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TRAUMA AS INCLUSION

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This article brings together a historian and law, public health, psychiatry, psychology, and neuroscience faculty and researchers to document how trauma is understood across disciplines and how it has developed in U.S. immigration law largely to exclude but increasingly to include migrants whose lives have been uprooted or otherwise impacted by borders. Our aim is to document and assess the progress and the gaps in immigration law's embrace and understanding of trauma through metrics that include the science of trauma, compassion, and fairness. This analysis is made urgent by the travesty we are witnessing of borders completely shut to desperate migrants seeking our protection.[1]

INTRODUCTION

For much of U.S. history, policymakers have sought to maximize sovereign power to decide when to open or shut the nation's borders to foreign nationals. The U.S. has consented to open borders for foreign nationals it deems desirable while simultaneously retaining nearly absolute power to rescind, consent, or deny entry altogether to those perceived as undesirable. While not unique, U.S. immigration laws' measurement of desirability has been ripe with bias and nationalistic notions of what is best for "America." A great deal has been written about a range of these biases -- e.g., racism,[2] classism,[3] ableism [4]-- writings that also have documented unfinished projects of

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2. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Bill Ong Hing, *Institutional Racism, Ice Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (2000).

3. *See, e.g.*, Cory Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefits Restrictions*, 97 DENV. L. REV. 1 (2019); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1 (2009).

4. *See, e.g.*, Monika Batra Kashyap, *Toward A Race-Conscious Critique of Mental Health-Related Exclusionary Immigration Laws*, 26 MICH. J. RACE & L. 87 (2021),);

undoing bias -- and the tendency to repeat our history.[5] The U.S. search for desirable immigrants involves a weeding out process that objectifies and dehumanizes migrants deemed undesirable. To be desirable, migrants must perform a utility furthering U.S. interests, which also means they cannot be "broken." Under these criteria, the poor, the disabled, those with a criminal history, those with mental illnesses, or those who have endured trauma are often rejected. The dehumanization of the undesirable foreigner occurs since adjudicating who is desirable and who is not can be brutal, and yes, traumatizing or re-traumatizing.

This article tells this story of objectification and dehumanization centered around migrant trauma. Our purpose is to make migrant trauma more visible and to contrast immigration law's conception and adjudication of trauma to how the term and its treatment has evolved in other fields, including psychology, psychiatry, neuroscience, and anthropology. Migrant trauma encompasses several types of experiences. It includes experiences of physical or psychological harm, whether in the past or in the future, that become the basis for an immigration remedy -- either as a ground for inclusion or a repair against removal. This type of trauma is not directly related to U.S. immigration law and practices but can be the push factor for forced displacement (e.g., persecution or natural disaster) or arise from vulnerabilities of immigrants in irregular status who experience victimization (e.g., crime or human trafficking). Migrant trauma also includes harm that is directly caused by the enforcement of borders. This can include when migrants are separated from family and communities to whom they have deep ties through exclusion or removal. It also includes the adjudication of borders, such as legal processes or detention practices that re-traumatize or create new trauma when migrants attempt to seek relief from exclusion or removal.

The good news is that the treatment of certain types of trauma in immigration law increasingly operates as a force of inclusion rather than exclusion. This has occurred both through jurisprudential developments that have imposed some constitutional limits on the immigration power through the recognition of the humanity of certain

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Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER RACE & JUST. 153 (2004).

5. *See, e.g.*, D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555 (20211555) (2021); David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism In Immigration Law*, 26 BERKELEY LA RAZA L. J. 1 (2016); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018).

migrants and the brutality of the immigration power. In tandem, Congress and the Executive have also, at times, created immigration paths based on trauma or have sought to ameliorate, in some cases, the brunt and the enforcement of borders.[6] The challenge that remains is that these developments in immigration law remain narrow, arbitrary, and uninformed by the science of trauma. In fact, how trauma is conceived and adjudicated in the immigration system–even when oriented toward inclusion–remains deeply flawed in ways that threaten to undermine the entire project of embedding borders and their enforcement with greater humanity.

This article proceeds in four parts. Part I explains how trauma is understood in a Western psychological model and across other cultures. This section serves to contextualize the dominant mode of understanding trauma in the United States, as well as to highlight the shortcomings of medicalized definitions of trauma both generally and in the specific case of refugees and asylum seekers. This article then chronicles two aspects of the role of trauma in immigration law. Part II documents the involvement of health authorities in federal immigration proceedings from the late nineteenth century through the Second World War that facilitated the exclusion of persons based on their mental "fitness". This exclusion was also informed by eugenics and the racism prevalent at the time. After the Second World War, some developments in mental health, progress in racial justice, the horrors of the Holocaust, and Cold War political considerations contributed to lessen, but certainly not eliminate, the biases against immigrants with histories of trauma. This period of dim enlightenment coincided with parallel humanizing trends in immigration law, documented in Part III, that began to treat trauma as a force of inclusion in immigration law. Part III A, which we label "Immigration Law's Humanitarianism," documents the beginnings of immigration law's embrace of grave instances of migrant physical and psychological trauma, whether arising from state persecution or other types of violent crimes waged by private actors, as grounds for inclusion. This turn also included limited instances of state or collective trauma to offer temporary protection to certain nations enduring grave man-made or natural disasters. Part III B turns to executive and legislative adoption of discretionary remedies against removal, recognizing immigrants' stakes to family, community, or belonging as members of U.S. society. Finally, Part IV assesses immigration law's current approach to documenting trauma. We discuss the significant gaps between this approach and current psychological and neuroscientific understanding of the impact of

6. *See infra* Part III.

trauma, and the barriers to inclusion it presents. We suggest initial steps for reform that incorporate the science of trauma, and the principles of compassion and fairness.

I. UNDERSTANDING TRAUMA ACROSS TIMES, DISCIPLINES, AND CULTURES

Although written accounts of trauma have been transmitted to us for more than 3,000 years,[7] it was only four decades ago that a specific psychological disorder resulting from exposure to a traumatic event was enshrined in the Western psychological tradition. From the middle of the nineteenth century, various terms had been used to describe trauma symptoms often seen after exposure to combat or war: Soldier's Heart (the American civil war),[8] Railway Spine (coined to describe the mental aftermath of early rail accidents),[9] Shell Shock (World War 1)[10] and Combat Fatigue (World War 2 and Korea).[11] In 1980, during the aftermath of the Vietnam War, the American Psychiatric Association (APA) added Post-Traumatic Stress Disorder (PTSD) to the third edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-III), describing a cluster of symptoms that plague some survivors of traumatic events, including nightmares, flashbacks, depression, dissociation, and hypervigilance.[12]

In its initial formulation, informed by the experiences of returning soldiers, a traumatic event was conceptualized as a catastrophic stressor that was outside the range of usual human experience such as war, torture, rape, and natural and human-made disasters.[13] The APA considered traumatic events to be clearly different from the stressors that constitute normal life such as divorce, failure, serious illness, or financial setbacks.[14] This dichotomization between traumatic and other stressors was based on the assumption that,

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7. *See* Walid Khalid Abdul-Hamid & Jamie Hacker Hughes, *Nothing New Under the Sun: Post-Traumatic Stress Disorders in the Ancient World*, 19 EARLY SCI. MED. 549, 550–51 (2014).

8. Edgar Jones, *Historical Approaches to Post-combat Disorders*, 361 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 533 (2006).

9. *Id.* at 534.

10. *Id.* at 533.

11. *Id.*

12. *See* MICHAEL R. TRIMBLE, *Post-traumatic Stress Disorder: History of a Concept*, *in* TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC STRESS DISORDER 12 (Charles R. Figley ed., 1st ed. 1985).

13. *See id.*

14. *See id.*

although most individuals have the ability to cope with ordinary stress, their adaptive capacities are likely to be overwhelmed when confronted by a traumatic stressor.[15] Thus, the term PTSD implies a sudden disruption of an individual's life by a singular, overwhelmingly traumatic event, that causes a breakdown of coping mechanisms, as identified by the clinician, in a specified range of mental signs and symptoms and producing a severe functional impairment.[16] The clinical conceptualization of trauma and PTSD has since been expanded to include witnessing traumatic events, learning that a loved one has experienced traumatic events, and repeated or extreme exposure to the consequences of such events;[17] yet, trauma's conceptualization remains individualistic and event-oriented.

The PTSD diagnostic formulation, treatments, and research are informed by a Western individualistic conceptualization of selfhood and of the trauma process. Traumatic events- whether happing to a person or to a larger group of people (criminal-, gang-, racial-, or political-related violence, terrorist attacks like 9/11 or the Boston marathon attack, insurgent improvised explosive device, rape, domestic violence, intimate partner violence, kidnapping, carjacking, physical assault, natural disasters, witnessing shooting in a public school, etc.) -, too, are ultimately seen as individual experiences.[16] And that is more than 40 years since transcultural psychiatry has been informed by Hofstede's (1980) Cultural Dimensions Theory with its individualistic versus collectivistic polarity.[18] However, much of the trauma in the Global South is collective in nature: interreligious, sectarian, or interethnic violence, state sponsored terrorism, gendered violence, and structural harm perpetrated on poor, oppressed, or occupied communities.[17] Unattended, collective traumas can trap countries and communities in multigenerational cycles of violence with enormous costs. While a collectivistic conceptualization of trauma offers a wider view than the individualistic model, diagnosing and researching collective trauma are yet undeveloped. Furthermore, the quadro-dimensional model of culture put forth by Triandis and Gelfand goes beyond Hofstede's bipolarity introducing four constructs: horizontal individualism, horizontal collectivism, vertical individualism, and vertical collectivism, thus adding even more

15. *See id.*

16. AMERICAN PSYCHIATRIC ASSOCIATION, *Post-traumatic Stress Disorder*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274 (5th ed. 2013).

17. *Id.* at 271.

18. Hofstede G (1980) Culture's Consequences: International Differences in Work-Related Values. Beverly Hills: SAGE

complexity to the cultural construction of trauma.[19] Not only cultural, but also political relativism modulates this construction. In his criticism of PTSD, Derek Summerfield observes that this diagnosis cannot have an objective existence outside of the cultural bias of the clinician. He views PTSD as a product of the "rise of psychologically minded expressive individualism, personal rights, and entitlement" in a time when the US antiwar movement needed to morally exonerate Vietnam veterans traumatized by the role forced unto them by US military, and to legitimize their victimhood defense against charges of atrocity, and their needs of psychiatric care and disability benefits.[20] In Summerfield's view, an entire trauma industry has emerged globally commodifying human suffering and medicalizing politically charged social issues such as oppression, inequity, war, and occupation.[21]

For this reason, the conception of PTSD as defined in the DSM has long been contested by, for example, South African and Palestinian critical psychology with the alternative concept of Continuous Traumatic Stress (CTS)[22] as well as through the novel formulations of Complex PTSD and Developmental Trauma.[23] These approaches suggest that instead of an isolated traumatic disruption, we should consider trauma and its effects as ongoing processes of harm. This allows us to critically engage a range of problems beyond the dominant trauma narratives of war, violence, and sexual assaults and to consider the structural conditions of social suffering[24] rather than focus exclusively on the psychology of traumatic events. Moreover,

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19. Triandis, H. C., & Gelfand, M. J. (1998). Converging measurement of horizontal and vertical individualism and collectivism. Journal of Personality and Social Psychology, 74, 118–128.

20. Bland J. (2017). Profile: Derek Summerfield – Politics and Psychiatry, BJPSYCH BULLETIN, 41(5), 294–296, https://doi.org/10.1192/pb.bp.117.056556.

21. Summerfield D. (2001), The Invention of Post-Traumatic Stress Disorder and the Social Usefulness of a Psychiatric Category, BMJ (CLINICAL RESEARCH ED.), 322(7278), 95–98. https://doi.org/10.1136/bmj.322.7278.95.

22. *See* BRIAN K. BARBER ET. AL., MENTAL SUFFERING IN PROTRACTED POLITICAL CONFLICT: FEELING BROKEN OR DESTROYED (Rochelle E. Tractenberg ed., 2016), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0156216.

23. *See generally* Jeff Jaeger, *Trauma Narratives: It's What You Say, Not How You Say It*, 6 PSYCH. TRAUMA: THEORY, RSCH., PRAC. & POL'Y 473 (2014) (studying how trauma narratives are associated with PTSD serverity as well as other reactions such as depression, anxiety, dissassocation, guilt, and anger).

24. *See* Arthur Kleinman, *"Everything That Really Matters": Social Suffering, Subjectivity, and the Remaking of Human Experience in a Disordering World*, 90 HARV. THEOL. REV. 315, 320–21 (1997).

this approach considers the ways in which other factors matter a great deal to explain differences in human responses to harm. Although the neurobiological processes underlying an acute posttraumatic stress response have universal components,[25] their temporal configurations and interactions are shaped by developmental, social, and cultural contexts.

Despite this reality, the psychiatric construct of PTSD continues to guide not only treatment programs that are offered to individuals and communities who have suffered mass trauma, but the ways trauma is understood within legal norms and processes. Yet, trauma is a nexus of divergent paradigms, and this raises questions about the applicability of current models of pathology and treatment to traumatic experiences occurring in different social, cultural, and political contexts. As most theories of the causes, meanings, and consequences of trauma, mass violence, and genocide come from a plethora of disciplines–history, anthropology, psychology, psychiatry, theology, comparative law, human rights, political science–an account of trauma produced within the narrow confines of any one discipline is insufficient.[26] The complex impacts of trauma cannot be fully captured by any discrete psychiatric disorder, as their individual, family, collective, religious/spiritual, moral, cultural, and sociopolitical dimensions are inextricably interwoven.While for some cases the suffering and functional impairment caused by a traumatic event may be the primary focus, in other cases the sociopolitical aspects of trauma are more important to making sense of horror and rebuilding lives and communities ruined by structural violence, poverty, hunger, social exclusion and humiliation, war, genocide, or exile.[27]

Many forcibly displaced migrants, moreover, do not share Western assumptions about the appropriate ways to respond to suffering and adversity. There is a wide range of culturally mediated strategies for labeling and coping with traumatic events. Often, explicit talk, like in Narrative Exposure Therapy (NET), about

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25. *See* Robert Lemelson et al., *Trauma in Context: Integrating Biological, Clinical and Cultural Perspectives*, in UNDERSTANDING TRAUMA: INTEGRATING BIOLOGICAL, CLINICAL, AND CULTURAL PERSPECTIVES 470 (Laurence K. Kirmayer et. al., eds. Cambridge University, 2007).

26. *See* NANCY SCHEPER-HUGHES & PHILIPPE BOURGOIS, VIOLENCE IN WAR AND PEACE: AN ANTHOLOGY 2 (Nancy Scheper-Hughes & Philippe Bourgois eds., 2004).

27. *See* Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 170–71, 180–83 (1969).

traumatic events is therapeutic.[28] Sometimes, however, it may be counter-therapeutic when talking about the experience is dangerous, when other cultural or spiritual coping strategies (Buddhist notion of "letting go," "nonattachment,"[29] or " the flowing water bears no scars" of Morita and Naikan Japanese therapies)[30] compete in restoring individual and social equilibrium, or when silence itself wields political power and moral authority. This further complicates the moral decision to use or not to use a diagnosis of PTSD. In some cases, applying a medical label to victims of political repression and torture may pathologize the victim and result in further disempowerment and stigmatization,[31] but not using the diagnosis may deprive some survivors of the legitimacy of their trauma story, their asylum status, and restitution rights. To build bridges between clinical concerns and the social contexts in which experiences and suffering are embedded, we must focus on "what is at stake" in the lives of individuals and communities. This type of cultural analysis provides a common ground on which the shared and disparate concerns of lawyers, policymakers, anthropologists, psychiatrists, and psychologists can be addressed and integrated.

Adding to the complexity of pathologizing, treating, and adjudicating trauma is the necessity to document its existence simultaneously as an event of the past and as a persistent harm in the present. Yet, remembering and forgetting, commemorating or denying traumatic events depends not only on memory systems that inscribe trauma on the body and brain but also on social and political processes that regulate both public and private recollection.[32] These systems may be independent, contradictory, or totally polarized. For

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28. *See generally* CAROLIN STEUWE, ET AL., EFFECTIVENESS AND FEASIBILITY OF NARRATIVE EXPOSURE THERAPY (NET) IN PATIENTS WITH BORDERLINE DISORDER AND POSTTRAUMATIC STRESS DISORDER-A PILOT STUDY (2016), https://doi.org/10.1186/S12888-016-0969-4 (studying the effectivness of NET in patients with borderline personality disorder and post-traumatic stress disorder).

29. *See generally* Ann Gleig, *Extreme Mindfulness, Secure (Non)-Attachment, and Healing Relational Trauma: Emerging Models of Wellness for Modern Buddhists and Buddhist Modernism*, 17 J. GLOBAL BUDDHISM 1 (2016).

30. *See generally* Lehel Balogh, *The Moral Compatability of Two Japanese Psychotherapies: An Appraisal of the Ethical Principles of Morita and Naikan Methods*, 12 VIENNA J. EAST ASIAN STUDIES 125 (2020).

31. *See generally* ROBERT DESJARLAIS ET AL., WORLD MENTAL HEALTH: PROBLEMS AND PRIORITIES IN LOW-INCOME COUNTRIES [PINCITE] (1995).

32. *See* Elizabeth Bowen, *Trauma-Informed Social Policy: A Conceptual Framework for Policy Analysis and Advocacy*, 106 Am. J. Pub. Health 223, 224 (2016) doi: 10.2105/AJPH.2015.302970.

some, trauma survivorship through silence may be a value in itself or even a foundation for posttraumatic growth.[33] For others, such as female survivors of sexual violence, recounting of trauma means social exclusion and symbolic death.[34] Thus, the imposition of persistent recounting of trauma is retraumatizing and yet may be the only portal to freedom. Recounting trauma is further complicated by the dynamics of memory and narrative. Because memory is fallible and relies on reconstruction, our recollection of the sequence and timing of events on which causal attributions may be based is shaped by the conceptual models we hold.[35] Most survivors do not fabricate or distort their past history in a conscious way.[36] The complex and ambiguous elements of one's trauma history are constantly reorganized to single out specific strands that have personal and collective meaning and that suit the current contexts in which one's story is told.[37] One of the legally contentious features of PTSD has been the claim that for some trauma survivors, symptoms and memories can emerge after a long period of having no overt difficulties, while in other cases the trauma narrative had one or several versions showing "inconsistency" in adjudication of claims for asylum.[38] The construction and reconstruction of a trauma narrative can serve different ends: to make sense of the suffering and allow living, to identify responsibility and apportion blame; to enable past enemies to live together; to inform a group's history, identity, and safeguards; to assign causality and guide research;[39] or to adjudicate an asylum claim. The survivor's story that works for one of these purposes may not be useful for the others. Consequently, there cannot be one story that gets it right from

33. *See* Laurence G. Calhoun & Richard G. Tedeschi, *The Foundations of Posttraumatic Growth: An Expanded Framework in* HANDBOOK OF POSTTRAUMATIC GROWTH: RESEARCH AND PRACTICE 3, 5 (L. G. Calhoun & R. G. Tedeschi, eds., 2006).

34. *See* Pia Jäger, et al., *The (Mental) Health Consequences of the Northern Iraq Offensive of ISIS in 2014 for Female Yezidis*, 16 INT'L J. ENV. RES. & PUB. HEALTH 2435 (2019), https://doi.org/10.3390/ijerph16132435.

35. Linda Carli, *Cognitive Reconstruction, Hindsight, and Reactions to Victims and Perpetrators*, 25 PERS. SOC. PSYCH. BULL. 966, 967 (1999).

36. Laura Jobsen et. al., *Culture and the Remembering of Trauma*, 2 CLINICAL PSYCH. SCI. 696, 698 (2014).

37. *See* Daniel Dennet, *The Self as a Center of Narrative Gravity, in* SELF AND CONSCIOUSNESS: MULTIPLE PERSPECTIVES 103, 114–15 (Frank Kessel et al. eds., 1992).

38. *See* Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 476–77, 503 (2016).

39. *See* ANA-LENA WERNER, LET THEM HAUNT US: HOW CONTEMPORARY AESTHETICS CHALLENGE TRAUMA AS THE UNREPRESENTABLE (2020).

all (biological, clinical, cultural, socio-political, legal) perspectives. We must judge each story in terms of the audience to which it is addressed and the goals it aims to achieve. Nevertheless, stories created for one purpose and told in one context could be taken up and used for other ends. We cannot ignore these wider implications of the stories we tell about trauma, notably in the context of immigration adjudication where the very documentation of trauma determines the outcome of inclusion versus exclusion.

II. TRAUMA AS EXCLUSION: A HISTORICAL ACCOUNT

A. *Public Health Officials and Immigration Policy, 1882-1920*

There has been much documentation on the origins of federal immigration policy in the United States.[40] In this recounting, we focus on the role of public health officials as gatekeepers to exclude undesirable foreigners, including those suffering the impact of trauma. In general, substantive laws and procedures during this early history targeted the exclusion of persons deemed feeble or burdensome based on factors that included perceived mental illness, defects, or weakness and in a context of profound suspicion and racism that largely discounted their human suffering.[41] In this project, race or racialized notions of foreigners often merged with these perceived or constructed vulnerabilities, and such human suffering – i.e., trauma – was deemed irrelevant and even viewed as a liability that warranted the fortification of borders against all foreigners.[42]

Immigration grounds for exclusion began narrow but widened with each new act of Congress. The impetus for the 1875 Page Law[43] and the more meaningful 1882 Chinese Exclusion Act[44] came from a variety of sources with west coast labor agitators initially as some of the loudest and most violent supporters. At its core, however, the desire to limit Asian immigration, and eventually almost all immigration at the turn of the century, were prevailing notions of

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40. *See, e.g.*, ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 (2004); ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943 (2003); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

41. *See infra* note 35.

42. *See infra* note 35.

43. Page Act of 1875, Pub. L. 43-141, 18 Stat. 477.

44. Chinese Exclusion Act of 1882, Pub. L. 47-126, 22 Stat. 58 (an act to execute certain treaty stipulations relating to the Chinese people).

white supremacy and increased xenophobia that followed in the wake of the tremendous upheavals caused by urbanization and industrialization. It is with this context in mind that we may better understand the early role of public health officials in immigration proceedings. The Page Act of 1875 prohibited the importation of Chinese women for "lewd and immoral purposes," and unfree laborers, both of which were a relatively small subset of Chinese immigrants.[45] The 1882 exclusion act prohibited "the coming of Chinese laborers to the United States" and the collector of customs or his deputy were charged with enforcement.[46] In 1891, Congress renewed the exclusion act for an additional ten years and greatly expanded the grounds for exclusion that reached well beyond the Chinese and for the first time included reference to an immigrant's mental state.[47] The new law prohibited granting entry to "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[48] The final act of the early twentieth century came in 1917, prior to the landmark immigration restriction acts in 1921 and 1924.[49] In thirty-eight sections, the law meticulously detailed many new classes of persons to be excluded and the methods of enforcement. The categories expanded the mental health grounds of exclusion to include "All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; [and] persons with chronic alcoholism."[50]

1. Administration of Exclusion

The Chinese Exclusion Act faced enforcement problems from the start. There was no established federal bureaucracy, "and its enforcement fell first to customs officials" as part of the duties of the U.S. Treasury Department.[51] When Congress extended the act in 1891, it also created the office of Superintendent of Immigration, with inspection officers stationed at various ports of entry across the United States (119 of the service's 180 officers were assigned to the

45. Oppenheimer, *supra* note 5, at 21–22.

46. Núñez, *supra* note 5, at 1557 n.5.

47. Immigration Act of 1891, Pub. L. 51-551, 26 Stat. 1084.

48. Immigration Act of 1891, Pub. L. 51-551, 26 Stat. 1084.

49. Immigration Act of 1917, Pub. L. 64-301 §3, 39 Stat. 874, 875.

50. Immigration Act of 1917, Pub. L. 64-301 §3, 39 Stat. 874, 875.

51. DANIELS, *supra* note 40, at 20.

newly-opened Ellis Island). Additionally, the law required medical examinations conducted by "surgeons of the Marine Hospital Service."[52] In 1891, the U.S. Public Health Service (USPHS) had 54 officers and an annual budget of $600,000.[53] By 1911, there were 135 officers and a budget of $1,750,000.[54]

Despite the number of trained officers assigned to Ellis Island, the inspection process carried expectations that must have been overwhelming.[55] Upon a ship's arrival, those passengers in first and second class were given a cursory inspection on board their ship. Third-class (steerage) passengers, however, were placed on a barge and sent to Ellis Island for a closer inspection.[56] According to E.H. Mullan, a surgeon with the USPHS, most immigrants spent two or three hours going through the inspection process.[57] The immigrants were divided into several lines and directed to walk past a succession of two medical inspectors.[58] Depending on whether a medical officer noticed a "defect," the immigrant either proceeded upstairs to the final immigration service checkpoint for landing or were identified for further testing.[59] Mullan explained, "[s]hould the immigrant appear

52. Immigration Act of 1891 § 8. In 1902 Congress passed "An Act To increase the efficiency and change the name of the United States Marine-Hospital Service," which became known as the "Public Health and Marine-Hospital Service of the United States." Act of July 1, 1902, Pub. L. 57-236, 1370 Stat. 712. The name was changed to U.S. Public Health Service in 1912. "An Act To change the name of the Public Health and Marine Service to the Public Health Service, to increase the pay of officers of said service, and for other purposes." Act of Aug. 14, 1912, Pub. L. 62-265, 288 Stat. 309.

53. Fitzhugh Mullan, Plagues and Politics: The Story of the United States Public Health Service 35 (1989).

54. FITZHUGH MULLAN, PLAGUES AND POLITICS: THE STORY OF THE UNITED STATES PUBLIC HEALTH SERVICE 35 (1989).

55. The examination of medical inspections in this analysis is based almost entirely on Ellis Island. During the first two decades of the twentieth century, approximately three-quarters of all arrivals went through Ellis Island, *Immigration and the Great War*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/immigration-and-the-great-war (last visited Oct. 2, 2022). Additionally, of the sources written by inspectors and the processes implemented (for example, the secondary mental examinations), almost all of them were based on accounts from Ellis Island. *See id.*

56. *See* E.H. Mullan, *Mental Examination of Immigrants: Administration and Line Inspection at Ellis Island*, 32 PUBLIC HEALTH REPORTS 733, 733 (1917).

57. *See id.*

58. *Id.*

59. *Id.* at 734.

stupid and inattentive to such an extent that mental defect is suspected, an X is made with chalk on his coat."[60]

Mullan and his colleagues claimed expertise in identifying physical or mental defects based on a range of visible symptoms. "An active or maniacal psychosis," depression, alcoholism, various states of dementia, and mental deficiency could be diagnosed from an immigrant's behavior including peculiarities in dress or general untidiness; talkativeness or low voice; excitement or a great amount of calmness; impudence or facial expressions of mirth; nervousness or excessive friendliness, and finally, uncommon activity or other eccentricities.[61] Additionally, the inspectors claimed the ability to just as quickly categorize these symptoms as normal or abnormal depending on the immigrant's race, which the experienced officer could "tell at a glance."[62] This was an important part of the process because "almost every race has its own type of reaction during the line inspection."[63] Mullan estimated that 15-20 percent of immigrants inspected were chalk-marked for additional testing.[64]

For the immigrants identified for additional testing, their eventual landing could be delayed by several days or prevented entirely. During an initial "weeding out process" the immigrants were given another brief inspection.[65] Following this, they were either permitted to resume landing or held for further in-depth examination.[66] If an immigrant presented more alarming symptoms, they were marked with a circled X and sent to a hospital for observation and treatment.[67] For those that remained, they were detained by the Immigration Service on Ellis Island.[68] Depending on the uncertainty of the immigrant's mental health, they could be examined four or five separate times over the course of as many days.[69]

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60. *See id.* at 735.

61. *Id.* at 737–38 (listing no fewer than ninety-one different behaviors that suggested a potential mental deficiency).

62. *Id.* at 738.

63. *Id.*

64. *Id.* at 736.

65. *Id.* at 740.

66. *See id.* at 740–41.

67. *See id.*

68. *See id.*

69. *See id.* at 744–46.

To assist with the medical examination of immigrants, in 1903, the Surgeon-General distributed a short set of instructions.[70] For guidance on identifying "insane persons" he provided a broad and simple definition that included an "abnormal condition of the mental faculties, accompanied by delusions or hallucinations or illusions" and "homicidal or suicidal tendencies."[71] For identifying "idiots," the manifestations were even more vague and included mental defects that "[incapacitate] the individual for self-maintenance or ability to properly care for himself or his interests."[72] Consistent with contemporary views about the supposed racial traits of different nationalities, he cautioned in the diagnosis of immigrants, "particularly the ignorant representatives of emotional races, due allowance should be made for temporary demonstrations of excitement, fear, or grief, and reliance chiefly placed upon absolute assurance of the existence of delusions or persistent refusal to talk or continued abstinence from eating."[73]

In 1918, the USPHS published an updated manual to assist its inspection officers with implementing new regulations issued by the Surgeon General following the 1917 law.[74] This manual was much more comprehensive than the edition published in 1903 and dealt exclusively with "determining the mental status of an alien."[75] Despite the additional detail and years of experience by then, the manual repeated some of the earlier claims that in the detection of mental defects "one is guided largely by their appearance, attitude, and conduct."[76] It provided fourteen different mugshots with an accompanying diagnosis ranging from "dementia paralytica," anxiety, and surliness.[77] With respect to the conditions of an immigrant's homeland, the manual explicitly stated such personal history "is unknown and unobtainable. His previous environments can be only estimated or suspected" and, in fact, any statement made by an immigrant about such things "must all be accepted with

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70. *See generally* BUREAU OF PUB. HEALTH SERV. AND MARINE-HOSP. SERV., TREASURY DEP'T, BOOK OF INSTRUCTIONS FOR THE MEDICAL INSPECTION OF IMMIGRANTS (1903).

71. *Id.* at 9.

72. *Id.* at 10.

73. *Id.* at 9–10.

74. *See* U.S. PUBLIC HEALTH SERVICE, TREASURY DEP'T, PUB. NO. 18, MANUAL OF THE MENTAL EXAMINATION OF ALIENS 5 (1918).

75. *Id.*

76. *Id.* at 13.

77. *Id.* at 12, fig. 1–14.

suspicion."[78] Because the process was guided by a belief in the hereditary nature of mental disease, the inspectors were warned any history they were provided would be designed to "conceal inferiorities" or to hide family degeneracy.[79] Thus the role of mental health professionals in immigration proceedings was strictly the "detection of the insane and the mentally defective . . . and the prevention of their entry."[80] This, they were assured, had a value to the national welfare that could "hardly be overestimated."[81] In the hundreds of pages of material on immigration policy and implementation published between 1882 and 1920, there was no meaningful consideration of an immigrant's past circumstances that might assist in a diagnosis of an immigrant's mental health that was for any reason besides barring entry.

2. Exclusion as Eugenic Self-Defense

Further evidence of mental health professionals as agents of exclusion can be seen in their involvement in immigration policy debates by eugenicists. Eugenics was an immensely popular and influential pseudo-science at exactly the period in which immigration policy was formulated and implemented.[82] Eugenicists advocated regulating fertility and applying the "laws of heredity" to check racial degeneration and to breed a nation of citizens suited to the challenges of modern civilization.[83] The policies they supported "stemmed from a belief that everything from intellect to sexuality to poverty to crime was attributable to heredity."[84] Historian Nancy Ordover writes its adherents exerted direct influence on immigration debates "predicting dire consequences for the country's bloodline if immigration of the 'unfit' was not curtailed."[85]

The new field of psychology provided a class of leading eugenic thinkers. The American Eugenics Society Advisory Council boasted no fewer than five presidents of the American Psychological

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78. *Id.* at 5.

79. *Id.* at 19–20.

80. *Id.* at 6.

81. *Id.* at 6.

82. *See, e.g.*, NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM xi-xiv (2003); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005).

83. *See generally*, Francis Galton, *Eugenics: Its Definition, Scope, and Aims*, 10 AM. J. SOCIO. 1 (1904) (The founder of eugenics describing his ideas in an article).

84. ORDOVER, *supra* note 82, at xii.

85. *Id.* at xiv.

Association between 1911 and 1922, including Lewis Terman (1923) and Robert Yerkes (1916).[86] Terman is perhaps best known for his ("Stanford") revision of the Binet-Simon Intelligence Test, and he actively advocated for immigration restriction based on eugenic principles in his published work.[87] Robert Yerkes, who began his career as a professor of psychology at Harvard University, was not only a leading voice of eugenics but through his work with the Army Intelligence Tests during the Great War, provided the research that became ubiquitous in the debates over immigration restriction in the 1920s.[88]

Although eugenicists were also interested in the physical fitness of immigrants, they advocated most adamantly for the use of mental qualifications for admission. Despite increasingly restrictive immigration policies, many complained that the laws were "inadequate to effect the exclusion of the unfit."[89] One such person was Henry H. Goddard, a prominent U.S. psychologist who advocated for the use of intelligence tests and was widely known for his (flawed) study, *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness*.[90] In 1910, he was invited to Ellis Island to evaluate the process of screening immigrants and to offer suggestions "as to how the service could be improved in the direction of recognizing and detaining more of the mental defectives."[91] At the time, inspectors assigned the task of identifying excludable immigrants were not specialized, mental health professionals and Goddard estimated that properly-trained inspectors would "detect at least ten times as many mental defectives" as were currently caught.[92] Such a result, he thought, could be accomplished by trained officers simply standing

86. *See* BARRY A. MEHLER, A HISTORY OF THE AMERICAN EUGENICS SOCIETY, 1921-1940, at 172 n.73 (1988).

87. *See* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 204–07 (1996); MEHLER, *supra* note 86, at 174; LEWIS M. TERMAN, WERE WE BORN THAT WAY? [PINCITE] (1922).

88. *See* MEHLER, *supra* note 86, at 174–75; Rachel Silber, *Eugenics, Family and Immigration Law in the 1920s*, 11 GEO. IMMIGR. L.J. 859, 863 (1997).

89. Alexander E. Cance et al., *First Report of the Committee on Immigration of the Eugenics Section*, 3 AM. BREEDERS MAG. 249, 250 (1912).

90. Science VS, *How Science Created Morons*, GIMLET MEDIA (MAY 25, 2018), https://gimletmedia.com/shows/science-vs/o2ho5g/how-science-created-morons.

91. Henry H. Goddard, *The Feeble Minded Immigrant*, 9 TRAINING SCH. BULL. 109, 110 (1912).

92. *Id.* at 111.

near the line "as the immigrants pass" and identifing "with marvelous accuracy every case of mental defect."[93]

In 1914, Howard A. Knox, an Assistant Surgeon of the U.S. Public Health Service at Ellis Island, published an article in the *Journal of Heredity*, a favorite venue of leading eugenicists, subtitled "How the Public Health Service Prevents Contamination of Our Racial Stock by Turning Back Feeble-Minded Immigrants" that described the mental screening newly-arrived immigrants received before they could be permitted to land.[94] He claimed that the service worked hard to "determine the standards of knowledge of the various races."[95] As part of this, they considered an immigrant's "previous environment, education and the stress under which he may be laboring," which came as close to understanding the potential push factors or trauma an immigrant might have faced before departing that inspectors came in these early years.[96] However, he concluded, the information was used exclusively "for weeding out defectives."[97]

The most common charge of exclusion by medical professionals against immigrants was "feeble-mindedness," and because there was no "legally binding codification for the term,"[98] it could be interpreted and applied in ways that suited the inspector.[99] Knox celebrated that ambiguity in his 1914 article. "Fortunately," he wrote, "the term 'feeble-mindedness' is regarded by most alienists as a sort of waste basket for many forms and degrees of weak-mindedness, and since it is incorporated in the law as a mandatorily excludable defect, it is especially suited to the needs of [Ellis Island] examiners."[100] The label of feebleminded was also one that came close to taking an immigrant's previous circumstances into account; it presented the possibility of inquiring into a traumatic past. For example, the Committee on Immigration of the Eugenics Section of the American Breeders Association noted that it was "a defect where family histories become important."[101] Knox recommended inspectors inquire into an immigrant's "ordinary occurrences and everyday duties of his previous environment. . . . Further than this ask about conditions as

93. *Id.* at 112.

94. Howard A. Knox, *Tests for Mental Defects*, 5 J. HEREDITY 122 (1914).

95. *Id.* at 122.

96. *Id.*

97. *Id.*

98. ORDOVER, *supra* note 82, at 12.

99. *See* Knox, *supra* note 94, at 125.

100. Knox, *supra* note 94, at 125.

101. Cance, *supra* note 89, at 251.

they exist in the town or locality from which the alien came."[102] Invariably, however, the line of inquiry was designed to confirm the inspector's presumption that an applicant came from an undesirable locale or whether the immigrant could put together a coherent and believable narrative of their past rather than searching for reasons we might now recognize as the basis for a claim of asylum.[103] As such, Knox concluded, the information was used exclusively "for weeding out defectives."[104]

3. The Great War

The most immediate effect of the great European war that began in 1914 on immigration was the drastic reduction in immigrant arrivals–from an all-time high of 1,218,480 arrivals at all ports of entry in 1914 to a low of 110,618 in 1918.[105] Although it is clear now, before the first battles had begun, that most of Europe was poised to take part in a continental war, the leaders of those nations felt certain it would be a relatively short war. But that was not to be. Nearly 9 million soldiers and 6 million civilians were killed.[106] Death came not just from the new weaponry, such as artillery, machine guns, grenades, chemical weapons, and aerial bombardments, but from famine and disease.[107] The influenza epidemic that began just as the war was ending killed 50 million more people worldwide. And, as with most wars, the number who survived but were wounded, disabled, widowed, or orphaned far outnumbered the dead.[108] The human cost was the most tragic consequence of World War I. The political and material ruin continued long after the armistice. As Ian Kershaw notes, "the war left behind a Europe broken into pieces, scarcely recognizable from the continent that had entered the conflict four years earlier."[109] The war brought about the end of the German empire, the overthrow of the Russian Tsar after three centuries of rule, the collapse of the Hapsburg monarchy after five centuries, and

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102. Knox, *supra* note 94, at 129.

103. *See id.* at passim.

104. Knox, *supra* note 94, at 122.

105. BUREAU OF IMMIGR., U.S. DEP'T OF LAB., REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION 191 (1920).

106. *See* IAN KERSHAW, TO HELL AND BACK: EUROPE, 1914-1949, at 91 (David Cannadine ed., Penguin Books 2015).

107. *See id.* at 99.

108. *See id.* at 95, 98.

109. *Id.* at 90.

marked the end of the Ottoman empire after six hundred years.[110] The collapse of empires and states, combined with the redrawing of boundaries by the victors, created a very different map of Europe in short order. These political and economic upheavals, particularly the "combination of ethnic nationalism, territorial conflicts and class hatred" that prevailed throughout much of the continent and would not culminate until the next world war, created the conditions for a vast wave of human migration.[111] Hundreds of thousands of refugees fled fighting, purges, and imprisonment as revolutions and counter-revolutions took place across eastern Europe.[112] However, there were few places on the continent that promised safety. The terrible toll of the war left many Americans with their own concerns about its aftermath.

Anti-immigration authors, writing as early as 1915, asked, "what will be the result when the war ends?"[113] They predicted the resumption of unchecked immigration and feared a wave "greater than we have ever before experienced."[114] But they certainly did not contemplate those potential immigrants with any degree of sympathy. "Shall we have an influx of physically and mentally deteriorated men, drawn from among the survivors of the great conflict," asked USPHS Assistant Surgeon General L.E. Cofer, "and from the non-combatants who are suffering as much from privation as the soldiers are from shot, shell and disease; and what will be the permanent character of the defects which these immigrants will present?"[115]

Opponents of immigration before the war frequently invoked the fear of being "overrun" by "foreign hordes," and that imagery persisted into the 1920s alongside arguments that the concept of the "melting pot" was no longer operational.[116] A report prepared for the Senate Judiciary Committee at the request of Chairman Edward M. Kennedy in 1980, asserted that the 1921 and 1924 immigration acts were, in fact, "intended to control the anticipated flood of immigrants to the United States from war-torn Europe following World War I."[117] George Creel, writing for *Collier's* magazine in 1922, made that

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110. Why the Ottoman Empire Rose and Fell, Nat'l Geographic, https://www.nationalgeographic.com/history/article/why-ottoman-empire-rose-fell (last visited Oct. 2, 2022).

111. *Id.* at 91.

112. *See id.* at 107.

113. L.E. Cofer, *Eugenics and Immigration*, 6 JOURNAL OF HEREDITY 170, 174 (1915).

114. *Id.*

115. *Id.*

116. 65 Cong. Rec. 5668, 5698 (1924).

117. S. REP. NO. 70-108, at 1 (1980).

argument and demanded that the U.S. "close the gates!" as this was not a time, he believed, "when we want medicant millions dumped on us."[118]

The Commissioner General of Immigration's annual report from 1920 confirmed the fears of earlier writers when he reported that the previous year had been "an extremely busy one–in fact, the busiest of any since the inauguration of the immigration service."[119] Nevertheless, the 450-page report made no further mention of the war-torn conditions that compelled some immigrants to seek refuge in the United States and whether those conditions should be taken into account, except to stress the need to redouble the efforts to keep unwanted immigrants out of the country. Under the 1920 report's heading "Defective Aliens," the Commissioner warned that "adequate enforcement" of immigration law was "of vital importance . . . at the present time with the enormous increase in immigration, much of it coming to us from countries which have suffered from the devastation of war."[120]

One response to the wave of war refugees that would fuel immigration policy debates for years after the war ended was the use of intelligence testing by the Army. Immediately after the U.S. entered the war, several psychologists including, Henry Goddard, Robert Yerkes, and Lewis Terman, "committed eugenicists all," developed the U.S. Army's Alpha and Beta Intelligence Tests."[121] According to historian David Kennedy, the APA convinced the War Department "to use the tests to screen mental incompetents from the Army and to classify all inductees on the basis of their intelligence."[122] Trained psychologists administered the Alpha tests to recruits literate in English, and the Beta test used pictures for illiterate soldiers.[123] Over the course of about eighteen months, more than 1,700,000 enlisted men took the tests.[124] An analysis of the test results indicating the extent of illiteracy among the recruits repeatedly surprised the psychologists; they were less surprised by the apparent correlations between race or nationality and intelligence.[125]

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118. George Creel, *Close the Gates!*, COLLIER'S, May 6, 1922, at 9.

119. BUREAU OF IMMIGR., *supra* note 105, at 5.

120. *Id.* at 13–14.

121. PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA 80 (2011); *see also* MEHLER *supra* note 86, at 174–75.

122. DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 130 (25th ed., 2004); *see also* SCHRAG, *supra* note 121, at 81.

123. *See* KENNEDY, *supra* note 121, at 130.

124. SCHRAG, *supra* note 121, at 81.

125. *See id.*

Restrictionists pointed to the published results of the tests as the basis for severely reducing immigration to the United States and advocated their adoption to screen out the "unfit."[126] The tests were credited by some with helping the Army mobilize millions of men into a highly effective and victorious fighting force, and it was the poor performance of recruits from recent immigrant backgrounds that was used by anti-immigration voices to advocate for greater restrictions after the war.[127]

Carl C. Brigham, a Princeton-based psychologist, published his own analysis of the results in *A Study of American Intelligence.* Brigham explained that "the army mental tests give us an opportunity for a national inventory of our own mental capacity, and the mental capacity of those we have invited to live with us."[128] They "give us a scientific basis" for conclusions about the correlation between intelligence and race.[129] Brigham's analysis that gained the most traction among restrictionists was his explanation of a graph derived from the data that indicated the longer an immigrant recruit had resided in the United States, the better he scored on the intelligence tests such that, around eighteen years of residence, it resulted in a score equivalent to a native-born white recruit.[130] After offering several hypotheses to account for this finding, for example, "the more intelligent [foreign born] remain in this country while the most stupid ones go home," Brigham settled on the conclusion that it reflected "the gradually decreasing intelligence of the most recent immigrants."[131] That assertion is exactly what immigration opponents and eugenicists had been arguing for several years.

B. *The Shifting Tide: Genocide and Racial Reckoning*

The Great War also made possible a series of earlier anti-foreign laws.[132] The 1924 Immigration Act,[133] however, imposed drastic quotas by country to reduce the number of immigrants arriving to a fraction of previous years, and by the end of the decade, the global

126. See Schrag, supra note 121, at 67, 80.

127. See id. at 81–82.

128. CARL C. BRIGHAM, A STUDY OF AMERICAN INTELLIGENCE, at xx (1923).

129. *Id.*

130. *See id.* at 94–95 fig.33.

131. BRIGHAM, *supra* note 128, at 96, 100.

132. KENNEDY, *supra* note 121, at 76–77. These included the 1917 the Espionage Act and the 1920 Passport Control Act of 1920.

133. Immigration Act of 1924, Pub. L. No. 68-139, 190 Stat. 153 (1924).

depression further suppressed human migrations.[134] For the entirety of the 1930s, the Immigration and Naturalization Service (INS) recorded only 528,431 arrivals, and those numbers dropped even further with the beginning of World War II.[135] Another significant change in immigration policy came with the extension of the 1918 Wartime Measure Act provision, which placed the burden of inspection on overseas officers and gave "consular officials the power to deny visas that was almost absolute."[136] Within a year, the USPHS ended inspection lines at Ellis Island and provided only "cursory examinations aboard ships" to ensure arrivals had the required visa and health clearance paperwork.[137] The 1924 law made no mention of refugees or exceptions for immigrants fleeing persecution.[138] Many Americans were eager to return the U.S. to its isolationist roots and downplay the humanitarian crisis that unfolded across much of Europe in the early 1920s.[139] Throughout the 1930s, the Depression made the U.S. even more hostile to immigrants.[140] Unable to secure congressional action to reduce the quotas further, President Hoover directed the State Department to find existing administrative ways to slow the issuance of visas.[141] Already in the practice of using the "likely to become a public charge" provision of the 1917 law for immigrants from Mexico, foreign consuls implemented a strict interpretation in Europe, and it "quickly brought the desired results."[142] It was this combination of anti-immigrant sentiment that

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134. After the 1924 law, the annual number of arriving immigrants hovered around 300,000 per year until 1931 when it dropped to 97,139 and in 1932 to 35,576. BUREAU OF IMMIGR., U.S. DEP'T OF LAB., ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION 186 (1932).

135. *See* IMMIGR. AND NATURALIZATION SERV., U.S. DEP'T OF JUST., ANNUAL REPORT 54 tbl.1 (1947).

136. Elliott Young, *Beyond Borders: Remote Control and the Continuing Legacy of Racism in Immigration Legislation*, *in* A NATION OF IMMIGRANTS RECONSIDERED: U.S. SOCIETY IN AN AGE OF RESTRICTION, 1924-1965, at 25, 38 (Maria C. Garcia et al. eds., 2019).

137. *Id.* at 35.

138. *See* Alan M. Kraut et al., *The State Department, the Labor Department, and German Jewish Immigration, 1930-1940*, 3 J.AM. ETHNIC HIST. 5, 5 (1984) (discussing concerns of a federal judge and subsequent investigation into immigration policy by then Secretary of Labor Perkins seeking special consideration for refugees within immigration regulations as well as concerns of those subject to persecution).

139. *See id.* at 6

140. *See id.* at 7.

141. *See id.*

142. *See id.*

culminated in the 1924 law and the pressure by the State Department for the aggressive implementation of exclusion provisions in the 1930s that contributed to the insufficient response to the growing refugee crisis in 1930s Germany.

The suspicion harbored towards immigrants, exacerbated by the global economic crisis of the 1930s, was reflected in the reluctance of Congress or President Roosevelt to aid those fleeing Nazi Germany. Senator Robert F. Wagner of New York proposed legislation to bring 20,000 German children to the U.S. but Roosevelt refused to lend his support, indicative of his position through much of the war, and the legislation quickly died in Congress.[143] Roosevelt's Labor Secretary Frances Perkins, under whose authority the INS resided at the time, tried to utilize administrative measures to admit more refugees from Europe and immigrants from Germany.[144] Despite some minor victories, she ultimately lost influence to the State Department, which by 1940 asserted "the primacy of national interest over humanitarianism" and emerged with "near complete jurisdiction over visa policy."[145]

As the situation became more dire in Europe, Roosevelt transferred the INS from the Department of Labor to the Department of Justice.[146] The agency's workforce increased from about 4,000 at the time of the transfer to 8,500 by mid-1942 and additional divisions were established to enforce new regulations, including the registration of resident immigrants.[147] Then, shortly after submitting his reorganization plan, Congress passed the Alien Registration Act of 1940.[148] This act provided the Justice Department grounds to pursue suspected Communists (used during and after the war), expanded the types of political activities as grounds for deportation, and required all resident aliens fourteen years of age and older to be fingerprinted and register with the U.S. government, including confirming their address every three months.[149] It was not until 1944 after his Treasury Secretary Henry Morgenthau presented a personal report that began by pronouncing "[o]ne of the greatest crimes in history, the slaughter of the Jewish people in Europe, is continuing

143. *See* Roger Daniels, *Immigration Policy in a Time of War: The United States, 1939-1945*, J. AM. ETHNIC HIST. 107, 109–10 (2006).

144. *See* Kraut, *supra* note 138, at 9–10.

145. Kraut, *supra* note 138, at 5, 23.

146. *See* Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 14, 1940).

147. *See* S. REP. NO. 70-108, at 1 (1980).

148. Pub. L. No. 76-670, 54 Stat. 670.

149. *See* Daniels, *supra* note 145, at 107–0-8.

unabated," did Roosevelt create a War Refugee Board.[150] Despite not having the authority to bring any refugees to the U.S., Treasury staff worked with Jewish relief organizations to send money abroad for local efforts and helped evacuate thousands of Jews to Allied-controlled territories in Europe.[151] In addition to this record of inaction in Europe, very little was done or discussed at the White House or in Congress about refugees from other parts of the world, most notably in Asia, where "massive displacements" came following Japan's defeat and subsequent decolonization conflicts in the region.[152]

Like the first great war, the second remade much of the world. But rather than retreating to its isolationist roots, the United States committed to providing more assistance to rebuild Europe and take a more engaged role in international affairs.[153] Whereas previously domestic politics and pressures guided immigration and refugee policies, in the 1950s and 1960s they involved a more complicated calculus of domestic priorities and foreign policy.[154] The misery and instability caused by the millions of displaced persons in Europe after the war, which provided the Soviet Union an opportunity to offer an alternative system of government, concerned President Truman and his successors. This, in turn, led to proposals admitting refugees outside existing quotas, such as the 1948 Displaced Persons Act (discussed below). The economic conditions in the U.S. also differed considerably from the post-World War I era of the 1920s and blunted the much-used fear of economic competition from immigrants. In what has been called the "biggest boom yet," the 1950s "seemed almost wonderful, especially in a material sense, to millions of upwardly mobile people."[155] Gross National Product, median family income, purchasing power, and industrial output accelerated upward for most of the decade.[156] Despite the prosperity at home, there were equally

150. HENRY MORGENTHAU, PERSONAL REPORT TO THE PRESIDENT 1 (1944); *see* DANIELS, supra note 145, at 111.

151. *See* DANIELS, *supra* note 145, at 111; *see also* REBECCA ERBELDING, RESCUE BOARD: THE UNTOLD STORY OF AMERICA'S EFFORTS TO SAVE THE JEWS OF EUROPE 62 (2018).

152. Laura Madokoro, *Contested Terrain: Debating Refugee Admissions in the Cold War*, *in* A NATION OF IMMIGRANTS RECONSIDERED: U.S. SOCIETY IN AN AGE OF RESTRICTION, 1924-1965, at 70 (2019).

153. *See id.*

154. *See id.*

155. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974, 311–312 (1996).

156. *See id.* at 312–313.

powerful countervailing forces in U.S. politics that resisted welcoming immigrants, most notably anti-Communism.

The fear of communism and subversive infiltration began years before the Cold War commenced. What began as an attack on the power of the labor movement under the New Deal, the House Un-American Activities Committee (HUAC) led by Texas House member Martin Dies, quickly expanded its investigations into the supposed security threat of foreign nationals living in the U.S.[157] Similarly, the anti-subversive intent of the Alien Registration (Smith) Act passed in 1940 heralded the red hunts of the 1950s. The world war and then the Cold War that followed heightened concerns about national security and made the admission of refugees and immigrants hurdle another formidable barrier.[158] The quota system based on national origins from 1924 largely remained in place throughout the 1940s.[159] At Roosevelt's request, Congress did strike the Chinese exclusion section in 1943 as a nod to that country's help in fighting the Japanese.[160] However, it allotted only 107 visas, "merely a token gesture that left the quota system in place."[161]

By the late 1940s, the Cold War had an oversized influence on immigration debates, and the specter of restriction and national origins lived on in the lead up to the 1952 legislation. Senator Patrick McCarran (D-NV) was one of the most outspoken and effective anti-Communist members of Congress.[162] As chair of the Senate Judiciary Committee, he sponsored "the most notorious piece of Red Scare legislation," the Internal Security (McCarran) Act of 1950, "which explicitly linked immigrants with communism."[163] It established a Subversive Activities Control Board that required groups identified by the Attorney General as Communist to register with the Justice Department, denied government defense jobs and passports to individuals belonging to those groups, and denied entry to an immigrant who belonged to the Communist party. The bill passed

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157. *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 349 (1999); CARL J. BON TEMPO, AMERICANS AT THE GATE: THE UNITED STATES AND REFUGEES DURING THE COLD WAR at 34 (2009).

158. *See* BON TEMPO, *supra* note 157, at 31.

159. *See id.*

160. *See id.*; Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, 344, 57 Stat. 600 (1943).

161. *Id.* at 33; *see* Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, 344, 57 Stat. 600 (1943).

162. PATTERSON, *supra* note 155, at 240.

163. BON TEMPO, *supra* note 157, at 27.

overwhelmingly despite Truman's veto, demonstrating the power of anti-Communism in Congress.[164]

Also passed over President Truman's veto, the McCarran-Walter Act of 1952[165] was a moderate revision of its 1924 forbearer. It did repeal the anti-Asian exclusions and racial qualifications for citizenship, and in their place, Asian countries received a minimal yearly quota (100).[166] Gary Gerstle argues that however modest, it represented the "enormous change in political climate" towards nations long discriminated against and was particularly striking "only seven years after Americans had fought a savage race war against" the Japanese.[167] Nevertheless, the law retained the national origins system of quotas that liberals and Truman found deeply offensive.[168] While all of those in Congress that spoke on the bill refrained from using explicitly eugenic or racist language, a position made untenable by the Holocaust, the substance of the law rested on the same racist-inspired grounds that viewed some nationalities with suspicion.[169]

Shortly after Congress passed the McCarran-Walter Act, newly elected President Dwight D. Eisenhower asked Congress for emergency legislation to admit 240,000 refugees from Europe.[170] His request illustrates the period's conflicting priorities. Eisenhower emphasized the importance of his foreign policy objectives by supporting the refugees who "braved death to escape from behind the Iron Curtain . . . searching desperately for freedom."[171] Further, he argued, "international political considerations are also factors" in the imperative to extend American assistance.[172] As the State Department and Senator McCarran crafted the bill, they excised any language or consideration of "immigrants" to make it applicable only to refugees.[173] Having just passed a comprehensive immigration "reform" bill, restrictionists were not eager to undermine that work by immediately creating administrative exceptions or appearing to

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164. KENNEDY, *supra* note 157, at 240.

165. Pub. L. No. 82-414, 66 Stat. 163.

166. *See* GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 257 (2001).

167. *See id.* at 257–58.

168. *See id.* at 258.

169. *See id.*

170. Letter to the President of the Senate and to the Speaker of the House of Representatives Recommending Emergency Legislation for the Admission of Refugees, 52 PUB. PAPERS 191, 192 (April 22, 1953).

171. *Id.* at 191.

172. *Id.*

173. *See* BON TEMPO, *supra* note 157, at 48.

expand the quotas. The supporters of the legislation reflected a third and increasingly important consideration starting in the 1950s, "the protection of individual rights and the eradication of ethnic and racial discrimination," that became central to the social revolutions of the next two decades.[174]

In response to his veto of the 1952 immigration law, Truman commissioned a presidential report to examine the issue from a more liberal perspective. The report published just before he left office "Whom We Shall Welcome,"[175] derided the national origins system and took a decidedly favorable view of immigration. The report's title came from a quote by President George Washington: "The bosom of America is open to receive not only the Opulent and Respectable Stranger but the oppressed and persecuted of all Nations And Religions; **whom we shall welcome** to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment."[176] Although it was largely ignored by Eisenhower and Congress, it set the tone for future debates over immigration and captured the spirit of protecting human and civil rights that "explicitly rejected ethnonational and racial benchmarks" to determine who made an American.[177]

What gained ascendency in the years that followed the 1952 law was what Gerstle calls the "civic nationalist tradition."[178] That tradition, he argues, can be found in the country's founding phrases: "all men are created equal" and "we the people."[179] It is a tradition that promises a society "free of discrimination–ethnic, religious, racial or sexual...where all individuals [can] pursue opportunity, economic and cultural, and secure their liberty and property."[180] That concept was, of course, most vividly expressed in the social protest movements of the era.

African Americans, as well as other racial and ethnic minorities, had been demanding political and social rights long before the Civil

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174. *Id.*, at 50.

175. PRESIDENT'S COMM. ON IMMIGR. AND NATURALIZATION, WHOM WE SHALL WELCOME (1953).

176. *Id.* at 84. Emphasis and spelling in original.

177. *See* BON TEMPO, *supra* note 157, at 18; *see* Kimber M. Quinney, *Teaching the History of the Cold War through the Lens of Immigration*, 51 HIST. TEACHER 670, 671 (2018).

178. GERSTLE, *supra* note 146, at 267.

179. Gary Gerstle, *The Contradictory Character of American Nationality: A Historical Perspective*, *in* FEAR, ANXIETY, AND NATIONAL IDENTITY 33, 34 (Nancy Foner & Patrick Simons eds., 2015).

180. *Id.*

Rights Movement. During World War II, racial minorities were speaking of a "Double V" campaign–victory abroad defeating fascism and victory over racism at home.[181] Just as black soldiers in 1919 pointed out the hypocrisy of fighting for democracy abroad, in the 1940s they fought against a government based on Aryan supremacy whilst Jim Crow and lynching continued unchecked across the U.S.[182] The Holocaust, as the logical outcome of a racist state ideology, motivated protesters and awakened a greater sensitivity by Americans in general about the issue. Besides the men that enlisted in the army in combat roles, another great migration of several million Americans moved out of the South and to urban centers across the nation to work in war production; huge numbers of racial minorities were working to make the world safe for democracy.[183]

The Cold War provided another important motivation to address racial injustices. Between 1945-1960 36 new nations were formed out of former colonies that comprised millions of nonwhite people; both the Communists and the United States were eager to court these new people as allies (or pawns).[184] Additionally, it was becoming increasingly clear to many diplomats and politicians that racial segregation interfered with the Cold War imperative of winning the world over to democracy.[185] In a report by President Truman's Committee on Civil Rights published in 1947, the authors quoted the Secretary of State Dean Acheson, who asserted,

[T]he existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen that our treatment of various minorities leaves much to be desired. . . . Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries. . . . We will have better international relations when these reasons for suspicion and resentment have been removed.[186]

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181. *See* RONALD TAKAKI, DOUBLE VICTORY: A MULTICULTURAL HISTORY OF AMERICA IN WORLD WAR II 20 (2000).

182. *Id.*

183. PATTERSON, *supra* note 155, at 19.

184. U.S. Department of State, Office of the Historian, "Decolonization of Asian and Africa, 1945-1960," https://history.state.gov/milestones/1945-1952/asia-and-africa (last visited Oct. 28, 2022).

185. Mary Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 62–63 (1988); THOMAS BORSTELMANN, THE COLE WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA, 46-48.

186. PRESIDENT'S COMM. ON CIV. RTS., TO SECURE THESE RIGHTS 146 (1947).

Numerous times the Kennedy administration had to deal with embarrassing diplomatic incidents of high-ranking government officials from African countries who would fly into New York and then, during the drive from New York to Washington D.C., would be denied service in a restaurant or gas station because they were racially segregated.[187]

The direct, nonviolent confrontations with racism during the 1960s–marches, sit-ins, voter registration drives–exposed the cruelty and barbarity of racial discrimination to a national and international audience and forced the federal government to respond. Pictures of firehoses and police dogs turned loose on crowds beamed into the living rooms of average U.S. families around the nation, shaking many out of their complacency regarding race relations and, with the memory of World War II still fresh in their minds, made them uncomfortable with the way non-white Americans were treated.[188] President Kennedy finally asked Congress to pass what became the 1964 Civil Rights Act; following a brutal response by Alabama state police to a march led by Martin Luther King, Jr. in 1965, President Johnson asked Congress to enact a law further protecting the right to vote.[189] Never before had the movement received so powerful an endorsement from the federal government. It was in this context that Congress debated what became the next major immigration legislation milestones, including the 1965 Immigration and Nationality Act, which removed a preference for white migration, a feature of U.S. immigration law since 1790.[190]

III. TRAUMA AS INCLUSION: A LEGAL ACCOUNT

A. *Immigration Law's Humanitarianism*

Following World War II, the United States began to develop a patchwork of laws and policies that recognized trauma as a potential ground for immigration inclusion. The public charge and mental health exclusion grounds remained, yet various forms of

187. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 168, 182–83 (William Chafe et al. eds., 2000); .

188. *Id.* at 187; *see also* Foster Hailey, *Dogs and Hoses Repulse Negroes at Birmingham*, N.Y.TIMES, May 4, 1963.

189. Dudziak, *supra* note 187 at 231–33; Patterson, *supra* note 155, at 579–82.

190. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 296–97 (1966).

humanitarian relief were made available as narrow exceptions to the general rule of using trauma as a basis for exclusion.

1. Asylees and Refugees

The forced displacement of millions of Europeans led the United States to enact laws designed to provide protection to particular groups of refugees.[191] The first of these laws, the Displaced Persons Act of 1948,[192] aided in the resettlement of roughly 350,000 Europeans.[193] The 1948 Act provided meaningful protection for some but also imposed significant restrictions on the ability of certain populations, namely Jews and Catholics, to seek protection.[194] Between 1949 and 1966, the United States continued to pass laws providing protection for certain refugees, particularly those fleeing Communist countries.[195] Yet, the United States lacked a formalized process for evaluating and processing refugee claims.

After World War II, the international community developed guidelines concerning the protection of refugees. These protections were codified in 1951 when a diplomatic convention adopted the Convention relating to the Status of Refugees.[196] The Convention defined a refugee as someone who is unable or unwilling to return to their country of origin "owing to a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group, or political opinion."[197] Additionally, the Convention enshrined the principle of *non-refoulement*, that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or

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191. *See Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline (last visited Sept. 20, 2022).

192. PUB. L. NO. 80-774, 62 Stat. 1009.

193. *Refugee Timeline*, *supra* note 191.

194. *See* Natalie Walker, *The Displaced Persons Act of 1948*, TRUMAN LIBRARY INSTITUTE: TRU BLOG (Apr. 29, 2019), https://www.trumanlibraryinstitute.org/the-displaced-persons-act-of-1948/.

195. *See Refugee Timeline*, *supra* note 191.

196. *See* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137.

197. Protocol Relations to the Status of Refugees art. 1(2), Jan. 13, 1967, 606 U.N.T.S. 267 (amending Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137).

freedom would be threatened. . . ."[198] The United States, however, did not take on any of the obligations of the Convention until 1968, when it acceded to the 1967 Protocol Relating to the Status of Refugees.[199]

The obligations to refugees were further codified as U.S. domestic law through the Refugee Act of 1980.[200] The Refugee Act brought the United States into conformance with the 1967 Protocol and included language similar to that in the Convention.[201] The drafters of the 1980 Act sought to establish permanent and consistent procedures for admitting refugees.[202] The 1980 Act aligned the United States' definition of "refugee" with the internationally recognized definition and mandated the establishment of annual refugee admissions ceilings, to be reassessed annually by the administration and Congress.[203] The 1980 Act also led to the creation of the Refugee Resettlement Program.[204]

Both the Refugee Convention and the Refugee Act made significant strides toward offering refuge to migrants on the basis of trauma. Their narrow conception of trauma, however, largely traces the Western clinical conceptualization of trauma discussed in Part I. By the time of the UN Convention's adoption in 1951, the dominant view had become to reject a group determination of refugee status in favor of an individualistic standard in search of a person escaping from certain types of prioritized injustices.[205] This has meant that only extreme forms of documentable and targeted physical or mental trauma satisfy the definition of persecution.[206] Protection is largely

198. Convention Relating to the Status of Refugees, *supra* note 196, at art. 33(1).

199. *See* Refugee Timeline, *supra* note 191.

200. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

201. *See* Note, *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1402 (2018).

202. *See* James A. Elgass, *Federal Funding of United States Refugee Resettlement Before and After the Refugee Act of 1980*, 3 MICH. J. INT'L L. 179, 179–80 (1982).

203. *Id.* at 179–80.

204. *See* Refugee Timeline, *supra* note 191.

205. Pre-1951 conceptions of refugees did not exclusively favor what became the dominant individualist perspective. From 1935 to 1939, for example, the refugee agreements tended to adopt a social approach to the refugee definition, defining them through the social lens of helpless casualties of broadly based (collective) social or political occurrences that separated them from their home society. *See* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 2–6 (1991).

206. *See, e.g.*, Kate Jastram, *Looking to Human Rights and Humanitarian Law to Determine Refugee Status*, 106 AM. SOC'Y INT'L L. PROC. 436, 437 (2012); Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 284 (2013); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 757–58 (1998).

unavailable to victims of generalized forms of violence, such as societal conflict or war, that are equally traumatic.[207] Also generally excluded from protection are those who experience trauma from life threatening events such as natural disasters caused by climate change.[208] Similarly, people experiencing the cruelty of hunger, disease, economic exploitation, greed, and corruption that results from chronic and systemic causes are excluded as well.[209] Refugee and asylum law also largely fail to protect individuals and groups facing persecution by private actors, such as women and LGBTQIA+ individuals,[210] even when private violence has become indistinguishable from state-sponsored persecution.[211] In many countries state power has waned and powerful private actors, including both licit—e.g., corporations—and illicit ones—e.g., gangs—have replaced them.[212]

Numerous other barriers undermine the ability of refugees or asylum seekers to obtain protection in the United States. Importantly, asylum law imposes deeply flawed credibility standards combined with onerous documentation requirements and high burdens of proof that refugees must meet. To be deemed credible, asylum seekers in the United States are required to tell their stories of trauma repeatedly, with consistency and adequate detail, in a coherent narrative that defies the effects of trauma on memory or fits within

207. *See, e.g.*, Kathy M. Salamat, In Re Fauziya Kazinga*: Expanding the Judicial Interpretation of "Persecution," "Well-Founded Fear," and "Social Group" to Include Anyone Fleeing "General Civil Violence,"* 40 HOW. L.J. 255, 271 (1996).

208. *See, e.g.*, Aurelie Lopez, *The Protection of Internationally-Displaced Persons in International Law*, 37 ENV'T L. 365, 368 (2007); Carly Marcs, *Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 AM. U. INT'L L. REV. 31, 34 (2008); and Aurelie Lopez, *The Protection of Internationally-Displaced Persons in International Law*, 37 ENV'TL. L. 365, 368 (2007).

209. *See, e.g.*, MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 9–10 (2007).

210. *See, e.g.*, Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 626–28 (1993); John Tobin, *Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law*, 44 N.Y.U. J. INT'L L. & POL. 447, 471–72 (2012).

211. *See, e.g.*, Walten Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEO. IMMIGR. L.J. 415, 417–18 (2001).

212. *Id.* at 415.

varied expectations of victim demeanor when recollecting trauma.[213] Moreover, asylum seekers often must meet these requirements as part of an adversarial process, in some cases without legal counsel and without meaningful safeguards against re-traumatization.[214] As a result of these and other barriers–such as strict numerical ceilings on refugee resettlement[215] and the offshoring of trauma through the externalization of borders[216]–access to the asylum and refugee resettlement systems is limited and grant rates for refugees and asylum seekers are low, leaving too many survivors of trauma–even those who satisfy the narrow definitions of persecution–unprotected.[217]

2. Victims of Torture

The United States signed the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) on April 18, 1988, and ratified the Convention on October 21, 1994.[218] Under CAT, the United States is obligated to

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213. *See* Alana Mosley, *Re-Victimization and the Asylum Process:* Jimenez Ferreria v. Lynch*: Reassessing the Weight Place on Credible Fear Interviews in Determining Credibility*, 36 LAW & INEQ. 315, 315, 321 (2018).

214. *See, e.g.*, James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 B.U. INT'L L.J. 1, 40 (2012); Mosley, *supra* note 215, at 321; Scott Rempell, *Credibility Assessments and the Real ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L. J. 185, 192 (2008).

215. *See U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united (last visited Sept. 20, 2022).

216. *See, e.g.*, Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 130–33 (2020); Anita Sinha, *Transnational Migration Deterrence*, 63 B.C. L. REV. 1295, 1298.

217. *See* TRACIMMIGRATION, ASYLUM DENIAL RATES CONTINUE TO CLIMB, https://trac.syr.edu/immigration/reports/630/ (last visited Sept. 20, 2022) ("Despite the partial court shutdown during the COVID-19 pandemic, this year [FY2020] immigration judges managed to decide the second highest number of asylum decisions in the last two decades. The rate of denial continued to climb to a record high of 71.6 percent, up from 54.6 percent during the last year of the Obama Administration in FY 2016.").

218. *See* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., PUB. NO. RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 3 (2009).

provide protections against the return to certain individuals who are likely to be tortured in their native countries.[219] The Foreign Affairs Reform and Restructuring Act of 1998 "required relevant agencies to promulgate and enforce regulations to implement CAT."[220] The resulting regulations implemented two different types of CAT protection: withholding of removal and deferral of removal under CAT, which is available to those who are barred from withholding of removal under the Immigration and Nationality Act (INA).[221]

CAT provides important protections to torture survivors and has fewer disqualifiers, such as those based on crime, as compared to other types of humanitarian immigration relief.[222] Still, relief under CAT is difficult to obtain for many reasons, including the high burden that applicants must meet in order to qualify for protection. The definition of torture is extremely narrow, even narrower than persecution, and has been further limited to shield U.S. military forces from liability.[223] In general, an applicant for either form of protection under CAT must demonstrate that they will more likely than not suffer the intentional infliction of severe pain and suffering committed by, or at the acquiescence of, the government in the country of removal.[224] This highly litigated definition imposes a specific intent requirement showing for torture, which significantly narrows who qualifies for protection.[225] Similarly, CAT applicants must meet a high threshold to demonstrate state acquiescence to violence committed by private actors, disqualifying most victims of

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219. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), art. 3.

220. GARCIA, *supra* note 218, at 5.

221. *See id.* at 8.

222. *See generally* Matthew J. Lister, *Gang-related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827 (2008) (discussing why asylum claims from criminal gang related maltreatment should arise either under asylum law or CAT).

223. *See, e.g.*, Renee C. Redman, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" When Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465, 465–66 (2007).

224. Garcia, *supra* note 218, at 5.

225. *See, e.g.*, Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under The Convention Against Torture*, 88 OR. L. REV. 777, 796–801 (2009).

gender-based violence.[226] Moreover, victims of torture, like refugees and asylum seekers, are subject to stringent procedures to establish credibility that lead to revictimization and unfairly assess the veracity of the applicants' experience.[227] Consequently, CAT relief is unattainable for most victims of trauma.[228] Even when granted, CAT relief does not confer lawful immigration status or provide a pathway to residency or family unification.[229] Recipients of CAT protection may be removed at any time to another country where they would not likely face torture, and DHS can file a motion to reopen at any time to seek termination of deferral of removal.[230]

3. Victims of Human Trafficking

The Trafficking Victims Protection Act (TVPA) of 2000 established the first comprehensive federal anti-trafficking law.[231] TVPA made human trafficking a federal crime and also created several new categories of trafficking related crimes.[232] Also, the TVPA includes a provision establishing T nonimmigrant status (T visa) for victims of trafficking.[233] The T visa is available to victims of "severe forms of trafficking."[234] To be eligible for a T visa, applicants must also be (1) individuals physically present in the United States on account of trafficking, (2) that complied with reasonable requests for assistance in the investigation and prosecution of trafficking crimes,

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226. *See, e.g.*, Lori A. Nessel, *"Willful Blindness" to Gendered-Violence Abroad: United States' Implementation of Article III of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 119 (2004).

227. *See, e.g.*, D. Bruce Janzen, Comment, Jr., *First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings*, 67 EMORY L.J. 1235, 1245 (2018).

228. In fiscal year 2018, for example, just 1,334 applications for withholding or deferral of removal under CAT were approved while 25,964 were denied. EXEC. OFF. FOR IMMIGR. REVIEW, U.S. DEP'T OF JUST., STATISTICS YEARBOOK FISCAL YEAR 2018, at 30 (2018), https://www.justice.gov/eoir/file/1198896/download.

229. *See* Aruna SURY, IMMIGR. LEGAL RES. CTR., QUALIFYING FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE 2–3 (2020).

230. *See id.* at 10.

231. *See* POLARIS PROJECT, TRAFFICKING VICTIMS' PROTECTION ACT (TVPA) – FACT SHEET, https://humantrafficking.ohio.gov/links/TVPA%20Fact%20Sheet,%20Polaris%20Proj ec t.pdf (last visited Aug. 19, 2021).

232. *See id.*

233. *See id.*

234. *Id.*

and (3) who can demonstrate that they would otherwise suffer extreme hardship.[235] TVPA also created the form of temporary legal status referred to as "Continued Presence" which is available to victims whose presence is needed by law enforcement.[236] Continued Presence provides deferred action and eligibility for certain federal benefits.[237]

Since its creation, the T visa has been consistently underutilized.[238] T visas are limited annually to 5,000.[239] However, fewer than ten percent of the available visas have been awarded each year.[240] Advocates suggest several potential explanations for the relatively low number of T visa applicants, including a general lack of awareness about the T visaand fear of retaliation from the human traffickers for cooperating with law enforcement.[241] Moreover, like other forms of humanitarian relief, it is difficult to establish eligibility for a T visa. Recently, advocates noted a rise in the number of requests for additional evidence by USCIS adjudicators for T visa applications and increased visa denials.[242] In some cases, denials are based on misperceptions of the "iconic" victim.[243] USCIS shows greater willingness to grant T visas to victims under a trafficker's total control than to victims who, despite their grave trauma, retain agency and are able to retain some level of autonomy or choose to fight back.[244]

4. Victims of Violent Crime

The United States offers a few humanitarian protections for immigrant victims of violent crimes that facilitate a path to legalization. One such path is the Violence Against Women Act's (VAWA) self-petition petition process. Created in 1994, the VAWA self-petition permits a spouse, parent, or child of a U.S. citizen or

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235. *See id.*

236. *Id.*

237. *See id.*

238. *See* Matthew La Corte & Monica Leung, *Congress Can Help Crime Victims and Witnesses with One Easy Fix*, NISKANEN CENTER: COMMENTARY (Feb. 11, 2021), https://www.niskanencenter.org/congress-can-help-crime-victims-and-witnesses-with-one-easy-fix/.

239. *Id.*

240. *Id.*

241. *See id.*

242. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 589 (2021).

243. Srikantiah, *infra* note 244 at 187, 192.

244. *See, e.g.*, Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Human Trafficking Law*, 87 B.U. L. REV. 157, 196–97 (2007).

lawful permanent resident (LPR) who has been the victim of serious forms of domestic abuse to petition for LPR status independently of the U.S. citizen or LPR relative who originally sponsored them.[245] VAWA's self-petition process represented an important first step toward recognition of domestic violence as one of the most common types of trauma experienced by immigrant women, such as those whose husbands weaponize their wives' undocumented status as a means of exerting control.[246] VAWA's immigration provisions form part of a much broader transformative piece of federal legislation–recognized as a core part of women's civil rights–that provided the first federal definition of what constitutes violence against women and led to the creation of federal agencies and programs to address root causes of gender-based violence.[247] Importantly, VAWA's self-petition remedy recognizes not only physical forms of violence but also "extreme cruelty" that encompasses emotional and mental forms of oppression, including oppression aided by structural, societal and cultural subjugation of women.[248] Thus, VAWA's definition of "extreme cruelty" is more consistent with the broader ways trauma should be understood.

Unfortunately, several obstacles, including evidentiary barriers, impede the full potential of the VAWA self-petition process.[249] Proving trauma for domestic violence victims is difficult, even in cases involving physical abuse, given the barriers to reporting.[250] Moreover, when the alleged hardship is based on "extreme cruelty," an immigrant's narrative alone can be deemed insufficient to establish

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245. *See* WILLIAM A. KANDEL, CONG. RSCH. SERV., PUB. NO. R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 23–24 (2012).

246. *See, e.g.*, Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 598–99 (2001); Leslye E. Orloff & Janice V. Kayugutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 112–13 (2002).

247. *See, e.g.*, Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L. J. 429, 431–33 (2013).

248. *See* 45 C.F.R. § 1626.2 (2014).

249. *See, e.g.*, Note, Katerina Shaw, *Barriers to Freedom: Continued Failures of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 CARDOZO J.L. & GENDER 663, 674–75 (2009).

250. *See, e.g.*, Samar Aryani-Sabet, Comment, *Battered Iranian Immigrant Women and the Ineffectiveness of U.S. Antiviolence Remedies*, 88 TEMP. L. REV. 313, 340–41 (2016).

eligibility.[251] For immigrants who can afford it, psychological evaluations can sometimes help document psychological trauma that is not otherwise documentable.[252] However, even these types of evidence may not help overcome the Western clinical conceptualizations of trauma that undermine the lived experiences of more resilient women, especially when one considers the different ways that victims respond to trauma.[253] Worse yet, these types of psychological evaluations can be used against immigrants to deny relief, such as when documented depression and suicidal thoughts trigger mental health grounds of inadmissibility.[254]

The VAWA reauthorization in 2000 also created the U visa, a new category of visa for victims of certain crimes who are helpful to law enforcement agencies in investigation and prosecution.[255] The U visa has successfully provided a pathway toward citizenship for thousands of previously undocumented immigrants victimized by crime.[256] Importantly, the U visa broadly protects victims of qualifying crimes, including victims of domestic violence who lack the familial relationship necessary to establish eligibility for VAWA.[257] To qualify, individuals must (1) have suffered "substantial physical or mental abuse" as a result of being the victim of certain types of violent crimes; (2) possess information concerning the criminal activity; (3) be helpful, have been helpful, or likely to be helpful to a federal, state, or local investigation or prosecution of the criminal activity; (4) obtain a certification from a law-enforcement official, prosecutor, judge, DHS,

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251. Shaw, *supra* note 249, at 677–77; *see also* Indira K. Balram, Comment, *The Evolving Yet Still Inadequate, Legal Protections Afforded Battered Women*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 387, 401–02 (2005).

252. *See, e.g.*, Gabrielle Stutman & Peggy Brady-Amoon, *Supporting Dependant Relatives of Undocumented Immigrants through Psychological Hardship Evaluations*, 11 J. FORENSIC PSYCH. PRAC. 369, 379 (2011).

253. See *supra* Part I.

254. *See, e.g.*, Monika Batra Kashyap, *Heartless Immigration Law: Rubbing Salt into the Wounds of Immigrant Survivors of Domestic Violence*, 95 TUL. L. REV. 51, 82–83 (2020).

255. *See* AM. IMMIGR. COUNCIL, VIOLENCE AGAINST WOMEN ACT (VAWA) PROVIDES PROTECTIONS FOR IMMIGRANT WOMEN AND VICTIMS OF CRIME 2 (2019), https://www.americanimmigrationcouncil.org/research/violence-against-women-act-vawa-immigration.

256. *See* U.S. CITIZENSHIP & IMMIGR. SERV., U VISA REPORT: U VISA DEMOGRAPHICS 1,2 (2020), https://www.uscis.gov/sites/default/files/document/reports/U_Visa_Report_-_Demographics.pdf.

257. *See* AM. IMMIGR. COUNCIL, *supra* note 255, at 2–5.

or other federal or state authorities investigating or prosecuting the criminal activity; and (5) be admissible under immigration law or must qualify for a waiver of inadmissibility.[258] Thus, not unlike the VAWA self-petition process, both physical or mental abuse, so long as deemed substantial, is considered.

Several barriers, including a low annual cap of 10,000, diminishes its potential impact.[259] A significant barrier to U visa protections include evidentiary requirements and the mandatory law enforcement certification, which tends to prioritize the reporting of crimes over victims' trauma.[260] Additionally, the U visa process is plagued with perceptions of fraud that undermine victim credibility while also subjecting them to a strenuous adversarial criminal justice process under which prosecutors and criminal defense lawyers alike burden victims with proving the guilt of the accused.[261]

5. Unaccompanied Minors and Special Immigrant Juvenile Status

Tens of thousands of unaccompanied minors[262] arrive at the U.S.-Mexico border each year fleeing violence and poverty and often seeking to reunite with family members in the United States.[263] Given their past trauma and enormous vulnerability for further exploitation or abuse, immigration laws have created special procedures and

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258. *See* 8 U.S.C. § 1101(a)(15)(U).

259. 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 (2018). By the end of 2019, there were nearly 152,000 pending principal petitions, and the average wait time for a U visa was roughly five to ten years. *See generally id.*

260. *See, e.g.*, Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and its "Credible Evidence" Rules: A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 643 (2010).

261. *See, e.g.*, Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J. L. REFORM 915, 943–44 (2015); Imogene Mankin, *Abuse-in(g) the System: How Accusations of U Visa Fraud and Brady Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse*, 27 BERKELEY LA RAZA L. J. 40, 46–49 (2017).

262. Unaccompanied alien children are defined as migrants under eighteen years old with no lawful status in the United States and who have no parent or legal guardian available to care for them. *See* 6 U.S.C. § 279(g)(2).

263. *See* CONG. RSCH. SERV., PUB. NO. R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2 (2019).

norms intended to ameliorate or repair this trauma, or at least minimize the ways the immigration system re-traumatizes them.

Several statutes and a consent decree known as the Flores Settlement Agreement ("FSA") establish the procedures the federal government must follow in the processing, treatment, and placement of unaccompanied minors.[264] During the 1980s, allegations of mistreatment of unaccompanied children by government officials led to a series of lawsuits that eventually resulted in the FSA in 1997.[265] The FSA outlines standards for the care of both accompanied and unaccompanied minors, including access to food, water, and emergency medical services.[266] About five years after the FSA took effect, the Homeland Security Act of 2002 divided responsibility for overseeing the processing and treatment of unaccompanied minors between the Departments of Homeland Security ("DHS") and Health and Human Services ("HHS") after advocates raised concerns about the ability of DHS to properly care for them.[267] In 2008, the Trafficking Victims Protection Reauthorization Act of 2008[268] ("TVPRA") also created additional procedures for processing the cases of unaccompanied children. The TVPRA requires unaccompanied minors to be screened as potential human trafficking victims and transferred to the custody of HHS within forty-eight hours for assistance, whether or not eligibility determinations are made on their status at that time.[269] After an unaccompanied minor is placed in HHS custody, the agency must place them in the "least restrictive setting" possible, which often means group homes, foster care, or other facilities equipped to provide long-term childcare.[270] The TVPRA mandated that unaccompanied children from both contiguous and noncontiguous countries apprehended at the border and determined to be human trafficking victims or to have a fear of returning to their

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264. *See* H.R. REP. NO. 106-487, pt. 2, at 2 (2000); Stipulated Settlment Agreement at 6, Flores v. Reno, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997); *H.R. 5005, The Homeland Security Act of 2002, Days 1 and 2: Hearing Before the H. Select Comm. on Homeland Sec.*, 107th Cong. 2 (2002) [hereinafter *Hearing*]; CHARLES DOYLE, CONG. RSCH. SERV., PUB. NO. R40190, WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. 110-447): CRIMINAL LAW PROVISIONS, at intro. (2008).

265. *See* CONG. RSCH. SERV., *supra* note 263, at 4.

266. *See id.*

267. *See Hearing*, *supra* note 264, at 2.

268. Pub. L. No. 110-457, 122 Stat. 5044.

269. *See* William Wilberforce Trafficing Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5076.

270. CONG. RSCH. SERV., *supra* note 263, at 9.

home country or country of last habitual residence be transferred to the care and custody of HHS's Office of Refugee Resettlement ("ORR") and placed in standard removal proceedings.[271]

Despite these special protections for unaccompanied immigrant children, the immigration system frequently causes or exacerbates children's trauma. Facilities that house immigrant children are criticized for their prison-like conditions.[272] In addition, some children endure the untenable trauma of family separation.[273] On April 6, 2018, the Trump administration announced a "zero tolerance" policy.[274] Under the policy, the U.S. government pressed criminal charges against all adult migrants attempting to enter the U.S. anywhere other than at an official port of entry.[275] The policy resulted in widespread family separation.[276] The government separated children from their parents and placed the children in ORR custody.[277] Although the government rescinded the "zero tolerance" policy following public outcry, family separations nevertheless continue, albeit on a less widespread basis.[278] Children who arrive at the border with nonparental caregivers (e.g. grandparents, aunts, uncles) continue to face family separation.[279] Stringent ORR policies and procedures also frequently prolong the length of children's stay in ORR custody and delay reunification with family members, further exacerbating the trauma associated with family separation and confinement in inhumane conditions.[280]

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271. *See id.* at 5.

272. *See, e.g.*, John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.*, NPR (Feb. 13, 2019, 10:13 AM), https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u-.

273. *See* Kristina Cooke & Mica Rosenberg, *Where is my Aunt? Kids Separated from Relatives at the Border Strain U.S. Shelters*, REUTERS (Mar. 30, 2021, 3:05 AM), https://www.reuters.com/article/us-usa-immigration-separations/where-is-my-aunt-kids-separated-from-relatives-at-the-border-strain-u-s-shelters-idUSKBN2BM149.

274. *Q&A: Trump Administration's "Zero Tolerance" Immigration Policy*, HUM. RTS. WATCH (Aug. 16, 2018, 8:00 AM), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy.

275. *See id.*

276. *See id.*

277. *See id.*

278. *See* Cooke & Rosenberg, *supra* note 273.

279. *See id.*

280. *See Hundreds of Immigrant Children Detained for Months Awaiting ORR Director Scott Lloyd's Personal Approval to Reunite with Families*, N.Y. CIV. LIBERTIES

With respect to forms of humanitarian relief for unaccompanied minors, some qualify for a form of immigration relief known as Special Immigrant Juvenile Status (SIJS). SIJS was created under the Immigration Act of 1990 as a form of legal relief for immigrant children in foster care.[281] The TVPRA subsequently expanded eligibility for SIJS. Today, SIJS is available to applicants who are (1) unmarried and under twenty-one years of age, (2) who cannot be reunited with one or both parents due to abuse, neglect, abandonment or a similar basis under state law, and (3) for whom it is not in the best interest to return to their country of origin.[282] Despite the laws and regulations governing the more humane processing and treatment of unaccompanied children, they continue to face substantial obstacles to obtaining immigration relief. Like adults in immigration proceedings, unaccompanied minors do not have the right to appointed counsel in immigration court.[283] And, with few exceptions,[284] humanitarian forms of relief, such as asylum and T and U visas, retain the same onerous substantive and evidentiary requirements discussed in previous sections.[285] Changes in standards for adjudicating SIJS applications have also led to the rejection of numerous applicants.[286] In recent years, processing rates for

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UNION (May 1, 2018), https://www.nyclu.org/en/press-releases/hundreds-immigrant-children-detained-months-awaiting-orr-director-scott-lloyds; Sara Roth, *'A Torture Day by Day': A Mother's Fight to Reunify with her Undocumented Son in Portland*, KGW8 (July 14, 2018, 8:30 PM), https://www.kgw.com/article/news/investigations/a-torture-day-by-day-a-mothers-fight-to-reunify-with-undocumented-son-in-portland/283-573676058.

281. *See* Austin Rose, *For Vulnerable Immigrant Children, A Longstanding Path to Protection Narrows*, MIGRATION POL'Y INST. (July 25, 2018), https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows.

282. *See* SAFE PASSAGE PROJECT, WHAT IS SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)?, https://www.safepassageproject.org/what-is-sijs-status/ (last visited Aug. 18, 2021).

283. *Unaccompanied Immigrant Children*, NAT'L IMMIGRANT JUSTICE CTR., https://immigrantjustice.org/issues/unaccompanied-immigrant-children (last visited Aug.18, 2021).

284. One notable exception, for example, is that children under 18 in general are not required to collaborate with law enforcement to secure a T visa, *see* U.S. DEP'T OF HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE, https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-ResourceGuide_1.4.16.pdf. (last visited Oct. 4, 2022).

285. *See* Rose, *supra* note 281.

286. *See id.*

applications slowed substantially, leaving some applicants without legal status for years after submitting an application.[287] Additionally, despite the expanded eligibility for SIJS under the Immigration Act of 1990, discrepancies between state and federal law have prevented many individuals between the ages of eighteen and twenty-one from successfully applying for SIJS.[288] As a result, unaccompanied children often fail to qualify for humanitarian forms of relief.[289]

6. Temporary Protected Status, Deferred Enforced Departure, and Parole

A final type of humanitarian immigration relief that recognizes human trauma are those that provide temporary status rather than a path to citizenship. Although temporary, these forms of relief are nonetheless important because they provide protection to survivors of certain forms of structural violence and collective trauma, such as trauma resulting from natural disasters. Temporary forms of humanitarian relief also have more relaxed evidentiary requirements than those imposed for the permanent forms of relief discussed in earlier sections. Since these types of immigration benefits are usually given to groups who experience collective trauma, it is generally sufficient to establish membership in the protected status, such as nationality, rather than establish particularized harm.

Temporary Protected Status ("TPS") was established by Congress as part of the Immigration Act of 1990.[290] The statute gives the Secretary of DHS, in consultation with other government agencies, the authority to designate a country for TPS under one or more of the following conditions: (1) ongoing armed conflict in a foreign state that poses a serious threat to personal safety; (2) a foreign state request for TPS because it temporarily cannot handle the return of its nationals due to an environmental disaster; or (3) extraordinary and temporary conditions in a foreign state that prevent its nationals from safely returning.[291] TPS recipients receive deferred action from

287. *See id.*

288. *See id.*

289. *See* Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNC. ON FOREIGN RELATIONS (May 4, 2021, 3:15 PM), https://www.cfr.org/backgrounder/us-detention-child-migrants.

290. *See* AM. IMMIGR. COUNC., TEMPORARY PROTECTED STATUS: AN OVERVIEW 1 (2021), https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview.

291. *See id.*

deportation and are eligible to apply for work authorization.[292] As of March 11, 2021, approximately 320,000 foreign nationals from ten countries were protected by TPS, including El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.[293] In 2021, the Biden administration designated two more countries for TPS: Venezuela and Burma.[294] In addition to TPS, Deferred Enforced Departure (DED) provides temporary relief from deportation to individuals from countries designated for DED status.[295] Unlike TPS, DED has no statutory basis.[296] Rather, the President has the authority to make DED designation based on the President's constitutional powers to conduct foreign relations.[297] Liberians, Venezuelans, and residents of Hong Kong present in the United States currently maintain relief under DED.[298]

In general, grants of TPS or DED emerged in response to natural disasters such as hurricanes, earthquakes, or civil conflict.[299] The collectivist nature of the protection–a desire to help these nations recover–in addition to dispensing with the need for beneficiaries to establish individualized trauma, has also permitted the group to provide healing to family members back home through the sending of generous remittances that have sustained those economies through

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292. *See Temporary Protected Status and Deferred Enforced Departure*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/i-9-central/complete-correct-form-i-9/temporary-protected-status-and-deferred-enforced-departure (last visited May 24, 2021).

293. JILL H. WILSON, CONG. RSCH. SERV., PUB. NO. RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 5 (2021).

294. *See* Designation of Venezuela for Temporary Protected Status, 86 Fed. Reg. 13,574 (Mar. 9, 2021); Designation of Burma (Myanmar) for Temporary Protected Status, 86 Fed. Reg. 28,132 (May 25, 2021).

295. *See* WILSON, *supra* note 293 at 4.

296. *See id.*

297. *See id.*

298. *See id.*

299. *See, e.g.*, Designation of Sudan Under Temporary Protected Status, 62 Fed. Reg. 59,737 (Nov. 4, 1997) (designating Sudan for TPS due to armed conflict); Designation of Nicaragua Under Temporary Protected Status, 64 Fed. Reg. 526 (Jan. 5, 1999) (designating Nicaragua for TPS following Hurricane Mitch); Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214 (Mar. 9, 2001) (designating El Salvador for TPS following a series of earthquakes in 2001); Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19,026 (Mar. 29, 2012) (designating Syria for TPS due to armed conflict).

the toughest times.[300] Although TPS and DED are temporary forms of status, protection for some recipients has lasted for decades.[301]

In addition to TPS and DED, humanitarian parole allows otherwise inadmissible individuals to enter the U.S. on a temporary basis.[302] To qualify, individuals must have a compelling emergency and show that there is an urgent humanitarian reason or significant public benefit to their entry.[303] Humanitarian parole, like TPS and DED, may be granted in response to collective forms of trauma, like civil conflict.[304] However, grants of humanitarian parole may also be granted on the basis of more individualized forms of trauma.[305] For example, individuals may seek humanitarian parole to visit loved ones who are terminally ill.[306] Also unlike TPS and DED, humanitarian parole is generally intended to last less than a year, and, in some cases, may last only a matter of weeks.[307] Still, for some, the duration of a humanitarian parole grant provides sufficient time to apply for other more permanent forms of relief.

B. *Embracing Stakes*

Exclusion and deportation can itself wield significant trauma by separating families or by expelling persons to nations they no longer

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300. *See, e.g.*, Raquel E. Aldana, *Border Solutions from the Inside*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 77, 100 (2021).

301. *See, e.g.*, *id.* at 104–05 (discussing the impact of TPS on Guatemala, Honduras, and El Salvador).

302. *See* 8 U.S.C. § 1182(d)(5)(a).

303. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., *Humanitarian Parole*, https://www.uscis.gov/forms/explore-my-options/humanitarian-parole (last visited Nov. 12, 2021).

304. *See, e.g.*, CATH. LEGAL IMMIGR. NETWORK, *Assistance for Afghans Toolkit*, https://cliniclegal.org/toolkits/assistance-afghans (Dec. 10, 2021); U.S. CITIZENSHIP AND IMIMGR. SERVS., *Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-humanitarian-parole (last visited Dec. 8, 2021).

305. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states (last visited Nov. 12, 2021).

306. *See id.*

307. *See id.*

or perhaps never considered home.[308] Congress has at times legislated to validate the ties that immigrants build overtime by living in the United States, such as family, property, and community–as a ground for relief against deportation or removal.

At its most generous, Congress has granted relief from deportation to large groups of immigrants in legislation commonly known as amnesty; that is, laws that confer legalization to immigrants who have broken immigration laws to enter or remain in a country. In the United States, immigration amnesty has been rare. Congress adopted Title II of the Immigration Reform and Control Act of 1986 (IRCA),[309] the only major piece of immigration amnesty legislation that allowed undocumented immigrants to regularize their status despite entering without inspection or violating the terms of their visas.[310] IRCA constituted a major statutory response to the vast tide of irregular immigration that had accumulated in the United States and that produced a shadow population of persons who lived in constant fear of deportation, were vulnerable to exploitation, and yet played a useful and constructive role in the U.S. economy.[311] Under IRCA, nearly 2.7 million persons secured legalization and with it demonstrable inter-generational socio-economic gains.[312] Since, there have been smaller amnesties, such as the adoption in 1994 of INA § 245(i) and its several extensions, a provision that permitted immigrants with family or employer immigrant sponsors who were ineligible to adjust their immigration status based on entry without inspection or unlawful stays to pay a penalty and be allowed to legalize without leaving the U.S.[313] However, despite repeated efforts to replicate some version of the 1986 amnesty, it has proved

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308. *See, e.g.*, Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

309. Pub. L. No. 99-603, 100 Stat. 3359.

310. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codifiifed at 8 U.S.C. § 1255). To be eligible under IRCA, immigrants needed to have resided continuously in the U.S. in an unlawful status since January 1, 1982; be present in the U.S. continuously since Nov. 6, 1986, and be otherwise admissible. S*ee* Reno v. Catholic Soc. Servs., 509 U.S. 43, 46 (1993).

311. *See, e.g.*, Emily Badger, *What Happened to the Millions of Immigrants Grants Legal Status under Ronald Reagan*, THE WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan/.

312. *See id.*

313. ANDORRA BRUNO, CONG. RSCH. SERV., PUB. NO. RL31373, IMMIGRATION ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i), at intro. (2003).

impossible, especially as anti-immigration sentiment has hardened.[314] Instead, the executive has increasingly resorted to the use of prosecutorial discretion to grant limited forms of relief to certain immigrants facing removal who are not considered priorities and who raise significant equities against removal.[315] Notably, in 2012, DHS issued a memorandum to grant Deferred Action for Certain Childhood Arrivals (DACA),[316] a program which, since its inception, has permitted over 800,000 youths to receive reprieve from removal and work authorization from the federal government as well as additional benefits in certain states, such as access to driver's licenses or state college tuition.[317] Not unlike the 1986 amnesty law, studies also show significant economic and social gains not only for recipients and their families but entire communities.[318]

Another form of relief for immigrants has been based on relief from removal for individual immigrants facing deportation. This type of relief has existed for almost as long as the federal regulation of borders in the United States. At the inception of federal immigration law during the late nineteenth century, immigrants could only be deported for conduct occurring within a narrow window of time after entry in recognition of their built ties over time.[319] While these temporal restrictions were ultimately lifted in the 1917 immigration laws, Congress nevertheless allowed judges to reprieve deportations

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314. *See, e.g.*, Elaine Kamarck, *Can Biden Pass Immigration Reform? History Says it Will be Tough*, BROOKINGS (June 22, 2021), https://www.brookings.edu/blog/fixgov/2021/06/22/can-biden-pass-immigration-reform-history-says-it-will-be-tough/.

315. *See e.g.*, SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

316. DEP'T. OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), https://www.aila.org/infonet/dhs-deferred-action-process-certain-young-people.

317. *See* Richard C. Jones, *Has DACA Promoted Work Over Schooling and Professional Advancement for Qualifying Mexican Dreamers*, 1 SOC. SCI. Q. 3007, 3009 (2021); *see, e.g,, How Many DACA Recipients Are There in the United States*, USA FACTS (Sept. 23, 2020), https://usafacts.org/articles/how-many-daca-recipients-are-there-united-states/.

318. *See. E.g.*, Jones, *supra* note 317, at 3013–14; Nicole Prchal Svaljenka & Trinh Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CTR. FOR AM. PROGRESS (Nov. 21, 2021), https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/.

319. *See, e.g.*, Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 395–96 (2017).

based on humanitarian grounds.[320] It was in 1940, through the adoption of the Smith Act, that Congress first legislated the remedy then known as suspension of deportation, which allowed certain deportable immigrants an opportunity to seek relief based on economic hardship to qualifying family (certain US citizens or LPRs) who would be left behind.[321] Since, Congress has legislated several times to tighten the requirements for this type of relief.[322] These changes included longer times of physical presence or residence in the United States, requirements of good moral character, and a much higher threshold of hardship.[323] The last set of legislative changes to this form of relief occurred in 1996, the same year Congress shifted the border.[324] Congress restructured the relief into three distinct categories it now calls cancellation of removal that applied different standards to LPRs, victims of domestic violence, and non-LPRs, including those who entered without inspection (EWIS).[325] In general, the relief was narrowed substantially to disqualify many based on criminal convictions or the commission of crimes, while retaining the higher threshold of exceptional and extremely unusual hardship except for those eligible as long-term LPRs or victims of domestic violence.[326] The extreme difficulty of proving the hardship, even for those who are not otherwise disqualified, has excluded from relief most families whose significant trauma is not deemed sufficient.[327] It has also required strenuous evidentiary requirements and burdens of proof on the noncitizen who must also resort to their own money to hire experts to assess their potential harm.[328] The relief was also capped at only 10,000 per year for non-LPRs, which has not only produced significant backlogs but encouraged more denials.[329]

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320. *Id.* at 396.

321. *Id.*

322. *See id.* at 397 (discussing changes in 1952 and 1962).

323. *See id.*

324. *See id.* at 398, 403.

325. *See id.* at 398–99, 399 n.47.

326. *See id.* at 399.

327. *See, e.g.*, Bill Ong Hing & Lizzie Bird, *Curtailing the Deportation of Undocumented Parents in the Best Interest of the Child*, 35 GEO. IMMIGR. L.J. 113, 113 (2020); Gina L. Signorelli, *Immigration Waivers and the Psychological Effects on Family Members Throughout Their Loved One's Legalization Process*, 46 S.U. L. REV. 195, 213–17 (2019).

328. *See* Signorelli, *supra* note 327, at 210–11.

329. *See, e.g.*, Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 549 n.87 (2015).

Another significant limitation of legislative or executive grants of relief from removal is that these are treated by both the political branches and the courts as purely discretionary remedies.[330] As such, their denial or rescission are subject to limited judicial oversight even when significant irregularities in implementation arise. IRCA, for example, came under quite a bit of scrutiny for its arbitrary implementation or to challenge the agencies' interpretation of its substantive requirements.[331] The Court's willingness to exercise oversight in such cases, however, was not always consistent.[332] Notably, the discretionary nature of these remedies has also meant even fewer judicial constraints on the due process, such as imposing the burden of establishing eligibility on the petitioner or adopting suspect evidentiary norms. In 1956, for example, the Court dismissed a challenge raised by an LPR of over three decades who was ordered to be deported based on his communistic associations and his suspension claim was denied by reliance on confidential information pertaining to those associations, even when he otherwise satisfied the statutory requirements for the relief.[333] In its reasoning, the Court emphasized the discretionary nature of the relief and the agency's broad discretion to decide what information and how to consider it.[334] Then in 1984, the Court imposed a strict literal reading of the "continuous physical presence" requirement to the suspension of deportation provision to preclude a student visa overstayer from relief based on a three month trip abroad.[335] To do so, the Court rejected the relevance of *Fleuti*, not only because the cases involved different statutes, but also because, in contrast to *Fleuti*, petitioner had already

330. *The Removal System of the United States: An Overview*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview (last visited Oct. 3, 2022).

331. *See* Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 1 U. CHI. LEGAL F. 103, 126 (2009).

332. *Compare* McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 479 (1991) (granting injunctive relief over amnesty denials based on due process challenges) *with* Reno v. Catholic Services, 509 U.S. 43, 43 (1993) (denying injunctive relief to a class of immigrants who had yet applied for amnesty who challenged the agency's interpretation of IRCA's requirements).

333. *See* Jay v. Boyd, 351 U.S. 345, 345 (1956).

334. *See id.* at 350–51.

335. *See* INS v. Phinpathya, 464 U.S. 183, 189–92 (1984).

been ordered deported after living unlawfully in the country.[336] Moreover, the Court has declined to impose similar strict statutory construction burdens that have applied in the context of crime-based bars to discretionary remedies given that, in contrast to deportation cases involving LPRs, it is the immigrant's burden to establish both that they qualify and are not disqualified from the discretionary remedies.[337] It is still possible, however, to challenge immigration policies as to the application of discretionary relief under the APA's narrow "arbitrary [or] capricious" standard, at least in cases in which judicial review has been preserved. For example, in *Judulang v. Holder*, the Court "flunked" the BIA for adopting distinctions the Court considered irrational for distinguishing between lawful residents who could seek suspension of deportation under the pre-1996 provision based on whether they had ever traveled outside the U.S.[338]

Narrow exceptions to legislative prerogative to issue or deny discretionary remedies apply, but only to impose structural constraints on their administration. This occurred, for example, when Congress retained legislative veto power over suspension of deportation grants approved by the agency.[339] In 1974, an immigration judge granted Chadha, who entered the United States lawfully with a student visa in 1966, suspension of deportation as authorized by law. [340] However, at the time, the immigration laws included a provision that allowed either chamber of Congress to overrule any grant of relief by sheer resolution.[341] When Chadha challenged a House of Representatives 1975 resolution that reversed his and hundreds of others suspension of removal relief, the Supreme Court agreed that the method employed to do so violated separation of powers in that it purported to undo legislative powers it had already conferred without following law making rules.[342] A more recent example involved the Administrative Procedure challenge to the Department of Homeland Security's (DHS) decision in 2017 to rescind

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336. *Id.* at 193. Ironically, the petitioner's husband, who had not traveled abroad, was successful in his suspension of deportation provision. Each had been living in the U.S. for over a decade. *Id.* at 185.

337. Pereida v. Wilkinson, 141 S.Ct. 754, 767–68 (2021). Pereida provoked a strong dissent given that he had lived in the U.S. 25 years and raised 3 children, including one U.S. citizen. *See id.* (Breyer J., dissenting).

338. Judulang v. Holder, 565 U.S. 42, 53 (2011).

339. *See, e.g., supra* note 310.

340. *See* INS v. Chadha, 462 U.S. 919, 924 (1983).

341. *See id.* at 925.

342. *See id.* at 944–56.

DACA.[343] In 2012, DHS issued a memorandum announcing the creation of DACA.[344] Then in 2017, responding to the advice of the then Attorney General Sessions, then DHS Acting Secretary Duke rescinded DACA in a letter addressed to the Attorney General.[345] Duke's sole reason for ending DACA was AG Session's legal opinion that DACA suffered from the same illegality that led the 5th Circuit to strike down another parallel program, Deferred Action for Parents of Americans (DAPA).[346] When Secretary Nielsen took over the DHS as its permanent Secretary, she chose to confirm Duke's rescission of DACA nine months later, choosing to elaborate on the reasons for the initial rescission rather than take new administrative action.[347] In a challenge that reached the Supreme Court, the issue became not whether DHS could rescind DACA but the procedures it must follow to do so under the APA. Specifically, outside of formal rulemaking, the APA sets forth procedures for federal agencies to be accountable to the public by requiring "reasoned decision-making" and directing agencies to "set aside" decisions that are "arbitrary or capricious."[348] J. Roberts, writing for the majority, imposed a demanding review of agency procedures,[349] one that J. Kavanaugh labeled as "an idle and

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343. *See* DHS v. Regents of the University of California, 140 S.Ct. 1891, 1891 (2020).

344. *See id.* at 1901.

345. *See id.* at 1903.

346. *See id.* at 1910.

347. *See id.* at 1904. "Nielsen articulated three reasons why DACA's rescission was sound. First, she reiterated that, 'as the Attorney General concluded, the DACA policy was contrary to law.' Second, she added that, regardless, the agency had 'serious doubts about [DACA's] legality' and, for law enforcement reasons, wanted to avoid 'legally questionable' policies. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on 'a truly individualized, case-by-case basis'; and (3) the importance of 'project[ing] a message' that immigration laws would be enforced against all classes and categories of aliens. In her final paragraph, Secretary Nielsen acknowledged the 'asserted reliance interests' in DACA's continuation but concluded that they did not 'outweigh the questionable legality of the DACA policy and the other reasons' for the rescission discussed in her memorandum." *Id.*

348. *Id.* at 1905.

349. *See id.* at 1911–13. First, the Court considered only Duke's reasoning for ending DACA rather than weighing Nielsen's additional rationale, reasoning that a foundational principle of administrative law is that judicial review of agency action

useless formality."[350] By the time Duke rescinded DACA, more than 700,000 youth had the status.[351] Petitioners and amici grounded the arbitrary and capricious action on the enormous harms DACA's rescissions would cause on the youth who relied on the program to make critical life decisions, such as having a family or investing in school.[352] For the Court, the agency's arbitrariness and capriciousness was in not considering these factors when it ended the program. As the Court explained, when an agency changes course, it must be cognizant that long standing policies may have "engendered serious reliance interest that must be taken into account."[353] While these limitations on how Congress can terminate relief against deportation have been important to safeguard the rights of persons who have benefitted from the exercise of this type of discretion, Congress retains the right not to issue relief or to rescind it at any time so long as it follows the right procedures.[354]

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must be limited to the grounds the agency invoked when it took the action, *see id.* at 1908–09. Second, the Court faulted Duke for inadequately distinguishing whether DACA's illegality rested in its forbearance of the deportation power (i.e., prosecutorial discretion) or in its conferral of benefits (i.e., work authorization), *see id.* at 1911–12. Third, the Court found Duke's rescission lacking for its failure to take up important policy choices that belonged to DHS, namely when and whether to exercise prosecutorial discretion in the exercise of the immigration enforcement function, *see id.*

350. *Id.* at 1909 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).

351. *Id.* at 1901.

352. *See id.* at 1914. Petitioners and amici also argued that DACA's rescission was motivated by racial animus in violation of the Fifth Amendment. The Court, however, rejecting this claim finding that the disparate impact of DACA's rescission on certain Latinos was rooted in the overrepresentation of Latinos among the unauthorized population and not on racial animum. *Id.* at 1915.

353. *Id.* at 1913 (quoting Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (2016)). In three separate dissents, four justices expressed strong dissatisfaction with the majority's holding. J. Thomas, joined by J. Alito and J. Gorsuch spent considerable time discussing DACA's illegality and could not imagine how a new administration could not end it the same way it started: with a memorandum. *See id.* at 1918. J. Alito wrote separately to make the point that the Court lacked jurisdiction to review the agency's exercise of prosecutorial discretion. *See id.* at 1932 (Thomas J., dissenting). Finally, J. Kavanaugh took a more measured approach to value APA oversight over agency decisions but disagreed that Secretary Nielsen's memorandum stating the policy reasons for the rescission should have been dismissed. *See id.* at 1934–35 (Kavanaugh J., dissenting).

354. *See id.* at 1920.

IV. MEANINGFUL INCLUSION

Despite the limitations documented in this paper, the United States remains one of the largest recipients of immigrants in the world and has become more inclusive in its practices.[355] In recent decades, millions have obtained permanent or temporary legal status in the United States, including hundreds of thousands who come seeking refuge from trauma experienced elsewhere or who become victims of crime once here.[356] As well, family unification remains a key guiding policy when Congress legislates to create paths to immigration or relief from removal in recognition of both the benefits to the family to social integration[357] and the trauma of separation.[358] Importantly, at least since 1965, the United States has moved away from explicit racial preferences that favored white Europeans in ways that have contributed to the construction of a multicultural nation.[359] Yet wide gaps remain between the way that immigration law recognizes certain forms of trauma and how trauma is understood today as informed by experience across cultures and science. In

355. *See, e.g.*, Phillip Connor & Gustavo Lopez, *5 Facts About the U.S. Rank in Worldwide Immigration*, PEW RESEARCH CTR. (May 18, 2016), https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/.

356. *See, e.g.*, Kira Monin et al., *Refugee and Asylees in the United States*, MIGRATION POL'Y INST. (May 13, 2021), https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2021; U.S. CITIZENSHIP AND IMMIGR. SERVS., *U Visa Demographics Analysis of Data through FY 2019*, https://www.uscis.gov/sites/default/files/document/reports/U_Visa_Report_Demographics.pdf (last visited Mar. 2020).

357. *See, e.g.*, U.N. Expert Grp. Fam. Pol'ys for Inclusive Soc'ys & Denise L. Spitzer, *Family Migration Policies and Social Integration* (May 15–16, 2018), https://www.un.org/development/desa/family/wp-content/uploads/sites/23/2018/05/Family-Oriented-Migration-Policies-and-Social-Integration.pdf.

358. *See* Johayra Bouza, et al., *The Science is Clear: Separating Families has Long-Term Damaging Psychological and Health Consequences for Children, Families and Communities*, SOC'Y FOR RSCH. IN CHILD DEV. (June 20, 2018), https://www.srcd.org/briefs-fact-sheets/the-science-is-clear.

359. *See* Gabriel J. Chin & Douglas M. Spencer, *Did Multicultural America Result from a Mistake? The 1965 Immigration Act and Evidence from Role Call*, 2015 U. ILL. L. REV. 1239, 1243 (2015). The important shifts in immigration law in 1965, of course, have not eradicated biased policies and enforcement of the immigration laws entirely. *See e.g.*, *supra* notes 2-4 and accompanying text.

general, immigration law's embrace of trauma remains narrow and focused on single traumatic events that favor a Western-centric view. Immigration law also erroneously relies on faulty understandings of how trauma is experienced and expressed that fail to account for personal and cultural differences. These misunderstandings are evident in how immigration law attempts to adjudicate trauma. Moreover, the absence of basic procedural safeguards, the imposition of onerous (and flawed) burdens of proof on victims of trauma without resources (i.e., no lawyers or access to mental health experts), and the conditions of removal (e.g., mandatory detention) create huge risks of getting it wrong and excluding even the few the law has recognized as deserving of our protection.[360]

As we move toward recognizing trauma as a ground for inclusion, the need to validate claims of past or future trauma or other hardships and document their impact is becoming central to some immigration cases. While documentation and validation are necessary parts of formalizing trauma as a grounds for inclusion, this formalization comes with its own risk of furthering exclusion. A common approach to documenting trauma in immigration cases is the use of forensic assessments, which more and more frequently include a mental health component.[361] In our own research, we have found that the documentation of trauma and related mental health diagnoses are two primary reasons immigration attorneys seek mental health forensic assessments for their clients.[362] Whereas studies do show that the use of forensic immigration assessments yield better outcomes in immigration cases,[363] narrow understandings of trauma in the immigration context have also led to the medicalization of trauma in problematic ways. For example, one of the most commonly sought diagnoses of past harm in immigration cases is posttraumatic stress disorder (PTSD).[364] PTSD was added to the third edition of the

360. *See* discussion *supra* Part III.

361. *See, e.g.*, Holly G. Atkinson et al., 84 J. OF FORENSIC LEGAL MED. 102272, pt. 4, § 4.2 (2021), https://doi.org/10.1016/j.jflm.2021.102272.

362. *See Immigration Forensic Assessments*, U.C. DAVIS, (unpublished survey data) summarized findings will be made available at https://compassioninimmigration.faculty.ucdavis.edu/.

363. *See* Atkinson et al., *supra* note 361, at abstract ("We conducted a retrospective analysis of 2584 cases initiated by Physicians for Human Rights between 2008 and 2018 that included forensic medical evaluations, and found that 81.6% of applicants for various forms of immigration relief were granted relief, as compared to the national asylum grant rate of 42.4%.").

364. Susan Meffert et. al., *The Role of Mental Health Professionals in Political Asylum Processing*, 38 J. AM. ACAD. PSYCHIATRY AND L. 479, 482 (2010).

Diagnostic and Statistical Manual of Mental Health Disorders (DSM: the standard diagnostic manual used by mental health professionals in the U.S.) in 1980 during the aftermath of the Vietnam War to describe a cluster of symptoms present in some trauma survivors.[365] Although the criteria have since been updated, they are still primarily informed by the types of trauma most frequently experienced by the U.S. population–for example, in veterans of war, victims of gang violence, or survivors of domestic violence or sexual assault. In the most current edition of the DSM (DSM-5), PTSD is characterized by a combination of intrusion symptoms–such as intrusive memories or dreams or exaggerated negative reactions to trauma-related stimuli; avoidance of situations or stimuli related to the traumatic event; changes in mood and cognition–such as difficulty remembering aspects of the traumatic events or blunted experience of feelings such as connection or happiness; and changes in arousal and reactivity.[366] These symptoms must persist for at least a month and must originate following experiencing or witnessing actual or threatened serious injury, death, or sexual violence, or learning that such an event has happened to a loved one.[367]

In the years since PTSD was first described in the DSM, the term has become nearly synonymous with trauma in colloquial language. Similarly, a diagnosis of PTSD may be considered a strong validation of past harm by advocates or adjudicators. In reality, the clinical presence of PTSD is a poor proxy for past harm. This is true for several reasons. The first has to do with the types of trauma the clinical criteria were designed to capture. The conceptualization of trauma presented in the diagnostic criteria for PTSD is highly individualistic and event-based:[368] embedded in the definition is the assumption of a singular traumatic event (or events) that happened to a person and then ceased.[369] As the external event is assumed to be over, behaviors and symptomology that may be adaptive in situations of active threat–such as enhanced vigilance and reactivity–are no longer considered appropriate. As discussed in Part I of this paper, the clinical criteria are also not well-suited to address or describe experiences of protracted or ongoing trauma (such as the refugee experience), or to describe instances of structural discrimination or

365. *See* TRIMBLE, *supra* note 12.

366. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS : DSM-5 (5th ed. 2013).

367. *Id.*

368. *See* Bessel van der Kolk, *Posttraumatic stress disorder and the nature of trauma*, 2 DIALOGUES CLIN NEUROSCI 7, 8 (2000).

369. *See* Meffert et. al., *supra* note 364, at 483–484.

violence (such as Apartheid in South Africa) or collective forms of trauma (such as the trauma of severe forms of generalized violence).

Even within populations for whom the diagnostic criteria are better suited, there is great variability in PTSD susceptibility and resilience. Not everyone who experiences a traumatic event will develop PTSD.[370] A growing body of research identifies a number of factors that relate to resilience and, conversely, to vulnerability in the face of trauma and hardship.[371] Individual differences in gender, genetic predispositions and epigenetic expression, brain structure and neurobiology, and personality characteristics are all related to the likelihood of developing PTSD following the experience of trauma.[372] For example, having a high felt sense of mastery is related to resilience, while being high in trait neuroticism is a risk factor for developing PTSD.[373] Situationally, social support and connection to community are highly protective factors that support resilience and post-traumatic growth.[374] A person's developmental history also matters: for children, having a stable and loving bond with an adult caregiver is a key factor in resilience.[375] Secure attachments in adulthood–which are supported by healthy childhood relationships and attachments–are also protective, while childhood trauma greatly increases the lifetime prevalence of PTSD.[376] Related to this, the timing of traumatic experiences, as well as how long the circumstances were endured, are important factors in resilience and vulnerability.[377] Early childhood and adolescence are both considered sensitive periods of development,[378] during which many factors, including the experience of trauma, may have an outsized impact.

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370. Post-Traumatic Stress Disorder (PTSD), NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/post-traumatic-stress-disorder-ptsd (last visited Oct. 4, 2022).

371. Ahmed, *infra* note 372.

372. *See* Ayesha Ahmed, *Post-Traumatic Stress Disorder, Resilience and Vulnerability*, 13 ADVANCES IN PSYCHIATRIC TREATMENT 369, 370 (2007); Sarah R. Horn, et al., *Understanding Resilience: New Approaches for Preventing and Treating PTSD*, 284 EXP. NEUROL. 119, 120 (2016); Gang Wu, et al., *Understanding Resilience*, FRONT. BEHAV. NEUROSCI., Feb. 15, 2013, at 1.

373. *See* Ahmed, *supra* note 372, at 373; Horn et al., *supra* note 372, at 122.

374. *See* Ahmed, *supra* note 372, at 373; Horn et. al., *supra* note 372, at 121; Wu et al., *supra* note 372, at 7.

375. *See* Horn et al., *supra* note 372, at 121.

376. *See* Ahmed, *supra* note 372, at 373.

377. *See* Horn et al., *supra* note 372, at 121.

378. *See* B.J. Casey et al., *The Adolescent Brain*, 1124 ANN. N.Y. ACAD. SCI. 111, 111 (2008).

Additionally, some types of traumatic experiences are more likely to lead to PTSD than others. Notably, rape and sexual violence results in higher prevalence of PTSD than do other types of trauma and interpersonal violence.[379] This means that a bias towards certain types of trauma is embedded in the diagnosis.

All of these factors are deeply intertwined and condition one another: being female is a risk factor for developing PTSD, and women are also more likely to experience rape and sexual violence, which result in a higher prevalence of PTSD than other types of interpersonal trauma.[380] Some epigenetic and neurobiological shifts that contribute to stress responses and risk of developing PTSD in adulthood are associated with having experienced childhood trauma.[381] As such, no single factor–including severity–is determinative of how someone will respond to traumatic events. In fact, some research indicates that resilience and post-traumatic growth may be the normative response to some forms of trauma.[382] Thus, PTSD is only one way that the complex system of a human embedded in their sociocultural context may react to experiencing trauma. Even among those who do develop PTSD, the presentation can be highly varied and inconsistent.[383] Thus, the presence of clinically significant PTSD symptomology is not necessarily a reliable indicator of whether or not that person has experienced past harm, nor of the severity of that harm. Additionally, as discussed in Part I, there are far-reaching cross-cultural differences in how trauma is understood and expressed.[384] Therefore, while a diagnosis of PTSD for an asylum seeker or victim of crime who is truly manifesting symptoms of PTSD could support claims on a case-by-case basis. Reliance on PTSD diagnosis or symptomology as a primary proxy for traumatic experience is neither scientifically-informed nor cross-culturally reliable—particularly when there are more appropriate

379. Maria M. Steenkamp, et al., *Trajectories of PTSD Symptoms Following Sexual Assault: Is Resilience the Model Outcome*, 25 J. TRAUMA STRESS 469, 469 (2012).

380. *See id.*

381. *See* Wu et al., *supra* note 372, at 3.

382. *See* George A. Bonanno, *Loss, Trauma and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extreme Aversive Events*, 59 AM. PSYCHOLOGIST 20, 22 (2004).

383. *See* Charles Stewart E. Weston, *Posttraumatic Stress Disorder: A Theoretical Model of the Hyperarousal Subtype*, FRONT. PSYCHIATRY, Apr. 5, 2014, at 2.

384. These differences have been the topic of extensive research and discussion. *See, e.g.*, LAURENCE J. KIRMAYER ET AL., UNDERSTANDING TRAUMA: INTEGRATING BIOLOGICAL, CLINICAL, AND CULTURAL PERSPECTIVES 2 (Laurence J. Kirmayer et al. eds., 2007).

international standards available such as the Istanbul Protocol[385]and risks excluding many whom the law may, in fact, deem as worth of inclusion.

Beyond concerns about the scientific and cross-cultural validity, the use of PTSD diagnoses as a proxy for trauma raises a number humanistic and person-centered issues. Practically, there are huge problems with access and equity. Many refugees and asylum seekers do not have access to an attorney, and an even smaller percentage are able to obtain a forensic assessment.[386] Barriers to access include availability of assessors, cost, and time constraints.[387] The implicit precedent set if adjudicators come to expect a forensic report as part of a strong asylum case stands to disadvantage the many asylum seekers who do not have access to that level of support and resources.[388] Furthermore, focusing on PTSD or other clinical symptomology furthers the narrative of the immigrant as "damaged," risks privileging the symptoms over the experience, and forces asylum seekers and refugees into a Western medical narrative of their experiences. This can be dehumanizing and retraumatizing in and of itself. Finally, overemphasizing clinical diagnoses accepts the implicit assumption that only those who display symptoms of PTSD have been through sufficient hardship to warrant a claim to asylum. Therefore, while we see the transition from trauma as a ground for exclusion to trauma as a cause for compassion and humanitarian action as fundamental to a just immigration system, the pull toward the codification of trauma and trauma symptomology risks perpetuating the exclusionary cycle.

Nevertheless, the need to document and validate claims of past trauma exists and efforts to make this process more fair, equitable, and science-informed are essential. Given the above-outlined pitfalls

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385. Office of the United Nations High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investiagation and Documentation of Turture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rev. 2* (2022), https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf

386. *See, e.g.*, Ingrid Eagly & Steven Shafer, *Access to Council in Immigration Court*, AM. IMMIGR. COUNC. (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

387. *Id.*

388. Our own survey reveals that many immigration lawyers, in particular, worry that the uneven availability of forensic reports, especially dictated by the lack of immigrant resources, has created expectations in the courts that bias immigration adjudicators against findings of credibility when such reports are not part of the record. *See Immigration Forensic Assessments*, *supra* note 362.

in co-opting clinical criteria for use in immigration cases, how might our current understanding of psychology and neuroscience contribute to a more just immigration system? We argue that the key lies in shifting our focus away from the codification of *criteria* for inclusion, and toward making the asylum-seeking *process* more trauma-informed and cross-culturally valid. There are a number of ways in which psychological and neuroscientific perspectives on trauma can contribute to this greater project. For example, one area that could offer immediate benefit is integrating what we know from scientific studies of stress, trauma, and memory to build an understanding about what a credible narrative might look like in immigration cases that involve trauma. Many immigration cases that involve trauma cases hinge on the perceived credibility of the immigrant's personal story. In order to tell this story, immigrants must access their autobiographical memory. Autobiographical memory is the memory of our own life events, and relies on the joint activity of multiple interacting brain systems.[389] High levels of uncontrollable stress can trigger a series of neurochemical processes in the brain that affect the structure and function of the very brain regions required for the formation and subsequent recall of autobiographical memories.[390] This can, in turn, lead to disruptions in autobiographical memory, making the task of recalling past events in one's life particularly difficult. This difficulty may be incompatible with the legal standard of a consistent, linear story with few variations across multiple tellings.[391] In this case, decision-makers and advocates who had a

389. These include the hippocampus, which is involved in memory encoding and recollection; the amygdala, which is involved in emotion processing and salience detection; the prefrontal cortex, which is involved in self-regulation, the representation of the self, searching for relevant memories, and other high-order cognitive processes. *See* Roberto Cabeza & Peggy St. Jacques. *Functional Neuroimaging of Autobiographical Memory*, 11 TRENDS COGNI. SCI. 219, 219 (2007).

390. The amygdala drives arousal systems, increasing the firing of neurons in the midbrain (e.g., the locus coeruleus). This can increase the release of a class of neurotransmitters called catecholamines. At moderate levels, these enhance activity in regions of the prefrontal cortex and weaken the influence of the amygdala. However, in situations of acute, uncontrollable stress, high levels of catecholamines released weaken prefrontal areas and strengthen the influence of the amygdala. *See* Amy F. T. Arnsten et al., *The Effects of Stress Exposure on Prefrontal Cortex: Translating Basic Research into Successful Treatments for Post-traumatic Stress Disorder*,1 NEUROBIOLOGY OF STRESS 89, 91 (2015).

391. *See, e.g*, Scott Rempell, *Guiding Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 383 (2011).

strong understanding of the impact of trauma on memory processes would be better-positioned to assess whether the narrative was consistent with the events described, and make a judgment on the strength of the case than would their peers who relied primarily on the idealized legal standards of credibility. This is but one example of where a dialogue between the law and science can contribute to fairness in immigration.

As we develop more inclusive approaches to adjudicating trauma, we must be vigilant to ensure that we do not inadvertently create more avenues for bias and exclusion. In addition to wider adoption of established interational standards for the documentation of trauma,[392] we suggest several efforts that we can collectively engage in to work toward meaningful inclusion. The first is to approach mental health forensic assessments as an educational, rather than diagnostic, tool. That is, instead of attempting to fit an asylum seeker or victim of crime into a Western medical diagnosis to prove the validity of their claim, these assessments should be used to elucidate what, *for this individual,* credibility might look like. To do this effectively requires culturally-appropriate and trauma-informed assessors and clinical assessment tools. Currently, access to these resources is extremely limited. Second, we must address barriers to access, including access to legal representation, the availability of appropriately trained assessors, and the financial burden to petitioners. Third, we must continue to seek the reform areas of immigration law and practices with wide gaps in scientific understanding on the impact of trauma,[393] or at a minimum train immigration advocates and adjudicators in science-informed understandings of trauma in the application of current standards. This will help build realistic expectations for credibility and support their ability to more fairly and accurately represent and adjudicate cases that involve trauma. The fourth is to push for creating a more trauma-informed process on the whole. This includes adopting alternatives to immigration detention and developing more trauma-informed interview processes and court proceedings, both to avoid perpetuating trauma and to provide fair and equitable grounds for petitioners to make their case. Other areas of law have already begun

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392. *See, e.g,* The Istanbul Protocol, *supra* note 385.

393. For example, the Real ID's standard for credibility assessments in asylum cases, especially its emphasis on consistency and reliance on demeanor, deviates significantly from a science-informed approach to documenting trauma. *See, e.g.,* Rempell, *supra* note 391, at 377; James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 B.U. INT'L L.J. 1, 18 (2012).

similar processes under the theoretical framework of therapeutic jurisprudence, in the context of mental health criminal courts[394] or in the handling of child abuse cases.[395] The application of therapeutic jurisprudence to the immigration system generally is a much larger question we hope to take up in a future article. Others have started to make very useful and excellent contributions to considering its possible uses and contributions in other aspects of immigration law and practice.[396] Finally, we must engage in cross-disciplinary and cross-cultural dialogue. This will help us bridge the legal-scientific gap and identify leverage points where the conversation between the law and science can be generative. Through all this work, we must maintain humility and a humanitarian orientation and learn from the history of how scientific perspectives have been used to justify and perpetuate harm.[397] We recognize that these initial suggestions are far from exhaustive and, at the same time, daunting. The greater project of working toward meaningful inclusion is a long one. We hope our collective work offers a piece of the roadmap to how we can create an immigration system that more clearly reflects the principles of compassion and fairness.

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394. *See, e.g.*, GINGER LERNER-WREN & REBECCA A. ECKLAND, A COURT OF REFUGE: STORIES FROM THE BENCH OF AMERICA'S FIRST MENTAL HEALTH COURT PINCITE (2018).

395. *See, e.g.*, Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623, 626 (2005).

396. Koelsch, *Embracing Mercy: Rehabilitation as a Means to Fairly and Efficiently Address Immigration Violations*, 8 INTERCULTURAL HUM. RTS. L. REV *See, e.g.*, Evelyn Cruz, *Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless*, 17 ST. THOMAS L. REV. 811, 819 (2005); David C.. 323, 365 (2013).

397. *See, e.g.*, *supra* Part II.