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AN IMMIGRATION DEFENSE LAWYER WALKED INTO A BARR...
The impact of Trump's Justice Department on the defense of criminal immigrants

Michael Vastine*

Some may think the legitimate prospect of a Trump political era started in earnest subsequent to the future president being ribbed by President Barack Obama and roasted by Seth Meyers at the White House Correspondents' Dinner, in jokes primarily fueled by Trump's public questioning of Obama's legitimacy as president and domestic birth.¹ For others, the seminal event—beginning the era—was Trump's slow, unwalking, gliding descent down his gilded escalator at Trump Tower to officially announce his candidacy in an isolationist and xenophobic diatribe.² However, I would argue that those moments didn't reflect the *real* reality of the era, as there was prevailing mystery over not just whether Trump could actually win election on such a paranoid platform, but also over whether he really *meant* the rhetoric he was feeding to his prospective base voters like so much red meat. The highlights of that rhetoric have been repeated *ad nauseum* to the point of losing their power to shock: categorically deriding immigrants as rapists and murderers; labeling Federal District Court Judge Gonzalo Curiel, a United States-born child of immigrants, as disloyal and inherently conflicted to sit as a judge;³ and later wondering why the United States tolerated immigrants from “shithole” countries (all either African or, like Haiti, populated by African descendants), rather than places like Norway.⁴ But again, it was realistic for observers to believe that this early show was

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Michael has authored *amicus curiae* briefs in major litigation, representing groups including Catholic Legal Services and AILA National, in cases before the U.S. Supreme Court (including *Shular v. United States*, discussed *infra*), the United States Court of Appeals for the Eleventh Circuit, the Florida and Connecticut state supreme courts, and the Board of Immigration Appeals. His litigation includes co-representing the lead case construing *Padilla v. Kentucky* in Florida (*Hernandez v. State*), which he argued at the Florida Supreme Court and which resulted in the Florida criminal plea process being held unconstitutional for failing to advise immigrants of the immigration consequences of their convictions; and application of the “categorical approach” legal analysis to Florida drug convictions (*Donawa v. U.S. Attorney General*), which resulted in a large class of Florida convictions no longer being considered “aggravated felonies” which trigger automatic deportation. He has been involved in another class of cases challenging due process rights of immigrants to reopen legally erroneous deportation orders, including after being deported. Michael publishes widely on these topics and has made hundreds of presentations at conferences of immigration attorneys and legal educators.

He is a graduate of Oberlin Conservatory of Music, Temple University Graduate School of Music and Georgetown University Law Center. He began his career serving the two-year Georgetown Jesuit Refugee Service Fellowship, representing detained immigration immigrants in South Florida, as part of the Catholic Legal Immigration Network (CLINIC). In 2013, Michael received the AILA (National) Elmer Fried Award for Excellence in Teaching.

¹ C-SPAN, C-SPAN: *Seth Meyers Remarks at the 2011 White House Correspondents' Dinner*, YOUTUBE (April 30, 2011), <https://youtu.be/7YGITxft6s>, archived at <https://perma.cc/JR4L-8M3H>; Roxanne Roberts, *I sat next to Donald Trump at the Infamous 2011 White House Correspondents' Dinner*, WASH. POST (April 28, 2016), https://www.washingtonpost.com/lifestyle/style/i-sat-next-to-donald-trump-at-the-infamous-2011-white-house-correspondents-dinner/2016/04/27/5cf46b74-0bea-11e6-8ab8-9ad050f76d7d_story.html, archived at <https://perma.cc/SHE7-NWDV>, (with Meyers landing material including “Donald Trump has been saying he will run for president as a Republican—which is surprising, since I just assumed he was running as a joke.”).

² Jeremy Diamond, *How Trump's Presidential Campaign Debut Holds up Four Years Later*, CNN (June 16, 2019), <https://www.cnn.com/interactive/2019/06/politics/trump-escalator-speech-annotated/>, archived at <https://perma.cc/CF9X-NN75>; Michael Kruse, *The Escalator Ride That Changed America*, POLITICO Magazine (June 14, 2019), <https://www.politico.com/magazine/story/2019/06/14/donald-trump-campaign-announcement-tower-escalator-oral-history-227148>, archived at <https://perma.cc/4PQ7-DXKY>.

³ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>, archived at <https://perma.cc/7XGV-EEQ6> (“Mr. Trump said the background of the judge [in a Trump University civil case, in which Trump University was accused of fraud], who was born in Indiana to Mexican immigrants, was relevant because of his campaign stance against illegal immigration and his pledge to seal the southern U.S. border. ‘I’m building a wall. It’s an inherent conflict of interest,’ Mr. Trump said.”).

⁴ Ibram X. Kendi, *The Day 'Shithole' Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>, archived at <https://perma.cc/7H94-BRKL> (“‘Why are we having all these people from shithole countries come here?’ Trump reportedly asked (He later denied having said this.). Months earlier, Trump had reportedly complained that Nigerian immigrants would never ‘go back to their huts’ and Haitians ‘all have aids.’ He doubled down at the

perhaps just a mirage for votes, in the same way that they might believe that a man whose domestic real estate empire sat in the immediate crosshairs of human-caused sea level rise and whose personal history was so objectively salacious *couldn't possibly* be stridently both anti-climate science and anti-*Roe v. Wade*? Perhaps the nationalist tone—especially its nostalgia for a day gone by—was a political game?

Soon after the election, the country got the confirmation of Trump's actual views on immigration when long-time immigration hawk Kris Kobach appeared on camera on his way into Trump Tower to consult with the President-elect. In Kobach's hands was a list of talking points,⁵ an early blueprint for the nascent administration's immigration playbook, one in which it amplified existing law, published interpretations, and sometimes made even obviously dubious legal cases, all with the unambiguous public purpose of vilifying immigrants and sowing distrust of outsiders, while capitalizing on the available legal room for heightening enforcement and curtailing immigration processing. Thus, inarguably the Trump Era had begun in earnest.

Installing immigration firebrand Jefferson B. Sessions, III, as Attorney General, and Sessions's former policy advisor and communications director (and "hypocritical" immigration extremist⁶) Steven Miller as policy advisor,⁷ cemented the branding. Existing hierarchical enforcement priorities were abandoned, so *all* cases became priorities. Immigration backlogs swelled;⁸ racist and paranoid exclusion policies were implemented barring (mostly) the international Muslim community from visiting or immigrating to the United States;⁹ family units seeking asylum from Central America were separated and children were detained apart from their parents.¹⁰ Immigration practice became headline material in the popular press. The administration's positions on niche immigration policy issues, formerly the bailiwick of immigration

Oval Office meeting. 'Why do we need more Haitians?' Trump said. 'Take them out. In their stead, Trump spoke of taking in immigrants from great European countries like Norway, and also from Asian countries, since they could help America economically.'")

⁵ Michael D. Shear, Carl Hulse & Michael S. Schmidt, *Transition Briefing: A List of Priorities From Trump, and Kris Kobach Tips His Hand*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/us/politics/donald-trump-transition.html>, archived at <https://perma.cc/EB9F-VGYU> ("Mr. Kobach, the conservative Kansas secretary of state, may have been a little too loose with his plans for the Department of Homeland Security. Entering Trump Tower, the anti-immigration hard-liner up for the job of secretary of homeland security, was photographed carrying a document titled 'Kobach Strategic Plan for First 365 Days' Some of it was obscured by his arm, but not all. Under 'Bar the Entry of Potential Terrorists,' the document called for reintroducing the "National Security Entry-Exit Registration System" implemented after the attacks of Sept. 11, 2001 and suspended a decade later. It also calls for 'extreme vetting questions' for 'high-risk aliens.' Questions included support for Sharia law, jihad and the equality of men and women. The document also calls for an end to entry for Syrian refugees."). Kobach, of course, was later considered for an "immigration czar" position, but his selection was thwarted, amid reports of both his excessive demands for personal perks like private jet service and the unlikely odds of his Senate confirmation.

⁶ Dr. David S. Glosser, *Stephen Miller Is an Immigration Hypocrite. I Know Because I'm His Uncle*, POLITICO (Aug. 13, 2018), <https://www.politico.com/magazine/story/2018/08/13/stephen-miller-is-an-immigration-hypocrite-i-know-because-im-his-uncle-219351>, archived at <https://perma.cc/BAL5-X3X4> (Miller's uncle, a retired neuropsychologist and neurology professor reflecting that "if my nephew's ideas on immigration had been in force a century ago our family would have been wiped out."); Aiden Pink, *Stephen Miller's Family Is Furious Over Family Separation Policy*, THE FORWARD (June 18, 2018), <https://forward.com/fast-forward/403382/stephen-millers-family-is-furious-over-his-immigrant-family-separation/>, archived at <https://perma.cc/BZ7U-ULRX> ("My nephew and I must both reflect long and hard on one awful truth," he concluded. "If in the early 20th century the USA had built a wall against poor desperate ignorant immigrants of a different religion, like the Glossers, all of us would have gone up the crematoria chimneys with the other six million kinsmen whom we can never know.").

⁷ Michal Kranz & Ellen Cranley, *Meet 34-year-old Stephen Miller, Trump's Longest-Serving Senior Adviser and Mastermind of his Most Inhumane Immigration Policies*, BUS. INSIDER (Feb. 21, 2020), <https://www.businessinsider.com/who-is-stephen-miller-trump-speechwriter-immigration-adviser-2018-1>, archived at <https://perma.cc/33EW-FSJW>.

⁸ See *Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), https://trac.syr.edu/phptools/immigration/court_backlog/, archived at <https://perma.cc/WUQ4-HH54> (reflecting increases in the immigration court backlogs over time, reflecting following increases between 2017 and 2020: Nationwide, 627,051 to 1,129,890; Miami 31,602 to 64,834; and Orlando 10,082 to 29,141).

⁹ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), *Protecting the Nation from Foreign Terrorist Entry into the United States*, (euphemistically known as Muslim Ban I).

¹⁰ U.S. DEP'T JUSTICE, *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>, archived at <https://perma.cc/8AR4-ZC7A> ("Today we are here to send a message to the world: we are not going to let this country be overwhelmed. People are not going to caravan or otherwise stampede our border. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."). Of course, the policy of separating children from their parents had long-preceded the announcement. See e.g., *Family separation under the Trump Administration – a timeline*, SOUTHERN POVERTY LAW CENTER (Sept. 24, 2019) <https://www.splcenter.org/news/2019/09/24/family-separation-under-trump-administration-timeline>, archived at <https://perma.cc/N4S4-TRGZ> ("Long before the Trump administration implemented its "zero tolerance" immigration enforcement policy in 2018, it was already separating children from their parents as part of a "pilot program" conducted in the El Paso, Texas, area and along other parts of the border.").

nerds and advocates, such as the *Flores* settlement agreement (governing the length and conditions of family detainees) were suddenly the material of late-night talk show comedic takedowns.¹¹

Of course, the administration was undeterred by any negative press.¹² Instead, the administration doubled down, in such measures as: proposing new rules, to be applied retroactively, that would govern how and when foreign students and other non-immigrants triggered “unlawful presence” that would bar or hinder their immediate immigration options;¹³ announcing a denaturalization task force that would ferret out supposedly high volumes of ill-gotten citizenship;¹⁴ and proposing leaps in application fees and massive increases in the filing fees for appeals.¹⁵ The scope has been simply breathtaking: the Trump Era has been marked by more than one substantive change to immigration policy every workday that Trump has been in office.¹⁶

Within the Department of Justice is the Executive Office of Immigration Review (EOIR), primarily comprised of a network of 69 immigration courts (and approximately 465 immigration judges), and the EOIR’s appellate body, the Board of Immigration Appeals (BIA). These forums, of course, are appointed by and answer to the Attorney General. Attorney General Sessions implemented docket reforms, pairing strict case processing metrics—such as case completion goals/quotas and standards for reviewing performance based on a reversal rate by the BIA—with a restaffing of the BIA by some of the most conservative immigration judges in the country.¹⁷ Simultaneously, the BIA issued decisions limiting the

¹¹ See e.g., LastWeekTonight, *Family Separation*: Last Week Tonight with John Oliver (HBO), YOUTUBE (Nov. 4, 2018), <https://youtu.be/ygVX1z6tDGI>, archived at <https://perma.cc/S3X5-AT85>; The Daily Show with Trevor Noah, “Stand Your Ground” Spooks & Trump’s Birthright Scare | The Daily Show, YOUTUBE (Oct. 31, 2018), <https://youtu.be/8ToevwVM3e8>, archived at <https://perma.cc/Q7HX-NYJJ>; Late Night with Seth Meyers, *The Trump Team’s Lies About Immigrants and Family Separation: A Closer Look*, YOUTUBE (June 20, 2018), https://youtu.be/jtdGk_brGDE, archived at <https://perma.cc/R3FQ-R8D6>; Late Night with Seth Meyers, *Trump Combines Cruel Immigration Policies with Broken Promises: A Closer Look*, YOUTUBE (Aug. 14, 2019), <https://www.youtube.com/watch?v=vTg20QpE93s>, archived at <https://perma.cc/BA2D-W8N5>.

¹² See e.g., Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017) <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>, archived at <https://perma.cc/SJS7-R97C> (“[W]hile Mr. Trump has been repeatedly frustrated by the limits of his power, his efforts to remake decades of immigration policy have gained increasing momentum as the White House became more disciplined and adept at either ignoring or undercutting the entrenched opposition of many parts of the government. The resulting changes have had far-reaching consequences, not only for the immigrants who have sought to make a new home in this country, but also for the United States’ image in the world.”).

¹³ U.S. DEP’T HOMELAND SECURITY, *Policy Memorandum PM-602-1060: Accrual of Unlawful Presence and F, J, and M Nonimmigrants*, (May 10, 2018), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNnonimmigrantsMEMO_v2.pdf, archived at <https://perma.cc/6X4D-J69U>. Subsequently enjoined from implementation by *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377 (M.D.N.C. 2019).

¹⁴ U.S. DEP’T JUSTICE, *The Department of Justice Creates Section Dedicated to Denaturalization Cases: The Civil Division’s Denaturalization Section Will Investigate and Litigate the Denaturalization of Terrorists, War Criminals, Sex Offenders, and Other Fraudsters*, (Feb. 26, 2020) <https://www.justice.gov/opa/pr/departement-justice-creates-section-dedicated-denaturalization-cases>, archived at <https://perma.cc/3E2V-9HBG>.

¹⁵ *Immigration Appeal Filing Fees May Go Up More Than 700%*, LAW360 (Feb. 27, 2020), <https://www.law360.com/articles/1248046>, archived at <https://perma.cc/L9GN-WNDE>; U.S. DEP’T JUSTICE, *Executive Office for Immigration Review Proposes Rule on Fees*, Feb. 27, 2020, <https://www.justice.gov/eoir/pr/executive-office-immigration-review-proposes-rule-fees>, archived at <https://perma.cc/4ZAH-SQED> (in most extreme examples, increasing filing fee for an appeal from \$110 to \$975 and filing fee for a motion to reopen (BIA jurisdiction) from \$110 to \$95).

¹⁶ Immigration Policy Tracking Project, <https://immpolicytracking.org>, archived at <https://perma.cc/UJV2-V5R7> (reporting 761 announced new immigration policies, not including those reported changes that were not formally announced) (last visited February 7, 2020).

¹⁷ U.S. DEP’T JUSTICE, *Executive Office for Immigration Review Swears in Six New Board Members* (Aug. 23, 2019), <https://www.justice.gov/eoir/page/file/1197861/download>, archived at <https://perma.cc/YD9L-YRWY>; Noah Lanard, *The Trump Administration’s Court-Packing Scheme Fills Immigration Appeals Board With Hardliners*, MOTHER JONES (Aug. 29, 2019), <https://www.motherjones.com/politics/2019/08/the-trump-administration-has-packed-the-immigration-appeals-board-with-hardliners/>, archived at <https://perma.cc/2VLX-NTEM> (“In his first six years as an immigration judge in New York and Atlanta, from 1993 to 1999, William Cassidy rejected more asylum seekers than any judge in the nation. A few years ago, Earle Wilson overtook Cassidy as the harshest asylum judge on the Atlanta court, which has long been considered one of the toughest immigration courts in the country.”).

Now both men have been elevated to the Board of Immigration Appeals, which often has the final say over whether immigrants are deported, as part of a court-packing scheme by the Trump administration that is likely to make it even more difficult for migrants fleeing persecution to gain asylum.

Between 2013 and 2018, the average immigration judge in the country approved about 45 percent of asylum claims. The six judges newly promoted to the board have all approved fewer than 20 percent. Cassidy granted 4.2 percent of asylum claims. Another appointee, Stuart Couch, approved 7.9 percent. For Wilson, the figure was just 1.9 percent.”); *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, TRAC IMMIGRATION (2008), <https://trac.syr.edu/immigration/reports/judge2018/denialrates.html>, archived at <https://perma.cc/34NM-MG5A>.

circumstances in which a judge may grant continuances in pending cases¹⁸ and eliminated a judge's authority to administratively close proceedings.¹⁹

Further, the Trump administration slashed refugee admissions, so those fleeing persecution would not be processed abroad and assigned to be received by the United States;²⁰ meanwhile, the Attorney General and EOIR issued decisions curtailing the eligibility of asylum seekers from the Western Hemisphere, and those who transit through the Western Hemisphere to be eligible for asylum once here, within the physical United States, issuing separate decisions addressing asylum seekers passing through a third country in transit. EOIR further limited or eliminated eligibility for asylum for victims of domestic violence, violence by private actors, and those persecuted based on their membership within a family unit.²¹ Not only did the administration create a new vision for asylum in which asylees must be processed while they reside in a *third country* (Mexico), but it devised a scheme in which immigrants who missed their United States court hearings *while residing in a third country* pursuant to this policy, could still be ordered removed *in absentia*.²²

Thus, the entire philosophical self-identification of the United States as a “nation of immigrants” was, and remains, under question. Actually, in the eyes of the administration, that is not an open question, as even the United States Citizenship and Immigration Services, the *services* component of the Department of Homeland Security (DHS), has gone so far as to remove that very language from its mission statement.²³

With this metamorphosis of self-image as a backdrop, the remainder of this article will address technical questions and trends in decision-making at the Board of Immigration Appeals. Remember, the initial thesis to draw national attention to immigration was the flawed premise that immigrants are criminals. In reality, of course, there is no objective correlation between immigration and criminality,²⁴ but that is irrelevant in stoking nationalist fears. Based on cheers of “build the wall,” the stoking has resonated in some quarters. I would agree that the real motivator of ethnic insecurity is the rapid ethnographic changes via immigration following the Immigration and Nationality Act of 1965, or Hart–Celler Act, which for the first time restricted allocation of western hemisphere immigration, but over time reshaped the ethnic makeup of the United States to a degree unanticipated at its passage.²⁵ Ironically, national numbers only

¹⁸ Matter of L-A-B-R-, 27 I. & N. Dec. 405 (B.I.A. 2018).

¹⁹ Matter of Castro-Tum, 27 I. & N. Dec. 271 (B.I.A. 2018), vacated by *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019) (rejecting argument to defer to the agency, even pursuant to the highly deferential model for deferring to an agency's interpretation of its own ambiguous regulation, per *Auer v. Robbins*, 529 U.S. 452, 461 (1997), and noting that, rather than increasing efficient resolution of cases, upending the expected mechanism of “administrative closure” of certain cases “would in fact serve to lengthen and delay many of these proceedings by: (1) depriving IJs and the BIA of flexible docketing measures sometimes required for adjudication of an immigration proceeding..., and (2) leading to the reopening of over 330,000 cases upon the motion of either party, straining the burden on immigration courts that *Castro-Tum* purports to alleviate.”).

²⁰ Michael D. Shear & Zolan Kanno-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html?auth=login-email&login=email>, archived at <https://perma.cc/W5UG-WRVE>.

²¹ See Matter of A-B-, 27 I. & N. Dec. 316 (B.I.A. 2018).

²² Matter of J.J. Rodriguez-Rodriguez, 27 I. & N. Dec. 762 (B.I.A. 2020) (“Where the Department of Homeland Security returns an alien to Mexico to await an immigration hearing pursuant to the Migrant Protection Protocols and provides the alien with sufficient notice of that hearing, an Immigration Judge should enter an *in absentia* order of removal if the alien fails to appear for the hearing.”).

²³ Richard Gonzales, *America No Longer A 'Nation Of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>, archived at <https://perma.cc/EH9K-9PNZ>.

²⁴ Catherine E. Shoichet, *What 7 Statistics Tell us about Immigration and Crime*, CNN (Jan. 8, 2019), <https://www.cnn.com/2018/11/03/us/immigrants-crime-numbers/index.html> archived at <https://perma.cc/9B8V-KWSC> (“The Cato Institute used figures from Texas in 2015 as a case study to look at how crime rates compare among immigrant and native-born populations. “The criminal conviction and arrest rates for immigrants were well below those of native-born Americans.” Cato's Alex Nowrasteh wrote. According to the libertarian think tank's analysis, the rate per 100,000 residents in each subpopulation was 899 for undocumented immigrants, 611 for legal immigrants and 1,797 for native-born Americans.” Cato also disputed an outlier statistician concluding otherwise.)

²⁵ See, e.g., Kenneth T. Walsh, *50 Years Ago, Immigration Changed in America*, U.S. NEWS AND WORLD REPORT (Oct. 2, 2015), <https://www.usnews.com/news/articles/2015/10/02/50-years-ago-immigration-changed-in-america>, archived at <https://perma.cc/WU9M-E7MC> (““The Immigration Act was like a time-release capsule – year by year, it reshaped America into the America we know today,” says political scientist Bill Galston of the Brookings Institution, a former White House adviser to President Bill Clinton.)

now approach early twentieth-century highs in terms of the percentage of national population that is foreign born (i.e. there is ample precedent for this level of immigration), but that population is decidedly now largely non-European.²⁶

The United States Department of Justice (USDOJ) has two primary immigration-related roles: the EOIR administrative court system (the immigration courts and the BIA) and, via the United States Attorneys' Offices, prosecuting immigration-related offenses, including unlawful entry and reentry into the United States. The USDOJ also defends the government's decisions in immigrants' circuit court appeals ("petitions for review") of removal proceedings. Thus, the optics and reality of the USDOJ are crucial to assuring the public that it is properly entrusted with both its enforcement role and its distinct role as an impartial adjudicative body. Jefferson Sessions certainly clouded this role in a speech vilifying the defense bar and characterizing the EOIR as having an executive role *enforcing* immigration law,²⁷ escalating calls for an independent immigration court system.²⁸

This, finally, brings us to the thesis of the article: beyond the rhetoric, how has this administration actually affected the legal removability of *actual* criminal immigrants? In other words, just how conservative is the EOIR in the time of President Trump and his DOJ, under the respective leaderships of Jefferson B. Sessions III (February 2017 – November 2018), Acting Attorney General Matthew Whitaker (November 2018 – February 2019), and William P. Barr (February 2019 to present)? More specifically, what trends, if any, can be discerned from canvassing lines of cases regarding the deportability of immigrants who have criminal histories? Finally, being as this article is the end-product of a symposium of Barry University and the Orange County (Florida) Bar Association, I will give special consideration to the Florida implications of those trends. To make the article of more utility to non-experts in the immigration field, some context will establish the essentials of the practice and the legal issues discussed.

The consequences have been immense. The U.S. Census Bureau notes that the non-Hispanic white population in the U.S. declined from 85 percent in 1965 to 62.2 percent in 2014, and the forecast is for the percentage of non-Hispanic whites to fall to 43.6 percent in 2060. Hispanics will increase from 17.4 to 28.6 percent, the Census Bureau estimates. African-Americans will go from 13.2 percent to 14.3. Asians will increase from 5.4 to 9.3.

In cultural and political terms, such dramatic changes could cause whites to grow increasingly insecure and resentful that their majority status is eroding and will soon end. There are already indications of such unsettled attitudes among many white Americans in the rise of presidential candidate Donald Trump, currently the front-runner for the Republican nomination [...].

Few policymakers 50 years ago thought the Immigration Act would have such profound consequences. In signing the bill into law, Johnson, who loved to claim big ideas and big programs as his stock in trade, said, "This bill we sign today is not a revolutionary bill. It does not affect the lives of millions. It will not restructure the shape of our daily lives." LBJ was wrong.²⁶

²⁶ See, e.g., Jason Lange & Yeganeh Torbati, *U.S. Foreign-Born Population Swells to Highest in Over a Century*, REUTERS (Sept. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-data/u-s-foreign-born-population-swells-to-highest-in-over-a-century-idUSKCN1LT2HZ>, archived at <https://perma.cc/J8HB-VBMX> ("Foreign-born residents made up 13.7 percent of the U.S. population in 2017, up from 13.5 percent in 2016, according to the Census Bureau's estimates. That put the proportion of immigrants in the United States last year at the highest since 1910, when they made up 14.7 percent of the population.

The data also showed that an increasing number of immigrants were Asian or had advanced university degrees, extending a trend that has been in place for over a decade during which immigration from Mexico slowed. The share of immigrants from Mexico fell to 25.3 percent last year from 26.5 percent in 2016, while the share from China rose to 6.4 percent from 6.2 percent.²⁷)

²⁷ U.S. DEP'T JUSTICE, *Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review* (EOIR) (Sept. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>, archived at <https://perma.cc/5AXX-X58T> ("Good [defense] lawyers, using all of their talents and skill, work every day—like water seeping through an earthen dam—to get around the plain words of the INA to advance their clients' interests. Theirs is not the duty to uphold the integrity of the act.... [A]s members of the Executive Branch, it is our duty to "take care that the laws be faithfully executed.").

²⁸ Am. Bar Ass'n., *ABA Again Calls for an Independent Immigration Court* (July 23, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july_2019_washington_letter/immigration_article_0719/, archived at <https://perma.cc/P2CN-X43Q> ("On July 11th, the ABA joined the American Immigration Lawyers Association, Federal Bar Association, and National Association of Immigration Judges in calling for the establishment of an independent immigration court.

Currently, immigration courts are part of the U.S. Department of Justice, and the judges in those courts are answerable to the U.S. Attorney General, who is also the nation's chief prosecutor. In a joint letter to Congress, the four organizations note that this inherent conflict of interest means that immigration judges are 'particularly vulnerable to political pressure and interference.' In addition to the structural issues, the letter said that problems have 'resulted in a severe lack of public confidence in the system's capacity to deliver just and fair decisions in a timely manner.'").

The DOJ Minimizes Its Acknowledgement of State Criminal Justice Outcomes

In 2010, the Supreme Court of the United States held that criminal defendants' Sixth Amendment right to effective counsel in criminal proceedings included accurate advice regarding the immigration consequences that would flow from a conviction.²⁹ Thus, the Court confirmed what the immigration bar had long known: that frequently deportation is the most serious consequence of a criminal conviction, and mitigating those consequences may be of paramount importance to the defendant. Chief Justice Roberts illustrated this further in a subsequent decision, in which he noted that many defendants will take long odds and the dramatic risk of trial, if that is the only way to create a possibility—even one that is incredibly remote—that the criminal proceedings might avoid triggering certain removal.³⁰

The Immigration and Nationality Act (INA) enumerates a wide array of immigration consequences of crimes, with different standards depending on whether the immigrant is seeking admission to the United States or if the immigrant is present in the country subject to a lawful admission (in a non-immigrant visa status or as a lawful permanent resident). For conduct to trigger deportability it must result in a “conviction,”³¹ but a “conviction” here is a term of art and includes guilty pleas, convictions after trial, and “withheld adjudication” outcomes in which the criminal court imposes a punishment.³² The INA further defines what offenses trigger “inadmissibility” for immigrants, but these offenses require at minimum an “admission” of the commission of the offense, not necessarily a conviction.³³ Arriving aliens include persons attempting to enter the United States with an immigrant visa (permanently sponsored by a family member or employer);³⁴ or non-immigrant status (temporary, as a tourist, student, investor, or employee);³⁵ those changing their visa status within the United States, applying from within the United States to “adjust” their status to that of a permanent resident;³⁶ and also to those permanent residents who have committed an offense and then travelled abroad and are subsequently returning to the United States.³⁷

Immigration and criminal procedure thus frequently converge when, pursuant to *Padilla*, an immigrant realizes that not only do they have an immigration consequence based on a conviction (i.e., the immigrant is charged as removable, denied citizenship or residency, or detained by DHS), but also that conviction is premised on ineffectiveness of counsel, in that the immigrant’s criminal attorney failed to apprise the immigrant of the current and future immigration consequences of a plea and/or other trial-level strategic decisions. A good example of this was the fact pattern of the lead Florida case applying *Padilla*, in which a lawful permanent resident was convicted at age nineteen (and sentenced to one year of probation)

²⁹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

³⁰ *Lee v. United States*, 137 S.Ct. 195 (2017) (“We cannot agree that it would be irrational for a defendant in Lee’s position to reject the plea offer in favor of trial. But for his attorney’s incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the “determinative issue” for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that “almost” could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee’s position would make the choice to reject the plea. But we cannot say it would be irrational to do so.”) (emphasis in original).

³¹ See INA § 237, 8 U.S.C. § 1227 (2020).

³² See INA § 101(a)(48), 8 U.S.C. 1101(a)(48).

³³ INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i):

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

(I) a crime involving moral turpitude [...], or

(II) a violation of [...] any law or regulation of a State, the United States, or a foreign country relating to a controlled substance [...], is inadmissible

(emphasis added).

³⁴ See INA §§ 203, 204(a), 8 U.S.C. §§1153, 1154 (2020) (detailing the various family and employment-based immigrant options and processing schemes, respectively).

³⁵ See INA § 101(a)(15), 8 U.S.C. § 1101 (2020) (detailing the various options for non-immigrant status).

³⁶ See § 245(a).

³⁷ See § 101(a)(13)(C).

for the sale of a small amount of LSD to an undercover informant.³⁸ This conviction effectively mandated his removal and excluded any eligibility for agency discretion, yet his criminal defense attorney—with whom he had a relationship of about ten minutes prior to entering his plea—had failed to counsel him of this obvious consequence, which of course was vastly and disproportionately harsher than any criminal punishment imposed.³⁹

Historically, a *vacatur*, such as that sought by Hernandez, would be binding on the immigration courts but only if the immigrant could prove that the *vacatur* was based on a constitutional violation or other substantive procedural flaw in the criminal proceeding.⁴⁰ In 2018, the Board of Immigration Appeals (BIA) decided to apply this logic nationwide,⁴¹ thereby improving the outcomes of immigrants in the Fifth Circuit, where previously the BIA had applied a circuit-specific carve-out to *In re Pickering* and did not give full faith and credit to state court *vacaturs*—even those based on constitutional or procedural defects that would otherwise satisfy both *Pickering* and common sense.⁴²

The BIA had room to reject the Circuit’s logic, because the Fifth Circuit had rejected the *Pickering* logic in a *Chevron* “step two”⁴³ analysis⁴⁴ in which it held that the INA’s definition of a conviction was ambiguous regarding treatment of vacated convictions.⁴⁵ Thus, the BIA was free to assert its own authority to offer a “reasonable” binding interpretation of the statute, which it administers, pursuant to *Brand X* principles of deference.⁴⁶

Soon thereafter, the BIA took on a related issue and rejected the procedural rule that changes to state criminal *sentences*, rather than the conviction itself, *could* be modified in an effort to shield an immigrant from removal consequences, or for any other rehabilitative purpose, as these modified sentences would be recognized by the DOJ as dispositive.⁴⁷ Thus, despite having a system in place since at least 2005, in which state sentence modifications were credited at face value,⁴⁸ going forward the immigration courts should apply the test articulated in *Pickering* in determining the immigration consequence of any change in a state sentence, no matter how the state court described its order. Such an alteration will have a legal effect

³⁸ Hernandez v. State, 124 So. 3d 757 (Fla. 2012).

³⁹ See *id.* at 759 (“Hernandez was born in Nicaragua, but entered the United States with his mother when he was under two years of age. On May 3, 2001, Hernandez was charged by information with a violation of section FLA. STAT. § 893.13(1)(a)1 (2001), sale of a controlled substance, a second degree felony. The same day, an Assistant Public Defender was appointed to represent him, he was arraigned, and he entered a plea of guilty to the charge. From appointment of counsel to entry of the plea, about ten minutes elapsed.”).

⁴⁰ See Matter of Pickering, 23 I. & N. Dec. 621 (B.I.A. 2003) (holding, in the case of Canadian, whose application for residency was barred by his non-waivable inadmissibility under INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182 (2020) – any admission or conviction for any domestic or foreign offense related to a controlled substance, his being possession of LSD thirteen (13) years prior - but whose conviction was quashed by the Canadian court for merely rehabilitative purposes (i.e. apparently doing Mr. Pickering a favor unrelated to the merits of the case), that “if a court vacates an alien’s conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.”).

⁴¹ Matter of Marquez-Conde, 27 I. & N. Dec. 251 (B.I.A. 2018).

⁴² *Id.*

⁴³ See *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, Inc. (*Chevron*), 467 U.S. 837, 843 (1984) (where a statute is silent or ambiguous, and intent cannot be gleaned by applying canons of statutory interpretation, an agency’s interpretation should be given deference if it is based on a permissible construction of the statute).

⁴⁴ See Renteria-Gonzalez v. I.N.S., 322 F.3d 804, 804, 813 (5th Cir. 2002) (finding Congress’ silence regarding vacated convictions in section 101(a)(48)(A) of the Act “strongly implies” that it did not intend to include any exception for a vacated conviction in the statutory definition, but not finding the language of section 101(a)(48)(A) as plain on its face in this regard).

⁴⁵ INA § 101(a)(48)(A), 8 U.S.C. § 1101 (2020) (The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.)

⁴⁶ See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” (emphasis added)).

⁴⁷ See Matter of Thomas and Thompson, 27 I. & N. Dec. 674 (A.G. 2019).

⁴⁸ See Matter of Cota-Vargas, 23 I. & N. Dec. 849, 850–52 (B.I.A. 2005); Matter of Song, 23 I. & N. Dec. 173 (B.I.A. 2001); see also Matter of Estrada, 26 I. & N. Dec. 749, 755–56 (B.I.A. 2016) (addressing, in the critical view of the Attorney General in 2019, see Thomas and Thompson, at 675, where a criminal court “order ‘clarifies’ an alien’s sentence, [and where subsequently] an immigration judge assessing the order’s effect considers several characteristics of the order, such as whether the original sentencing order contained an obvious discrepancy and whether the clarifying court had jurisdiction to enter the order;” noting that “‘modification’ or ‘clarification’ may turn on how the state court itself labels the order, not on any objective distinctions between the two categories.”).

for immigration purposes when based on a procedural or substantive defect in the underlying criminal proceeding, but not when the change was based on reasons unrelated to the merits, such as the alien's rehabilitation or an interest in avoiding an immigration consequence.

Notably, *In re Thomas and Thompson* cited neither *Chevron* nor *Brand X* to explain its departure from eighteen years of precedent.⁴⁹ Instead, the Attorney General's declaration was one more of fiat, flatly rejecting three decisions made under the Attorney General's predecessors' direction as lacking basis in the INA.⁵⁰

Of course, if that premise is true, so is the opposite. For example, the immigration "aggravated felony" categorizations of "theft" and "crime of violence" (which trigger harsh consequences including barring the preferred form of discretionary relief of cancellation of removal) turn on the underlying offense resulting in a sentence of a year or more.⁵¹ However, the definition of a "conviction" for the purposes of the INA requires controlling weight be given to the *period of incarceration ordered* by the court, regardless of any *suspension* of that sentence.⁵² Thus, Congress apparently gave weight to the maximum sentence actually *ordered* by the state court, with a specific admonition to ignore *only* the state court's wisdom to suspend the imposition of that sentence.

The scenario confronted in *Thomas and Thompson* was one where the sentencing *order* itself changed, so the initial order became a historic legal fiction, as it no longer existed in the eyes of the state court.⁵³ While there is, of course, no specific mention of sentence modification in the statute, only one statutory carve-out was made for non-recognition of state sentence—the "sentence imposed" clause.⁵⁴ However, the well-worn canon of statutory interpretation *expressio unius est exclusio alterius*⁵⁵ would seem to dictate that the operative terms in the statute are the state court's order itself (which of course a state court has the right to rescind, withdraw, clarify, or modify, a power which implicates an obvious constitutional dimension)⁵⁶, except for ignoring only whether or not the sentence was actually imposed, *not* whether it had been modified.

Attorney General Barr highlighted the weakness of his own argument in stating that this decision was based on the language of the immigration statute itself.⁵⁷ Of course, under *Chevron*, no deference is given to an agency's reading of the *language* of a statute, as it is the province of the courts to tell us what

⁴⁹ See generally *Matter of Thomas and Thompson*, 27 I. & N. Dec. at 690.

⁵⁰ *Id.* at 675 ("The tests articulated in *Matter of Cota-Vargas*, *Matter of Song*, and *Matter of Estrada* have no basis in the text of the INA, promote inconsistency in the application of the country's immigration laws, and fail to advance Congress's intent to attach immigration consequences to certain convictions and sentences. Accordingly, those cases are overruled.")

⁵¹ See INA 101(a)(43)(F), (G), 8 U.S.C. 1101 (2020).

⁵² INA § 101(a)(48), 8 U.S.C. 1101(a)(48):

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

⁵³ Some 15 years after completing his sentence for a Georgia family battery offense, Thomas had petitioned for, and received, "clarification" in his sentence, effectively reducing it from 12 months (which triggered immigration aggravated felony treatment), to 11 months and 28 days (which facially would not). In contrast, Thompson also had a 12-month sentence for Georgia family battery (his was five years old) reduced to 11 months and 27 days, via a sentence "modification." However, based on the semantics of the state court decisions, the BIA had credited Thompson's "modification" but not Thomas' "clarification." Attorney General Barr rejected both. See generally *Matter of Thomas and Thompson*.

⁵⁴ INA § 101(a)(48)(B), 8 U.S.C. 1101(a)(48)(B) (triggering immigration consequences based on length of sentences "regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part").

⁵⁵ See Merriam-Webster, *expressio unius est exclusio alterius* (New Latin), <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius>, archived at <https://perma.cc/L5K8-F9RB> (the explicit mention of one (thing) is the exclusion of another.).

⁵⁶ 10th Amendment to the United States Constitution, ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁵⁷ *Thomas and Thompson*, 27 I. & N. Dec. at 684.

Congress said, using interpretive canons as a guide. Thus, *Thomas and Thompson* are quite literally an *opinion* of the Attorney General, and (right or wrong) is not afforded any deference by a reviewing court. Further, immigrants and their counsel may borrow from the Ninth Circuit, which has stated that “a state court order to classify an offense or modify a sentence . . . is clearly construing the *nature* of the conviction pursuant to state law,”⁵⁸ and thus, having already construed this very issue in published decisions, may ignore the subsequent effort of the Attorney General to dabble in *Chevron* “step one” territory. Finally, this abrupt and drastic change of agency policy would seem to raise compelling arguments against its retroactive application, consistent with the *Chenery* doctrine.⁵⁹

In a variant on this scenario, the State of California realized that its criminal scheme was setting up a probability of harsh immigration consequences for its residents’ criminal convictions, based on the state’s definition of a misdemeanor.⁶⁰ In addition to the “aggravated felony” consequences for certain crimes based on the length of sentences, entire other classes of “crimes involving moral turpitude” (CIMT) trigger “inadmissibility”⁶¹ or “deportability,”⁶² but only trigger the latter (and thereby also eliminate the availability

⁵⁸ See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); see also Rose Kahn et al., *AG Overturns Sentence Modification Rule: Matter of Thomas & Matter of Thompson*, IMMIGRANT LEGAL RES. CTR. (Oct. 2019) https://www.ilrc.org/sites/default/files/resources/matter_of_thomas_sentence_pcr.pdf, archived at <https://perma.cc/VXT9-M2RP> (discussing *Garcia-Lopez* and other strategic points).

⁵⁹ See e.g. *Obeya v. Sessions*, 884 F.3d 442, 445 (2d Cir. 2018) (applying *Chenery* in scenario of BIA reversing agency opinion held from 1973-2016, noting:

“Agencies may create new rules through adjudication, but the retroactive application of the resulting rules ‘must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.’ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). We weigh the following factors to determine whether an agency may apply a new rule retroactively:

(1) whether the case is one of first impression, (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order places on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.”).

⁶⁰ Michele Wasslin, *California Bills Begin to Restore Fairness to Immigrants Caught up in Criminal Justice System*, Immigration Impact, September 30, 2016, <https://immigrationimpact.com/2016/09/30/california-immigration-laws-2016/#.XkA0JC2Z2NZI>, archived at <https://perma.cc/8ES4-TPLL> (“In January 2015, California’s law changed the maximum possible punishment for a misdemeanor from 365 to 364 days, thereby avoiding the federal consequences. SB1242 makes that change retroactive in two ways. First, every California misdemeanor conviction that had a potential sentence of 365 days now has a potential 364-day punishment. This change will automatically apply to all misdemeanors as of January 1, 2017. Second, persons who were sentenced to a year in jail for a misdemeanor prior to January 1, 2015 can apply in criminal court to have their sentence reduced by one day. As a result of SB1242, as of January 1, 2017, no California misdemeanors will have a potential for a 365 day sentence.”).

⁶¹ INA § 212(a), 8 U.S.C. §1182 Inadmissible Aliens

(2) Criminal and related grounds

(A) Conviction of certain crimes

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

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

(ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if . . .

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) *did not exceed imprisonment for one year* and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

⁶² § 237(a)(2)(A)(i) Deportable Aliens

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a *sentence of one year or longer may be imposed*, [is deportable].

of the discretionary relief of cancellation⁶³ of removal for non-permanent residents) if a sentence of a year or more was available. Thus, California sought to ameliorate these “deportability” consequences, passing SB 1242 to amend Section 18.5 of the California Penal Code and thereby:

“[A]lign[] the definition of misdemeanor between state and federal law” and to ensure that aliens “who committed low level and non-violent crimes [would not be] subject to deportation.” ... This provision is necessarily limited to California convictions and does not affect crimes committed in other States, even if the convicted alien resides in California.⁶⁴

The BIA rejected giving full faith and credit to this change, noting that the retroactive statutory changes might be binding for purposes of state law, but the federal immigration consequences would be unaffected.⁶⁵ As the BIA reasoned:

[B]y its plain terms, [the CIMT deportation provision] is concerned with whether an alien has been convicted of a crime involving moral turpitude for which a sentence of 1 year or longer “*may be imposed.*” In other words, it calls for a backward-looking inquiry into the maximum possible sentence the alien *could have received* for his offense *at the time of his conviction.*⁶⁶

The “historical fact”⁶⁷ remained unchanged that California had, in fact, convicted numerous immigrants under a scheme in which felony treatment had attached.⁶⁸ In this regard, the BIA seems on firm legal ground, as the Supreme Court of the United States has ruled similarly, as has the Ninth Circuit.⁶⁹

Thus, with *Padilla* not running retroactively in Florida (or federally), and under the Trump-era Department of Justice sentence modifications explicitly rejected and legislative assists to immigrants (no matter how seemingly far-fetched in Florida⁷⁰) non-beneficial, even greater emphasis is placed on the outcomes of criminal proceedings as totally dispositive of immigration consequences.

⁶³ § 240A(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. (emphasis added).

⁶⁴ *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470, 471 n.2 (B.I.A. 2018).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.* at 473 (“The fact that California decided to retroactively reclassify one of his State felonies as a misdemeanor did not change “the historical fact that, for purposes of § 841, the defendant had been convicted of the felony in the past.”). In reaching its conclusion, the court relied on the Supreme Court’s decision in *McNeill v. United States*, 563 U.S. 816 (2011), which rejected a similar argument.

⁶⁸ *Id.*

⁶⁹ *See McNeil; United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016).

⁷⁰ *See e.g. City of South Miami v. Desantis* (1:19-cv-2292), District Court, S.D. Florida; Julia Ingram, *South Miami Sues to Block Sanctuary City Ban, says it will Divide Police and Residents*, Miami Herald, July 16, 2019, <https://www.miamiherald.com/news/local/immigration/article232713882.html#storylink=cpy>, archived at <https://perma.cc/6U4J-3GPB> (“Police departments across the region see their jobs as keeping the residents safe.’ [City of South Miami Mayor] Stoddard said. ‘As soon as you start making some residents suspicious of the police, then they can’t do their job.’

SB 168 requires local law enforcement to honor federal detainer requests, which ask that police detain immigrants arrested for other reasons if agencies have probable cause to believe the immigrant could be deported. South Miami adopted a resolution in 2017 stating that detainer requests will not be honored by South Miami Police. The resolution may put South Miami out of compliance with SB 168, city leaders say, leaving the city vulnerable to lawsuits by the state or residents of South Miami.”).

But two more contexts predictably demonstrate the current DOJ's hostility to immigrants' full exercise of their state court remedies to ameliorate deportability. The first of these was the BIA's clarification that most state court drug diversionary programs will lead to immigration consequences.⁷¹ Of course, these programs, which began with diversion of youthful offenders in the 1940s, have been widely accepted for their treatment, rehabilitative focus, and massive economic benefit throughout the state and federal justice systems.⁷² Nonetheless, in 2017, the BIA clarified that such a diversionary program—*which avoids a conviction*—would trigger immigration treatment.⁷³ Arising in the context of a Somali lawful permanent resident, the immigration judge had relied on Texas law to understand that since “the purpose of pretrial intervention is to provide the defendant with an opportunity to have the charges dismissed prior to a finding of guilt or innocence,” a guilty plea is not required for entry into a pretrial intervention agreement, as that would be contrary to the program's design.⁷⁴

However, like so many paradoxical terms in the immigration context, a “conviction” need not be one.⁷⁵ “Convictions” can be either:

- (1) conventional convictions via findings of guilt; or (as relevant here)
- (2) withheld adjudication where:
 - (a) there was a finding or plea of guilt, a plea of *nolo contendere*, or an admission of guilt; and
 - (b) imposition of any form of punishment.⁷⁶

Despite the plain language of the statute dictating that a “withheld adjudication” is the initial required threshold, the BIA ignored this, instead letting the secondary factors—an admission and a punishment—alone establish that the state process triggers immigration treatment.⁷⁷ This necessarily reads the technical term “withheld adjudication” out of the statute, which would seem to violate *Chevron* “step one.”

For the purposes of the present article, the point is to note the Trump Era step to move non-convictions into the realm of deportable convictions. As applied to Florida, for example, it is apparent that *In re Mohammed* will have *deportation* consequences for the diversionary programs in the vast majority of counties. Previously, the Eleventh Circuit had held that formal admissions made in the drug court diversionary process could be used to establish a ground of inadmissibility⁷⁸ (which of course, require admission of conduct, not a conviction),⁷⁹ but now there is a new disability attached to these diversions, as grounds of deportability (which do require a conviction, as now expanded into extra-statutory turf, via *Mohammed*), until and unless the circuits reverse and impose a plain language reading, per *Chevron*.

In a final point regarding state criminal process, in 2018 the BIA had occasion to reconsider whether a criminal conviction only triggers an immigration consequence if it is “final,” noting its “long-standing

⁷¹ See e.g. MIAMI OFFICE OF THE STATE ATTORNEY, *Diversionary Programs*, <http://www.miamisao.com/services/diversion-programs/>, archived at <https://perma.cc/QDX8-P4GH> (describing Miami-Dade County's “Misdemeanor and Felony Pre-Trial Diversion Program” and “Drug Court,” the latter being a groundbreaking program since its 1989 inception).

⁷² See e.g. Diversion Programs in America's Criminal Justice System: A Report by the Center for Prison Reform, August 2015, <https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf>, archived at <https://perma.cc/329U-HGPK> at 7-8 (“In 1968, the President's Commission on Prisoner Rehabilitation and then the Comprehensive Drug Abuse Prevention and Control Act of 1970 recommended that US states use diversion programs for drug offenses. The first federal program was established through the Pretrial Services Act of 1982. By 2010, 45 US states had 80 diversion laws and 298 diversion programs.”).

⁷³ See *Matter of Mohammed*, 27 I. & N. Dec. 92 (B.I.A. 1997).

⁷⁴ See *id.* at 95.

⁷⁵ See *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006) (“Humpty Dumpty used a word to mean ‘just what [he chose] it to mean -- neither more nor less,’ and legislatures, too, are free to be unorthodox.”) (quoting L. Carroll's *Alice In Wonderland and Through the Looking Glass*).

⁷⁶ See INA § 101(a)(48), 8 U.S.C. 1101(a)(48).

⁷⁷ See *id.*; *But cf.*, *Matter of Mohammed*, 27 I. & N. Dec. at 98 (finding removability in absence of finding of guilt by the state criminal court, in proceeding resulting in a drug “diversionary program”).

⁷⁸ *Martinez v. United States AG*, 577 Fed. App'x 969 (11th Cir. 2014). (citing an admission made in the context of a diversionary program and rejecting argument that an admission for inadmissibility purposes carries immigration consequences only if the immigrant is presented the essential elements of the offense and concedes violation of each element, and instead holding that an admission in a diversionary program is properly a basis of a finding of inadmissibility and ineligibility for discretionary relief.).

⁷⁹ See INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182 (2020).

requirement that a conviction must have sufficient finality to be considered a valid predicate for immigration consequences to attach.”⁸⁰ Although the BIA ultimately reiterated that finality—the exhaustion or waiver of appeal—was impliedly expected by Congress (based on the principle that Congress is aware of cases holding that principle at the time it legislated the modern definition of “conviction” at INA § 101(a)(48)) for the immigration consequence to attach, the fact that this required reconsideration may give one pause.⁸¹

The immigration court had sustained deportability based on a conviction that later was subject to a late-filed appeal, but the BIA ultimately could not sustain that finding after evaluating the state court appeal, noting that this would not be the outcome:

Appeals, including direct appeals, and collateral attacks that do not relate to the underlying merits of the conviction will not be given effect to eliminate the finality of the conviction. Such appeals include those that relate only to the alien’s sentence or that seek to reduce the charges, to ameliorate the conviction for rehabilitative purposes, or to alleviate immigration hardships, and any other appeals that do not challenge the merits of the conviction.⁸²

Dissenting, Board Member Malphrus objected to this entire scheme and instead would permit the DHS to prosecute—and ostensibly remove⁸³—immigrants like Acosta, for whom the state court appeal related to a conviction that was dispositive of their eligibility for removal or relief.⁸⁴ Not only would this upend decades of BIA precedent and present additional efficiency concerns to the already-bloated EOIR courts (that have over a million cases in processing *without* including cases that turn on non-final convictions)⁸⁵, but would have tremendous practical concerns for immigrant respondents, who are not appointed counsel and would have to invest in a defensive immigration case that is at best premature or at worst, entirely unnecessary. This is compounded by the reality that many immigrants would also unnecessarily be detained based on these non-final convictions, further raising constitutional implications regarding their liberty interests.⁸⁶

⁸⁰ *Matter of Ozkok*, 19 I. & N. Dec. 546, 552 n.7 (B.I.A. 1988) (“It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.”).

⁸¹ The decision, *Matter of J.M. Acosta*, 27 I. & N. Dec. 420, 426 (B.I.A. 2018) related to a criminal defendant who had belatedly reinstated a state court appeal, with the BIA holding that the immigrant bore the burden of demonstrating that the criminal case was *not* final in such a circumstance, including that the state court had done so for procedural or substantive reasons, and that the appeal related the veracity of the underlying initial proceeding, not a collateral or non-direct attack.

⁸² *See id.* at 433.

⁸³ *Matter of J.M. Acosta*, 27 I. & N. Dec. 438 (B.I.A. 2018). Fortunately, Florida has recognized that post-conviction criminal cases survive deportation, as a result of litigation asserting constitutional equal protection principles for immigrants in criminal proceedings, thus opening the door for return of immigrant respondents to the United States in instances of successful criminal litigation leading to eventual reversal of immigration removal order. *See Bernard Storey v. State of Florida*, 133 So. 3d 528 (Fla. 2014), discussed on remand at *Storey v. State*, 139 So. 3d 448 (Fla. Dist. Ct. App. 2014). However, the total human and financial cost of such premature prosecution and improvident deportation is extraordinary.

⁸⁴ *See id.* at 438 (BIA Member Malphrus, dissenting) (“Thus, any unfairness that may ensue from ordering the respondent removed based on his conviction now could be remedied if he successfully overturns his conviction before the State court. This is one reason why the Department of Homeland Security (‘DHS’) might choose for policy or prudential reasons not to proceed with removal proceedings until direct appeals have been exhausted.”).

⁸⁵ *See Immigration Court Backlog Tool*, TRANSACTIONAL CLEARINGHOUSE ACCESS CTR. (TRAC Immigration), Syracuse University, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited February 5, 2020), archived at <https://perma.cc/GV7F-WX8G>, noting nationwide backlog of 1,089,696 cases through December 2019.

⁸⁶ *See Demore v. Kim*, 538 U.S. 510 (2003) (upholding constitutionality of mandatory detention scheme at INA § 236(c); *but see, e.g., Sopo v. United States AG*, 825 F.3d 1199, 1201 (11th Cir. 2016) (finding that, under theory of constitutional avoidance to uphold § 236(c), but imposing a flexible limitation, in case of detainee held without a bond hearing for over four years); *see Jennings v. Rodriguez*, 138 S. Ct. 831, 833 (2018) (reversing *Sopo* and similar decisions from other Courts of Appeals, but inviting a constitutional challenge to *unlimited* “prolonged” detention, rather than litigating a theory of constitutional avoidance).

Perhaps non-coincidentally, given the compatibility of this opinion with the other decisions amplifying negative interpretation of state court remedies sought by immigrants, in October 2019, Attorney General Barr appointed Garry D. Malphrus as the Acting Chairman of the BIA.⁸⁷

Drugs

Since 1996, perhaps no topic has dominated the criminal removal practice like that of the implications of controlled substances convictions. The Supreme Court of the United States has been called upon to construe the parameters of removability four times, in addition to another two closely related criminal cases.⁸⁸ The Eleventh Circuit has published another six cases regarding removal consequences of Florida drug laws alone, plus another addressing the constitutionality of the Florida statute.⁸⁹ The BIA has also been active in this arena, publishing another two cases specific to Florida offenses.⁹⁰

Why the influx of cases? With the amendments to the INA via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), deportability was expanded and discretionary relief from removal was restricted.⁹¹ Commercial drug offenses would totally bar relief. Most possessory offenses within seven years of immigration would also bar relief. Thus, more immigrants were dependent upon hyper-technical arguments related to the examination of statutes, via the “categorical approach” (an elements-based test, in which the state statute of conviction must necessarily match each element of a generic federal standard),⁹² in order to prevent certain removal or establish eligibility for relief.⁹³ Remarkably, thus far, every drug case to reach the Supreme Court has been resolved in favor of immigrants, thus proving a trend—regardless of administration—for the EOIR to overreach in this context, assigning removability in an over-expansive reading of the INA.

In the “aggravated felony” context, the Supreme Court of the United States has unambiguously held that to be a “drug trafficking crime” (a term of art both torturing semantics and including every federal

⁸⁷ See *Biographical Information*, U.S. DEP’T JUSTICE: BOARD IMMIGR. APPEALS, <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> (last updated May 1, 2020), archived at <https://perma.cc/G5FZ-DT2Z>. Also worth noting, was the interim rule announced in August 2019 to grant decision-making authority to the Director of EOIR (not necessarily even an attorney-filled position) in cases that have not been decided within an allotted timeframe. It also creates a new office of policy within EOIR to implement the administration’s immigration policies, thus infusing the adjudicative body with an overt political element. See *EOIR Director Given Power To Decide BIA Cases In New Rule*, LAW360 (August 23, 2019), <https://www.law360.com/articles/1191879/eoir-director-given-power-to-decide-bia-cases-in-new-rule>, archived at <https://perma.cc/6EDN-AB3K>.

⁸⁸ See *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Mellouli v. Lynch*, 575 U.S. 798 (2015) (all discussed, *infra*).

⁸⁹ *Donawa v. United States AG*, 735 F.3d 1275 (11th Cir. 2013) (Distinction in mens rea elements means Florida “sale or delivery” conviction is categorically not a federal equivalent, so cannot be a “drug trafficking crime under 101(a)(43)(B); *Spaho v. United States AG*, 837 F.3d 1172 (11th Cir. 2016) (finding the various ways of violating Fla. Stat. § 893.13(1)(a)(1) “divisible” and therefore discoverable (by reviewing record of conviction, not just reviewing text of statute) to determine if conviction related to commercial activity); *Gordon v. United States AG*, 861 F.3d 1314 (11th Cir. 2017) (distinguishing *Spaho*, and finding if the conduct revealed in the record of conviction, is ambiguous, the immigrant is presumed to have committed the least culpable of the alternatives); *Cintron v. United States AG*, 882 F.3d 1380 (11th Cir. 2018) (a violation of Fla. Stat. 893.135 “Trafficking” is categorically not an aggravated felony because as a matter of law, conviction relates to possessory conduct); *Choizilme v. United States A.G.*, 886 F.3d 1016 (11th Cir. 2018) (using Chevron step 2, deferred to BIA’s determination that *mens rea* is not an element of “illicit trafficking” for purposes of the aggravated felony definition); *Guillen v. United States AG*, 910 F.3d 1174 (11th Cir. 2018) (the identity of the controlled substance is an element of Florida possessory offenses).

⁹⁰ *Matter of L-G-H-*, 26 I. & N. Dec. 365 (BIA 2014) (interpreting INA 101(a)(43)(B) to *not* require a *mens rea* element regarding the illicitness of a controlled substance, in order for an offense to qualify as an “illicit trafficking” aggravated felony); *Matter of Navarro-Guadarrama*, 27 I. & N. Dec. 560 (B.I.A. 2019) (rejecting dissonant state drug definitions, relative the enumerated federal definition, as escaping treatment under the INA).

⁹¹ See INA § 240A(a), 8 U.S.C. § 1229(b) (2020) Cancellation of Removal, the post-1996 program, requiring five years of lawful permanent residency, seven years continuous residence *in any status* subsequent to any entry (with the clock starting at admission and stopping at commission of a deportable offense), and no “aggravated felony;” *cf.* § 212(c) (repealed), codified at 8 C.F.R. § 212.3, which before 1990 permitted waiver of any offense and after 1990 permitted waiver of any offense with less than a five year sentence served, so long as the permanent resident had maintained a continuous domicile in the United States for seven years prior to the date of the adjudication of the waiver request.

⁹² See, e.g., *Taylor v. United States*, 495 U.S. 575 (1990); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

⁹³ See *id.*

drug-related felony, regardless of whether “trafficking” is involved), a state offense must necessarily be the equivalent of a federal felony, regardless of the state punishing consequence.⁹⁴ The Court later held that this could not be based on a “hypothetical” prosecution, reiterating that the categorical inquiry is regarding the elements of the statute charged, not what crime theoretically *could* have been charged.⁹⁵ The Court expanded this logic to the inverse, where the federal statute treats almost all “delivery” offenses as felonies, but has a limited exception; for a state offense that lacks that exception will necessarily be over-inclusive and fail to trigger aggravated felony treatment.⁹⁶ Finally, the Court held that the drug involved in the conviction must necessarily relate to one in the Federal Controlled Substance Act, and where the drug’s identity is ambiguous, the offense may avoid immigration treatment altogether.⁹⁷ Outside of the paraphernalia context, however, the identity of the controlled substance is typically an element of the offense.⁹⁸

The Attorney General has litigated these same issues before the Eleventh Circuit in cases interpreting the Florida Criminal Code. Most notoriously, litigation has addressed the Florida state scheme, enacted in 2002 as Fla. Stat. § 893.101, that does not require the State to prove the defendant *knowingly* possessed a *known* illicit substance and, if challenged (by raising an affirmative defense of *lack of knowledge*), presumes culpable *mens rea*.⁹⁹ The immigrant won a challenge (overturning the BIA) that the

⁹⁴ See *Lopez*, 549 U.S. at 59-60 (rejecting premise that South Dakota cocaine possession conviction triggered aggravated felony definition, where the federal Controlled Substances Act (“CSA”) assigns only misdemeanor treatment to possessory offenses, so the state offense could not be the equivalent of a federal felony).

⁹⁵ See *Carachuri-Rosendo*, 560 U.S. at 574 (rejecting theory that two separate state possessory offenses, combine, could trigger aggravated felony treatment as the equivalent of the federal felony of recidivist possession, where the federal offense has an *element* of the existence of a prior conviction, but the state offense did not).

⁹⁶ See *Moncrieffe*, 569 U.S. at 198-9 (rejecting Georgia delivery offense as “drug trafficking” (federal felony) aggravated felony, where federal CSA has carve-out for misdemeanor treatment of social sharing of small amount of marijuana for no remuneration, but Georgia does not, i.e. the state treated *all* delivery offenses as felonies, so was overinclusive).

⁹⁷ See *Mellouli*, 575 U.S. at 804 (holding that where a Kansas paraphernalia conviction did not require the identification of the specific drug involved—just that the conviction related to “a controlled substance” as defined by Kansas—and where the Kansas schedule of controlled substances was broader than the federal CSA, the elements of the paraphernalia offense categorically failed to establish the offense necessarily violated the federal CSA and thus escaped immigration consequences). Since 1965, the BIA has also recognized that that the immigration consequences triggered by drug convictions and controlled substances offenses listed in the INA, reach only those substances that are regulated by the federal law. See *Matter of Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965) (terminating proceedings because conviction was based on state law that included some drugs not penalized as narcotics under federal law).

⁹⁸ Applying a “next-generation” claim based on *Mellouli*, the Eleventh Circuit held as much in *Guillen v. United States Att’y Gen.*, 910 F.3d 1174 (11th Cir. 2018). In this case, the Court found that the term “controlled substance,” used in charging possessory offenses under FLA. STAT. § 893.13(6)(b) (2020), was a general term that is:

“defined by a lengthy list provided in another section of the Florida code. This reveals little about whether the listed substances are alternative elements, one of which must be established to make out a conviction, or merely various factual means that satisfy a single ‘controlled substance’ element.”

Id. at 1182. Because the Court could not glean whether the term was divisible or not (and consequently whether the identity of the controlled substance was discoverable, or not), it also turned to state precedent. The court identified examples where a Florida defendant was charged with two counts of possessing different drugs, in a single indictment relating to a single set of facts. Citing *United States v. Dixon*, 509 U.S. 688 (1993), the Court reasoned that because double jeopardy prohibits being charged twice for the *same* offense, the identity must be an element, concluding, “in short, because the Florida Supreme Court has told us that the elements of possession of marijuana and possession of a hallucinogen are different, it has implicitly told us that the identity of the substance possessed is an element of possession.”

⁹⁹ See Legislative findings and intent, FLA. STAT. § 893.101 (2020)

(1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

In the possessory context, at the present, Florida and Washington are the only states presuming culpable *mens rea* and requiring a defendant to raise innocence at trial as an affirmative offense. See, e.g., FLA. STAT. § 893.13(6), as informed by FLA. STAT. § 893.101, *supra*

Florida “delivery” offense was obviously dissonant with the federal equivalent felony, since the federal crime had a *mens rea* element and the Florida offense did not.¹⁰⁰ Undeterred, the BIA found that the “sale” offense *could* be an aggravated felony under a separate theory—“illicit trafficking in a controlled substance”—which is not defined in the INA.¹⁰¹ The BIA rejected the idea that this term should have required determining Congress’s understanding of the term at the time—based on canvassing the 50 states to determine prevailing usage at the time of passage (which would have resulted in 0 of 50 states lacking *mens rea*, as Florida had not changed its scheme yet). Of course, this would appear a *Chevron* “step one” question, that the BIA resolved via *interpretation* at *Chevron* “step two.” The Eleventh Circuit ultimately deferred to the BIA and upheld *In re L-G-H*,¹⁰² but a very similar challenge was heard at the Supreme Court of the United States—in the criminal sentencing context—in an argument held January 21, 2020.¹⁰³ Naturally, the Department of Justice, represented in that litigation by the Solicitor General, took the position that *mens rea* should not be a requirement of predicate offenses to trigger lengthy criminal sentence enhancements. The Court unanimously ruled against Mr. Shular, in an opinion that turned on the idea that the term “involving” “serious drug offense” is a description of types of qualifying conduct, not a fixed term of art with a generic definition. The term thus escaped requiring the strict application of the categorical approach, and under a flexible definition, Shular could not escape a sentence enhancement.¹⁰⁴

As discussed, the identity of a drug is discoverable in most Florida offenses. However, the INA specifically instructs that immigration consequences attach only to offenses related to a controlled substance, “as defined in section 802 of Title 21” of the United States Code.¹⁰⁵ This begs the question of how to treat anomalous state definitions.

In 2018, the BIA called for supplemental briefing and amicus briefing in a case presenting a variety of challenges to removability under INA § 237(a)(2)(B), premised on a Florida conviction, including how to parse definitions presenting these chemical distinctions in state controlled substance definitions.¹⁰⁶ That case involved a conviction for possession of cocaine, which had a complicated definition in state and federal law, with distinctions somewhat inscrutable to a non-chemist, but distinctions nonetheless.¹⁰⁷ Despite engaging in the exercise of supplemental briefing, the BIA did not publish a decision in that matter. Instead the BIA took up the issue of disparate definitions in a case in which the BIA’s logic was much more assailable, in the context of Florida’s unusual definition of marijuana, or “cannabis.”¹⁰⁸

Florida formerly shared the common definition of cannabis but departed from the federal and Uniform Controlled Substance Act definitions of “cannabis” in 1979.¹⁰⁹ Consequently, Florida rather

(reversing the presumption and providing affirmative defense). A minority of other states’ statutes are silent on *mens rea* but, as is the norm in criminal law, are read to imply an element of *mens rea* that the government must prove beyond a reasonable doubt. *See also* *McFadden v. United States*, 576 U.S. 186 (2015) (unanimous Supreme Court holding that *mens rea* is an element of federal offenses, despite lack of explicit notation of *mens rea* by Congress).

However, Florida is the only jurisdiction to apply such a scheme of presumptions in the delivery, sale, or trafficking contexts and has only done so since 2002.

¹⁰⁰ *See Donawa*, 735 F.3d at 1282.

¹⁰¹ *See Matter of L-G-H-*, 26 I. & N. Dec. 365, 368 (B.I.A. 2014).

¹⁰² *Choizilme v. United States A.G.*, 886 F.3d 1016 (11th Cir. 2018).

¹⁰³ *See Shular v. United States*, No. 18-6662 (oral argument held January 21, 2020),

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-6662.html>, archived at <https://perma.cc/F2AQ-WPVJ>.

¹⁰⁴ *Shular v. United States*, 589 U.S. ---, 140 S.Ct. 779 (2020).

¹⁰⁵ *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B); INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); INA § 237 (a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).

¹⁰⁶ *See* Amicus Invitation No. 18-02-27, *Conviction for Possession of a Controlled Substance in Florida*, BD. OF IMMIGR. APPEALS (Mar. 29, 2018), <https://www.justice.gov/eoir/page/file/1038991/download>, archived at <https://perma.cc/5EGM-RAYA>.

¹⁰⁷ For explanation of the “original” isomer defense, in the criminal context, *see e.g.*, *United States v. Ross*, 719 F.2d 615, 617 (2d Cir. 1983) (describing the defense as a “sophisticated scientific defense grounded in the chemistry of cocaine” frequently asserted in cocaine prosecutions, prior to Congress’ modification of the definition of cocaine to include different molecular variants, including both “optical” and “geometric” isomers, some of which formerly escaped treatment).

¹⁰⁸ Fla. Stat. § 893.02(3) (2020).

¹⁰⁹ *See cf. Purifoy v State*, 359 So. 2d 446 (Fla. 1978); *Jordan v. State*, 419 So. 2d 363 (Fla. Dist. Ct. App. 1982) (explaining the old and new definitions and the former requirement to separate and weigh only qualifying material).

obviously categorically defines “cannabis” in broader terms than used at 21 U.S.C. § 802.¹¹⁰ Under the former scheme, the State had to separate the legal parts of the plant from the prohibited parts prior to submitting to the jury evidence of violation of a statute.¹¹¹ In 1979, Florida purposefully abandoned the federal definition and made a broader definition of cannabis that included stalks, stems, seeds and numerous derivatives, salts, oils, and cakes made therefrom.¹¹² The federal definition specifically excludes these components of the plant.¹¹³

The BIA took up this issue in the summer of 2019, in a decision acknowledging the dissonance between the definition and the facial over-inclusiveness of the Florida Statute. However, the BIA *still* did not rule in favor of the immigrant, instead requiring the immigrant to provide an exemplar prosecution under the Florida Statute that related solely to the non-federal cannabis material.¹¹⁴

This was a nifty piece of moving the goalposts, if not the football,¹¹⁵ by the BIA. It is, of course, self-evident that Florida intended to prosecute cannabis outside of the federal definition, as proven by the actions of the Florida legislature itself to change the definition, as illustrated by cases such as *Purifoy*, which showed the challenges of prosecuting under the old standard.¹¹⁶ Further, the Eleventh Circuit has held that this showing—that the State would prosecute conduct falling outside the federal definition of the crime—is unnecessary “when the statutory language itself, rather than ‘the application of legal imagination’ to that language, creates the ‘realistic probability’ that a state would apply the statute to conduct beyond the generic definition.”¹¹⁷ Again, the Attorney General and BIA certainly had space to resolve this question at *Chevron* “step one” but elected not to do so by noting the clear intent of the Florida legislature and applying *Ramos*. Instead, by taking this most restrictive approach to the cannabis definition, the DOJ has triggered broad implications, both in restrictive cannabis states like Florida and beyond. For example, in a state like Colorado, which legalized recreational cannabis and has a similarly worded, overbroad definition, historic (pre-legalization) cannabis convictions continue to trigger deportability under *Navarro*, creating disparate-seeming in-state consequences.

Other Offenses: Theft, Sexual Crimes, Driving Under the Influence

¹¹⁰ The federal substance is enumerated as follows:

(16) The term ‘marihuana’ means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*

21 U.S.C. § 802 (emphasis added).

¹¹¹ See *Purifoy*, 359 So. 2d at 449.

¹¹² Fla. Stat. § 893.02(3) (2020) (“Cannabis’ means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.”).

¹¹³ *United States v. Peraza*, 754 F. App’x 908, 910 n.2 (11th Cir. 2018). In addition to other distinctions, the Eleventh Circuit has accepted that among other materials, “Florida criminalizes the possession of hemp, but it is not against federal law to possess imported hemp.”

¹¹⁴ See *Matter of Navarro-Guadarrama*, 27 I. & N. Dec. 560 (B.I.A. 2019) (“Where an alien has been convicted of violating a State drug statute that includes a controlled substance that is not on the Federal controlled substances schedules, he or she must establish a realistic probability that the State would actually apply the language of the statute to prosecute conduct involving that substance in order to avoid the immigration consequences of such a conviction.”).

¹¹⁵ See, e.g., Eric Schulmiller, *All Your Life, Charlie Brown. All Your Life. The Complete History of Lucy’s Pulling the Football Away*, SLATE, October 8, 2014, <https://slate.com/culture/2014/10/the-history-of-lucys-pulling-the-football-away-from-charlie-brown-in-peanuts.html>, archived at <https://perma.cc/N4P3-DJER>.

¹¹⁶ See *Purifoy*, 359 So. 2d at 449.

¹¹⁷ See *id.* (citing *Ramos v. United States Att’y Gen.*, 709 F.3d 1066 (11th Cir. 2013)).

The author is conscious of devoting disproportionate space to the treatment of drug offenses, relative to other crimes, although it actually *is* somewhat proportional.¹¹⁸ However, of course, the Attorney General and the BIA also give attention to the *other* half of convictions, i.e., those not directly involving controlled substances.

Theft

In the lame duck months of the Obama administration, its DOJ expanded a decades-long definition of “theft” for purposes of categorization as a CIMT for immigration purposes, both in the inadmissibility and deportability contexts. Whereas since 1973,¹¹⁹ a state statute must have had a *mens rea* element requiring a “permanent taking” to trigger this immigration treatment, in a pair of cases in 2016, this definition was expanded to encompass the Model Penal Code definition of theft, which includes the lesser conduct of “substantial erosion” of the victim-owner’s property rights.¹²⁰ It is worth noting that some state theft offenses still can escape CIMT treatment, most notably Florida’s, based on its anomalous definition of theft which includes a “temporary or permanent” “deprivation” or “appropriation.”¹²¹ Florida offenses, in fact, *categorically* avoid the CIMT removal consequence because the *mens rea* element is considered “indivisible,” as a Florida jury, *en route* to conviction never distinguishes between “temporary or permanent” intentions to take (deprive) or use (appropriate).¹²²

The DOJ has tried, unsuccessfully, to apply the theories of *Diaz-Lizarraga* and *Obeya* retroactively.¹²³ With this effort thwarted by the United States Courts of Appeals, we now have an effective “grandfathering” of pre-2016 convictions under the former (*Grazley*) standard, for purposes of the CIMT context.¹²⁴ That has not deterred the DOJ from applying its new standard in harsh ways, including in the aggravated felony “theft offense” context, which also assigns the harshest immigration treatment to burglary and “stolen property” offenses which resulted in sentences of a year or more.¹²⁵ In considering a South Dakota offense, in which the elements of “receipt of stolen property” permit conviction where the defendant merely had “reason to believe” he or she received property that had been stolen, the BIA held that the *mens rea* was not quite culpable enough to trigger the explicit standard of “knowledge or belief.”¹²⁶

In contrast, the BIA has held that a “stolen property” offense need not relate to property that was actually “taken” in a manner that would constitute “theft” under the BIA’s own definition.¹²⁷ In other words, despite Florida’s theft offense being categorically overbroad and therefore failing to trigger a removal

¹¹⁸ See generally JENNIFER BRONSON, PH.D., & E. ANN CARSON, PH.D., PRISONERS IN 2017, U.S. DEP’T JUSTICE, OFF. JUSTICE PROGRAMS, BUREAU JUST. STATS. (April 2019) <https://www.bjs.gov/content/pub/pdf/p17.pdf>, archived at <https://perma.cc/YP6S-JQC2> (“Nearly half of federal prisoners were serving a sentence for a drug-trafficking offense at fiscal year-end 2017. Among sentenced prisoners under the jurisdiction of state correctional authorities on December 31, 2016, about 15% (190,100 prisoners) had been convicted of a drug offense as their most serious crime. A quarter (25%) of females serving time in state prison on December 31, 2016, had been convicted of a drug offense, compared to 14% of males.”).

¹¹⁹ See *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (B.I.A. 1973).

¹²⁰ *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (B.I.A. 2016).

¹²¹ See FLA. STAT. § 812.014 (2020); see also *Daniels v. State*, 587 So. 2d 460 (Fla. 1991) (illustrating the non-divisibility of the *mens rea* requirement). Per the Florida Standard Jury Instruction:

14.1 THEFT FLA. STAT. § 812.014 (2020)

To prove the crime of Theft, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) knowingly and unlawfully [obtained or used] [endeavored to obtain or to use] the (property alleged) of (victim).
2. [He] [She] did so with intent to, either temporarily or permanently,
 - a. deprive (victim) of [his] [her] right to the property or any benefit from it.
 - b. appropriate the property of (victim) to [his] [her] own use or to the use of any person not entitled to it.

¹²² *Daniels*, 587 So. 2d at 461-62.

¹²³ See *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018); see also *Monteon-Camargo v. Barr*, 918 F.3d 423 (5th Cir. 2019).

¹²⁴ See *id.*

¹²⁵ INA § 101(a)(43)(G); 8 U.S.C. § 1101(a)(43)(G).

¹²⁶ See *Matter of Deang*, 27 I. & N. Dec. 57 (B.I.A. 2017) (addressing S.D. CODIFIED LAWS § 32-4-5 (2020), receipt of a stolen motor vehicle).

¹²⁷ See *Matter of Alday-Dominguez*, 27 I. & N. Dec. 48 (B.I.A. 2017).

consequence, a *second* Florida defendant who “received” that same Florida property that was attained via a Florida “theft” could *still* be considered for aggravated felony treatment for receiving the property. In this instance, the BIA considered California Penal Code § 496(a), which also does not describe common law theft, but decided that that test was irrelevant to the separate test of whether one had received “stolen” property.¹²⁸

Sexual Offenses

This DOJ has also clarified some open questions in the realm of sexual offenses, concluding that an offense may be a “specified offense against a minor” even if it involved no minor at all, but an undercover police officer posing as a minor.¹²⁹ The BIA separately held that knowledge of a victim’s age is not necessary for a sexual offense with a young victim to constitute a CIMT.¹³⁰ The timing of this decision is interesting, as the Supreme Court of the United States decided *Esquivel-Quintana v. Sessions* in 2017, holding that the age of consent—and therefore the definition of “minor” for purposes of the aggravated felony of “sexual abuse of a minor”—is sixteen.¹³¹ Here, the moral culpability for such offense attaches in the absence of knowledge of the very thing that makes the act a crime—the age of the victim. Obviously, this loophole was left open by prior DOJ for that very reason, since a culpable mental state is the hallmark of a crime of moral turpitude. It bears noting that the BIA borrowed language from the Third Circuit regarding the community need to protect children, which “obviates the need to prove knowledge of the actual age of the victim at a criminal trial.”¹³² However, that offense considered there was “indecent assault,” an offense more egregious than the solicitation statute at issue before the BIA.¹³³

On the issue of solicitation, in 2018 the BIA took up the question of what is prostitution for the purposes of the aggravated felony definition.¹³⁴ Over a fairly vigorous dissent, the panel came to the conclusion that it should depart from its prior standard and broaden the definition of “prostitution” to include non-intercourse forms of sexual activity in exchange for something of value.¹³⁵ At issue was a Wisconsin statute criminalizing keeping a place of prostitution.¹³⁶ Although the BIA had previously defined “prostitution” for purposes of “inadmissibility”—and therein incorporated the standard from the Department of State and required an element of “intercourse” for the prostitution to qualify,¹³⁷—the BIA had not explicitly done so for purposes of the aggravated felony deportability ground for certain prostitution offenses related to prostitution-related businesses.¹³⁸ While it does make sense to follow *Esquivel-Quintana* and determine Congressional intent by canvassing the use of the term by the states in 1994, when the aggravated felony was added to the INA, this created a confusing result, where now the BIA is using the term differently in two different contexts, which is contrary to at least two rules - “whole act rule” and the

¹²⁸ See *id.*

¹²⁹ Matter of Izaguirre, 27 I. & N. Dec. 67 (B.I.A. 2017) (finding the convicted would-be immigrant ineligible for a visa under the grounds of the Adam Walsh Child Protection and Safety Act of 2006, which bars the immigration of individuals with disqualifying criminal pasts).

¹³⁰ See Matter of Jimenez-Cedillo, 27 I. & N. Dec. 1, 3 (B.I.A. 2017) (Accepting DHS’s arguments and holding that respondent’s offense “a categorical crime involving moral turpitude because all violations of the statutes necessarily involve either a very young victim—that is, a child under 14 years of age—or a substantial age difference between an adult perpetrator and a minor victim under the age of 16.”).

¹³¹ INA § 101(a)(43)(A), 8 U.S.C. § 1101 (2020); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1565 (2017).

¹³² See *Jimenez-Cedillo*, 27 I. & N. Dec. 1 at 5.

¹³³ See *id.*

¹³⁴ Matter of Ding, 27 I. & N. Dec. 295 (B.I.A. 2018).

¹³⁵ See *id.* at 297 (canvassing state jurisdictions utilizing broader definitions of qualifying sexual conduct for “prostitution” offenses).

¹³⁶ See *id.* at 295-296 (section 944.34(1) of the Wisconsin Statutes, which provides that “[w]hoever intentionally . . . [k]eeps a place of prostitution” is guilty of a felony. Wisconsin law defines a place of prostitution in section 939.22(24) as “any place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact for anything of value.”)

¹³⁷ Matter of Gonzalez-Zoquiapan, 24 I. & N. Dec. 549, 553 (B.I.A. 2008) (quoting 22 C.F.R. § 40.24(b) (2006), to define the term for purposes of inadmissibility, requiring intercourse).

¹³⁸ See INA § 101(a)(43)(F).

“presumption of consistent usage - of statutory interpretation, which forbids this very thing.¹³⁹ Further, in doing so, the BIA necessarily both held out a new definition and applied it to respondent Ding’s own case, which again, implicates retroactivity concerns, as discussed (with similar decisions rejected by the courts in the theft context).¹⁴⁰ Fundamentally, if Congress truly wished the term to be defined differently in two applications of the same statute, it would have needed to instruct as such.¹⁴¹

Finally, the uninitiated may be surprised to learn that the INA is silent regarding immigration consequences of driving while impaired. Alcoholism does arise in the context of “good moral character” for naturalization, and the INA bars such a showing by a “habitual drunkard.”¹⁴² By reference, the relief of cancellation of removal also requires “good moral character” (in stark contrast to the “prostitution” decisions) and actually does define the term the same way in these two contexts.

In typical immigrant scapegoating, much like the wild hyperbole of immigrant crime rates overall, political narratives focus on DUI’s committed by immigrants as a way of escalating enforcement, including in comments made by Trump and even state and local officials visiting the White House.¹⁴³ However, the conservative CATO institute—which has engaged in a deep study of the issue—finds no statistical impact of the undocumented population on overall DUI deaths.¹⁴⁴ The one reality for DUI is that it provokes difficult political discussions if a candidate wishes to address it with any degree of nuance.¹⁴⁵

However, DUI is not an element of any enumerated ground of inadmissibility or deportability. The last major appellate case addressing DUI-related conduct was in 2004, when the Supreme Court held that a Florida DUI offense lacked the necessary *mens rea* requirement to constitute a “crime of violence.”¹⁴⁶ Obviously, the “crime of violence” standard was not directly on point with the concerns of DUI, or substance abuse generally. Separately, a DUI can constitute a necessary misdemeanor or felony for purposes of barring eligibility for Temporary Protected Status¹⁴⁷ or Deferred Action for Childhood Arrivals,¹⁴⁸ but again DUI is not targeted specifically.

During the past few years the DOJ has made its move to fill this void. In early 2017, the *en banc* Ninth Circuit upheld a finding that an immigrant had failed to show good moral character required for cancellation of removal, in the case of a man whose long term daily consumption of a liter or more of tequila had contributed to liver failure and, relatedly, a conviction for driving under the influence of alcohol.¹⁴⁹ But that case really turned more on the factual standard of review of habitual drunkenness, a test that factually

¹³⁹ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW*, (2012), at 167, 170.

¹⁴⁰ See *Obeya*, 884 F.3d at 449-50.

¹⁴¹ See *Lopez*, 549 U.S. at 54. (quoting *Alice in Wonderland* to illustrate the absurdity of concluding otherwise).

¹⁴² INA § 101(f).

¹⁴³ See, e.g., Paul Cobler & Dianna Solis, *Tarrant County Sheriff calls migrants facing DUI charges ‘drunks’ who ‘will run over your children,’* THE DALLAS MORNING NEWS (Oct. 10, 2019), <https://www.dallasnews.com/news/politics/2019/10/10/tarrant-county-sheriff-calls-migrants-facing-dui-charges-drunks-who-will-run-over-your-children/>, archived at <https://perma.cc/8NKT-JKJ>; Tal Kopan & Maegan Vazquez, *Trump: ‘Disgraceful that a person illegally in our country’ killed Colts player in crash*, CNN (Feb. 6, 2018), <https://www.cnn.com/2018/02/06/politics/colts-drunk-driving-crash-undocumented-immigrant/index.html>, archived at <https://perma.cc/LAZ7-ZKTW>.

¹⁴⁴ Alex Rowrasteh & Andrew C. Forrester, *Do Illegal Immigrants Increase Drunk Driving Deaths?*, CATO INSTITUTE (Oct. 18, 2019), <https://www.cato.org/blog/do-illegal-immigrants-increase-drunk-driving-deaths>, archived at (“We find no statistical evidence to suggest that places with more illegal immigrants are more at risk for drunk driving deaths. Of course, there are individual instances to the contrary and those illegal immigrants who commit real crimes should be punished like everybody else, but their presence doesn’t seem to affect overall drunk driving deaths. Although our regressions results are correlative and not causal in nature, they suggest that illegal immigrants do not affect overall drunk driving deaths.”).

¹⁴⁵ See, e.g., Tim Pearce, *Joe Biden: ‘I don’t count drunk driving as a felony,’* WASHINGTON EXAMINER (Jan. 20, 2020), <https://www.washingtonexaminer.com/news/joe-biden-i-dont-count-drunk-driving-as-a-felony>, archived at <https://perma.cc/57B8-YZYS>; Talia Kaplan, *Tom Homan hits back at Biden for remark on illegal immigrants arrested for DUI: He’s ‘lost his mind’*, FOX NEWS (Jan. 22, 2020), <https://www.foxnews.com/media/tom-homan-joe-biden-illegal-immigrant-drunk-drivers>, archived at <https://perma.cc/57B8-YZYS>.

¹⁴⁶ See *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

¹⁴⁷ INA § 244(c)(2)(B) (barring eligibility in the case of otherwise qualifying individuals from designated countries with one felony or two or more misdemeanor convictions).

¹⁴⁸ Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>, archived at <https://perma.cc/RJ4J-FTA3> (barring such discretion in the case of otherwise qualifying individuals with one felony or three or more misdemeanor convictions).

¹⁴⁹ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042 (9th Cir. 2017).

was not surprisingly met, albeit under a deferential standard of review (rational basis) and over a dissent stressing the misapplication of the test.

Ledezma was a federal appeal of an unpublished BIA decision. Subsequently, the DOJ has issued two published decisions specifically addressing DUI. First, in the bond context, the BIA held that a DUI conviction was strong indicia of dangerousness, and a lack of dangerousness must be proven by an immigrant prior to the immigration judge even considering what bond amount was necessary to balance any risk of flight.¹⁵⁰ To quote, the BIA held that “[d]riving under the influence is a significant adverse consideration in determining whether an alien is a danger to the community in bond proceedings.”¹⁵¹ There, the BIA reversed a judge’s granting of a \$25,000 bond.¹⁵² Being as such reversals do not take place in a vacuum, and the judges are all subject to performance metrics based in part on reversal rates, *Siniauskis* will give judges further pause before granting any amount of bond in the case of a DUI conviction.

Also, in 2018, former Acting Attorney General Whitaker certified to himself the question of whether a DUI should serve as a bar to demonstrating the “good moral character” for cancellation of removal.¹⁵³ The certification was interesting in that it framed the question in the alternative—whether DUI convictions should serve as a *statutory* bar and/or whether such convictions should or could serve as a bar to the favorable exercise of discretion.¹⁵⁴ A year later, Attorney General Barr answered those questions in the positive, proclaiming that “[e]vidence of two or more convictions for driving under the influence during the relevant period establishes a presumption that an alien lacks good moral character under INA § 101(f),” and “presumptively establishes that discretionary relief should be denied.”¹⁵⁵ Curiously, perhaps the Attorney General resolved the question by considering “good moral character” generally, rather than through the “habitual drunkard” subtest. This perhaps makes sense in the most general sense, as the Attorney General cited numerous cases generally describing the heavy toll of drunk driving on communities, but ultimately Barr relied on a 1943 case to make his moral case.¹⁵⁶ This perhaps reflects the tension in trying to firmly proscribe truly destructive activity that is itself somewhat non-volitional. It is perhaps a step too far to describe this offense in moral terms. Of course, as Joe Biden recently learned, there is in fact moral outrage available in society to help scorn on a politician who might cut such an immigrant a break, given the right circumstances, but in the absence of *mens rea* to commit reprehensible acts, it is hard to describe DUI in moral terms.¹⁵⁷ Thus, the Attorney General hedged his bets by directing the presumption against discretionary relief for DUI offenders. Being as the “Attorney General may, in his discretion, cancel the removal” of otherwise qualified applicants, this direction on how to exercise the Attorney General’s discretion would seem much less assailable.

CONCLUSION

When I write, I often think of (and cite) the late Bill Stuntz, who wrote of the pathology of criminal law—as he saw it and eloquently described—in which American society constantly ratcheted up the number of crimes and the punishments for them. When a variation of an existing crime presented itself, this new boutique crime might be legislated and in the future so-charged in prosecutions, in addition to the former crime. In this scheme, exacerbated by the prevalence of plea bargaining, the justice system became

¹⁵⁰ Matter of Siniauskas, 27 I. & N. Dec. 207 (BIA 2018).

¹⁵¹ *Id.* at 209.

¹⁵² *Id.* at 207, 210 (“We recognize that the Immigration Judge set a significant bond of \$25,000, which he said ‘reflects the seriousness with which this court views the respondent’s repeated conduct.’ However, an Immigration Judge should only set a monetary bond if the respondent first establishes that he is not a danger to the community.”).

¹⁵³ Matter of Castillo-Perez, 27 I. & N. Dec. 495 (A.G. 2018) (Acting Attorney General Whittaker’s call for supplemental briefing).

¹⁵⁴ See *id.* (in call for participation of *amici curia* in supplemental briefing, framing DUI as having either – or both - statutory and discretionary dimensions).

¹⁵⁵ Matter of Castillo-Perez, 27 I. & N. Dec. 664 (A.G. 2019) (final decision by Attorney General Barr).

¹⁵⁶ See *id.* at 670 (“Multiple DUI convictions represent a repeated failure to meet the community’s moral standards, rather than a ‘single lapse’ that would be less probative of moral character. *Matter of B-*, 1 I. & N. Dec. 611, 612 (B.I.A. 1943)”).

¹⁵⁷ See *Ledezma-Cosino*, 857 F.3d at 1048-49.

predictable and quite transactional: defendants make deals and privately attempt to mitigate damage, rather than assert their rights at trial and make a more public case for justice before the judge or jury. In the current model, where 95% of convictions are achieved by plea, the judge is often relegated to a bystander on the central issues of guilt, innocence, and appropriate punishment.¹⁵⁸

Surely, in the immigration field, some predictability is useful as well. However, in the absence of an independent immigration court, and in the presence of a model where the Attorney General has a law enforcement and justice role, we enter dangerous territory when the Attorney General is closely involved in all aspects of the cases and continuously ratchets up the scope of removability in all aspects. Determining legal standards. Offering directives on the proper exercise of discretion. Denying full faith and credit to decisions of state courts.

To the extent that the Attorney General is empowered to interpret law and opine on discretion, this opens up a tremendous political volatility. In 2016, then-Circuit Judge Gorsuch further explained that proper checks and balances are compromised where the federal courts leave such questions of law and discretion to the executive of the moment:

The problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. . . . And it is a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.¹⁵⁹

So, beyond the presidential rhetoric and the cacophony of the most bombastic and visible policies, little mainstream attention has been given to the granular administration policies affecting actual criminal immigrants. Hopefully, for some readers, it is instructive to comprehensively examine the administration's actions through both some themed groups of agency case decisions. Beyond the rhetoric is a clear move toward enforcement via the nation's immigration courts. Removing docket management tools and imposing quotas means the million-case backlog is on an inexorable march to decisions, despite the constant swell of that very backlog. To practitioners—all defense counsel—the BIA has always seemed to tilt conservative, in part because unsettled legal issues always present an uphill venture, as an immigrant has never won a novel issue, until he or she does. But under current administration that uphill battle is more steep and certainly a more volatile climb.

With the benefit of three years of hindsight, I think it is fair to say that the skepticism of state criminal court decisions—on the merits, on sentencing, and on finality—is a major step against immigrants' due process rights. Pushing for removal of drug offenses without a *mens rea* requirement seems contrary to a neutral sense of justice, as does couching DUI offenses in “moral” terms to achieve a policy objective and score political points. Rejecting consistency in defining statutory terms—such as the definition of prostitution—seems counter to conservative interpretive norms. Interpreting theft statutes in ways to torture terms like “stolen” to make them internally inconsistent, seems again, to be the opposite of conservative statutory interpretation.

¹⁵⁸ Lindsey Devers, *Plea and Charge Bargaining*, Bureau of Justice Assistance, U.S. DEP'T OF JUSTICE (Jan. 24, 2011) <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf>, archived at <https://perma.cc/JR7G-NYRR> (According to the Bureau of Justice Statistics (2005), in 2003 there were 75,573 cases disposed of in federal district court by trial or plea. Of these, about 95 percent were disposed of by a guilty plea); John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RESEARCH CENTER (Jun. 11, 2019) <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>, archived at <https://perma.cc/T6SQ-WLB3> (“Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial. The overwhelming majority (90%) pleaded guilty instead, while the remaining 8% had their cases dismissed, according to a Pew Research Center analysis of data collected by the federal judiciary. Most defendants who *did* go to trial, meanwhile, were found guilty, either by a jury or judge. (Defendants can waive their right to a jury trial if they wish.) Put another way, only 320 of 79,704 total federal defendants – fewer than 1% – went to trial and won their cases, at least in the form of an acquittal, according to the Administrative Office of the U.S. Courts.”).

¹⁵⁹ Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

The author is conscious that an immigrant with a conviction is not a popular protagonist. But her immigration fate deserves consistent and thoughtful interpretation, not necessarily the bending of concepts by the DOJ to capture all in the deportation web. Which brings us back to the thesis of the article: beyond the rhetoric, how has this administration actually affected the legal removability of *actual* criminal immigrants? To paraphrase the money line in every presidential address of the joint congress: the state of the removal scheme is strong, and within the DOJ, getting stronger.