

William & Mary Journal of Race, Gender, and Social Justice

Volume 27 (2020-2021)

Issue 1 *Justice Across Borders: Social Justice and Its Intersections with Law, Immigration, and Human Rights*

Article 5

November 2020

Relentless Pursuits: Reflections of an Immigration and Human Rights Clinician on the Past Four Years

Sarah H. Paoletti

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Administrative Law Commons](#), [Immigration Law Commons](#), [Law and Race Commons](#), [Legal Education Commons](#), and the [President/Executive Department Commons](#)

Repository Citation

Sarah H. Paoletti, *Relentless Pursuits: Reflections of an Immigration and Human Rights Clinician on the Past Four Years*, 27 Wm. & Mary J. Women & L. 121 (2020), <https://scholarship.law.wm.edu/wmjowl/vol27/iss1/5>

Copyright c 2021 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

RELENTLESS PURSUITS: REFLECTIONS OF AN
IMMIGRATION AND HUMAN RIGHTS CLINICIAN
ON THE PAST FOUR YEARS

SARAH H. PAOLETTI*

INTRODUCTION

- I. THE TRUMP ADMINISTRATION'S RELENTLESS ASSAULT ON IMMIGRANTS IN CONTEXT
 - A. *The Historical Context, Laws and Actions that Laid the Foundation for the Trump Administration's Assault on Immigration*
 - B. *Trump Introduces a New Enforcement Regime, Unprecedented in Approach, Scope and Attitude*
 - C. *The Upending of Lives Through the Announced Termination of DACA and TPS Status*
 - D. *Denying Protection While Layering Trauma upon Trauma: The Trump Administration's Policy of Family Separation and Kids in Cages, Restrictions on Asylum, and the Creation of a Humanitarian Crisis at the Southern Border and for Those Who Finally Make It Across*
 - E. *Bold Recasting of the Institutions that Govern Immigration*
 - II. NAVIGATING THE TRUMP ADMINISTRATION'S RELENTLESS ASSAULT ON IMMIGRANTS
 - A. *Deciding When to Step-In and Step-Up: Values, Pedagogy and Reality*
 - B. *Reflecting Back and Looking Forward: Preparing for and Responding to Indeterminacy, the Trauma, Injustice, and the Systemic and Explicit Racism at Play*
- CONCLUSION: RESISTANCE AND RELENTLESS RESILIENCE

* Practice Professor of Law and Director, Transnational Legal Clinic, University of Pennsylvania Carey School of Law. JD, American University–Washington College of Law; BA, Yale University. The Author wishes to thank the editors of the *William and Mary Journal of Race, Gender, and Social Justice* for their work in hosting the Symposium and inviting me to participate, as well as for their thoughtful feedback and edits throughout the process. In addition, the author wants to give special recognition and thanks to Sarah L. Best, without whose research assistance this Essay would not have been possible, and to Ayodele Gansallo, who has not only co-taught the Transnational Legal Clinic with her for more than a decade, but has served as a treasured mentor, colleague, friend and co-conspirator. Finally, immense gratitude to Praveen, Mira and Niko for finding ways to keep me smiling over the past four years.

INTRODUCTION

When Donald J. Trump, Jr. first announced his candidacy for President of the United States, he made clear that immigration was going to be at the centerpiece of his campaign, using inflammatory language that laid bare his racialized political agenda.¹ From that moment forward, it became clear: the political was personal. No longer was immigration being debated in abstract terms focused on numbers and economics and preferred approaches to achieving “immigration reform.”² The immigration policies proposed and set forth had as their primary and unambiguous intent the severe curtailment of immigration into the country and the deportation of those immigrants already in the country.³ The proffered rationale for those policies was personal and based on the very identity of the immigrants themselves, individuals labeled by Trump as “bad hombres,” “murderers,” “rapists” and “terrorists.”⁴ Deeply enmeshed in the rhetoric promoting an anti-immigrant political agenda were racially based and discriminatory tropes.⁵ Candidate Trump has brought the campaign narrative—replete with race-based and xenophobic untruths about immigrants—into the White House.⁶ While these tropes

1. See *Here’s Donald Trump’s Presidential Announcement*, TIME (June 16, 2015, 2:32 PM), <https://time.com/3923128/donald-trump-announcement-speech> [<https://perma.cc/Y6PF-LLGR>] (“When Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”); see Maya Rhodan, *Donald Trump Raises Eyebrows With “Bad Hombres” Line*, TIME (Oct. 19, 2016, 10:02 PM), <https://time.com/4537847/donald-trump-bad-hombres> [<https://perma.cc/HPU2-AVMJ>] (discussing then candidate Trump’s remark during the final presidential debate of the 2016 election that “[w]e have some bad hombres here and we’re going to get them out.”); see also Amber Phillips, *Here are 12 other times Donald Trump vilified illegal immigrants*, WASH. POST: THE FIX (July 1, 2015, 4:22 PM), <https://www.washingtonpost.com/news/the-fix/wp/2015/07/01/here-are-12-other-times-donald-trump-vilified-illegal-immigrants-in-no-uncertain-terms> [<https://perma.cc/M8DB-ZC4W>]. For a discussion on the racist underpinnings of the Trump Administration’s anti-immigrant rhetoric and policy, see Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019), <https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy> [<https://perma.cc/RE5C-2ZBE>].

2. See Molly O’Toole, *Trump and Biden on immigration: nearly opposite but not quite*, L.A. TIMES (Aug. 17, 2020, 6:30 AM), <https://www.latimes.com/politics/story/2020-08-17/trump-biden-immigration-policy>.

3. See Peniel Ibe, *Trump’s attacks on the legal immigration system explained*, AMERICAN FRIENDS SERVICE COMMITTEE (Apr. 23, 2020), <https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained> [<https://perma.cc/2T3N-EC85>].

4. See Rhodan, *supra* note 1; see also Phillips, *supra* note 1.

5. See Karla McKanders, *Immigration and Blackness: What’s Race Got to Do With It*, 44 ABA HUM. RTS. MAG. 20 (2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/immigration-and-blackness [<https://perma.cc/GBC2-TPHP>].

6. See David Leonhardt & Ian Prasad Philbrick, *Donald Trump’s Racism: The*

are not new, this was the first time they have been at best, implicitly excused, and at worst, rewarded with the Presidency.⁷ As the Transition Team took shape, and it became clear that the aggressive anti-immigrant agenda espoused by Candidate Trump on the campaign trail—punctuated by racialized, nationalist, fear-based rhetoric—was going to find a place in the White House,⁸ I knew that I would be challenged both personally and professionally in ways that I could not fully appreciate at the time. I was wary of the havoc that the President-Elect’s agenda would wreak on immigrant communities across the country and on those seeking entry into the United States—communities that were already suffering from the laws and policies of prior administrations.⁹ But I could not fathom the full extent of havoc to be wrought and the suffering caused.

I had anticipated—as did the financial markets—that we would see an increase in the use of detention for immigrants subject to removal proceedings, a campaign promise that gave rise to the doubling of stocks for two of the primary private prison corporations the United States contracts with for the detention of immigrants.¹⁰ But I did not anticipate that families thrown into detention upon presenting themselves to Customs and Border Protection would be torn apart by an explicit policy of family separation aimed at terrorizing and deterring future asylum seekers.¹¹ While I anticipated a push for Congress to pass funding to build a wall along the U.S.-Mexico Border, I had not anticipated that when President-Elect Trump took office, he would bypass Congress and begin returning all asylum

Definitive List, Updated, N.Y. TIMES: OPINION (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html> [<https://perma.cc/2JR2-SBWR>].

7. See Nick Gass, *The 15 most offensive things that have come out of Trump’s mouth*, POLITICO (Dec. 9, 2015, 3:29 PM), <https://www.politico.eu/article/15-most-offensive-things-trump-campaign-feminism-migration-racism> [<https://perma.cc/MX3N-95ET>].

8. See Leigh Ann Caldwell, *Trump Transition Team Filled with Hardline Anti-Immigration Advocates*, NBC NEWS (Nov. 11, 2016), <https://www.nbcnews.com/politics/2016-election/trump-transition-team-filled-hardline-anti-immigration-advocates-n682651> [<https://perma.cc/S9D9-PWXM>]; see also NPR, *Adviser To Trump Transition Team Considers Immigration As National Security Priority* (Nov. 19, 2016), <https://www.npr.org/2016/11/19/502685388/advisor-to-trump-transition-team-considers-immigration-as-a-top-national-security> [<https://perma.cc/J4EG-EHT5>] (discussing the importance of protecting “the homeland” from “terrorist groups”).

9. See, e.g., *The History of Immigration Policies in the U.S.*, NETWORK LOBBY, <https://networklobby.org/historyimmigration> [<https://perma.cc/V58R-YZ7U>].

10. See Heather Long, *Private prison stocks up 100% since Trump’s win*, CNN BUSINESS (Feb. 24, 2017, 2:07 PM), <https://money.cnn.com/2017/02/24/investing/private-prison-stocks-soar-trump/index.html> [<https://perma.cc/BE44-FBTU>].

11. See Phillip Bump, *Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018, 12:14 PM), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent> [<https://perma.cc/PZ7Z-V9YV>].

seekers to Mexico to wait out their asylum proceeding.¹² I certainly had not anticipated that this Administration would begin sending asylum seekers from Central America and further south back to Guatemala, El Salvador and Honduras—the very countries many asylum seekers were fleeing—arguing they should seek asylum there, first.¹³ And while Candidate Trump had repeatedly declared DACA an “illegal executive order” issued by Obama,¹⁴ I had not anticipated that Congress would fail to act to preserve and codify the popular program that had broad-based bipartisan support, leaving it to the judiciary to hold the line.¹⁵ And I certainly had not anticipated that once the Supreme Court had ruled to restore the program to its pre-termination status that the acting head of the very agency charged with carrying out the Supreme Court’s decision would declare it “an affront to the rule of law,” and that the Administration would persist in its cross-agency assault on a program that is paradoxically grounded on the very notion of discretion upon which the Administration’s entire immigration platform has been built.¹⁶

In his first week in office, President Trump unleashed three Executive Orders upending the immigration system as we knew it.¹⁷ On January 25, 2017, he issued two orders specific to enforcement, one focused on internal enforcement,¹⁸ and one focused on border enforcement.¹⁹ Those were quickly overshadowed, though, just two days later by the January 27, 2017 Executive Order titled, “Protecting the

12. See Kristine Phillips, *Supreme Court allows Donald Trump’s ‘Return-to-Mexico’ asylum policy to continue for now*, U.S.A. TODAY: POLITICS (Mar. 11, 2020, 2:18 PM), <https://www.usatoday.com/story/news/politics/2020/03/11/trumps-return-mexico-asylum-policy-stay-place-now/5003630002> [<https://perma.cc/GA6Y-5ZHY>].

13. See Nick Miroff, *Trump Administration to Begin Sending Asylum Seekers to Guatemala as Soon as This Week*, WASH. POST (Oct. 28, 2019, 5:40 PM), https://www.washingtonpost.com/immigration/trump-administration-to-begin-sending-asylum-seekers-to-guatemala-as-soon-as-this-week/2019/10/28/998868c4-f99e-11e9-8190-6be4deb56e01_story.html [<https://perma.cc/3F4P-88L8>].

14. See Jemima McEvoy, *All The Times Trump Promised To Repeal DACA*, FORBES (June 18, 2020, 1:23 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/06/18/all-the-times-trump-promised-to-repeal-daca/#762c52fb679a> [<https://perma.cc/RXU7-XU77>].

15. See Ryan Costello, *Congress needs to act on Dreamers as Supreme Court considers immigration program*, PHILA. INQUIRER: OPINION (Mar. 11, 2020, 7:00 AM), <https://www.inquirer.com/opinion/commentary/daca-policy-dreamers-supreme-court-trump-administration-20200311.html> [<https://perma.cc/LJR8-AETU>].

16. See Press Release, Department of Homeland Security, DHS Statement on Supreme Court Decision on DACA (June 18, 2020), <https://www.dhs.gov/news/2020/06/18/dhs-statement-supreme-court-decision-daca> [<https://perma.cc/HGC9-H48R>].

17. See Avalon Zoppo, Amanda Proença Santos & Jackson Hudgins, *Here’s the Full List of Donald Trump’s Executive Orders*, NBC NEWS (Oct. 17, 2017, 11:58 AM), <https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796> [<https://perma.cc/34CR-Z9MP>].

18. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

19. Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 30, 2017).

Nation from Foreign Terrorist Entry into the United States,”²⁰ whereby he suspended the refugee admissions program and more than halved the number of annual admissions, ceased the processing of any Syrian refugee admissions, and banned entry to the United States for nationals of seven Muslim-majority countries.²¹ With the stroke of a pen, hundreds of people were left stranded at airports in the United States and across the world, while thousands of anxious family members wondered when, if ever, they might see their loved ones again.²²

It was then that I started employing the following analogy: the Trump Administration keeps launching new fireballs, and while advocates chase down each new fireball in an effort to minimize its

20. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Feb. 1, 2017).

21. See *Trump Travel Ban: What Does This Ruling Mean?*, BBC NEWS (June 26, 2018), <https://www.bbc.com/news/world-us-canada-39044403> [<https://perma.cc/C8FT-987D>].

22. See Michael D. Shear, Nicholas Kulish & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html> [<https://perma.cc/LU9W-BS2M>] (“Lawyers who sued the government to block the White House order said the judge’s decision could affect an estimated 100 to 200 people who were detained upon arrival at American airports.”). The January 27th Executive Order and the ensuing revisions to that order in response to litigation are often referred to as a “travel ban,” referencing the restrictions on travel into the United States for persons from certain countries. See, e.g., Donald J. Trump (@realDonaldTrump) TWITTER (June 5, 2017, 5:29 AM), <https://twitter.com/realDonaldTrump/status/871675245043888128> (referring to the January 27th Executive Order as “the original Travel Ban”). However, this terminology fails to account for the fact that the order also barred the entry of refugees seeking resettlement and individuals seeking permanent reunification with family members in the United States. Many refer to the Executive Order as the “Muslim Ban” because it has specifically targeted persons from Muslim majority countries. See *US Expands Travel Ban to Include North Korea*, BBC (Sept. 25, 2017), <https://www.bbc.com/news/world-us-canada-41382585> [<https://perma.cc/V223-PY5C>] (“Mr. Trump’s original ban in March was highly controversial, as it affected six majority-Muslim countries, and was widely labeled a ‘Muslim ban.’”). Neither label is entirely accurate, though I will refer to it throughout as the “Muslim ban” as it is important to recognize who the target is and the politics and discrimination behind it. Furthermore, it is important to recognize the precedent upon which this ban was built: the 1993 restrictions on asylum, H.R. 3363, 103d Cong. (1st Sess. 1993), and, more dramatically, the post-9/11 hate crimes committed against persons of the Muslim faith and those perceived to be Muslim, *Hate Crime Reports Up in Wake of Terrorist Attacks*, CNN (Sept. 17, 2001, 7:15 AM), <https://www.cnn.com/2001/US/09/16/gen.hate.crimes> [<https://perma.cc/MUH4-PBGD>], and the official immigration enforcement initiatives targeting Muslim communities, see Sameer Ahmed, Amna Akbar, Caroline Burrell, Kibum Kim & Smita Narula, *Under the Radar: Muslims Deported, Detained, and Denied on Unsubstantiated Terrorism Allegations* (2011), <https://chrgj.org/wp-content/uploads/2016/09/undertheradar.pdf> [<https://perma.cc/A5EU-97Z7>] (examining the U.S. government’s discriminatory use of the immigration system in its counterterrorism efforts). For the language and rhetoric that followed during the debates and passage of AEDPA and IIRIRA in 1996, see Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6(3) J. ON MIGRATION AND HUM. SEC. 192, 192–204 (2018), <https://journals.sagepub.com/doi/pdf/10.1177/2331502418786718> [<https://perma.cc/BX49-VQ22>].

damage, the forest fire set by its deliberate and calculated arson still rages. Over the past nearly four years, the Trump Administration has continued in its relentless bombardment, through executive orders, presidential proclamations, agency guidance, memoranda and orders, precedential opinions of the Attorney General, new regulations, and highly politicized and ideologically driven hiring throughout all levels of the Administration of persons with a hand in the development, implementation, and oversight of immigration enforcement.²³ While the courts have provided moments of relief and have held the line against the advancement of some of the more severe fires that threaten immigrant communities and our overall system of immigration, those fires still smolder while others burn on, and we must remain ever attentive to and conscious of those who stand in their midst at risk of being engulfed by the flames.²⁴

This is the environment in which I direct the Transnational Legal Clinic at the University of Pennsylvania Carey Law School, through which I teach and mentor law students in all aspects of lawyering and work to ensure that our clients receive high-quality representation. The Clinic's law student representatives directly represent individuals seeking asylum and other forms of humanitarian-based immigration relief.²⁵ They also work on a range of advocacy initiatives with and on behalf of organizational partners and clients, seeking to bridge international human rights standards with domestic (im)migration policy and practice both in the United States and across the globe.²⁶ Through this Essay, I share my reflections on this Administration's approach to immigration from the perspective of a clinical law professor and supervisor. I address how the past four years have influenced my approaches to teaching and mentoring future lawyers: I discuss the challenges presented, the questions that persist, and my thoughts on cultivating effective engagement moving forward.

In Part I, I provide an overall synopsis of the actions taken by the Trump Administration to upend our system of immigration and of the simultaneous retrenchment from international engagement

23. See SARAH PIERCE & ANDREW SELEE, *MIGRATION POL'Y INST, IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION* 1, 2–3, 6 (2017), <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts>.

24. See Fred Barbash, Deanna Paul, Brittany Renee Mays & Danielle Rindler, *Federal courts have ruled against Trump administration policies at least 70 times*, WASH. POST (Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled> [<https://perma.cc/UQ94-QJ6J>].

25. See *Transnational Legal Clinic*, UNIV. PA. CAREY LAW SCH., <https://www.law.upenn.edu/clinic/transnational> [<https://perma.cc/6BA3-JK42>].

26. *Id.*

particularly on matters related to human rights and global migration.²⁷ In Part II, I outline the ways in which the Clinic and I as a clinical law professor and immigration attorney at the University of Pennsylvania have responded to the new and constantly shifting policies, practices and politics in the fields of immigration and human rights law, and I reflect on the choices made and the choices left unmade.²⁸

I conclude with what sustains and inspires me, and what gives me both hope and renewed determination to do better: the community of clinical law professors that I am proud to call my colleagues; the advocates and activists who tirelessly and fearlessly meet every relentless assault with relentless resistance; and finally, and most importantly, my clients and the thousands of asylum seekers and other immigrants who confront and overcome the seemingly relentless challenges, hurdles and assaults on their most basic rights, and hope for and have faith in a better future.²⁹ I am ever cognizant of the intense privilege of operating in this space as a clinical law professor, a privilege that cannot be divorced from my identity as a white cis-woman and the ensuing socioeconomic advantages.³⁰ I owe it to my clients and their loved ones, to the community of activists who are deeply entrenched in the fight for dignity and rights, as well as to my students, to recognize and name that privilege, and to leverage it with humility. It is in that spirit that I share my observations and reflections.

I. THE TRUMP ADMINISTRATION'S RELENTLESS ASSAULT ON IMMIGRANTS IN CONTEXT

It is an incontrovertible truism to say that there is no area of law and policy that has been impacted as significantly by the Trump Administration as immigration.³¹ The Migration Policy Institute has

27. See Alexandra Schmitt, *President Trump's Alarming Human Rights Agenda at Home and Abroad*, CTR. FOR AM. PROGRESS (Dec. 10, 2019, 9:02 AM), <https://www.americanprogress.org/issues/security/reports/2019/12/10/478458/president-trumps-alarming-human-rights-agenda-home-abroad> [https://perma.cc/4XDZ-TCWS].

28. See Emilie Hoffer, *Modern Migration Challenges: U.S. Immigration Policy Fails to Balance National Security and Human Rights*, GEO. PUB. POL'Y REV. (Jan. 9, 2019), <http://gppreview.com/2019/01/09/modern-migration-challenges> [https://perma.cc/QUE8-3M83].

29. See *Asylum in the United States*, AM. IMMIGR. COUNCIL (June 11, 2020), <https://www.americanimmigrationcouncil.org/research/asylum-united-states#:~:text=Asylum%20is%20a%20protection%20granted,or%20her%20home%20country%2C%20and> [https://perma.cc/G9WU-ED9T].

30. See Cory Collins, *What Is White Privilege, Really?*, 60 TEACHING TOLERANCE MAG. 38, 39 (2018), https://www.tolerance.org/sites/default/files/2018-09/Teaching-Tolerance-magazine-60_1.pdf [https://perma.cc/S278-DJKT].

31. See Tyler Anbinder, *Trump has spread more hatred of immigrants than any*

documented over 400 policy changes that the Trump Administration has instituted in its report, *Dismantling and Reconstructing the U.S. Immigration System*.³² As the report's authors note, the Trump Administration has delivered on its anti-immigrant agenda "by maintaining a rapid-fire pace and layering each initiative with a series of regulatory, policy and programmatic changes."³³ Below I touch on a small fraction of those initiatives that have had an immediate impact on our Clinic's clients. Almost entirely omitted from my discussion below are the numerous restrictions the Administration has placed on all aspects of the legal immigration system, including both family-based and employment-based immigration, restrictions that have been enhanced and expounded upon under the guise of protecting "public health" and protecting jobs for American workers in the midst of the COVID-19 global pandemic.³⁴ While those actions are beyond the scope of this Essay, they warrant attention because of their impact, and because they serve to dispel notions that the Trump Administration's agenda is focused on upholding the "rule of law" by purportedly targeting its initiatives on those who seek to bypass the legal immigration system.³⁵ Before setting forth my snapshots of this Administration's anti-immigrant agenda, I begin with a very brief historical overview that established the foundation for the Trump Administration's actions.³⁶

American in history, WASH. POST: OUTLOOK (Nov. 7, 2019, 10:03 AM), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html [https://perma.cc/8XTF-GNBH].

32. See SARAH PIERCE & JESSICA BOLTER, MIGRATION POL'Y INST., *DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY* (2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency>.

33. *Id.* at 4.

34. Proclamation No. 10052, 85 Fed. Reg. 38263, 38263 (June 22, 2020).

35. See Carly Goodman, "The Shadowy Network Shaping Trump's Anti-Immigration Policies," WASH. POST (Sept. 27, 2018), <https://www.washingtonpost.com/outlook/2018/09/27/shadowy-network-shaping-trumps-anti-immigration-policies> [https://perma.cc/BP62-QCXY] (discussing the historical roots of Donald Trump's anti-immigration sentiments). The American Immigration Lawyers Association (AILA) has recently taken the unprecedented action of calling on its members to work together to defeat Trump in the November 2020 election. In an email sent to all AILA members, the AILA leadership wrote:

The AILA Board, which includes some very conservative members, unanimously agreed that in these extraordinary times AILA cannot stand on the sidelines and leave it to others to fight against the anti-immigrant agenda of the Trump administration. Our mission calls us to promote justice and to protect the interests of our members. Neither justice nor the interests of our members would be served by another four years of the Trump administration.

See Email from The Am. Immigr. Lawyers Ass'n (AILA) (July 28, 2020) (on file with author).

36. For a more thorough history of U.S. immigration see MAE NGAI, *IMPOSSIBLE*

A. The Historical Context, Laws and Actions that Laid the Foundation for the Trump Administration's Assault on Immigration

The United States has a troubled history with immigration: the harms being inflicted today on immigrants, intending immigrants, and their families are not without precedent, nor are the appeals to racism, xenophobia and implicit bias that are driving these harmful policies.³⁷ The cliché of the United States as a “nation of immigrants” that welcomes and has welcomed the contributions of immigrants whitewashes our history.³⁸ Indeed, the very first immigration law in the United States, the 1790 Naturalization Act, required applicants for naturalization to be “free white person[s].”³⁹ It was not until 1870 after a Civil War that took 750,000 lives that persons of African descent could apply for citizenship.⁴⁰ Then there was the Chinese Exclusion Act of 1882,⁴¹ followed by a quota-based immigration system that privileged persons from northern and western Europe.⁴² Subsequent stains on U.S. treatment of immigrants

SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 1–14 (2004); *see also* BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 1–8 (2004).

37. *See, e.g.*, John Burnett, *The U.S. Has A Long, Troubled History of Detaining Families Together*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624789871/president-trumps-new-plan-isnt-to-separate-migrant-families-but-to-lock-them-up> [https://perma.cc/XZC5-V6AS].

38. *See* Shani M. King, *Child Migrants and America's Evolving Immigration Mission*, HARV. HUM. RTS. J. 59, 60 (2019) (explaining that the “nation of immigrants” claim serves to erase our history of colonization and genocide of indigenous peoples across the land, as well as our history of slavery. It attempts to exclude from our country’s narrative those forcibly brought to our shores and their descendants whose labor provided the foundation for the modern-day America).

39. 1790 Naturalization Act, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795) (“Be it enacted . . . That any alien, being a free white person . . . may be admitted to become a citizen thereof.”).

40. 1870 Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (“And be it further enacted, that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.”).

41. The Chinese Exclusion Act, ch. 126, § 14, 22 Stat. 58, 61 (1882) (repealed 1943) (“That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.”).

42. The Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (stating that “[t]he annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality shall be 100”); *see also* Kaila C. Randolph, *Executive Order 13679 and America's Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1, 15–17 (explaining that “the percentage of available visas increased for Western Europe but decreased for other regions such as Southern and Eastern Europe” as a result of the revised quota system imposed by the 1924 Act, the very purpose of which was to “favor[] Northern Europeans, whose culture Americans viewed as superior to Southern and Eastern Europeans.”).

include, among others, the Japanese Internment program during World War II.⁴³

While not explicitly grounded in race or nationality, more recent legislation, such as the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), both enacted in 1996, laid the groundwork for much of the policies pursued by the Trump Administration today.⁴⁴ The two laws, taken together, have served to further the criminalization of migration, and have expanded and deepened the linkages between civil immigration law and criminal law and the systemic racism inherent in both.⁴⁵ The terrorist attacks of 9/11/2001 launched an era of intensified discrimination against persons of the Muslim faith, and all those perceived to be Muslim or from countries in the Middle East.⁴⁶ It also led to the creation of the Department of Homeland Security and the transition of many of the immigration functions that had originally resided within the Department of Justice, Immigration and Naturalization Services, to new agencies operating under the auspices of “national security.”⁴⁷ This gave way to both a heightened militarization of immigration enforcement,⁴⁸ and the erasure of even the pretense of justice in immigration proceedings, whereby persons seeking relief from deportation are now prosecuted in the name of homeland security.⁴⁹

When President Obama took office, he did so in the wake of demands for comprehensive immigration reform following the Immigrant Worker Freedom Rides of 2003 and subsequent actions led by the labor movement, members of the religious community,

43. See *Japanese-American Internment During World War II*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN. (Mar. 17, 2020), <https://www.archives.gov/education/lessons/japanese-relocation> [<https://perma.cc/UK6R-GRS9>].

44. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1269–71; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 630–31; Kerwin, *supra* note 22, at 4.

45. See Walter A. Ewing, Daniel E. Martinez & Ruben G. Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL, 14–15 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf [<https://perma.cc/LWY9-VK9N>].

46. See Ahmed et al., *supra* note 22, at 4.

47. See George W. Bush, *The Department of Homeland Security* (2002), https://www.dhs.gov/sites/default/files/publications/book_0.pdf [<https://perma.cc/8DF9-8ZUH>]; *Who Joined DHS*, DHS (Sept. 15, 2015), <https://www.dhs.gov/who-joined-dhs> [<https://perma.cc/FL2W-S56L>].

48. See *Creation of the Department of Homeland Security*, DEP'T OF HOMELAND SEC. (Sept. 24, 2015), <https://www.dhs.gov/creation-department-homeland-security> [<https://perma.cc/7QF3-PNZP>] (collecting key documents that led to the creation of the Department).

49. See *id.*

and immigrant rights advocates.⁵⁰ His approach was to pursue deportation of those deemed to pose a threat to public safety and national security, while allowing for deferred action, prosecutorial discretion and non-enforcement of the immigration laws as to persons with ties to the community and with minimal or no criminal histories.⁵¹ It was an approach that resulted in a record number of removals, earning Obama the title “Deporter-in-Chief.”⁵² The Obama Administration also employed family detention and detention as deterrence in response to a rise in the number of immigrants and asylum seekers entering the United States along the southern border with Mexico.⁵³ At the same time, though, President Obama introduced Deferred Action for Early Childhood Arrivals (DACA) and sought to extend relief, as well, to parents of U.S. citizens, as a stop gap measure to provide relief to families with deep ties to the United States until the hoped-for passage of comprehensive immigration reform.⁵⁴ Under President Obama, the Department of Homeland Security also issued clear guidance as to who was and was not a priority for deportation, recognizing that the United States did not have the capacity to deport the entire estimated 11 million undocumented persons living in the United States;⁵⁵ moreover, the Department set forth a program for granting Deferred Action and access to work authorization and driver’s licenses to those individuals who were not a priority for deportation and who were thus granted some comfort in knowing

50. See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 128 (2007); see also S. 1348 Comprehensive Immigration Reform Act of 2007, 110th Cong. (which ultimately did make it through Congress).

51. *President Obama’s Legacy on Immigration*, AM. IMMIGR. COUNCIL (Jan. 20, 2017), <https://immigrationimpact.com/2017/01/20/president-obamas-legacy-immigration/#.XzIEQBCSmEs> [<https://perma.cc/7BRP-5CH6>]; NPR The Latino USA Podcast, *Obama Leaves Office As ‘Deporter-In-Chief’* (Jan. 20, 2017), <https://www.npr.org/2017/01/20/510799842/obama-leaves-office-as-deporter-in-chief#:~:text=Obama%20Leaves%20Office%20As%20%27Deporter-In-Chief%27%20President%20Obama%20has,label%20and%20places%20the%20term%20in%20historical%20context>.

52. See Dara Lind, *Obama Is Deporting More Immigrants Than Any President in History: Explained*, VOX (Apr. 9, 2014, 7:00 AM), <https://www.vox.com/2014/4/9/5575006/2-million-immigrants-have-been-deported-under-obama> [<https://perma.cc/9DL2-E6G6>].

53. *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations*, DEP’T OF HOMELAND SEC. (July 10, 2014), <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations#> [<https://perma.cc/772B-YFJ8>] (announcing the administration’s intent to implement “an aggressive deterrence strategy” in response to the “recent rise of unaccompanied children and adults with children cross the southwest border” that included “building additional space to detain these groups”).

54. *2014 Executive Actions on Immigration, U.S. Citizenship and Immigration Services*, UCIS (Apr. 15, 2015), <https://www.uscis.gov/archive/2014-executive-actions-on-immigration> [<https://perma.cc/VCQ6-W78A>].

55. See *id.*

that as long as they did not run afoul of the criminal laws, they were not at risk of deportation.⁵⁶ President Obama's political gamble—enforcement in exchange for relief for millions of undocumented individuals and their families—proved fatal to many: Congress failed to deliver the sought after permanent relief, and when Trump took office, he began with tearing down all structures for providing discretionary forms of relief, while reinforcing the systems and structures of detention and deportation.⁵⁷

B. Trump Introduces a New Enforcement Regime, Unprecedented in Approach, Scope and Attitude

In the days immediately following the inauguration of President Trump, any limited relief or certainty provided by the Obama Administration and under earlier administrations to individuals and families within immigrant communities, was eviscerated, and the impact ran deep into communities across the United States and the globe.⁵⁸ One Clinic client, among the strongest people I have ever met, physically shook at the mere mention of the name “Trump.” Her body went cold when she heard his name, terrified that he would deliver her and her daughter back to the unfathomable abuse and persecution she had managed to escape when she fled her home country. She had persevered through decades of torture and after careful planning and many prayers, had finally reached the United States, a country that had held out for her the promise of safety and a new life for her and her children. Over the past four years, the bases for our clients' fear have grown more justified, and the assurances I can offer have grown more and more limited.⁵⁹

As we try to counsel clients and as I supervise students in the representation of clients, I have found that keeping up with what will be from one day to the next has become an almost insurmountable challenge. When my students look to me for answers to a host of questions related to what will happen in their clients' cases, or what one pronouncement or another pronouncement means in terms of what they can expect moving forward, I respond honestly, “I do not know.” I look to my colleagues with years of experience as full-time

56. *Id.*

57. See Alan Gomez, *Undocumented immigrants on edge as new Trump immigration policy calls for more deportations*, USA TODAY (Aug. 13, 2019), <https://www.usatoday.com/story/news/nation/2019/08/13/new-trump-immigration-policy-means-more-deportations-across-us/1880847001> [<https://perma.cc/48VP-WNP3>].

58. Executive Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017).

59. See Ernesto Sagas & Ediberto Roman, *Build the Wall and Wreck the System: Immigration Policy in the Trump Administration*, 26 TEX. HISP. J.L. & POL'Y 21, 22–23 (2020).

immigration practitioners, and they similarly respond, “I do not know.” Indeterminacy has always been a part of lawyering—it is part of life.⁶⁰ Our clients’ lives and the worlds they inhabit are full of grey spaces.⁶¹ The law itself is never black and white.⁶² But with research, time and experience, and significant preparation, we—as lawyers and law students—can often proceed with a general understanding as to what the rules are and how they will be applied given a particular set of circumstances and facts; and, we can counsel our clients accordingly, and proceed with some educated sense as to what we believe will transpire.⁶³ But we are living in what I have termed an era of “indeterminacy on steroids”: the rules are constantly changing; the precedent that governs our client’s cases when we file their initial applications for relief, and even when we file our final evidence packet and legal brief in the requisite fifteen days before their interview or hearing may be overruled by a decision not only from the Board of Immigration Appeals or a federal court, but a decision issued by the politically appointed Attorney General.⁶⁴ Government attorneys and immigration judges may receive new directives that change the way they prosecute and adjudicate the cases respectively.⁶⁵ Furthermore, ICE may choose to no longer respect “safe spaces,” and may show up to detain our client while he is taking his child to school despite an earlier grant of parole.⁶⁶ If there is one thing students all struggle with, it is making peace with and finding their way through indeterminacy.

What is certain amidst all of the indeterminacy is the relentless pursuit by the Trump Administration of an extremely restrictive

60. See Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511, 523 (2006).

61. See Sebastian Martinez, *What rights do immigrants in the US have?*, ATLANTA J.-CONST. (Sept. 23, 2016), <https://www.ajc.com/news/national/what-rights-immigrants-the-have/ttJThfJLQlpw0QIRIWRuLK> [<https://perma.cc/5992-APCN>].

62. See *id.*

63. *Representing Clients at the Master Calendar Hearing: How to Prepare for an Initial Hearing, Quick-Reference Checklist*, IMMIGR. LEGAL RES. CTR. (Dec. 2018), https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf [<https://perma.cc/VQY2-9DPT>].

64. Kim Bellware, *On immigration, Attorney General Barr is his own Supreme Court. Judges and lawyers say that’s a problem.*, WASH. POST (Mar. 5, 2020), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power> [<https://perma.cc/TDW6-M7W8>].

65. See, e.g., *Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement*, U.S. DEPT OF JUST. (Apr. 11, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal> [<https://perma.cc/M7WC-Z5VM>].

66. See *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGR. AND CUSTOMS ENFT (Sept. 25, 2018), <https://www.ice.gov/ero/enforcement/sensitive-loc> [<https://perma.cc/C4VK-LFVR>].

immigration system and its complete abandonment of the historically espoused values associated with family reunification and refugee protection that have been a benchmark of the U.S. immigration system.⁶⁷ What is less certain is how career immigration officers and immigration judges will carry out their duties and respond to the Administration's attempts to systematically tear down the immigration system under which they have long operated.⁶⁸ Nor is it any clearer where the federal courts will hold the line in challenges to major initiatives put forth, and how the Administration will respond as they seek to push back against those lines while pursuing a seemingly endless stream of litigation.⁶⁹

As noted in the Introduction, the first week of the Trump Administration came with the release of three Executive Orders.⁷⁰ The first two Executive Orders, one addressing enforcement at the border and the second addressing internal enforcement, laid bare the intent of exclusion and deportation.⁷¹ The statements of purpose for both were lifted directly from the scripted narrative of Trump's campaign, othering the immigrants through its persistent use of the term "alien"⁷² in reference to immigrants⁷³—both those seeking entry, and those for whom the United States had been home for most of

67. See Zolan Kanno-Youngs & Maggie Haberman, *Trump Administration Moves to Solidify Restrictive Immigration Policies*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/politics/coronavirus-trump-immigration-policies.html> [<https://perma.cc/3V7B-LVGQ>].

68. See Bellware, *supra* note 64.

69. See, e.g., Joel Rose, *Trump Administration Refuses to Accept New DACA Applicants Despite Court Rulings*, NPR (July 28, 2020), <https://www.npr.org/2020/07/28/896334928/trump-administration-will-reject-new-daca-applications-administration-official-s> [<https://perma.cc/Z944-8J73>].

70. See Zoppo et al., *supra* note 17.

71. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 30, 2017); Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

72. While the term "alien" is taken directly from the Immigration and Nationality Act, it had not in recent years been part of common parlance because it was recognized as serving to dehumanize people solely based on their immigration status. Alexandra Kelley, *Lawmakers battle over calling people 'undocumented immigrants' or 'illegal aliens'*, THE HILL (Feb. 20, 2020), <https://thehill.com/changing-america/respect/equality/483095-illegal-alien-or-undocumented-immigrant-colorado-lawmakers> [<https://perma.cc/9KEA-4B74>].

73. See Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 30, 2017) ("*Aliens* who illegally enter the United States without inspection or admission present a significant threat to national security and public safety.") (emphasis added); Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017) ("Many *aliens* who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for *aliens* who engage in criminal conduct in the United States. Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield *aliens* from removal from the United States.") (emphasis added).

their lives—while employing the narrative of illegals and illegality, and making unfounded assertions of the alleged threat to national security and to the security of our local communities.⁷⁴ Both EO's also lay blame at the feet of the Obama Administration for allegedly failing to do its job in enforcing our immigration laws, despite the rise in apprehensions and detentions at the border, and aggressive removal policies referenced above.⁷⁵

The Executive Order on “Border Security and Immigration Enforcement Improvements” called for the immediate construction of a “wall” along the southern border of the United States, the detention and prosecution of persons “apprehended on suspicion of violating Federal or State law, including Federal immigration law,” expedition of the processing of any claims for relief, and prompt removal of all denied relief after pursuit of any potential civil or criminal sanction, leading to the dramatic dismantling of the asylum system for those seeking protection at our borders.⁷⁶ In justifying the EO and the further militarization of the border set forth therein and the stripping of procedural due process protections, the President alleged a “surge” of persons whose entry into the United States presents a “significant threat to national security and public safety,” and poses a “clear and present danger to the interests of the United States.”⁷⁷ What does this mean in practice? Per IIRIRA, asylum seekers arriving in the United States without a visa or other documentation granting permission to enter the United States are subject to mandatory detention and must pass a “credible fear” interview granting them access to a full hearing on their claims for relief.⁷⁸ If they do not succeed in making out a *prima facie* case for asylum or withholding eligibility, they are to be deported.⁷⁹ In years

74. See *Creation of the Department of Homeland Security*, *supra* note 48.

75. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

76. Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017); *Summary of Executive Order “Border Security and Immigration Enforcement Improvements,”* AM. IMMIGR. COUNCIL (Feb. 27, 2017), <https://www.americanimmigrationcouncil.org/research/border-security-and-immigration-enforcement-improvements-executive-order> [https://perma.cc/YQ4C-35C7].

77. Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017). Included in the Executive Order were orders for the construction of the border wall and for the detention of “individuals apprehended on suspicion of Federal or State law, including Federal immigration law.” *Id.* It further expedited the process of removals, reinforced cooperation with local law enforcement through 287(g) agreements, increased oversight of those communities that have either refused to enter into or have withdrawn from those agreements, and deputized local law enforcement to “perform the functions of an immigration officer”—bringing border enforcement into the interior of the country. *Id.* at 8793, 8795.

78. See Deborah Anker, Bahar Khoshnoudi & Ron Rosenberg, *Expedited Removal: Applying the Credible Fear Standard*, 21 IN DEF. OF THE ALIEN 193, 194 (1998).

79. See Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76, 144 (2020).

past, those who were found to have a credible fear of persecution giving rise to a claim for asylum or withholding were either released on parole by ICE, or were granted bond by an immigration court, allowing for their release from detention during the pendency of their immigration court hearings.⁸⁰ The Trump Administration has sought to severely limit, if not end the previous alternatives-to-detention policies that it disparaged as “catch and release,” preferring instead to subject asylum seekers of all ages to prolonged detention and to the inherent barriers to due process resulting therefrom.⁸¹ The EO also calls on all federal agencies to collect and report on any direct and indirect aid provided to Mexico over the prior five years, laying the groundwork for the future economic strengthening of Mexico into taking actions to prevent migrants from ever reaching the U.S. border, and to ensure its cooperation with the later announced “Remain in Mexico” program.⁸² The EO has resulted in the application of heightened standards in the initial screening of persons at the border,⁸³ and laid the basis for the “zero tolerance” policy that gave rise to family separation (discussed below).⁸⁴

The twinned Executive Order addressing internal enforcement took aim at “[s]anctuary jurisdictions,” alleging that those jurisdictions that opted to leave immigration enforcement to the designated jurisdiction of the federal government, “have caused immeasurable

80. Kerwin, *supra* note 22, at 195.

81. See Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017) (ordering the Secretary of the Department of Homeland Security to issue new policy guidance to terminate “catch and release”); see also *Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security*, THE WHITE HOUSE (Apr. 6, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/> [<https://perma.cc/M5VC-GPDG>] (terminating “catch and release”).

82. Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017); see also Joel Rose, *Fear, Confusion and Separation as Trump Administration Sends Migrants Back to Mexico*, NPR (July 1, 2019, 2:35 PM), <https://www.npr.org/2019/07/01/736908483/fear-confusion-and-separation-as-trump-administration-sends-migrants-back-to-mex> [<https://perma.cc/5ZD9-WQ9F>] (discussing the impact of and response to the Trump Administration’s “Remain in Mexico” program).

83. See CATHOLIC LEGAL IMMIGR. NETWORK, INC. & AM. IMMIGR. LAWS. ASS’N, CREDIBLE FEAR LESSON PLANS COMPARISON CHART (May 30, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/80417> [<https://perma.cc/9N3L-5T4L>]. The Credible Fear Lesson Plans provided to USCIS asylum officers charged with making the initial findings have been amended from 2017 through 2019, resulting in a heightened threshold standard for proving a credible fear; eliminated guidance that the officer should consider the impact of trauma and cross-cultural issues that might impact a credibility determination; and requires consideration of whether internal relocation was possible for persons only eligible for CAT relief, and eliminating the asylum officers duty to elicit all relevant information during the course of the interview. *Id.*

84. CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 2 (2019).

harm to the American people and to the very fabric of our Republic.”⁸⁵ The EO then set into motion the withdrawal of federal funding to any jurisdiction it deemed was failing to carry out its directives, while calling for a dramatic increase and reliance on 287(g) agreements.⁸⁶ It made clear that all persons in the United States who for any reason may be subject to removal are priorities for deportation, calling for the immediate end of the 2014 “Priority Enforcement Program.”⁸⁷ What has resulted from the EO? From 2016 through 2018, this EO and ensuing policy initiatives resulted in a near doubling of the total number of ICE arrests.⁸⁸ Notable in the rise of arrests is the increase in the number of arrests made through at-large enforcement initiatives in communities across the country, as opposed to arrests of persons already in prison or jail, and the resulting rise in deportations of persons from the interior of the United States with minimal or no criminal histories.⁸⁹ The EO also signaled the Trump Administration’s intent to pursue cities that declined to cooperate with ICE in the enforcement of federal immigration laws, leading not only to massive enforcement actions in homes and public spaces throughout those jurisdictions, but also to the introduction of courthouse arrests in those cities labeled “sanctuary cities,” creating a chilling effect on parties to litigation, as well as on witnesses necessary for the prosecution of certain crimes.⁹⁰ One state court judge who is alleged to have allowed a man being pursued by ICE in her courtroom to leave the courthouse through the backdoor is now the subject of federal prosecution for alleged obstruction of justice.⁹¹

Just two days following the enforcement EOs and before the import of these two orders could be fully processed, the Trump Administration released a third Executive Order, often referred to as the Travel Ban, or the Muslim Ban, because it specifically targeted for

85. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

86. *Id.* at 8800.

87. *Id.* at 8801.

88. See GUILLERMO CANTOR, EMILY RYO & REED HUMPHREY, AM. IMMIGR. COUNCIL, CHANGING PATTERNS OF INTERIOR IMMIGRATION ENFORCEMENT IN THE UNITED STATES, 2016–2018 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/changing_patterns_of_interior_immigration_enforcement_in_the_united_states.pdf [<https://perma.cc/HAW5-U8RP>].

89. *See id.* at 1–2.

90. *See, e.g.*, SHELLER CTR. FOR SOC. JUST., TEMPLE UNIV. BEASLEY SCH. OF L., OBSTRUCTING JUSTICE: THE CHILLING EFFECT OF ICE’S ARREST OF IMMIGRANTS AT PENNSYLVANIA COURTHOUSES 6–7 (2019), https://www.ncsc.org/_data/assets/pdf_file/0011/13412/obstructing-justice013019.pdf [<https://perma.cc/K4E4-SLDN>].

91. *See* Shannon Dooling & Deborah Becker, *Mass. Judge Accused of Helping Immigrant Evade ICE to Face Trial on Conspiracy, Obstruction Charges*, WBUR (July 27, 2020), <https://www.wbur.org/news/2020/07/27/massachusetts-judge-undocumented-immigrant-ice-case-proceeds> [<https://perma.cc/PRT7-6GM7>].

the exclusion of nationals of Muslim-majority countries.⁹² The result was immediate chaos and protest.⁹³ The ban, announced late the afternoon of Friday, January 27, 2017, took effect immediately, and people in the air en route to the United States at the time it was announced landed at airports across the United States only to find themselves detained and facing immediate return, despite having visas and the requisite documentation to allow for their entry.⁹⁴ Throughout the weekend, the media streamed coverage of advocates, local government officials and community members arriving in large numbers at the airports to show their support of individuals seeking entry, and to call for the immediate release into the United States of those trapped at the airport.⁹⁵ It was the first show of mass resistance in response to what has become a series of immigration policies issued by executive fiat often without full administrative review, and certainly without meaningful opportunity for public notice and comment.⁹⁶

The Muslim/Refugee Travel Ban EO was further evidence of the Trump Administration's commitment to follow through on campaign promises to restrict refugee admissions into the United States, while also using national origin and religion as the basis for excluding persons seeking lawful entry into the United States.⁹⁷ It also resulted in the first of a series of emergency stays issued by a federal court temporarily halting the policy until after full judicial review.⁹⁸ As has become commonplace, Trump responded with disdain, referring to the judge who issued the nationwide injunction as a "so-called judge" and promising to push forward.⁹⁹ Just a few months later, despite pronouncements that the United States wanted the "best and brightest" immigrants to come to the United States, Trump

92. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Feb. 1, 2017); *see also Trump Travel Ban: What Does This Ruling Mean?*, *supra* note 21.

93. *See* James Doubek, *PHOTOS: Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, NPR (Jan. 29, 2017, 5:30 AM), <https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order> [<https://perma.cc/9CXB-WSKG>].

94. *See id.*

95. *Id.*

96. *Id.*

97. *See* Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 215, 221 (2017).

98. *See* Shear et al., *supra* note 22; *Darweesh v. Trump*, No. 17 Civ. 480, 2017 WL 388504 at *1 (E.D.N.Y. Jan. 28, 2017); Hunter Hallman, *Court Challenges to Trump's Immigration Policies—Where Are They Now*, BIPARTISAN POL'Y CTR. (Feb. 1, 2018), <https://bipartisanpolicy.org/blog/court-challenges-to-trumps-immigration-policies-where-are-they-now> [<https://perma.cc/W8AZ-MWZ7>].

99. *See* Martha Bellisle, *Trump Lashes Out at Travel Ban Ruling By "So-Called Judge,"* PBS (Feb. 4, 2017, 10:53 AM), <https://www.pbs.org/newshour/world/trump-lashes-travel-ban-ruling-called-judge> [<https://perma.cc/J96X-6RJS>].

issued another Executive Order on “Buy American, Hire American,” calling for reforms to the H-1B program, a temporary non-immigrant visa that allows for the hiring of highly educated immigrants in the STEM fields, that has served to bring persons educated in U.S. institutions into the U.S. labor market.¹⁰⁰

Further demonstrating his disregard for the judiciary, President Trump issued his first pardon late summer 2017 to Joe Arpaio (“Sheriff Joe”), the former Sheriff of Maricopa County, Arizona.¹⁰¹ Sheriff Joe had earned a reputation for racial profiling and detention of Latinx persons, and for running inhumane tent camps and forced labor programs for all of his prisoners.¹⁰² After a federal judge ordered him to cease his program of racial profiling, Sheriff Joe persisted unapologetically, and was ultimately prosecuted and convicted of criminal contempt of court.¹⁰³ Trump had supported Joe Arpaio throughout, and Sheriff Joe was one of his earliest supporters for the Presidency.¹⁰⁴ Trump had indicated he might pardon Sheriff Joe following his conviction, and late on a Friday afternoon—as he has done with many of his more controversial pronouncements—he announced his pardon of Joe Arpaio.¹⁰⁵ The pardon came before the sentencing hearing of Joe Arpaio, ensuring that Sheriff Joe would never be held to account for his unlawful racial profiling and contempt of court.¹⁰⁶ Trump’s pardon—notably the only pardon he issued in the entire first year that he held office, with the next pardon not issued until March 2018¹⁰⁷—demonstrated his own contempt for the federal judiciary and the civil servants within the Department of Justice who had worked for years under the Obama Administration to curtail the rights abuses carried out by Sheriff Joe.¹⁰⁸ It also signaled Trump’s unapologetic support for a man who abused his authority to carry out acts of egregious discrimination and to flout the civil rights and

100. Exec. Order No. 13,788, 82 Fed. Reg. 18837, 18838–39 (Apr. 21, 2017).

101. Press Release, The White House, President Trump Pardons Sheriff Arpaio (August 25, 2017), <https://www.whitehouse.gov/briefings-statements/president-trump-pardons-sheriff-joe-arpaio/> [<https://perma.cc/53JW-YHEH>].

102. See Richard Pérez-Peña, *Former Arizona Sheriff Joe Arpaio is Convicted of Criminal Contempt*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/us/sheriff-joe-arpaio-convicted-arizona.html> [<https://perma.cc/K9QE-YHEG>].

103. See *id.*

104. See Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017, 2:32 AM), <https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html> [<https://perma.cc/DV23-D778>].

105. See *id.*

106. See *id.*

107. *Pardons Granted by President Donald Trump*, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> [<https://perma.cc/4Z2M-YRZL>] (last updated Mar. 19, 2020).

108. See Liptak et al., *supra* note 104.

civil liberties of persons perceived to be in the United States unlawfully, i.e., persons from or believed to be from Latin America.¹⁰⁹

As the Trump Administration forged ahead, unapologetic and undeterred, it brought its disregard for external critique to the international arena: in March 2017 the Administration failed to show for hearings before the Inter-American Commission in Washington, D.C., hearings to which the United States had been invited to explain its actions on immigration in light of its international human rights commitments.¹¹⁰ The no-show signaled both the Trump Administration's attitude that it is beyond reproach, and the beginning of a series of open expressions by the Trump Administration of exceptionalism and nationalism.¹¹¹ Over the next year, it would systematically disengage from the international community and withdraw from dialogues and spaces aimed at advancing human rights.¹¹² In December 2017, it withdrew from negotiations around the Global Compact on Safe and Orderly Migration.¹¹³ In January 2018, it withdrew from negotiations around the Global Compact on Refugees.¹¹⁴ The Trump Administration's agenda for international engagement reflected a sea change from the Obama Administration and preceding administrations of both political parties, as demonstrated in the change of the State Department's mission statement in December 2017.¹¹⁵ Over voiced objections from career civil servants, and ambassadors past and present, the Trump Administration erased the prior mission "to shape and sustain a peaceful, prosperous, just, and democratic world and foster conditions for stability

109. Pérez-Peña, *supra* note 102.

110. See Jamil Dakwar, *In an Unprecedented No-Show, the U.S. Pulls Out of Planned Human Rights Hearing*, ACLU (Mar. 21, 2017, 11:00 AM), <https://www.aclu.org/blog/human-rights/unprecedented-no-show-us-pulls-out-planned-human-rights-hearing> [https://perma.cc/4FFF-VUYQ].

111. *See id.*

112. See Martin Finucane & Jeremiah Manion, *Trump has Pulled Out of International Agreements Before. Here's a List*, BOS. GLOBE (Feb. 1, 2019, 1:43 PM), <https://www.bostonglobe.com/metro/2019/02/01/trump-has-pulled-out-international-agreements-before-here-list/H9zTo2ctVEQ0b8xkUQ2t9J/story.html> [https://perma.cc/4CRP-KP7Q]; *see also* Press Release, U.S. Dep't of State, *On the U.S. Withdrawal from the Paris Agreement*, <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement> [https://perma.cc/JQ2N-ET6T] (discussing that at a time when the international community is grappling with the impact of climate change on human migration, the Trump administration also announced its withdrawal from the Paris Agreement).

113. CONG. RSCH. SERV., IF11003, *THE GLOBAL COMPACT ON MIGRATION & U.S. POLICY* (2020).

114. *Id.*

115. See Julia Conley, *Tillerson's State Department Drops Stated Mission to Promote Democracy*, COMMON DREAMS (Aug. 1, 2017), <https://www.commondreams.org/news/2017/08/01/tillersons-state-department-drops-stated-mission-promote-democracy> [https://perma.cc/2JHF-RENE].

and progress for the benefit of the American people and people everywhere.”¹¹⁶ Now the Department’s stated mission is to “advance the interests of the American people, their safety and economic prosperity,”¹¹⁷ interests that are apparently divorced from justice and democracy, and interests that are not shared with others in the global community.¹¹⁸

C. The Upending of Lives Through the Announced Termination of DACA and TPS Status

On September 5, 2017, Attorney General Jeff Sessions held a national press briefing to announce the termination of DACA, asserting that President Obama’s enactment of DACA was an unlawful exercise of discretion that bypassed Congress.¹¹⁹ It came as schools across the country, including the University of Pennsylvania, were holding their first day of classes.¹²⁰ College and graduate students, and recent graduates and their families across the country had the rug suddenly yanked out from underneath them. Having overcome any trepidation or fear they might have had in stepping forward and in providing their information and that of their family members to the U.S. government on the promise of the relief and opportunity provided by the program, DACA recipients were now reeling in the uncertainty as to what might happen next.¹²¹ While those already with DACA status were given six months to file for renewal of their status, those six months offered little in the way of relief and high school students who had been working hard to achieve college

116. See Cindy Saine & Marissa Melton, *Changes at State Department Lead to Questions about Its Mission*, VOICE OF AM. (Aug. 6, 2017, 12:15 AM), <https://www.voanews.com/usa/us-politics/changes-state-department-lead-questions-about-its-mission> [https://perma.cc/7DKS-2WCC].

117. See Charles S. Clark, *Reading Between the Lines on Agency Mission Statements*, GOV’T EXEC. (Mar. 9, 2018), <https://www.govexec.com/management/2018/03/reading-between-lines-agency-mission-statements/146530> [https://perma.cc/7L9J-L3VE].

118. See Conley, *supra* note 115.

119. Jefferson B. Sessions III, Attorney General Sessions Delivers Remarks on DACA, U.S. Dep’t of Just. (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca> [https://perma.cc/52V5-96MQ].

120. See Zihan Xiong, *Penn Denounces Trump’s ‘Heartbreaking’ and ‘Perverse’ Decision to End DACA*, DAILY PENNSYLVANIAN (Sept. 7, 2017, 10:00 AM), <http://www.thedp.com/article/2017/09/penn-denounces-trumps-heartbreaking-and-perverse-decision-to-end-daca> [https://perma.cc/J89J-RSYP]; see also *Three-year Academic Calendar, 2017–2018 through 2019–2020*, UNIV. OF PENN. ALMANAC (May 9, 2017), <https://almanac.upenn.edu/articles/three-year-academic-calendar-63-34> [https://perma.cc/Q9TD-H7XT].

121. See Elizabeth Redden, *Trump Ends DACA*, INSIDE HIGHER EDUC. (Sept. 6, 2017), <https://www.insidehighered.com/news/2017/09/06/trump-administration-announces-plans-wind-down-daca-after-six-months> [https://perma.cc/GB76-JMR5].

admissions, with the promise of the security DACA would provide, had that opportunity ripped away from them.¹²² Universities responded,¹²³ the business sector responded,¹²⁴ Silicon Valley responded,¹²⁵ and states and municipalities responded,¹²⁶ all in strong favor of DACA and in support of DACA recipients.¹²⁷ Litigation ensued and the courts enjoined the termination of DACA for those already in that status as the litigation moved forward.¹²⁸ But no new applications could be filed, advanced parole requests necessary to pursue study abroad and other opportunities were no longer available, and the promise of security that the DACA recipients had relied upon when they stepped out of the shadows and put themselves and their families before the U.S. government, was suddenly ripped away.¹²⁹ Just a few months following Session's announcement, ICE arrested 23-year-old DACA recipient Daniel Ramirez Medina in Seattle in his father's home, where they had gone to arrest his father.¹³⁰ A few days later, ICE arrested 19-year-old Josué Romero, despite his DACA status.¹³¹

122. See Eliana Johnson, *Trump Has Decided to End DACA, With 6-Month Delay*, POLITICO (Sept. 4, 2017, 12:40 AM), <https://www.politico.com/story/2017/09/03/trump-dreamers-immigration-daca-immigrants-242301> [<https://perma.cc/8GCS-MM7W>].

123. See Isabel Fattal, *How Higher-Education Leaders Are Fighting for DACA*, THE ATLANTIC (Sept. 1, 2017), <https://www.theatlantic.com/education/archive/2017/09/how-higher-education-leaders-are-fighting-for-daca/538740/> [<https://perma.cc/PP5P-476W>].

124. See Michael Corkery, *'Dreamers' Find Allies in Trump's Business World*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/business/daca-dreamers-trump-business.html> [<https://perma.cc/PS49-L7HV>].

125. See *Here are the Tech Companies Speaking Out Against a DACA Repeal*, THE VERGE (Sept. 5, 2017, 10:55 AM), <https://www.theverge.com/2017/9/5/16236602/daca-repeal-tech-companies-speaking-out-against-trump> [<https://perma.cc/25KV-W7K2>].

126. See Brief for Respondents N.Y. et al. at 2, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (No. 18-589); Brief amici curiae of 109 Cities, et al. at 1, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589).

127. See Fattal, *supra* note 123.

128. See *Regents of the Univ. of Cal. v. U.S. Dep't. of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018) (issuing nationwide preliminary injunction ordering the Department of Homeland to continue the DACA program); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018) (same); *N.A.A.C.P. v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018) (issuing a *vacatur* to set aside the DHS decision to end DACA).

129. See Kseniya Premo, Joanna Silver, *Trump Administration's Rescission of DACA to Affect Faculty, Students and Staff at Colleges and Universities*, JD SUPRA (Sept. 8, 2017), <https://www.jdsupra.com/legalnews/trump-administration-s-rescission-of-67209> [<https://perma.cc/9RMS-TW7U>]; Redden, *supra* note 121.

130. See Jason Hanna & Dan Simon, *'Dreamer' Arrest: Detainee Denies He Admitted Gang Membership*, CNN (Feb. 17, 2017, 7:35 PM), <https://www.cnn.com/2017/02/17/us/daniel-ramirez-medina-differing-accounts-daca-detention/index.html> [<https://perma.cc/B9QJ-GMMG>].

131. See Emily Goldberg, *What Immigration Raids Mean for Students*, THE ATLANTIC (Feb. 17, 2017), <https://www.theatlantic.com/education/archive/2017/02/why-was-a-daca-recipient-detained-by-ice/517134> [<https://perma.cc/9F6K-ZSFP>].

The resulting anxiety was palpable.¹³² At the Transnational Legal Clinic, as with clinics across the country, we scrambled to file renewals while renewals still could be processed and searched for alternative forms of relief that would provide DACA recipients with lawful status and a pathway to lawful residence.¹³³ We worked across the university and across universities to ensure DACA recipients, their family members, their teachers, and their institutions, had accurate information.¹³⁴ We added our voices to the chorus of support for those who are DACAmented, those who are undocumented, and their families, and we worked to do what we could to ensure that our words did not ring hollow, holding town halls, information sessions and trainings for staff, and otherwise listening to students and staff to learn how we could help.¹³⁵

Litigation once again resulted in the courts holding the line, enjoining the Administration from terminating DACA status for those who had it and requiring the processing of renewals for those whose DACA status was expiring but who remained eligible.¹³⁶ The Trump Administration took its challenge to the Supreme Court in 2019, and as people across the country waited to learn how the Court would respond, a CNN report revealed ICE was moving to reopen deportation cases against DACA recipients whose cases had been administratively closed upon the grant of their DACA status.¹³⁷ The Supreme Court ultimately ruled that the manner in which DACA was terminated was “arbitrary and capricious” and could not stand, but it refused to rule on the legality of DACA, leaving open the avenue for future action to quash the relief provided to approximately 600,000 individuals and their family members across the

132. See Chetanya Robinson, *After a Detention, DACA Recipients Live in Fear*, CROSSCUT (Feb. 23, 2017), <https://crosscut.com/2017/02/after-a-detention-daca-recipients-live-in-fear> [<https://perma.cc/MAB7-UBW2>].

133. See Penn Coll. of Liberal and Pro. Studies (@PennLPS), FACEBOOK (Sept. 20, 2017), <https://www.facebook.com/PennLPS/posts/daca-renewal-clinic-and-info-session-for-the-university-of-pennsylvania-communit/10156610606239368>; Don Macaulay, *Law School Clinics Support DACA Recipients*, THE NAT'L JURIST (Sept. 28, 2017, 10:13 AM), <https://www.nationaljurist.com/national-jurist-magazine/law-school-clinics-support-daca-recipients> [<https://perma.cc/WWY5-U5T7>].

134. See Manlu Liu, *Trump's Repeal of DACA: Inside the Movement to Support Penn's Dreamers' in 2017*, DAILY PENNSYLVANIAN (Dec. 13, 2017, 12:05 AM), <https://www.thedp.com/article/2017/12/daca-trump-politics-penn-administration-upenn-protest-philadelphia-immigration> [<https://perma.cc/KZU2-SJAV>].

135. See *id.*

136. See *DACA Litigation Timeline*, NAT'L IMMIGR. LAW CTR. (May 8, 2020), <https://www.nilc.org/issues/daca/daca-litigation-timeline> [<https://perma.cc/7DMF-WZXZ>].

137. See Bob Ortega, *ICE Reopening Long-Closed Deportation Cases Against Dreamers*, CNN (Dec. 21, 2019, 6:01 AM), <https://www.cnn.com/2019/12/21/us/ice-reopening-dreamer-deportation-cases-invs/index.html> [<http://perma.cc/3ZNZ-S847>].

country,¹³⁸ action which the Attorney General, together with the Acting Secretary of DHS seem intent on taking.¹³⁹

Joining the community of DACA recipients whose lawful presence in the United States has been secured by discretionary and long-term but impermanent relief are those in the United States with Temporary Protected Status (TPS).¹⁴⁰ TPS is granted to eligible nationals of a country that the United States has determined to be not safe for return, because of an ongoing armed conflict, an environmental catastrophe or other humanitarian crisis.¹⁴¹ Like their peers with DACA status, TPS recipients have built their lives, their futures, and the futures of their families, in the United States.¹⁴² And like their DACA peers, many are part of mixed-status families.¹⁴³ In just four months spanning from October 2017 through January 2018, Acting DHS Secretary Duke announced the Trump Administration's intent to terminate TPS for individuals from Sudan,¹⁴⁴ Haiti,¹⁴⁵ Nicaragua and El Salvador.¹⁴⁶ The underlying memo from USCIS to the Secretary of DHS assessing conditions in Haiti and purportedly relied upon when deciding to terminate TPS for Haitians, reveals the Administration's disregard for the needs of others and a cynicism with regard to any forms of humanitarian relief.¹⁴⁷ The USCIS memo details the devastation that followed from the

138. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 510 U.S. 20, 21, 29 (2020); see also Shoba Sivaprasad Wadhia, *DACA: Some Thoughts, Some Links*, MEDIUM (June 18, 2020), <https://medium.com/@shobawadhia/daca-some-thoughts-some-links-69aeaa784341> [<https://perma.cc/332U-MRVT>].

139. U.S. DEP'T OF HOMELAND SEC., ACTING SEC'Y OF HOMELAND SEC. CHAD WOLF, RECONSIDERATION OF JUNE 15, 2012 MEMORANDUM ENTITLED "EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN" (2020); OFF. OF THE ATT'Y GENERAL, ATT'Y GEN. WILLIAM BARR, LETTER TO ACTING SEC'Y OF HOMELAND SEC. CHAD WOLF (2020).

140. See *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/497X-SFPS>].

141. *Id.*

142. See *Permanently Protect Dreamers and TPS Holders*, FWD, <https://www.fwd.us/immigration/dream-tps/> [<https://perma.cc/L7XU-PEFF>].

143. See Michael Lyle, *Children of TPS Recipients Share Fears of Families Torn Apart*, NEVADA CURRENT (July 29, 2019), <https://www.nevadacurrent.com/2019/07/29/children-of-tps-recipients-share-fears-of-families-torn-apart> [<https://perma.cc/79KL-GC68>].

144. Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47228, 47228 (Oct. 11, 2017).

145. See *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti*, DEP'T OF HOMELAND SEC. (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti> [<https://perma.cc/8C2W-PJDP>].

146. Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636, 59636 (Dec. 15, 2017); Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2654 (Jan. 18, 2018).

147. See *Release of FOIA Documents Related to Termination of Haiti TPS*, NAT'L IMMIGR. PROJECT (Apr. 16, 2018), https://www.nipnlg.org/PDFs/practitioners/our_lit/im pact_litigation/2018_16Apr_foia-tps-haiti.pdf [<https://perma.cc/8YSZ-QKHX>].

massive earthquake in January 2010 that displaced a large percentage of the population and left government buildings and the entire infrastructure of the capital city in shambles; it discusses the cholera epidemic that followed, the ongoing challenges to rebuilding, and the political instability that persists; it notes the lasting impact from the destruction wrought by Hurricane Matthew in October 2016.¹⁴⁸ The memo concludes: “Many of the conditions prompting the original January 2010 TPS designation persist, and the country remains vulnerable to external shocks and internal fragility.”¹⁴⁹ Nonetheless, in November 2017, then Acting DHS Secretary Elaine Duke announced the termination of Haiti’s TPS designation, noting some progress in Haiti’s restoration post-2010 and asserting that many of Haiti’s persistent humanitarian and political crises are independent of the earthquake that gave rise to the initial TPS designation.¹⁵⁰

Termination of TPS, like termination of DACA, left families with long-standing ties to the United States in a state of tremendous uncertainty and insecurity.¹⁵¹ TPS beneficiaries and their families were suddenly confronted with their possible deportation to a country they no longer considered home.¹⁵² As with DACA recipients, a large percentage of persons with TPS are part of mixed-status families, with U.S. citizen children and other family members, but with no apparent means for regularizing their status and remaining lawfully in the United States.¹⁵³ Hundreds of thousands of families face displacement from their homes and family separation.¹⁵⁴ Congress could act and grant a transition to lawful permanent resident status to long-term residents who have maintained TPS, but to date, it has failed to do so.¹⁵⁵ Instead, individuals and their families have

148. *See id.*; *see also* UNITED STATES SENATE, SENATOR MARKEY, LETTER TO SEC’Y. DEPT. HOMELAND SEC. & DIR. OF U.S. CITIZENSHIP AND IMMIGR. SERV’S. (May 8, 2018).

149. *See Release of FOIA Documents Related to Termination of Haiti TPS*, *supra* note 147.

150. *See id.*

151. *See* Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 UC DAVIS L. REV. ONLINE 121, 133–34 (Nov. 2019).

152. *See* Ben Remaly, *Thousands to Face Deportation as Trump Administration Cancels Residency Permits*, NBC NEWS (May 4, 2018 5:22 PM), <https://www.nbcnews.com/politics/politics-news/thousands-face-deportation-trump-administration-cancels-residency-permits-n871416> [<https://perma.cc/UF2M-Y6Y7>].

153. Lyle, *supra* note 143.

154. *See* AV Press Releases, *New York Family Faces Separation as Result of Administration’s Termination of TPS*, AMERICA’S VOICE EDUC. FUND (Aug. 27, 2018), https://americasvoice.org/press_releases/new-york-family-faces-separation-as-result-of-administrations-termination-of-tps [<https://perma.cc/HC5G-W3PC>].

155. *See* Rebekah Entralgo, *Trump Administration Extends, But not Redesignate, TPS for Thousands of Syrians*, THINK PROGRESS (Aug. 1, 2019 2:29 PM), <https://archive.thinkprogress.org/trump-administration-extends-but-does-not-redesignate-tps-for-thousands-of-syrians-c298a4b85755> [<https://perma.cc/AS22-ZNKV>].

again stepped up and stepped forward to be recognized as established residents of the United States and the communities in which they live; activists have rallied alongside them, and lawyers have once again challenged the Administration's actions in court.¹⁵⁶ Again, the courts held the line, issuing preliminary injunction to halt the termination of TPS status.¹⁵⁷ But on September 14, 2020, in a split decision, the U.S. Court of Appeals for the Ninth Circuit ruled in *Ramos v. Wolf* that termination of TPS could proceed as to El Salvador, Haiti, Nicaragua, and Sudan.¹⁵⁸

D. Denying Protection While Layering Trauma upon Trauma: The Trump Administration's Policy of Family Separation and Kids in Cages, Restrictions on Asylum, and the Creation of a Humanitarian Crisis at the Southern Border and for Those Who Finally Make It Across

The Trump Administration's complete lack of empathy for immigrants and the cruelty with which it carries out its policies is evident in every household that has felt the impact.¹⁵⁹ But it is perhaps seen most acutely in the Administration's determination to eviscerate our asylum system and to return those fleeing persecution directly back into harm's way.¹⁶⁰

In April 2017, Attorney General Jeff Sessions issued a memo directing federal prosecutors to prioritize the prosecution of persons deemed to have entered or attempted to enter into the United States in violation of the any of the provisions of the immigration statute that permit criminal prosecution.¹⁶¹ On Friday, April 6, 2018, Sessions

156. See *Ending Obstacles for Temporary Protected Status Recipients Seeking Legal Permanent Residence*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/ending-obstacles-temporary-protected-status-recipients-seeking-permanent-residence#:~:text=The%20American%20Immigration%20Council%2C%20the%20Northwest%20Immigrant%20Rights,the%20United%20States%20from%20becoming%20lawful%20permanent%20residents> [https://perma.cc/N58C-4X3Z].

157. See *Challenges to TPS and DED Termination*, CLINIC LEGAL (Nov. 17, 2019), <https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/challenges> [https://perma.cc/N58C-4X3Z].

158. *Ramos v. Wolf*, No. 18-16981, slip op. at 2 (9th Cir. filed Sept. 14, 2020).

159. See Masha Gessen, *Trump's Immigration Rule is Cruel and Racist—But it's Nothing New*, THE NEW YORKER (Jan. 29, 2020), <https://www.newyorker.com/news/our-columnists/trumps-immigration-rule-is-cruel-and-racist-but-its-nothing-new> [https://perma.cc/X98D-L7C2].

160. See Maria Woltjen, *The White House is Quietly Deporting Children*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/opinion/coronavirus-children-border-deportation.html> [https://perma.cc/M5AZ-6BVT].

161. OFF. OF THE ATT'Y GEN., ATT'Y GEN. JEFF SESSIONS, MEMORANDUM FOR ALL FEDERAL PROSECUTORS (2017).

referred to the migrants as those “seeking to further an illegal goal [who] constantly alter their tactics to take advantage of weak points,” and issued a follow up memo in which he invoked the term “[z]ero-[t]olerance,” and effectively mandated prosecutions along the southern border.¹⁶² In his memorandum to federal prosecutors, he wrote: “You are on the front lines of this battle.”¹⁶³ The “zero tolerance” approach—set forth using a glorified militaristic narrative—was issued by the very man who in his recent Senate campaign called for continued glorification of Confederate monuments, and who worked closely to ensure that the criminal prosecutions of immigrants would give rise to their removal.¹⁶⁴

Perhaps the greatest perceived sin of this Administration has been its explicit practice of family separation, instituted as a means of deterring families fleeing violence and persecution from seeking protection in the United States, a systematic policy choice that appears to have been implemented shortly after Sessions’ April 2017 memo calling on federal prosecutors to pursue claims against all persons who may have committed a prosecutable offense upon entry.¹⁶⁵ In early 2018, the ACLU filed suit seeking a preliminary injunction that sought the U.S. government’s reunification of a Congolese asylum-seeker, Ms. L., with her seven-year-old daughter.¹⁶⁶ In March of that year, the ACLU sought class certification, calling for immediate family reunification of children and the parents from whom they had been forcibly separated.¹⁶⁷ In the months that followed, the cruelty of the Trump Administration’s policy of forcibly taking children from their parents—often with no notice—and locking them up in cages until they could be transferred into the custody of Health and Human Services (HHS), layering trauma upon trauma, provoked widespread condemnation.¹⁶⁸ But the Administration seemed

162. OFF. OF THE ATT’Y GEN., ATT’Y GEN. JEFF SESSIONS, MEMORANDUM FOR FED. PROSECUTORS ALONG THE SOUTHWEST BORDER (2018).

163. *See id.*

164. *See id.*; *see also* Lee Fang, *Senator: Confederate Flag Removal an Attempt to Delegitimize “Fabulous Accomplishments”*, THE INTERCEPT (June 29, 2015 9:32 AM), <https://theintercept.com/2015/06/29/push-remove-confederate-flag> [<https://perma.cc/PV8T-ZJLP>].

165. *See* Jasmine Aguilera, *Here’s What to Know About the Status of Family Separation at the U.S. Border, Which Isn’t nearly Over*, TIME (Oct. 25, 2019 2:49 PM), <https://time.com/5678313/trump-administration-family-separation-lawsuits> [<https://perma.cc/JG93-MSRN>].

166. *Ms. L v. ICE*, ACLU (Jan. 13, 2020), <https://www.aclu.org/cases/ms-l-v-ice> [<https://perma.cc/DNH6-X324>].

167. *Id.*

168. *See Kids in Cages: Inhumane Treatment at the Border: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform*, 116th Cong. 1, 5 n.7 (2020) (Written Testimony of Clara Long, Acting Deputy Washington Director, Senior Researcher, US Program Human Rights Watch); *Trump Migrant Separation Policy:*

immune to the condemnation, and was unrepentant as the public, members of Congress, and the international community called on it to account for the inhumanity of tearing kids away from their parents, locking them up, and often leaving the elder children to care for the younger ones.¹⁶⁹ Detention and family separation were part of the Administration's deterrence strategy,¹⁷⁰ terrorizing families as a means to threaten and deter other prospective migrants.¹⁷¹ From May 2018, when the court ordered the government to track how many children were being separated, through late June 2018 when President Trump finally responded to bipartisan and widespread outcries from all sectors of society to formally end the policy, more than 2,300 children had been separated.¹⁷² Shortly thereafter, following an order from the court in *Ms. L et al. v. ICE* commandeering ICE to reunify children with their parents, it became clear that DHS and HHS carried out the separations without any system for linking children to their parents.¹⁷³ In the year following the purported end of family separation, the practice continued, leading to 900 additional children being separated from their parents at the border.¹⁷⁴ Many of the parents have been deported without their children, and many families still remain separated.¹⁷⁵

Those families that remain together in the United States waiting for the opportunity to have their asylum cases heard remain detained.¹⁷⁶ The Trump Administration's persistence in detaining

Children 'In Cages' In Texas, BBC (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942> [<https://perma.cc/KFW7-X6AV>].

169. See Cora Currier, *Prosecuting Parents—And Separating Families—Was Meant to Deter Migration, Signed Memo Confirms*, THE INTERCEPT (Sept. 25, 2018), <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance> [<https://perma.cc/5GTW-9N2M>].

170. See *id.*

171. See *id.*

172. See Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' At The Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [<https://perma.cc/Q2ES-5P3Z>].

173. See Leila Rafei, *Family Separation, Two Years After Mrs. L*, ACLU (Feb. 26, 2020), <https://www.aclu.org/news/immigrants-rights/family-separation-two-years-after-mrs-l> [<https://perma.cc/X2PJ-BRRJ>]; *Federal Court Orders Reunification of Thousands of Parents and Children Torn Apart by Trump Family Separation Policy*, ACLU (June 26, 2018), <https://www.aclu.org/press-releases/federal-court-orders-reunification-thousands-parents-and-children-torn-apart-trump> [<https://perma.cc/352F-JC22>].

174. See *Family separation under the Trump administration—a timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline> [<https://perma.cc/F9L8-JKUQ>].

175. See *id.*

176. See Vanessa Romo, *Federal Judge Blocks Trump Policy Ordering Indefinite Detention For Asylum-Seekers*, NPR (July 3, 2019 6:09 AM), <https://www.npr.org/2019/07/03/738385096/federal-judge-blocks-trump-policy-ordering-indefinite-detention-for-asy>

families operates in direct contravention of the *Flores* settlement agreement originally reached in 1997, which sets the mandatory detention of migrant children at twenty days.¹⁷⁷ The *Flores* settlement arose out of litigation initially brought to challenge the detention of unaccompanied minors, but in 2015, the District Court judge ordered that the settlement's restriction on the detention of migrant children cover all children with or without their parents.¹⁷⁸ Again, the Trump Administration bristled under court orders and rules set under prior administrations and has sought termination of the settlement agreement.¹⁷⁹ In the meantime, in response to calls to shut down family detention centers and to release all children from detention in response to the COVID-19 pandemic, Judge Gee, who oversees the *Flores* settlement and subsequent litigation, has ordered the release of all *Flores* class members.¹⁸⁰ DHS has delayed.¹⁸¹ In another brazen show of cynicism, rather than release all families from detention, the Administration is asking parents for information about potential sponsors who could be responsible for the children, inciting fears of a new round of child separations.¹⁸² Kids and their parents remain in detention beyond the judge's ordered release date, subjected to the ongoing traumas associated with detention, while left to fester in what the judge has called "hotbeds of contagion."¹⁸³

While pushing for the detention and prosecution of asylum seekers arriving at the southern border, Attorney General Jeff Sessions and now Attorney General Barr have sought to preempt claims for asylum or withholding by changing the underlying law that governs asylum relief.¹⁸⁴ In June 2018, the Attorney General

lum-seeke#:~:text=Live%20Sessions-,Migrants%20Seeking%20Asylum%20Can't%20Be%20Detained%20Indefinitely%2C%20Federal%20Judge,reversing%20a%20Trump%20administration%20order [https://perma.cc/D8HH-QA38].

177. See *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST (Oct. 2018), https://www.humanrightsfirst.org/sites/default/files/FLORES_SETTLEMENT_AGREEMENT.pdf [https://perma.cc/FG4A-W5E4].

178. See *id.*

179. *Id.*

180. See Camilo Montoya-Galvez, *Judge Says Government Must Justify Holding Migrant Children as Coronavirus Spreads*, CBS NEWS (Mar. 29, 2020 3:11 PM), <https://www.cbsnews.com/news/coronavirus-migrant-children-detained-judge-dolly-gee-order> [https://perma.cc/JZH5-MH8Y].

181. See Julia Ainsley & Daniel Barnes, *Judge Delays Deadline for Release of Migrant Children Held by ICE*, NBC NEWS (July 16, 2020 7:15 PM), <https://www.nbcnews.com/politics/immigration/judge-delays-deadline-release-migrant-children-held-ice-n1234109> [https://perma.cc/LHD7-DT6Y].

182. See Nomaan Merchant, *Judge Demands ICE Better Explain Why it Won't Release Kids*, AP (May 22, 2020), <https://apnews.com/0cf36c3c15b6ce24c9486ab52ce86faf> [https://perma.cc/S7W8-MGKV].

183. Ainsley & Barnes, *supra* note 181; Montoya-Galvez, *supra* note 180.

184. See Dara Lind, *Attorney General Barr Just Handed ICE More Power to Keep*

issued a precedential opinion in *Matter of A-B-*, overturning a 2014 Board of Immigration Appeals decision, *Matter of A-R-C-G-*, which recognized women unable to leave their domestic partnership as a protected “particular social group,” that could give rise to the relief of asylum for those persecuted by their partner.¹⁸⁵ Attorney General Sessions had certified the case to himself, taking it away from The Board of Immigration Appeals (BIA) and indicating his intent to determine “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”¹⁸⁶ In doing so, he effectively usurped the agency appeals process, and sought to rewrite asylum law, and negate any domestic violence–based, or gang violence–based, claim to asylum.¹⁸⁷ The impact on women fleeing femicide and devastating rates of domestic violence—and their children with whom and for whom they ultimately fled—cannot be understated.¹⁸⁸ We have several clients within the Clinic who have fled unspeakable domestic violence, and whose pleas for help from their own local authorities have been met with responses ranging from helplessness to derision.¹⁸⁹ As lawyers, we are left to try to craft creative arguments from what was once a straightforward case theory to what is now the remaining threads of a basis for which asylum relief might be granted.¹⁹⁰ We do so in recognition of the unimaginable acts of violence, including even murder our clients face, a risk now exacerbated by the retaliation they confront in their home country for having deigned to flee.¹⁹¹

One year later, Attorney General Barr followed suit—and before the appellate body even had the opportunity to consider the legal issues at hand, as required by regulation—he addressed whether “immediate family . . . constituted a particular social group” for purposes of qualifying for asylum.¹⁹² While the definition of “particular

Asylum Seekers in Detention, VOX (Apr. 17, 2019 12:00 PM), <https://www.vox.com/2019/4/17/18411929/william-barr-attorney-general-immigration-detention-asylum-bond> [<https://perma.cc/D3LD-LCYD>].

185. *In re A-B-*, 27 I&N Dec. 316, 319, 346 (A.G. 2018).

186. *See id.*

187. *Id.*

188. *See* Rose L Molina, Sabrineh Ardalán, & Jennifer Scott, *Impact of a US Asylum Decision on Sexual and Reproductive Rights: A Call to Action for Health and Legal Professionals*, TAYLOR FRANCIS ONLINE 24, 24–25 (2019).

189. *See The Facts on Immigrant Women and Domestic Violence*, FUTURES WITHOUT VIOLENCE, https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Immigrant.pdf [<https://perma.cc/4XYU-7KB4>].

190. *See* Davis & Associates, *7 Traits of the Best Immigration Lawyers*, DAVIS & ASSOCIATES (Jan. 2, 2018), <https://gldlaw.com/best-immigration-lawyer-traits> [<https://perma.cc/2BS3-8FCX>].

191. Molina et al., *supra* note 188.

192. *Recent Adjudication*, 133 HARV. L. REV. 1500, 1500 (2020).

social group” has been heavily litigated, it had been well settled law that “immediate family” was recognized.¹⁹³ But Attorney General Barr built off of the decision by Attorney General Sessions and an earlier decision in *Matter of M.E. V.G.* to recraft families as not “socially distinct,” declaring that persecution based on membership in a “nuclear family” does not give rise to the protection of asylum.¹⁹⁴ Had this been the governing law earlier, it would have prevented several of our Clinic’s clients from qualifying for asylum.¹⁹⁵ We now are left scrambling to redefine “family” in the cases for our clients, for whom the rules have once again been changed midway through the process.¹⁹⁶

The significant restrictions imposed on asylum eligibility by the Attorney Generals have apparently not done enough to curtail the already narrowly constrained relief of asylum in the eyes of the Administration.¹⁹⁷ In June 2020, the Departments of Justice and Homeland Security came together to again bypass the administrative appeals and judicial process, and to bypass Congress, with the release of expansive new proposed regulations that will entirely gut asylum law and practice as we know it.¹⁹⁸ The proposed regulations seek to codify the Attorney General decisions restricting the “particular social group,” while also redefining persecution to a level of severity that goes beyond precedent, and is inconsistent with international norms arising from the Refugee Convention, which forms the basis for the U.S. asylum system.¹⁹⁹ According to the Administration, real and credible threats to one’s life are not sufficient to establish a “well-founded fear of persecution;” and instead, the proposed regulations seem to require that asylum seekers wait until their fears become reality and they have endured not just one, but repeated acts of targeted persecution that asylum is designed to protect against.²⁰⁰

193. *Id.* at 1504.

194. *Id.* at 1503.

195. See Isabela Dias, *Persecution Based on Family Ties Will No Longer Qualify as Grounds for Asylum, the Attorney General Rules*, PACIFIC STANDARD (July 29, 2019), <https://psmag.com/news/persecution-based-on-family-ties-will-no-longer-qualify-as-grounds-for-asylum> [<https://perma.cc/W7RK-WB5H>].

196. *See id.*

197. See Lisa Riordan Seville & Adiel Kaplan, *AG Barr Using Unique Power to Block Immigrants from U.S., Reshape Immigration Law*, NBC NEWS (July 31, 2019 4:30 AM), <https://www.nbcnews.com/politics/immigration/ag-barr-using-unique-power-block-migrants-u-s-reshape-n1036276> [<https://perma.cc/4KAR-DNVH>].

198. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36264 (June 15, 2020).

199. *Id.* at 36268; Danilo Zak, *The Trump Administration’s Proposed Changes to the U.S. Asylum System*, IMMIGR. F. (June 18, 2020), <https://immigrationforum.org/article/the-trump-administrations-proposed-changes-to-the-u-s-asylum-system/> [<https://perma.cc/9KZJ-Q892>].

200. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36270 (June 15, 2020).

In addition to restricting the definition of who qualifies as a “refugee” eligible for the protection of asylum, the proposed regulations severely restrict who even gets to step through the door of the courtroom to seek asylum: it allows judges, either *sua sponte* or through a motion from DHS to pretermite an application upon a finding of prima facie ineligibility without a hearing; establishes broader bases for finding an application to be “frivolous,” which carries with it bars to other forms of relief; codifies its current third country policy, which requires persons who have passed through more than one country en route to the U.S. to have applied for asylum in one of those countries; and denies access to asylum to anyone who has entered or sought to enter without permission.²⁰¹ Evidencing its continued disregard for administrative procedures, the Administration set a truncated thirty-day comment period, mid-summer, in the midst of a pandemic.²⁰²

These regulations follow on the heels of new regulations changing asylum seekers’ eligibility for work authorization.²⁰³ In 1994, the then Immigration and Naturalization Service changed its rules such that asylum seekers could no longer file for work authorization concurrently with their asylum application, and instead had to wait 150 days to file and 180 days to receive authorization.²⁰⁴ Congress codified this change in the 1996 immigration legislation.²⁰⁵ The 180-day waiting period has created significant hardship to asylum seekers, many of whom have no networks of support to help sustain them as they wait out the process.²⁰⁶ The new regulations, which went into effect August 25, 2020, deny employment authorization outright to persons who entered the United States unlawfully, and

201. See *Comment on Proposed Changes to Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear*, HUM. RTS. WATCH (July 15, 2020, 9:00 AM), <https://www.hrw.org/news/2020/07/15/comment-proposed-changes-procedures-asylum-and-withholding-removal-credible-fear> [<https://perma.cc/2Z5E-P4WY>]; see Zak, *supra* note 199; *New Regulation on Asylum Seeks to Erase Our Immigration History and Legacy*, AM. IMMIGR. COUNCIL (June 11, 2020), <https://www.americanimmigrationcouncil.org/news/new-regulation-asylum-seeks-erase-our-immigration-history-and-legacy> [<https://perma.cc/7YMT-5FV2>].

202. *New Regulation on Asylum Seeks to Erase Our Immigration History and Legacy*, *supra* note 201.

203. See Andrew R. Arthur, *DHS Changes Rules for Asylum Work Permit Applications*, CTR. FOR IMMIGR. STUD. (June 23, 2020), <https://cis.org/Arthur/DHS-Changes-Rules-Asylum-Work-Permit-Applications> [<https://perma.cc/2L84-BMH6>].

204. See Jesús Saucedo & David Rodríguez, *Up Against the Asylum Clock: Fixing the Broken Employment Authorization Asylum Clock*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/asylum_clock_paper.pdf [<https://perma.cc/XVY6-GUGE>].

205. See *id.*

206. *Id.*

require those who are eligible to wait a full year before they can apply for permission to work.²⁰⁷

In the meantime, the Trump Administration has effectively rendered these new regulations moot as it seeks to block persons from ever being able to apply for asylum.²⁰⁸ Access to the United States along the southern border was first restricted by a policy of metering, whereby the United States was allowing only a limited—though undetermined—number of asylum seekers to cross the border to present themselves to Customs and Border Protection and to ask for asylum.²⁰⁹ Asylum seekers arriving at ports of entry in places like Tijuana were suddenly trapped waiting months for their number to be called.²¹⁰ That wait became even longer when the United States implemented the inaptly named “Migration Protection Protocols” (MPP), also known as the “Remain in Mexico” program, whereby asylum seekers presenting at ports of entry along the U.S.-Mexico border are provided a brief screening and are then forcibly returned to Mexico to await their hearings.²¹¹ The program was initiated in late January 2019,²¹² and has expanded such that as of May 2020, there were more than 65,000 asylum seekers returned to Mexico, where asylum seekers face significant rates of violence.²¹³ As of mid-May, 2020, Human Rights First had documented at least 1,114 publicly reported cases of murder, rape, torture, kidnapping and other violent assaults against asylum seekers in MPP.²¹⁴ The risks that asylum seekers confront have been severely exacerbated by COVID-19, which the Administration has used as a pretext for closing the border entirely and for suspending MPP courts.²¹⁵ Asylum-seekers

207. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532, 38533 (proposed June 26, 2020) (to be codified at 8 CFR pts. 208, 274a).

208. See Lorelei Laird, *Strangers in a Strange Land: ‘Metering’ Makes Asylum Rights Meaningless, Immigrant Advocates Say*, ABA J. (July 24, 2019, 6:00 AM), <https://www.abajournal.com/web/article/strangers-in-a-strange-land-human-rights-organizations-say-metering-of-asylum-seekers-makes-asylum-rights-meaningless> [<http://perma.cc/EEY8-BFZK>].

209. *See id.*

210. *Id.*

211. Vanessa Romo, *U.S. Supreme Court Allows ‘Remain In Mexico’ Program to Continue*, NPR (Mar. 11, 2020, 6:48 PM), <https://www.npr.org/2020/03/11/814582798/u-s-supreme-court-allows-remain-in-mexico-program-to-continue> [<https://perma.cc/43H9-MRSL>].

212. U.S. DEP’T OF HOMELAND SEC., POLICY GUIDANCE FOR IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (2019).

213. *See Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers And Children To Escalating Danger*, HUM. RTS. FIRST (May 13, 2020) [hereinafter *Pandemic as Pretext*], <https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf> [<https://perma.cc/H2LP-LP9V>].

214. *Delivered To Danger*, HUM. RTS. FIRST (May 13, 2020), <https://www.humanrightsfirst.org/campaign/remain-mexico> [<https://perma.cc/A3XF-AD93>].

215. *See Pandemic as Pretext, supra* note 213.

are now finding themselves stranded in Mexico for almost two years, where the danger to their lives are now compounded by a global health crisis.²¹⁶

In another brazen display of inhumanity and coercion, the Trump Administration has aggressively pursued “Asylum Cooperative Agreements” with Honduras, El Salvador and Guatemala, allowing for the forcible return of asylum seekers to one of those three countries on the pretext that they should have applied for asylum in the first country passed through before reaching the United States.²¹⁷ The Administration has done so with blatant disregard for the extreme dangers posed to asylum seekers in those countries,²¹⁸ and the utter lack of capacity in those countries to process asylum claims and provide refuge.²¹⁹

The compounding trauma to asylum seekers stranded in Mexico, forced into unknown and dangerous countries, separated from families, and subjected to mandatory detention are long-lasting.²²⁰ Rather than finding protection, they are finding prosecution and, in some cases, new forms of persecution.²²¹ And for those who are able to finally make it into U.S. immigration court, the chances of success have been radically altered, and the way in which their claims may be processed could change from one day to the next.²²² All of this gives rise to a great deal of uncertainty, which is compounded by large backlogs in the immigration courts and at the asylum office.²²³

216. Arun Gupta & Michelle Fawcett, *Refugees in the Time of COVID-19*, THE NATION (Apr. 21, 2020), <https://www.thenation.com/article/society/refugees-asylum-coronavirus-mexico>.

217. Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994, 63994–63995 (Nov. 19, 2019) (codified at 8 C.F.R. pts. 208, 1003, 1208, 1240).

218. See Claire Hansen, *U.S. Signs Asylum Deal With Honduras*, U.S. NEWS & WORLD REP. (Sept. 25, 2019), <https://www.usnews.com/news/national-news/articles/2019-09-25/us-signs-asylum-deal-with-honduras> [<http://perma.cc/5J7N-QME4>] (noting that Honduras has one of the world’s highest homicide rates); Sofia Menchu, *Guatemala’s Shortcomings Raise Doubts About U.S. Migration Deal*, REUTERS (July 31, 2019, 3:06 PM), <https://www.reuters.com/article/us-usa-immigration-guatemala-idUSKCN1UQ2I5> [<http://perma.cc/F88EGJTF>] (reporting that Guatemala is rife with the violence and dangers that asylum seekers are fleeing).

219. See *id.* (noting that Guatemala processed an average of six asylum cases per year from 2002–2014, and in 2019, 226 cases had been filed, but none had been adjudicated); see also Whitney Eulich, *2,000 Miles, 72 Hours, A Tough Choice: Asylum In Guatemala, Or Go Home?*, THE CHRISTIAN SCI. MONITOR (Mar. 13, 2020), <https://www.csmonitor.com/World/Americas/2020/0313/2-000-miles-72-hours-a-tough-choice-Asylum-in-Guatemala-or-go-home> [<http://perma.cc/85AG-U3TF>].

220. See *Pandemic as Pretext*, *supra* note 213.

221. *Id.*

222. *Id.*

223. See Gretchen Frazee, *U.S. Claims Reducing Refugee Numbers Helps With The Asylum Backlog. Will It?*, PBS (Oct. 2, 2019, 3:41 PM), <https://www.pbs.org/newshour>

And now that uncertainty is soon to be compounded by even greater financial insecurity, as the Trump Administration has not just changed the rules for eligibility for work authorization for asylum seekers, discussed above, it has also instituted a \$50 application fee for all asylum seekers, a fee that appears to not be waivable and creates a substantial barrier to access.²²⁴

E. Bold Recasting of the Institutions that Govern Immigration

In addition to dramatically altering immigration policies and the legal framework for our immigration system, the Trump Administration is also recasting the very institutions that govern immigration, from mission statements, to rules governing how cases are handled, to the very people charged with carrying out and overseeing the policies, and to the immigration judges charged with interpreting the law and determining who gets relief and who gets deported.²²⁵

It did not take long before the ideologies espoused by Trump and his inner circle of advisors—including Steve Bannon, Kris Kobach, and Steven Miller—would penetrate the administrative agencies carrying out the immigration laws and policies.²²⁶ A year

/politics/u-s-claims-reducing-refugee-numbers-helps-with-the-asylum-backlog-will-it [https://perma.cc/P4RV-DC7M].

224. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (proposed June 26, 2020) (to be codified at 8 CFR pts. 208, 274a); U.S. Citizenship and Immigration Services Fee Schedule Changes to Certain Other Immigration Benefit Requirement, 85 Fed. Reg. 46788, 46795–96 (Oct. 2, 2020).

225. See Richard Gonzalez, *America No Longer A 'Nation Of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018, 6:18 PM), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says#:~:text=United%20States%20Citizenship%20and%20Immigration,%22a%20nation%20of%20immigrants.%22&text=The%20removal%20of%20the%20phrase,Francis%20Cissna> [http://perma.cc/49KQ-RBWZ]; Julia Preston & Andrew R. Calderon, *How Trump Broke The Immigration Courts*, POLITICO (July 16, 2019), <https://www.politico.com/magazine/story/2019/07/16/trump-ice-raids-immigration-courts-arent-ready-227359> [https://perma.cc/GSE9-T67H]; *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, S. POVERTY L. CTR. (June 25, 2019) [hereinafter *The Attorney General's Judges*], <https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool> [https://perma.cc/4RXP-TN26].

226. See Walter Ewing, *The Ideological Roots of Donald Trump's Immigration Team*, IMMIGR. IMPACT (Nov. 15, 2016), https://immigrationimpact.com/2016/11/15/ideological-roots-donald-trumps-immigration-team/#.XzxS_pNKi3J [http://perma.cc/5C74-BNFX]; Jonathon Blitzer, *How Stephen Miller Manipulates Donald Trump To Further His Immigration Obsession*, THE NEW YORKER (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [http://perma.cc/N468-PB4K]; Josh Gerstein, *Trump Immigration Adviser Ordered To Turn Over Briefing Document*, POLITICO (Apr. 5, 2017, 12:17 PM), <https://www.politico.com/blogs/under-the-radar/2017/04/kris-kobach-trump-immigration-adviser-236910> [http://perma.cc/2NFJ-Y2Y8]; Mica Rosenberg & Julia Edwards Ainsley, *Immigration Hardliner Says Trump Team Preparing Plans For Wall, Mulling Muslim*

into the Trump Administration, U.S. Citizenship and Immigration Services (USCIS), which oversees the majority of visa applications, naturalization, and associated benefits, announced a change in its mission statement.²²⁷ USCIS removed the reference to the United States as a “nation of immigrants,” and changed its mission from facilitating “America’s promise as a nation of immigrants” to administering “the nation’s lawful immigration system, safeguarding its integrity and promise.”²²⁸ Perhaps more revealing, USCIS replaced its previously declared purpose of serving its “customers”—the immigrants and intending immigrants—with “protecting Americans, securing the homeland, and honoring our values.”²²⁹

This change in mission statement is reflected in changes in both policy and practice.²³⁰ For example, USCIS had historically viewed its role in adjudicating affirmative applications for humanitarian visas as distinct from the role of ICE in enforcing the immigration laws against persons not lawfully present in the United States.²³¹ Individuals applying for U and T visas, available to victims of particularly serious crimes and for victims of trafficking, as well as persons eligible for immigration relief under the Violence Against Women Act (VAWA), could proceed secure in the knowledge that if for any reason USCIS did not grant relief, they were at least not at risk of that application triggering their ultimate deportation.²³² Early in this Administration, USCIS indicated that persons found ineligible for relief may be referred to ICE and placed into removal proceedings, putting persons in already extremely vulnerable situations at even greater risk of harm.²³³ At the same time, USCIS began

Registry, REUTERS (Nov. 15, 2016, 8:54 PM), <https://www.reuters.com/article/us-usa-trump-immigration/immigration-hardliner-says-trump-team-preparing-plans-for-wall-mulling-muslim-registry-idUSKBN13B05C> [<http://perma.cc/TEN9-NGLL>].

227. Saucedo & Rodríguez, *supra* note 204.

228. *Id.*

229. *Id.*

230. See Daniel Shoer Roth, *It Has Been A ‘Historic’ Year For Trump’s Agenda. Here’s What That Means For Immigrants*, MIAMI HERALD (Oct. 25, 2019, 4:41 PM), <https://www.miamiherald.com/news/local/immigration/article236539203.html> [<https://perma.cc/45V8-ECU6>].

231. U.S. CITIZENSHIP AND IMMIGR. SERVICES, CHAPTER 1—PURPOSE AND BACKGROUND OF POLICY MANUAL (2020).

232. U.S. DEP’T OF HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE (2011); *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime Asylum*, AM. IMMIGR. COUNCIL (Nov. 23, 2019), <https://www.americanimmigrationcouncil.org/research/violence-against-women-act-vawa-immigration> [<https://perma.cc/6XKX-ULPM>].

233. See Aaron Reichlin-Melnick, *USCIS Begins Implementing Plan To Issue More Deportation Notices*, IMMIGR. IMPACT (Oct. 2, 2018), <https://immigrationimpact.com/2018/10/02/uscis-issue-more-deportation-notices/#.X0A2H5NKjIw> [<https://perma.cc/DS38-XVW6>].

issuing a seemingly record number of requests for evidence, in some cases requesting evidence already submitted, and revealing a significantly heightened burden of proof being applied.²³⁴ At a purely administrative level, time-sensitive applications for affirmative asylum, which are subject to a strict one-year filing deadline, have been routinely rejected for purportedly failing to include the required photographs, even when the photograph is attached.²³⁵ The result is—at best—further delays and costs associated with the processing of the case, and the resulting possibility of missing the one-year filing deadline for an asylum application.²³⁶ It has become harder to distinguish what might be simple bureaucratic ineptitude from calculated malevolence.²³⁷

The immigration courts—which operate not under the Department of Homeland Security, but instead under the Executive Office of Immigration Review (EOIR) within the Department of Justice—have also undergone a dramatic shift reflecting a shared ideology between the political leadership overseeing the courts and administrative appellate body, and the political leadership of the Department of Homeland Security.²³⁸ The Executive Office of Immigration Review is comprised of the immigration courts and the Board of Immigration Appeals (BIA), which provides the first level of judicial review, from where cases can be appealed to the federal Circuit Courts of Appeal.²³⁹ EOIR and BIA operate under the Department of Justice, and ultimately under the authority of the Attorney General.²⁴⁰ As highlighted above, the Attorney General—a political appointee—has significant power in not just the administration of law, but in the re-casting and even creation of law, as seen in the practice of taking cases on appeal away from the BIA and certifying them to the AG for the issuance of precedential decisions, just two of which I highlight above.²⁴¹ But this is not the only way in which

234. See Melissa Manna, *Requests for Evidence and Visa Denials Continue to Climb in 2019*, THE NAT'L L. REV. (Aug. 7, 2019), <https://www.natlawreview.com/article/requests-evidence-and-visa-denials-continue-to-climb-2019> [<https://perma.cc/66ZB-FLG4>].

235. See Email from The Am. Immigr. Lawyers Ass'n (AILA) (Oct. 8, 2020) (on file with author).

236. See *id.*

237. See Charles Davis, *Bureaucracy As A Weapon: How The Trump Administration Is Slowing Asylum Cases*, THE GUARDIAN (Dec. 23, 2019, 6:00 AM), <https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers> [<https://perma.cc/2JS5-UJGG>].

238. See Felipe de la Hoz, *The Shadow Court Cementing Trump's Immigration Policy*, THE NATION (June 30, 2020), <https://www.thenation.com/article/society/trump-immigration-bia> [<https://perma.cc/7YUR-KB5U>].

239. *Id.*

240. *Id.*

241. See Jeffrey S. Chase, *The AGs Certifying of BIA Decisions*, JEFFREY S. CHASE

Attorney General Sessions and his successors, Acting Attorney General Whitaker and now Attorney General Barr, as well as other appointed officials within the Department of Justice and the EOIR, have worked to influence the adjudication of immigration cases.²⁴² The Trump Attorney Generals have implemented new mandates and increased political oversight over immigration judges in ways that have significantly changed the adjudication of cases and the outcomes for immigrants in removal proceedings.²⁴³ This is to say nothing of the changes to the composition of the immigration courts, comprised of non–Article III judges appointed through an internal hiring process.²⁴⁴

Many of the actions taken by the Department of Justice—in addition to those aimed at restricting the asylum system—are driven by the desire for swift adjudication of cases in furtherance of Trump’s stated agenda of ensuring prompt deportations.²⁴⁵ In 2018, purportedly in response to the backlogs in the immigration courts, the Director of the EOIR instructed all immigration judges to complete 85% of all non-detained cases within one year.²⁴⁶ Given the dockets that judges face, this mandate has put incredible time pressure on the judges, not accounting for the fact-specific and complex nature of many cases where relief from removal is sought, and sets an unattainable benchmark for judges who take seriously their duty to ensure minimal standards of due process and to ensure that the applicants have an opportunity for their case to be heard in its entirety.²⁴⁷

BLOG (Mar. 29, 2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions> [<http://perma.cc/UP8E-S9DH>].

242. See Greg Chen, *DOJ Puts Its Integrity In Doubt By Interfering With Immigration Courts*, THE HILL (Feb. 27, 2020, 3:00 PM), <https://thehill.com/opinion/immigration/484966-doj-puts-its-integrity-in-doubt-by-interfering-with-immigration-courts> [<https://perma.cc/P24V-YUMX>] (cataloging AG Sessions and AG Barr both removing judges they with whom they disagree, creating quotas for judges, as well as completely rewriting rules); Emma Platoff, *Immigration Judges Are Expected To Be Impartial. But They Report To Jeff Sessions*, THE TEXAS TRIBUNE (Aug. 15, 2018, 12:00 AM), <https://www.texastribune.org/2018/08/15/immigration-judges-report-prosecutors-jeff-sessions-justice-department> [<https://perma.cc/3ZSH-Q4QQ>] (reporting that AG Sessions and other members of DOJ would demote and move around judges that ruled in favor of migrants too often).

243. See Chen, *supra* note 242.

244. *The Attorney General’s Judges*, *supra* note 225 (noting that the immigration courts have been packed with former prosecutors, mainly former ICE employees).

245. Preston & Calderon, *supra* note 225 (for example, the Trump administration created a rule stating that a deportation warrant will be issued for any immigrant whose application is denied).

246. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., CASE PRIORITIES AND IMMIGRATION COURT PERFORMANCE MEASURES (2018).

247. See Nina Shapiro, *Trump Orders Judges To Hurry Up; Here’s What The Public Rarely Sees in Seattle And Tacoma Immigration Courts*, THE SEATTLE TIMES (Apr. 6, 2018, 6:47 AM), <https://www.seattletimes.com/seattle-news/northwest/immigration>

Evidencing the Administration's ultimate intent of speeding up deportations, rather than reducing the court's backlog, in May 2018, Attorney General Sessions certified *Matter of Castro-Tum* to himself and ruled that immigration judges do not have the authority to administratively close cases.²⁴⁸ Administrative closure had regularly been used when a person had a pending application with USCIS for which the immigration judge determined the individual was prima facie eligible.²⁴⁹ This practice had been particularly important for persons with pending applications for special immigrant juvenile visas, U visas, T visas or other visas subject to statutory caps for which there are two- to four- or five-year backlogs.²⁵⁰ In an effort to manage their dockets, immigration judges then placed these cases on a "status docket," off of the regular docket, subject to the one-year processing rule, and thereby allowed judges to continue those cases without risking punishment for failing to meet case completion quotas.²⁵¹ In August 2019, however, EOIR restricted the use of the status dockets to only those cases where it was required by law; all other cases would fall within the completion quota.²⁵²

Despite the quotas, backlogs persist in large part because of a large number of vacancies on the court.²⁵³ This Administration has worked diligently to fill those vacancies by using a "streamlined hiring plan" that has resulted in the overwhelming majority of judges being appointed from within the ranks of the Department of Homeland

-courts-out-of-public-sight-face-new-criticism-as-trump-ramps-up-pressure [https://perma.cc/3VHV-P98D].

248. See Lorelei Laird, *Whose Court Is This Anyway? Immigration Judges accuse executive branch of politicizing their courts*, ABAJ. (Apr. 1, 2019), <https://www.abajournal.com/magazine/article/immigration-judges-executive-politicizing-courts> [http://perma.cc/2YFB-4DUN] (stating that after the Attorney General stepped in, he reassigned the case to a handpicked judge, giving rise to concerns about the independence of the immigration courts).

249. See *The End of Administrative Closure: Sessions Moves to Further Strip Immigration Judges of Independence*, THE CATHOLIC LEGAL IMMIGR. NETWORK, INC. (Apr. 4, 2018), <https://cliniclegal.org/resources/removal-proceedings/end-administrative-closure-sessions-moves-further-strip-immigration> [https://perma.cc/HJ35-5YV7].

250. See *Administrative Closure Post-Castro-Tum*, AM. IMMIGR. COUNCIL (Oct. 22, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf [https://perma.cc/74GJ-HQFA].

251. Matthew Hoppock, *Immigration Court "Status Docket"—the Secret Almost Alternative to Administrative Closure*, HOPPOCK LAW FIRM (Nov. 5, 2019), <https://www.hoppocklawfirm.com/immigration-court-status-docket-the-secret-almost-alternative-to-administrative-closure> [https://perma.cc/T6S5-2M7Y].

252. *Id.*

253. See Zoe Tillman, *Immigration Court Backlog Could Pose Problems For Trump's Enforcement Plans*, BUZZFEED NEWS (Feb. 23, 2017, 10:06 PM), <https://www.buzzfeednews.com/article/zoetillman/backlogged-immigration-courts-pose-problems-for-trumps-plans#.wcMKevdYG> [https://perma.cc/LW35-5699].

Security, with the next largest contingency coming from US attorneys' offices or JAG offices who have no apparent immigration experience, and only a handful being appointed from the private immigration bar.²⁵⁴ In July 2020, Matthew O'Brien was among the forty-eight immigration judges announced.²⁵⁵ Not only had he served within the Fraud Investigation Unit at USCIS for the four years prior to his appointment as an immigration judge in Arlington, Virginia, belying his approach to and perspective on asylum cases, he was Director of Research for the anti-immigrant lobbying group, the Federation for American Immigration Reform (FAIR).²⁵⁶ Similarly, ideology has seemed to play a key role in the appointment of judges to the Board of Immigration Appeals.²⁵⁷ In August 2019, six new judges were appointed to the Board of Immigration Appeals, all of whom had an exceptionally low rate of orders granting immigration relief.²⁵⁸ One judge had further distinguished himself on the bench by threatening a two-year-old boy with a large dog that he would bring out to bite the boy, whom he felt was making too much noise in his courtroom, if he did not stop talking.²⁵⁹

While this behavior is extreme for any judge, it appears to be pervasive within the cadre of immigration enforcement officials within DHS, who are seemingly emboldened by the rhetoric of their Commander in Chief.²⁶⁰ In July 2019, ProPublica reported on a

254. U.S. DEP'T OF JUST., OFF. OF PUB. POL'Y, EOIR ANNOUNCES LARGEST EVER IMMIGRATION JUDGE INVESTITURE (2018) (AG Sessions announces "streamlined hiring process" for immigration judges); see *Immigration Court Hiring Politicization*, HUM. RTS. FIRST, <https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf> [<https://perma.cc/VSY4-YWKM>] (showing that 40 out of 78 new immigration judges were prosecutors from within DHS, and that one third of new judges had no prior immigration experience); U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., EOIR ANNOUNCES 46 NEW IMMIGRATION JUDGES (2020) (containing specific examples of individual judges that have been hired from DHS, ICE, and JAG programs, as well as judges without any immigration experience).

255. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., EOIR ANNOUNCES 46 NEW IMMIGRATION JUDGES (2020).

256. *Federation For American Immigration Reform*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform> [<http://perma.cc/VN8M-T2X2>].

257. *The Attorney General's Judges*, *supra* note 225 (noting that judges with different political views than the Trump administration have not been hired or promoted to BIA, or as EOIR adjudicators).

258. de la Hoz, *supra* note 238 (stating that the six new judges had granted asylum in less than 10 percent of their cases).

259. See Noah Lanard, *Judge Promoted by Trump Administration Threatened a 2-Year-Old With an Attack Dog*, MOTHER JONES (Sept. 10, 2019), <https://www.motherjones.com/politics/2019/09/judge-promoted-by-trump-administration-threatened-a-2-year-old-with-an-attack-dog> [<http://perma.cc/7K7U-3WFD>].

260. See Sean McElwee, *It's Time to Abolish ICE*, THE NATION (Mar. 9, 2018), <https://www.thenation.com/article/archive/its-time-to-abolish-ice> [<https://perma.cc/5K2P-HR9Q>].

Facebook Group made up of border patrol officers—those charged with the initial screening of asylum seekers at the border—where migrant deaths were joked about, and where racist and explicitly sexual and sexist memes were posted.²⁶¹ A full year later, only four of those officers were terminated, thirty-eight were suspended without pay and twenty-seven were given “reprimands or counseling.”²⁶²

The hostility our clients confront persists at every level of the immigration system, with the cultural shift being led by the rhetoric regularly unleashed by Trump.²⁶³ Those seeking to do justice and to ensure immigrants are provided with due process and afforded basic dignity from within the system are being challenged because of unreasonable work demands and changes in the law and policies they are charged with implementing.²⁶⁴ Lawyers often serve as the only buffer between immigrants and an outwardly hostile system, and now the Trump Administration has acted to separate immigrants from those lawyers by forcing them across a national border (or two or three) or behind barbed wire fences, locked away in detention centers in rural communities dotting the national landscape.²⁶⁵

(pointing out that ICE agents treat immigrants as threats, explicitly wanting immigrants to live in fear of an ICE raid); Manny Fernandez, Miriam Jordan, Zolan Kanno-Youngs & Caitlin Dickerson, *‘People Actively Hate Us’: Inside the Border Patrol’s Morale Crisis*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/15/us/border-patrol-culture.html> [<https://perma.cc/9M94-CLNM>] (noting that, since Trump’s election, many CBP agents have become more open online about their racism, bigotry, and violent hatred of immigrants).

261. See A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Memes*, PROPUBLICA (July 1, 2019, 10:55 AM), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes> [<http://perma.cc/LK9J-QXEA>].

262. See Molly O’Toole, *Border Agency Fires 4 For Secret Facebook Groups With Violent, Bigoted Posts*, L.A. TIMES (July 16, 2020, 3:35 PM), <https://www.latimes.com/politics/story/2020-07-16/border-patrol-fired-for-secret-facebook-group-with-violent-sexist-posts> [<http://perma.cc/AEC5-7EGU>].

263. See Srikantiah & Sinnar, *supra* note 1, at 198, 200.

264. See, e.g., Molly Hennessy-Fiske, *Immigration judges are quitting or retiring early because of Trump*, L.A. TIMES (Jan. 27, 2020, 4:00 AM), <https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump> (providing the example of former Philadelphia immigration judge, Judge Honeyman, one of an increasingly smaller percentage of immigration judges who brought experience as a private immigration practitioner to the bench. He routinely welcomed the Clinic students into his courtroom to observe master calendar hearings and to answer any questions the students may have had).

265. For a discussion on how the Trump administration barred third-country transit, see *Trump Administration’s Third-Country Transit Ban is An Asylum Ban that will Return Refugees to Danger*, HUM. RTS. FIRST (Sept. 2019), <https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf> [<https://perma.cc/D6YU-WBCF>]. For a discussion on the movement of detention centers into rural communities, see Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar*, NAT’L PUB. RADIO (Aug. 15, 2019, 7:13 AM), <https://www.npr.org/2019>

II. NAVIGATING THE TRUMP ADMINISTRATION'S RELENTLESS ASSAULT ON IMMIGRANTS

As noted in the Introduction, despite all the warning signs from the Trump campaign trail, I had not fathomed that the onslaught of policies and practices initiated by President Trump and his Administration would be as relentless as it has been cruel.²⁶⁶ This Administration has tested the will and faith of immigrants and the stamina of immigration attorneys and advocates in unprecedented ways.²⁶⁷ It is inspiring to witness how the Trump Administration has been met at almost every step with lawyers and activists demonstrating their relentless resistance.²⁶⁸ At the same time, it has been daunting, energizing, overwhelming, and humbling to try to keep up with the onslaught and determine the appropriate role for the Clinic, and the appropriate role for me as an immigration attorney and as a clinical law professor. While I have been inspired by the advocates, and have felt pulled to be part of the litigation at the forefront of the fight against each new major policy initiative, I am mindful of the Clinic's role in training law students in foundational and fundamental lawyering competencies that they will carry with them and build upon in their career; our limitations in terms of capacity and expertise; the commitments we have to existing clients; and the persistent unmet legal needs of individuals seeking immigration relief for themselves and for their families.²⁶⁹ I am also increasingly confronted by my own discomfort in playing a role in a system that has become increasingly unjust. I have historically looked at my role

/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks [https://perma.cc/G59G-JULH].

266. The week after the election, a panel was held at the law school where my respected colleagues spoke one after the other about the role of judicial precedent, the rules of administrative procedure, and the role of career attorneys and policy makers within the federal agencies which would all come together to hold the line and ensure that despite the leadership in the White House, day-to-day laws and policies would not be dramatically impacted, and to the degree that they were, any changes would be changes that could be readily undone by the next Administration. The sentiment was perhaps naïve, perhaps overly optimistic and hopeful, and perhaps reflected an underappreciation for the way in which President Trump would rule. *See Post-Election Forum: The Role of Law and Legal Institutions*, UN. PA. L. SCH., https://www.law.upenn.edu/newsevents/calendar.php?#!view/event/date/20161115/event_id/54016 [https://perma.cc/2TW8-RZ8P].

267. *See* Nicole Narea, *How Immigration Attys Are Battling Burnout Under Trump*, LAW360 (July 19, 2019, 7:16 PM), <https://www.law360.com/articles/1182648/how-immigration-attys-are-battling-burnout-under-trump> [https://perma.cc/A2JW-CHM7].

268. *See, e.g.*, Josh Blackman, *The Legal Resistance*, 9 FAULKNER L. REV. 45, 47–48 (2017) (discussing how legal resistance arose in response to Trump's travel ban and continued to stand in the face of many Trump administration initiatives).

269. *See* Sarah H. Paoletti, *Finding the Pearls When the World Is Your Oyster: Case and Project Selection in Clinic Design*, 5 DREXEL L. REV. 423, 452–53, 459–60 (2013).

and the role of the Clinic students and our colleagues as one whereby we are working to make the system a little more just, and I now find myself questioning if my participation makes me complicit in the unjust system. As I reflect on my own role as a lawyer, the role of the Clinic operating in an immigration system originally built on racial exclusion and national origin quota systems, an immigration system that has since become more insidiously enmeshed in systems replete with racism and xenophobia,²⁷⁰ I struggle with how to engage in a way that is more resistant and less complicit, while also doing what needs to be done to help our clients achieve their individual goals. The tropes and tweets employed by the President and those executing his agenda lay bare the racism and xenophobia driving a system intent on stripping away our clients' fundamental rights to dignity, due process, and security in person and family life, and require me to reconsider what is "appropriate."²⁷¹

There is a notion that law professors are to be "neutral,"²⁷² and I fully embrace that my role is to create a safe space for students of all political and ideological persuasions to explore beliefs, unpack assumptions, and rigorously challenge each other to engage critically and reflectively, rather than reflexively. But during the 2016 campaign, in the course of the transition and in the first few weeks of the Trump Administration, I found it harder and harder to mask my reactions. As the weeks turned into months, any semblance of a filter that I had was quickly worn away. The barrage of executive orders, presidential proclamations, agency policy guidance documents, and regulatory changes peppered with racist and xenophobic tweets from the President and his entourage tore at any veil of

270. For a discussion on the United States' immigration system and its racist origins, see Michael Luo, *America's Past and Present and the Judgment of History*, THE NEW YORKER (August 17, 2019), <https://www.newyorker.com/news/our-columnists/americas-exclusionary-past-and-present-and-the-judgment-of-history> [<https://perma.cc/3MK5-V3GK>]. For a discussion on the immigration system's current enmeshment in racism and xenophobia, see Fatma Marouf, *Immigration Challenges of the Past Decade and Future Reforms*, 73 SMU L. REV. F. 87, 100–01 (2020).

271. See, e.g., Fahmida Alam & Samin Farhan Asef, *Xenophobia and Shift in Immigration Policy Under Trump Administration*, 25 ISOR J. OF HUMANITIES & SOC. SCI. 1, 1–4 (2020) (discussing Trump's xenophobic rhetoric as a mechanism of his white nationalist agenda and policies); Laura Finley & Luigi Esposito, *The Immigrant as Bogeyman: Examining Donald Trump and the Right's Anti-immigrant, Anti-PC Rhetoric*, 44 HUMAN. & SOC'Y 1, 10–12 (2019) (discussing Trump's rhetoric surrounding immigrants and his use of Twitter).

272. See Jason M. Breslow, *A glance at the current issue of the Journal of Law, Medicine & Ethics: The risks and rewards of staying neutral*, THE CHRON. OF HIGHER EDUC. (Sept. 25, 2007), https://www.chronicle.com/article/a-glance-at-the-current-issue-of-change-making-institutional-transparency-work?cid=gen_sign_in [<https://perma.cc/KTV9-2FT2>] (noting the neutrality approach to teaching).

neutrality I may have worn²⁷³: I could not pretend that I did not have an opinion and strong reactions to what was coming out of Washington, D.C., even if those beliefs laid bare my values and, by extension, my politics. As I struggled with and continue to work through what that means for me as a teacher, I also have struggled with how we—the Transnational Legal Clinic—should respond.

A. Deciding When to Step-In and Step-Up: Values, Pedagogy and Reality

With each new action from the Trump Administration that impacts the Clinic's clients and prospective clients, members of the University of Pennsylvania community, and members of the greater Philadelphia community, the following questions arise: What is the role for the Clinic? How should we—collectively or individually—respond? And what is my own role—professionally and morally? Is there a role for the Clinic in responding to the Muslim Ban, and, if so, what is that role? What role can and should we play in responding to the Trump Administration's pursuit of "sanctuary cities?"²⁷⁴ How can we effectively engage at the local level to ensure Philadelphia's status as a "welcoming city" has meaning to those without lawful immigration status?²⁷⁵ For those facing termination of Temporary Protected Status, especially for those for whom Philadelphia is home, what is our role in working with them to ensure they can continue to call Philadelphia their home?²⁷⁶ What is our role in ensuring that the University of Pennsylvania truly is a safe space for all students, regardless of immigration status? Does that role extend to students' family members, whose security of status has a direct impact on their ability to fully participate in their education

273. See PIERCE & BOLTER, *supra* note 32 (noting the Trump administration delivered on a vast series of changes to the immigration system); Finley & Esposito, *supra* note 271, at 11–12 (examining Trump's anti-immigrant tweets).

274. See, e.g., *Major Developments Relating to "Sanctuary" Cities under the Trump Administration*, ACLU (Aug. 27, 2018), <https://www.aclu.org/other/major-developments-relating-sanctuary-cities-under-trump-administration> [<https://perma.cc/86JK-69X6>] (explaining the Trump Administration's pursuit of sanctuary cities).

275. See John Urwin, Dominique Bohorquez & Vasiliki Triantafillou, *Philadelphia is a welcoming city. Let's keep it that way*, THE PHILA. INQUIRER (Mar. 6, 2019, 12:29 PM), <https://www.inquirer.com/opinion/commentary/philadelphia-sanctuary-city-health-care-20190306.html> [<https://perma.cc/84AJ-AE6C>] (explaining Philadelphia's status as a welcoming city).

276. See Dara Lind & Javier Zarracina, *By the numbers: how 2 years of Trump's policies have affected immigrants*, VOX (Feb. 5, 2019, 4:38 PM), <https://www.vox.com/policy-and-politics/2019/1/19/18123891/state-of-the-union-2019-immigration-facts> (describing the number of immigrants whose legal status under the TPS program is under attack).

and university life? When should we respond affirmatively to the calls for pro bono assistance in Tijuana, along the Texas border, and in rural communities across the United States where there are no or extremely limited immigration legal services?²⁷⁷ Is there a role for us in assisting persons trapped in Mexico seeking asylum in the United States, or to the families trapped in detention facilities across the country and on our own doorstep at the Berks Family Detention Center, at risk of being deported without ever getting a full and fair hearing before an immigration judge?²⁷⁸ What is our role in filling the representation gap for all individuals who appear in immigration court pro se, and more so, to all the individuals locked up in immigrant detention without representation and facing deportation—some of whom were detained on arrival and are seeking asylum, others of whom have lived in the United States for years, sometimes decades, sometimes most of their lives, but have been placed into removal proceedings because of criminal convictions?²⁷⁹ What is our role in filing litigation on behalf of those detained who are now at risk of contracting COVID-19?²⁸⁰

277. See Kate Morrissey, *Asylum seekers stranded in Tijuana struggle to hang on amid the pandemic*, THE SAN DIEGO UNION-TRIB. (May 31, 2020, 6:00 AM), <https://www.sandiegouniontribune.com/news/immigration/story/2020-05-31/asylum-seekers-tijuana-corona-virus> [<https://perma.cc/ACR6-VDML>] (discussing the program Migrant Protection Protocols and its requirement that certain asylum seekers wait in Tijuana for U.S. immigration court hearings); Mandi Cai & Connie Hanzhang Jin, *Most migrants cross at the Texas border. Here's how the flow of people intersects with Trump's policies*, THE TEX. TRIBUNE (updated Aug. 6, 2020), https://apps.texastribune.org/features/2019/migrant-texas-border-trump-policies/?_ga=2.2057842.2144974515.1598231307-1231753152.1598231307 [<https://perma.cc/8SYG-X44P>] (discussing the increase in encounters between border control and migrants in Texas); Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 21–23 (2018) (analyzing the lack of legal services in rural communities in the United States).

278. For a discussion on persons trapped in Mexico seeking asylum, see Ashoka Mukpo, *Asylum-Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*, ACLU (2020), <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face> [<https://perma.cc/D2XK-T89P>]. For a discussion on individuals at risk of being deported without ever seeing a judge, see Nora Caplan-Bricker, *Deported Without Seeing a Judge: One of the Worst Parts of the Immigration System*, THE NEW REPUBLIC (Apr. 14, 2014), <https://newrepublic.com/article/117355/expedited-removal-deportations-immigrants-don-t-get-due-process> [<https://perma.cc/C3J3-TL74>].

279. See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://scalelegal.org/wp-content/uploads/2018/03/Access-to-Counsel-in-Immigration-Court.pdf> [<https://perma.cc/U6WT-AP94>] (describing barriers to counsel in immigration cases); Matthew Minniefield, *Immigration Law—Mixed Feelings on Mixed Petitions to Reopen Removal Proceedings: The Necessity Behind Requiring a Test to Determine the Applicability of the Changed Country Conditions Exception*, 39 W. NEW ENG. L. REV. 69, 84–86 (2017) (discussing removal for criminal convictions).

280. See, e.g., Allen S. Keller & Benjamin D. Wagner, *COVID-19 and Immigration Detention in the USA: Time to Act*, 5 THE LANCET PUB. HEALTH 245, 245 (2020).

Each of the above questions implicates additional questions about my role. What is my role? And, how has my role vis-à-vis my students changed, or how should I change my role in response to the disregard for humanity and the appeals to implicit bias and explicit racism and xenophobia that are central to the laws and current policies confronting our clients?²⁸¹ Underlying each of those questions are questions as to how to fulfill my roles effectively and responsibly? And questions as to when should I concede to my own limitations and the limitations inherent to the structure of the Clinic? Are those limitations real or perceived, and when and how do I reach beyond those limitations to lend support in fighting the forest fires set to smoke out persons the Trump Administration has decided do not belong in this country?²⁸²

The Transnational Legal Clinic is designed to provide law students with a range and depth of experiences through which they can develop—under close faculty supervision—the full range of core lawyering competencies and transferable skills that will serve them throughout their professional careers.²⁸³ There are intentionally no prerequisites to the clinic and no presumption that students have a background in immigration or refugee law, or even an interest in pursuing a career in immigration or refugee law moving forward.²⁸⁴ As I have navigated my own way through the past four years, and as I have responded to requests and sought opportunities for the Clinic's engagement, I am attuned to the pedagogical goals that I have for my students. An overarching pedagogical goal is to instill in Clinic students a deeper understanding as to what it means to be "client-centered."²⁸⁵ Another pedagogical goal—one that is necessarily values-based—is to instill in students the practice of challenging assumptions, a practice that requires engaging in reflection on our own implicit and explicit biases, the biases of the clients, and of the adjudicators and other actors in our clients' cases, as well as the biases built into the systems within which we operate.²⁸⁶ And then there are the goals associated with fundamental lawyering skills, such as interviewing, counseling, case theory development, use of narrative, fact investigation and strategic planning, negotiation, and advocacy.²⁸⁷

281. See Alam & Asef, *supra* note 271, at 1–3 (explaining the xenophobia of the immigration system under Trump).

282. See Srikantiah & Sinnar, *supra* note 1, at 197, 200 (discussing Trump's immigration policies that are explicitly designed to target noncitizens of color).

283. See Paoletti, *supra* note 269, at 432, 438, 440.

284. See *Transnational Legal Clinic*, *supra* note 25.

285. See Paoletti, *supra* note 269, at 450.

286. See *id.* at 448–49.

287. See *id.* at 441–42.

Can I effectively fulfill my pedagogical mission in the midst of a fire, and if so, how? And what is reasonable to expect of one student or group of students in light of the overwhelming nature of all they must confront when the learning curve is so steep? And how do I ensure that we continue to meet our obligations to existing clients and partner organizations? Questions about both my individual and the Clinic's collective capacity are ever-present. I am cognizant of the constraints of the current structure of the Transnational Legal Clinic: it is a one-semester clinic with no prerequisites, an incredibly sharp learning curve for our students, limited non-English speaking language capacity of our students, faculty, and staff, and outside commitments and scheduling constraints our students bring with them to the Clinic.²⁸⁸ I am also acutely aware of my own limitations and demands outside of the clinic setting, and mindful of the time and care it would require to overhaul the Clinic to be more responsive while also trying to keep up and respond to existing commitments and obligations. This brings me back to the question posed at the outset: Where do we, and where do I, step in and step up to join the resistance?

For the most part, we have focused on the direct representation of individuals for whom our representation may serve as a buffer of humanity in an increasingly confounding and hostile system.²⁸⁹ I have left the federal court challenges to the seemingly unending executive orders, presidential proclamations, agency policies, and regulatory overhauls, in the exceptionally qualified hands of the ACLU, Southern Poverty Law Center, American Immigration Council, Human Rights First, Aldea PJC, National Immigration Law Center, Al Otro Lado, and numerous other national and regional immigrant rights and human rights organizations,²⁹⁰ as well as those law school clinics²⁹¹ and Centers²⁹² that have developed an

288. *See id.* at 439, 442, 464.

289. For a discussion on the method of direct representation in the clinic, see *Transnational Legal Clinic*, *supra* note 25. For a discussion on how the immigration system has become increasingly hostile to migrants, see Tyche Hendricks, *Trump's Changes to Immigration Could Take Years to Undo—Even with a New President*, KQED (Feb. 2018), <https://www.kqed.org/news/11801732/trumps-changes-to-immigration-could-take-years-to-undo-experts-say> [<https://perma.cc/UY3Z-H2GN>].

290. *See, e.g., Groups Challenge Trump Administration's Illegal Border Expulsions*, ACLU (June 10, 2020), <https://www.aclu.org/press-releases/groups-file-challenge-trump-administrations-illegal-border-expulsions> [<https://perma.cc/WZC2-697D>]; *Weekend Read: SPLC sues Trump administration over family separation policy*, S. POVERTY L. CTR. (Jan. 11, 2020), <https://www.splcenter.org/news/2020/01/11/weekend-read-splc-sues-trump-administration-over-family-separation-policy> [<https://perma.cc/J43P-QQSU>].

291. *See, e.g., Batalla Vidal v. Nielsen*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/worker-and-immigrant-rights-ad>

expertise and the internal capacity to respond on that front. But I am always attentive to opportunities where we can support that work, whether through the drafting and submission of amicus briefs addressing the applicable international human rights standards, or engaging in parallel and coordinated advocacy before international human rights mechanisms, aimed at bringing in the attention and support of the international community in the immediate term. At the same time, I want to maximize the opportunities presented to strengthen applicable international norms and deepen the foundation for achieving meaningful human rights-oriented reforms should the courts be willing to listen, and should we have an administration willing to engage in a dialogue where the baseline understanding is the government has an obligation to respect, protect, and fulfill the fundamental human rights of all persons within its jurisdiction.²⁹³

Deciding when to lean in and step up is harder when the issues at hand either directly and immediately impact an existing client or when there is an unmet legal need.²⁹⁴ In August 2019, ICE conducted raids at poultry processing plants across rural Mississippi, including at Koch Foods, where we had represented a number of individuals in applying for U visas arising from abuse endured at the poultry plant.²⁹⁵ I wanted to go to Mississippi to respond to the resulting legal services needs. The urge was driven by my personal indignation around the timing of the raids, carried out on the first day of school—reminiscent of Attorney General Sessions’ announcement terminating DACA on what was the first day of school for many—and the circumstances of the raid, which was reminiscent of retaliatory raids I witnessed as a farmworker legal services attorney

vocacy-clinic/batalla-vidal-v-nielsen [https://perma.cc/69F7-LDLE]; *Challenging the Refugee and Travel Ban*, YALE L. SCH., https://law.yale.edu/yls-today/news/challenging-refugee-and-travel-ban [https://perma.cc/3AQ6-JYJ4].

292. See, e.g., *Litigation*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/litigation [https://perma.cc/4AE6-PD7P].

293. See Paoletti, *supra* note 269, at 435, 448, 459, 468.

294. See Daniel Shoer Roth, *How US Immigration policy changes affect immigrants in 2020*, MIA. HERALD (Jan. 8, 2020, 9:31 AM), https://www.miamiherald.com/news/local/immigration/article239058173.html (discussing five changes in immigration policies that impacted legal immigrants in the U.S. in 2020); Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 619 (2011) (describing the unmet legal needs of immigrants).

295. See Mica Rosenberg & Kristina Cooke, *Allegations of labor abuses dogged Mississippi plant years before immigration raids*, REUTERS (Aug. 9, 2019, 10:40 AM), https://www.reuters.com/article/us-usa-immigration-koch-foods/allegations-of-labor-abuses-dogged-mississippi-plant-years-before-immigration-raids-idUSKCN1UZ1OV. For a compelling short documentary on the Mississippi raids, see Tessa Stuart & Reed Dunlea, *The Faces of Deportation*, ROLLING STONE (July 22, 2020, 8:00 AM), https://www.rollingstone.com/culture/culture-features/photographs-families-fighting-deportation-orders-from-trump-administration-1027700.

against workers who deigned to stand up and speak out against abusive workplaces and claim their rights.²⁹⁶ Ultimately, the realities of my own limitations and personal commitments, the timing of the raids, and questions as to whether we could play an effective role without a full-time and longer-term presence in Mississippi won out in my internal debates. Instead of getting on a plane or trying to reconfigure the Clinic for the fall to allow it to have a presence and play a role, we responded only to the specific needs and requests of individuals we previously represented.

During the COVID-19 pandemic, where the health and well-being of all detained persons are at risk,²⁹⁷ I have questioned whether we should be more aggressive in pursuing habeas litigation to push for the release of detained immigrants, or whether it is okay to focus on the individual clients we represent who are in detention, and on the steps we can take to secure their ultimate release? While we have opted for primarily the latter we are also making plans to refocus some of our case assignments moving forward on representing individuals in bond hearings to hopefully secure the release of at least some individuals.

For each individual request for representation, I am confronted with a subset of general and specific questions and asks. Those who inhabit the immigration advocacy space are all subject to similar demands, as are those in most legal services roles.²⁹⁸ But the urgency with which the requests are issued seems greater than in the past, and the stakes feel so much higher. At the same time the representation itself is harder due to the sheer volume and rapidity of the policy changes, all of which are aimed at making it harder to achieve the client's goals.²⁹⁹

As I assess each request and make determinations as to what to take on and in what capacity, I have felt the pull of that underlying

296. See Zack Ford, *ICE raids followed a massive sexual harassment settlement at Mississippi plants*, THINKPROGRESS (Aug. 8, 2019, 3:39 PM), <https://archive.thinkprogress.org/ice-raids-follow-massive-sexual-harassment-settlement-mississippi-plant-koch-foods-d95eb2720f67/> [<https://perma.cc/KBC8-WEKQ>] (stating that the raid took place on the first day of school and explaining the retaliatory nature of the raid).

297. See, e.g., Andre G. Montoya-Barthelemy, Charles D. Lee, Dave R. Cundiff & Eric B. Smith, *COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, 58 AM. J. OF PREVENTIVE MED. 888, 888–89 (2020) (explaining the unique risk of contracting COVID-19 while detained).

298. See Paoletti, *supra* note 269, at 436–37, 471 (articulating questions demanded of legal representatives).

299. See SARAH PIERCE, JESSICA BOLTER & ANDREW SELEE, MIGRATION POL'Y INST. U.S. IMMIGRATION POLICY UNDER TRUMP: DEEP CHANGES AND LASTING IMPACTS 2–10 (2018), <https://www.migrationpolicy.org/research/us-immigration-policy-trump-deep-changes-impacts> (discussing the vast policy changes that make representation more difficult).

urgency. I have also felt the pull of the fear and anxiety among the immigrants with whom I interact. I have felt the pull of the students, eager to respond and to be part of the resistance. And, if I am truly honest, I have felt the pull of my own ego as I witness my colleagues across the country engaged in tireless and fearless advocacy in federal court, city halls, state legislatures, jails, at the border, and in communities across the country living with the uncertainty of when a loved one might be deported, stopped at the border, detained, or summarily returned.³⁰⁰

But I have also been overwhelmed, as have my students. As noted, the individual client cases have become ever more challenging; the rules that apply seem to change regularly, the barriers are higher, the openings are smaller, and the clients' fears and anxieties have been amplified by the hostility and threats directed at them by this Administration.³⁰¹ And now the global pandemic has exacerbated an already challenging situation.³⁰² As a clinician, I am attuned to the need to do more to affirmatively address underlying traumas that are exacerbated when confronting and trying to operate within a system that acts to compound the trauma.³⁰³ As I move forward with my students and our clients, I find that we need to reassess and recalibrate our notions of victory, though doing so can seem like a concession. We remind ourselves that standing alongside our clients in recognition of their inherent worth, their dignity and their rights, signals—in its own small way—our act of resistance.

All of this brings me back to the original question: what is the appropriate role for the Clinic in responding to the Trump Administration's assault on immigrants?³⁰⁴ And does the assessment of what

300. See, e.g., Douglas Keith, *New York Passes Ban on Immigration Arrests at Courthouses*, BRENNAN CTR. FOR JUST. (July 29, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-york-passes-ban-immigration-arrests-courthouses> [<https://perma.cc/96PV-49K3>]; John Burnett, *As Jails And Prisons Reduce Populations, Advocates Call On ICE To Do The Same*, NPR (Apr. 4, 2020, 8:00 AM), <https://www.npr.org/2020/04/04/827241659/as-jails-and-prisons-reduce-populations-advocates-call-on-ice-to-do-the-same> [<https://perma.cc/W9GB-UEX3>].

301. For a discussion on the rapid changes in policy and rules, see PIERCE & BOLTER, *supra* note 32, at 1, 3. For a discussion on the rise in fear and anxiety among immigrants under the Trump administration, see Olivia Sanchez, *Endless fear: Undocumented immigrants grapple with anxiety, depression under Trump*, USA TODAY (Aug. 25, 2019, 1:04 PM), <https://www.usatoday.com/story/news/nation/2019/08/25/undocumented-immigrants-struggle-mental-health-survival-mode/1816672001> [<https://perma.cc/9H3G-FZLT>].

302. See, e.g., Jonathan Ross, Channele M. Diaz & Joanna L. Starrels, *The Disproportionate Burden of COVID-19 for Immigrants in the Bronx*, *New York*, 180 J. OF AM. MED. ASSOC. INTERNAL MED. 1043, 1043–44 (May 2020).

303. See Krista M. Perreira & India Ornelas, *Painful Passages: Traumatic Experiences and Post-Traumatic Stress among Immigrant Latino Adolescents and their Primary Caregivers*, 47 INT'L MIGRATION REV. 1, 1–4 (2014).

304. See *Transnational Legal Clinic*, *supra* note 25.

is an “appropriate” role need to change—both in terms of the clients and cases we undertake, and in terms of how I discuss the law, the procedures and the policies at play? While I have not strayed far from the clinical model that existed prior to Trump taking office and have stayed true to the pedagogical goals that have driven case and project selection for more than a decade, I have sought to extend the boundaries of student engagement. The Clinic has undertaken service immersion weeks where we are confronted with injustices that plague the immigration system in places like detention centers in rural Georgia, in MPP courts in El Paso, and at the Berks Family Detention Center, just 90 miles away from Philadelphia.³⁰⁵ We have taken on representations for persons with claims directly challenged by the Attorney General decisions, where we can seek to reclaim and expand the protection framework for asylum.³⁰⁶ We have represented individuals whose encounters with the criminal system have landed them in detention and in removal proceedings.³⁰⁷ And we continue to press forward at the international level to obtain acknowledgment for our clients that they have rights, and that those rights must be respected.

With each choice made about the representation undertaken and the discussions around lawyering in the present, it has felt increasingly important to be transparent as to the underlying values, those that are being promoted and those that are being trampled on as the rule of law is routinely flouted.³⁰⁸ It is also important to critically examine what is the role of the lawyer when confronted with laws, policies and practices that promote and perpetuate systems of injustice. What should be my response when, for example, the President maligns a judge whose judicial opinion he does not like?³⁰⁹ What should be my response when the Acting Assistant Secretary of USCIS Cuccinelli, who has direct oversight over DACA and the

305. See Colin Deppen & Sarah Anne Hughes, *Why PA’s Controversial Berks Detention Center For Immigrant Families Is Still Open*, BILLY PENN (June 22, 2018, 11:45 AM), <https://billypenn.com/2018/06/22/why-pas-controversial-detention-center-for-immigrant-families-is-still-open/> [http://perma.cc/W493-ERRZ].

306. See *Transnational Legal Clinic*, *supra* note 25.

307. See *id.*

308. See Erika Lee, *Trump’s Xenophobia is an American tradition—but it doesn’t have to be*, WASH. POST (Nov. 26, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/11/26/trumps-xenophobia-is-an-american-tradition-it-doesnt-have-be> [http://perma.cc/KG93-ZGEX]; Paul Rosenzweig, *Trump’s Defiance of the Rule of Law*, THE ATLANTIC (June 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/trumps-unique-assault-rule-law/590875> [http://perma.cc/UE9L-CTGN].

309. See Thomas Fuller, *‘So-Called’ Judge Criticized by Trump Is Known as a Mainstream Republican*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html?searchResultPosition=2> [http://perma.cc/U4D3-AAY8].

processing of DACA applications, publishes a statement on the Department's website referring to the decision as "an affront to the rule of law?"³¹⁰ Such a statement unambiguously demonstrates that politics and law are deeply connected.³¹¹ And there is no denying or shying away from the reality that the politics of this Administration are infused with and promote racism, misogyny, xenophobia, and ableism.³¹² Looking ahead, how can I train my students to effectively challenge the systemic -isms that plague immigration law and practice, and that are at the forefront of the Trump Administration's anti-immigrant agenda?³¹³

B. Reflecting Back and Looking Forward: Preparing for and Responding to Indeterminacy, the Trauma, Injustice, and the Systemic and Explicit Racism at Play

As noted above, while I knew that the Trump Administration was going to bring with it hostility towards our clients, plans for mass deportations and a dismantling of the immigration system, I did not appreciate the manner in which it would be carried out and the depth and breadth of the harm to be caused.³¹⁴ I did not fully appreciate how Trump's policy agenda would not only rain terror upon my clients but would fundamentally alter the system in which they appeared and their chance of prevailing in their cases.³¹⁵ I therefore did not have a way to prepare myself for what was to come, let alone prepare my students for what was to come. It has taken three years to learn not to say or think, "it can't get worse than this," because each action where that thought had been uttered was followed by yet another.³¹⁶ Knowing this, how can I prepare myself and my

310. See Press Release, U.S. DEP'T OF HOMELAND SEC., DHS Statement On Supreme Court Decision on DACA (June 18, 2020), <https://www.dhs.gov/news/2020/06/18/dhs-statement-supreme-court-decision-daca> [<http://perma.cc/39T3-4VTR>].

311. See Josh Gerstein, *Judge rebukes feds over statement slamming Supreme Court's DACA ruling*, POLITICO (Aug. 13, 2020, 4:46 PM), <https://www.politico.com/news/2020/08/13/judge-rebukes-feds-supreme-courts-daca-ruling-395000> [<http://perma.cc/8KT8-9WGD>].

312. See Kristin Garrity Sekerci & Azza Altiraifi, *A US immigration history of white supremacy and ableism*, ALJAZEERA (Jan. 31, 2018), <https://www.aljazeera.com/indepth/opinion/immigration-history-white-supremacy-ableism-180122111928695.html> [<http://perma.cc/M5R8-4GJR>].

313. See *id.*

314. See Josh Gramlich, *How border apprehensions, ICE arrests and deportations have changed under Trump*, PEW RSCH. CTR.: FACT TANK (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump> [<http://perma.cc/Z2BV-L3N6>].

315. See *Outcomes of Deportation Proceedings in Immigration Court*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php [<http://perma.cc/Y4B4-D6YG>].

316. See *id.*

students for what is and what might come next? How does this change our approach to clients and cases?

While good lawyering has always meant being prepared for anything and everything that could happen,³¹⁷ how can we predict what has not happened? We must stay abreast of every new pronouncement and policy change that may fundamentally alter our client's ability to obtain relief, and we must stay abreast of any litigation that may or may not succeed in enjoining that policy change, and the scope of the injunction. We must stay abreast of the litigation that could upend the governing precedent we had based our initial claims on, and we must stay abreast of any Circuit Court or Supreme Court decision that may or may not rule otherwise.

In addition, we must prepare ourselves and our clients for the reduced likelihood of success that has resulted from constriction of the law and from the simultaneous constriction of empathy from those appointed to adjudicate the cases.³¹⁸ We must find a way to walk the line between harsh realism and fostering and sustaining hope as we counsel our clients. And, now more than ever, we must ensure that we have made the record for appeal, in the likely event that the judge tries to quash that hope by denying relief.

In the midst of indeterminacy are two persistent constants that we must also be willing to name and prepared to address: racism and xenophobia.³¹⁹ The harms wrought by the barrage of changes to law and policy, and the daily denials of due process confronting our clients are compounded the harms wrought from the overlay of racism, white nationalism, xenophobia—and at its most inane—lack of humanity on display from the President, the immigration judges, and the agency representatives serving as gatekeepers before our clients.³²⁰

The President has been consistent in how he has cast the immigrants he is seeking to exclude.³²¹ Persons from the Muslim-majority

317. See *Judges and Outcomes are Unpredictable*, LIMPert & ASS., <http://limpertlaw.com/resources-articles-presentations/overview-of-canadian-litigation-litigation/judges-outcomes-unpredictable> [<http://perma.cc/E82B-G7HM>].

318. See *The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration> [<http://perma.cc/K9LG-M6YV>].

319. See Alex Mikulich, *U.S. Xenophobia and Racism—The Presence of the Past*, JESUIT SOC. RSCH. INST. (2009), <http://www.loyno.edu/jsri/sites/loyno.edu/jsri/files/USXenophobiaandRacism-Summer2009jsq.pdf> [<http://perma.cc/66VV-YL2A>].

320. See Tiger Sun, *The inhumanity of US immigration control*, STAN. DAILY (June 7, 2018), <https://www.stanforddaily.com/2018/06/07/the-inhumanity-of-us-immigration-control/loyno.edu.jsri/files/USXenophobiaandRacism-Summer2009jsq.pdf> [<http://perma.cc/H7EC-XJ3P>].

321. See Eugene Scott, *Trump's most insulting—and violent—language is often reserved*

countries that he sought to exclude in his initial “Travel Ban” are terrorists.³²² Persons from Central America are drug dealers, rapists, and murderers.³²³ And, in January 2018, as Congressional leaders were meeting with President Trump to try to move forward on an immigration deal whereby relief for DACA and TPS recipients was purportedly being negotiated in exchange for President Trump’s “Great Wall,” and an end to the diversity visa lottery and family-based immigration petitions, Trump is reported to have referred to Haiti and African countries as “sh[**] hole countries,”³²⁴ questioning why we would want to welcome nationals from those countries. This is just one of many race-based tropes that have been a constant from the campaign throughout his Presidency and are reiterated in the narratives set forth in the regular communications issued by DHS and persons within the Trump Administration.³²⁵

As someone who spends significant time teaching my students about the role of narrative and effective use of narrative in advocacy, I felt a responsibility to pay attention to the narratives being promoted by DHS and ICE and began receiving their regular press releases.³²⁶ The “Top 5 Stories” promoted at the top line told stories of arrests for sex trafficking in children and child pornography, drug trafficking, and other stories of the “murderers,” and “rapists.”³²⁷ Yet each time I looked behind the headlines, clicked on the link and read the full story, it was clear that the majority of the “worst of the worst” stories involved the arrests of citizens, where Homeland Security Investigations had played a part in the investigation leading to the ultimate arrests.³²⁸ Where the names appeared Spanish,

for immigrants, WASH. POST: THE FIX (Oct. 2, 2018, 3:21 PM), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-for-immigrants> [http://perma.cc/P2KN-FEH8].

322. See Brian Klaas, *A short history of President Trump’s anti-Muslim bigotry*, WASH. POST (Mar. 15, 2019, 3:39 PM), <https://www.washingtonpost.com/opinions/2019/03/15/short-history-president-trumps-anti-muslim-bigotry> [http://perma.cc/E3SV-UGYC].

323. See Scott, *supra* note 321.

324. See Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump referred to Haiti and African nations as ‘shithole’ countries*, NBC NEWS (Jan. 12, 2018, 7:47 AM), <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946> [http://perma.cc/8XYU-93CZ].

325. See *ICE Newsroom Overview*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/news/overview#wcm-survey-target-id> [http://perma.cc/6ZGB-XBQH].

326. *Id.*

327. See *News Releases*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/news/all> [http://perma.cc/S6WA-5S3P].

328. See Press Release, U.S. DEP’T OF HOMELAND SEC., ICE and DOJ Announce Indictments from Largest Single-State Worksite Enforcement Action in Nation’s History (Aug. 6, 2020), <https://www.dhs.gov/news/2020/08/06/ice-and-doj-announce-indictments-largest-single-state-worksite-enforcement-action> [http://perma.cc/7R47-G5L5].

they were included in the headline.³²⁹ When they did not, they were not included.³³⁰ The Trump Administration's explicitly race-based narratives have laid bare the role of race in the immigration system.³³¹ What then is my role in responding: how can I most effectively represent my clients, while also engaging with my students and the broader community in a constructive discussion that goes beyond just naming the racism underlying the messages and the policies they promote.³³²

How do we as lawyers confront and challenge systemic racism inherent in the system,³³³ beyond being merely attentive to the words we use and the ways in which we craft our narrative? How can we effectively craft our clients' cases in a way that challenges systemic racism in immigration enforcement as it applies to facially race-neutral provisions of the immigration statute?³³⁴ This is particularly true when examining the criminalization of migration and the ways in which immigration enforcement are tied directly to our system of criminal law enforcement.³³⁵ In a recent Clinic case, our client, who came to the United States more than two decades ago as a refugee, was now facing deportation because of his criminal record.³³⁶ As we discussed how to present his criminal record in a way that might garner the judge's exercise of discretion in granting him relief, one student asked the simple yet confounding question: "Why is the theory of the case not racism?" It was undeniable that our client's criminal record contained a list of crimes for which Black men are charged and convicted at rates significantly higher than whites.³³⁷ I thought back to all of the clients we have had in the

329. See Press Release, ICE, ICE lodges detainees for MS-13 members, associates arrested by FBI for sex trafficking a minor (Aug. 18, 2020), <https://www.ice.gov/news/releases/ice-lodges-detainers-ms-13-members-associates-arrested-fbi-sex-trafficking-minor> [<http://perma.cc/K9X5-GLMR>].

330. See *id.*

331. See Julissa Arce, *Trump's Anti-Immigrant Rhetoric Was Never About Legality—It Was About Our Brown Skin*, TIME (Aug. 6, 2019, 4:47 PM), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism> [<http://perma.cc/GUM7-TQDS>].

332. See Brandon Vaidyanathan, *Systemic Racial Bias in the Criminal Justice System Is Not a Myth*, PUB. DISCOURSE: RACE (June 29, 2020), <https://www.thepublicdiscourse.com/2020/06/65585> [<http://perma.cc/CFP9-VW6U>].

333. See Carrie Rosenbaum, *Unequal Protection in Immigration Law*, YALE J. ON REGUL. (July 22, 2020, 4:47 PM), <https://www.yalejreg.com/nc/unequal-protection-in-immigration-law-by-carrie-rosenbaum> [<http://perma.cc/FKL7-45L9>].

334. See *id.*

335. *Id.*

336. See *The Deported: Immigrants Uprooted from the Country They Call Home*, HUM. RTS. WATCH (Dec. 5, 2017), <https://www.hrw.org/report/2017/12/06/deported/immigrants-uprooted-country-they-call-home> [<http://perma.cc/UEK3-5VD6>].

337. See *Report to the United Nations on Racial Disparities in the U.S. Criminal*

Clinic where their criminal records had triggered removal proceedings—all but one of those clients were Black, and in each case there was no disguising the reality that the crimes for which they were charged were again, all crimes for which Black people are disproportionately arrested and convicted.³³⁸

In our discussions of case theory and narrative theory, we talk about the assumptions and biases that each player brings to the table,³³⁹ and we talk about challenging those assumptions. In other contexts, we problematize victim narratives and highlight the importance of recognizing our clients' agency. How can we similarly challenge assumptions about race, racial profiling, and race-based policing in the context of an immigration case where the judge is not there to adjudicate the criminal case, but to adjudicate the immigration case based on the criminal court's prior adjudication?³⁴⁰ How can we rethink our lawyering so that we are not ultimately complicit in the system that disproportionately punishes Black and Brown people?³⁴¹ These are questions that we must grapple with well beyond the Trump Administration.

Race and racism, misogyny, homophobia, and the host of -isms now openly permeate all aspects of immigration work, though this phenomenon is certainly not unique to the field of immigration.³⁴² When we bear witness to—and for some, experience—those -isms alongside and in tandem with our clients' narratives of persecution endured and feared, particularly when that persecution is driven by racism, misogyny, homophobia or transphobia, and the trauma inflicted, the impact can be both subtle and profound.³⁴³ Trauma can be triggered by an experience recalled, or a violent shift in our understanding of the way the world operates, or a forced reckoning with the depth of systemic injustices that permeate our laws, legal

Justice System, SENT'G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<http://perma.cc/4Z67-YMG2>].

338. *See id.*

339. *See* Susan Bryant, *The Five Habits: Building Cross-Culture Competence in Lawyers*, 8 CLINICAL L. REV. 33, 89–90 (2001).

340. *See The Attorney General's Judges*, *supra* note 225.

341. *See* Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, THE ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425> [<http://perma.cc/DU78-THWT>].

342. *See* Sidra Owens, *The -isms That Will Destroy America. The Mantra That May Save It.*, MEDIUM (May 7, 2018), <https://medium.com/@sidraowens/https-medium-com-sidraowens-the-isms-that-will-destroy-america-the-mantra-that-may-save-it-82b0cbd9164> [<http://perma.cc/PHW7-DJ27>].

343. *See* Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process through Adjudicators*, 19 MICH. J. RACE & L. 53, 77–78 (2013).

systems, and politics.³⁴⁴ And it can be exacerbated by the relentless unleashing of vitriolic rhetoric that is both aggressively political and intensely personal.³⁴⁵ I am increasingly cognizant of the impact on my students and of the need to find ways to address that throughout the semester, in preparation for the work, during the work, and in reflecting upon the work at the end. It no longer feels sufficient to merely devote a seminar session to trauma and secondary trauma, with perhaps a case rounds aimed at giving students the space to openly share what they are feeling and how they are doing. It is no longer enough to just name it. Pushing forward without critically engaging in a discussion of the underlying causes giving rise to the trauma, and confronting the trauma itself, risks signaling permission for the way things are and have been and can perpetuate and exacerbate the traumas inflicted moving forward.³⁴⁶

In the past, I have sought to give room and space to the students to raise for themselves the issues that arise in their representation. But with each new Executive Order, Proclamation, policy memo, tweet, and rallying cry from the President, with each outrageous comment made by a judge, immigration officer, or an attorney for DHS,³⁴⁷ withholding my own reactions became harder and harder. I have come to realize as well that just giving space without naming more explicitly why that space was needed silenced students and created a barrier where I was looking to create an opening. We needed a framework for processing rhetoric and actions that cast aspersion upon, demean, and foster hate against Black and Brown people, against an entire nationality as seen in Trump's commentary on the COVID-19 pandemic, or an entire gender as seen throughout the Me Too movement.³⁴⁸ And we needed a way to process the resulting injustices that emerge from the system, and we needed to find a way forward while working under an administration that flouts the rule of law and due process, and disrespects and disregards the judiciary.³⁴⁹ These too are essential lawyering competencies.³⁵⁰

344. *See id.* at 82.

345. *See id.* at 110.

346. *See id.* at 79–81.

347. *See President Trump's executive orders on immigration and refugees*, CTR. FOR MIGRATION STUD., <https://cmsny.org/trumps-executive-orders-immigration-refugees> [http://perma.cc/AZ8L-KQWQ].

348. *See* David Smith, *Trump's tactic to attack black people and women: insult their intelligence*, THE GUARDIAN (Aug. 10, 2018), <https://www.theguardian.com/us-news/2018/aug/10/trump-attacks-twitter-black-people-women> [http://perma.cc/2N8F-LWPJ].

349. *See* Gerstein, *supra* note 311.

350. *See How Attorneys Can Adapt Now to the Changing Legal World*, ARAG LEGAL INS., <https://www.araglegal.com/attorneys/learning-center/topics/building-your-practice/how-attorneys-can-adapt-to-succeed-in-changing-legal-world> [http://perma.cc/F2HJ-S7U9].

CONCLUSION: RESISTANCE AND RELENTLESS RESILIENCE

I have outlined above the Trump Administration's relentless assault on immigrants, their families, our shared communities, and the system of immigration.³⁵¹ But this Essay cannot fully communicate the massive humanitarian crises brought about by the Trump Administration's continued relentless assault on all immigrants, asylum seekers, refugees, skilled workers, academics, and long-standing and essential members of our communities—all under the continued guise of putting America first and protecting Americans—and the failure of Congress to act.³⁵² We cannot ignore the devastating harm to individuals and families, to human beings and to our communities, harms that in some cases are fatal.³⁵³ We must also recognize that the systemic dismantling of the immigration system as we know it, the infusion of enforcement-oriented immigration judges, the broad discretion afforded to the Administration by the courts and the silence of Congress, will have impacts for individuals and families well into the future.³⁵⁴

But we cannot allow ourselves to be lost in despair. It would be a disservice to our clients, whose very presence in the United States is a testament to human resilience and, in many cases, the power of faith and determination. That does not mean it is not hard. That does not mean that I do not feel anger, deep sadness, frustration, and exhaustion. I do. And it would be a disservice to my students to pretend otherwise and to inadvertently communicate that those emotions are not real or valid, or somehow demonstrate an unfitness to do the work. Instead, we must give space to those emotions and find ways to build back our reserves. And then we are better positioned to channel those emotions, listen and learn from our clients, look to those who have been battling systemic injustices, and persevere. We must find a way to sustain ourselves and honor our clients as we find our path forward in an era of indeterminacy on

351. See *President Trump's executive orders on immigration and refugees*, *supra* note 347.

352. See Greg Sargent, *The other humanitarian crisis under Trump, exposed by a new report*, WASH. POST (Oct. 29, 2019, 2:41 PM), <https://www.washingtonpost.com/opinions/2019/10/29/other-humanitarian-crisis-under-trump-exposed-by-new-report> [http://perma.cc/6ULE-FX27].

353. See *id.*

354. See Britta Glennon, *Why the Trump administration's anti-immigration policies are the United States' loss and the rest of the world's gain*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/up-front/2020/07/20/why-the-trump-administrations-anti-immigration-policies-are-the-united-states-loss-and-the-rest-of-the-worlds-gain> [http://perma.cc/8CLK-URBS].

steroids. And we must find a path forward that does not feed with our complicity a system that is replete with racism.

The last four years have brought immeasurable challenges.³⁵⁵ Fortunately, I am part of a community of committed, generous and creative advocates—lawyers and non-lawyers alike, and have benefitted from the shared knowledge and collective set of experiences that have helped to demystify the current system, and craft ways to respond and push back.³⁵⁶ Against this backdrop of evil, is a fierce group of immigrants, along with their allies and advocates, who are meeting relentless assaults with relentless resistance.³⁵⁷ Looking ahead, the spirit of resilient resistance will continue to play a critical role as we work not just to restore the immigration system to what it was before Trump took office, but to re-vision and build a new and more humane immigration system. We need to re-vision an immigration system that is not tied to the privileges originally afforded to “free white persons” who were deemed by other white people to be of “good moral character,” and that is divorced from the systemic racism in criminal laws and law enforcement.³⁵⁸ In doing so, we must remain true to our clients, and honor and uphold the abiding faith of so many immigrants who make their way to the United States and who believe that we can do better for all of our children.

355. See *Timeline of federal policy on immigration, 2017–2020*, BALLOTPEDIA: THE ENCYCLOPEDIA OF AMER. POL., https://ballotpedia.org/Timeline_of_federal_policy_on_immigration,_2017-2020 [<http://perma.cc/8R72-CLGT>].

356. See Ana Campoy, *Pro-immigrant Americans are beating Trump back with a flood of lawsuits*, QUARTZ (July 25, 2018), <https://qz.com/1330683/aclu-and-other-organizations-are-shaping-donald-trumps-immigration-policy> [<http://perma.cc/UK6H-BZ4J>].

357. See Grace Tatter, *Telling Immigration Stories—and Stories of Resilience*, HARV. GRADUATE SCH. OF EDUC. (Apr. 8, 2019), <https://www.gse.harvard.edu/news/19/04/telling-immigration-stories-resilience> [<http://perma.cc/DEL3-LNX9>].

358. See Steve Kuhn, *Chapter 9: Immigration Designed to Enhance American Lives (IDEAL)*, CATO INST. (May 13, 2020), <https://www.cato.org/publications/publications/chapter-9-immigration-designed-enhance-american-lives-ideal> [<http://perma.cc/E5SV-T9UW>].