It was time to meet the Bhutanese family.

On her way to the gate, Sinlapasai stopped to buy a Coke, candy and a pickle. She needed one final sugar rush to push through.

About 75 people formed a semicircle outside the terminal. Some admitted they didn't know where Bhutan was. An Egyptian woman who had driven from the Coast to welcome strangers held a sign: "All Americans are immigrants."

Bhutanese ethnic minorities were pushed out of their home country in 1990, but the United States began accepting them less than a decade ago. The odds remain slim: Of 21 million refugees worldwide, only 1 percent make it out of camps.

The family of four coming that night had spent 25 years in a camp in Nepal, living on dirt long before even a distant hope existed.

They arrived just after 8 p.m. Sinlapasai's was the first face they saw. She cheered and led the volunteers in saying "Welcome to America" in unison.

The crowd squeezed together for a group portrait. The Bhutanese family stood in the center but only the mother smiled. The father and kids looked from camera to camera, stunned.

Sinlapasai stood back for a moment. Bhutan is, like Laos, an inland country in South Asia. She knew what their lives must have been like. The family owned little to nothing, but they arrived wearing nice clothes, red jackets and new floral shirts.

Sinlapasai smiled in recognition. Migration officials had given her family dress clothes for their journey 37 years ago. She thought of her mother, the way American cosmetology students had shown up in the camp just before her family left. The students permed her mother's hair, but the chemicals left her with more of a dark poof than curls.

Sinlapasai cheered and clapped, but she knew how scary the airport must be. For refugees, landing in the United States may be the best day of their life. It can also be among the most traumatizing. So much is new and inscrutable.

The day Sinlapasai's family flew from Thailand to Los Angeles, the flight attendants served hamburger. Sinlapasai cried in fear when she saw it. Her entire life, she had eaten only rice.

A pastor had sponsored her family, but when they arrived, he was not at the airport to greet them. No one was. Her family wandered the terminal looking for someone who spoke Thai or Lao. No one did.

"We were alone," she said.

She was proud of being a refugee but she avoided the airport pick-ups for so long because watching one reminded her of the traumatic experience, she said. She looked at the Bhutanese refugees, and she saw her mother, she saw herself.

Watching the Bhutanese family, Sinlapasai felt like crying. The executive order made her feel, again, rejected by a country.

The community had shown her otherwise. The refugees who came that night weren't alone. They had the crowd. And they had Sinlapasai.

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Epilogue:

Last week, President Donald Trump issued a new executive order again banning refugees from resettling in the United States for 120 days. Catholic Charities was forced to cut its budget and lay off staff. For the foreseeable future, Sinlapasai will not be meeting refugees at the airport.

Vera INSTITUTE OF JUSTICE

April 7, 2017
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New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation

New York, NY – The Vera Institute of Justice and partner organizations today announced that detained New Yorkers in all upstate immigration courts will now be eligible to receive legal counsel during deportation proceedings. The 2018 New York State budget included a grant of $4 million to significantly expand the New York Immigrant Family Unity Project (NYIFUP), a groundbreaking public defense program for immigrants facing deportation that was launched in New York City in 2013..

New York has become the first state to ensure that no immigrant will be detained and permanently separated from his or her family solely because of the inability to afford a lawyer. Without counsel, a study shows, only 3% of detained, unrepresented immigrants avoid deportation, but providing public defenders can improve an immigrant's chance of winning and remaining in the United States by as much as 1000%.

"All New Yorkers deserve to have a fair shot in court, and this funding will help thousands of immigrant families receive due process and the chance to remain together," said Oren Root, director of Vera's Center on Immigration and Justice. "This expansion would not be possible without the critical support and leadership of the Independent Democratic Conference (IDC), which delivered on its promise to protect New York immigrant families. Vera especially thanks

Senator Jeffrey Klein, the IDC leader, and all members of their conference, particularly Senators Marisol Alcantara, Jose Peralta, and Jesse Hamilton. We look forward to working with Governor Andrew Cuomo in protecting all immigrant families in New York State."

"The New York Immigrant Family Unity Project provides a valuable service for immigrants who face deportation without fair representation," said IDC Leader Jeff Klein (D-Bronx/Westchester). "The work done by NYIFUP is so critical that the Independent Democratic Conference is proud to award $4 million of a historic $10 million legal aid fund to its work ensuring that immigrants have legal counsel. No person should face a legal proceeding without an attorney, and no family should be ripped apart because they couldn't afford counsel. The Independent Democratic Conference is proud to knock down that financial wall so that NYIFUP can protect our immigrant communities."

NYIFUP has been operating in two of the four affected upstate immigration courts on a limited basis since 2014 with funding from the New York State Assembly and the IDC. In the just-ended fiscal year, the funding was sufficient to meet less than 20% of the need upstate. In New York City, NYIFUP has been representing all financially eligible, otherwise unrepresented detained immigrants since 2014 with funding from the City Council.

Research has shown that keeping immigrant families together saves money for the state's taxpayers in increased tax revenues and less need for families left behind to draw on the social safety net. New York State employers also receive significant economic benefits from avoiding the loss of productivity when their employees are detained and deported, and the consequent need to identify and train replacement workers.

The first public defender program in the country for immigrants facing deportation, the NYIFUP Coalition includes Vera, the Immigration Justice Clinic of Cardozo Law School, the Northern Manhattan Coalition for Immigrant Rights, Make the Road New York, and The Center for Popular Democracy. The Erie County Bar Association Volunteer Lawyers Project is a NYIFUP Coalition partner upstate. Brooklyn Defender Services, the Legal Aid Society, and The Bronx Defenders are Coalition partners in New York City.

Several cities and states, including Los Angeles, San Francisco, Chicago, Washington, D.C., and

California have recently begun efforts to design similar programs.

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Statements from NYIFUP Coalition Partners:

"Unprecedented times call for visionary measures like the NYIFUP program. And as mothers, fathers, sisters, and brothers from our communities are increasingly pulled into a growing detention and deportation system, our New York elected officials are doing what is right and just by providing free court-appointed counsel for detained immigrants through this groundbreaking program." – Angela Fernandez, Esq., Executive Director, Northern Manhattan Coalition for Immigrant Rights

“For decades, there has been a huge need for public defenders for detained immigrants in upstate New York. We thank our New York State elected officials helping us to provide this crucial service that will fill that gap and keep many families together.” – Sophie Feal, Director, Immigration Program, Erie County Bar Association Volunteer Lawyers Project

“We applaud New York for becoming the first state in the nation with a fully funded public defender system for all detained immigrants statewide. As a result of this investment in due process, no New York family can have a loved one locked and deported simply because they cannot afford a lawyer.” – Professor Peter L. Markowitz, Director, Immigration Justice Clinic, Cardozo School of Law

"At a time when immigrant families are increasingly endangered, all immigrant New Yorkers ensnared in the deportation machine must have access to legal representation. The New York Immigrant Family Unity Project has been an enormous success in New York City—dramatically increasing the odds of families being able to remain together and bringing them peace of mind—and our members have demanded it statewide as part of our Immigrant Opportunity Agenda. NYIFUP's statewide extension is an important victory for immigrant New Yorkers that will make a big difference for our communities." – Javier H. Valdés, Co-Executive Director, Make the Road New York

"The statewide expansion of NYIFUP will stop thousands of unjust deportations and ensure due process for immigrants targeted by harsh immigration enforcement policies. New York is setting a powerful example that we hope other state and local governments will follow." – Ana Maria Archila, Co-executive Director, Center for Popular Democracy

“With this funding, New York has sent a powerful message and set the standard for the rest of the nation. No person should face detention and deportation alone, without legal advice or counsel through a frightening process in which a person's family or even her life may be at stake. We congratulate the New York State leaders who have provided a basic level of due process that will keep more New York families together." – Andrea Saenz, Supervising Immigration Attorney, Brooklyn Defender Services

“In the wake of increased ICE enforcement statewide, immigrant communities need access to legal advice and representation—especially because a right to counsel in deportation proceedings is not one guaranteed by law. We applaud the Governor and Legislature for allotting funds for this exact purpose and hope New York continues to make strong investments for initiatives that help keep families together.” – Adriene Holder, Attorney-in-Charge, Civil Practice, The Legal Aid Society

The Vera Institute of Justice is a justice reform change agent. Vera produces ideas, analysis and research that inspire change in the systems people rely upon for safety and justice, and works in close partnership with government and civic leaders to implement it.

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Is It Possible to Resist Deportation in Trump's America?

Living under draconian state laws, Arizona activists honed an effective strategy for keeping undocumented immigrants in the country. Can the same tools still work today?

By MARCELA VALDES MAY 23, 2017

On Monday, Feb. 6, two days before Guadalupe García Aguilar made headlines as the first person deported under President Donald Trump's new executive orders on immigration, she and her family drove to the modest stucco offices of Puente, an organization that represents undocumented immigrants. It was a postcard day: warm and dry, hovering around 70 degrees, the kind of winter afternoon that had long ago turned Phoenix into a magnet for American retirees and the younger, mostly Latin American immigrants who mulch their gardens and build their homes.

García Aguilar and her family — her husband and two children — squeezed together with four Puente staff members into the cramped little office that the group uses for private consultations. Carlos Garcia, Puente's executive director, had bought a fresh pack of cigarettes right before the talk; he needed nicotine to carry him through the discomfort of telling García Aguilar that she would almost certainly be deported on Wednesday. Until that moment, she and her family had not wanted to believe that the executive orders Trump signed on Jan. 25 had made her expulsion a priority. She had been living in the United States for 22 years, since she was 14 years old; she was the mother of two American citizens; she had missed being eligible for DACA by just a few months. Suddenly, none of that counted anymore.

García Aguilar's troubles with Immigration and Customs Enforcement (ICE) began in 2008, after police raided Golfland Sunsplash, the amusement park in Mesa, Ariz., where she worked. She spent three months in jail and three months in detention. (ICE booked her under the last name "García de Rayos.") In 2013, an immigration court ordered her removal. Yet under pressure from Puente, which ultimately filed a class-action lawsuit contending that Maricopa County's work-site raids were unconstitutional, ICE allowed García Aguilar (and dozens of others) to remain in Arizona under what is known as an order of supervision. ICE could stay her removal because the Obama administration's guidelines for the agency specified terrorists and violent criminals as priorities for deportation. But Trump's January orders effectively vacated those guidelines; one order specifically instructed that "aliens ordered removed from the United States are promptly removed." García Aguilar, who had a felony for using a fabricated Social Security number, was unlikely to be spared.

Orders of supervision are similar to parole; undocumented immigrants who have them must appear before ICE officers periodically for "check-ins." García Aguilar's next check-in was scheduled for Wednesday, Feb. 8. She had three options, Garcia explained. She could appear as usual and hope for the best. She could try to hide. Or she could put up a fight, either from a place of sanctuary or by appearing for her check-in amid media coverage that Puente would organize on her behalf. Whatever she decided, he said, she would be wise to spend Tuesday preparing for separation from her children.

The family was devastated. García Aguilar left the meeting red-faced with tears.

The next day a dozen activists gathered at Puente to strategize for García Aguilar's case. After reviewing the logistics for the usual public maneuvers — Facebook post, news release, online petition, sidewalk rally, Twitter hashtag, phone campaign — they debated the pros and cons of using civil disobedience. In the final years of the Obama administration,

activists in Arizona had come to rely on "C.D.," as they called it, to make their dissatisfaction known. Puente members had blocked roads and chained themselves in front of the entrance to Phoenix's Fourth Avenue Jail. Yet Francisca Porchas, one of Puente's organizers, worried about setting an unrealistic precedent with its membership. "For Lupita we go cray-cray and then everyone expects that," she said. What would they do if Puente members wanted them to risk arrest every time one of them had a check-in?

Ernesto Lopez argued that they needed to take advantage of this rare opportunity. A week earlier, thousands of people had swarmed airports around the country to protest the executive order barring citizens from seven Muslim-majority nations. "There's been a lot of conversation about the ban, but for everything else it's dead," Lopez said. "Nobody is talking about people getting deported. In a couple of months, it won't be possible to get that media attention."

Garcia wasn't sure a rally for García Aguilar would work. "We're literally in survival mode," Garcia told me that week. It was too early to tell how ICE would behave under Trump, but they were braced for the worst. Nobody had a long-term plan yet. Even as he and his staff moved to organize the news conference, his mind kept running through the possibilities: Would it help García Aguilar stay with her family? Would it snowball into an airport-style protest? Would it cause ICE to double down on her deportation? He decided it was worth trying.

Shortly before noon on Wednesday, García Aguilar and her lawyer, Ray Ybarra Maldonado, entered ICE's field office as supporters chanted *"No está sola!"* (You are not alone!) behind her. Telemundo, Univision and ABC shot footage. Supporters posted their own videos on Twitter and Facebook. ICE security warily eyed the scene. An hour later, Ybarra Maldonado exited ICE alone. García Aguilar had been taken into custody. All around the tree-shaded patio adjacent to ICE's building, Puente members teared up, imagining the same dark future for themselves. Ybarra Maldonado filed a stay of deportation, and Porchas told everyone to come back later for a candlelight vigil.

That night a handful of protesters tried to block several vans as they sped from the building's side exit. More protesters came running from an ICE decoy bus that had initially distracted those attending the vigil out front. Manuel Saldaña, an Army veteran who did two tours in Afghanistan, planted himself on the ground next to one van's front tire, wrapping his arms and legs around the wheel. The driver looked incredulous; if he moved the van forward now, he would break one of Saldaña's legs. Peering through the van windows with cellphone flashlights, protesters found García Aguilar sitting in handcuffs. The crowd doubled in size. "Those shifty [expletive]," Ybarra Maldonado said as he stared at the van. ICE, he said, had never notified him that her stay of deportation had been denied.

Four hours later, García Aguilar was gone. After the Phoenix Police arrested seven people and dispersed the crowd, ICE took her to Nogales, Mexico. By then images of García Aguilar and the protest were already all over television and social media. She and her children became celebrities within the immigrant rights movement. Carlos Garcia, who was with her in Nogales, told me that Mexican officials stalked her hotel, hoping to snag a photo. "Everyone wanted to be the one to help her," he said. "Everyone wanted a piece." Later that month, her children — Jacqueline, 14, and Angel, 16 — sat in the audience of Trump's first address to Congress, guests of two Democratic representatives from Arizona, Raúl Grijalva and Ruben Gallego.

During the Obama years, most immigrant rights organizations focused on big, idealistic legislation: the Dream Act and comprehensive immigration reform, neither of which ever made it through Congress. But Puente kept its focus on front-line battles against police-ICE collaboration. For Garcia, who was undocumented until a stepfather adopted him at 16, the most important thing is simply to contest all deportations, without exception. He estimates that Puente has had a hand in stopping about 300 deportations in Arizona since 2012.

Ever since Arizona passed Senate Bill 1070, one of the toughest anti-undocumented bills ever signed into law, the state has been known for pioneering the kind of draconian tactics that the Trump administration is now turning into

federal policy. But if Arizona has been a testing ground for the nativist agenda, it has also been an incubator for resistance to it. Among the state's many immigrant rights groups, Puente stands out as the most seasoned and most confrontational. In the weeks and months following Election Day 2016 — as progressive groups suddenly found themselves on defense, struggling to figure out how to handle America's new political landscape — Garcia was inundated with calls for advice. He flew around the country for training sessions with field organizers, strategy meetings with lawyers and policy experts and an off-the-record round table with Senators Dick Durbin and Bernie Sanders in Washington. A soft-spoken man with a stoic demeanor and a long, black ponytail, Garcia was also stunned by Trump's victory. But organizers in Phoenix had one clear advantage. "All the scary things that folks are talking about," he told me, "we've seen before." On Nov. 9, he likes to say, the country woke up in Arizona.

During the 1990s, after President Bill Clinton's administration cracked down on illegal entries at the border near San Diego, migrants crossed the desert into Arizona instead, and the state's undocumented population swelled. In response, the State Legislature passed laws intended to make the daily lives of the undocumented untenable, a legal strategy known as "attrition through enforcement." Arizona cut off access to driver's licenses, to social services, to in-state college tuition; it reclassified the use of a fake Social Security number to gain employment as a felony. In 2007 Maricopa County — an area that includes nearly four million people and the cities of Phoenix, Scottsdale and Mesa — went further, signing what's known as a 287(g) agreement with ICE. At the time, fewer than 70 police organizations in the country had 287(g)s, more than half of them in the Southeast. These agreements give local law-enforcement agencies the power to place immigration detainers inside jails and to assemble task forces to arrest people suspected of being undocumented while out on patrol.

That year Arizona's undocumented population reached roughly half a million people. In Maricopa County, Sheriff Joseph Arpaio aimed to make that number plummet. He directed police to conduct "crime suppression" sweeps in predominantly Latino neighborhoods and to raid businesses. During sweeps, police would often detain Latinos for minor offenses like honking a car horn, then demand proof of legal residence.

Maricopa County voters appeared delighted with his tactics; for a time, "Sheriff Joe" was the most popular elected official in the state. Support for him may have been abetted by Arizona's dismal economy. Phoenix had been one of the centers of the building boom; in 2006, business owners in the state said they needed a Mexican guest-worker program to meet the demand for cheap manual labor. But in the spring of 2007, Arizona's housing market began to crater. In 2008, the state had 117,000 foreclosures, the third-highest number in the country.

For readers of Mexican-American history, this sudden hardening of attitudes toward the undocumented was unsurprising: America has long maintained a love-hate relationship with Spanish-speaking labor. During the Great Depression, at least one million Mexican nationals and Mexican-Americans were forcibly repatriated. The following decade, the United States began importing 4.6 million Mexicans to satisfy labor shortages in agricultural fields. But even as that program continued in the 1950s, President Eisenhower's administration sent another one million back to Mexico by truck, train and ship in a roundup known as "Operation Wetback."

Near Miami, Ariz., a young Alfredo Gutierrez and his family escaped capture by camping in the mountains. "One of the reasons they got away with repatriation and they got away with Wetback was because there was no resistance," Gutierrez, who later became an Arizona state senator, told me. "Everyone of that era will tell you how they hid." But when Arpaio came for the undocumented, many of them argued for their right to stay. This transformation was due, in great part, to Puente.

During its early years, Puente planned protest marches, organized boycotts against local businesses that supported Arpaio and ran know-your-rights classes in Spanish. When Arizona Republicans passed S.B.1070 in 2010, Puente and the National Day Laborer Organizing Network began a national boycott that was estimated to cost Arizona over $200 million in canceled business conferences; 100,000 people marched against the bill in Phoenix. T-shirts with the slogan

"Legalize Arizona" popped up in places like Chicago and New York.

Yet these actions did little to stop actual deportations. So in the wake of S.B.1070, Puente adopted a new organizing strategy, setting up neighborhood defense committees, or *comités del barrio*, throughout Maricopa County. "We had to build a base," Garcia explains; five or six leaders planning actions in a room was no longer enough. Through the *comités*, Puente cultivated relationships with hundreds of undocumented people and their families with the goal of piecing together a detailed understanding of how ICE and Arpaio worked. By 2011, it could draw a map tracing the system from arrest to deportation — and mark each point along the way where a person had the possibility of release.

In *comités*, people learned several ways of avoiding deportation. If a police officer pulled them over while driving, they could exercise their constitutional right to remain silent when they were asked whether they were American citizens. If an officer didn't explicitly detain them, they could walk away from their cars to avoid further questions. If officers appeared at their homes, they could demand to see a warrant before opening the door. The *comités* also taught people how to argue their own cases if they were handed over to ICE. (Undocumented immigrants have no right to a public defender but often may plead their cases before an immigration judge.) Puente encouraged its members to hash out legal strategies with a lawyer before they ever were detained — and to sign a copy of a Department of Homeland Security form authorizing media interviews in detention. Because their weekly meetings built genuine social ties, the *comités* also helped mobilize rapid responses to deportation. Members were more likely to show up for one another at protest rallies.

But even as the *comités* were being assembled, there was lingering tension within the broader immigrant-activist community over whether "Dreamers," who had been brought to the United States as minors, should represent themselves separately from the rest of the undocumented population. Undocumented students at Arizona State University had organized themselves into their own tightly knit group, the Arizona Dream Act Coalition (ADAC). Nurtured by other organizers and inspired by the national organization United We Dream, ADAC members came out of the shadows to push Congress to pass the Dream Act and to fight for other legislative exceptions, like in-state tuition. "Early on, a lot of Dreamers wouldn't even talk about deportations," Garcia says. "It was all about the Dream Act, figuring out tuition and those sorts of things, driver's licenses." He was irritated by the Dreamers' tendency to portray themselves as innocent victims, a tactic that opened the door for conservatives to speak of Dreamers with empathy even as they cracked down on their parents as "criminals." (Trump has expressed support for Dreamers.) "A lot us feel like we sort of shot ourselves in the foot," Erika Andiola, ADAC's first president, told me after Trump's election. "Because we started that narrative like 'I was brought here by my parents, not my fault, poor me, I was here as a child' that kind of created blame on our parents."

But after S.B.1070's "papers please" law overcame court battles and went into effect in September 2012 — three months after the Obama administration created Deferred Action for Childhood Arrivals (DACA) — collaborations between Puente and ADAC increased. In Arizona, the police were now obligated to question anyone that they had "reasonable suspicion" to believe was undocumented. As a result, a new wave of undocumented residents, including many Dreamers' parents, found themselves snared in deportation proceedings.

Andiola's own mother, Maria Guadalupe Arreola, was stopped while driving in Mesa in September 2012; the police passed her information along to ICE. Three months later, ICE agents appeared at the family's home and took Arreola away in handcuffs. Andiola responded by flipping open her laptop and filming a video that she posted to social media. Within hours of her mother's arrest, the hashtags #WeAreAndiola and #SomosAndiola were rousing people over Facebook and Twitter. ICE's office in Phoenix was flooded with calls. Messages also poured into the Department of Homeland Security from Washington; hours before ICE had banged on her door, Andiola was hired by an Arizona congresswoman, Kyrsten Sinema.

The next morning, as Arreola sat on a bus headed for Nogales, protesters rallied outside of ICE's Phoenix office,

drawing television crews. The bus driver received a phone call. The bus turned around. A few hours later, Arreola was released with an order of supervision signed by ICE's field-office director, Katrina Kane. Jose Luis Peñalosa, the lawyer who represented Arreola at the time, believes the directive to reverse the deportation must have come directly from Washington.

Under Obama, Andiola told me, the primary strategy had been to create a well-publicized "moral dilemma" between Obama's pro-immigrant rhetoric and his aggressive immigration enforcement — exactly what she had done with her mother. Such dilemmas could provoke ICE to use prosecutorial discretion to stop a removal.

By 2014, however, such maneuvers rarely worked. After Obama won re-election and Democrats lost the midterms, Washington was less susceptible to public shaming. Phone campaigns and news conferences no longer resulted in release. "We got to a point where the legal strategy, the political strategy wasn't working," Andiola said, "so we had to begin using our bodies in civil disobedience." In August 2013, ADAC stopped an ICE bus full of deportees in Phoenix, delaying their removal. In 2014 Andiola and Garcia were arrested together during a hunger strike outside ICE's field office.

By then Andiola had left her leadership position at ADAC, whose board at that time disapproved of its members' involvement in non-Dreamer cases. She also abandoned the job as a congressional staffer, frustrated by the lack of movement on comprehensive immigration reform. When people facing deportation petitioned her for help, as scores did through Facebook, she sent them to Puente, which her own mother joined. "Puente and us were trying to do the same thing with parents," Andiola said. ADAC could no longer help them, but Puente would.

Late on the night of García Aguilar's protest, after the chants stopped and the crowd dwindled to a handful of private conversations, an ADAC veteran asked Andiola how she thought she might handle her own mother's check-in with ICE in May. "I don't know," Andiola snapped. "I don't know. I don't know." A few weeks later at a Puente meeting, when Porchas asked how she was doing, Andiola simply began crying. Andiola walked over the desert into Arizona with her mother in 1998, when she was 11, primarily to escape her father. He was an abusive alcoholic, she said, with a taste for firing guns indoors. He was still alive in Durango; Arreola was terrified of seeing him again.

But after what happened with García Aguilar, Andiola knew that the tactics she used to stave off her mother's deportation in 2013 would no longer work. "He's not going to listen," Andiola said of Trump. "He's not going to care." The week ICE deported García Aguilar, more than 600 undocumented immigrants were picked up in raids across the country. This in itself wasn't unusual: ICE surges had occurred many times during Obama's presidency, including, notoriously, over New Year's weekend 2016. Yet because Trump's presidential campaign had promised millions of deportations, the surge could now be spun as a change in federal policy. Trump himself basked in the news. "The crackdown on illegal criminals is merely the keeping of my campaign promise," he tweeted that Sunday. "Gang members, drug dealers & others are being removed!"

"We've always had these really broad laws so what the history really is about is what the executive wants to enforce," Hiroshi Motomura, a law professor at U.C.L.A., told me, recalling the Palmer Red Raids of 1919 and 1920 and the Japanese internment camps of the 1940s. "Right now, we see the swing of the pendulum back to the harshest possible interpretation." The velocity of this swing is possible because most of the victories achieved by the undocumented during Obama's administration depended upon the use of prosecutorial discretion.

Until the 1970s, immigration officials staunchly denied that they ever allowed any illegal immigrant to remain in the country with their approval. Prosecutorial discretion was exposed only after President Richard Nixon tried to throw John Lennon, the former Beatle, out of the country before the 1972 elections. (Nixon feared that Lennon, who opposed the war in Vietnam, might turn younger voters against him.) In the course of defending Lennon — as the Penn State law professor Shoba Sivaprasad Wadhia details in her book, "Beyond Deportation" — his lawyer, Leon Wildes, unearthed a

trove of documents proving the existence of a hidden "deferred action" program, which allowed immigration officials to use prosecutorial discretion to grant "nonpriority" status to individuals on humanitarian grounds. After Wildes spotlighted the program, he won deferred action for Lennon, allowing one of the world's most famous musicians to stay in the United States long enough to gain lawful permanent residence.

Until Obama came into office, gaining "deferred action" or "nonpriority" status required the help of a savvy immigration lawyer. "I used to call it the invisible sword," Wadhia told me, noting that, outside the DACA program, there has never been any official form to fill out or fee to pay in order to win deferred action. Obama did not invent prosecutorial discretion, but he did make it more transparent and accessible, standing in the Rose Garden to announce how his administration had used it to create a deferred-action program for Dreamers. Trump cannot destroy prosecutorial discretion — it's what allows a district attorney to ignore shoplifting so she can focus on murders — but his administration can pressure ICE officials to resist appeals to exercise it favorably.

And that's exactly what many believe has happened. In the past, when Washington-based officials pressured ICE supervisors to reverse decisions, as seems to have happened in Arreola's case, ICE agents had little recourse. Even immigration judges could find their orders for deportation halted by prosecutorial discretion, as in the case of García Aguilar. But those roadblocks have been undone. "Some 60,000 agents, they have been chafing at prosecutorial-discretion memos," Paromita Shah, the associate director of the National Immigration Project, told me in November.

In fact, García Aguilar's deportation was just the first of many cases in which undocumented residents who were granted nonpriority status found themselves deported when they appeared for routine check-ins. ICE now commonly instructs people to appear for check-ins with passports, which makes their deportation easier. With prosecutorial discretion held out of reach, Garcia told me, "once ICE decides to deport someone, it's nearly impossible to get them out of their grasp."

This is exactly the situation that Andiola feared when we met for coffee on a cold, drizzly day last November. Many of the cases that activists won under Obama, she said, weren't actually closed; they were merely suspended through prosecutorial discretion. "The judge says, 'I'm not saying I'm not going to deport you, but I'm going to put your file away and you can just stay,' " she said. "Those cases are easy to just open up again." In April, ICE officially reopened her own mother's file, sending Arreola a letter ordering her to report for removal at its Phoenix field office on May 3. "Everything's going to change for me, for my life," Arreola told me, weeping, the day after the letter arrived. "*Ay*, I don't want to cry, I don't want to cry, I don't want to cry."

On a blazing afternoon this May, signs lay stacked in piles throughout Puente's large meeting room. Blue hummingbirds on one sign flew through the words "Resist!" "¡Resiste!"; on another, Aztec gods pointed like Uncle Sam over the question "Who you calling illegal, Pilgrim?" Sitting at a plastic table amid the slogans, her hair braided in preparation for a long march through high heat, Maria Castro, an ADAC veteran who had become a Puente organizer, explained to me how Puente's strategy had shifted in the months since the effort to save García Aguilar failed. With a black crayon, she drew six boxes in a row, each symbolizing a stage in the deportation process: police, city court, prison, ICE, immigration court, deportation. Before Trump, she said, Puente had focused its efforts on stopping deportations at ICE or after. But now that Trump had vacated Obama's priorities and reduced the likelihood of prosecutorial discretion, "everything from city court forward no longer works." She drew a red line through five of the boxes, leaving only one unscathed: the initial point of police contact.

After Arpaio fully lost his 287(g) status in 2011 amid allegations of abuse, he allowed ICE to install an agent inside central booking at the Fourth Avenue Jail in Phoenix. Because that agent could question anyone charged with any offense right after fingerprinting, Castro told me, most undocumented people who are arrested in Maricopa County have an ICE hold on them by the time they are arraigned. Last year, ICE requested the detention of 3,483 people in Maricopa County jails. The signs lying around the room were for Puente's May Day march, the theme of which was "ICE out of

Fourth Avenue."

Last fall many assumed that Trump would instigate huge roundups of the undocumented, á la Operation Wetback. Yet so far, the process for deportations in Arizona has mostly followed the pattern set by Arpaio; the undocumented are first caught by the police. (Nationally, however, ICE's noncriminal arrests have increased 157 percent compared to the first four months of 2016.) "Trump doesn't have to do much to deport anyone he wants to because Obama has already built this machinery for him," Garcia told me. Under Obama, 287(g) agreements proliferated. In 2006, ICE was allocated $5 million to implement such agreements. A year into Obama's first term, that number shot up to $68 million, though it was reduced to $24 million in 2014.

Obama also beefed up ICE's power by expanding the Bush-era information-sharing network known as Secure Communities. In 2009, Secure Communities connected only 88 jurisdictions to ICE. By 2013, ICE was linked to every jurisdiction in the nation. What difference does such an expansion make? When Arreola was taken to a police station after her traffic stop in 2012, she refused to answer the questions. *Are you a citizen of the United States? Do you have a Social Security number? Were you born in Mexico?* But when her fingerprints were run through ICE's database, they got a hit. "Be nice," Arreola recalls one officer saying sarcastically in English, as he held up a piece of paper with her mug shot on it. The photo had been taken in 1998, after her first, failed attempted to enter the United States.

Obama deported nearly three million undocumented immigrants, more than any president in American history. For Puente, one of the stranger outcomes of Trump's election is that, for the first time, they stand a chance of dismantling some police-ICE collaborations. Fighting individual deportation cases has become harder, but policy battles have gained traction in Phoenix, where Democrats still hold significant power. "Now it's convenient for Democrats to shame a deportation," Garcia told me.

Under Obama, he speculated, many Democrats were reluctant to oppose any of the president's policies. Under Trump, they saw political advantage in talking about deportations, sanctuary cities and immigrant rights — especially now that the undocumented had found new allies. When Garcia helped assemble the coalition United Against Hate after Trump's victory in November, 56 groups signed up. That same month, Paul Penzone defeated Joe Arpaio at the polls. For Garcia, who began his activism under President George W. Bush, one great lesson of the past eight years is that Democrats are unreliable allies, willing to place other policy goals, like the Affordable Care Act, above the needs of the undocumented. "Neither party is our friend," he said. But the two-party system, he knew, could be played to Puente's advantage as it pushed for Phoenix to do more cite-and-release actions instead of arrests and as it argued for school boards to reduce the number of police officers in schools.

None of these policy advances could save someone already facing deportation. That May Day, García Aguilar's family joined hundreds of protesters for Puente's march from Arizona's Capitol to the Fourth Avenue Jail. García Aguilar's daughter, Jacqueline, and Arreola spoke at the final rally. "With ICE there's now no right or wrong," García Aguilar's husband told me, as the crowd marched around the jail three times, losing more people with each turn. His wife had decided not to hide from ICE, he said, because living on the lam "*no es vida*." But as time goes by, he finds her absence more and more difficult. "Now," he said, "maybe it's better not to show up."

I heard anecdotal accounts that more people were, in fact, choosing the option that his wife had declined. Some were moving to new addresses. Others were looking for sanctuary in churches or simply shutting themselves up in their homes, essentially becoming fugitives when their check-ins passed. The full extent of these changes won't be clear until this summer, said Petra Falcon, the executive director of Promise Arizona (PAZ). During past crises in Arizona, she said, undocumented parents had often waited for classes to end before moving with their children. But a recent report from the Arizona Health Care Cost Containment System showed that the percentage of Hispanics participating in Arizona's state health care system had fallen by more than half between October 2016 and April 2017. Some Hispanics, it appeared, might be trying to retreat into the shadows again.

Trump's Jan. 25 orders have made the concept of a single national strategy to stop deportations irrelevant. Under Obama, ICE's prosecutorial priorities were consistent from state to state because they were clearly defined by the Department of Homeland Security and ICE in Washington. Trump's orders, however, expanded prosecutorial priorities so broadly that, as a practical matter, there no longer exist any priorities at all. Steve Legomsky, the former chief counsel of United States Citizenship and Immigration Services (U.S.C.I.S.), told me that, effectively, "the decision of what to prioritize is now left in the hands of each individual ICE agent and each individual C.B.P. border-patrol officer." Much has been made of the fact that Trump has essentially ceded America's military strategy to its generals. His handling of ICE, whose field directors now set the agency's direction, appears similar.

Legomsky said that the sweep of Trump's priorities has also given ICE cover for the use of targeted deportations against activists. The agency doesn't need to explain why the deportation of a DACA activist or an undocumented organizer is consistent with their announced priorities, he said, "if the announced priorities cover almost everybody." In February, the Department of Homeland Security seemed to give its blessing for such retaliations when it issued a memo that gave ICE officers the authority to prioritize the deportation of anyone they believed posed "a risk to public safety." Andiola, who is now the political director of Our Revolution, the 501(c)(4) that sprang from Bernie Sanders's presidential bid, didn't know if her mother had been targeted or if the letter ordering her to report for removal was simply a consequence of Trump's redefined priorities.

After Arreola received the letter, Andiola worked her extensive professional network, calling organizers, lawyers and activists to gather opinions about what she should do. "It's great that there are so many perspectives," she said, "but it's difficult to sort through all the differing kinds of advice." Eventually, she realized there was no single solution. With a diversity of tactics in her pocket, she would deploy one after another in hopes of reaching success. What she needed first, she decided, was a legal strategy.

Even though Arreola fled to the United States to escape domestic abuse, it never occurred to either woman that Arreola might be eligible for asylum. In Andiola's mind, asylum seekers came from Central America or the Middle East, places with extreme political turmoil. After García Aguilar's deportation, though, Andiola began to take the option seriously. She knew it was a long shot: It has never been easy for Mexicans to gain asylum in the United States. And though several lawyers told me that asylum applications are now rising, the process is likely to become even more difficult soon. The Jan. 25 order on border security includes an entire section declaring Trump's intention "to end the abuse of parole and asylum provisions." "It's the same political agenda that is behind banning Muslims and refugees from coming to the U.S.," says Marielena Hincapié, the executive director of the National Immigration Law Center.

A successful asylum application, Andiola learned, depended upon documentary evidence. Arreola recalled that a newspaper in Durango once published her ex-partner's photograph, noting that he had been charged for the kidnapping and rape of a minor: her. In Durango, Arreola's brother-in-law found a copy of a 1991 police report detailing one of her ex-partner's rages. These two documents formed the backbone of the asylum application Arreola used to request an interview with U.S.C.I.S. in April. Within a week, she had an appointment for a "reasonable fear" interview to determine if her case merited serious consideration. Three days after the interview, Arreola received good news: ICE had canceled her scheduled removal on May 3. She had passed the interview, the first of many steps in gaining asylum. Her lawyer, Ray Ybarra Maldonado, who also represents García Aguilar, says there is still a fair chance that Arreola's application for asylum may be denied, but she was now safe to report for her check-in on May 23.

On May 3, the day Arreola was to have been deported, Arreola and Andiola gathered with friends, family and supporters for a prayer breakfast at the First Congregational United Church of Christ in Phoenix, which had offered to house Arreola if she chose sanctuary. Pastor James Pennington had been active in the fight for gay rights. The patio of First Congregational was decorated with several flags, including a rainbow flag, an Arizona state flag and an American flag. Inside the church, members of Puente and former members of ADAC formed a circle with several non-Hispanics who had only recently allied themselves with the undocumented. Standing together they recited Psalm 30 in Spanish:

Te ensalzaré, oh Señor, porque me has elevado, y no has permitido que mis enemigos se rían de mi.

I'll praise you, Lord, because you've lifted me up. You haven't let my enemies laugh at me.

Yet their enemies remained hard at work. A week later, Marco Tulio Coss Ponce, who had been living in Arizona under an order of supervision since 2013, appeared at ICE's field office in Phoenix with his lawyer, Ravindar Arora, for a check-in. ICE officers, Arora said, knew that Coss Ponce was about to file an application for asylum -- several of his relatives had been recently killed or threatened by the Sinaloa cartel in Mexico — and they had assured Arora several times that Coss Ponce would not be removed. They said he simply needed to wear an ankle monitor to make sure he didn't disappear. The fitting was delayed several times until finally Arora had to leave to argue a case in court. After he departed, ICE officers handcuffed Coss Ponce and put him in a van, alone. Three hours later, he was in Nogales.

Correction: May 24, 2017

An earlier version of this article misstated the year that Marco Tulio Coss Ponce, a deportee, began living under an order of supervision. It was 2013, not 2012.

Marcela Valdes is a contributing writer for the magazine. She last wrote about why so few eligible Latino voters actually cast ballots.

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A version of this article appears in print on May 28, 2017, on Page MM50 of the Sunday Magazine with the headline: Staying Power.

Stephen W. Manning

IMMIGRANT LAW GROUP
IMMIGRATION
PORTLAND

THE NEW Oregon Trail

How immigration attorney Stephen Manning is fighting exclusion orders and deportations

BY BILL LASCHER PHOTOGRAPHY BY CRAIG MITCHELLDYER

One of the many tributes to pioneers who risked death and disease to cross North America is a century-old former bank building in downtown Portland called the Oregon Trail Building. Its current occupants include a web-design firm, investment managers, the Hispanic Metropolitan Chamber, and, most fittingly, Immigrant Law Group, where Stephen Manning practices with partners Jessica Boell and Jennifer Rotman. Most of their clients face a challenge as frightening as a months-long wagon journey. Seeking refuge from war, murder, rape and political persecution, they must also surmount an increasingly unwelcoming U.S. immigration system.

The walls of the firm's fifth-floor offices feature photos of children, Portland landmarks and American flags. Kids' drawings surround the reception desk. Flyers on a corkboard offer "Five reasons to become a U.S. citizen."

It's a morning in late February and Manning says work lately has been "crazy." It's obvious why, but the question needs to be asked.

"Because we've elected a federal executive that's intending to use executive powers to engage in a mass depopulation of the United States," Manning says.

Two weeks earlier, the 9th U.S. Circuit Court of Appeals upheld a ruling by a federal district judge in Seattle blocking President Donald Trump's executive order banning immigrants and refugees from seven predominantly Muslim countries from entering the U.S. Leaks were starting to emerge about what a revised ban might look like, and people were worried. The previous day, Immigrant Law Group recorded more than 500 phone calls—as opposed to the 50 or so Manning guesses it received on the same day a year earlier. Manning has been fielding calls, visiting airports, filing amicus briefs and suing the federal government on behalf of his clients. About 60 percent of his time is spent on Oregon-based cases; the rest involves travel to cities such as Atlanta, Houston, Los Angeles and San Francisco.

"People hire me to prevent deportation, to end unnecessary or prolonged detention, to unify families that have been separated by border issues, to seek asylum because they've been harmed in the past or they'll be harmed in the future," he says. "I've been doing that for a long time."

He wears a blue-and-white striped dress shirt, jeans, multicolored socks and black shoes tied with purple shoelaces. It's an ensemble that complements the room's colorful furniture, not to mention the framed certificate on a window ledge lauding him as "Most Festive Attorney." An old chest in the corner hints at the many adventures he and husband Jim Wilson have taken climbing mountain peaks all over the world.

"It's just a fast-moving and diverse [practice]," Boell says. "He stays joyful through all of it. He carries a lot of joy and energy. It's really fun to work with him."

"I think I'm really blessed," Manning adds. "I walk into the office around 7:30 and then it's 6 p.m. at night and I'm like, 'Whoa, what happened with this day?'"

Maintaining that attitude is a bit more challenging these days. Invoking *Game of Thrones*, Manning mentions it's no longer sufficient to say "Winter is Coming."

"Winter has totally arrived," he says.

J. Ashlee Albies is a Portland-based civil rights and employment lawyer who met Manning while working on campaigns where their practice areas intersected.

"When he says something like that, it sends a chill down my spine," Albies says. "Because I know he knows."

MANNING DESCRIBES HIS LEGAL CAREER

as "penance" for a momentary, naïve assumption.

He was born and raised in Bradford, Pennsylvania, to a seamstress mother and an electrician father. Upon graduating college in 1992, realizing he'd never been west of his native time zone, Manning, on a whim, drove across the country to Oregon. With only a few hundred dollars in his pocket, he camped on national forest land for months while looking for work.

By the mid-'90s, Manning, who is fluent in Spanish, was volunteering for a program called the Touchstone Project at an elementary school in North Portland. Most of his students came from Spanish-speaking immigrant families. He would show students' parents how to help the kids with their homework. But when some of his second-graders weren't turning in their assignments, and Manning asked why, they said it was pointless because they were going to be deported.

"You're not going to be deported," Manning recalls telling them. "That's ridiculous. No one deports second-graders." (Manning interrupts this story to point out that the average age of the people currently detained at a facility in Dilley, Texas, is 6 years old.)

So Manning decided to pay a visit to one student's home, where he asked the

"Stephen recognizes the need to recharge," says Melissa Crow, the legal director of the American Immigration Council. "On occasion I've tried to reach him, only to learn he's climbing an ice-covered mountain in Peru." Left to right: Mount Adams, Washington, 2014; Cordillera Blanca, Peru, 2015; Ouray, Colorado, 2017.

multigenerational Salvadoran family to get in his car so he could sort out the problem. They asked where he wanted to go and he said, "Immigration."

Horrified, they told Manning to stop the car. Instead, he locked the door and kept driving, insisting that he had the situation covered. He thought he could just get in line with the family, ask for papers to fill out, and sort out their status. "Like all good Americans, I think there's a line people can actually stand in, and it's just pretty straightforward, right?" Manning recalls thinking.

The staff at the immigration facility told Manning that the family could be deported right then; in fact, they should leave immediately. Mortified, Manning took the family to a nonprofit law firm, Immigration Counseling Service, which agreed to help. (Many in the family ultimately became U.S. citizens; Manning sees them regularly.) Then he decided to volunteer at ICS. He became a protégé of its founder, the late Margaret Godfrey, and, inspired, decided to attend Lewis & Clark Law School.

Manning passed the bar on, of all days, Sept. 10, 2001. The next day's attacks were followed by what he calls a racialized "power grab" that included the first mass registration of immigrants from Muslim countries. Suddenly his constitutional law classes seemed relevant.

Both Manning and Boell appreciated the work they were doing at ICS but found the nonprofit environment constraining. He remembers thinking: "Look, we need to sue; we need to right some of these wrongs that are happening."

Boell and Manning began their partnership in 2002 and Rotman joined soon afterward. They've since added a support staff of 14. "We each have our own cases," Boell says, "but we always collaborate in terms of strategies, legal arguments and best practices. The three of us have always been really tight-knit and collaborative, and a team."

A key moment came in 2014. Over the previous three years, thousands fled to the United States as murders by MS-13 and the 18th Street Gang spiked in El Salvador, Guatemala and Honduras—largely targeting women and often involving sexual violence. That June, officials in the Obama administration shifted their characterization of this migration from a humanitarian crisis to a national security threat. According to a report prepared by Manning the following year, that shift gave the administration justification for a plan to deport hundreds of asylum-seekers, most of whom were women and children.

In legal circles, word spread that some of these women and children were being detained at a razor wire-encircled law enforcement training facility in Artesia, a remote town in southeastern New Mexico. Allegedly the government planned to deport the detainees without interviewing them about their asylum applications. So Manning and a brigade of Oregon lawyers joined attorneys from across the country and traveled to New Mexico to learn more about the situation. Catching the government off guard, they were able to talk to a few of the detainees. In turn, these women told the rest to write down their names and ID numbers. The lawyers could then insist on meetings with the women.

"They ended up with, ultimately, hundreds of detainees who came in asking for advice, for legal representation," says Juliet Stumpf, a professor at Lewis & Clark Law School who contributed to the work at Artesia.

To manage the volume of asylum claims, lawyers devised a system to break up their work into discrete legal tasks so new attorneys could take over whenever necessary. Better, after Manning engaged colleagues to code software for a client-management tool, lawyers across the country who wanted to assist the Artesia project could suddenly plug in and contribute.

"Big law uses attorneys in exactly the same way," Stumpf says. "The attorneys themselves become fungible."

Sixteen asylum cases were litigated at Artesia. Manning and his allies won all of them; one is currently on appeal.

HOW TO HELP **Contact the Law Lab via its website (innovationlawlab.org); or go to Oregon Immigration Resources for a list of agencies working in the immigration space.**

Asylum seekers, says Manning, "have human stories of hope, fears, dreams of resilience." With at-risk kids in Ica, Peru (above) and celebrating a birthday outside Lima (left)

"It takes a certain amount of vision, creativity and courage to say, 'Let's represent everybody and we're just going to make it happen,' and then actually make it happen," Stumpf says.

Meanwhile, a 2,400-bed detention center opened in Dilley, Texas, as did another facility in Karnes City, Texas. Thanks to the model developed at Artesia, eventually called the Innovation Law Lab, similar collaborations got moving quickly.

"You would never know about the inordinate amount of work he's put in, because on the surface it all appears to happen very seamlessly," Melissa Crow, the legal director at the American Immigration Council, says of Manning's role in the lab's development.

Manning enlisted a professional developer to improve the software originally coded at Artesia, but the Law Lab isn't just about software. It also developed "centers of excellence" in various cities to focus immigration law strategy. One such center in Portland has trained 150 lawyers to represent clients seeking asylum on a pro bono basis. The third prong of the lab, the overarching Big Immigration Law Project, aims to aggregate power among lawyers in the immigration sphere. All of this helps explain why Manning participated in a "Crowdsourcing Justice" panel at this year's South by Southwest conference. The ultimate goal, he says, is for immigration cases to be adjudicated more fairly.

"Lawyers can be health-bringers to a system that's gone wrong," he says.

MANNING SAYS HE COULDN'T DO IT without the support of his husband, an architect.

"He's the one who lets me do it all," Manning says. "I have no idea what I contribute to the relationship. I show up. He takes care of me. He feeds me. He makes sure I'm healthy. He says, 'Go forth and do good stuff.'"

Manning and Wilson host regular salon-style dinner parties in the home they built, and both are active climbers, skiers and swimmers. "Stephen recognizes the need to recharge," says Crow. "On occasion I've tried to reach him, only to learn he's climbing an ice-covered mountain in Peru."

That type of passion has been necessary during the early days of the Trump administration, Manning says. Through March, he and his colleagues have challenged the president's exclusion orders in court and joined protests against the executive orders at the Portland International Airport. In mid-March, the Innovation Law Lab convened a meeting of scholars and activists to dissect the new administration's "constitutionally risky experiments" in immigration, according to Manning: how they impact Oregonians, and how the public can respond. When a DREAMer who ran a Portland food pantry was arrested, Manning met with the man's family and joined the ACLU in speaking out on his behalf.

"People who engage in immigration," Manning says, "who engage in seeking asylum, have human stories of hope, fears, dreams of resilience, of suffering, and my role is to ask them, 'Tell me your life. Tell me what's happening to you and tell me what your future is. Tell me your fears. Tell me your dreams.'" SL


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Building a Responsive Network

Pro Bono Immigration Work Escalates After Executive Orders Shift Policies

By Melody Finnemore

Portland attorney Rima Ghandour is a litigator specializing in construction defect, personal injury, products liability, commercial and business litigation, and insurance coverage. She's also the president of the board for the Arab American Cultural Center of Oregon, and when President Trump in January signed the first executive order temporarily banning citizens from seven predominantly Muslim countries and all refugees from traveling to the United States, Ghandour's phone immediately started ringing.

"I was getting calls from different community members whose family members were getting stuck at different airports," she says.

Ghandour reached out to Lawyers for Good Government to ask how she could help. They directed her to Seattle-Tacoma International Airport, which needed more lawyers because Sea-Tac has a larger influx of international travelers than Portland International Airport, so she and fellow Oregon attorneys Jennifer Kristiansen and Hala Gores headed north.

"It was really nice because anybody could go volunteer. I had never done immigration law and didn't really know much about it except that I'm an immigrant myself," Ghandour says, adding she was able to help with intake that day.

Since then, she has become one of the cadre of attorneys who have provided pro bono services at Portland International Airport during the executive order attempts. "We're also there just to make people feel better when their loved ones are delayed so they know someone is advocating on their behalf," she says.

Oregon attorneys have stepped up on behalf of immigrants and refugees for years, but the effort has ramped up significantly in response to the Trump administration's recent attempts to enact travel bans and increase the deportation of immigrants living in America illegally. Many lawyers are volunteering their time and services, ranging from setting up shop at PDX when the need arises to leading trainings and building a network of resources for others who want to get involved.

Oregon Legal Community Part of Nationwide Network

For Ghandour, the chance to provide pro bono services stemmed, in part, from her personal experience.

"I knew firsthand just from the calls and from being an immigrant who had to go through border controls at airports just how stressful that is normally, and then you have the executive order and that just adds to how scary it can be," she says. "People were terrified because they had been waiting for family to come to Portland for so long. One of our members had been waiting for his parents for 10 years."

Ghandour described for the *Bulletin* how the local legal community, including Oregon Women Lawyers and the Oregon chapter of the American Immigration Lawyers Association (AILA), among others, began networking to determine immediate needs and assign lawyers to provide those services. The American Civil

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Liberties Union has provided expert contacts who can answer questions and provide resources for lawyers who are new to immigration law.

"It really has been amazing because it wasn't just a Portland thing or a Northwest thing. There are attorneys across the country; we are all connected, and we are sharing news and information right as it comes through so we're all up to date," she says.

The growing network and community outreach includes Arabic and Farsi speakers who have helped families who don't speak English. And random strangers have been supportive at the Portland airport, offering a thumbs up or a "thank you for being here" to the attorneys, Ghandour says.

In mid-March, Ghandour and several other attorneys gathered to receive training on how to help refugees readjust their status to apply for green cards. The following day, they staffed an event where refugees could receive the assistance at no cost.

"It's important to put ourselves in the shoes of people coming here, whether they are visitors or immigrants or refugees. They are stepping off a really long flight and they are really worried, so it's very important for the U.S.'s image and for us as a nation and as a people to be welcoming and show who we really are," she says.

New Pro Bono Project Takes Holistic Approach

More lawyers are receiving training in immigration law through a new pro bono project that launched shortly after the first executive order was signed. Stephen Manning, a partner with Immigrant Law Group in Portland and a member of AILA's amicus committee, said the project established the Center of Excellence in Portland as part of the nationwide Big Immigration Law Project.

Manning, a coordinator of nationwide litigation strategies to advance the rights of immigrants and asylees, organized a volunteer brigade of attorneys and law students to represent families detained at the South Texas Family Residential Center in Dilley, Texas. He says the attorneys were winning cases at the detention level, but when the immigrants and asylees were released and had their full hearings, the outcomes were not as positive.

In response, the Big Immigration Law Project was established as a nationwide, collaborative effort to win every meritorious case using a more comprehensive, team approach to representation. Manning noted that while Portland has an immigration court, there still are an estimated 2,000 women and children in the city who are seeking asylum and on the docket without representation.

"We have a strong immigration bar and good resources, but the infrastructure doesn't really exist within our legal system to handle these cases," he says.

Perkins Coie, a partner in establishing Portland's Center of Excellence, earlier this year hosted a tactical training for about 150 lawyers to provide pro bono representation to those living in Oregon who need assistance with asylum claims or other protection-based forms of immigration status. The training was led by Oregon immigration specialists, national experts from the Catholic Legal Immigration Network (CLINIC) and members of the U.C. Hastings Center for Gender and Refugee Studies.

The training offered through the center consists of a 90-minute substantive section that is self-conducted by participants beforehand, followed by nearly four hours of tactical training where participants are presented with problems and collaborate to find solutions or identify questions that still need to be answered. The training is designed to highlight the fact and law discovery process for asylum claims, and includes a hypothetical claim in which participants identify the client's present state of being, understand how the client perceives their experiences, and develop an initial framework for discovery and presentation.

Given that the majority of asylum seekers are escaping war and civil unrest, domestic violence, sexual abuse and other traumatic experiences, the training also teaches attorneys to identify the nonlegal needs that may be impediments to discovering or presenting the claim.

A Lewis & Clark law student who attended the training stated, "Tonight I felt as if I was in a room full of some of the bravest and most compassionate people in Portland. As a Muslim American law student, I am incredibly appreciative to those who organized and attended the seminar."

Manning says that unlike traditional pro bono models, the massive collaborative representation means everyone with the Center of Excellence meets regularly to talk about cases, share information, discuss trends, tell empirical stories and determine whether to engage in "impact litigation" through the technology of the Innovation Law Lab, which is the central hub of the Big Immigration Law Project.

"The goal is not to place cases but to win them," he says, adding that the model allows legal teams to consider the entire ecosystem and "keep pushing the boundaries of law in a way that is thoughtful and meaningful."

The pro bono project strives to appoint two lawyers to serve as co-counsel for each case. The tactical team provides experts who participate before the first client meeting, after the initial meeting and as the case is being prepared. These teams include professionals who curate master exhibits and those who identify and retain expert witnesses, among other services.

"We replicate what big law does for people who have no access to big law otherwise," Manning says.

Laura Kerr, an associate at Perkins Coie, says the firm backed the Center of Excellence concept after one of its pro bono committee members heard Manning speak and shared the information about physical, mental and legal conditions at the detention center in Texas. Other staff members expressed an interest in volunteering to help support immigrants and refugees.

"We were really inspired by that idea and reached out to Stephen about how to get involved," she says.

Kerr notes that the last hour of the four-hour training focused on the travel ban, and Eunice Lee, co-legal director of the U.C. Hastings Center for Gender and Refugee Studies, gave her impressions of what the ban was doing and how it has impacted people. "It was an amazing thing to sit in and listen to these immigration practitioners talking and debating the effects of that," Kerr says.

As of mid-March, about 55 lawyers had committed to provide a year's worth of pro bono work through Portland's Center of

Excellence. Kerr says the center estimates that will involve one or two cases during the year. Meetings to workshop each case as a group began in late March and will be held every couple of months.

"At this point, we think the focus will be primarily asylum cases, but we also want to be able to react to other cases that might come up," she says. "The goal is to provide attorneys with the resources and support they need to successfully try asylum cases and win every single case. What Stephen likes to say is, 'No one goes it alone.' "

Kerr says she will be involved in trying some cases and looks forward to helping people through the legal process gain access to counsel during a period of great uncertainty. Her primary role for now is to serve as a coordinator for the Center of Excellence as it begins to grow and become more active.

"It's allowed me to bring attorneys together and to see how much attorneys here want to help and want to be part of the solution," she says. "That has been very humbling and has made me proud to be part of this legal community."

Resources Available, but Need Continues to Grow

Oregon offers other resources for legal services to support the immediate needs of immigrants in local communities, including Catholic Charities' Immigration Legal Services, Legal Aid Services of Oregon and the Oregon State Bar. The OSB Lawyer Referral Service has reported an increase in calls for assistance, and the bar has initiated a Legal Q&A video series that is posted on its public pages.

The video Q & A topics, posted in English and Spanish, include an explanation of the Deferred Action for Childhood Arrivals (DACA) policy, its current status and who is eligible; what a U Visa is; how to fight deportation; who qualifies for asylum in the U.S.; and how to adjust one's immigration status. The video series is available at *www.osbar.org/public/legalinfo/immigration.html.*

The Oregon Law Foundation in early February approved an emergency grant to several nonprofit organizations wrestling with increased demand for help with immigration matters. The foundation released $100,000 to Immigration Counseling Services, SOAR Immigration Legal Services and Catholic Charities Legal Services. The three organizations offer distinct services but have collaborated in areas of high need, and are working together to respond to rapid changes in federal policy and dramatic increases in those seeking help.

Along with providing legal help to individuals and families, these organizations are seeing sharp increases in demand for guidance from church groups, health care systems, schools and other social services organizations about how they can serve their immigrant communities.

"This has been a remarkably turbulent time for the immigrant community, and for those touched by our immigrant problem," says Judith Baker, director of the law foundation, which is funded largely through interest generated on lawyer trust accounts. "Providers are having to meet growing demand while responding to a constantly shifting legal environment. This is exactly why we have provisions in place for emergency grants."

While there are several resources available and many opportunities to become involved in the growing body of pro bono work related to immigration law, demand still outpaces the services available. Melina LaMorticella, a business immigration attorney with Tonkon Torp and chair of AILA's Oregon chapter, said the chapter's members recently held a regional conference to discuss local response efforts and needs that must be addressed.

"There is a huge demand for pro bono services for people who are newly eligible for citizenship and need help with that process, and for migrants who are eligible for their green card," she says.

"Some of us are doubling and tripling what we do," LaMorticella notes. "Right now, a lot of the demand is for information, so we've been involved in 'Know Your Rights' presentations across the state."

In part, the presentations provide general information about how immigration law exists now, how it may evolve, what Immigration and Customs Enforcement (ICE) is administered to do, and what to do if ICE agents attempt to detain a family member. The presentations also include emergency-preparedness measures, such as family plans for caring for children and how to handle finances if a family member is detained or deported. These emergency-preparedness measures include having pro bono providers who can help with power-of-attorney filings and who can also access tax filings and records requests under the Freedom of Information Act, she says.

However, the biggest demand is for removal defense, or attorneys who can provide representation for immigrants who are being deported. "We are trying to address that area because we expect that to increase under the new administration's actions," LaMorticella says.

Catholic Charities is part of the network providing the Know Your Rights series, and by mid-March had held 60 such presentations since Election Day. Another 20 are planned in the coming months, says Kat Kelley, the organization's director of programs. She notes that information about notario fraud, or notaries posing as lawyers, is part of the presentations.

"Folks here have been able to exploit that cultural norm, and there are notaries who will try to take advantage of people who don't know, and that can really mess up a case," she says.

Catholic Charities also is offering training in family law for attorneys who don't practice it but want to help immigrants and refugees with powers of attorney, guardianship and other emergency-preparedness measures if a member of the family is detained or deported. The organization held trainings in March and early April, and Kelley says it will host more if the demand is there.

"We've had dozens and dozens of lawyers reaching out to us and wanting to help, so we do anticipate future trainings," she says. "We really appreciate the folks who come out to staff our mobile clinics. It's been amazing to see the law community mobilize and come out to support us and help the community." B

Melody Finnemore is a Portland-area freelance writer and frequent contributor to the Bulletin. *She can be reached at* precisionpdx@comcast.net.

IMMIGRATION COURTS: RECLAIMING THE VISION

HON. PAUL WICKHAM SCHMIDT (RET.)

Our immigration courts are going through an existential crisis that threatens the very foundations of our American justice system. I have often spoken about my dismay that the noble due process vision of our immigration courts has been derailed. What can be done to get it back on track?

First, and foremost, the immigration courts must return to the focus on due process as the *one and only mission*. The improper use of our due process court system by political officials to advance enforcement priorities and/or send "don't come" messages to asylum seekers, which are highly ineffective in any event, must *end*. That's unlikely to happen under the Department of Justice—as proved by over three decades of history, particularly recent history. It will take some type of independent court. I think that an Article I Immigration Court, which has been supported by groups such as the American Bar Association and the Federal Bar Association, would be best.

Clearly, the due process focus has been lost when officials outside the Executive Office for Immigration Review have forced ill-advised "prioritization" and attempts to "expedite" the cases of frightened women and children from the Northern Triangle (the Central American countries of El Salvador, Honduras, and Guatemala) who require lawyers to gain the protection that most of them need and deserve. Putting these cases in front of other pending cases is not only unfair to all, but has created what I call "aimless docket reshuffling" that has thrown our system into chaos.

Evidently, the idea of the prioritization was to remove most of those recently crossing the border to seek protection, thereby sending a "don't come, we don't want you" message to asylum seekers. But, as a deterrent, this program has been *spectacularly* unsuccessful. Not surprisingly to me, individuals fleeing for their lives from the Northern Triangle have continued to seek refuge in the United States in large numbers. Immigration court backlogs have continued to grow *across the board*, notwithstanding an actual *reduction* in overall case receipts and an increase in the number of authorized immigration judges.

Second, there must be structural changes so that the immigration courts are organized and run like a *real* court system, *not* a highly bureaucratic agency. This means that *sitting immigration judges*, like in all other court systems, must control their dockets. The practice of having administrators in Falls Church, Va., and bureaucrats in Washington, D.C.—none of whom are sitting judges—be responsible for daily court hearings and manipulate and rearrange local dockets in a vain attempt to achieve policy goals unrelated to fairness and due process for individuals coming before the immigration courts, must *end*.

If there are to be nationwide policies and practices, they should be developed by an "Immigration Judicial Conference," patterned along the lines of the Federal Judicial Conference. It would be composed of sitting immigration judges representing a cross-section of the country, several appellate immigration judges from the Board of Immigration Appeals (BIA), and probably some U.S. circuit judges, since the circuits are one of the primary "consumers" of the court's "product."

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Third, there must be a new administrative organization to serve the courts, much like the Administrative Office of the U.S. Courts. This office would naturally be subordinate to the Immigration Judicial Conference. Currently, the glacial hiring process, inadequate courtroom space planning and acquisition, and unreliable, often-outdated technology are simply not up to the needs of a rapidly expanding court system like ours.

In particular, the judicial hiring process over the past 16 years has failed to produce the necessary balance because judicial selectees from private-sector backgrounds—particularly those with expertise in asylum and refugee law—have been so few and far between.

Fourth, I would repeal all of the so-called "Ashcroft reforms" at the BIA and put the BIA back on track to being a real appellate court. A properly comprised and well-functioning BIA should transparently debate and decide important, potentially controversial, issues, publishing dissenting opinions when appropriate. *All* BIA appellate judges should be *required* to vote and take a public position on *all* important precedent decisions. The BIA must also "rein in" those immigration courts with asylum grant rates so incredibly low as to make it clear that the generous dictates of the Supreme Court in *Cardoza-Fonseca*[1] and the BIA itself in *Mogharrabi*[2] are not being followed.

Nearly a decade has passed since professors Andy Schoenholtz, Phil Shrag, and Jaya Ramji-Nogales published their seminal work, *Refugee Roulette*, documenting the large disparities among immigration judges in asylum grant rates.[3] While there has been some improvement, the BIA, the only body that can effectively establish and enforce due process within the immigration court system, has not adequately addressed this situation.

For example, let's take a brief "asylum magical mystery tour" down the East Coast.[4] In New York City, 84 percent of the asylum applications are granted. Cross the Hudson River to Newark, N.J., and that rate sinks to 48 percent, still respectable in light of the 47 percent national average but inexplicably 36 percent lower than New York. Move over to the Elizabeth Detention Center Court in Elizabeth, N.J., where you might expect a further reduction, and the grant rate *rises* again to 59 percent. Get to Baltimore, and the grant rate drops to 43 percent. But, move down the BW Parkway a few miles to Arlington, Va., still within the Fourth Circuit like Baltimore, and it rises again to 63 percent. Then, cross the border into North Carolina, still in the Fourth Circuit, and it drops remarkably to 13 percent. But, things could be worse. Travel a little further south to Atlanta and the grant rate bottoms out at an astounding 2 percent.

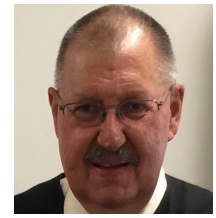
In other words, by lunchtime some days the eight immigration judges sitting in Arlington have granted more than the five asylum cases granted in Atlanta during the entire Fiscal Year 2015! An 84 percent to 2 percent differential in fewer than 900 miles! Three other major non-detained immigration courts, Dallas, Houston, and Las Vegas, have asylum grants rates at or below 10 percent.

That's *impossible* to justify in light of the generous standard for well-founded fear established by the Supreme Court in *Cardoza-Fonseca* and the BIA in *Mogharrabi*, and the regulatory presumption of future fear arising out of past persecution that applies in many asylum cases.[5] Yet, the BIA has only recently and fairly timidly addressed the manifest lack of respect for asylum seekers and failure to guarantee fairness and due process for such vulnerable individuals in some cases arising in Atlanta and other courts with unrealistically low grant rates.[6]

Over the past 15 years, the BIA's inability or unwillingness to aggressively stand up for the due process rights of asylum seekers and to enforce the fair and generous standards required by American law have robbed our immigration court system of credibility and public support, as well as ruining the lives of many who were denied protection that should have been granted. We need a BIA that functions like a federal appellate court and whose overriding mission is to ensure that the due process vision of the immigration courts becomes a *reality* rather than an unfulfilled promise.

Fifth, and finally, the immigration courts need e-filing NOW! Without it, the courts are condemned to "files in the aisles," misplaced filings, lost exhibits, and exorbitant courier charges. Also, because of the absence of e-filing, the public receives a level of service disturbingly below that of any other major court system. That gives the immigration courts an "amateur night" aura totally inconsistent with the dignity of the process, the critical importance of the mission, and the expertise, hard work, and dedication of the judges and court staff who make up our court. ⊙

This is an excerpt from a longer presentation given at a number of law schools, most recently Washington & Lee Law School on Oct. 20, 2016.



Paul Wickham Schmidt is a recently retired U.S. immigration judge who served at the immigration court in Arlington, Va., and previously was chairman and member of the Board of Immigration Appeals. He also has served as deputy general counsel and acting general counsel of the former Immigration and Naturalization Service, a partner at two major law firms, and an adjunct professor at two law schools. His career in the field of immigration and refugee law spans 43 years. He has been a member of the Senior Executive Service in administrations of both parties.

Endnotes

[1]*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

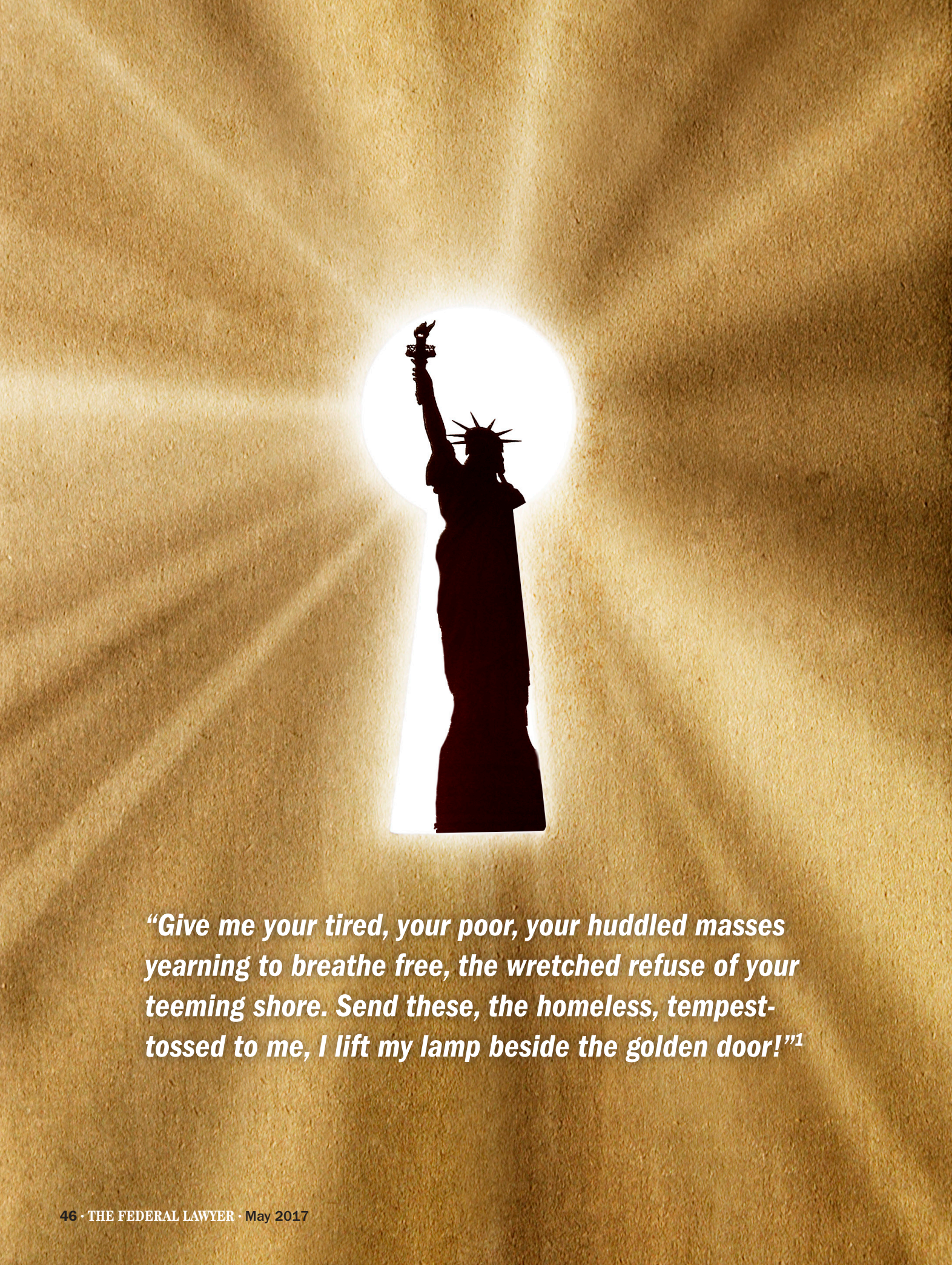
[2]*Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

[3]Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

[4]All statistics are from the EOIR FY 2015 *Statistics Yearbook, available at* www.justice.gov/eoir/page/file/fysb15/download.

[5]*See* 8 C.F.R. § 1208.13(b)(1).

[6]*See, e.g., Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015) (denial of due process where the immigration judge tried to bar the testimony of *minor respondent* by disqualifying him as an *expert witness under the Federal Rules of Evidence*). While the BIA finally stepped in with this precedent, the behavior of this judge shows a system where some judges have abandoned any discernable concept of "guaranteeing fairness and due process." The BIA's "permissive" attitude toward judges who consistently deny nearly all asylum applications has allowed this to happen. How does this live up to the EOIR Vision of "through teamwork and innovation being the world's best administrative tribunals guaranteeing fairness and due process for all"? Does this represent the best that American justice has to offer?



"Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!"[1]

LAND OF THE FREE?
IMMIGRATION DETENTION IN THE UNITED STATES

DEREK C. JULIUS

Many see the "golden door" to the United States as a beacon of freedom, opportunity, and a better life than what they left behind. But for some noncitizens—"aliens" as they are defined by current immigration law—that "golden door" leads to an immigration detention center, where they must await: (1) agency determinations on their removability and any applications for relief and protection from removal or (2) execution of a final order of removal from the United States.[2] Indeed, the United States uses immigration detention as "a tool of immigration enforcement—to effectuate the deportation of those who are removable under the law and to prevent danger to the community during this process."[3] Particularly important to understanding immigration detention is that such detention is considered civil or administrative, not criminal. Thus, not all rights and protections afforded those in criminal proceedings (e.g., counsel at government expense) attach in this context.[4]

As President Donald J. Trump's administration took office, many questions remained as to how it would ultimately craft and implement its immigration-detention policies. While President Trump's campaign platform provided indications, after taking office, he issued two immigration enforcement and border security related executive orders—implemented through agency memoranda and discussed herein—that answered some questions, left others open, and prompted new ones. But immigration-detention policies do not exist in a vacuum, nor are they the product of a single person's ideology. History has shown that such policies generally reflect the social and political forces of the time. The world currently is grappling with: rising numbers of migrant children and families; increasing recognition of lesbian, gay, bisexual, and transgender (LGBT) people; apparent resurging nationalist ideology and xenophobia, domestically and abroad; and continuing concerns about terrorism, crime, and national security. This combination of forces creates a complicated backdrop. A review of relevant historical policies and cases may help contextualize contemporary issues in immigration detention and hopefully guide the formulation of—or at least advocacy for—better policies and practices.

Historical Evolution[5]

Constitutional Underpinnings and Plenary Power

The Constitution does not explicitly address the federal government's authority over immigration—let alone detention of aliens. Indeed, the Constitution does not use the word "alien" at all; rather, it variously guarantees rights and privileges to "people," "persons," "citizens," and "subjects." And, as "persons," aliens who enter the United States are entitled to due process protection regarding the deprivation of liberty.[6] But jurisprudence shows that the extent of such protection typically depends on a particular alien's ties to the United States and national security considerations. Aliens who believe their immigration detention is unlawful typically seek judicial redress through filing a petition for a writ of *habeas corpus*.

The Supreme Court held that "the government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[7] As most recently recognized by the Court, that authority rests, in part, on the government's constitutional power to "establish an [sic] uniform Rule of Naturalization" and its inherent power as sovereign to control and conduct relations with foreign nations.[8] The Supreme Court has routinely declared that immigration falls within Congress' and the executive branch's "plenary power."[9] And without exception, the Supreme Court has upheld Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[10]

Under this authority, over the last 200-plus years, Congress has enacted numerous pieces of legislation addressing which aliens should be allowed into the United States, who should be deported, and who should be detained pending resolution of those questions.[11] In turn, the executive branch has implemented policies and procedures to effectuate these legislative mandates.

Alien and Sedition Acts

The fledgling United States wasted no time in confronting the issue of alien detention. In 1798—the same year the U.S. Constitution officially came into effect—Congress passed, and President John Adams signed into law, four bills known as the Alien and Sedition Acts. These included the Alien Enemy Act of 1798, allowing the president to detain and deport any male citizen of a hostile nation above the age of 14 during times of war.[12]

The Federalist-controlled Congress ostensibly passed the Alien and Sedition Acts to protect national security during an undeclared war with France. But modern historians now largely agree that the primary motive was actually to decrease the number of voters who disagreed with the Federalist Party. At the time, most immigrants living in the United States supported Thomas Jefferson and the Democratic-Republicans, the Federalists' political rivals.[13] Although political authorities reportedly created deportation lists, many immigrants voluntarily left the United States during debate over the Alien and Sedition Acts, and President Adams ultimately never signed a deportation order.[14]

In 1800, after an electoral campaign dominated by denouncement of the Alien and Sedition Acts, Thomas Jefferson was elected president, and Democratic-Republicans gained control of Congress. They allowed the Sedition Act and Alien Friends Act to expire in 1800 and 1801, respectively, and repealed the Naturalization Act in 1802. The Alien Enemies Act, however, remained—and became the first (and oldest) statute authorizing alien detention.[15]

Westward Expansion, Immigration Act of 1882, and Chinese Exclusion

The 19th century saw the westward expansion of the United States—all the way to California, where gold was discovered in 1848. The demand for cheap labor to work in the mines and building projects to develop the frontier—along with unrest in China—led to a significant increase in Chinese migration to the American West.[16] The Chinese migrants were largely tolerated until the economy weakened after the Civil War, and California labor leaders and politicians blamed them for depressing workers' wages.[17] Animosity toward Chinese migrants grew to the point where the 1878 California Constitutional Convention appealed to Congress to take measures to prevent their further immigration.[18]

In 1882, Congress passed two significant immigration laws: (1) the Immigration Act of 1882, which for the first time specified that the federal government—rather than the states—had responsibility for regulating immigration and prohibited entry convicts, paupers, "mental defectives," and other aliens likely to become public charges;[19] and (2) the Chinese Exclusion Act, which specifically prohibited Chinese laborers from entering the United States—the first in what would become a series of immigration laws that barred entry to people of specific ethnicities and nationalities.[20]

Litigation about the Chinese Exclusion Act and its subsequent amendments helped build the jurisprudential foundation of federal control over immigration, including the ability to detain those subject to removal. *Chae Chang Ping v. United States* arguably provided the initial basis for the plenary power doctrine, discussed *supra*, which was premised on national sovereignty.[21] In *Wong Wing v. United States*, the Supreme Court struck down a provision that imposed "hard labor" for Chinese Exclusion Act violators, but held that deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character."[22] Lawful immigration detention was therefore determined not to be punishment, but an administrative function of border control.[23]

Industrial Revolution, Mass Migration, and Alien Inspection Stations

On the East Coast, the late 19th century situation was not much better for European migrants. American nativists routinely invoked the "increasingly resonant logic of heredity and race."[24] Drawn in part by the industrializing cities and the need for cheap labor, "new" Europeans often found themselves viewed as "increasingly drawn from the nations of southern and eastern Europe—peoples which have got not great good for themselves out of the race wars of centuries, [and have] … remained hopelessly upon the lowest plane of industrial life."[25] The large number of people seeking entry to the country resulted in the need to better process those arrivals—particularly for an America that had become communicable-disease conscious.[26]

Against this backdrop, Congress enacted the Immigration Act of 1891, and instituted immigration detention as an administrative tool to ensure that aliens were "properly housed, fed, and cared for," pending a screening, which generally led to entry to the United States.[27] For the next 60 years, the United States had a policy of detaining all aliens seeking entry—at least for the period of time that it took to complete medical checks.[28] Two years later, the Immigration Act of 1893 made it "the duty every inspector of arriving alien immigrants to detain for a special inquiry … every person who may not appear to him to be clearly and beyond doubt entitled to admission."[29]

The best known—and busiest—of the admission stations was Ellis Island in New York Harbor, where 12 million people passed between 1892 and 1954.[30] Most arrival inspections occurred before 1924, after which Ellis Island was largely used as a detention and deportation station.[31] A sister facility, Angel Island, was opened in San Francisco Bay in 1910.[32] Arriving aliens generally were only detained for a few hours to complete the inspection process—with longer periods of detention for those with health problems; and a small percentage of aliens whose status needed to be determined, or who were among the 2 percent of arrivals who were denied entry to the United States and needed to be deported.[33]

Wartime Immigration Detention

In 1917, the United States entered World War I. That same year, over President Woodrow Wilson's veto, Congress enacted its most comprehensive immigration legislation to date, the Immigration Act of 1917, which reflected a rise in nativism.[34] Rather than regulating immigration as prior acts had, this act restricted immigration from most Asian countries and imposed a literacy requirement on admission. The act also increased the executive's discretion to decide the fate of deportable aliens, but it did not indicate for how long aliens could be detained.[35] To fill gaps, courts imposed a so-called "reasonable time limit" of four months in immigration detention.[36]

On April 6, 1917, President Wilson delivered Proclamation 1364 and invoked the Alien Enemies Act of 1789, which as discussed above, had remained good law after the Alien and Sedition Crisis.[37] Enemy aliens who failed to comply with U.S. laws and refrain from actual hostility or giving information, aid, and comfort to the enemy were "liable to restraint, or to give security, or to remove and depart from the United States."[38] Ultimately, over 2,000 enemy aliens—male German nationals over 14 years old—were interned in camps until the end of the war.[39]

In 1933, the United States unified two bureaus into a single agency, the Immigration and Naturalization Service (INS) and in the Department of Labor.[40] In 1940, INS transferred to the Department of Justice, where it remained for the rest of its existence.[41]

Detention under the auspices of the Alien Enemies act of 1789 was again used during World War II. On Feb. 19, 1942—shortly after the Japanese attack on Pearl Harbor—President Franklin D. Roosevelt issued Executive Order 9066, which forcibly relocated all people of Japanese ancestry—including aliens and citizens—on the United States' West Coast to internment camps.[42] Of the nearly 120,000 people forcibly relocated and interned, nearly two-thirds were U.S. citizens.[43] Decades later, the United States provided compensation to former internees.

Immigration and Naturalization Act of 1952 and the Cold War

Following World War II, the world faced an unprecedented migratory and displacement crisis and the rise of communism—both influencing U.S. immigration law and detention policies. Over President Harry S. Truman's veto, Congress passed the Immigration and Nationality Act of 1952 (INA), which—although significantly amended over the years—remains the primary basis for immigration law today.[44]

In 1952, the Supreme Court also issued its decision in *Carlson v. Landon*.[45] *Carlson* involved a challenge brought by aliens detained by INS under what Justice Felix Frankfurter viewed as the mistaken "conception that Congress had made [alien Communists] in effect unbailable"—despite the fact that the attorney general ostensibly had discretion to release these aliens on bond.[46] The aliens acknowledged that they were Communist Party members and therefore removable, but challenged their immigration detention because there had been no finding that they were unlikely to appear for deportation proceedings when ordered.[47] The Supreme Court rejected claims that they were entitled to release if they did not pose a flight risk because "detention is necessarily a part of this deportation procedure."[48]

A year later, in 1953, the Supreme Court decided *Shaughnessy v. United States ex rel. Mezei*, in which it upheld the constitutionality of Mezei's 21-month immigration detention.[49] Mezei, who had lived in the United States for more than 25 years, left and spent 19 months in Hungary; when he returned, he was permanently excluded from the United States on national security grounds under 8 C.F.R. § 175.57. Because no other country would grant him entry, he became stranded on Ellis Island for 21 months without a hearing and petitioned the courts for a writ of *habeas corpus*. The Supreme Court held that Mezei was an entrant under the regulation and thus had no rights and no protections under the Constitution.[50]

Immigration detention remained a relatively low profile until 1979 and 1980, when an influx of people from Cuba and Haiti began arriving on American shores. When Cuban President Fidel Castro refused to take back many of the Cuban migrants, many Americans grew concerned that they were criminals or public safety threats. In sorting out which of these migrants should be allowed to stay, the government detained them at numerous centers in Florida, Arkansas, Pennsylvania, and Georgia. Ultimately, the government paroled most of the Cubans into the United States in 1981 after finding that they were not dangers to the community.[51]

The Rise of 'Crimmigration' and Mandatory Detention

In the 1980s, Congress amended the INA several times "to deal more effectively and expeditiously with the involvement of aliens in serious criminal activities, particularly narcotics trafficking."[52] In 1986, Congress classified all controlled substances as drugs for purposes of establishing exclusions and deportation under immigration laws.[53] The Anti-Drug Abuse Act of 1988 (ADAA) introduced the term "aggravated felony" to the INA, resulting in a new category of deportable aliens. ADAA also mandated that an alien convicted of an aggravated felony be detained during deportation proceedings.[54] Immigration aggravated felonies originally only included murder, drug trafficking crimes, illicit trafficking in firearms or destructive devices, or any attempt or conspiracy to commit such act in the United States. But over the years, Congress greatly expanded the "aggravated felony" definition—which today consists of at least 18 subparts.[55]

Within a matter of months in 1996, Congress passed two major immigration bills: (1) Antiterrorism and Effective Death Penalty Act,[56] which in relevant part expanded deportability grounds and provided broader mandates for detaining criminal aliens; and (2) the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[57] which also expanded the scope of criminal removability.

Perhaps IIRIRA's most significant addition, however, was an explicit mandatory detention provision for most criminal aliens during the pendency of their removal proceedings. Under 8 U.S.C. § 1226(c) (known to immigration practitioners as "INA § 236(c)"), the Department of Homeland Security (DHS) ostensibly lacks all discretion to release certain categories of aliens on bond. For other aliens, they could be released on bond on a case-by-case basis, depending on their risk of flight and danger to the community. Under 8 U.S.C. § 1231(a)(6), those with an administratively final removal order are to be held in custody for a 90-day removal period.

In the following years, courts grappled with the mandatory detention system; ultimately, resulting in two landmark Supreme Court immigration detention decisions. First, the Supreme Court in *Zadvydas v. Davis*,[58] which arose when some countries refused to take back deportees. *Zadvydas* held that "indefinite detention" of aliens with administratively final removal orders raised constitutional concerns under the Fifth Amendment due process clause. Accordingly, the Supreme Court adopted a presumptively reasonable six-month period of detention, after which judicial review was appropriate to review the likelihood that the government could remove the alien in the "reasonably foreseeable future." To be sure, however, simply keeping such an alien in detention more than six months does not mean that such detention has presumptively become unreasonable—and certain actions, including the alien's noncompliance with obtaining travel documents or otherwise obstructing the removal order, can toll the removal period and impact the reasonableness of continued post-order detention beyond the six-month mark.

Two years later, in *Demore v. Kim*, the Supreme Court upheld the constitutionality of 8 U.S.C. § 1226(c)'s mandatory detention provision for most criminal aliens "for the brief period necessary for their removal proceedings."[59] In its decision, the Supreme Court cited statistics showing that detention in the majority of cases lasted less than 90 days, while most cases were completed in a few months.[60]

Current Issues in Immigration Detention

From INS to DHS

The Homeland Security Act of 2002 created the modern immigration enforcement structure.[61] The INS's functions were divided between three agencies within the newly created DHS: Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), and

U.S. Citizenship and Immigration Services (USCIS). ICE has primary responsibility for detention and removal operations. In executing these responsibilities, ICE currently focuses on two core missions: (1) identifying and apprehending criminal aliens and other priority aliens in the United States; and (2) detention and removal of those individuals apprehended in the United States' interior and those CBP apprehends patrolling the nation's borders.[62] The current immigration detention statutes that DHS administers are found at 8 U.S.C. § 1226 (apprehension and detention of aliens), which govern immigration detention before an alien has an administratively final removal order, and 8 U.S.C. § 1231 (detention and removal of aliens ordered removed), which governs post-order immigration detention.

The United States currently operates the largest immigration detention system in the world, utilizing approximately 250 detention facilities. During Fiscal Year (FY) 2015, ICE housed a total of 307,310 detainees, although only a fraction of that population at any single time; ICE's average daily population (ADP) for FY 2015 was 28,168.[63] In FY 2015, approximately 84 percent of ICE's ADP was male and 16 percent were women.[64] These numbers are actually down from the FY 2012 high of 477,523 detainees during the year—a time when Congress mandated that ICE "maintain" 34,000 detention beds at all times. Notably, "maintaining" a detention bed does not necessarily mean that a person must "fill" or "occupy" that bed. Congress lowered the bed quota based on decreased illegal border crossings.[65] For FY 2017, ICE requested $1.748 billion to fund maintenance of 30,913 beds.[66]

In November 2016, DHS Secretary Jeh Johnson announced a surge in apprehensions along the Southwest border: 46,195 in October, compared to 39,501 in September and 37,048 in August. As a result of this surge, approximately 41,000 aliens were in immigration detention as of November 2016.[67] Secretary Johnson authorized ICE to acquire additional detention space for single adults so that those apprehended at the border can be removed as soon as possible.[68]

But following President Trump's inauguration, the number of apprehensions at the border fell. For example, according to CBP data, February 2017 numbers (18,762) were down 40 percent from January 2017 (31,578); March 2017 numbers (roughly 12,000) were down 35 percent from February 2017 and 63 percent from March 2016.[69] Some experts attribute this, at least in part, to President Trump's issuance of certain executive orders, including: (1) *Enhancing Public Safety in the Interior of the United States*, and (2) *Border Security and Immigration Enforcement Improvements*. Among other things, these orders:

- specified immigration-enforcement priorities;
- called for increased hiring of immigration officers (10,000) and border patrol agents (5,000);
- reinstituted a program (Secured Communities) to facilitate cooperation between immigration authorities and other law enforcement agencies;
- directed relevant Cabinet officials to "allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico", and to assign asylum officers and immigration judges to conduct appropriate interviews and proceedings in those facilities;
- and specifically directed the DHS secretary, to the extent permitted by law, to ensure the detention of aliens apprehended for immigration-law violations pending the outcome of their removal proceedings or removal from the United States and to end the so-called "catch and release" practice of routinely releasing aliens into the United States after apprehension for immigration-law violations.[70]

Modern Crimmigration

Removal Priorities. As of April 2017, ICE focuses its resources on removing aliens identified by President Trump's executive order. In a Feb. 20 memorandum, to "maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation," DHS Secretary John Kelly directed DHS personnel to prioritize for removal those aliens Congress described in:

- INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (inadmissible on criminal grounds);
- INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (inadmissible on national security and terrorism related grounds);
- INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (inadmissible on misrepresentation and fraud grounds);
- INA §§ 235(b) and (c), 8 U.S.C. §§ 1225(b) and (c) (subject to expedited removal proceedings for inadmissible arriving aliens or removal without further hearing on national security or other grounds); and
- INA §§ 237(a)(2) and (4), 8 U.S.C. §§ 1227(a)(2) and (4) (deportable on criminal or national security and related grounds).[71]

Secretary Kelly further directed that, regardless of the basis for an alien's removability, DHS personnel should prioritize removable aliens who:

- have been convicted of any criminal offense;
- have been charged with any criminal offense that has not been resolved;
- have committed acts that constitute a chargeable criminal offense;
- have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency;
- have abused any program related to receipt of public benefits;
- are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or
- in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Secretary Kelly authorized the ICE director, CBP commissioner, and USCIS director to issue further guidance to allocate appropriate resources to prioritize enforcement activities within the above categories. He gave the specific example of prioritizing enforcement activities against removable aliens convicted of felonies or who are involved in gang activity or drug trafficking.[72] To the extent they conflicted with those in the Feb. 20 memorandum and with certain enumerated exceptions (notably prior guidance for applying to prosecutorial discretion for individuals who came to the United States as children), Secretary Kelly's Feb. 20, 2017 memorandum explicitly rescinded "all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal." In many ways, current enforcement priorities are a continuation and extension of previous prioritizations—focusing on national security threats and criminals, many of whom were

subject to mandatory detention during removal proceedings.

Secure Communities and the Priority Enforcement Program. In July 2015, based on the priority of removing convicted criminals and in an attempt to gain the support of many state and local jurisdictions that had been uncooperative with ICE, DHS ended the Secure Communities program and replaced it with the Priority Enforcement Program (PEP).[73] Secure Communities was a 2008 Bush administration initiative—expanded by the Obama administration—originally designed to fully integrate immigration and law enforcement databases. Under Secure Communities, local law enforcement officials shared information concerning aliens with federal immigration authorities—including lawfully present and undocumented aliens—who had been arrested.[74]

In particular, Secure Communities raised questions about ICE's use of "immigration detainers"—documents ICE uses to notify other law enforcement agencies of its interest in taking custody of specific aliens in those agencies' detention.[75] ICE, and before it INS, had used immigration detainers as a means of obtaining custody of and detaining aliens for removal purposes since at least 1950.[76] Notably, under Secure Communities, ICE sometimes asked other agencies to continue detaining the alien not more than 48 hours "beyond the time when the subject would have otherwise been released from … custody to allow DHS to take custody of the subject."[77] But, while ICE emphasized that under Secure Communities it prioritized criminal aliens—particularly "aggravated felons," other felons, and those convicted of three or more misdemeanors—reports surfaced of detainers issued for aliens without criminal convictions or single misdemeanor offenses.[78] As a result, several state and local law enforcement jurisdictions adopted policies of declining ICE immigration detainer requests for at least some aliens, and numerous lawsuits were filed challenging detainer practices.[79]

Ultimately, Secure Communities came under criticism for targeting a number of aliens who committed seemingly minor, nonviolent offenses.[80]

In July 2015, PEP became fully operational and replaced Secure Communities.[81] Like Secure Communities, PEP "continue[d] to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks."[82] However, detainers under PEP were to be used only for aliens with convictions—rather than just arrests—for crimes that are described in ICE's priorities memo.[83] However, as discussed, President Trump called for the reinstitution of the Secure Communities Program, which DHS Secretary Kelly specifically implemented in his Feb. 20, 2017, Enforcement of the Immigration Laws to Serve the National Interest memo, which terminated the PEP program and restored Secure Communities.[84]

Mandatory and Prolonged Detention Revisited

With the official prioritization of criminal aliens, and increased enforcement generally, more aliens in removal proceedings find themselves subject to 8 U.S.C. § 1226(c)'s "mandatory detention," which the Supreme Court previously upheld as constitutional in *Demore v. Kim*. But immigration court backlogs have resulted in removal proceedings taking much longer than they did in years past—some aliens being detained for years, waiting for their cases to be completed before the immigration court and Board of Immigration Appeals. Thus, courts have struggled to apply the *Zadvydas* and *Demore* holdings in the modern context. This has resulted in a circuit split in approaches to mandatory and prolonged detention: (1) a "reasonable period" administered on a case-by-case basis and (2) a bright-line six-month/180-day approach.

The First, Third, Sixth, and Eleventh Circuits have adopted a "reasonableness" interpretation to prolonged detention, holding that an alien can only be held in immigration detention for a "reasonable" period without being provided a bond hearing.[85] In contrast, the Ninth and Second Circuits adopted a bright-line six-month/180-day period interpretation.[86] Under this approach, an alien who is otherwise subject to mandatory detention must be given a bond hearing after six months in detention. The Ninth Circuit's most recent case, *Rodriguez v. Robbins*, brought the issue of mandatory and prolonged detention back before the Supreme Court.[87]

The Supreme Court heard the *Rodriguez* oral argument on Nov. 30, 2016. But on Dec. 15, 2016, the Supreme Court issued a supplemental briefing order, directing the parties and any amici to address whether the Constitution—rather than a proper interpretation of the immigration statutes—requires the result the Ninth Circuit reached. As University of Texas School of Law professor Steve Vladeck—who also joined in a *Rodriguez amicus* brief—observed, "if the justices tackle the extent to which the Constitution does or does not compel the Ninth Circuit's bottom line, [*Rodriguez*] now may force the Court to answer" a number of significant unanswered questions, including:

- whether circumstances exist in which the government may constitutionally detain aliens pending removal for more than six months without violating due process;
- the meaning and continuing vitality of *Mezei,* which has often been read to hold that aliens physically "stopped at the border"—such as some *Rodriguez* plaintiffs—do not have due process rights;
- whether and when IIRIRA's mandatory detention requirements raise procedural and/or substantive due process problems; and
- the standard of review the Constitution requires in cases in which it requires judicial review of ongoing detention.[88]

If the Supreme Court addresses any of these questions, the ramifications for immigration-detention litigation could be profound.

Privatization of Immigration Detention

Not all aliens are detained in ICE owned-and-operated facilities. ICE contracts with state and local jails and for-profit prison corporations to house aliens—justifying such actions as a cost-cutting measure.[89] In 2014, the immigration-detention-bed breakdown was as follows: 11 percent ICE facility; 18 percent for-profit detention facilities under contract with ICE; 24 percent in state and local government detention facilities that exclusively house aliens for ICE; 28 percent in state and local detention facilities that also house criminal defendants and convicts; and 19 percent in U.S. Marshals Service facilities.[90] In 2014, of those aliens who were detained, 62 percent were housed in facilities run by private companies; that rose to 73 percent in 2016.[91]

As of 2015, for-profit prison corporations administered nine of the country's 10 largest immigration-detention centers.[92] Critics argue that the growth in privatization to congressional bed quotas and contracts has led to administrative decisions to detain—rather than release—otherwise bond eligible aliens, including vulnerable detainees such as asylum-seekers and LGBT people.[93] Critics also highlight that

DHS is the largest federal client of the private-prison industry.[94] For example, according to February 2016 Security and Exchange Commission filings, ICE contracts account for 24 percent of Correction Corporation of America's 2015 $1.79 billion revenue and 17.7 percent of The GEO Group Inc.'s 2015 $1.8 billion revenue.[95]

After the U.S. Department of Justice's Aug. 18, 2016, announcement that it would phase out the use of private prisons to house criminal inmates, critics called on ICE to follow suit for immigration detainees. Secretary Johnson directed the Homeland Security Advisory Council to evaluate the situation and submit a report by Nov. 30, 2016. After a two-month investigation by a six-member subcommittee made up of former law enforcement leaders, legal experts, and advocates, the report was submitted to the council. In part, the report called for greater oversight and monitoring of immigration detention facilities; on a vote, the council panel upheld these provisions.[96] However, 17 of the 24 members of the council panel voted to support a dissent that was included in the report, in which one of the authors criticized "the [majority's] conclusion that reliance on private prisons should, or inevitably must, continue."[97] The report and the council's vote nonetheless were advisory and nonbinding, with any final decisions to be made by the agency's director; Secretary Johnson apparently did not act and left the matter to his successor in the Trump administration, which has not officially addressed the report.[98]

Detention Conditions and Medical Care

While immigration detention is not criminal detention, the conditions often resemble jails—with detainees wearing uniforms, traveling to immigration court appearances in handcuffs, and residing in detention cells. But, in August 2009, then ICE Assistant Secretary John Morton announced that ICE would reform its system to create a "truly civil detention system," and ICE created a new Office of Detention Policy and Planning to design and implement that system.[99] Nonetheless, advocates continued to express concerns over the detention conditions—and medical care in particular, which allegedly contributed to the deaths of some immigration detainees.

In February 2012, ICE released its 2011 Performance-Based National Detention Standards. Among other things, these new standards:

- expand some medical and privacy protections for vulnerable populations (e.g., women, elderly, LGBT detainees);
- during initial intake and assignment to various levels of security facility, give "special consideration" to factors that raise the risk of "vulnerability, victimization, or assault" of the detainee during detention (e.g., transgender identity, elderly, pregnant, or physically or mentally disabled);
- expand medical care offered to women in ICE detention; and
- strengthen oversight of the process through which detainees may file grievances.[100]

Historically, critics have argued that a large obstacle to improving immigration detention conditions is that ICE's detention guidelines are not mandatory. But, as shown in a February 2016 U.S. Government Accountability Office Report and others, ICE continues working to improve its management and oversight of detention centers and the provision of medical care to immigration detainees.[101]

Changing Detention Demographics and Vulnerable Populations

In 2015, ICE reported a continuing decrease in illegal entries by Mexicans, while illegal entries by those from Central America—especially the Northern Triangle countries (Honduras, Guatemala, and El Salvador)—continued to increase.[102] In 2014 and 2016, DHS reported that Central Americans outnumbered Mexicans intercepted at the border.[103] As discussed *supra*, after a period of decreased border apprehensions, they significantly increased along the Southwest border in the final months of 2016, including a number of unaccompanied children, families, and asylum-seekers—vulnerable populations that present special concerns in immigration detention.[104] But also as discussed *supra*, the number of 2017 apprehensions has significantly dropped.

Families and Children. In mid-2014, the United States experienced an influx of tens of thousands of children from Central America. Immigration law distinguishes between accompanied and unaccompanied alien children, and they are treated differently for immigration purposes. Unaccompanied alien children are those under the age of 18 years, who have no lawful immigration status and no parent or legal guardian in the United States available to provide care and custody.[103] With limited exceptional circumstances, any federal department or agency—including ICE—must transfer any unaccompanied alien children to the Department of Health & Human Services Office of Refugee Resettlement's custody within 72 hours of determining that they are unaccompanied alien children.[104]

On the other hand, accompanied alien children are sometimes detained by ICE at family residential facilities with their mothers and siblings, a practice that has proved controversial. In June 2015, DHS Secretary Johnson announced a new approach to family detention, saying "once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued."[105] Nonetheless, litigation remains ongoing in the Ninth Circuit in *Flores v. Lynch*, regarding a 1997 settlement agreement that set minimum nationwide standards for the detention, release and treatment of minors in DHS custody. A Central District of California judge found that detaining mothers and children violated the 1997 settlement, and ordered DHS to release class members subject to specific provisions of the agreement during removal proceedings; DHS's appeal of that ruling remains pending.[106]

Mentally Ill. Detained aliens with serious mental illnesses and disabilities also present unique challenges—particularly as it relates to the general premise that removal proceedings are civil, and aliens are not entitled to counsel at government expense. These individuals are the subject of a long-running class action in the Central District of California, *Franco-Gonzalez v. Holder*. In April 2013, the court entered a permanent injunction in which it ruled that alien class members (only aliens in certain Western states) who were determined to be incompetent to represent themselves before an immigration judge must be provided with legal representation under the Rehabilitation Act as a reasonable accommodation for their disabilities.[107]

LGBT. LGBT immigration detainees also face unique challenges. Many critics allege that such individuals suffer harassment and physical and sexual abuse by detention facility staff and fellow detainees. Critics also assert that certain measures ostensibly designed to protect LGBT detainees—such as protective custody, in which the LGBT detainee is isolated from other detainees—are themselves abusive. A 2013 Center for America Program Freedom of

Information Act request revealed over 200 reports of abuse with ICE from 2008-2013 that mentioned the detainee's sexual orientation or gender identity, but ICE does not otherwise keep track of complaints in this way.[108] Since 2011, ICE contracted with the Santa Ana City Jail in California to maintain a number of beds specifically for LGBT individuals, but the Santa Ana City Jail recently decided to phase out that contract, forcing ICE to relocate these individuals. In 2017, ICE will open a new facility in Texas, which will have 36 beds designated for transgender detainees.[109]

Future

Much remains unsettled in the area of immigration detention—including the interpretation of "mandatory" detention for criminal alien detainees. This unsettledness is amplified now that the country is in the midst of transitioning from one presidential administration with its set of policies, practices, and priorities to a new one. And as discussed, the incoming administration's post-election policies, practices, and priorities have yet to be explicitly defined and implemented. Donald Trump's immigration plans during his campaign included: detaining "anyone who illegally crosses the border" "until they are removed out of our country"; "mov[ing] criminal aliens out day one, in joint operations with local, state, and federal law enforcement"; and enforcing "all immigration laws" and tripling the number of ICE agents.[110]

These pre-election policies seem to have largely followed his inauguration and continue—if not further—the prior prioritization of criminal offenders in removal proceedings and expand use of immigration detention. As history has shown, the implementation of immigration detention policies reflect the social and political forces of the time. And our time is not lacking in complicated social and political forces, both domestically and abroad. As the Trump administration clarifies and implements post-election policies, it will do so amid significant upheaval in Central America, the Middle East, and Europe, and the inevitable Supreme Court *Rodriguez* decision. ⊙

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[3]Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. Chi. L. Rev. 137, 139 & n.8 (2013).
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[14]*See* Silverman, *supra* note 5, at 2.
[15]*Id.*
[16]Lindsay, *supra* note 5, at 6-8, 40-45.
[17]*Id.* at 40-45.
[18]*Chae Chan Ping v. United States*, 130 U.S. 581, 595-96 (1889); *see also* Lindsay, *supra* note 5, at 42 (discussing case).
[19]Silverman, *supra* note 5, at 3 (citing 1882 Immigration Act (An Act to Regulate Immigration), Sess. 1 Ch. 375, Stat. 214, 47th Cong. (1882)).
[20]Chinese Exclusion Act, Pub. L. No. 46-126, 22 Stat. 58 (1882).
[21]*Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
[22]*Wong Wing v. United States*, 163 U.S. 228, 235, 242-44 (1896).
[23]*Id.*
[24]Lindsay, *supra* note 5, at 7.
[25]*Id.* at 38 (citing Francis A. Walker, *Immigration and Degradation*, 11 Forum 634, 641 (1891)).
[26]Das, *supra* note 3, at 140 n.17.
[27]*Id*. at 140 (citations omitted); Immigration Act of 1891 § 8, ch. 551, 26 Stat. 1084, 1085-86 (1891) (permitting detention" until a thorough inspection is made").
[28]Silverman, *supra* note 5, at 4.
[29]Immigration Act of 1893 § 5, ch. 206, 27 Stat. 569, 570 (1893).
[30]Silverman, *supra* note 5, at 4.
[31]*Id*.
[32]*United States Immigration Detention Profile,* at 3, Global Detention Project (2016), *available at* www.globaldetentionproject.org/wp-content/uploads/2016/06/us_2016.pdf (last visited Jan. 30, 2017).
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[34]Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874 (1917).
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[38]*Id*.
[39]Silverman, *supra* note 5, at 6.
[40]*Our History*, U.S. Citizenship & Immigr. Servs., *available at* www.uscis.gov/about-us/our-history (last visited Jan. 30, 2017).
[41]*Id*.
[42]Silverman, *supra* note 5, at 7.
[43]Karaim, *supra* note 5.
[44]Immigration and Nationality Act of 1952, Pub. L. No., 82-414, 66 Stat. 163 (1952); 8 U.S.C. § 1101 *et seq*. (2016).
[45]*Carlson v. Landon*, 342 U.S. 524 (1952).
[46]*Demore v. Kim*, 538 U.S. 510, 524 (2003) (discussing *Carlson*, 342 U.S. at 559, 568) (alteration in *Demore*).
[47]*Carlson*, 342 U.S. at 531-32.
[48]*Id.* at 535, 538.
[49]*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).
[50]*Id*.
[51]Karaim, *supra* note 5; Silverman, *supra* note 5, at 8-11.
[52]55 Fed. Reg. 24,858-01 (June 19, 1990).
[53]Anti-Drug Abuse Act of 1986, Pub. L. No. 999-570, 100 Stat. 3207 (1986).
[54]ADAA § 7343(a).
[55]8 U.S.C. §§ 1101(a)(43)(A)-(U).
[56]AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[57]IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[58]*Zadvydas v. Davis,* 533 U.S. 678 (2001).
[59]*Demore*, 538 U.S. at 513.
[60]*Id*. at 529.
[61]Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).
[62]*ICE Enforcement and Removal Operations (ERO) Report: Fiscal Year 2015,* U.S. Citizenship & Immigr. Servs. (Dec. 22, 2015), *available at* www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf (last visited Jan. 30, 2017).
[63]U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 88 & n.33 (Jan. 2016).
[64]*Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care*, U.S. Gov't Accountability Off., Report No. GAO-16-231 (Feb. 2016).
[65]*See ICE ERO Report*, *supra* note 62 at 6 ("In FY 2015, the total number of U.S. Border Patrol apprehensions was approximately 337,117, a decrease of 30 percent from FY 2014.").
[66]Dep't of Homeland Security, *Budget-in-Brief: Fiscal Year 2017* 38 (2016), *available at* www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf (last visited Jan. 30, 2017). The FY 2017 request of $1.748 billion also includes $309 million for the transportation and removal program, which coordinates the safe and secure transportation of aliens in ICE custody or for those who are being removed from the United States.
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[69]Tal Kopan, *Does Border Drop Mean Trump's Tough Talk Is Working? available at* www.cnn.com/2017/03/08/politics/border-crossings-huge-drop-trump-tough-talk/ (last visited Apr. 6, 2017); Tal Kopan & David Shortell, *Border Apprehensions Continue to Fall Under Trump*, *available at* www.cnn.com/2017/04/04/polititics/border-crossings-drop-continue/index.html (last visited Apr. 6, 2017).
[70]*See* Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017), §§ 1(b), 5, 6, 8; President Donald J. Trump, Exec. Order 13768: *Enhancing Public Safety in the Interior of the United States* §§ 5, 7, 10 (Jan. 25, 2017) *available at* www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united (last visited Apr. 6, 2017).
[71]Memorandum from DHS Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (*Enforcement Memo*) (Feb. 20, 2017), *available at* www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (last visited Apr. 6, 2017).
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[73]Memorandum from DHS Secretary Jeh Charles Johnson, *Secure Communities* (Nov. 20, 2014), *available at* www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (last visited Jan. 30, 2017) (discontinuation of the Secure Communities program).
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[75]Kate M. Manuel, Cong. Research Serv., R42690, Immigration Detainers: Legal Issues, at 1 (May 7, 2015).
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[78]*Id*. at 1.
[79]*Id*.
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[81]*ICE ERO Report*, *supra* note 62, at 1.
[82]DHS Secretary Johnson, *Secure Communities*, *supra* note 73 at 2.
[83]*Id*.
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[85]Margo Kniffin & Sarah Martin, *Developments in Civil Detention: Circuit Approaches to the Reasonableness of Porolonged Detention and Interpretation of "When Released" Clause*, 10(4) EOIR Immig. L. Adv. 4, 10-11 (2016) (discussing cases).
[86]*Id*. (discussing cases).
[87]*Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, -- S. Ct. --, 2016 WL 1182403 (U.S. June 20, 2016) (No. 15-1204).
[88]Steve Vladeck, *The (Potentially) Monumental Significance of the Jennings Supplemental Briefing Order*, Just Security (Dec. 16, 2016, 8:05 AM), *available at* www.justsecurity.org/35634/potentially-monumental-significance-jennings-supplemental-briefing-order (last visited Jan. 30, 2017).
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[91]Sharita Gruberg & Tom Jawetz, *How the U.S. Department of Homeland Security Can End Its Reliance on Private Prisons*, Ctr. for Am. Progress (Sept. 14, 2016, 9:04 AM), *available at* www.americanprogress.org/issues/immigration/news/2016/09/14/144160/

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[94]Gruberg & Jawetz, *supra* note 89.

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[98]*Id.*

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[101]*See generally*, Report No. GAO-16-231, *supra* note 64.

[102]*ICE ERO Report*, *supra* note 62, at 6.

[103]6 U.S.C. § 279(g)(2).

[104]8 U.S.C. § 1232(b)(3).

[105]Karaim, *supra* note 5.

[106]*Flores v. Lynch*, 15-56434 (9th Cir.); *see also* Report GAO-16-231, *supra* note 64, at 6 n.8.

[107]*Franco-Gonzales v. Holder*, No. 10-2211 (C.D. Cal.); Rehabilitation Act, 28 U.S.C. § 794.

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Vetting Refugees:

Is Our Screening Process Adequate, Humane, and Culturally Appropriate?

SABRINEH ARDALAN

In his March 6, 2017 memorandum on heightened screening and vetting, President Donald Trump called for the implementation of "protocols and procedures … [to] enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people."[1] A letter signed the same day by Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly described the need for "a thorough and fresh review of the particular risks to our nation's security from our immigration system."[2] The letter also called for a "temporary pause on the entry of nationals from certain countries."[3]

Yet, as President Trump acknowledged in his Feb. 16, 2017, press conference, the United States already has robust procedures in place to vet refugees and asylum seekers.[4] Any changes to the asylum and refugee processing system should thus promote the rule of law, safeguard the consistent application of screening measures, and ensure the fair and equitable treatment of applications for protection, without regard to an individual's country of origin. The March 6, 2017 Executive Order, "Protecting the Nation from Foreign Terrorist Entry into the United States," however, attempts to suspend the refugee resettlement program and reduce the number of refugees admitted to the United States in direct contravention of U.S. legal and moral obligations to protect those fleeing persecution and fearing return to torture.

This article first provides a brief history of this country's long-standing commitment to refugee protection. Next, it describes the legal standard applied in determining whether an individual is eligible for refugee protection, including bars to protection under U.S. law. The article then provides an overview of the extensive screening procedures already in place to address national security concerns.[5] Finally, the article concludes with a discussion of challenges related to credibility and corroboration, including issues with trust, translation, trauma, time, resources, and other hurdles, all of which must be considered as part of any effort to change the system.

History and Context of the U.S. Asylum and Refugee Admission System

The United States has long provided protection to refugees fleeing human rights abuses from around the world. After World War II, Congress enacted the Displaced Persons Act, which provided for the admission of hundreds of thousands of displaced Europeans. Throughout the Cold War, the United States responded on an ad hoc basis to refugee crises in Cuba, Southeast Asia, and Eastern Europe.[6] In 1980, the Refugee Act established a "permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States" and provided "comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted." In doing so, Congress emphasized that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[7]

The Refugee Act incorporated key provisions of international refugee law from the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol on the Status of Refugees,[8] including the international definition of "refugee" and the non-refoulement obligation, which provides protection against return.[9] In addition to creating a uniform overseas processing system for admission of refugees, the act also set forth provisions for the establishment of a domestic asylum system, such that individuals already in the United States who fear return to their home countries would also have a mechanism for applying for protection.[10]

Prior to the Refugee Act, the United States limited the admission of refugees based on geographical and ideological preferences. Specifically, the United States required refugees to show that they fled either a Communist country or a country in the Middle East.[11] The Refugee Act repealed such ideological criteria in an effort to eliminate the influence of foreign policy and politics over decisions regarding refugee status.[12] As Sen. Edward Kennedy, who introduced the legislation, explained, the act "gave new statutory authority to the United States' long-standing commitment to human rights and its traditional humanitarian concern for the plight of refugees around the world."[13] Legislative history, including the 1979 Senate and 1980 House reports, makes clear that the act aimed to reform the ad hoc approach the United States had taken to refugee admissions in order to "establish a more uniform basis for the provision of assistance to refugees."[14]

The U.S. Supreme Court relied on this history in *INS v. Cardoza-Fonseca*, noting: "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 act, it

is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees … to which the United States acceded in 1968."[15] The Board of Immigration Appeals (BIA), in *Matter of S-P-*, similarly observed that the Refugee Act brought the U.S. "definition of 'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, g[a]ve 'statutory meaning to our national commitment to human rights and humanitarian concerns.'"[16]

Despite the legislative intent of the Refugee Act, in the 1980s, political and foreign policy considerations continued to strongly influence certain decisions concerning refugee status,[17] leading to a 1991 settlement agreement reached in the case of *American Baptist Churches (ABC) v. Thornburgh*. In that agreement, the Department of Justice and legacy Immigration and Naturalization Service agreed that under both the statute and the regulations, "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.…" The settlement underscored that "whether or not the United States government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution … [and that] the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities."[18]

The terms of the *ABC* settlement agreement are still relevant 25 years later. Indeed, polarized discussions about national security and admission of refugees and asylum seekers are at the forefront of the public debate today. Nonetheless, prominent government officials have repeatedly voiced the belief that providing refuge to those fleeing persecution is not only integral to fulfilling this country's humanitarian obligations, but also to advancing strategic U.S. interests "by supporting the stability of our allies and partners that are struggling to host large numbers of refugees." Indeed, officials have emphasized that, contrary to common perception:

> Refugees are victims, not perpetrators, of terrorism. Categorically refusing to take them only feeds the narrative of ISIS that there is a war between Islam and the West, that Muslims are not welcome in the United States and Europe, and that the ISIS caliphate is their true home. We must make clear that the United States rejects this worldview by continuing to offer refuge to the world's most vulnerable people, regardless of their religion or nationality.[19]

As Barbara Strack—the Refugee Affairs Division chief at the U.S. Citizenship and Immigration Services' (USCIS) Refugee, Asylum, and International Operations (RAIO) Directorate—noted in written testimony submitted to the Senate Committee on the Judiciary, Subcommittee on Immigration and National Interest, in October 2015: "the United States has a proud and long-standing tradition of offering protection, freedom, and opportunity to refugees from around the world who live in fear of persecution."[20]

The Legal Process and Standard for Asylum and Refugee Protection

The international refugee definition governs claims for protection adjudicated both domestically and overseas. Different processes apply if a person seeks a referral for refugee status from outside the United States, as opposed to those who are already in the United States and apply for asylum.[21] Under the 1980 Refugee Act, the president, in consultation with Congress, determines the number of refugees that may be admitted through the overseas resettlement process each year.[22] The number varies from year to year. In FY 2016, for example, 84,995 refugees were admitted to the United States; for FY 2017, the number was set at 110,000.[23] Since the passage of the act, the United States has resettled more than 3 million refugees.[24] In addition, over half a million people have been granted asylum in the United States in that same period.[25]

Under U.S. law, a refugee is defined as:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.…[26]

As noted above, U.S. refugee law provides that foreign policy concerns, including whether an "applicant [for asylum or refugee status] is from a country whose government the United States supports or with which it has favorable relations" and whether the U.S. government "agrees or disagrees with the political or ideological beliefs of the individual," are inappropriate in decision-making.[27]

An applicant for refugee status or asylum bears the burden of proof of establishing that he or she meets the refugee definition. An applicant need not have suffered persecution in the past to qualify as a refugee: "In either the asylum or refugee context, an applicant can show he or she is a refugee based solely on a well-founded fear of future persecution without having established past persecution."[28]

Credibility and Corroboration

USCIS RAIO training materials for officers who conduct eligibility determinations for refugee and asylum status instruct that "credible testimony alone may be sufficient to meet the applicant's burden" and note that officers have "a duty to elicit sufficient testimony to make the determination whether the applicant is eligible for asylum or refugee status."[29]

Refugee division and asylum officers may request corroborating documentation where it is reasonably available.[30] They must, however, consider the context and circumstances of each applicant's case in doing so. For example, the USCIS training materials emphasize that a female applicant "might not have access to identity documents or other documentary proof of her claim," where "women in the applicant's country may not be afforded full rights of citizenship, or an applicant's means of support may have been dependent upon a male relative who had control over any documents pertaining to the female applicant." As the training materials note, "it may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual violence she suffered. Because of strong cultural stigma attached to rape, 'women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports.'"[31]

Additionally, in accordance with the guidance set forth in the UN High Commissioner for Refugees (UNHCR) Handbook, refugee

and asylum officers are required to consider each applicant's fear in light of that person's background "since psychological reactions of different individuals may not be the same in identical situations. One person may have strong political or religious convictions, the disregard of which would make life intolerable; another may have no such strong convictions."[32] The RAIO training materials underscore that while a "genuine fear of persecution must be the applicant's primary motivation in seeking refugee or asylum status," "it need not be the only motivation."[33]

Eligibility and Bars

Under the Immigration and Nationality Act (INA), a "well-founded fear" means a "reasonable possibility" or a 1-in-10 chance of persecution,[34] which can be inflicted at the hands of either a state or a non-state actor the state is unable or unwilling to control.[35] It is not, however, necessary that an applicant seek government protection where doing so would be futile or dangerous.[36]

In *Matter of S-A-*, for example, the BIA found a failure of state protection where a young Moroccan woman testified and presented country conditions evidence demonstrating that contacting government authorities about her father's abuse would have proven ineffective and dangerous. In that case, the BIA granted the young Moroccan asylum, finding that the beatings and burns her father inflicted "arose primarily out of religious differences between her and her father, i.e., the father's orthodox Muslim beliefs, particularly pertaining to women, and her liberal Muslim views … [that] differed from those of her father concerning the proper role of women in Moroccan society."[37]

The Refugee Act excludes from the refugee definition "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[38] In addition, under U.S. law, individuals who are deemed a danger to the community or a threat to national security are barred from asylum or refugee status. For example, statutory amendments to the INA bar individuals who have engaged in terrorist activity or provided material support to terrorism or terrorist activity, defined broadly, as the use of any "weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."[39] Under the INA, individuals convicted of a particularly serious crime in the United States or who have committed a serious nonpolitical crime may not be eligible for asylum.[40]

The Security Screening Process for Asylum Seekers and Refugees

Asylum seekers who meet the legal requirements for protection are subject to a rigorous security screening process, including thorough vetting by the Department of Homeland Security (DHS) and other agencies. Biographical data is screened against the Central Index System, which identifies whether immigration authorities have previously encountered the applicant; the National Counterterrorism Center's database of terrorism-related intelligence; the Customs and Border Protection (CBP) law enforcement and national security databases, which contain records relating to terrorists, wanted people, and people of interest to law enforcement; the Immigration and Customs Enforcement database; and the Department of State database. The FBI and DHS conduct name and fingerprint checks, which include identity confirmation and terrorist watch list checks; biometrics are also checked against the Department of Defense's biometric and watch list system.[41]

Refugees who are resettled to the United States are "subject to the highest degree of security screening and background checks for any category of traveler to the United States."[42] Prominent former government officials, including Secretaries of State Henry Kissinger and Madeleine Albright, among others, emphasized in a December 2015 letter to members of Congress that refugees resettled to the United States through the U.S. Refugee Admissions Program "are vetted more intensively than any other category of traveler."[43] Refugees are "interviewed several times over the course of the vetting process, which takes 18-24 months and often longer," and national and international intelligence agencies check fingerprints and other biometric data against terrorist and criminal databases.[44]

Government officials cite the "extensive," "redundant," and "careful" security-focused system for screening refugees.[45] A number of different international intelligence and law enforcement agencies are involved in the overseas refugee screening process, including "the National Counterterrorism Center, the Department of Defense, and Interpol, which have extensive databases on foreign fighters, suspected terrorists, and stolen, false, and blank passports from Syria, Iraq, and elsewhere."[46] USCIS initiates biometric checks to retrieve any criminal history and prior immigration data for refugees who are considered for resettlement, as well as to check for any national security concerns and matches it with biometric data collected by the Department of Defense in conflict zones.[47]

Additionally, Syrian refugee cases are specifically subjected to an enhanced review process.[48] As part of that enhanced review, the DHS-USCIS Office of Fraud Detection and National Security works to identify fraudulent claims[49] and "engages with law enforcement and intelligence community members for assistance with identity verification and acquisition of additional information."[50]

At multiple stages throughout the overseas screening and admission process, refugees are checked against watch list information contained in the State Department's Consular Lookout and Support System, and Security Advisory Opinions are sought from law enforcement and intelligence agencies.[51] The National Counterterrorism Center conducts Interagency Checks for all refugees who fall within a certain age range, irrespective of nationality, and additional "recurrent vetting" checks are conducted before the applicant travels to the United States.[52] Once refugees are brought to the United States, CBP officials conduct further screenings as well.[53] Applications may be subject to the Controlled Application Review and Resolution Process (CARRP) if "any national security concerns are raised, either based on security and background checks or personal interviews or testimony."[54]

Recommendations for Culturally Appropriate and Trauma-Sensitive Refugee Screening

Prominent bipartisan government officials, advocates, and scholars alike have emphasized that the United States has an obligation to stand by its "tradition of openness and inclusivity" in welcoming refugees and asylum seekers.[55] However, lack of resources, a daunting case backlog, and other constraints present obstacles to fulfilling this obligation.[56] Decisions regarding asylum or refugee status eligibility may be fraught with, *inter alia*, cultural misunderstandings and translation errors, among other problems, leading to mistrust and miscommunication.[57]

Numerous studies have documented the persistence of "refugee roulette"—disparities in decision-making, depending on the adjudicator.[58] Indeed, a recent study by the Transactional Records Access Clearinghouse found that "the outcome for asylum seekers has become increasingly dependent upon the identity of the immigration judge assigned to hear their case."[59] In order to improve its decision-making process, the Department of Justice implemented implicit bias training for employees.[60] Advocates have called upon the DHS to institute a similar mandatory training for its officials, as well.[61]

The USCIS training materials include important guidance on cultural sensitivity and the effects of trauma, emphasizing the challenges that officers may face in evaluating credibility. In particular, those materials note the "differences and norms governing women's behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum and refugee applicants." The training materials explain that effects of trauma—including reluctance to discuss sexual harm, particularly for female applicants with a male officer or interpreter, as well as limitations on access to information, due to social constraints, gender roles, and education level—may impede an applicant's ability to "clearly express her claim, … creating the false impression that she is being evasive."[62]

The training materials also note that "demeanor is often an unreliable and misleading indicator of credibility," particularly in cases involving torture or sexual violence, since "while some individuals who have been tortured become emotionally overcome when recalling their ordeals, others may exhibit no emotion at all." RAIO further instructs that "in some cultures, keeping the head down and avoiding eye contact are signs of respect … and should not be viewed as indicators of lack of credibility."[63]

The RAIO materials include detailed modules on interviewing torture survivors, working with interpreters, conducting a non-adversarial interview, and handling cross-cultural communication—but, given the significant backlogs facing officers and the pressures to make and write up decisions, this guidance may be insufficient. Although the RAIO materials discuss the need for a trauma-sensitive and culturally appropriate approach to interviewing applicants for refugee status and asylum, officers may not have the time to follow the guidance in a system hampered by limited resources.

As a retired immigration judge recently commented, given the pressures inherent in an overloaded system, it is inevitable that "the quality of justice erodes over time."[64] Immigration judges suffer from high burnout rates.[65] Adjudicators thus require greater resources, including additions to the refugee and asylum officer corps and the immigration courts, to ensure fair and consistent eligibility determinations.[66]

Conclusion

The United States has always had vital strategic as well as humanitarian reasons for granting protection to people fleeing persecution. In keeping with this long-standing commitment, the United States should continue to ensure that asylum seekers and refugees are treated in a humane, culturally appropriate, and trauma-sensitive manner, regardless of their country of origin or religion. Thorough vetting procedures and programs, such as the enhanced review processes and CARRP, should not be applied in a discriminatory manner that disadvantages Syrian refugees and others who come from predominantly Muslim countries. As U.S. government officials and advocates have repeatedly emphasized, U.S. interests are best served by a fair and equitable asylum and refugee resettlement system that fosters goodwill internationally and stability in regions, such as the Middle East, that are overburdened by refugees.

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Endnotes

[1]Donald J. Trump, *Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits* (Mar. 6, 2017).

[2]Letter from Jefferson B. Sessions III, U.S. Att'y Gen., and John F. Kelly, U.S. Sec'y of Homeland Sec., Dep't of Homeland Sec., to Donald J. Trump, U.S. President (Mar. 6, 2017).

[3]*Id.*

[4]Luqman Adeniyi, Rachel Cao, Mack Hogan, Mike Juang, & Natalia Wojcik, *Read the Full Transcript of Trump's First Solo Press Conference*, CNBC (Feb. 16, 2017, 4:51 PM), www.cnbc.com/2017/02/16/click-for-a-full-transcript-of-trumps-first-solo-press-conference.html.

[5]As part of its Syrian Refugee Resettlement Project, the Harvard Immigration and Refugee Clinical Program is issuing a report that addresses the vetting and screening process more fully. *See Clinical Program Receives Grant From Milstein Foundation to Launch Syrian Refugee Resettlement Project*, Harv. L. Today (June 10, 2016), today.law.harvard.edu/clinical-program-receives-milstein-foundation-grant-launch-syrian-refugee-resettlement-project.

[6]U.S. Dep't of State, *History of U.S. Refugee Resettlement* (June 2015); Anastasia Brown & Todd Scribner, *Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States*, 2 J. Migration & Human Sec. 101 (2014).

[7]Refugee Act of 1980, Public Law 96-212, 94 Stat. 102, § 101(a) (1980).

[8]July 28, 1951, 189 U.N.T.S. 150. The United States is bound by Articles 2 through 34 as a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267.

[9]For an overview of the history of the 1980 Refugee Act, *see generally* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981).

[10]Refugee Act of 1980, Public Law 96-212, 94 Stat. 102, §§ 207-08 (1980).

[11]Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913. *See* Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. Miami L. Rev. 865, 868-69, n.22 & n.23 (1982); Anker & Posner, *supra* note 9, at 10-13; David A. Martin, *Reforming Asylum Adjudication:*

On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247, 1250-61 (1990); Recs. & Stat't of Admin. Conf. of the United States, 54 Fed. Reg. 28970, at 28971 (July 10, 1989) (codified at 1 C.F.R. § 305.89-4).

[12]*Compare* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913:

> Aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from *any Communist or Communist-dominated country or area*, or (II) from any country within the general area of the *Middle East*, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion.… (emphasis added)

with Refugee Act of 1980, Public Law 96-212, 94 Stat. 102 (1980):

> *Any person* who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and *who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*… (emphasis added).

[13]Edward M. Kennedy, *Refugee Act of 1980*, 15 Int'l Migration Rev. 141, 142-43 (1981).

[14]H.R. Rep. No. 96-781, at 1-2 (1980) (Conf. Rep.); S. Rep. No. 96-590, at 1-2 (1980) (Conf. Rep.). *See also* Rep. for the S. Comm. on the Judiciary, 96th Cong., upon formation of the Select Comm'n on Immigr. & Ref. Policy 1, 100-09 (Comm. Print 1979). Brown & Scribner, *supra* note 6, at 106 ("The ad hoc nature of refugee resettlement and the de facto development of distinct resettlement programs that coincided with influxes of new refugee populations fostered inconsistencies in the program. For example, voluntary agencies resettling Soviet refugees were eligible for a stipend of $1,100 dollars per refugee that was to be matched by $1,100 dollars in private money, whereas agencies resettling Indochinese refugees were eligible for a $500 dollar stipend with no match required. In testimony before the US Senate Committee on the Judiciary in 1979, former Senator Dick Clark—then newly appointed United States Coordinator for Refugee Affairs—expressed the need for a permanent and consistent refugee policy to replace what he characterized as an inadequate 'patchwork of different programs that evolved in response to specific crises.'") (internal citations omitted).

[15]*INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (internal citation omitted).

[16]*Matter of S-P-*, 21 I. & N. Dec. 486, 492 (1996) (quoting S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144).

[17]8 C.F.R. § 208.7 (1980); 8 C.F.R. § 208.10(b) (1980). *See* Arthur C. Helton, *Final Asylum Rules: Finally*, 67 No. 27 Interpreter Releases 789, 792-93 (July 23, 1990) ("The State Department's participation in the asylum process has been a recurring issue in inter-agency deliberations."); *see also* Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 NYU J. L. & Soc. Change 433 (1992).

[18]The lawsuit in *American Baptist Churches v. Thornburgh*, was based on widespread discrimination against asylum applicants from Guatemala and El Salvador, the majority of whom were denied asylum, in stark contrast to the majority of applicants who fled Communist countries. 760 F. Supp. 796, 799 (N.D. Cal. 1991).

[19]Human Rights First, *At Least 10,000,* Appendix, Letter to members of Congress 17 (2016), www.humanrightsfirst.org/sites/default/files/HRFReportAtLeastTenThousand-final.pdf (last visited Apr. 13, 2017).

[20]Written Testimony of Barbara L. Strack, Chief, Refugee Affairs Division, Refugee, Asylum, and International Operations Directorate, U.S. Citizenship and Immigration Services, and Matthew D. Emrich, Acting Associate Director, Fraud Detection and National Security Directorate, U.S. Citizenship and Immigration Services, *Hearing on "Refugee Admissions, Fiscal Year 2016" before The Senate Committee on the Judiciary, Subcommittee on Immigration & The National Interest* (Oct. 1, 2015), *available at* www.uscis.gov/tools/resources/hearing-refugee-admissions-fiscal-year-2016-senate-committee-judiciary-october-1-2015-chief-refugee-affairs-division-barbara-l-strack-and-acting-associate-director-matthew-d-emrich (last visited Apr. 13, 2017).

[21]For a discussion of the differences between refugees and asylees, *see* USCIS, *Refugees & Asylum*, U.S. Citizenship & Immgr. Servs. (Nov. 12, 2015), *available at* www.uscis.gov/humanitarian/refugees-asylum (last visited Apr. 13, 2017) ("Refugee status or asylum may be granted to people who have been persecuted or fear they will be persecuted on account of race, religion, nationality, and/or membership in a particular social group or political opinion.…You may seek a referral for refugee status only from outside of the United States.… You may apply for asylum in the United States regardless of your country of origin or your current immigration status.").

[22]INA § 207(a)(2), (b) ("Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.… (b) If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.").

[23]*U.S. Refugee Admissions Program*, U.S. Dep't of State, www.state.gov/j/prm/ra/admissions/index.htm (last visited Apr. 13, 2017).

[24]U.S. Dep't of State, *History of U.S. Refugee Resettlement* (June 2015).

[25]Eleanor Acer & Tara Magner, *Restoring America's Commitment to Refugees and Humanitarian Protection*, 27 Geo. Immigr. L.J. 445, 446 (2012-13). During 2014, 23,533 people were granted asylum in the United States. More recent statistics are not available. DHS Office of Immigration Statistics, *Annual Flow Report: Refugees and Asylees* (2016).

[26]INA § 101(a)(42)(A). For an in-depth analysis of U.S. asylum law, *see* Deborah E. Anker, Law of Asylum in the United States (2016).

[27]U.S. Citizenship & Immgr. Servs, *Decision Making Training Module*, RAIO Combined Training Course 11 (May 16, 2013), www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/Decision%20Making%20LP%20%28RAIO%29.pdf.

[28]*Id.*

[29]*Id.*

[30]*Matter of S-M-J-*, 21 I. & N. Dec. 722 (BIA 1997).

[31]U.S. Citizenship & Immgr. Servs, *Gender-Related Claims Training Module,* RAIO Combined Training Course 43 (Oct. 16, 2012), www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/Gender%20Related%20Claims%20LP%20%28RAIO%29.pdf.

[32]*Id.* at 12 (quoting UN High Comm'r for Refugees, Handbook on Procedures & Criteria for Determining Refugee Status under the 1951 Convention & the 1967 Protocol Relating to the Status of Refugees ¶ 40 (2011)).

[33]*Id.* at 10-11.

[34]*See INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-41 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook explains that 'in general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'") (internal citations omitted). *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

[35]*See* Anker, *supra* note 26, at ch. 4. *See, e.g.*, *Crespin-Valladares v. Holder*, 632 F.3d 117, 128-29 (4th Cir. 2011) ("[P]ersecution under the INA encompasses harm inflicted by either a government or an entity that the government cannot or will not control … whether a government is unable or unwilling to control private actors … is a factual question that must be resolved based on the record in each case.") (internal quotation marks omitted).

[36]*Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000). *See also Gender-Related Claims Training Module, supra* note 31, at 33.

[37]*Matter of S-A-*, 22 I. & N. Dec. at 1335-36.

[38]Refugee Act of 1980, Public Law 96-212, 94 Stat. 102 § 201 (1980); INA § 101(a)(42)(A). The definition of refugee has since been amended to include the following language: "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion." INA § 101(a)(42)(A).

[39]Acer & Magner, *supra* note 2, at 453. *See also* U.S. Citizenship & Immgr. Servs., Mandatory Bars to Asylum and Discretion, Asylum Officer Basic Training (2009).

[40]U.S. Citizenship & Immgr. Servs, Mandatory Bars to Asylum and Discretion, *supra* note 39.

[41]*Vetting, Security and Fraud Screening in Asylum Process: Issue Brief*, Human Rights First (Dec. 4, 2015), www.humanrightsfirst.org/resource/vetting-security-and-fraud-screening-asylum-process.

[42]The U.S. Refugee Admissions Program priorities are as follows:

- Priority 1: UN High Commissioner for Refugees, U.S. Embassy, or specially trained nongovernmental organization identified cases, including persons facing compelling security concerns, women-at-risk, victims of torture or violence, and others in need of resettlement
- Priority 2: Groups of special concern identified by the U.S. refugee program (e.g., Bhutanese in Nepal)
- Priority 3: Family reunification cases (i.e., spouses, unmarried children under 21, and parents of persons lawfully admitted to the U.S. as refugees or asylees or persons who are legal permanent residents or U.S. citizens who previously had refugee or asylum status).

U.S. Citizenship & Immgr. Servs., Refugee Security Screening Fact Sheet (Dec. 3, 2015), www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf (hereinafter "USCIS Fact Sheet").

[43]Human Rights First, *At Least 10,000, supra* note 19. *See also* Testimony of Anne C. Richard, Assistant Secretary, Bureau of Population, Refugees, and Migration, *Statement Submitted for the Record to the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights* (Jan. 7, 2014), *available at* 2009-2017.state.gov/j/prm/releases/remarks/2014/219388.htm (last visited Apr. 13, 2017).

[44]*Id.*

[45]Statement of Leon Rodriguez, Director, U.S. Citizenship & Immigr. Servs., Dep't Homeland Sec., *The Syrian Refugee Crisis and Its Impact on the Security of the U.S. Refugee Admissions Program Before the H. Comm. On the Judiciary*, 114th Cong. (2015), *available at* judiciary.house.gov/wp-content/uploads/2016/02/USCIS-Rodriguez-Testimony.pdf (last visited Apr. 13, 2017). *See also* U.S. Dep't of State, Special Briefing, *Background Briefing on Refugee Screening and Admissions* (Nov. 17, 2015), *available at* 2009-2017.state.gov/r/pa/prs/ps/2015/11/249613.htm (last visited Apr. 13, 2017).

[46]Human Rights First, *At Least 10,000*, *supra* note 19.

[47]USCIS Fact Sheet, *supra* note 42.

[48]*Id.*

[49]Human Rights First, *Vetting, Security and Fraud Screening, supra* note 43.

[50]Human Rights First, *At Least 10,000*, *supra* note 19.

[51]USCIS Fact Sheet, *supra* note 42; Human Rights First, *At Least 10,000, supra* note 19. Statement of Leon Rodriguez, *supra* note 45 (explaining that the State Department's Bureau of Population, Refugees and Migration (PRM) incorporated Security Advisory Opinions (SAOs) into the program in response post-9/11 security

concerns and that SAOs are required in the Syrian context; Statement of Zoe Lofgren, Member, H. Comm. on the Judiciary, *The Syrian Refugee Crisis and Its Impact on the Security of the U.S. Refugee Admissions Program Before the H. Comm. On the Judiciary*, 114th Cong. (Nov. 19, 2015), *available at* www.gpo.gov/fdsys/pkg/CHRG-114hhrg97632/pdf/CHRG-114hhrg97632.pdf (last visited Apr. 13, 2017).

[52]Human Rights First, *At Least 10,000*, *supra* note 19. *See also* Statement of Leon Rodriguez, *supra* note 45 (noting that the Interagency Check is of the "most import" since the check is repeatedly conducted throughout the application and admission process, even after the refugee passes the initial State Department background check).

[53]Human Rights First, *At Least 10,000, supra* note 19.

[54]USCIS Fact Sheet, *supra* note 42. For a critique of CARRP, see ACLU, *Muslims Need Not Apply* (2013).

[55]Human Rights First, *At Least 10,000, supra* note 19.

[56]Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. Times (Oct. 4, 2016), www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html?_r=0.

[57]*See, e.g.*, Jane Herlihy et al., *Discrepancies in autobiographical memories—implications for the assessment of asylum seekers: repeated interviews study*, BMJ (2002); Jane Herlihy & Stuart Turner, *Untested assumptions: psychological research and credibility assessment in legal decision-making*, Eur. J. Psychotraumatol. (2015); Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 2 Int'l Migration Rev. 230 (1986).

[58]Philip G. Schrag et al., Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (2009); Philip G. Schrag et al., Lives in the Balance: Asylum Adjudication by the Department of Homeland Security (2014).

[59]*Asylum Outcome Increasingly Depends on Judge Assigned*, TRAC Immigr. (Dec. 2, 2016), trac.syr.edu/immigration/reports/447.

[60]Press Release, U.S. Dep't of Justice, Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel (June 27, 2016), www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel (last visited Apr. 13, 2017).

[61]Chris Rickerd, Letter to the Editor, *Bias in Immigration Judges*, N.Y. Times (Oct. 6, 2016), www.nytimes.com/2016/10/07/opinion/bias-in-immigration-judges.html.

[62]U.S. Citizenship & Immgr. Servs., *Gender-Related Claims Training Module*, *supra* note 34.

[63]*Id.*

[64]Dickerson, *supra* note 56. *See also* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 Judges J. (2015), www.americanbar.org/publications/judges_journal/2015/fall/who_me_am_i_guilty_of_implicit_bias.html (last visited Apr. 13, 2017).

[65]Dickerson, *supra* note 56 (citing Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 Bender's Immigr. Bull. 22 (2008)).

[66]*See, e.g.*, Human Rights First, *At Least 10,000, supra* note 19 ("The president should direct DHS and U.S. security vetting agencies to increase staffing and resources to conduct follow-up vetting inquiries … so that the completion of security clearance vetting is not unnecessarily delayed due to lack of sufficient staffing.… DHS should increase the size of the USCIS Refugee Corps and build on recent initiatives to conduct larger, more continuous, circuit rides to the region to minimize processing gaps and meet U.S. targets. The State Department and U.S. Resettlement Program should enlist and leverage trained and trusted nongovernmental organizations to refer vulnerable refugee cases for U.S. processing and encourage [the UN High Commissioner for Refugees] to work closely with experienced nongovernmental organizations that can assist in identifying and preparing cases.").

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U.S.

A Defender of the Constitution, With No Legal Right to Live Here

By JENNIFER MEDINA JULY 17, 2017

LOS ANGELES — She spends her days preparing legal strategies to help undocumented immigrants stay in the country. But at any moment, Lizbeth Mateo could be picked up for deportation herself. She is an immigration lawyer with her own immigration lawyer.

Last month, Ms. Mateo was officially sworn in as a lawyer, taking an oath to uphold the United States Constitution. After years of flaunting her status as undocumented and openly defying immigration law, she is now part of the legal system and hopes to represent clients who, like her, entered the United States illegally.

Allowing undocumented immigrants to work as lawyers is a sign of just how far the acceptance of such immigrants has come in places like California. When Kevin de León, the leader of the California State Senate, presided over Ms. Mateo's swearing-in ceremony, he called her the embodiment of the American dream.

But Ms. Mateo is setting out to practice law in a new era: President Trump, whose vows to seal off the border with a wall energized supporters, has made clear that all undocumented immigrants could be deported. Some immigrants have responded by going into hiding while others prepare to return home.

Ms. Mateo is among those confronting the administration even though doing so carries with it personal risk. She is regarded as a bold advocate by some and as a foolhardy provocateur by others because she left the country and returned illegally, daring immigration agents to detain her.

"I see activists who are well respected and seen as leaders in the community freaking out, and I'm like, 'That's not what we need right now,'" said Ms. Mateo, who was born in Oaxaca, Mexico. "Your job doesn't allow you to be freaking out. What you need to do is reassure the community that we're going to fight. At the end of the day we have no choice but to fight."

But others say that should not be her role. "You're taking the oath to uphold the Constitution of the United States, while you are simultaneously breaking those laws," said John C. Eastman, a constitutional law expert and the former dean of the law school at Chapman University in Orange, Calif. "You're violating the oath of office from the moment you take it — that's a real problem."

Ms. Mateo, 33, is among a very small number of undocumented immigrants in the country to receive a law license, and one of even fewer to work as an immigration lawyer. Another is her own lawyer, Luis Angel Reyes Savalza, who is fighting for her to stay in the country.

In 2014, California became the only state in the country to allow undocumented immigrants to practice law. The next year, New York courts reached a similar conclusion. There is no official count of how many undocumented immigrants are now working as lawyers, but Mr. Reyes Savalza can name about a dozen.

When California first began to consider admitting undocumented immigrants to the bar, a lawyer from the Obama administration submitted a brief opposing the idea, arguing that federal law is "plainly designed to preclude undocumented aliens from receiving commercial and professional licenses." But the administration backed off its opposition when Gov. Jerry Brown signed legislation explicitly allowing it.

While there has been little public outcry over the issue in California, some argue that it is yet another sign of the state's overreach on immigration.

Mr. Eastman said undocumented lawyers are putting their clients who are here under the Deferred Action for Childhood Arrivals, or DACA, at risk because the Trump administration could rescind it at any moment, leaving them even more vulnerable to deportation. In January, the president signed an executive order vastly expanding the definition of who is considered a criminal to include offenses like using fake Social Security numbers.

Young people like Ms. Mateo began publicly identifying themselves as undocumented more than a decade ago, telling their own stories to try to force change.

National attention on the plight of young people taken to the country by their parents helped pressure the Obama administration to put DACA in place, allowing the so-called "Dreamers" to live and work in the United States. That program is now in limbo under President Trump. Several Republican attorneys general have threatened to sue the federal government if the program is not rescinded by this fall.

Mr. Reyes Savalza and Ms. Mateo are pushing for a continuation of DACA, but they have other goals that are more extreme. They argue that immigrants who have served their time in prison for criminal convictions should not be targets for deportation. And they are pushing for local governments to set aside more money to pay immigrants' legal fees.

"We know they have said that everyone is at risk, period," Ms. Mateo said. "They want us to be scared."

Actions that she calls necessary, however, others call reckless.

In 2013, Ms. Mateo traveled to visit her relatives in Oaxaca for several days, knowing she had no legal visa to return. She then showed up at the border with eight other undocumented students who demanded to be let into the United States and granted asylum. She was eventually granted entry and held in an Arizona detention center for several days. After some political pressure, she was allowed to pursue her case in immigration court while she began law school at Santa Clara University in California.

The protest was meant to call attention to the many people who had been deported before DACA was put in place, but many immigration activists criticized her for leading an irresponsible publicity stunt. Still, she became something of a celebrity in some immigrant rights circles.

The action jeopardized her own chance at legal status. The DACA program requires applicants to prove they have never left the United States since they entered as children. When Ms. Mateo applied for DACA last year, she was denied because of the trip to Mexico.

She plans to reapply and has enlisted help from members of Congress, university leaders and an army of immigration advocates.

If she is denied this time, Ms. Mateo will have few other legal possibilities. Regardless of the outcome, she said, she

has no plans to leave the United States.

"I keep struggling with what I planned for my life; what I still plan for my life versus what is my reality right now," she said. While she now has her law license, because she does not have legal status, no employer can hire her without the risk of sanctions. Instead, she will soon open her own law firm, because any undocumented immigrant can own a business.

For months, she has been working out of a day laborer center in Pasadena. She trains people in how to tell their stories to groups that have promised to defend immigrants against deportation, and helps them fill out forms for family members in deportation proceedings.

"Anything you can say to show that you have a life established here, that you are working and contributing, that is helpful," she told a group of middle-age women gathered at the center one night. She added, "We need them to know that we need their help and deserve it."

Ms. Mateo came to the United States with her family from Oaxaca as a teenager in 1998. When she began high school, she knew little English but already dreamt of becoming a lawyer.

As a student at California State University, Northridge, she began quietly meeting with other undocumented students. For months, they gathered in secret in the windowless office of a Chicano studies professor. Then they learned about a similar group in the journalism department. The groups merged and began to hold public events, calling themselves "Dreams to be Heard." The students were among the first to press for the Dream Act, legislation in Congress that would grant a path to citizenship for young undocumented immigrants brought to the United States by their parents. The legislation failed, which led President Barack Obama to establish the DACA program administratively.

"People say they are scared, but we don't have to be invisible anymore," Ms. Mateo told hundreds of students when she was honored by a Northridge student group this spring. "You're safer when you are out, when you are connected to people who will know if ICE comes for you in the middle of the night."

Those who advocate for a stricter crackdown on illegal immigration strongly disagree.

"To say 'I am here illegally and I don't care about what the law says and I am just going to be here and I demand to be rewarded for it,' that tends not to play well," said Ira Mehlman, a spokesman for the Federation for American Immigration Reform, which advocates more immigration restrictions. "If you are in the country illegally, there is no reason you should be able to practice law."

Mr. Reyes Savalza, 29, who was also born in Mexico, knew about Ms. Mateo long before he met her. He had seen her speak at rallies and read about her protests for years. Her brand of activism inspired him while he was studying at New York University School of Law. When he was offered to take on her case, he did not hesitate.

As a child, Mr. Reyes Savalza's mother taught him to tell anyone who asked that he was born at O'Connor Hospital in San Jose, Calif. When he began working as a teenager he used a fake Social Security number to get a job, as a vast majority of undocumented immigrants do. That is now considered grounds for deportation.

For the past two years, Mr. Reyes Savalza has worked at Pangea Legal Services, a nonprofit in San Francisco that helps defend immigrants from deportations. These days, as Mr. Trump moves forward with his vows to increase deportations throughout the country, Mr. Reyes Savalza, who has legal status through DACA, sees his job as more difficult.

He worries about his parents, anxious that any phone call could be the one to inform him that they were picked up by immigration officers. Like his clients, they want answers he does not have.

"They want me to tell them everything will be O.K., but I can't," he said.

Between the two of them, Ms. Mateo and Mr. Reyes Savalza are working to help more than a dozen undocumented immigrants remain in the country. As her lawyer, Mr. Reyes Savalza plans to resubmit Ms. Mateo's application for DACA in the coming weeks. Ms. Mateo will soon begin working on her two younger brothers' applications for renewal.

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