

LEGAL LIMBO AS SUBORDINATION: IMMIGRANTS, CASTE, AND THE PRECARIETY OF LIMINAL STATUS IN THE TRUMP ERA

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ABSTRACT

This Article describes the ways in which prolonged states of legal limbo have grown more precarious, and thereby subordinating, under the Trump administration. Liminal forms of status have long been a feature of U.S. immigration law. But under the Trump administration, legal limbo grew both in prevalence and precarity. Due to Trump's pursuit of an aggressive enforcement agenda, the legal system has become so overwhelmed that non-detained immigrants find themselves in protracted removal proceedings that routinely last for years. During this time, immigrants are consigned to a marginalized existence that harms their long-term ability to achieve social and economic mobility and integration. In this way, legal limbo has become increasingly tied to the creation and maintenance of a caste system in U.S. society.

This Article offers a new conceptual framework, the "spectrum of precarity," to analyze how and to what extent various types of liminal legal status in immigration law marginalize immigrants. Application of this spectrum to the states of limbo experienced by immigrants under the Obama and Trump administrations reveals very different approaches and outcomes. President Obama created liminal forms of legal status through specific policies and programs: administrative closure and the Deferred Action for Childhood Arrivals program (DACA). These efforts were explicitly designed to provide immigrants with a measure of social integration, along with protection from deportation. In contrast, immigrants in the Trump Era found themselves in limbo due to ballooning backlogs in the over-burdened legal immigration system. As a result, at the close of the Trump administration, immigrants with pending visas and asylum-seekers live in a state of prolonged uncertainty and fear that forces them into a marginalized existence in the shadows.

This state of affairs poses a challenge for removal defense attorneys of non-detained immigrants, and calls into question the due process framework

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that often serves as a guiding structure for advocates in the immigration system. Due process, with its focus on discrete legal events and its failure to pay sufficient attention to the passage of time, risks causing attorneys to become accomplices in the creation of caste. Instead, in the current dysfunctional and disempowering legal immigration system, removal defense attorneys must seek to counterbalance the marginalizing effects of legal limbo on their clients' daily lives and future trajectories through multi-faceted, interdisciplinary, and community-based models of lawyering.

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INTRODUCTION

It was March 16, 2020. Downtown Los Angeles was a ghost town. I drove into the heart of the city in record time, easily found parking, and walked through the eerily empty streets. It was only when I reached the federal building that houses the immigration court that I saw human beings: a line of people, mostly of color, with a few lawyers in suits, waiting to be wanded by security guards and permitted inside. There was no effort to keep people spread out from one another, and no visible warning or guidance regarding coronavirus.

Yet fear of the coronavirus had to be at the forefront of everyone's minds as they waited uncomfortably in line, passed through security, and rode elevators to one of many courtrooms in the vast federal building that houses Los Angeles' non-detained immigration courts. Mayor Garcetti had declared a local emergency on March 4; Disneyland had closed on March 12; President Trump had declared a national emergency on March 13.¹ That same day, the Los Angeles Unified School District, the second-largest school district in the country, had announced it would shut down.² The Centers for Disease Control issued guidelines against gatherings of fifty or more people, and the President advised against gatherings of more than ten.³

For the unlucky immigrants with hearings scheduled for that week, however, there was no indication from the Executive Office of Immigration Review (EOIR), the federal agency in charge of the immigration court system, that it planned to respond to the public health crisis. As a result, the immigration clinic I direct had been dutifully preparing for an asylum hearing on March 17. As the risk of attending the hearing became increasingly clear, we decided to request a continuance. Early in the morning on March 16—after numerous increasingly urgent calls from our clinic—the prosecuting attorney from Immigration and Customs Enforcement (ICE) agreed not to oppose a continuance in light of the public health concerns raised by bringing our clients, three law students, and several additional witnesses to court. Unable to connect with anyone in EOIR by phone, I carefully navigated my

1. EMERGENCY ORDERS, MEMORANDUM, AND FILES RELATED TO COVID-19 (Aug. 5, 2020, 3:00 PM), <https://www.lamayor.org/COVID19Orders>; CALMATTERS STAFF, TIMELINE: CALIFORNIA REACTS TO CORONAVIRUS (Apr. 1, 2020) [hereinafter *California Coronavirus Timeline*] <https://calmatters.org/health/coronavirus/2020/04/gavin-newsom-coronavirus-updates-timeline/> (last visited Aug. 5, 2020).

2. *Id.*

3. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

way through the building to the immigration clerk's office and filed our unopposed motion. Late in the day, the clerk confirmed that the judge had agreed to continue the case and reset for a new hearing date nearly a year later.

While it was a relief to avoid bringing the clients and students to the courtroom, the continuance did not feel like cause for celebration for two reasons. First, I could not shake the image of the many unlucky people in line outside the federal building with me that morning, most of whom did not have advocates by their side to insist that they minimize their time in the crowded space. The contrast between the deserted streets and the crowded lobby was a stunning encapsulation of the caste system in which we live in the United States, usually not so rankly on display. Second, while I knew that our clients would be relieved at having more time in this country before their hearing, this sensation of merely kicking the can down the road had become a familiar aspect of our docket that increasingly weighed on me.

In the months after my trip to the federal building, both these dynamics only grew more pronounced. On the one hand, immigrants, along with other low-income people of color, constitute a high proportion of essential workers, and are at heightened risk of infection by COVID-19.⁴ The crowd of immigrants in the federal building in an otherwise deserted city was just one concentrated moment in the racially stratified society that has come to typify our daily existence. Immigrants work as delivery drivers, farmworkers, grocery store workers, and in the healthcare industry,⁵ while much of the rest of society, predominantly white people, stay safely quarantined at home.

In this regard, like many, the pandemic has heightened the visibility of a preexisting social problem. In the Supreme Court's landmark *Plyler v. Doe* decision in 1982, the Court described immigrants without legal status as a "shadow population" that "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents."⁶ *Plyler's* holding that all children, regardless of immigration status, have equal access to education explicitly sought to resist this caste system.

Although this holding led to undeniably real social integration for undocumented immigrants, *Plyler's* equality-based reasoning has never extended beyond public education.⁷ Instead, in the decades since *Plyler*, numerous

4. Julia Gelatt, *Fact Sheet: Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*, MIGRATION POL'Y INST. (2020), <https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response>.

5. Donald Kerwin, Mike Nicholson, Daniela Alulema & Robert Warren, *U.S. Foreign-Born Essential Workers by Status and State, and the Global Pandemic*, CTR. FOR MIGRATION STUDIES (2020), <https://cmsny.org/wp-content/uploads/2020/05/US-Essential-Workers-Printable.pdf>.

6. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

7. Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1941 (2020) ("Plyler is perceived as an outlier, it has not led to other significant constitutional safeguards for undocumented immigrants based on

laws and policies at the federal level, as well as to varying degrees at the state and local level, have operated to further the creation of caste. Immigrants have been denied access to health care, public benefits, housing, and higher education.⁸ At the same time, they have been subject to surveillance and enforcement policies that create pervasive fear and insecurity in immigrant communities.⁹ It has become increasingly clear that *Plyler*'s provision of formal legal equality in the context of primary and secondary education cannot single-handedly counterbalance the many ways that immigrants are not granted equal opportunity in numerous other realms. As a result, there are many indications that the caste system the Supreme Court described in 1982 has only grown more pronounced in the years since *Plyler*, with immigrants systematically subordinated and limited in terms of social and economic mobility.¹⁰

The other aspect of that March morning that stayed with me—the extreme delay in our legal case—also grew more severe in the months since my visit. A few days after our hearing, the immigration court system for non-detained cases finally shut down, and it has yet to reopen in some parts of the country as this article goes to press. The extremely protracted nature of legal proceedings for immigrants was problematic before COVID-19, and dramatically worsened in the months since the pandemic began.¹¹

This Article describes how these two phenomena—the subordinated status of immigrants in U.S. society and protracted legal proceedings in the immigration system—are importantly connected. I argue that attorneys for immigrants in today's deeply dysfunctional immigration legal system must

their personhood.”); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 17 (2014) (“The basic principle in *Plyler*—forbidding different treatment of unauthorized migrants because of their immigration law status—remains contested, and as a matter of law it seems limited to the context in which it arose.”).

8. Motomura, *supra* note 7, 74–75 (summarizing state and local efforts to limit housing and employment based on immigration status); see also NAT'L IMMIGR. LAW CTR., UPDATE ON ACCESS TO HEALTH CARE FOR IMMIGRANTS AND THEIR FAMILIES (2020), <https://www.nilc.org/issues/health-care/update-on-access-to-health-care-for-immigrants-and-their-families/> (summarizing federal and state restrictions on immigrants' access to health care); Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561 (2019) (summarizing federal and state exclusions of immigrants from housing and higher education).

9. For a discussion of the subordinating effects of “cimmigration,” see Yolanda Vazquez, *Constructing Cimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 608 (2015); see also Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1382 (2019) (describing how the prison system has evolved to create a “second-class system of punishment for noncitizens”).

10. Indicators of the entrenched nature of immigrants' social status include the high rates of high school drop-out for foreign-born teens. See PEW RESEARCH CTR., THE HIGHER DROP-OUT RATE OF FOREIGN-BORN TEENS (2005), <https://www.pewresearch.org/hispanic/2005/11/01/the-higher-drop-out-rate-of-foreign-born-teens/>; see also Marie T. Mora & Alberto Dávila, *The Hispanic–White Wage Gap has Remained Wide and Relatively Steady*, ECON. POL'Y INST. (July 2, 2018), <https://files.epi.org/pdf/147311.pdf>; Isabel Wilkerson, *America's Enduring Caste System*, N.Y. TIMES MAGAZINE, July 1, 2020, at 26 (tracing the roots of caste in American society from slavery to present day).

11. JORGE LOWEREE, AARON REICHLIN-MELNICK & WALTER EWING, THE IMPACT OF COVID-19 ON NONCITIZENS AND ACROSS THE U.S. IMMIGRATION SYSTEM, AM. IMMIGR. COUNCIL (2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system>; *More Immigrants in Limbo as Government Shutdown Due to COVID-19 Leads to Widespread Immigration Court Hearing Cancellations*, TRAC IMMIGR. (June 4, 2020), <https://trac.syr.edu/immigration/reports/612/>.

grapple with the fact that the legal process itself is a potent method of subordination. My focus is specific to removal defense outside the context of immigration detention. When representing immigrants who are detained, the passage of time has different implications and dimensions that require a separate analysis. In this Article, I describe the unique challenges facing advocates for immigrant clients who are the “shadow population” described by the *Plyler* Court. For these lawyers, advocacy has become largely an exercise in placing one’s clients in prolonged states of legal limbo to fend off deportation by engaging in a protracted legal process in an overburdened system. Although lawyers tend to view the extended state of limbo as a victory of sorts against Trump’s aggressive efforts to speed up deportations, when the time in limbo is viewed through a wider lens its marginalizing effects complicate this advocacy’s implications.

The structural role of the removal defense lawyer in ensuring due process and resisting rapid deportation has been rightly celebrated. But the Trump administration’s corruption of an already dysfunctional legal process makes it increasingly hard to square due process in the immigration context with just outcomes. With its focus on specific legal events—immigration hearings, asylum interviews, appeals briefs—the due process framework averts attention from the crucial passage of time in between these events. As the time in limbo grows in length and precarity, it threatens to have implications for an individual’s long-term welfare just as significant as the legal case itself.

Many scholars have discussed legal limbo as a key aspect of our immigration legal system. The production of what some scholars have termed “legal liminality” has been a growing aspect of the immigration system for years, as well as the subject of numerous important analyses by both legal scholars and those in other disciplines.¹² It attracted particular attention during the Obama years, when, to contend with the growing population of undocumented immigrants and the absence of congressional immigration reform, the Administration shifted many immigrants into liminal forms of status to shelter them from deportation.

Yet, there has been little commentary to date on how the experience of legal limbo shifted under the Trump administration. Not all forms of legal limbo are equal. And while there are unquestionably disturbing consequences of legal limbo in all its forms, this Article argues there are uniquely disempowering aspects of limbo in the Trump Era worth identifying to allow the pernicious effects to be directly addressed. Identifying these differences also highlights the political significance of limbo as a form of status in and of itself, a dimension of limbo that has attracted little attention among immigration scholars and advocates.¹³ In order to create a working vocabulary for the

12. See discussion and citations *infra* Part I.

13. For a discussion of the political dimension of durational time, see ELIZABETH F. COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018). Although not

important intersection between limbo status and political power, this Article maps various forms of legal limbo on a “spectrum of precarity.” This spectrum illustrates why limbo due to legal backlogs, where the growth in liminal status occurred under the Trump administration, is at such a far end of the spectrum that it consigns those in limbo to an extremely limited life at the margins of society. In other words, limbo has become a key engine in the legal machinery that creates caste.

This reality raises hard questions for advocates in the system. On the one hand, the need to place clients in limbo is all the more pressing given the lack of other viable legal options for many clients. Yet greater recognition of the subordinating effects of limbo suggests that lawyers providing individual representation must conceive of their role differently, and create models of advocacy that more effectively counter the distressing growth of a societal structure in which immigrants are relegated to such a compromised state of social integration. If not, the legal work is of questionable value, given that years of marginalized status will make it difficult to overcome subordination even if and when clients do eventually obtain legal status.

The Article proceeds as follows. Part I provides an overview of states of limbo in the U.S. immigration system, and then offers a new conceptual framework, the “spectrum of precarity,” which lays out key factors that determine how and to what extent various types of legal limbo lead to subordination. Part II applies the spectrum of precarity to states of limbo in the Obama and Trump years, and contrasts how immigrants have experienced subordination through limbo to varying degrees under each presidential Administration. President Obama strategically employed forms of ambiguous legal status to shield certain undocumented immigrants from deportation—an explicit aspect of his targeted approach to immigration enforcement. Part II.A contrasts the two primary legal mechanisms the Obama administration used, administrative closure and Deferred Action for Childhood Arrivals (“DACA”). This contrast illustrates how and why different forms of legal limbo rank along the spectrum of precarity.

Rather than a strategic tool, ambiguous legal status under the Trump administration has been an indirect outcome of the President’s enforcement agenda. Part II.B describes how Trump’s ramped-up immigration enforcement has led to ballooning backlogs that have placed many immigrants in a different legal limbo. A close examination reveals that the experience of being in limbo because of the court backlog is not uniform. Unlike forms of liminal status like DACA, which has the same basic parameters for everyone, the experience of limbo due to protracted removal proceedings differs dramatically based on several factors. Fleshing out these factors is significant because they alter where the state of limbo lies on the spectrum of precarity. I

centrally focused on immigration, Cohen’s discussion of time as a political good uses the naturalization process as one example.

illustrate this by examining two groups of immigrants particularly likely to be in states of precarious legal limbo under the Trump administration: immigrants with pending visas and asylum-seekers.

In Part III of this Article, I offer four vignettes from my own practice to illustrate how the experience of legal limbo has shifted for immigrant clients under the Obama and Trump administrations. This shift raises new and difficult questions for immigration practitioners. Two cases involve clients during the Obama years who affirmatively opted for limbo through administrative closure and DACA because it allowed for greater social integration than continuing with their removal proceedings. The next two cases involve current clients whose cases began under the Trump administration, who “chose” limbo insofar as it became the only option to avoid rapid deportation. They experience a form of limbo with more disturbing marginalizing effects likely to limit their future trajectories.

Finally, Part IV considers what the foregoing analysis and examples of the spectrum of precarity suggest about legal advocacy for immigrants in states of limbo. On the one hand, there are undeniably real, tangible benefits to providing clients with the thin protection that results from participating in the protracted legal process towards immigration relief. These benefits can be substantial, including work authorization and removal of the prospect of imminent deportation.

But as I reflect on my clients’ lives in legal limbo during the Trump administration, it is clear that the legal advocacy I provide is often not transformative to the extent that I have wanted to believe. In my current work, focused primarily on young people just at the cusp of forging their futures here in the United States, it has been disheartening to see how many appear destined to remain in the low-wage workforce unless something beyond a long, protracted process to obtain legal status intervenes to disrupt this life path.

In the context of the subordinating legal process that currently constitutes our legal immigration system, I suggest legal advocates for non-detained immigrants shift away from the due process framework that so often animates the legal profession. Clearly, there is value in providing immigrants with representation in a legal process otherwise impossibly stacked against them. In the context of detained immigrants, where clients’ lives are completely circumscribed by their legal proceedings, the due process framework accurately captures the essential role the lawyer plays. But for non-detained clients—for whom the legal process routinely takes years and intersects with myriad aspects of daily life—the due process framework risks a limited understanding of the lawyer’s role that solely focuses on the discrete legal case. Instead, lawyers of non-detained immigrants should understand their role as a multifaceted effort to combat precarity along multiple dimensions. This requires advocacy that combines policy reform, holistic defense, and community lawyering. This ambitious, interdisciplinary form of practice reframes individual

legal representation so that lawyers do not become accomplices in the creation of caste, but instead contribute to a larger project of social justice.

I. LEGAL LIMBO AND SUBORDINATION

A. Overview

Since its earliest history, the U.S. immigration legal system has had pockets of ambiguity. Certain immigrants live in gray spaces, sometimes for prolonged periods of time, in states of uncertain legal immigration status.¹⁴ Other authors have cataloged the many different types of ambiguous legal statuses that have long been part of the U.S. immigration system. The authors refer to them by different terms, including “nonstatus,”¹⁵ “twilight status,”¹⁶ and “liminal legality.”¹⁷

For example, since at least the 1920s, the federal immigration agency, at that time known as the Immigration and Naturalization Service (INS), used parole to permit people to enter the country without any visa or administrative process. This practice did not even acquire a statutory basis until the 1950s. It has been used subsequently to permit countless individuals to reside in the United States without a durable form of legal status.¹⁸

Another executive action that confers a provisional, ambiguous form of status on its recipients is “temporary protected status” (TPS).¹⁹ There are hundreds of thousands of people who receive TPS, a designation that the federal government can make to permit certain nationals to stay in this country temporarily due to conditions in their home countries like civil war, natural disasters, or other extremely unsafe conditions.

Cecilia Menjívar was the first to apply the anthropological concept of “liminal legality” to the phenomenon of ambiguous legal status in immigrant communities. She applied it to her study of Salvadoran and Guatemalan immigrants with TPS in the United States. Menjívar noted that this legal form of protection from deportation requires frequent renewals and extended periods of uncertainty about whether status will continue.²⁰ Thus, while TPS might seem like a more official form of status than parole, its short duration and the uncertainty regarding its extension make it far different from legal

14. See Motomura, *supra* note 7, at 22–26 (describing the variety of forms of “gray areas” in legal status for immigrants).

15. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U.L. REV. 1115 (2015).

16. David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, MIGRATION POL’Y INST. 1, 4–5 (June 2005), <http://www.migrationpolicy.org/research/twilight-statuses-closer-examination-unauthorized-population>.

17. Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999 (2006).

18. Heeren, *supra* note 15, at 1135; see also Laura Murray-Tjan, “Conditional Admission” and Other Mysteries: *Setting the Record Straight on the “Admission” Status of Refugees and Asylees*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 37, 46 (2014).

19. 8 U.S.C. § 1254a(b)(1) (2018); see also MADELINE MESSICK & CLAIRE BERGERON, TEMPORARY PROTECTED STATUS IN THE UNITED STATES: A GRANT OF HUMANITARIAN RELIEF THAT IS LESS THAN PERMANENT, MIGRATION POL’Y INST. (2014), <https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

20. Menjívar, *supra* note 17, at 1015–16.

permanent residency or a nonimmigrant visa with a fixed end date and clear terms.

Another common and longstanding form of ambiguous status is that held by immigrants in the process of applying for legal permanent residency through a family member.²¹ Although highly likely to acquire permanent legal residency eventually, these immigrants are stuck in prolonged periods of waiting due to lengthy backlogs in the visa application system. Professor David Martin noted this form of “twilight status” over a decade ago. As discussed further in Part II. B, *infra*, “twilight status” has grown significantly in the years since Martin’s analysis. As active participants in a legal process to obtain immigration status, these immigrants differ in important ways from other undocumented people. And yet, they would formally be classified as undocumented because they have no durable, lasting form of status until they receive the visa.

Numerous scholars have analyzed how liminal forms of legal status operate to prevent immigrants from fully integrating and flourishing.²² Professor Coutin describes how uncertainty inherent in liminal legal status has wide-ranging, pernicious effects:

Such uncertainty can cause plans to be placed on hold, marriages or childbearing to be deferred, and individuals to live in a state of preparation. Uncertainty has been theorized as a form of social control, a suspension of time that places individuals in a different order of being, one in which individuals can neither advance nor return to their prior state. It also is associated with precarity in that this suspension of time and of rights impacts individuals’ abilities to work, obtain housing, pursue educational opportunities, and obtain healthcare. Psychologically and emotionally, uncertainty can be devastating.²³

Although all forms of limbo are limiting, however, the extent to which uncertain immigration status prevents integration and incorporation varies. Ambiguous forms of legal status are a product of ambivalence regarding the extent to which immigrants are and ought to be welcomed as full-fledged members of society. Thus, each of the forms of legal limbo already described—parole, TPS, and pending visas—evince varying degrees of willingness to integrate recipients into society. All three are meaningfully different from undocumented immigrants on the one hand and lawful permanent residents on the other. They are also different from one another. While parolees are typically granted permission to stay for a very short duration, TPS recipients are subject to regular renewal applications, and those with pending visas have a clear path to becoming lawful permanent residents in time.

21. Martin, *supra* note 16, at 4–5.

22. See, e.g., Menjivar, *supra* note 17; Leisy Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 U. DENVER L. & POL’Y 265, 279 (2015); Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 718 (2015).

23. Susan Bibler Coutin, “*Otro Mundo Es Posible*”: *Tempering the Power of Immigration Law Through Activism, Advocacy, and Action*, 67 BUFF. L. REV. 653, 660–61 (2019).

As bookends, on one side is Deportation, or banishment from the society altogether, and on the other, Citizenship. In between, the spectrum moves from left to right, from marginalization to greater integration. This movement occurs through multiple intersecting legal systems and factors, four of which are diagrammed. These four rows do not move in tandem, but rather catalog various factors that combine to determine, in varying combinations, where on the spectrum an individual's state of limbo lies.

1. **Agency with jurisdiction over the individual:** When agents of enforcement are tasked with determining who is permitted to remain in legal limbo, individuals will be far less integrated into the community than if bureaucrats tasked with implementing affirmative programs with humanitarian aims make these determinations.
2. **Transparency and durability of the limbo status:** When the provision of limbo occurs through a regular bureaucratic process that is predictable and transparent, a person has a greater sense of security than when limbo is obtained through an irregular, unpredictable, non-transparent process. Relatedly, when durable administrative rules and regulations create the limbo status, it is more secure than when it is obtained through administrative guidance, policies, or decisions that are subject to rapid reversal with little oversight.
3. **Nature of limbo status:** Those with more certainty regarding their future—specifically their susceptibility to deportation and their eventual ability to obtain residency for themselves and their family members—will have a greater capacity to fully engage as contributing community members without fear of adverse consequences. Further, the more a person in limbo can participate in mainstream society on equal footing to those with legal status—through lawful work, a driver's license, enrollment in higher education, access to health care, and other social support—the more the individual will be socially integrated. To the extent these forms of social participation are compromised, they will grow increasingly subordinated during the time in limbo.
4. **Status of removal proceedings:** The closer on the spectrum an immigrant is to deportation, the more their sense of precarity will relegate them to the most marginalized sector of society.

The degree to which limbo operates to subordinate lessens as one moves from the left to the right side of the spectrum. The multiple intersecting legal and social factors track what we know about subordination and the creation of caste. It is not the product of a single legal determination, but rather, created when a group faces social and legal obstacles in multiple facets of

society. As Cass Sunstein describes it in the context of racial caste in the United States, the term encompasses not a “genuine caste system,” but a society in which a group is systematically subordinated by social and legal practices “in multiple spheres and along multiple indices of social welfare: poverty, education, political power, employment, susceptibility to violence and crime, distribution of labor within the family, and so forth.”²⁵

Sunstein’s analysis of racial caste serves as an important reminder of the limited scope of this Article’s proposed analytic framework, which does not purport to capture the complex factors above and beyond legal status that contribute to the creation of caste. Importantly, the proposed spectrum does not capture the intersectional nature of subordination, and in particular, the ways in which legal status intersects with and compounds the racism that pervades our social fabric.²⁶ Thus, the fact that legal citizenship is at the far end of the spectrum does not indicate that citizenship in and of itself provides for social inclusion and security on equal terms with white Americans. Subordination occurs through harms including racial profiling, incarceration, and detention—all of which impact communities of color with members who are both citizens and noncitizens.²⁷ The spectrum detailed here focuses on legal status as one crucial but not exclusive factor in the journey, at both the individual and group level, towards greater social integration and equality.

With these limits in mind, the spectrum of precarity offers a method to analyze many forms of limbo within the legal immigration system. Legal permanent residency is, in itself, a form of limbo, in that it is more precarious than citizenship and requires a period of waiting prior to obtaining the “full security” of citizenship.²⁸ The focus of this Article, however, is on immigrants in removal proceedings. It is here that the spectrum of precarity provides a particularly useful tool to tease out why various forms of limbo are more or less subordinating. As the two levels in the fourth row in Figure 1 diagram, immigrants in limbo can be in removal proceedings (the top row) or not in proceedings (the bottom row). An imminent hearing will create a much more tenuous presence than a far-off hearing for those in removal proceedings. Both will be more destabilizing than removal proceedings that have been

25. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429–30 (1994); see also Owen Fiss, *The Accumulation of Disadvantages*, 106 CAL. L. REV. 1945 (2018) (noting that subjugation of a group occurs when individuals are systematically unable to access high-quality education, jobs, health care, and housing). These variables operate all the more potently for a group like immigrants, the majority of whom lack voting rights or political power.

26. See Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (describing how naturalization—the process of “becoming American”—is steeped in race, both as a social and legal matter).

27. See e.g., Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1 (2018) (discussing the limits of citizenship in the context of immigrant communities); Leisy J. Abrego, *Relational Legal Consciousness of U.S. Citizenship: Privilege, Responsibility, Guilt, and Love in Latino Mixed-Status Families*, 53 LAW & SOC’Y REV. 641, 645 (2019) (same).

28. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (in-depth examination of the varying meanings of limbo for legal permanent residents throughout U.S. history).

closed or terminated (as discussed further in Part II *infra*). For immigrants in limbo but not currently in removal proceedings, the degree of precarity depends on the likelihood that proceedings could be initiated at any given time.

All this comes into sharper focus by applying the spectrum of precarity to the evolution of legal limbo in the immigration system during the last two presidential Administrations. The nature and prevalence of certain types of ambiguous status have changed over the last decade in ways that reflect the ever-deepening social discord and ambivalence about the role of immigrants in U.S. society. Unsurprisingly, under the Trump administration, the growth of states of legal limbo generally shifted towards the more precarious, less integrated end of the spectrum. Yet as the next Section makes clear, the growth in legal limbo under Obama was not a straightforward story of movement towards integration.

II. CONTRASTING EXPERIENCES OF LEGAL LIMBO AND SUBORDINATION

For immigrants in the Obama years, the active solicitation of forms of legal limbo became an increasingly common practice. Although there were clear downsides to the provisional nature of limbo status, it was widely viewed by immigrants and their advocates as more desirable than undocumented status. As the Obama administration progressed, it created more robust forms of limbo status, and it became increasingly clear that immigrants could obtain a degree of social integration that was meaningfully distinct from the subordinated life of an undocumented resident. In contrast, during the Trump years, legal limbo grew in non-transparent ways, leaving recipients in such precarious circumstances that they may be worse off than undocumented immigrants without any form of status, ambiguous or otherwise. While living completely in the shadows is inherently socially marginalizing, the precarity of legal limbo under the Trump administration became so extreme that it had the capacity to result in even greater subordination than undocumented status itself.

A. *The Obama Era: States of Limbo through Prosecutorial Discretion*

During the Obama years, the number of immigrants living in gray areas within the immigration system increased. Professor Jennifer Chacón has analyzed this growth as a byproduct of the paralysis experienced by the legislative branch with regard to immigration reform. Despite the strong equitable and economic reasons that make deportation of large portions of the undocumented population both unlikely and undesirable, Congress was unable to act. As a result, Obama “increasingly relied on a number of discretionary mechanisms short of legalization to normalize the status of migrants who might otherwise face long-term exclusion because of their periods of unauthorized residence.”²⁹ These discretionary actions led to “the proliferation of

29. Chacón, *supra* note 27, at 19.

liminal and twilight statuses” that allowed “long-term residents lacking legal immigration status . . . to remain in the country by executive designation.”³⁰

Thus, under Obama, more than his predecessors, ambiguous forms of status grew through large-scale executive programs explicitly intended to create such ambiguity. These programs were implemented in two waves, with approaches that differed in important ways. Of particular significance, the programs had different institutional homes within the immigration bureaucracy. The first wave consisted of efforts situated within the enforcement arm: both Immigration and Customs Enforcement (ICE), the agency charged with enforcement and removal, and the Executive Office of Immigration Review (EOIR), the agency responsible for running the immigration court system. The Obama administration sought to boost enforcement in a targeted manner that would allow for prioritization of certain immigrants for removal (criminals and recent arrivals), while shielding sympathetic classes of immigrants (childhood arrivals) by placing them in gray areas, particularly “administrative closure” (described below). The second wave shifted efforts to the agency charged with affirmative benefits and humanitarian visas, U.S. Citizenship and Immigration Services (USCIS), and created the most robust form of liminal status to date, the DACA program.

1. *Limbo through Administrative Closure*

A key piece of the Obama administration’s immigration agenda was the prioritization of enforcement resources. Early in his Administration, Obama faced mounting evidence of the harmful impact that aggressive immigration enforcement, particularly through programs partnering with local law enforcement, was having on sympathetic undocumented immigrants who were not the “criminal aliens” purported to be the programs’ targets.³¹ When Congress failed to pass the Development, Relief, and Education for Alien Minors (DREAM) Act in 2010, which would have granted legal status to young people who were brought illegally to the country as children, pressure increased to halt the deportation of those who would have been DREAM-eligible students.³²

To accomplish a more targeted approach to enforcement, the Department of Homeland Security (DHS) instructed ICE prosecutors to administratively close cases that were classified as low priorities for removal.³³ Although the

30. *Id.*

31. Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 231 (2014).

32. Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J., Oct. 15, 2012, at A2.

33. See Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J. FORUM 567, 574 (2020) (citing and discussing Memorandum from Riah Ramlogan, Acting Principal Legal Advisor); see also IMMIGRATION & CUSTOMS ENF’T, TO OFFICE OF THE PRINCIPAL LEGAL ADVISOR ATTORNEYS 2 (2015), https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf (directing ICE attorneys to “generally seek administrative closure or dismissal of cases [DHS] determines are not priorities”); see also Memorandum from Peter S. Vincent, Principal Legal Advisor, Immigration & Customs Enf’t, to All Chief Counsel, Office of the Principal Legal

agency was initially reluctant to do so, by 2016, they averaged 2,400 administrative closures per month.³⁴ As Geoffrey Heeren has described, the use of administrative closure is a prime example of legal limbo in the immigration system.³⁵ Undocumented immigrants' removal cases are closed, but they are not permanently removed from the immigration court docket. As a result, these individuals are no longer at risk of deportation so long as their case remains closed. But ICE can reopen cases at any time and end the temporary reprieve. Immigration courts also increasingly granted administrative closure throughout the Obama administration, from over 32,000 closures in 2013 to over 50,000 in 2016.³⁶

On the spectrum of precarity, immigrants with administratively closed cases are better off than immigrants with open removal cases, but are still on the precarious end of the spectrum. They are not at imminent risk of removal, but have no form of status that allows them to engage on equal footing with other community members. Furthermore, this approach lacks transparency and predictability. Obama tried to improve transparency by providing a clear articulation of who would be considered for administrative closure in internal guidance memos to ICE.³⁷ Despite these efforts, however, there was very little predictability as to how long the status might last, and no mechanism to apply for work authorization or public benefits programs based on it.

One subset of people in removal proceedings were closer to the secure side of the precarity spectrum during the Obama years: applicants for a form of immigration relief called "cancellation of removal and adjustment of status for certain nonpermanent residents," known as "non-LPR cancellation" by immigration practitioners.³⁸ For many long-time U.S. undocumented residents, non-LPR cancellation is the only viable path to legal status. It allows an immigration judge to cancel their deportation if they meet certain eligibility requirements and the judge decides to exercise discretion in their favor. If granted, the applicant receives legal permanent residency.

To be eligible, the immigrant must have lived in the U.S. continuously for at least ten years, must show they are a person of good moral character, and, most difficult of all, must show that their deportation would result in "exceptional or extremely unusual hardship" to the applicant's spouse, parent, or child who is a U.S. citizen or lawful permanent resident.³⁹ Congress

Advisor, Exec. Office for Immigration Review (Nov. 17, 2011) [hereinafter ICE Prosecutorial Discretion Memos], <https://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>.

34. RANDY CAPPS, MUZAFFAR CHISHTI, JULIA GELATT, JESSICA BOLTER & ARIEL G. RUIZ SOTO, *REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT UNDER TRUMP AND THE PUSHBACK, MIGRATION POL'Y INST.* (2018) [hereinafter MPI Revving Up the Deportation Machinery], <https://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback>.

35. Heeren, *supra* note 15, at 1157.

36. EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FY 2017 STATISTICS YEARBOOK 15, Fig. 9 (2017), <https://www.justice.gov/eoir/page/file/1107056/download>.

37. See ICE Prosecutorial Discretion Memos, *supra* note 33.

38. Immigration and Nationality Act § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2018).

39. Immigration and Nationality Act § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (2018).

established this form of relief from deportation in 1996 to narrow the availability of the previous, similar form of discretionary relief, called “suspension of deportation.”⁴⁰ In addition to making the requirements significantly more difficult to meet, Congress also established a statutory cap of 4,000 grants of non-LPR cancellation per year.⁴¹ In 2010, the number of approved applicants hit the statutory cap for the first time, and a backlog has grown ever since.⁴² As a result, applicants for cancellation of removal face years of waiting for a visa to become available even if a judge is inclined to issue a discretionary grant.

Importantly, during this waiting period, the applicant for non-LPR cancellation can receive work authorization.⁴³ During the Obama administration, many immigrants applied for non-LPR cancellation of removal, received work authorization pursuant to the pending application, and then the immigration system—both DHS attorneys and the courts—agreed to administratively close their cases.⁴⁴ Thus, these immigrants were meaningfully closer to the security side on the precarity spectrum than those without work authorization, whose proceedings were closed.

Yet work authorization is only one factor, and many other factors continued to create precarity, especially the lack of predictability regarding the future. This was particularly disconcerting given that immigrants’ fates lay in the hands of the enforcement arm of the immigration bureaucracy. Limbo based on administrative closure means ICE agents can decide to reopen removal proceedings at any time.

2. *Limbo through DACA*

In the latter years of the Obama administration, the effort to implement the President’s enforcement priorities shifted to the agency charged with affirmative benefits and admissions, USCIS, which was charged with implementing the DACA program. Created by the Obama administration in 2012, DACA provided a form of executive reprieve from deportation to young people who had arrived in this country as children.⁴⁵ Like TPS, DACA requires frequent renewals, resulting in ongoing uncertainty about the recipient’s long-term prospects in this country.⁴⁶ At the same time, DACA allows for a certain level of societal integration, particularly because recipients can access work

40. Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 530 (2015).

41. Immigration and Nationality Act § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (2018).

42. Taylor, *supra* note 40, at 541–42.

43. *Id.* at 527.

44. MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 6:30 (2019) (“As of November 2016, the EOIR reported that 40,895 cancellation cases and suspension cases were awaiting decision. . .”).

45. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901–02 (2020) [hereinafter *DHS v. Regents*] (summarizing the history of the creation of the program).

46. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 718 (2015).

authorization and have a government reprieve from deportation for a stated, fixed time period.

Notably, Obama implemented both administrative closure and DACA through administrative guidance documents that were not subject to notice-and-comment rulemaking. Several states challenged DACA's legality on this basis, which heightened the precarity of DACA recipients' lives for years while the case was pending before the Supreme Court.⁴⁷ This prolonged litigation demonstrates how the durability and transparency of the administrative mechanism selected to implement limbo status—row 2 in the spectrum of precarity in Figure 1—operates.⁴⁸

Eventually, however, the Supreme Court upheld the DACA program in *Dep't of Homeland Sec. v. Regents of the Univ. of California*.⁴⁹ Its analysis rested on the transparent, regular process created by DACA, as well as its substantive benefits—particularly access to work authorization. The reasoning highlights the difference between limbo created by ICE agents when granting “administrative closure” and limbo created by USCIS when granting “deferred action” in the form of DACA. The *Regents* court emphasized that DACA “created a program for conferring affirmative immigration relief” as opposed to simply “a passive non-enforcement policy.”⁵⁰ The Court's analysis emphasizes how DACA allows for a form of status closer to social integration than does administrative closure.

Despite these distinctions, DACA, like administrative closure, is a form of limbo that poses significant hurdles to full social integration for its recipients. In fact, in her analysis of liminality under the Obama administration, Chacón described DACA as a prime example. She explained, “The temporal uncertainty of core legal protections stands at the center of the experience of liminal legality.”⁵¹ In the case of DACA, Chacón emphasized that the reprieve's short duration, only two years, and lack of clarity about what the future holds after the reprieve expires means this state of limbo continuously places its recipients in a subordinated position in society. This is furthered by the fact that DACA recipients face many limits on obtaining state and federal benefits.⁵²

Another important factor that has limited the extent to which DACA moves its recipients towards full societal membership is its inability to confer

47. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1901–02.

48. See Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 *YALE L.J.* 2122 (2019) (discussing the significance of the Obama administration's use of informal administrative mechanisms rather than notice-and-comment rulemaking, and specifically examining the case of DACA).

49. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1901–02.

50. *Id.* at 1906.

51. Chacón, *supra* note 46, at 723.

52. See Laura E. Enriquez, Martha Morales Hernandez, Daniel Millán & Daisy Vazquez Vera, *Mediating Illegality: Federal, State, and Institutional Policies in the Educational Experiences of Undocumented College Students*, 44 *LAW & SOC. INQUIRY* 679, 683 (2019) (describing the ways local, state, and federal policies can provide more or less opportunities for integration by DACA recipients).

family stability. Nearly by definition, DACA recipients are part of mixed-status families; the vast majority have undocumented parents who cannot obtain DACA or a comparable form of legal status. This is a crucial factor on the precarity spectrum. Many advocates and researchers have shown how undocumented family members' uncertainty and vulnerability impact the well-being of family members who have legal status.⁵³

The spectrum of precarity brings into focus both the limitations of a program like DACA and its benefits. From its initial rollout, DACA's proponents have viewed it as a necessary but insufficient step towards integrating immigrants into the community. Obama's decision to implement DACA was rightly seen as a more socially beneficial method to achieve his enforcement priorities than through administrative closure. DACA recipients have flourished in many ways, yet they also contend with serious obstacles to full social equality. The shift in the experience of liminality for immigrants, including DACA recipients, under the Trump administration illustrates how the degree to which limbo is empowering versus oppressive is a multi-faceted analysis.

B. *The Trump Era: States of Limbo through Backlogs*

Under the Trump administration, ambiguous forms of status continued to grow, but not in the transparent manner that occurred under Obama. Trump did not explicitly seek to expand gray areas in the immigration system. On the contrary, his rhetoric and overt policy goals were aimed relentlessly at deportation, the ultimate definitive act that ends ambiguity in the immigration system. However, in the face of ongoing legislative paralysis, limited resources, and the brake in the system created by legal process, one form of legal limbo ballooned: the population of immigrants awaiting their hearings in removal proceedings. Immigration court backlogs have been a problem in the immigration system for many years, but the increase during the Trump years has been staggering. Whereas in 2015, 456,216 cases were pending in the immigration court system, as of June 2020, there were 1,218,737.⁵⁴

The short explanation for this is straightforward: Trump rapidly increased the number of people in removal proceedings without expanding in equal measure an already overburdened court system. The result is long delays in removal. Data support this straightforward account. The number of removal proceedings initiated by the Trump administration each year grew far larger than under Obama, from a low of just under 200,000 in 2015 to a high of over

53. See, e.g., Abrego, *supra* note 27, at 665; Chacón, *Citizenship Matters*, *supra* note 27, at 42 ("Moreover fear of family separation persisted since most DACA recipients have close family members who were out of status and not covered by deferred action programs.") (citing Joanna Dreby, *The Burden of Deportation on Children of Mexican Immigrant Families*, 74 J. MARRIAGE & FAM. 829, 829 (2012)); Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in A Border County*, 47 J.L. & EDUC. 1 (2018).

54. *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Aug. 5, 2020).

650,000 in 2019.⁵⁵ Increases were especially dramatic at the border⁵⁶ but also occurred in the interior of the country.⁵⁷ Yet, despite the enforcement surge, there was not a marked increase in actual deportations. In fact, the number of removals under Trump never reached the height of the Obama administration when the government deported over 400,000 in 2012.⁵⁸ Under Trump, DHS deported over 260,000 in 2019,⁵⁹ an increase from the 230,000 removals at the end of the Obama administration in 2015, but nowhere near the all-time high of deportations under Obama.⁶⁰ Instead, the increase in initiated removal cases led to a ballooning of cases pending in the immigration court system.

Yet this straightforward account is not the full story. Although it is true that far fewer removals occurred than were initiated under Trump, his Administration's relentless efforts to speed up the deportation machinery had pernicious effects not captured by the statistics on total deportations. Whether an intended consequence or a side effect, the many aggressive measures undertaken by the Trump administration to ramp up enforcement created a huge population of people at the far end of the precarity spectrum. These people await removal hearings in a prolonged state of limbo that is deeply limiting and oppressive. The next two Sections describe how this operates for two key groups of immigrants who were already commonly in limbo due to legal backlogs, but face a substantially more disempowering experience due to Trump administration policies: immigrants with pending visas and asylum-seekers.

1. *Limbo for Applicants with Pending Visas*

As noted previously, pending visa applications have long been considered one of the quintessential forms of legal limbo or "twilight status" in our immigration system. Separate and apart from Trump's enforcement surge, these gray areas in the immigration system have continued to grow due to an ever-increasing undocumented population and inflexible statutory framework.

55. *New Deportation Proceedings Filed in Immigration Court*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last visited Aug. 5, 2020).

56. John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed under Trump*, PEW RES. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/>.

57. *Id.*; see also *Tracking Over 2 Million ICE Arrests: A First Look*, TRAC IMMIGR. (Sept. 25, 2018), <https://trac.syr.edu/immigration/reports/529/> ("ICE interior arrests overall are up as compared to the last two years of the Obama administration after implementation of the Priority Enforcement Program (PEP) that focused arrests on the most serious criminals and recent illegal border crossers. However, current ICE arrests remain only half the levels of five years ago when Secure Communities held sway under President Obama.").

58. *Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGR. (Sept. 25, 2018) [hereinafter *TRAC Latest Data on ICE Removals*], <https://trac.syr.edu/phptools/immigration/remove/>.

59. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>. Deportations dropped to 185,884 in 2020, a drop due in large part to the coronavirus pandemic. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2020), <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf>.

60. *TRAC Latest Data on ICE Removals*, *supra* note 58.

Statutory caps on visas are wildly out of line with the number of people in the system. Two shifts occurred under Trump that accelerated these dynamics: first, the wait times for visas grew even more protracted due to growing dysfunction and shifts in the agency that handles affirmative applications. Second, and even more importantly, the interaction between an affirmative visa application and removal proceedings became far more fraught, causing much more precarity for immigrants who await their visas.

This Section describes the protracted process for three particularly common types of visa applications: family-based visas, U visas, and visas based on Special Immigrant Juvenile Status. It then describes how and why the Trump administration's enforcement policies greatly exacerbated the subordination experienced for these three types of visa applicants due to the interaction between their pending visas and impending removal proceedings.

To begin with family-based visas, the lengthy wait times endured by immigrants seeking to obtain a visa through a U.S. citizen or legal permanent resident relative has been widely noted.⁶¹ Even before the Trump administration, certain categories of family relationships faced delays of a decade or even longer. The origins of this backlog go back to the 1965 Immigration Act, which established a system for immigrant admissions that provided for equal numerical caps for all countries.⁶² At the time, these statutory caps were viewed as a victory for progressive change in the immigration system, because they replaced a system of numerical quotas based on national origin that had served to preserve racist preferences about the composition of the United States. By the 1960s, public outcry about the racism inherent in this system grew and culminated in the shift in 1965 to per-country caps.⁶³

Yet, despite the roots of this system in principles of equality, the results have been profoundly unequal, particularly for immigrants from certain countries, who, due to historical migration patterns and geographic proximity, live in the U.S. in far greater numbers than immigrants from other countries. For family members from some countries, including Mexico and the Philippines, these caps have created extreme waiting times compared to applicants from other countries where there is little wait time. For example, as of June 2020, unmarried sons or daughters of U.S. citizens from Mexico face a wait of over twenty years for their visa to become available, compared to a six-year wait for applicants from most other countries.⁶⁴

61. See, e.g., David J. Bier, *Immigration Wait Times from Quotas Have Doubled: Green Card Backlogs Are Long, Growing, and Inequitable*, CATO INST. 7 (June 18, 2019), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-873-updated.pdf>; WILLIAM A. KANDEL, CONG. RES. SERVS., U.S. FAMILY-BASED IMMIGR. POLICY (2018), <https://crsreports.congress.gov/product/pdf/R/R43145/12>

62. For a discussion of this history, see Motomura, *supra* note 7, at 43; see also 8 U.S.C. § 1152(a)(2) (2018) (setting total number of immigrant visas available to each country to 7 percent of total).

63. Motomura, *supra* note 7, at 43.

64. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., VISA BULLETIN FOR JUNE 2020, (2020), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-june-2020.html>.

The visa application system proceeds in a two-step manner that exacerbates the legal limbo for applicants.⁶⁵ U.S. citizens or legal permanent residents first petition for eligible family members with a visa application adjudicated by USCIS.⁶⁶ It is only after USCIS approves the visa that the beneficiary of a family-based petition can apply for “adjustment of status” — the term in immigration law for the application for lawful permanent residency, or what is known colloquially as a “green card.”⁶⁷ Thus, there are two distinct phases to the time in limbo: in the first phase, the applicant must wait for initial approval of the visa application; then, in the second phase, the applicant waits for the visa itself to become available, which depends on whether the annual cap has already been reached for any given year. For immigrants from countries where the applications surpass the annual quota, this second stage grows longer each year, as the statutory cap is filled by applicants waiting from years back. Since 1991, when the current quotas went into effect, the time visa beneficiaries spend waiting for a green card to become available has doubled. It has reached extreme lengths for immigrants from countries with high demand.⁶⁸

A similar story plays out in the context of applications for U visas, which are a special category of visas available to victims of serious crimes in the United States. When Congress created the visa in 2000, it imposed a cap of 10,000 U visas per year. This statutory cap was surpassed in 2008 and every year since, resulting in a waitlist that grows exponentially every year.⁶⁹ In 2008, Congress foresaw the problem the backlog would create, and attempted to address it by providing authority for a grant of “deferred action” and work authorization for immigrants with bona fide applications pending.⁷⁰ However, even the wait for these grants of deferred action is subject to delays of multiple years, resulting in an estimated total wait time spanning over a decade from submission to final grant of a U visa.⁷¹

A final common type of backlogged visa is that of applicants for Special Immigrant Juvenile Status (SIJS). Originally enacted by Congress in 1990 to

65. *In re Hashmi*, 24 I. & N. Dec. 785, 789 (B.I.A. 2009) (describing the two-step process), citing 8 U.S.C. § 1255(a)(3).

66. The average wait time for USCIS adjudication is eight to ten months. See Bier, *supra* note 61, at 3.

67. *How to Apply for a Green Card*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/how-to-apply-for-a-green-card> (last accessed Mar. 30, 2021).

68. Bier, *supra* note 61, at 3.

69. *USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS., (Dec. 11, 2014), <https://www.uscis.gov/archive/archive-news/uscis-approves-10000-u-visas-6th-straight-fiscal-year> (last accessed Aug. 5, 2020); see also Jason A. Cade & Mary Honeychurch, *Restoring the Statutory Safety-Valve for Immigrant Crime Victims: Premium Processing for Interim U Visa Benefits*, 113 NW. U.L. REV. ONLINE 120, 121–22 (J2019); AM. IMMIGR. LAW. ASS’N., USCIS RELEASES REP. ON U VISA FILING TRENDS (2020), <https://www.aiala.org/infonet/uscis-releases-report-on-u-visa-filing-trends>.

70. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008) (codified as amended at 8 U.S.C. § 1184(p)(6) (2018)); see also Cade & Honeychurch, *supra* note 69, at 122.

71. Cade & Honeychurch, *supra* note 69, at 137.

provide a remedy for undocumented foster youth,⁷² SIJS substantially expanded in 2008 beyond foster care to include any children unable to reunify with either one or both parents due to abuse, abandonment, or neglect.⁷³ Importantly for this Article's purposes, the SIJS pathway to permanent residency consists of the same two-step process as in the context of family-based visa petitions: first, the applicant must obtain a visa approval from USCIS; second, he or she can apply for adjustment of status, in order to become a lawful permanent resident.

Oddly, the SIJS visa is classified as an employment-based visa of a type in a different category than family-based visas. It appears from the legislative history that there was little reason for this, other than the fact that these young people are "special immigrants" and did not fit clearly into another visa category.⁷⁴ The overall cap for their employment-based visa type has yet to be filled, but the per-country caps, as in the family-based context, are filled to varying degrees because they are fixed and cannot be adjusted based on demand. Beginning in 2016, Central American countries hit the caps as the surge in numbers of young people fleeing violence from 2014 resulted in an influx of SIJS applications.⁷⁵ By 2020, the wait time had grown to at least three years for SIJS applicants from El Salvador, Guatemala, and Honduras to receive a visa.⁷⁶ These young people already have approved petitions and are solely waiting for their "priority date" to become current.

Thus, in all three visa contexts, family-based visas, U visas, and SIJS applications, backlogs have been growing due to years of congressional failure to adjust fixed statutory caps. As a result, many immigrants with pending visas were already in a state of limbo under Obama, but their experience of limbo markedly shifted under Trump. While they continued to face ever-increasing backlogs in the visa system, many immigrants with pending visa applications now found themselves far closer to the deportation end of the precarity spectrum as they waited for their visas. This is because of two types of change: the length and nature of the waiting period.

72. Amy Joseph, Amy Pont & Cristina Romero, *Consent Is Not Discretion: The Evolution of SIJS and the Consent Function*, 34 GEO. IMMIGR. L.J. 263, 274 (2020); see also Immigration Act of 1990, S. 358, 101st Cong. § 153 (1990) (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1991)).

73. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 108th Cong. § 235 (2008) (codified as amended in scattered sections of 8, 18, & 22 U.S.C.).

74. Deborah S. Gonzalez, *Sky Is the Limit: Protecting Unaccompanied Minors by Not Subjecting Them to Numerical Limitations*, 49 ST. MARY'S L.J. 555, 561 (2018) (explaining that juvenile recipients of SIJS "did not fit within the categories of family-based or employment-based immigrants that were being contemplated by the Immigration Act of 1990, and were instead classified as "special immigrants" . . . for lack of a better place to categorize them.").

75. Jesse Imbriano, *From Humanitarian Crisis to Marauding Hordes: A Manufactured Outcome*, 50 CAL. W. INT'L L.J. 23, 64–66 (2020).

76. U.S. DEP'T OF STATE, VISA BULLETIN FOR JUNE 2020 (2020), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-june-2020.html>; see also *id.* at 65–66 (noting 2016 was the first year the cap was hit).

First, the length of the waiting period for visa applications under Trump grew longer and more uncertain due to far-reaching changes in USCIS, the agency in charge of adjudicating visa applications. The extent and implications of the cultural shift within USCIS during the Trump administration are beyond this Article's scope.⁷⁷ However, the agency's shift is relevant here to the extent that it created an enforcement orientation resulting in significant delays and increased denials.⁷⁸ As a result, the amount of time to obtain a visa approval and receive a decision on an application for adjustment of status increased, as did the likelihood of receiving adverse decisions that require time and legal process to address.

Second, the ever-growing population of immigrants with pending visas became increasingly likely to face removal proceedings under the Trump administration. During the Obama years, immigrants with pending visa applications were specifically identified early in the effort to establish enforcement priorities as a category for which ICE should agree to administrative closure or even outright dismissal of removal proceedings.⁷⁹ Under the Trump administration, enforcement policies directed at both ICE and EOIR provided no such exception. At the outset of his Administration, President Trump announced new enforcement priorities that no longer encouraged ICE to "back-burner" the removal of certain sympathetic populations of undocumented immigrants.⁸⁰ Under Trump's aggressive enforcement net, more immigrants were subject to arrest by ICE, including many with viable or actively pending visa applications.

While immigrants with pending visas were more likely to be arrested and placed in removal proceedings, they were also far less likely to have their cases administratively closed under the Trump administration. ICE's willingness to administratively close cases plummeted to an average of 100 case closures per month in the first five months of the Trump administration.⁸¹ At the same time, Trump's Department of Justice (DOJ), which houses the immigration courts, issued numerous policy documents and precedential decisions that attempted to speed up removal proceedings. These documents and decisions included severely limiting the extent to which immigration judges can grant administrative closure.

For decades, it was well-established practice for immigration judges to administratively close or continue removal proceedings when immigrants

77. For a discussion of changes in USCIS during the Trump administration, see Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 562 (2019); Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on A Year As an Immigration Attorney in the Trump Era*, 53 U. MICH. J.L. REFORM 139, 156–157 (2019).

78. Chen & New, *supra* note 77, at 562 (noting "a surge in case processing times by 46% over the past two fiscal years and a 91% increase since fiscal year 2014.").

79. Memorandum from John Morton, Dir., ICE, Policy No. 16021.1, Guidance Regarding the Handling of Removal Proceedings of Aliens With Pending or Approved Applications or Petitions 1 (Aug. 20, 2010), www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf; see also Montano, *supra* note 33, at 574.

80. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

81. MPI Revving Up the Deportation Machinery, *supra* note 34, at 4.

established that they were eligible for or awaiting a visa. A line of cases from the Board of Immigration Appeals recognized that administrative closure and continuances were appropriate, and even encouraged, when an immigration judge determined that an immigrant in removal proceedings was likely to have their status adjusted based on a pending visa application.⁸² For the first few years of the Trump administration, some judges continued to administratively close certain cases even over ICE's objection, though at significantly lower rates than under Obama.⁸³ However, in 2018, the Attorney General issued the opinion *In re Castro-Tum*, which severely limited the authority of immigration judges to grant administrative closure.⁸⁴ In the aftermath of this decision, the number of administratively closed cases dropped by 67%.⁸⁵

The *Castro-Tum* decision also ordered immigration judges (IJs) to approve motions to put formerly administratively closed cases back on the active calendar. Previously, this had been left to an IJ's discretion. After the decision, ICE announced its intention to reopen all previously closed cases, which would have suddenly thrust the tens of thousands of immigrants whose cases were administratively closed under Obama back into active removal proceedings.⁸⁶ ICE filed a surge of motions to recalendar such cases in some regions of the country, even for DACA recipients with no criminal histories.⁸⁷ In the latter half of the Trump administration, this effort appeared to subside, perhaps because ICE quickly realized that, rather than expediting deportations, this move only added to the court backlog.⁸⁸

82. *In re Avetisyan*, 25 I. & N. Dec. 688, 692 (B.I.A. 2012) (affirming the use of administrative closure for a pending family-based petition, and explaining that administrative closure is "appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time"); *In re Hashmi*, 24 I. & N. Dec. 785, 790 (B.I.A. 2009) (listing factors to be considered in granting a continuance premised on a pending visa petition).

83. EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FY 2018 STATISTICS YEARBOOK 14, Fig. 9 [hereinafter EOIR Statistics YB 2018], <https://www.justice.gov/eoir/file/1198896/download>.

84. *See In re Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). One key tool the Trump administration has used to speed up removal proceedings is the Attorney General's power to certify decisions to himself and directly decide substantive questions of the interpretation of immigration law, bypassing the existing court and appeal system and overturning its decisions. 8 C.F.R. § 1003.1(h)(1)(i) (2020). This form of administrative guidance is arguably even less durable and less transparent than the informal rules, policy memorandum, and executive orders used by Obama to implement limbo status. *See* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. (2021). For further discussion of the AG's use of this power, *see* Maureen A. Sweeney, *Enforcing/protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 192 (2019).

85. EOIR Statistics YB 2018, *supra* note 83, at 14.

86. Memorandum from Mayra O'Neill to ICE Office of Principal Legal Advisor (OPLA) Personnel, OPLA Guidance: Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018), (Jun. 15, 2018), <https://www.dropbox.com/s/9h1k4942zcomwku/Castro%20Tum%20OPLA%20guidance.pdf?dl=0>.

87. Hamed Aleaziz, *The Trump Administration is Seeking to Restart Thousands of Closed Deportation Cases*, BUZZFEED NEWS (Aug. 15, 2018), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-deportations-immigration-ice-dhs-courts>; Bob Ortega, *ICE Reopening Long-Closed Deportation Cases against Dreamers*, CNN (Dec. 21, 2019), <https://www.cnn.com/2019/12/21/us/ice-reopening-dreamer-deportation-cases-invs/index.html>.

88. Hamed Aleaziz, *The Trump Administration Asked To Restart Nearly 20,000 Suspended Immigration Cases – As It Faces An Existing Backlog*, BUZZFEED NEWS (Mar. 28, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-administration-restart-nearly-20000-immigration-cases>.

As a result of these changes, many more immigrants with pending visa applications found themselves in active removal proceedings during the Trump administration than previously. As they face impending hearing dates without administrative closure, the next option to avoid deportation while a visa application is pending is a request for a continuance, a mechanism in immigration court to temporarily adjourn proceedings until a later date. Federal regulations simply authorize the immigration judge to grant continuances when there is “good cause” to do so.⁸⁹ Again, for decades, it was well-established that immigration courts would ordinarily grant continuances when an immigrant in removal proceedings had a pending visa petition. And caselaw explicitly affirmed this practice, both for family-based petitions and U visas.⁹⁰ However, in another decision by Trump’s Attorney General, *In re L-A-B-R-*, the DOJ strictly limited the use of continuances in light of purported concerns about administrative efficiency.⁹¹

These changes have significantly shifted the precarity of limbo for immigrants with pending visa petitions. Prior to Trump, most immigrants with pending visa applications had their fates solely in the hands of USCIS adjudicators, who were not part of the immigration bureaucracy’s enforcement arm. Immigrants with pending visas were not priorities for removal. For those unlucky enough to be placed in removal proceedings, ICE and/or the immigration courts were highly likely to terminate or administratively close their proceedings upon discovery of a pending visa application, or at least grant continuances generously to allow time for adjudication of the visa application. All these options kept removal from becoming imminent, and allowed for a degree of social integration during the years that the visa application kept them in limbo.

In contrast, the Trump administration’s efforts to ramp up enforcement and speed up removal proceedings shifted this group of immigrants in limbo far closer to the precarious end of the spectrum. The USCIS adjudicators look more and more indistinguishable from ICE agents due to shifts in bureaucratic culture that have brought an enforcement orientation to affirmative benefit decisions.⁹² At the same time, many immigrants with pending visa applications face imminent removal proceedings. ICE and immigration judges are unwilling to terminate or administratively close these cases. And if they grant continuances at all, they are brief and often accompanied with the enervating message that deportation is imminent if a visa is not obtained quickly.

89. 8 C.F.R. § 1003.29 (2020).

90. *In re Hashmi*, 24 I. & N. Dec. 785, 788 (B.I.A. 2009). The BIA applied this same presumption to the granting of continuances based on pending U visas in *In re Sanchez Sosa*, 25 I. & N. Dec. 807, 812 (B. I.A. 2012).

91. *In re L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018).

92. See *Chen & New*, *supra* note 77.

2. *Limbo for Asylum-Seekers*

Like the population of immigrants with pending visa applications, asylum-seekers have also long-faced a prolonged state of limbo in the immigration system, which grew even more protracted and precarious under the Trump administration. Just as in the visa context, the increasing backlogs in the asylum system have been, in part, a product of sheer numbers. In recent years, conditions in the Northern Triangle countries of Honduras, El Salvador, and Guatemala have continued to deteriorate. As a result, Central American asylum-seekers have arrived at the border in ever-growing numbers. Although overall numbers of border apprehensions have not been on the rise,⁹³ the proportion of migrants apprehended at the border who are asylum-seekers has dramatically increased. Over the course of the last decade, this proportion has grown from approximately one in every 100 border crossers to more than one in three.⁹⁴ In parallel, the countries of origin of migrants apprehended at the border have shifted dramatically. In 2008, more than ninety percent of those apprehended were Mexicans. By 2019, Central American migrants comprised seventy-four percent of apprehensions.⁹⁵ The majority of Central American migrants are fleeing violence and persecution in their home countries that form the basis for asylum claims.⁹⁶

There are two different paths to asylum status: affirmative applications, which are filed with USCIS by asylum-seekers who are not in removal proceedings, and defensive applications, which are filed in immigration court as a defense against deportation. As the number of asylum-seekers has steadily grown, they have faced growing delays in both these systems. In the affirmative process, USCIS has had a growing backlog, especially since 2014, when the surge of Central American claims began.⁹⁷ Although by statute, asylum interviews are to occur within forty-five days of the filing of an application, in practice, USCIS has been unable to meet this timeframe for years. Due to the backlog, affirmative asylum applicants often face waits of between two and five years for an interview.⁹⁸

93. See AUDREY SINGER & WILLIAM A. KANDEL, CONG. RES. SERV., IMMIGRATION: RECENT APPREHENSION TRENDS AT THE U.S. SOUTHWEST BORDER 6 (2019).

94. DORIS MEISSNER, FAYE HIPSMAN & T. ALEXANDER ALEINIKOFF, THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD, MIGRATION POL'Y INST. 9 (2018) [hereinafter MPI, *Asylum System in Crisis*], <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward>.

95. RANDY CAPPS, DORIS MEISSNER, ARIEL G. RUIZ SOTO, JESSICA BOLTER & SARAH PIERCE, FROM CONTROL TO CRISIS: CHANGING TRENDS AND POLICIES RESHAPING U.S.-MEXICO BORDER ENFORCEMENT, MIGRATION POL'Y INST. 10 (2019), <https://www.migrationpolicy.org/research/changing-trends-policies-reshaping-us-mexico-border-enforcement>.

96. Sofia Martinez, *Today's Migrant Flow Is Different*, THE ATLANTIC (June 26, 2018), <https://www.theatlantic.com/international/archive/2018/06/central-america-border-immigration/563744/>.

97. The backlog has grown from 40,000 in 2014 to over 338,000 in 2019. See Gretchen Frazee, *U.S. Claims Reducing Refugee Numbers Helps with the Asylum Backlog. Will it?*, PBS NEWSHOUR (Oct. 2, 2019), <https://www.pbs.org/newshour/politics/u-s-claims-reducing-refugee-numbers-helps-with-the-asylum-backlog-will-it>.

98. MPI, *Asylum System in Crisis*, *supra* note 94.

In addition to growing in length, the time awaiting an interview in the affirmative system has also grown increasingly unpredictable and erratic. In an attempt to clear the backlog, USCIS has implemented different approaches to scheduling interviews. They first prioritized children, then shifted in 2018 to a “last in first out” system, in which recently filed applications are processed first.⁹⁹ The agency announced this strategy as an effort to discourage recent entrants from filing weak or frivolous asylum applications solely to obtain work authorization.¹⁰⁰ Yet the result wreaked havoc on the scheduling of asylum hearings because the agency does not have capacity to schedule even all the recent filings promptly.¹⁰¹ As a result, some recent entrants receive interviews within weeks of filing their applications, with insufficient time to prepare.¹⁰² Others are relegated to the ever-growing backlog, where they may face years of delay and, in many cases, separation from loved ones who remain in harm’s way.

The defensive process has become similarly overloaded and erratic. In the five years from 2014 to 2019, the number of asylum cases in the immigration court system increased by nearly two-and-a-half times.¹⁰³ Asylum cases went from being a tenth of the immigration court’s workload to making up nearly a quarter of it. The average time for case completion, which has grown for all removal proceedings due to court backlog,¹⁰⁴ is even longer for asylum cases. In 2019, asylum applicants waited on average 1,030 days—or nearly three years—for their cases to be decided. A quarter of applicants waited 1,421 days or nearly four years.¹⁰⁵

As noted, the growing backlogs and protracted schedules are rooted in migration dynamics and infrastructure deficits that predate the Trump administration. But again, as in the context of pending visa applications, the Trump administration implemented policies and practices that made the state of limbo for asylum-seekers a far more harrowing experience than in previous years. It is beyond the scope of this article to provide a detailed analysis of

99. *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 26, 2018), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling>.

100. *Id.*

101. *AILA Frequently Asked Questions (FAQs) on Changes to the Asylum Office Affirmative Scheduling System*, AM. IMMIG. LAWS. ASS’N (Feb. 2, 2018), <https://www.aila.org/infonet/aila-provides-faqs-on-changes-to-the-asylum-office>.

102. Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 GEO. J. GENDER & L. 541, 566 (2019) (noting this is a particular concern for individuals fleeing gender-based violence, who often need additional time to prepare their claims).

103. *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020) [hereinafter TRAC, *Asylum Cases*], <https://trac.syr.edu/immigration/reports/588/> (providing government data that the number of asylum cases rose from 19,779 to 67,406 in this five-year period).

104. *Immigration Court Processing Time by Outcome*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last visited Aug. 6, 2020) (The average time it takes to complete a case has grown to reach 748 days, over two years, as of June 2020).

105. See TRAC, *Asylum Cases*, *supra* note 103; see also Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html>.

the Trump administration's multi-pronged assault on asylum law. It systematically attacked every stage and aspect of the asylum process: expediting border processing procedures to make it harder to establish asylum eligibility;¹⁰⁶ preventing asylum-seekers from obtaining release from detention;¹⁰⁷ reversing well-established precedent on several of the most common grounds for asylum for Central American migrants;¹⁰⁸ reversing the right to a full evidentiary hearing before an asylum claim can be adjudicated;¹⁰⁹ rendering ineligible for asylum migrants who passed through a third country and did not seek asylum there;¹¹⁰ enacting agreements with third countries to deport asylum-seekers to third countries rather than process their claims;¹¹¹ and forcing thousands of asylum-seekers to live in Mexico while their cases are pending.¹¹² In its final months, under the guise of public health concerns during the COVID-19 pandemic, the Administration began summary expulsions of asylum-seekers without any process whatsoever.¹¹³ And, in the very final month of the Administration, DHS promulgated federal regulations that, if implemented, would end asylum law as a viable form of relief.¹¹⁴

106. Since at least October 2019, Customs and Border Patrol has implemented two programs, the Prompt Asylum Case Review (PACR) and the Humanitarian Asylum Review Program (HARP), to quickly expedite processing of claims for asylum and other humanitarian protections while asylum-seekers are held in CBP custody. See Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL'Y INST. (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum>.

107. *In re M-S-*, 27 I. & N. 509 (A.G. 2019) (overturning precedent that allowed asylum seekers who entered between ports of entry to request release from detention on bond); *In re R-A-V-P-*, 27 I. & N. Dec. 803 (B.I.A. 2020) (noting that the BIA precedential decision that asylum-seekers without family ties or employment may pose a sufficient flight risk to deny bond, thereby justifying their continued detention throughout their removal proceedings).

108. The Attorney General used his certification power to issue two opinions that severely limit the viability of two of the most common types of asylum claims brought by Central American asylum-seekers, particularly women and children: *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) (overturning recent Board precedent that had found certain domestic violence-based asylum claims viable) and *In re L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019) (narrowing the circumstances in which family membership can be a basis for an asylum claim).

109. *In re E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018) (vacating precedent that required a full evidentiary hearing before an asylum claim can be dismissed).

110. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019), (codified at 8 C.F.R. § 208.13(c)(4)); see also *Al Otro Lado v. Wolf*, 952 F.3d 999, 1003 (9th Cir. 2020).

111. See Michelle Hackman & Juan Montes, *U.S. Asylum Pact With Honduras Cements Trump Administration's Regional Strategy*, WALL ST. J. (Sept. 25, 2019).

112. This program, called by the Trump administration the Migrant Protection Protocols ("M.P.P."), forces non-Mexican asylum-seekers who present themselves at the southern border to remain in Mexico and only enter the United States for their court hearings. The Ninth Circuit ruled the program was illegal and enjoined it in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020); however, the U.S. Supreme Court declined to lift the emergency stay, permitting the continued use of M.P.P. unless the Court denies review of the Ninth Circuit decision or decides the merits against the government. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

113. Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22, 424 (Apr. 22, 2020); see also Caitlin Dickerson, *10 Years Old, Tearful and Confused After a Sudden Deportation*, N.Y. TIMES, May 20, 2020, at A6.

114. See *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (effective Jan. 11, 2021); see also *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09253-JD, 2021 U.S. Dist. LEXIS 5093, 2021 WL 75756, at *3 (N.D. Cal. Jan. 8, 2021) (complaint and temporary restraining order filed Dec. 24, 2020). In its initial months, the

Tragically, many of these policies succeeded in stark terms that have no ambiguity: the rates of asylum denials grew steadily during the Trump years, thousands of asylum-seekers have been forced to live in Mexico while their cases are pending, thousands more were deported to third countries ill-equipped to process their asylum claims, and, most recently, thousands have been summarily expelled with no process whatsoever. The focus of this article, however, is on the “lucky” sub-set who somehow managed to navigate their way into the territorial United States, avoid or were released from detention, and pursued asylum-related claims. Despite the many barriers, this was still a significant number of individuals: over 54,000 non-detained asylum-seekers received decisions from immigration judges in 2019.¹¹⁵

Many of these individuals face a prolonged state of limbo as they pursue their asylum claims. This is due, in part, to the backlogs described above. Statistics specific to asylum show a system overflowing on all counts: the combined total of initial asylum applications in the affirmative and defensive systems skyrocketed, from 82,000 in 2016 to over 212,000 in 2019.¹¹⁶ Meanwhile, the number of decisions rose, but not nearly as precipitously as the number of filings, with 64,000 decisions issued in 2019. This accounted for not even a third of the total cases in the system.¹¹⁷

As a result, the chance of being in a prolonged state of limbo during the asylum process increased during the Trump administration. But the sheer numbers in the system only tell part of the story. Complicating this further is the thicket of legal issues created by the Trump administration’s assault on asylum. Unsurprisingly, there has been a dramatic increase in the rate at which asylum claims are denied, from twenty-one percent in 2016 to fifty-four percent in 2020.¹¹⁸ These denials are not all definitive, however; instead,

Biden administration took steps to review and in some cases reverse many of the Trump Administration’s asylum-related policies and regulations. *See, e.g.*, Press Statement from Secretary of State Antony Blinken, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras* (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>; Press Release, Dep’t of Homeland Sec., *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases* (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>.

115. This number was drawn from a data tool provided by the Transaction Records Access Clearinghouse (“TRAC”), which allows FOIA-obtained data from EOIR on asylum decisions to be sorted by numerous variables, including custody status. In 2019, there were 38,095 asylum decisions for individuals who had never been detained, and an additional 16,236 decisions for individuals who had been released from detention. *Asylum Decisions Data Tool*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/asylum/> (last accessed Aug. 6, 2020).

116. EXEC. OFFICE OF IMMIGR. REVIEW, ADJUDICATION STATISTICS: TOTAL ASYLUM APPLICATIONS (2020), <https://www.justice.gov/eoir/page/file/1106366/download>.

117. EXEC. OFFICE OF IMMIGR. REVIEW, ADJUDICATION STATISTICS: ASYLUM DECISION RATES (2020), <https://www.justice.gov/eoir/page/file/1248491/download>. EOIR reports 91,391 total asylum decisions but this figure includes 27,135 decisions classified as “other,” which indicates a decision of abandonment, not adjudicated, or withdrawn. *See* EOIR Statistics Yearbook FY 2018, *supra* note 83, at 24, Fig. 19 (asylum receipts increased 238 percent from FY 2014 to FY 2018; completions increased by 125 percent over the same period).

118. EXEC. OFFICE OF IMMIGR. REVIEW, ADJUDICATION STATISTICS: ASYLUM DENIAL RATES (2020), <https://www.justice.gov/eoir/page/file/1248491/download>. *See also* EOIR Statistics Yearbook FY 2018,

a portion of them result in further limbo for those asylum-seekers who decide to appeal the immigration judge's decision.

Sure enough, statistics from the immigration court system indicate that another form of limbo that grew during the Trump administration was cases with pending appeals. Over the first three years of his Administration, the number of appeals filed with the Board of Immigration Appeals grew dramatically each year, from roughly 17,500 in 2016 to over 50,000 in 2020.¹¹⁹ The data do not specify the proportion of these appeals that are asylum decisions, but it is likely significant, given these claims' increasing share of the immigration court docket. The deluge of new rules and policies impacting asylum eligibility also increases the likelihood of appeals. As a general matter of administrative law, "new rules can . . . exacerbate backlogs, as administrative judges struggle to interpret how they apply in novel situations."¹²⁰ Specifically, with regard to the immigration system, the new precedent and policies implemented by DHS and DOJ raise a host of grounds for statutory and constitutional challenges.¹²¹

Thus, the Trump administration increased the number of asylum-seekers in limbo due to its aggressive enforcement and legal assaults on the system. At the same time, it also made the nature of this time in limbo more precarious for asylum-seekers. On the precarity spectrum, asylum-seekers have shifted closer to deportation. This is in part due to the substantive legal changes that make asylum claims so hard to win. As they await adjudication of their pending cases, asylum-seekers know that they face an uphill battle, which inevitably shapes their ability to integrate and fully engage in their new communities.

It is also due to procedural changes that increase the immediacy, stakes, and predictability of immigration hearings. In addition to the limitations the Attorney General placed on immigration judges' ability to manage their dockets through administrative closure and continuances, DOJ has imposed strict case completion quotas and ordered sudden and unexpected changes in docket management.¹²² Immigration judges under the Trump administration were continuously pressured to speed up their decisions, and the IJ's union vociferously raised concerns about the impact this had on their ability to

supra note 83, at 29, Fig. 20 (showing that in the past five years, asylum grants have increased by about 53 percent, and in the same period, denials increased 193 percent).

119. EXEC. OFFICE OF IMMIGR. REVIEW, ADJUDICATION STATISTICS: CASE APPEALS FILED, COMPLETED, AND PENDING (2020), <https://www.justice.gov/eoir/page/file/1248501/download>; see also EOIR Statistics Yearbook FY 2018, supra note 83, at 36, Table 20.

120. Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 GA. L. REV. 1335, 1358 (2019).

121. See, e.g., supra notes 112, 114; see also *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 3:20-cv-09253-JD, 2021 U.S. Dist. LEXIS 5093, 2021 WL 75756, at *3 (N.D. Cal. Jan. 8, 2021); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020); *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020).

122. INNOVATION LAW LAB & S. POVERTY LAW CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 14–15 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

provide due process and fairness in their courtrooms.¹²³ As a result of this pressure on immigration judges, the long waiting periods between hearings are punctuated by stressful hearings in which asylum-seekers are likely to face impatient judges, chomping at the bit to schedule them for a final hearing or terminate their cases as quickly as possible. For asylum-seekers lucky enough to find representation, these procedural decisions may form the basis for appeals, further extending the time in limbo for those who are not deported.¹²⁴

An asylum-seeker who has lost before the immigration judge and continues to live in limbo while her appeal is pending surely has a different frame of mind than one who is still awaiting her hearing. Similarly, an asylum-seeker with an upcoming hearing only weeks away will be differently situated than someone with a hearing scheduled years in the future. In both cases, the asylum-seeker closer to removal lives in a state of greater marginalization and vulnerability due to the psychological impact of uncertainty and fear.

There are also pragmatic factors that increase the precarity for asylum-seekers with cases in limbo, most centrally their ability to access work regulations in effect for most of the Trump administration. Asylum-seekers under Trump could apply to receive work authorization once their case was pending for more than six months.¹²⁵ If, however, the asylum claim was denied before the six months had run, they could no longer receive work authorization, even if they filed an appeal. The high rates of denial and expedited hearings for certain asylum-seekers under Trump's policies caused more asylum-seekers to lose within the initial six months. They then were left unable to apply for work authorization, even if they had an appeal pending. This dynamic was greatly exacerbated in the final months of the Trump administration when DHS implemented new regulations regarding work authorization for asylum-seekers. Under the new rules, as of August 2020, asylum applicants must wait a full year rather than six months before submitting an application for work authorization. And USCIS is no longer subject to strict timetables for processing the applications.¹²⁶ The new regulations immediately prompted litigation and have been partially enjoined.¹²⁷ Regardless of the pending

123. See, e.g., *Strengthening and Reforming America's Immigration Court System: Hearing Before the Senate Judiciary Committee, Border and Immigration Subcommittee*, 115th Cong. 1-13 (2018) (Statement of Judge A. Ashley Tabaddor, President, Nat. Ass'n of Immigr. Judges) <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>; Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling*, 56 CAL. W.L. REV. 35, 44 (2019).

124. See Russell Wheeler, *Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners*, BROOKINGS INST. (June 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/> ("The case-completion standards will nudge some judges to cut corners to close cases quickly and trust the appellate process to sort things out. More respondents will appeal to the Department's Board of Immigration Appeals, and then to the courts of appeals.")

125. 8 C.F.R. § 208.7 (effective until Aug. 25, 2020).

126. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (June 26, 2020); Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants, 85 Fed. Reg. 37,502 (July 6, 2020).

127. *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX (D. Md. Sept. 11, 2020) (partially enjoining implementation of the regulations for members of the organizational plaintiffs); *Complaint, AsylumWorks v. Wolf*, No. 1:20-cv-03815 (D.D.C. Dec. 23, 2020).

litigation's eventual outcome, however, it is clear that by the end of the Trump administration, many more asylum-seekers experience social marginalization as they are consigned to the underground economy to make ends meet.

Finally, the Administration's assault on asylum has also expanded one of the quintessential states of limbo in the immigration system: a form of relief called "withholding of removal."¹²⁸ This ambiguous form of status has long existed in U.S. immigration law. It is rooted in international refugee law, was subsequently incorporated into domestic law, and establishes the government's *non-refoulement* obligation: the rule that the government cannot deport a person to a country where they will be persecuted or tortured. As a result of its statutory basis, many of the bars on asylum eligibility created by the Trump administration still allow asylum-seekers to seek withholding of removal.¹²⁹ Relief in the form of withholding of removal requires satisfaction of a higher evidentiary threshold than asylum, but if it is met, the government must grant relief.

However, unlike asylum, which provides a path to a green card within a year, recipients of withholding of removal can never obtain lawful permanent residency. Also unlike asylum, recipients of withholding of removal cannot petition for immigration status for their family members, they must regularly apply to renew work authorization, and they do not qualify for most federal or state benefits programs.¹³⁰ In addition, although it rarely happens, the government retains the right to deport a beneficiary of withholding of removal to a third country where they would be safe. Between 2016 and 2018, the number of grants of withholding of removal under the Convention Against Torture more than doubled, from 621 to over 1,334.¹³¹

In summary, asylum-seekers, like immigrants with pending visa applications, faced increasingly long states of limbo even before Trump came into office due to the growing demands on the legal systems in place to process asylum claims. Under Trump, both the nature and the length of this time in limbo grew more severe. Asylum-seekers now face many years in limbo. And during this time, they live in a state of fear and anxiety, with the ever-present possibility of deportation shaping their daily lives in profound ways.

128. 8 U.S.C. § 1231 (2006).

129. See 8 C.F.R. § 208.30 (instructing asylum officers to screen for withholding of removal or relief under the Convention Against Torture ("CAT") even if they deny asylum based on presidential orders issued after November 9, 2018).

130. See HUM. RTS. FIRST, WITHHOLDING OF REMOVAL AND THE U.N. CONVENTION AGAINST TORTURE—NO SUBSTITUTE FOR ASYLUM, PUTTING REFUGEES AT RISK (2018), https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf (summarizing these limitations).

131. Compare EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2016 STATISTICS YEARBOOK M1, <https://www.justice.gov/eoir/page/file/fysb16/download> with EOIR Statistics FY 2018, *supra* note 83, at 30.

III. STATES OF LIMBO ON THE GROUND

This Part presents four vignettes of immigrants in four different states of limbo. These are clients and cases from the two clinics where I have worked over the past two presidential Administrations, first in Arizona under Obama and then in California under Trump. The cases track the evolving types of limbo that have typified immigration practice over the course of these years. They capture how often, under both Obama and Trump, the legal system forces immigrants and lawyers to make hard decisions about when to pursue liminal status. The first two cases—of two single mothers in removal proceedings, Marta and Paula, occurred under Obama. These cases show how lawyers, myself included, often encouraged our clients to opt for limbo, even at times when it meant foregoing the possibility of more robust forms of relief. Marta and Paula received offers of administrative closure and DACA, respectively. These programs, as discussed in the preceding Part, have varying degrees of regularity and transparency. Both, however, allowed for opportunities for social integration that were sufficiently meaningful to weigh favorably against proceeding with a risky case for more robust immigration relief.

In contrast, the second two cases, of high school student Pablo and a family of asylum-seekers, Isabel and Mateo, illustrate the precarity of states of limbo under Trump. Here, too, lawyers play a central role in opting their clients into limbo. But it is not through a regular, transparent process, and it is only as a means to avoid near-certain deportation. And as an outcome, the limbo in today's immigration system is far less desirable, as it comes with no tangible benefits other than simply avoiding deportation. These four vignettes illustrate the spectrum of precarity. They also give human faces to the concluding discussion in Part IV regarding what the experiences of immigrant clients suggest about the role of lawyers in combating the subordinating effects of limbo.

A. *Limbo through Administrative Closure: Marta*

In 2014, Marta fled Sonora, Mexico, with her twelve-year-old son to escape severe domestic violence. She had a border crossing card and had lived in the United States for brief periods with her husband throughout her life, including when her youngest son was born a U.S. citizen. She entered the U.S. with her border crossing card in 2014 to escape her abuser. She then lived with relatives without incident until she was picked up by ICE for a routine traffic stop and placed in removal proceedings. In December 2015, the Immigration Clinic at the University of Arizona became Marta's pro bono representatives. We prepared a defensive asylum claim, but became increasingly convinced that she would have a hard time winning it given the state of uncertainty regarding domestic violence-based asylum claims and the immigration judge we were assigned.

At the same time, the Obama administration had recently articulated its enforcement priorities, and ICE expressed willingness to entertain requests for “prosecutorial discretion.” There was no formal application form for the process, but practitioners knew to email requests to the prosecuting attorney on the case and cite internal departmental memos about what factors would be considered. After several client counseling sessions with Marta in which we discussed the pros and cons of proceeding with her asylum claim or requesting “administrative closure,” she authorized us to make the request.

Our request emphasized that Marta was the primary caregiver of a U.S. citizen son and had no criminal history, factors that the Obama administration had established as favorable in requests for prosecutorial discretion. After initially refusing our request via email, on the morning of the trial, the ICE attorney agreed to administratively close Marta’s case. Neither the clinic nor Marta was elated with this outcome. By this time, we were fully prepared for the hearing and believed in the strength of our asylum case, although we knew our chances of success were slim. More pragmatically, the offer of administrative closure did not include work authorization, because insufficient time had elapsed since Marta initially filed her asylum application to allow for it. Despite these misgivings, Marta agreed to take the offer given that the prospect of a removal order, if she lost on her removal case, was far worse.

In the months and years after the administrative closure, Marta found work as a house-cleaner, where she was paid in cash. She struggled because she could not obtain a driver’s license, but she found ways to get herself to various job sites and support herself and her son. I heard little from Marta until September 2019, when I received a notice that ICE filed a motion to recalendar her case. The motion remains pending as this article goes to press. If the judge grants it, Marta’s “administrative closure” will end, and she will be back in active removal proceedings.

B. *Limbo through DACA: Paula*

Paula came to the U.S. from Mexico at ten years old, and lived in Southern Arizona with her grandmother after she was abandoned by both of her parents. She dropped out of high school and had her first child at sixteen, followed by two more children over the next few years. I met Paula in 2012 after she had been picked up by ICE in a routine traffic stop and placed in removal proceedings. At the time, her oldest two children were eleven and four years old, while her youngest was just six months old. Her oldest daughter suffered from severe mental health conditions, including anxiety, depression, and attention deficit disorder. And her four-year-old was born with a foot deformity that required surgery and ongoing physical therapy and monitoring.

Represented by the Immigration Clinic, Paula prepared a case for “non-LPR cancellation of removal.” As discussed in Part II.A, cancellation of removal is a very difficult form of immigration relief to win. But Paula

provided a particularly strong case in light of the extensive needs of her children and the fact that she was a single mother. Midway through her proceedings, the Obama administration announced DACA, and Paula qualified, although she had to enroll in a GED program to meet the educational requirements. We applied but continued to prepare her cancellation application. The DACA program was so new that we did not know whether USCIS would grant Paula's DACA application. We were not convinced it would be preferable to cancellation of removal.

When USCIS approved Paula's DACA application, we discussed with Paula whether to request that ICE administratively close her case before her hearing, but decided against it. We knew she had a strong case and needed the long-term stability that cancellation of removal would provide: a path to residency and a host of benefits eventually available to her that she could never obtain with DACA. At the time, she could not even obtain a driver's license with DACA because Arizona refused to issue them to DACA recipients.¹³² We reasoned that Paula could have DACA as an option if she lost her cancellation claim in court. ICE, however, moved to administratively close her case on the eve of her final hearing. We opposed, but the judge granted ICE's motion. Paula was left with DACA. We lost touch with her shortly after this and were unable to locate her in advance of the deadline to renew her initial two-year DACA approval. We did not hear from Paula again until ICE filed a motion to reopen her removal proceedings in January 2020. As in Marta's case, this motion remains pending.

C. *Limbo through a Pending Visa: Pablo*

Pablo, a high school junior in Los Angeles originally from rural Guatemala, began working as a shepherd at the age of four. Throughout his childhood, Pablo spent most of his time working as a farmhand on his family's farm, squeezing in school around the edges. When he was around fifteen years old, his father was injured in the fields. Pablo dropped out of school to work full-time to try to keep his family afloat. At sixteen, he moved on his own to Chiapas, Mexico, to work full-time. He spent about a year working in a poultry store and sending a portion of his earnings back to his family in Guatemala. In Mexico, he lived in a constant state of fear because of regular harassment and threats from the gang that controlled the area. So, when Pablo turned seventeen, he decided to come to the United States.

Pablo was picked up trying to cross the desert at the U.S.-Mexico border by ICE in 2018 and spent three months in detention facilities for unaccompanied minors. Then, a cousin in Los Angeles provided the necessary paperwork, and Pablo was released to his custody. Pablo's cousin, undocumented

132. The state law was eventually struck down by the Ninth Circuit. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (finding Arizona policy denying DACA recipients drivers' licenses was not rationally related to a legitimate state interest).

himself, insisted that Pablo enroll in school and focus on his studies. Meanwhile, our clinic prepared an application for Special Immigrant Juvenile Status for Pablo, based on the strong facts of parental neglect and abandonment. USCIS approved the visa in a matter of months. However, according to the visa bulletin at the time of this writing, Pablo faces a wait of over three and a half years before his visa “priority date” will come due. Then, he can apply for a green card. Until then, Pablo has neither a work authorization nor any other tangible situational differences as compared to before his visa was approved.

Unlike most of our clients, when we first met Pablo, he was not facing an imminent removal hearing. Although ICE apprehended him and placed him in detention, they had yet to file a “notice to appear” to initiate removal proceedings in immigration court. We knew ICE had Pablo’s address and could file a notice at any time, or Pablo could be picked up during a routine traffic stop or another encounter. If ICE were to initiate removal proceedings, Pablo’s situation would suddenly shift significantly further towards deportation on the precarity spectrum. His predicament would be particularly tenuous because the circumstances of his flight, while compelling, do not translate into a strong asylum claim. Without any defense against deportation other than the pending SIJS visa, our only option to stave off a final removal hearing would be to request that the immigration judge grant administrative closure or continuances. Under the new cases issued by the Attorney General described in Part II.B, both are highly unlikely to be granted.¹³³ Thus, there will be ever-greater momentum towards a final deportation hearing in his case.

Both before and after the visa was pending, Pablo came to visit me in our clinic office from time to time. He seemed more engaged in school than many of our high-school-age clients, and was particularly excited about his art class. He had long loved sketching, and at one point showed me a notebook full of drawings he made while detained to pass the time. Once in school, Pablo found the access to art materials and instruction exhilarating. But abruptly, shortly after the coronavirus pandemic closed down the school, Pablo called to tell me he was dropping out in order to work full-time. He was apologetic and nervous as he told me that his cousin had lost his job and they needed whatever help they could get to stay afloat. He wanted to know if this would be held against him in his immigration case.

Technically speaking, whether or not Pablo graduates from high school will not alter his eligibility to adjust status to a legal permanent resident when his visa is current. But the prolonged period of limbo complicates Pablo’s situation. I must walk a fine line to give him accurate advice: he should still be able to receive the visa, which does not have any educational requirement.

133. See discussion of *In re Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) and *In re L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018), discussed *supra* notes 84 and 91 and accompanying text.

But if he winds up in removal proceedings, the immigration judge *might* look more favorably on our requests for delay if he is a high school graduate.

The disempowering message sickens me as I deliver it. On the one hand, it appears inevitable that Pablo will drop out and join the low-wage workforce, given the economic and social reality of our society—and the fact that taking care of his family has been part of Pablo’s nature and approach to life since he was four years old. On the other hand, the legal system forces Pablo to live in a constant state of insecurity, always aware that he could be thrown into removal proceedings at any time.¹³⁴ The burden of this precarious existence seems a nearly insurmountable obstacle for an eighteen-year-old to overcome and end up on a path to social and economic mobility in four years’ time, when he becomes a lawful permanent resident.

D. *Limbo for Asylum-Seekers: Isabel & Mateo*

Isabel and her fifteen-year-old son Mateo fled El Salvador after receiving increasingly direct threats on Mateo’s life by a gang seeking to recruit him. At the U.S.-Mexico border, they were apprehended by Border Patrol and spent about four days detained in Texas before they were released to live with Isabel’s undocumented brother in Los Angeles. However, the venue of immigration court hearings does not change automatically, and they received no instructions for how to request a change of venue. They had a hearing back in Texas in eight months’ time.

Upon arrival in Los Angeles, Mateo enrolled in public school, and Isabel began to look for a job. Without work authorization, she was turned away by most employers. Finally, a market agreed to hire her if she could provide them with a fake social security number. Isabel lived in constant worry about how they were going to get back to Texas for their hearing. She had no money for the trip nor for an attorney to help with their case. The month before the hearing, one of Mateo’s teachers referred him to our immigration clinic. Since we were unsure of our capacity to take the case, we helped them file a pro se motion to change venue to Los Angeles. The motion was granted, and initially, they received a hearing notice to appear in Los Angeles immigration court for a hearing on December 24. Surprised by the possibility of a hearing on Christmas Eve, we called the clerk and confirmed that the court would, in fact, be closed that day. We urged them not to ruin their holiday by going to the court since we were sure it would be dark. Sure enough, a notice of rescheduling arrived after the holidays with a hearing date in January.

Whether cruelty or mere bureaucratic error, the immigration agency’s needless instruction to arrive at the federal building on Christmas Eve is a striking example of the constant, low-visibility forms of social control that immigrants in removal proceedings endure. The image of Mateo and Isabel

134. In fact, ICE did initiate removal proceedings just as this Article went to press.

arriving at a deserted federal building on Christmas Eve is a particularly vivid illustration of their caste status when juxtaposed with the scene at the same federal building during the COVID-19 shut-down described at the outset of this piece.

At the January hearing, our clinic entered appearances as the family's representatives. The judge initially pushed to set the case for a final hearing within weeks, explaining that this case was classified as a "priority" and could not be postponed. When the immigration clinic requested additional time in light of the law students' academic schedule, the judge begrudgingly agreed to give the family a few additional weeks to prepare the asylum filing. The law students began an ambitious schedule of frequent client interviews to explore the claim, and quickly realized the case was more complex than we originally realized. Although the immediate cause for flight was gang-related, Isabel soon disclosed extensive domestic violence. Prior to the Attorney General's decisions changing the immigrant court precedent for gender and family-based asylum claims, this would have been a strong case. Now, it faced an uphill battle before a hostile immigration court. Meanwhile, the same domestic violence formed a basis for an application for Special Immigrant Juvenile Status (SIJS) for Mateo. We rushed to make sufficient headway with SIJS so we could ask the judge to consider continuing his case while the application was pending.

If we lined everything up just right, it looked like our best-case scenario was that Isabel would lose with a strong record for an appeal of her gender-based asylum claim. It was nearly certain to lose at the Board of Immigration Appeals under the current precedent established by the Attorney General, but then she could appeal to the Ninth Circuit, a process that would take several years. During this time, Isabel could continue to live and work in this country, protected from deportation. However, the judge was pushing things at such a rapid clip that Isabel would be unlikely to receive work authorization before her asylum claim was denied, leaving her to continue to work in the underground economy for her appeal's duration. Meanwhile, Mateo would have to appear at court hearings and beg for continuances periodically for years while he awaited his SIJS visa, never sure if the judge would lose patience and require him to move forward on his asylum case. He, too, would be unable to receive work authorization during this time, even once his visa was approved. The current backlog of Salvadoran SIJS visas takes at least three years, meaning Mateo would have no work authorization or legal status during the crucial years between sixteen and nineteen years of age, when he would be forming his educational and professional goals and plans.

In Isabel and Mateo's case, COVID-19 intervened to their benefit. When the court postponed all non-detained hearings, they received a new hearing notice for six months later, which gave them both time to file and receive work authorization. They were lucky in many regards: if they had arrived at the border just a few months later, they would have been covered by one of

the Trump administration’s asylum “bans” and eligible only for withholding of removal. If they had filed for work authorization a few weeks later, they would have been ineligible under the new regulations. But even threading all these needles, Isabel and Mateo are not in a particularly empowered situation. They face a series of hearings before a hostile immigration judge who will periodically remind them of their precarious status. Soon, Isabel is likely to have a deportation order hanging over her head with only a modest chance of eventual success on appeal. Mateo will face years of uncertainty regarding his own future and, just as importantly, his mother’s future. The prospect of losing his primary caregiver to deportation will surely impact his own life plans profoundly.

Each of these clients is in a precarious position due to their liminal legal status. Yet when considered on the spectrum of precarity, there are significant differences between their experiences of liminality, resulting in the placement of their cases on the spectrum as mapped out in Figure 2.

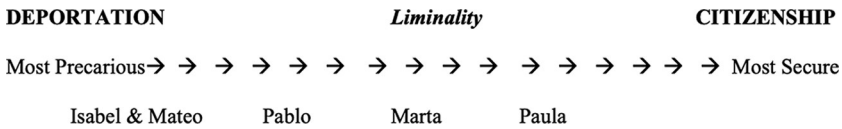


Figure 2.

Before ICE reopened removal proceedings in Paula and Marta’s cases, Paula’s DACA status enabled her to live a more integrated life in this country than Marta, whose case was administratively closed by ICE. Paula had work authorization, a written, fixed-term reprieve from deportation, and a process to seek renewal of that reprieve every two years. Marta, in contrast, had no work authorization and no idea when her life could abruptly be thrown back into crisis if ICE decided to reopen her removal proceedings. Both Marta and Paula were better off than Pablo, who, unlike them, has no agreement from ICE to close his removal proceedings. As a result, Pablo lives with constant uncertainty about whether the government will pursue efforts to deport him. And all three of them are better off than Isabel and Mateo, who face impending hearings in immigration court in which they will have to convince a hostile judge to delay their final hearing or rely on appeals to put off a final deportation order.

IV. LAWYERING AGAINST LIMBO: RESISTING SUBORDINATION THROUGH HOLISTIC AND COMMUNITY-BASED REPRESENTATION

As the introduction and each of the vignettes demonstrates, placing clients in a state of limbo while awaiting far-off immigration remedies has become

one of the foremost tools in the fierce immigration advocate's toolbox. The legal system has become so uniformly antagonistic towards immigrants that there are virtually no efficient, promising options to obtain robust, permanent forms of immigration status. As a result, many "victories" in the Trump Era consisted of simply avoiding the irreversible, definitive act of deportation.

Yet these victories feel hollow. Limbo is not conducive to flourishing. Even for forms of liminal status closer to the integration side of the precarity spectrum like DACA, recipients struggle with limitations inherent in their uncertain status. Clearly, the greater certainty and access to benefits that DACA provides has resulted in concrete indicators of greater social integration, as well as intangible benefits in terms of mental health and well-being.¹³⁵ Yet the research also shows that DACA recipients continue to struggle with limits on their educational and professional horizons, along with high rates of stress and anxiety.¹³⁶

These limits are more dramatic for the states of limbo under Trump, many of which do not result in work authorization and involve constant reminders to those in limbo of their precarity. How does this spectrum inform a lawyer's efforts to counterbalance the marginalizing effects of legal limbo? Immigration lawyers can resist the creation of caste by engaging in advocacy that may, on first impression, appear beyond the scope of traditional individual representation. In a professional culture conceptualized in terms of highly specialized expertise in specific legal processes, it is disorienting to suggest that the lawyer's role encompasses goals beyond discrete legal outcomes.¹³⁷ Yet, the next two Sections lay out forms of advocacy that push at these boundaries. Through policy advocacy and holistic, community-oriented representation, immigration lawyers can reconceptualize their role and work towards a larger conception of justice for immigrants. This Part first considers how the spectrum of precarity informs efforts at policy reform and then individual representation.

A. *From Subordination to Sanctuary: Resisting Precarity through Policies That Promote Integration*

The spectrum of precarity underscores the important ways in which legal status can be disaggregated from other forms of social integration. State and local policies can move the experience of limbo closer to the integration end of the spectrum by allowing immigrants to pursue opportunities and activities that do not hinge on obtaining residency or citizenship. The experience of

135. Roberto G. Gonzalez, Sayil Camacho, Kristina Brant & Carlos Aguilar, *The Long-Term Impact of DACA: Forging Futures Despite DACA's Uncertainty: Findings from the National UnDACAmented Research Project*, IMMIGRATION INITIATIVE AT HARVARD (2019) [hereinafter *Long-Term Impact of DACA*], https://immigrationinitiative.harvard.edu/files/hii/files/final_daca_report.pdf.

136. *Id.*

137. See, e.g., Daria Fisher Page, *A Pedagogy of Anxiety: The Dangers of Specialization in Legal Education and the Profession*, 44 J. LEGAL PROF. 37 (2019).

DACA recipients vividly illustrates this. Despite their state of limbo, many DACA recipients have achieved tangible social integration and real economic mobility.¹³⁸ Their gains have been particularly striking in states that have facilitated access to educational and professional opportunities through in-state tuition and occupational licensing schemes.¹³⁹ Local and state policies that minimize immigration enforcement further encourage integration by removing the constant specter of deportation from immigrants' daily lives. These policies free those in limbo, as well as their undocumented family members, to engage in social activities like school, work, and leisure with less fear.

Clearly, however, such policies only go so far, as evidenced by the vignettes of Pablo, Isabel, and Mateo. Their cases occurred in Los Angeles, California, a county with a robust set of sanctuary measures in place. Despite the strong local and state policies that encourage social integration for all immigrants without regard to legal status, my LA-based clients' lives are still pervasively shaped by their sense of precarity. The spectrum of precarity highlights the urgent need for key federal policy reforms, particularly regarding when immigrants can access work authorization, so they are not consigned to the underground economy. For example, a targeted effort to provide work authorization to immigrants with approved SIJS petitions and/or U visas, who are simply waiting for the visa to become current, would go a long way toward enabling a meaningfully less vulnerable existence for immigrants in limbo. The arguments for this policy fix are particularly strong in the SIJS context, which involves young people during crucial years when they are establishing their professional identities and forging their life-path. Unfortunately, the new federal regulations implemented in August 2020, which add limits and delays to work authorization for asylum-seekers, are a step in the opposite direction.¹⁴⁰

The spectrum of precarity is also a helpful lens through which to consider the implications of another federal policy: the Trump administration's expansion of the "Public Charge Rule."¹⁴¹ This rule, long a feature of immigration policy, allows the government to deny visas and applications for residency to applicants who are deemed "likely to become a public charge," meaning a person who is primarily dependent on the government for subsistence.¹⁴² The Trump administration expanded the rule in 2020, allowing the government to deny visas and adjustment of status based on an applicant's past use of a wide range of public benefits programs, including public housing, Medicaid, and cash assistance programs. The rule has been the subject of numerous lawsuits

138. *Long-Term Impact of DACA*, *supra* note 135.

139. *Id.* at 22.

140. *See supra* note 126.

141. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Oct. 15, 2019).

142. For an overview, *see* Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1369 (2020).

and injunctions, so its implementation has been uneven and sporadic.¹⁴³ Yet even before the rule was implemented, social service providers reported a broad “chilling effect” on immigrant families’ use of a wide range of public benefit programs, including basic food and nutritional programs not actually covered by the rule.¹⁴⁴

One way to conceptualize this rule’s impact is that it moves immigrants in limbo to the more precarious end of the spectrum. Fearful of jeopardizing their future path to a green card, immigrants with pending visas (and in other forms of limbo) forego access to social support programs that would meaningfully facilitate social and economic mobility. COVID-19 brings the subordinating effects of this rule into even more stark relief. Immigrant families fearful of accessing health care, nutritional assistance programs, and other essential support during the pandemic are forced into potentially life-threatening levels of social marginalization.¹⁴⁵ Policies that seek to counter these impacts—by encouraging immigrants in limbo to access a range of health care and public benefit programs without fear—can be viewed as important efforts to shift immigrants towards the more integrated end of the precarity spectrum.

Sanctuary policies, work authorization, and public charge are just some examples of policy levers that can meaningfully shift where an immigrant lies on the spectrum of precarity. Lawyers engaged in representing immigrants in limbo are uniquely well-situated to identify which policy reforms would empower their clients during protracted legal proceedings. While individual representation and policy reform can often be viewed as separate public interest domains, the spectrum of precarity brings into focus the need for the two modes of advocacy to be in dialogue. This type of multi-faceted advocacy furthers both the welfare of individual clients in limbo and the fight for a less socially stratified society for immigrants writ large.

B. *From Due Process to Holistic Representation: Resisting Precarity through Community Lawyering*

Unless and until there is far-reaching legislative immigration reform that puts whole families on a path to full equality in society, policy advocacy can only go so far. As the analysis of DACA in Part III reflected, there are many ways that even immigrants with work authorization and some access to

143. Most recently, a federal district court in New York issued a national injunction, halting enforcement of the new expanded Public Charge Rule so long as the public health emergency related to COVID-19 remains in effect. *See* New York v. U.S. Dep’t of Homeland Sec., No. 19 CIV. 7777 (GBD), 2020 WL 4347264 (S.D.N.Y. July 29, 2020).

144. Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephan Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URBAN INST. (May 21, 2019), <https://www.urban.org/urban-wire/public-charge-rule-looming-one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018>.

145. Indeed, the federal district court issued a national injunction on these grounds in July 2020. *See supra* note 143.

benefits will still be susceptible to exploitation and marginalization. Given how far we are from a system in which mixed-status families can flourish, it is essential that lawyers working on behalf of individual immigrants not cede these concerns to those engaged in policy reform. Instead, lawyers providing individual representation must find ways to engage in legal advocacy without becoming part of the machinery of subordination for immigrant communities.

Much of the advocacy surrounding individual legal services in the immigration context has focused on due process. The call for increasing access to individual legal representation has been framed as a need to ensure fairness and dignity in legal proceedings.¹⁴⁶ This is a necessary and pressing call. Particularly in the context of immigrants at imminent risk of deportation, such as detainees, asylum-seekers forced to await their hearings in Mexico, and immigrants with mental competency concerns, the legal process is so wildly skewed against success that lawyers' most crucial role is to provide some semblance of structural fairness in the process.

For the population that is the focus of this Article, however—non-detained immigrants in prolonged states of limbo—framing legal representation in terms of due process does not fully capture the goals of individual representation. To be sure, lawyers make a tremendous and valuable difference in legal outcomes for these immigrants, too. But the foregoing analysis suggests that if the lawyers' obligations are solely conceived of in terms of the legal immigration system, they may be unknowingly perpetuating subordination of their clients during the critical years that legal proceedings drag on.

The narrow focus of the due process framework is compounded by the high volume of demand on immigration legal service providers, which furthers the tendency towards modes of practice that focus resources on clients with imminent legal needs. In my own practice, I routinely “back burner” certain clients, going for months or in some cases even years without contact, then switching to periods of intensive client contact leading up to key hearings or briefing deadlines. Reflecting on this style of practice, I must acknowledge it does nothing to address the quiet forms of subordination that my clients experience during the prolonged periods of waiting in between legal events.

What can lawyers offer their clients to counterbalance the subordinating effects of their state of limbo? Community lawyering and holistic defense provide models and a vocabulary that more fully capture the goals of effective lawyering in this context. Holistic representation, which developed in the context of criminal defense, involves working with a team of interdisciplinary professionals that can help address the range of social needs and

146. See, e.g., Lindsay Nash, *Universal Representation*, 87 *FORDHAM L. REV.* 503, 528 (2018).

challenges that arise for clients.¹⁴⁷ As recently summarized in an empirical study of its effectiveness,

[T]he key insight of holistic defense is that to be truly effective advocates for their clients, defenders must adopt a broader understanding of the scope of their work with their clients. Defenders must address both the enmeshed, or collateral, legal consequences of criminal justice involvement (such as loss of employment, public housing, custody of one's children, and immigration status), as well as underlying nonlegal issues that often play a role in driving clients into the criminal justice system in the first place. To this end, holistic defender offices are staffed not only by criminal defense lawyers and related support staff (investigators and paralegals) but also by civil, family, and immigration lawyers as well as social workers and nonlawyer advocates, all working collectively and on an equal footing with criminal defense lawyers.¹⁴⁸

In the criminal defense context, where holistic representation originated, the unifying goal of the interdisciplinary team is to minimize criminal justice system involvement over time, for both an individual and a community. This reorients the lawyer's perspective from a specific legal case to a longer time horizon and broader over-arching goal. Applying this to the immigration context, holistic representation means looking beyond the specific immigration remedy—such as asylum, SIJS, or adjustment of status—to address the larger marginalizing effects of undocumented status. Just as in the criminal defense context, this requires a shift in time horizon and goals.

Many immigration legal service providers already employ aspects of holistic representation in their practice. Among the prominent legal services providers for unaccompanied minors, most have social workers on staff. Yet often, interdisciplinary teams are viewed as a means towards a narrow legal end: working with social workers and/or health professionals enables more successful outcomes in individual legal claims.¹⁴⁹ While this is an important reason for interdisciplinary collaboration, it does not address the pernicious effects of legal limbo.

Community lawyering provides a helpful reframing to respond to this challenge. Community lawyers see the goal of their work not solely in terms of

147. Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 964 (2013); Michael Pinard, *Teaching Justice-Connectivity*, 80 LA. L. REV. 95, 104 (2019) (holistic lawyers identify, assess, and address the legal issue in the context of other conditions and systems that have marginalized the client over time).

148. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821 (2019).

149. See, e.g., Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1038 (2015) ("By working effectively with medical and mental health professionals, country experts, and others, attorneys can present the strongest case possible for asylum seekers.").

success on individual legal matters but in terms of community-wide justice. One of the foremost proponents of this approach, William Quigley, describes it this way,

What is community justice? Think of it this way. If hundreds of thousands of people are in immigration courts and most are without lawyers, is the *only* problem lack of access to free lawyers by each individual? What about the millions of people every year who have individual, family, consumer, or housing legal problems which they have to either ignore or journey through on their own, because they cannot afford lawyers? What about all the other neighborhood, community, and organizational problems?¹⁵⁰

Quigley goes on to describe that community lawyers see their role as helping directly impacted people to “organize and recognize common grievances.”¹⁵¹ He calls for lawyering work that involves “[a] mix of community organizing, litigation, policy and media advocacy, and direct-action tactics.”¹⁵²

Creating a bridge between traditional, individual representation and this community-based work is possible—and arguably essential—for the success of the immigrants’ rights movement.¹⁵³ Immigrants will be more empowered to organize if they have access to advocates who can help them navigate the many forms of subordination that shape their daily lives.

Concretely, this requires individual lawyers to shift from conceiving of their role as a highly specialized legal craft to a more general and flexible service that is responsive to clients’ diverse needs. This runs counter to the tendency towards specialization that permeates legal practice.¹⁵⁴ It poses a particularly daunting challenge to immigration lawyers, where effective advocacy requires a demanding level of hyper-specialized expertise. Yet drawing on holistic defense and community lawyering models, organizations could structure their work collaboratively, so that interdisciplinary teams with various skills and areas of expertise would be available to support and advocate on behalf of immigrants at various stages of their legal limbo. Crucial aspects of this effort would include community education, so that individuals would be encouraged to look critically at the legal process in which they are engaged; workers’ rights advocacy, to protect against rampant exploitation in the workplace; mental health support, to attempt to counter

150. William P. Quigley, *Law or Justice? What Future for the Legal Profession?*, 14 INTERCULTURAL HUM. RTS. L. REV. 93, 105 (2019).

151. *Id.* at 106 (quoting Charles Elsesser, *Community Lawyering - The Role of Lawyers in the Social Justice Movement*, 14 LOYOLA J. PUB. INTEREST L. 375, 384 (2013)).

152. *Id.* (quoting Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1466 (2017)).

153. For an in-depth examination of the role lawyers play in immigrants’ rights movement, see Ashar, *supra* note 152.

154. See Page, *supra* note 137, at 37; Pinard, *supra* note 147, at 98.

the emotional toll of limbo with targeted supports; and educational and professional advocates, to help individuals access opportunities specially tailored to their uncertain status and futures.

V. CONCLUSION: FINAL REFLECTIONS ON SUBORDINATION AND MOBILIZATION

The current moment gives reason for both hope and concern. While the indications of caste in U.S. society are daunting, there are countervailing examples of immigrants throughout history and today who have bettered their families and communities' welfare and future prospects, despite the odds. This Article's focus on the subordinating effects of the legal immigration system should not be read as an indication that immigrants, in limbo or otherwise, are in fact rendered powerless by their lack of legal status. On the contrary, the vibrancy and effectiveness of the immigrants' rights movement, led by young people in various states of limbo, would lay any such conclusion to rest.¹⁵⁵ The mobilization of so many young immigrants to demand justice for themselves and their family members is all the more inspiring when considered in the context of the precarity of their lives.

In this fraught moment, COVID-19 has highlighted both the extent of our nation's inequities and the capacity of people to mobilize for social change, even under the most trying of circumstances. It feels particularly appropriate to pause and reflect on the role lawyers can play in systematic subordination. In the ongoing struggle for a more fair and just society, lawyers must contend with the full extent of harms the legal process can do to our clients. In recognizing the precarious existence legal limbo imposes on our clients, we can then find ways to resist through creative, collaborative forms of advocacy that counterbalance the subordinating effects of the law and work towards a more equal society.

155. Ashar, *supra* note 152.