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OBSCURED BOUNDARIES: *DIMAYA*'S EXPANSION OF THE VOID-FOR-VAGUENESS DOCTRINE

*Katherine Brosamle**

I. INTRODUCTION

The United States, despite being dubbed the "nation of immigrants,"[1] is no stranger to excluding those deemed "undesirable" by the governing majority.[2] This often-discriminatory intent to exclude manifests in immigration law, which has continually expanded and transformed throughout history. One pertinent development is the emergence of "crimmigration law"—a term generally referring to "the intersection of criminal law and procedure with immigration law and procedure."[3]

Three broad trends have contributed to this recent crimmigration phenomenon:

> [1] criminal convictions now lead to immigration law consequences ever more often; [2] violations of immigration

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1. This moniker was popularized after the posthumous publication of President John F. Kennedy's book, *A Nation of Immigrants*, but has been traced as far back as 1874 when an editorial appearing in the *The Daily State Journal of Alexandria* noted, "We are a nation of immigrants and immigrants' children." *See* Miriam Jordan, *Is America a 'Nation of Immigrants'? Immigration Agency Says No*, N.Y. TIMES (Feb. 22, 2018), https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html (discussing the removal of this phrase from the mission statement of United States Citizenship and Immigration Services).

2. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 4–8 (2015) (providing an overview of American immigration policy); *see generally* Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 203 (2004) ("The history of American immigration law can be divided into stages that reflect racial prejudices and discriminations of the day.").

3. GARCÍA HERNÁNDEZ, *supra* note 2, at 3; *see also* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (coining the phrase "crimmigration" and discussing its origins).

> law are increasingly punished through the criminal justice system; and [3] law enforcement tactics traditionally viewed as parts of one or the other area of law have crossed into the other making enforcement of immigration law resemble criminal law enforcement and turning criminal law enforcement into a semblance of immigration law enforcement.[4]

The first trend reflects a shift in the composition of people prioritized as "undesirable." Throughout early American history, deportability "turned on race or national origin."[5] Focus transferred in the early twentieth century to the exclusion of specific ideologies such as anarchism, socialism, and communism.[6] Finally, in the 1980s, "the preferred measure of undesirability [became] crime."[7] Today, immigration law, political rhetoric, and policy decisions reflect a mounting concern about so-called "criminal immigrants."[8]

Sessions v. Dimaya[9] illustrates this increasingly complex web of crimmigration law. In this case, a lawfully-present immigrant acted unlawfully, and, in addition to the criminal punishment of incarceration, he faced the steepest immigration repercussion—deportation without any possibility of relief.[10] And yet, he ultimately

4. GARCÍA HERNÁNDEZ, *supra* note 2, at 3.

5. *Id.* at 23.

6. *Id.*

7. *Id.*

8. *See, e.g.*, Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1723–36 (2018) (outlining the origins of crimmigration and detailing recent legislative action that has further merged criminal and immigration law together in Part I:B–C); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 196 (2012) ("In defending Arizona's recent efforts to crack down on illegal immigration . . . the state's governor did not talk about immigrants using public benefits, the leitmotif of anti-immigration rhetoric a decade or so ago; she talked about crime. Part of what has blurred the line between immigration enforcement and crime control may in fact be a kind of cultural obsession with violence and victimization, a tendency to see *everything* through the lens of crime control."); Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to Immigration and Customs Enf't Employees (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (announcing increased enforcement priority to "criminal immigrants" under the Obama Administration); Katie Rogers, *Trump Highlights Immigrant Crime to Defend His Border Policy. Statistics Don't Back Him Up.*, N.Y. TIMES (June 22, 2018), https://www.nytimes.com/2018/06/22/us/politics/trump-immigration-borders-family-separation.html; *see generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) (detailing the historic relationship between criminal and immigration law and contending that immigrant detention is punitive).

9. 138 S. Ct. 1204 (2018).

10. *Id.* at 1210–11.

found relief, albeit through an unusual mechanism—the void-for-vagueness doctrine.[11]

Aliens can be subjected to removal from the United States if they commit "aggravated felonies,"[12] a term with many definitions, including the commission of a "crime of violence."[13] The term "crime of violence" in turn has two separate definitions.[14] In *Dimaya*, the petitioner was charged as removable due to his prior convictions, which were deemed aggravated felonies under the definition of "crime of violence" set forth in 18 U.S.C. § 16(b).[15] On review, the Court of Appeals for the Ninth Circuit remanded the petitioner's immigration proceedings after determining that section 16(b) was unconstitutionally vague and thus, void.[16] A divided Supreme Court ultimately upheld the Ninth Circuit's holding, a decision that eliminated one ground for deportation of "criminal immigrants" and created broader uncertainty as to the scope of the void-for-vagueness doctrine.[17]

Although a majority of the Justices agreed that section 16(b) was unconstitutionally vague, there was no settled majority as to the underlying basis for extending the void-for-vagueness doctrine into the realm of immigration law.[18] This doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes."[19] It serves as a shield against "arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges."[20] However, the doctrine has traditionally been limited to criminal statutes with limited exceptions.[21] By extending its application to immigration law, its scope has been called into question.

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11. *Id.* at 1211–12.
12. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).
13. *Id.* § 1101(a)(43)(F).
14. 18 U.S.C. § 16 (2012) ("The term 'crime of violence' means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").
15. *Dimaya*, 138 S. Ct. at 1211.
16. *Id.* at 1212.
17. *Id.* at 1223.
18. *Id.*
19. *Id.* at 1212 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)).
20. *Id.* (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).
21. *Id.*

This Comment argues that the Supreme Court properly extended the void-for-vagueness doctrine to find section 16(b) unconstitutionally vague. Part II sets forth the relevant statutory framework, and Part III outlines the factual and procedural history of the *Dimaya* case. Part IV breaks down the reasoning of the opinion delivered by Justice Kagan, distinguishes the concurrence penned by Justice Gorsuch, and highlights the dissenting arguments of Chief Justice Roberts and Justice Thomas. Part V analyzes the Justices' various interpretations of the void-for-vagueness doctrine and advocates for the broad construction outlined in the concurrence. Part VI examines the practical impacts of *Dimaya* on immigration enforcement and future immigration reform. Finally, Part VII concludes that *Dimaya*'s legacy lies in its furtherance of the void-for-vagueness doctrine.

II. RELEVANT STATUTORY FRAMEWORK

On June 27, 1952, American immigration law and policy were completely revamped with the passage of the comprehensive McCarran-Walter Act, more commonly known as the Immigration and Nationality Act (INA).[22] The Senate Judiciary Committee drafted the INA after a two-year study on immigration conducted in response to mounting fears of communism.[23] Congress passed the INA, despite President Harry S. Truman's veto and concerns about the "severe hardships involving exclusion, deportation, and denaturalization."[24] Although amended over the past several decades,[25] the INA endures as the main source of immigration law.[26]

Truman's disregarded apprehensions about the severe difficulties involved with deportation and the structure of the INA remain germane. Indeed, the issue raised in *Dimaya* centers on a specific ground for the deportation of "criminal immigrants."

22. RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:2, Westlaw (database updated Nov. 2018).

23. *Id.*

24. *Id.*; *see also* MARGARET C. JASPER, LEGAL ALMANAC: THE LAW OF IMMIGRATION § 1:7, Westlaw (database updated 2012) (noting President Truman's veto of the INA).

25. The INA, including all subsequent amendments and additional provisions, is contained in Title 8 of the United States Code which deals with "Aliens and Nationality."

26. 1 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE 2D § 1:120, Westlaw (database updated Feb. 2019).

Again, with the rising crimmigration trend, criminal convictions are increasingly coupled with immigration consequences. Under the INA, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable"[27] and ineligible for cancellation of removal.[28] Thus, "removal is a virtual certainty for [] alien[s] found to have an aggravated felony conviction," regardless of the length of their residency in or connections to the United States.[29]

The term "aggravated felony" is defined in section 1101, subdivision 43 of the INA through a wide-ranging list of specific offenses and cross-references to various federal criminal statutes.[30] Among this list of qualifying offenses is "a crime of violence (as defined in section 16 of Title 18 . . .) for which the term of imprisonment [is] at least one year."[31] The aforementioned criminal statute (hereinafter referred to as "section 16") sets forth two distinct definitions for the term "crime of violence."[32] First, subdivision a, known as the elements clause, covers any "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[33] Second, subdivision b, known as the residual clause, covers any "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[34]

When analyzing a crime under the residual clause, courts use a "categorical approach," which looks to the general "nature of the offense," as opposed to whether "'the particular facts' underlying a conviction" or "the statutory elements of a crime" present the substantial risk demanded.[35] Thus, courts seeking to apply the residual clause of section 16 look to an "idealized ordinary case" of any given offense.[36]

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27. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).
28. *Id.* § 1229b(a)(3), (b)(1)(C); *see also* 3 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE § 13:222, 2D Westlaw (updated Aug. 2019) (detailing the impact of aggravated felony convictions on eligibility for relief).
29. Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018).
30. 8 U.S.C. § 1101(a)(43)(A)–(U) (2012).
31. *Id.* § 1101(a)(43)(F).
32. 18 U.S.C. § 16.
33. *Id.* § 16(a).
34. *Id.* § 16(b).
35. Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018).
36. *Id*. at 1214 (quoting Johnson v. United States, 135 S. Ct. 2551, 2557 (2015)).

In sum, section 16 delineates two classifications of "crimes of violence"—elemental and residual—both of which qualify as aggravated felonies, the commission of which is grounds for deportation. The underlying proceedings in *Dimaya* illustrate how immigration courts have interpreted and utilized section 16's residual clause in removal proceedings.

III. STATEMENT OF THE CASE

A. Original Immigration Proceedings

Petitioner James Garcia Dimaya, a native citizen of the Philippines, was admitted to the United States as a lawful permanent resident in 1992.[37] In 2007, and again in 2009, Dimaya was convicted of first-degree residential robbery under California law.[38] Each conviction carried a two-year sentence.[39]

The Department of Homeland Security (DHS) characterized these convictions as aggravated felonies and subsequently charged Dimaya as removable without eligibility for relief.[40] The Immigration Judge (IJ) assigned to Dimaya's case agreed with DHS and found that the robbery convictions qualified as aggravated felonies under the definition set forth in the residual clause of section 16.[41] The categorical approach employed by section 16(b) required that the IJ look to an idealized version of a burglary, not the actual circumstances of Dimaya's two robberies. Specifically, the IJ cited *United States v. Becker*[42] for the proposition that a burglary is a crime of violence and explained that "unlawful entry into a residence is by its very nature an offense where is apt to be violence [sic], whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon."[43]

The Board of Immigration Appeals (BIA) subsequently dismissed Dimaya's appeal on the same ground and affirmed the IJ's decision.[44]

37. Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir. 2015) *aff'd sub nom* Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

38. *Dimaya*, 803 F.3d at 1111. Specifically, Dimaya was charged under California Penal Code, section 459. *Id.*

39. *Id.*

40. *Id*.

41. *Dimaya*, 803 F.3d at 1112.

42. 919 F.2d 568, 573 (9th Cir. 1990).

43. *Dimaya*, 803 F.3d at 1112.

44. *Id.*

B. Ninth Circuit Review

Dimaya filed a petition for review of the BIA's decision with the Court of Appeals for the Ninth Circuit.[45] During the interim period between initial arguments and the court's judgment, the Supreme Court decided *Johnson v. United States*,[46] which found the term "violent felony" in the Armed Career Criminal Act (ACCA)[47] to be unconstitutionally vague.[48] In response to *Johnson*, the Ninth Circuit ordered supplemental briefs and arguments due to the similar structure and wording of section 16 and the overturned ACCA provision.[49] Ultimately, seeing no meaningful distinctions between the two provisions, the Ninth Circuit directly applied *Johnson*, and held that section 16(b) was unconstitutionally vague, and remanded Dimaya's case to the BIA for further proceedings.[50]

In the wake of the Ninth Circuit's extension of *Johnson*, three other circuit courts took up the same issue with varying results,[51] and the Supreme Court granted certiorari to resolve this split in circuit authority.[52]

IV. REASONING OF THE COURT

In determining how the *Johnson* holding applied to the issue presented in *Dimaya*, two distinct inquiries were presented—first, whether the void-for-vagueness analysis used to reach the *Johnson* decision could apply in this civil context, and second, whether the statutes at issue in *Dimaya* and *Johnson* were sufficiently analogous to warrant a similar finding of unconstitutionality. The Justices vastly

45. *Id.*

46. 135 S. Ct. 2551 (2015).

47. 18 U.S.C. § 924(e)(2)(B) (2018) ("[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.").

48. *Johnson*, 135 S. Ct. at 2563.

49. *Dimaya*, 803 F.3d 1112.

50. *Id.* at 1120.

51. *Compare* Shuti v. Lynch, 15-3835 (6th Cir. July 7, 2016) (finding section 16(b) unconstitutionally vague), *and* United States v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015) (same), *with* United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc) (upholding section 16(b)).

52. Lynch v. Dimaya, 137 S. Ct. 31 (2016).

diverged in their views on both questions. Ultimately, the judgment came down to a 5–4 vote in favor of overturning section 16(b), and resulted in an opinion by Justice Kagan, a concurrence in part and in the judgment by Justice Gorsuch, and two separate dissents from both Chief Justice Roberts and Justice Thomas.[53]

A. The Court's Opinion

The Court's opinion sets forth the majority's judgment and a plurality analysis of the scope of the void-for-vagueness doctrine.

To ultimately find section 16(b) unconstitutionally vague under the *Johnson* framework, the opinion begins with a justification for the application of the void-for-vagueness doctrine to a civil immigration statute.[54] Writing for the plurality, Justice Kagan cited an immigration case pre-dating the INA itself—*Jordan v. De George*[55]—where the Supreme Court found an immigration law making aliens deportable for convictions of "crimes of moral turpitude" to be "sufficiently definite."[56] Although not a criminal statute, the Supreme Court in *Jordan* tested and upheld this immigration provision under the void-for-vagueness doctrine because of the "grave nature of deportation," which is a "'drastic measure,' often amounting to lifelong 'banishment or exile.'"[57] Drawing on this notion, the *Dimaya* plurality in essence cited the crimmigration phenomenon, without explicitly using the term, as the basis for application of the void-for-vagueness doctrine to immigration law today. In light of and considering the "particularly severe penalty" of deportation and increasing connection between deportability and criminal convictions, the plurality determined that the most exacting vagueness standard should apply even though removal is a civil matter.[58]

Having established the relevance of the void-for-vagueness doctrine, the majority looked to *Johnson*, which it described as a "straightforward decision, with equally straightforward application here."[59] The residual clause of the ACCA provision at issue in *Johnson* defined the term "violent felony" as one involving a "serious potential

53. Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018).
54. *Id.* at 1212–13. Justice Gorsuch did not join this analysis in Part II.
55. 341 U.S. 223, 229 (1951).
56. *Dimaya*, 138 S. Ct. at 1213 (quoting *Jordan*, 341 U.S. at 231.).
57. *Id.* (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
58. *Id.*
59. *Id.*

risk of physical injury,"[60] whereas section 16's residual clause defines a "crime of violence" as one involving a "substantial risk that physical force" will be used.[61] In *Johnson*, the Supreme Court identified two features of ACCA's residual clause that jointly "produced hopeless indeterminacy," and rendered the clause unconstitutionally vague.[62] First, the use of a categorical approach, centered around a crime's "ordinary case," was imprecise and speculative.[63] Second, the ACCA's residual clause failed to identify the required "threshold level of risk."[64] Although the second element did not independently render the provision unduly vague, when compounded with the first issue, it did.[65]

Turning then to the residual clause of section 16, the *Dimaya* majority found the same two dangerous elements—the use of a categorical approach and an indeterminate level of required risk.[66] Thus, section 16(b), just like the ACCA's residual clause, created "more unpredictability and arbitrariness than the Due Process Clause tolerates."[67]

To conclude, the opinion addressed the dissenters—first Justice Thomas[68] and then Chief Justice Roberts. Thomas questioned the validity of the void-for-vagueness doctrine at length before ultimately taking the position that if vagueness were to be considered, analysis under the residual clause of section 16 should switch from categorical to case-specific to avoid invalidating the law.[69] The plurality noted this was the same argument raised in *Johnson's* dissent.[70] There, like here,

60. 18 U.S.C. § 924(e)(2)(B) (2018).

61. 18 U.S.C. § 16(b) (2012).

62. *Dimaya*, 138 S. Ct. at 1213 (quoting Johnson v. United State, 135 S. Ct. 2551, 2558 (2015)).

63. *Id.* at 1214 ("[A] court was supposed to 'imagine' an 'idealized ordinary case of the crime'—or otherwise put, the court had to identify the 'kind of conduct the "ordinary case" of a crime involves.' But how, *Johnson* asked, should a court figure that out? By using a statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct? ACCA provided no guidance, rendering judicial accounts of the 'ordinary case' wholly 'speculative.'").

64. *Id.*

65. *Id.* (quoting Johnson v. United States, 135 S. Ct. 2551, 2558 (2015)) ("'By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause' violates the guarantee of due process.").

66. *Id.* at 1215–16.

67. *Id.* at 1216 (quoting *Johnson*, 135 S. Ct. at 2558).

68. Gorsuch did not join in this section, Part IV-A, which rebutted Thomas's dissent.

69. *Dimaya*, 138 S. Ct. at 1216.

70. *Id.*

the Government did not request such a switch, which would create new and separate constitutional inquiries.[71]

Conversely, Roberts's dissent adopted the Government's position that section 16 was sufficiently distinguishable from its ACCA counterpart.[72] First, the Government noted that unlike the ACCA provision, section 16(b)'s temporal restriction[73] arguably made the inquiry "more focused."[74] The majority noted that although the ACCA had no such temporal restriction on its face, in practice, the Supreme Court had never looked at conduct beyond that committed in the course of the offense when applying the ACCA's residual clause.[75] Thus, the express inclusion of this restriction in section 16 did not change the inquiry or make it more focused.[76] Second, the Government focused on section 16's use of the term "physical force" versus the ACCA's use of the term "physical injury."[77] The majority found this distinction meaningless.[78] Third, the Government noted that a "confusing list of exemplar crimes" proceeded the ACCA provision that contributed to the statute's vagueness.[79] Since section 16 lacked any such list, the Government argued section 16 was more readily understandable.[80] The majority again found this argument to be illogical.[81] Finally, the Government cited judicial experience, in that courts have divided less frequently on the residual clause of section 16 than they did on the ACCA residual clause, as a sign that section 16 was clearer than the ACCA.[82] The majority vehemently rejected this notion.[83]

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71. *Id.* at 1217 (noting that the categorial approach originated out of Sixth Amendment concerns that sentencing courts would become fact-finders).

72. *Id.* at 1218.

73. 18 U.S.C. § 16(b) (2012) (stating that the risk must arise from acts taken "in the course of committing the offense").

74. *Dimaya*, 138 S. Ct. at 1219–20.

75. *Id.*

76. *Id.*

77. *Id.* at 1220.

78. *Id.* at 1220–21 (noting that "evaluating the risk of 'physical force' itself entails considering the risk of 'physical injury'").

79. *Id.* at 1221.

80. *Id.*

81. *Id.* ("To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem. . . . *Johnson* found the residual clause's vagueness to reside in just 'two' of its features: the ordinary-case requirement and a fuzzy risk standard. Strip away the enumerated crimes—as Congress did in § 16(b)—and those dual flaws yet remain.").

82. *Id.* at 1221–22.

83. *Id.* at 1223 ("[T]his Court's experience in deciding ACCA cases only supports the conclusion that § 16(b) is too vague . . . . The Government would condemn us to repeat the past—

Having set forth her argument and refuted the dissenters, Kagan concluded that under *Johnson*, the residual clause of section 16 was unconstitutionally vague and affirmed the Ninth Circuit's decision.[84]

B. Justice Gorsuch's Concurrence

While Justice Gorsuch joined in the judgment and many parts of the Court's opinion, he diverged on the issue of the scope and applicability of the void-for-vagueness doctrine to non-criminal matters. Whereas the plurality focused on the gravity of a statute's consequences as justification for extending the void-for-vagueness doctrine to immigration law, Gorsuch went further and opined that the doctrine should apply more broadly to *all* criminal *and* civil laws.[85]

Gorsuch first sought to ensure that the void-for-vagueness doctrine enjoyed "a secure footing in the original understanding of the Constitution."[86] To do so, Gorsuch detailed an extensive history of the "due process underpinnings" of the doctrine.[87] Collectively, Gorsuch's compendium of varied sources spoke to a history, in both English common law and American jurisprudence, of concerns over the lack of fair notice in laws that pose the risk of the deprivation of life, liberty, or property as penalty—a fear not limited just to criminal laws.[88]

Gorsuch turned to the inquiry of an applicable standard of review—"What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague?"[89] The Government argued that civil laws should only be deemed unconstitutional if they are "unintelligible," whereas criminal laws

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to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? 'Insanity,' Justice Scalia wrote in the last ACCA residual clause case before *Johnson*, 'is doing the same thing over and over again, but expecting different results.' We abandoned that lunatic practice in *Johnson* and see no reason to start it again.").

84. *Id.*

85. *Id.* at 1224, 1231 (Gorsuch, J., concurring).

86. *Id.* at 1228.

87. *Id.* at 1224–28 (citing an expansive range of sources, including everything from recent Supreme Court precedent to 14th century caselaw, the scholarship of Lord Coke and Blackstone among contemporary law review articles, to the Declaration of Independence and Federalist Papers).

88. *Id.* ("[T]he Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law.").

89. *Id.* at 1228.

have historically been required to provide "ordinary people . . . fair notice of the conduct" made punishable.[90] In light of the history he set forth, Gorsuch could not see why different standards were needed.[91] Moreover, the Supreme Court had previously extended the strictest vagueness test to civil laws—namely, "those abridging basic First Amendment freedoms."[92] Turning to the argument promulgated by the plurality portion of the Court's opinion, that the applicability of the void-for-vagueness doctrine hinges on the severity of a law's consequences, Gorsuch highlighted the severity of many civil penalties:

> Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are "punitive civil sanctions . . . rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*."[93]

Therefore, under the void-for-vagueness doctrine, a "fair notice standard" should apply to all laws.

C. Chief Justice Roberts's Dissent

Chief Justice Roberts's dissent focused on distinguishing the residual clauses of section 16 from the ACCA, such that section 16(b) should have been upheld.[94] Roberts did not entertain the debate over the scope of the void-for-vagueness doctrine, because he did not find

90. *Id.* (alteration in original) (quoting Johnson v. United States, 135 S. Ct. 2551, 2556 (2015)).

91. *Id.*

92. *Id.* at 1228–29 (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

93. *Id.* at 1229 (alteration in original) (quoting Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law*, 101 YALE. L.J. 1795, 1798 (1992)).

94. *Id.* at 1234 (Roberts, C.J., dissenting); *see* The Court's Opinion, *supra* Section IV(A) (discussing the arguments of the Government and Roberts regarding the differences between the residual clauses).

section 16(b) to be unconstitutionally vague, even under the heightened criminal standard.[95]

D. Thomas's Dissent

Justice Thomas joined in Roberts's dissenting analysis of the residual clauses, but wrote separately to discuss the void-for-vagueness doctrine.[96] Thomas's dissent is most at odds with Gorsuch's concurrence—whereas Gorsuch advocated for a broader interpretation of the void-for-vagueness doctrine, Thomas questioned the doctrine all together.[97]

Thomas surmised that the majority's holding depends on the validity of three premises: "[1] [t]he Due Process Clause requires federal statutes to provide certain minimal procedures, [2] the vagueness doctrine is one of those procedures, and [3] the vagueness doctrine applies to statutes governing the removal of aliens."[98] Thomas then questioned each proposition in turn.

First, Thomas noted that the void-for-vagueness doctrine could only operate if the "law of the land" view of due process[99] was invalid.[100] Despite the Supreme Court's rejection[101] of this view over a century and a half ago, Thomas argued that it had "textual and historical support."[102] Thomas contended that vagueness analysis did not begin until the twentieth century, but rather courts historically had followed a "traditional rule of lenity"[103]—a "tool of statutory construction."[104] The void-for-vagueness doctrine, Thomas argued, was not historical; rather, it was part of the Supreme Court's "bad habit

95. *Dimaya*, 138 S. Ct. at 1234 (Roberts, C.J., dissenting).

96. *Id.* at 1242 (Thomas, J., dissenting).

97. *Id.*

98. *Id.*

99. *Id.* This view "require[s] only that our Government . . . proceed . . . according to written constitutional and statutory provision[s] before depriving someone of life, liberty, or property." *Id.* at 1242–43 (alterations in original) (quoting Nelson v. Colorado, 137 S. Ct. 1249, 1264 n.1 (2017) (Thomas, J., dissenting)).

100. *Id.*

101. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276–77 (1855).

102. *Dimaya*, 138 S. Ct. at 1243.

103. The "traditional rule of lenity" refers to the "common law doctrine, also known as 'strict construction,' that directs courts to construe statutory ambiguities in favor of criminal defendants." Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

104. *Dimaya*, 138 S. Ct. at 1244.

of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process."[105]

Second, Thomas contended that, even assuming that the Due Process Clause banned vague laws, the void-for-vagueness argument would not apply to civil, immigration laws.[106] Noting the "founding generation's" decision that due process was inapplicable to removal statutes,[107] Thomas noted that due process was not implicated until the twentieth century with regards to removal statutes.[108] And even still, the Supreme Court "upheld vague standards in immigration laws that it likely would not have tolerated in criminal statutes."[109] Therefore, it is "at best, unclear" whether federal immigration law can violate the Due Process Clause due to vagueness.[110]

Thomas found it unnecessary to resolve this uncertainty, as the issue raised in this case was solvable on narrower grounds—namely, *how*, not *if*, vagueness challenges could be raised.[111] "If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute."[112] Thus, Thomas believed that Dimaya needed to show how section 16 was vague as to him specifically.[113] Without this showing, Thomas found no issue with any purported vagueness of section 16.

Thomas concluded by arguing that the residual clause of section 16 should be switched from a categorical analysis to a case-specific one.[114]

V. THE SCOPE OF CONSTITUTIONAL VAGUENESS

The most derisive inquiry raised in *Dimaya* was not the specific issue with section 16(b), but rather the fundamental question regarding

105. *Id.*
106. *Id.* at 1245.
107. *Id.* at 1245–46 (discussing a 1798 debate over the Alien Acts, in which the Federalists successfully argued that due process was inapplicable to statutes governing the removal of aliens).
108. *Id.* at 1247.
109. *Id.*
110. *Id.* at 1247–48.
111. *Id.* at 1250.
112. *Id.*
113. *Id.* ("In my view, § 16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was 'sufficiently forewarned . . . that the statutory consequence . . . is deportation.' At the time, courts had 'unanimous[ly]' concluded that residential burglary is a crime of violence, and not 'a single opinion . . . ha[d] held that [it] is *not*.'").
114. *Id.* at 1252–59; *see id.* at 1216–18 (majority opinion) (discussing this argument).

the scope and applicability of the void-for-vagueness doctrine. Arguments were raised in favor of a vast spectrum of interpretations.

The void-for-vagueness doctrine is typically contemplated within the criminal context.[115] Justice Kagan, writing for the plurality, called for its broader application to all statutes which result in severe consequences or penalties.[116] Justices Thomas and Gorsuch championed opposing extremes—Thomas dissented by calling the doctrine into question altogether,[117] while Gorsuch, in his concurrence, advocated for its equal application to *all* laws, irrespective of the severity of consequences.[118] In the absence of a majority holding on this issue, the scope of the void-for-vagueness doctrine is presently unclear. It is this Comment's position that Gorsuch's broad interpretation is the most appropriate, in light of the history of and principles supporting the void-for-vagueness doctrine.

A. Historical Origins

While Gorsuch recalls a history with origins reaching back far beyond even the framing of the Constitution, Thomas dismisses the void-for-vagueness doctrine as a recent judicial creation. In reality, the history is unclear, but falls somewhere in between.

The void-for-vagueness doctrine, as it is known today, was likely not used prior to the nineteenth century.[119] At common law, the rule of lenity governed.[120] Without a doctrine of judicial supremacy, English courts could not "*explicitly* . . . invalidate the product of the legislative branch," so they "resorted to canons of construction to give 'content' to vague statutes."[121] This practice carried into colonial America and thus neither the Federalists Papers nor the Constitutional Convention expressly contemplated vagueness as grounds for invalidating laws.[122] Although the void-for-vagueness doctrine does not have explicit common law origins, the principles underlying the

115. *Id.* at 1212–13.

116. *Id.* at 1213.

117. *Id.* at 1242 (Thomas, J., dissenting).

118. *Id.* at 1224, 1231 (Gorsuch, J., concurring).

119. *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 274 (1948); *see also* Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 263 (2010) (noting that the void-for-vagueness doctrine was not used in the seventeenth and eighteenth centuries).

120. *See Void for Vagueness: An Escape from Statutory Interpretation*, *supra* note 119.

121. *Id.*

122. *Id.* at 274–75; *see also* Lockwood, *supra* note 119, at 263 (noting the same).

doctrine—the need for fair notice and fear of arbitrary enforcement—were contemplated and implicated throughout this period and in early American law.[123]

As Gorsuch notes, many Constitutional provisions "presuppose and depend on the existence of reasonably clear laws."[124] This reflects a concern expressed in the Declaration of Independence and deliberated throughout the drafting of the Constitution—that arbitrary power could divest citizens of life, liberty, or property without sufficient notice. "Fair notice of the law's demands . . . is 'the first essential of due process.'"[125] Due process, as it was contemplated at the inception of the Constitution, is embodied in the Fifth Amendment which clearly protects the inalienable rights announced in the Declaration of Independence: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[126] One such protection against an unjust deprivation of rights is the requirement that laws be definite and comprehensible, such that (1) the people know what conduct could result in a deprivation of their liberty; and (2) laws are not arbitrarily enforced.[127]

Further, the structure of the Constitution allowed for the transition from the practice of statutory lenity to use of the void-for-vagueness doctrine. While Congress is assigned, "All legislative Powers,"[128] the

123. *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

124. *Id.* at 1226–27 (citing THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)) ("Take the Fourth Amendment's requirement that arrest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witnesses he might need to rebut that charge. Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a 'parchment barrie[r]' against arbitrary power.").

125. *Dimaya*, 138 S. Ct. at 1226–28 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

126. U.S. CONST. amend. V.

127. *See* THE FEDERALIST NO. 62 (James Madison) ("The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?").

128. U.S. CONST. art. I, § 1; THE FEDERALIST NO. 78 (Alexander Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated.").

judiciary has the authority to decide "Cases" and "Controversies."[129] "That power does not license judges to craft new laws to govern future conduct, but only to 'discer[n] the course prescribed by law' as it currently exists and to 'follow it' in resolving disputes between the people over past events."[130] This structure provides courts with the power of judicial review,[131] but the judiciary's role is still distinct from that of the legislature.

B. Early Precedent

Gradually, the common law practice of statutory lenity and the American principle of judicial review combined and, in light of fair-notice concerns, developed into the void-for-vagueness doctrine.

Two early cases—*The Enterprise*[132] and *United States v. Sharp*[133]—entertained the issue of vagueness when evaluating laws that were incomprehensible to the respective courts as written.[134] In *The Enterprise*, the court found there was no ground for enforcement of an unintelligible embargo law[135] and in *Sharp*, the court quashed an indictment brought under an ambiguous law.[136] The constitutional grounds for these decisions are unclear, and scholars have long debated whether the decisions rested in the rule of lenity, or an early formulation of the void-for-vagueness doctrine.[137] This dispute is

129. U.S. CONST. art. III, § 2.

130. *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (citing Osborn v. Bank of U.S., 22 U.S. 738, 866 (1824)).

131. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

132. 8 F. Cas. 732 (C.C.D.N.Y. 1810) (No. 4499) (evaluating a statute setting forth the requirements for when ships may enter ports during an embargo).

133. 27 F. Cas. 1041 (C.C.D. Pa. 1815) (No. 16264) (considering a statute prohibiting seamen from "making a revolt").

134. *Void for Vagueness: An Escape from Statutory Interpretation*, *supra* note 119, at 275–76.

135. *Enterprise*, 8 F. Cas. at 735 ("If no sense can be discovered for them, as they are here introduced, the court had better pass them by as unintelligible and useless, than to put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed.").

136. *Sharp*, 27 F. Cas. at 1043 ("I am not able to support [the law] by any authority to be met with, either in the common, admiralty, or civil law. If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a captal [*sic*] nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid.").

137. *Void for Vagueness: An Escape from Statutory Interpretation*, *supra* note 119, at 275 n.18.

unsurprising, as the two practices are often difficult to distinguish—while the techniques are different, the results are often the same. Indeed, "prolonged application of a canon of construction could circumvent the will of the legislature just as surely as would an articulate declaration that the statute was 'void for vagueness.' The *result* therefore, would be the same . . . [b]ut the *technique* [of strict construction is] . . . more subtle."[138]

The less-distinct blending of the doctrines continued through the early twentieth century as courts focused on fair notice.[139] In the 1920s, the Supreme Court began to explicitly connect the requirement of fair notice to due process, giving the concept of vagueness constitutional legs.[140] Thus, while the origin of the void-for-vagueness doctrine is uncertain, it is apparent that "the requirement of notice was foremost in the minds of the Court in implementing this doctrine."[141]

C. Contemporary Precedent

The stringent requirements of the void-for-vagueness doctrine have long been limited to criminal laws, while civil laws have been held to a more permissive standard.[142] Generally stated, the contemporary void-for-vagueness doctrine demands that criminal

138. *Id.* at 274 ("For example, the court would 'strictly construe' a statute requiring that notice of a certain offense be proclaimed 'in two market towns near the place where the offense was committed' to mean 'those towns nearest the place of commission of the crime.' Since notice was not so given, defendant was released because not legally convicted."); *see* Sessions v. Dimaya, 138 S. Ct. 1204, 1226–27 (2018) (Gorsuch, J., concurring).

139. Lockwood, *supra* note 119, at 264 ("[I]n 1891, in *United States v. Brewer*, the Court provided, '[l]aws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid,' without reference to constitutional support. In 1914, Mr. Justice Holmes in *Nash v. United States* limited the scope of the above principle with the often-quoted statement, '[t]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree,' without specifically providing a constitutional basis for the decision to uphold the portion of the Sherman Act that was challenged as vague.").

140. *Id.* at 264–66 ("In the 1921 case of *United States v. L. Cohen Grocery Co.*, the Court relied generally on the Fifth and Sixth Amendments, holding that a[] regulation . . . was 'void for repugnancy to the Constitution.' Interestingly, by 1926, the Court expressed its firm belief that a statute's vagueness offends the Constitution. . . . In 1927, in *Cline v. Frink Dairy Co.*, this constitutional requirement was applied to a state . . . statute. The Court referenced *L. Cohen Grocery Co.*, . . . [and] then provided, '[w]e are now considering a case of state legislation and threatened prosecutions in a state court where only the *Fourteenth Amendment* applies; but that amendment requires that there should be due process of law, and this certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required.'").

141. *Id.* at 268.

142. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982).

statutes sufficiently and specifically define the offense such that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[143] This distinction is due to the Court's "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[144] Although the doctrine is typically associated with criminal laws, in practice, it is more broadly applied. The Supreme Court has indeed extended the vagueness doctrine to civil laws, namely in instances where the severity of the penalties at issue is great.[145]

D. Proper Scope

The plurality in *Dimaya* opted to extend the void-for-vagueness doctrine to section 16(b) because the penalty—deportation—is the most severe immigration consequence.[146] Justice Gorsuch questioned this decision, pondering:

> [G]rave as [deportation] may be, I cannot see why we would single it out for special treatment when . . . so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home? I can think of no good answer.[147]

Indeed, no answer truly satisfies this question. The void-for-vagueness doctrine is rooted in the fundamental concerns over the

143. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

144. *Vill. of Hoffman Estates*, 455 U.S. at 498–99; *see* Sessions v. Dimaya, 138 S. Ct. 1204, 1212–13 (2018).

145. *See, e.g.*, *Vill. of Hoffman Estates*, 455 U.S. at 499 (applying a "relatively strict" vagueness test to an ordinance that "nominally impose[d] only civil penalties," because it was "quasi-criminal" considering its "prohibitory and stigmatizing effect"); Aptheker v. Sec'y of State, 378 U.S. 500, 516–17 (1964) (finding a vagueness review warranted for a statute that "severely curtail[ed] personal liberty" by restricting "freedom of travel"); Jordan v. De George, 341 U.S. 223, 231 (1951) (applying the vagueness doctrine to an immigration removal statute in light of the "grave nature of deportation"); Minnesota *ex rel*. Pearson v. Prob. Court, 309 U.S. 270, 274 (1940) (applying the doctrine to a civil commitment statute); Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 241 (1932) (extending the doctrine to a civil statute with a penalty that was "not consistent with any purpose other than to inflict punishment").

146. *Dimaya*, 138 S. Ct. at 1210–12.

147. *Id.* at 1231 (Gorsuch, J., concurring).

deprivation of life, liberty, or property without fair notice. If a law is constructed so vaguely that an ordinary person cannot determine the conduct criminalized or penalized, then it is too vague, regardless of the degree of the deprivation associated with its violation.

Moreover, extending the void-for-vagueness doctrine to all laws honors the proper separation of powers. It is the duty of the legislature, not the judiciary, to make laws. Although judicial review gives courts the power to interpret laws, it does not give courts the power to write-in meaning all-together where poor drafting has rendered a law incomprehensible.

Rather than depending on an arbitrary distinction between civil laws with severe penalties and those with less-than-severe penalties, the void-for-vagueness doctrine should apply across the board to all laws—civil or criminal—as a procedural due process guarantee.

Dimaya illustrates the importance of the void-for-vagueness doctrine in practice. Had the traditional rule of lenity been used as it once was, each of the circuits involved in the split of decision prior to the Supreme Court's ruling would have assigned a meaning to section 16(b). Some may have continued with the categorical approach, others may have switched to a case-specific approach; some may have incorporated a requisite level of risk, others may have set a list of qualifying offenses. This is not a simple case of judicial review or basic statutory interpretation. Such decisions regarding section 16(b) would have fundamentally changed the effects of the law depending on the jurisdiction it was enforced in. It is nearly impossible to have fair notice of a law that holds different meanings depending on your location. Instead, to void a law as unconstitutionally vague puts the law out of use, lest it be remedied through the legislative process. This approach best balances the due process concerns and separation of powers principles at play. Limiting the scope of the void-for-vagueness doctrine to certain groups of laws is unsound and unnecessarily narrow.

VI. IMMIGRATION IMPLICATIONS

Although much of the decision focused on debate over the void-for-vagueness doctrine, the core issue in *Dimaya* was the use of section 16(b) as a ground for deportability. The Supreme Court's decision will have a slight immediate effect on immigration

enforcement; however its true impact lies in its potential for future litigation.

A. Section 16(b) as a Ground for Deportability

In response to the Supreme Court's decision in *Dimaya*, President Donald Trump reacted on Twitter, posting:

> Today's Court decision means that Congress must close loopholes that block the removal of dangerous criminal aliens, including aggravated felons. This is a public safety crisis that can only be fixed by....
>
> ….Congress – House and Senate must quickly pass a legislative fix to ensure violent criminal aliens can be removed from our society. Keep America Safe![148]

The White House subsequently released an official statement, also characterizing the decision as creating a "loophole" and calling for legislative action.[149] Immigration agencies responded similarly.[150]

It is concerning that the administration has painted this decision as creating a loophole, a term that disparages the fundamental constitutional principles at play.[151] However, to call for legislative action is the correct response. Indeed, this is the purpose of the void-for-vagueness doctrine—to make Congress aware of constitutionally defective laws so that they may be remedied through the legislative process, rather than having courts assign new meaning.

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148. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2018, 2:34 PM), https://twitter.com/realdonaldtrump/status/986357230219022342.

149. Statement by the Press Secretary Calling on Congress to Fix Loopholes in Our Immigration Laws, WHITE HOUSE (Apr. 18, 2018) https://www.whitehouse.gov/briefings-statements/statement-press-secretary-calling-congress-fix-loopholes-immigration-laws.

150. *DHS Press Secretary Statement on* Sessions v. Dimaya, U.S. DEP'T OF HOMELAND SECURITY (Apr. 17, 2018), https://www.dhs.gov/news/2018/04/17/dhs-press-secretary-statement-sessions-v-dimaya (imploring Congress to "take action on passing legislation to close public safety loopholes, such as these, that encourage illegal immigration and tie the hands of law enforcement"); *ICE Deputy Director Statement on* Sessions v. Dimaya, U.S. DEP'T OF HOMELAND SECURITY: ICE NEWSROOM (Apr. 18, 2018), https://www.ice.gov/statements/ice-deputy-director-statement-sessions-v-dimaya (referring to the decision as "yet another example of the need for Congress to urgently close the loopholes that allow criminal aliens to avoid removal and remain in the United States").

151. Miriam Valverde, *What the U.S. Supreme Court Decision Means for the Deportation of Criminal Immigrants*, POLITIFACT (Apr. 23, 2018, 9:00 AM), http://www.politifact.com/truth-o-meter/article/2018/apr/23/what-us-supreme-court-decision-means-deportation-c/ ("A poorly written statute is not a loophole . . . . It's a constitutional defect. Congress has the authority to write a new statue at any time. Vague language . . . is more accurately described as a loophole for the government.").

In many ways, the reactions from President Trump and his administration were overstated. *Dimaya* only directly voided one of the eighty grounds for removal outlined in the INA.[152] Even looking specifically to removal of "criminal immigrants," section 16(b) is a sub-definition for just one of the more than twenty grounds for establishing an aggravated felony conviction.[153] To those facing deportation on section 16(b) grounds, this decision matters. Yet in light of the many other grounds for deportation of "criminal immigrants" that have developed through the crimmigration phenomenon, it is unclear how substantial this immediate impact will actually be.[154]

As of now, the residual clause of section 16 cannot be used by immigration authorities to qualify a conviction as being a crime of violence to satisfy the aggravated felony ground for removability. It is clear the executive branch and immigration authorities alike want Congress to fix and clarify section 16(b) so that it may be used in future immigration proceedings. Yet, until that action is taken, the residual clause of section 16 is void for immigration purposes.

B. Future Vagueness Challenges

Dimaya's most substantial impact on immigration law and policy is likely to be in the future litigation it inspires. This decision creates a sense of possibility. At minimum, immigration laws that result in deportation or removal are now clearly subjected to the same strict void-for-vagueness standard that criminal laws are held to.[155] Section 16(b) is by no means the only questionable provision of the INA—"Courts have used terms such as 'nebulous,' 'bewildering,' and 'labyrinthine' to describe immigration laws."[156] For example, the

152. IMMIGRANT JUSTICE NETWORK, ISSUE BRIEF: THE IMPLICATIONS OF *SESSIONS V. DIMAYA*, https://www.ilrc.org/sites/default/files/resources/issue_brief_sessions_dimaya-20180501.pdf.

153. *See* 8 U.S.C. § 1101(a)(43)(A)–(U) (2012).

154. *See* Leah Litman, *Vague Criminality and Mass Incarceration: Will* Dimaya *End the Insanity?* HARV. L.R. BLOG (Apr. 17, 2018), https://blog.harvardlawreview.org/vague-criminality-and-mass-incarceration-will-dimaya-end-the-insanity/ (discussing the potential scope of this decision in terms of future and retroactive application).

155. Erwin Chemerinsky, *What* Sessions v. Dimaya *Means for Immigration Law*, ABA J. (May 3, 2018, 8:30 AM),
http://www.abajournal.com/news/article/why_sessions_v._dimaya_matters.

156. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1128 (2016) (citing Baltazar-Balcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004); Franklin v. INS, 72 F.3d 751, 573 (8th Cir. 1995); Velasco v. United States Citizenship &

Ninth Circuit has struggled with the aggravated felony sub-definition of an "offense related to obstruction of justice."[157] Moreover, the use of imprecise terms such as "crime involving moral turpitude," "single scheme of misconduct," and "particularly serious crime" in the INA could conceivably be challenged under the vagueness doctrine.[158]

With the *Dimaya* decision, the doors are open to procedural due process challenges to INA provisions on the basis of vagueness. Keeping in mind the twin aims of the void-for-vagueness doctrine—providing fair notice and preventing arbitrary enforcement—immigration reformists are now armed with a new tool to combat the mounting crimmigration phenomenon.

VII. CONCLUSION

"[T]he power vested in the America courts of justice of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against tyranny of political assemblies."[159] The void-for-vagueness doctrine is rooted in fundamental American concerns about the unjust deprivation of fundamental rights. This doctrine allows the courts to hold the legislature accountable for imprecise laws and ensures that ordinary people have fair notice of what the law requires. The Supreme Court's extension of this doctrine into the realm of immigration law is promising and shows a recognition of the severe consequences of immigration enforcement. However, as this Comment advocates, the void-for-vagueness doctrine ought to be extended to all laws—civil or criminal, without regard for the severity of the consequences—so as to comport with the standards of due process. Although the actual, immediate impact on immigration law is limited, *Dimaya*'s legacy will likely be in its furtherance of the void-for-vagueness doctrine. *Dimaya* opens the door for future constitutional challenges at least to imprecise immigration laws, and conceivably indefinite civil laws.

Immigration Servs., No. CV 09-1341 AHM (CTx), 2009 WL 5184419 at *8 (C.D. Cal. Dec. 21, 2009); L.D.G. v. Holder; 744 F.3d 1022, 1024 (7th Cir. 2014)).

157. *Id.* at 1175–76.

158. *See generally id.* at 1177–83 (discussing "potential vagueness problems" for provisions of the INA using these imprecise phases).

159. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 83 (John C. Spencer ed., Henry Reeve trans., 2nd ed. 1838).