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Shoba Sivaprasad Wadhia
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Letter from the Editor-in-Chief

Shoba Sivaprasad Wadhia

Welcome to the official second volume of the *AILA Law Journal*! In my immigration law class at Penn State, I opened the 2020 semester with a theme that "Immigration is everywhere." I use this theme to generate a discussion about the ways immigration law touches or intersects with other fields of law. "Immigration law is everywhere" is likewise a defining theme in the current issue of the *AILA Law Journal*. This issue contains five dynamic articles connecting immigration law to administrative law, tax law, trauma, technology, and history. Each of our authors bring deep experience in the immigration field and are new to the *AILA Law Journal*.

Professor Maureen A. Sweeney argues that federal courts should not apply *Chevron* deference to Board of Immigration Appeals or Attorney General decisions on asylum or withholding of removal. She provides a background of *Chevron* and lays out specific reasons why deference is inappropriate in asylum and withholding of removal cases. Some of the reasons Sweeney analyzes include the treaty source for asylum and withholding of removal, the lack of expertise by agencies in the laws informing asylum and withholding law, and the unique vulnerability faced by asylum seekers. This article illustrates the significant connection between immigration law and administrative law.

Immigration attorneys Hannah C. Cartwright, Liana E. Montecinos, and Anam Rahman, and Professor Lindsay M. Harris explore the intersections of trauma and immigration law by identifying the barriers in recognizing the trauma immigration lawyers may experience during the course of representation. The authors analyze the ethical obligations of immigration attorneys when exposed to trauma and the challenges of meeting standards like competence or diligent representation when they are suffering vicarious trauma. The authors suggest practical ways that the immigration bar can develop techniques for self-awareness and support. This piece resonated personally, as I consider the ways I teach and handle the vicarious trauma my own students face when working with traumatized clients, all while monitoring my own responses to trauma from clients or students. The piece aims to continue the conversation about trauma in the immigration field among the immigration bar, law students, law professors, and leaders. I hope its publication in the *AILA Law Journal* helps to achieve this aim.

Immigration attorney Patrick J. McCormick provides an overview about the tax considerations for expatriates. He provides a background on how Americans, residents, and nonresidents are taxed and thereafter analyzes the tax consequences for individuals who choose to expatriate.

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Third-year law student Heather Adamick provides a historical account about the border between the United States beginning with Spanish Rule and Mexican Independence. She criticizes the policy reasons President Trump has advanced for a border wall and argues how the administration has failed to show how a border wall will lead to real solutions.

Immigration attorney Greg Siskind provides practical advice and information for immigration lawyers considering case management software. Siskind interviewed a wide range of lawyers to learn about the software they are currently using and consolidated this information for this volume. In sum, 219 individuals responded to the market survey conducted by Siskind. One goal of his article is to provide immigration lawyers with knowledge about the differences between case management products and make informed decisions about which products to use.

Editing and publishing each volume of the *AILA Law Journal* takes a village. I am grateful to our editorial board, Managing Editor Danielle Polen, Full Court Press Publisher Morgan Morrissette Wright, and Paige Britton, and Kritika Agarwal for supporting the journal and giving their time to selecting articles, editing those pieces selected, and all with a special patience and talent. Moving forward, I encourage all of our readers to consider submitting a piece to the *AILA Law Journal*. We are always looking for high-quality writing on a range of immigration issues from diverse authors. If you have ideas you want to pitch, drop me a line at ssw11@psu.edu. It is a true honor to serve as *AILA Law Journal*'s Editor-in-Chief. I look forward to hearing from you!

Shoba Sivaprasad Wadhia, Esq.
Editor-in-Chief

Enforcing/Protection

Arguing Against *Chevron* Deference in Asylum and Withholding of Removal Cases

Maureen A. Sweeney*

Abstract: This article presents a timely argument that federal courts should not apply *Chevron* deference to Board of Immigration Appeals (BIA) or Attorney General (AG) decisions on asylum or withholding of removal. The Supreme Court's *Chevron* case law has identified a range of factors that properly limit the application of deference to agency decisions, including the nature and expertise of the agency and the likelihood that Congress would have intended to confer essentially unreviewable discretion to the executive agency on a particular question. Using this framework, litigators should argue that *Chevron* deference is inappropriate in the asylum/withholding context because of (1) the non-negotiable treaty source of the obligation to protect, (2) the prosecutorial and politically responsive nature of the Justice Department in immigration, (3) the BIA's and the AG's lack of expertise in the international and comparative law that should inform humanitarian law, and (4) the political and personal vulnerability of asylum seekers.

One of the biggest challenges for a litigator trying to overturn a Board of Immigration Appeals (BIA or Board) decision on petition for review in the federal court of appeals can be overcoming *Chevron* deference. Under *Chevron*,[1] a reviewing court is instructed that whenever there is an ambiguity in a statute, it should defer to any reasonable interpretation given by the executive agency that implements the statute. In other words, the court will not rigorously review a decision to ensure the *best* legal interpretation, but rather should defer to any interpretation by the agency that passes the bar of "reasonableness." In the context of humanitarian protection, this means that federal courts of appeals will often defer to BIA and Attorney General (AG) decisions interpreting eligibility for asylum or withholding of removal when the meaning of the statute is not clear. For an asylum or withholding applicant, this restricted review by the court can mean the difference between protection and deportation back to danger.

Chevron's presumption of deference has been justified on separation of powers and agency expertise grounds, and because it preserves political accountability for policy decisions. However, it is not a good fit for the context of Department of Justice (DOJ) decisions on asylum and withholding, in which fundamental individual rights are at stake, especially when politicized agency leadership has shown outright hostility to the enforcement of the

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law's protective measures. The danger of bias is structurally inherent to an executive agency charged with both enforcing border security and ensuring humanitarian protection.

Chevron jurisprudence is not a monolith, however. The Supreme Court's developing case law on deference and *Chevron* in fact leaves room for an interpretation that would decline deference to the Board or the AG and would require robust judicial review of decisions affecting asylum or withholding of removal law.

This article gives some background on *Chevron* and lays out an argument that courts should categorically deny *Chevron* deference in asylum and withholding cases because of: (1) the non-negotiable treaty source of the government's legal obligations, (2) the prosecutorial nature of the DOJ with regard to immigration, (3) the Board's and the AG's lack of any special expertise in the international and comparative law that should inform asylum and withholding law, and (4) the extreme political and personal vulnerability of asylum seekers. These factors—all appropriate considerations under contemporary Supreme Court deference analysis—weigh in favor of eschewing *Chevron* in asylum and withholding cases in favor of robust judicial review of BIA and AG decisions.

The *Chevron* Holding, Its Theoretical Underpinnings, and Recent Developments

In its 1984 *Chevron* decision, the Supreme Court addressed the balance of decision-making authority between administrative agencies and the courts. The question was: Where a statute is ambiguous because Congress either did not foresee or did not choose to address a policy question that arises in implementation, which of the remaining branches of government should have preference to answer the implementation question? *Chevron* held that where Congress does not say otherwise, it should be presumed to have delegated the power to interpret the ambiguous statute to the executive agency charged with implementing it, rather than to the courts.[2] Thus, where *Chevron* deference is held to apply, a reviewing court should defer to *any reasonable interpretation* made by the executive agency, even if the court might find a different interpretation to be preferable.

Chevron deference has been justified on a number of grounds. The Court itself discussed the issue in terms of the separation and balance of powers between the branches of government, concerned about overreach by the judiciary into policy questions for which it had neither expertise nor political accountability. The decision is predominantly grounded in these separation of powers principles and establishes a hierarchy of government authority for policy decisions: *legislative* intent trumps *executive* implementation, which in turn is given deference over *judicial* interpretation where the legislature has left a statute ambiguous. The presumption in favor of agency decision-making

has been explained as fulfilling an unspoken understanding of Congress that unanswered issues would be resolved by the implementing agency.

Part of the logic for this presumption is the idea that the agency, because of its focus and practical experience, will be a better decision-maker because it has expertise in the matter at hand. The *Chevron* Court, faced with a technical policy question about the classification of pollution emitters under the Clean Air Act, acknowledged that an understanding of the policy implications of that question required more than ordinary knowledge and that the justices were "not experts in the field." Given its lack of expertise, the Court found it preferable to leave the policy question for the agency to answer. One study showed that in the decades since *Chevron*, courts have granted the most substantial deference in cases arising in technically complicated areas like environmental science, energy, intellectual property, pensions, and bankruptcy.[3]

Finally, the *Chevron* Court expressed concern for political accountability, describing the subject of the contested decision-making in that case as "policy-making" and as "assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest." The Court held that this policy-making function was properly left to the political branches, which could ultimately be held accountable by their constituents for these normative choices: "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."

But the implementation of the *Chevron* principle has been anything but straightforward, and the reach of the doctrine has been increasingly limited over the years. What appeared at first blush to be a sweeping and categorical preference for executive over judicial authority has gradually been narrowed and qualified. The Supreme Court's skepticism of agency deference has only accelerated in recent years, as justices' predominant concerns have shifted from judicial overreach to runaway executive agencies.[4] Some justices now suggest that the doctrine should be reconsidered altogether, as an improper "thumb on the scale" for executive agencies or even a violation of the separation of powers.[5] As both a practical and theoretical matter, *Chevron*'s broad sweep has been narrowed over the years as the Supreme Court and lower courts have tried to find appropriate limiting principles for its broad language.

As early as 1987, the Supreme Court clarified its holding in separation of powers terms, by reasserting the primacy of courts to interpret statutory language, drawing attention to the first step of what would become *Chevron*'s two-step analysis. In Step One, a reviewing court is required to use all the "traditional tools of statutory construction" to discern the intent of Congress.[6] In other words, where a statute's meaning can be discerned, it is the job of the court to ensure that its terms are given the effect that Congress intended, regardless of any agency position. In balance of powers terms, Step One preserves to Congress the power to write the law and to the courts the power to "say what the law is."[7] It is only if the court finds that the intent of Congress is unclear—that there is an unresolvable ambiguity in the law—that the court

should go to *Chevron*'s Step Two, which requires the court to defer to reasonable agency interpretations.

Beyond Step One, courts have found a variety of other ways to limit automatic *Chevron* deference where they perceive that it was unlikely that Congress would have intended to shift authority to an agency because of the nature of the question or of the agency, or of the relationship between the two. Many of these principles have come to be known as "Step Zero" considerations, because they remove a question from the reach of *Chevron* even before a court engages the analysis of Step One or Step Two. Over the years, the Supreme Court has become increasingly willing to sidestep deference entirely in this way; that is, to *not* presume that Congress intended to delegate authority to an agency to clarify statutory ambiguities. Most recently, in *Kisor v. Wilkie*, a 2019 case involving deference to an agency's interpretation of its own regulations, the Court stated that the presumption of agency deference should not be given effect "when the reasons for that presumption do not apply, or countervailing reasons outweigh them."[8] The first decision considered to have employed Step Zero was *United States v. Mead Corp.* in 2001, when the Supreme Court limited *Chevron*'s reach to formal agency decisions, holding it unnecessary to defer to informal or low-level decisions that were held not to represent the voice of the agency speaking "with the force of law."[9] A more recent Step Zero case was *King v. Burwell*, the 2015 Affordable Care Act (ACA) case, in which the Court dismissed an invitation to apply *Chevron* on grounds that it was unlikely Congress intended to implicitly delegate a question of such "deep economic and political significance" as the ACA to the Internal Revenue Service (IRS).[10]

Another area in which courts have never deferred to executive agencies—for separation of powers reasons—is in criminal enforcement; a prosecutor's office is due no deference to its interpretation of criminal law. This is consistent with an understanding of the power of the office of prosecutor vis-à-vis the individual, the role the prosecutor plays in enforcement of the laws in an adversarial system, and the importance of the role of the courts as a check on that power.[11]

Courts have also limited the reach of *Chevron* where an agency lacked relevant expertise on a question despite having general implementing responsibility in an area. Of course, this is one way to understand the Supreme Court's refusal to defer to the IRS in the Affordable Care Act case.

In short, since 1984 the Court has become more willing to consider the nature of both the executive agency and the question at issue to decide under Step Zero whether Congress likely intended to delegate a particular question to an agency. This in turn has affected the Court's willingness to apply *Chevron*'s presumption of deference to the agency's interpretation. The doctrine has evolved from a seemingly blanket directive of deference to the recognition of a range of reasons for courts to decline to defer to agencies.

Chevron nonetheless holds powerful sway in the lower courts, where the majority of cases are decided. A study published in 2017 found that the *Chevron* framework was applied in 75 percent of agency cases in the courts of appeals

and that in those cases, 94 percent of the agency decisions were upheld. Unless and until the Court undertakes a wholesale reconsideration of the *Chevron* doctrine, it is therefore essential for litigators to advocate vigorously for the lower courts to consider the same range of factors that the Supreme Court has identified to determine whether or not *Chevron* deference is appropriate in any particular case or area of the law.

Arguments to Oppose the Application of *Chevron*'s Framework

Immigration litigators should consider the full range of possibilities for arguing that *Chevron* deference is inappropriate in their cases, including:

- Step Zero arguments under *Mead Corp*. that the decision was not formal enough to trigger *Chevron*. This would apply to unpublished BIA decisions, which are not precedential under 8 C.F.R. § 1003.1(g).
- Step One arguments that the statute is unambiguous. For example, the Supreme Court avoided deference in *Pereira v. Sessions*, holding that the Immigration and Nationality Act (INA) unambiguously required the time and date of hearing on a notice to appear.[12]
- Step One arguments that an apparent ambiguity in the statute can be resolved using the ordinary tools of statutory construction. For example, the Court held in *Cardoza-Fonseca* that legislative history and statutory structure supported finding that Congress created different standards for asylum and withholding claims.[13] Litigators can likewise argue that a court can look to international and comparative law sources on the meaning of Refugee Convention provisions underlying asylum and withholding, both because Congress intended to comply with Convention obligations and as an exercise of the *Charming Betsy* canon that a statute should be interpreted in accord with international law.[14]
- Other Step Zero–style arguments that Congress would not have intended to delegate unchecked power to the agency on a question.
  - The question is one of "deep economic and political significance" that Congress would not have delegated to the agency implicitly. This concept could be expanded to include fundamental human rights questions as deeply significant.
  - The question is one outside the agency's area of expertise. For example, the BIA is due no deference on constitutional claims or interpreting criminal statutes; similar arguments could be made about internationally based human rights protections.
  - Practitioners should consider, in the wake of *Kisor*, whether the generally recognized reasons for deference apply or whether

countervailing reasons outweigh them,[15] including whether the "character and context" of the interpretation entitles it to controlling weight, whether it implicates substantive expertise beyond that of judges, and whether it reflects the "fair and considered judgment" of the agency.

- Step Two arguments that the interpretation of the agency is unreasonable, especially where a recent agency decision overturns long-standing law or practice.

In the broader context of these possible arguments, this article develops a Step Zero–style argument that *Chevron* deference should be denied categorically in asylum and withholding cases, because a presumption of deference is ill suited to the factual and legal context of DOJ decisions on humanitarian protection.

A Step Zero Argument to Oppose *Chevron* Categorically on Asylum and Withholding Issues

Precedent on *Chevron* in Asylum and Withholding Cases: Ripe for Reconsideration

As a historical matter, the Supreme Court and lower federal courts have generally given *Chevron* deference to the BIA and the AG in matters of asylum and withholding of removal, where they have found the INA to be ambiguous. However, this position is ripe for reconsideration. The Supreme Court has actually never engaged in a robust analysis of whether a presumption of deference would be appropriate in the unique context of Refugee Act provisions (or even in the context of immigration courts that are structurally part of an enforcement agency). This is significant, given the space within contemporary *Chevron* doctrine for considering whether the reasons for presumption apply in a given context.

The Supreme Court first observed, in *dicta*, that *Chevron* deference would apply to some aspects of asylum adjudications in the 1987 *Cardoza-Fonseca* decision.[16] However, the Court's observation was not essential to its decision (which found the statute to be unambiguous) and involved no substantive discussion or analysis of *Chevron*'s applicability. Subsequent cases, including *INS v. Aguirre-Aguirre* and *Negusie v. Holder*, held directly that *Chevron* applies to asylum and withholding cases, but they relied almost exclusively on the *dicta* from *Cardoza-Fonseca* and did not engage in a robust analysis of whether a presumption of deference was appropriate.[17] At no time in the three decades since *Cardoza-Fonseca*, as *Chevron* jurisprudence has evolved, has the Court substantively analyzed whether such a presumption would be appropriate in the asylum context.

Neither have courts taken into account the fact that the INA refugee protections have their origin in non-negotiable international obligations. Nor that the Justice Department acts as an immigration prosecutor. This is a significant oversight in *Chevron* terms, because the mission, capacities, and expertise of the agency and its relation to the question at issue have become important factors in the Supreme Court's decisions about whether to extend *Chevron* deference to a particular area of agency activity. These factors have taken on increasing urgency in the immigration realm as recent AGs have repeatedly certified asylum decisions to themselves and overturned important BIA precedent, and as the DOJ has proposed to enhance the authority of political appointees to set agency precedent on asylum and other issues. Given that the Supreme Court has never engaged in a substantive analysis on the appropriateness of deference on humanitarian protection and that evolving case law increasingly declines to presume deference, the time is ripe for courts to reconsider *Chevron* deference in asylum and withholding cases.

Theoretical Limitations of *Chevron* in Asylum and Withholding

The theoretical justifications for the *Chevron* doctrine all come up short in the context of asylum and withholding of removal cases. As a matter of the separation and balance of powers, there is good reason to believe that Congress, when it enshrined asylum and withholding in the INA, would not have intended to entrust unfettered power over the interpretation of those vital protections to a politically responsive and prosecutorial agency. In fact, as a matter of balance of powers, the agency's primary enforcement mission could support a presumption *against* deference to its decisions on the limits of protection. Neither is deference warranted because of agency expertise. The INA's asylum and withholding provisions require statutory interpretation of the sort that courts engage in regularly and moreover should be interpreted in light of their international law roots and of the interpretations of the Convention's other signatories and the international legal community. The BIA and the AG have no advantage or expertise over courts in these areas. And finally, the right to protection from persecution is a fundamental human and civil right (under both U.S. and international law) and as such is not a matter of "policy" that should be entrusted to the pressures of political accountability. Quite the opposite. We will look at each of these possible justifications for *Chevron* in more detail below.

Balance of Powers: Prosecutor as Protector?

When Congress passed the Refugee Act of 1980, it created the asylum system and enshrined in statute the right of individuals fleeing persecution to seek protection in the United States. It indicated its intent that the statute

would bring the nation into full compliance with its international obligations under the Geneva Refugee Convention of 1951.[18] The primary obligation under the Refugee Convention is that of *non-refoulement*, the prohibition on returning an individual to a country where they would likely be persecuted because of protected characteristics. Responding to the "urgent needs" of these individuals was the explicit congressional purpose in passing the Refugee Act,[19] and it is therefore safe to assume that Congress intended for the protection of *non-refoulement*—in the forms of asylum and withholding of removal—to be vigorously enforced.

Immigration courts, where asylum and withholding seekers apply for this protection, are, of course, administrative tribunals located within the Department of Justice. The DOJ is a law enforcement agency, responsible in significant part for enforcing U.S. law against unlawful immigration. It is led by the Attorney General, who is both a member of the president's cabinet (and thus sensitive to politics) and the nation's chief law enforcement officer. Because immigration courts are responsible for both enforcing removability and providing relief from removal, their location in the DOJ has long been a challenge to their integrity. The pressures on the objectivity of the courts are exacerbated when, as now, an administration seeks to exert power through the AG and the administrative court system to direct the substantive development of the law.

The Justice Department has a primary mandate for and deep investment in immigration enforcement, as one of the principal federal agencies that carries out enforcement of immigration laws as part of its ordinary statutory duties. While the Department is charged equally with enforcing INA provisions that provide for relief from deportation and those that prohibit unlawful immigration, it has tended to skew in favor of punishing violations rather than providing relief. Even beyond the enforcement mandate of the immigration court system, DOJ has been actively engaged in *criminally* prosecuting immigration violators for more than the last decade and through three presidential administrations. Long before the Trump administration, prosecutions for illegal entry and reentry represented the majority of criminal prosecutions brought nationwide by DOJ,[20] demonstrating the Department's sustained investment in criminal prosecution of immigration violations. Finally, under a long-standing INA provision, U.S. Attorneys have the power to bypass separate removal proceedings and directly seek judicial orders of deportation as part of any criminal prosecution.

The tenure of Jeff Sessions, an AG with a long history of hostility to the asylum system, highlighted the danger this structure can pose to the INA's humanitarian protection provisions. The Sessions Justice Department implemented the administration's policy of "zero tolerance" criminal prosecution of *all* those who cross the border illegally, predictably sweeping in the high percentages who were seeking asylum, and intentionally separating parents and children as a means of deterring future claimants. Sessions also unilaterally

issued the decision of *Matter of A–B–*, which struck down *Matter of A–R–C–G–* (a BIA decision that represented the culmination of 15 years of agency deliberation) and included sweeping language designed to preclude future asylum claims arising from domestic violence or persecution by gangs.[21]

However, it is important to recognize that the dangers of the immigration courts' subjection to the AG are institutional in nature and not personal to any AG or administration. President Trump has called asylum "a scam."[22] Sessions' successor, William Barr, recently issued *Matter of L–E–A–*, a decision that also purports to overturn important asylum law, in this case decades-old precedent recognizing protection for individuals targeted because of family relationships.[23] And the DOJ has continued to issue rules designed to limit eligibility for asylum broadly, including proposed bans on asylum for those who enter the country illegally or transit through a third country without seeking protection there.[24] AGs from previous administrations likewise took actions motivated to achieve political goals, actions that directly or indirectly limited the accessibility of asylum. For example, under President George W. Bush, AG John Ashcroft conducted a "purge" of liberal-leaning BIA members whose views were disfavored by the incoming administration, making it considerably more difficult for asylum seekers to prevail on appeal to the BIA.[25] The Obama administration, for its part, expanded family detention and upended immigration court dockets to prioritize the cases of Central American asylum seekers with a political goal of deterring future illegal entry—moves that served no constructive purpose for the courts and made it harder for asylum seekers to find representation and present their cases. [26]

Asylum Seekers in the Hands of the Agency

Asylum seekers' only administrative safeguards in the face of DOJ's enthusiasm for enforcement are in the hands of the very agency that enforces the law against them. While many nations' asylum systems and even the U.S. Citizenship and Immigration Services (USCIS) institutionally separate enforcement decision-makers from those who make refugee determinations,[27] there is no such separation of asylum adjudicators for the large number of applicants whose cases are decided by immigration judges and BIA members. Judges and Board members move back and forth between asylum and all other removal cases and issues in any given workday.

Review at the federal circuit court of appeals, therefore, represents the first access asylum applicants have to a decision-maker who is not part of an immigration enforcement agency. As a result, the rigor with which these courts review the agency's decisions—and the question of whether they must presumptively defer to those decisions under *Chevron*—is vitally important.

In recent case law discussing the balance-of-powers principles underlying *Chevron*, the Supreme Court has repeatedly expressed concerns about the potential for abuse of executive power and the dangers of lax judicial review.

These concerns seem particularly apt in the asylum and withholding context, where Congress intended to protect individuals facing persecution and to comply fully with the Convention requirements of *non-refoulement*. These important goals are endangered when they are entrusted without vigorous oversight to the prosecutorial agency.

The Justice Department, whose ordinary statutory duties involve the *prosecution* of irregular migrants, has its own executive—and prosecutorial—imperatives. Given the political importance of strong border control, the Department has incentive to interpret Refugee Act provisions to maximize its ability to *deny* protection and to remove or repel those in irregular status. The Attorney General, as the politically appointed head of the Department, is both powerful in influencing the interpretation of asylum law *and* demonstrably sensitive to the volatile political consequences of irregular migration. As such, he or she often acts as an instrument of the broader administration and for its political purposes. Political incentives and pressures can and do color the Department's statutory interpretations, predictably limiting the protections Congress intended. Given the distorting influence of the DOJ's structural investment in immigration enforcement, courts need to serve as a crucial check on the executive's enforcement power and should rigorously review BIA and AG asylum and withholding decisions to ensure compliance with the nation's commitment to *non-refoulement*.

Refusing to defer to the Justice Department in matters of asylum is akin to the principle that there is no deference due to a prosecutor's interpretation of a criminal statute. As Justice Scalia observed, prosecutors in an adversarial system have an incentive to err on the side of over-enforcement. For this reason, "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."[28]

Alina Das, considering deference in the federal habeas context, argues that separation of powers concerns should affect a court's consideration of whether Congress likely intended to delegate a question to an executive agency.[29] With regard to deference, Das suggests the two-sided question: (1) are there reasons to think that Congress intended to delegate its law-making authority?, and (2) are there reasons to think it would *not* delegate its authority on the particular question at issue? Das argues that the strong liberty interest and constitutional prominence of *habeas* give rise to a kind of "anti-deference" with which a court should regard the detaining agency, on grounds that Congress would have been unlikely to cede largely unreviewable authority on such an important liberty issue to the very executive responsible for the detention.[30]

These same principles apply to DOJ decisions on humanitarian protection. Like the liberty interest in the criminal or habeas context, *non-refoulement* is a fundamental interest with serious consequences for personal liberty and even physical survival. And as in the habeas context, the question is who should police the agency's *self*-regulation on a matter of fundamental individual liberty. The need for an external check in this circumstance is amplified.

As a matter of separation of powers, there are thus good reasons to believe that Congress would not have left the fundamental principle of *non-refoulement* in the essentially unmonitored hands of the executive enforcement agency. As with the criminal prosecutor, Congress would have expected the courts to exercise robust review of the enforcement agency's interpretations. Unlike the DOJ, the federal courts are not invested on an institutional level in the mission of punishing, deporting, excluding, or deterring unlawful migrants. As such, the courts are in a better position as a structural matter to ensure adherence to the principle—and to the nation's obligation under U.S. and international law—of *non-refoulement*. In the absence of an express indication otherwise, it is reasonable to conclude that Congress intended them to do so vigorously.

Agency Expertise and Capacity

As we have seen, another possible justification for *Chevron* deference is that the agency has a subject-matter expertise that the courts do not. This rationale also fails to support a presumption of deference to the DOJ in interpreting asylum or withholding law.

As noted earlier, the Environmental Protection Agency expertise to which the Supreme Court gave deference in *Chevron* was in the area of the technical, scientific details of air quality and industrial outputs, and the Court's subsequent deference to agency expertise in other cases has proved stronger in such areas as environmental, health care, financial, and other scientific or technical fields. The expertise required to interpret the INA, however, does not require familiarity with technical or scientific information, nor with the workings of an industry, nor even, for the most part, with the mechanics of immigration enforcement. And though immigration decisions are sometimes said to implicate delicate matters of foreign relations, it is the very unusual case that affects anyone other than the parties themselves. The vast majority of immigration cases require expertise, not in foreign affairs, but rather in the legal interpretation of a complex statutory and regulatory scheme. This is precisely the sort of expertise that federal courts have, and the fact that the BIA sees a high volume of cases does not give it any inherent advantage in legal analysis.

And, in fact, the research and analysis required for asylum and withholding adjudications arguably require an even more specialized legal expertise than the average immigration case, because asylum and withholding are rooted in the Refugee Convention. In keeping with the Supreme Court's recent example in *Abbott v. Abbott*,[31] interpretation of Convention-based provisions properly includes reference to international and comparative law sources, either on grounds that the interpretation should fulfill congressional intent to comply with Convention obligations or because such obligations are themselves "the law of the land" as incorporated treaty provisions.[32] The BIA has no expertise in interpreting international instruments or in comparative or international

human rights law. Nor does it have expertise in the history of humanitarian concerns or the context in which the Refugee Convention was drafted or in which the United States signed on to the 1967 Protocol. The AG, who only infrequently engages in immigration adjudication, has even less familiarity with application of the INA or of international or comparative sources relevant to the Convention.

Furthermore, even if they had the institutional will to do so, the immigration courts and the Board do not have the capacity to develop expertise in international and comparative law. The system suffers from serious institutional capacity challenges that compromise its decision-making and limit the consideration it can give to any single case. While the history of this dysfunction is long-standing, the courts and the Board are in more crisis now than ever. Approximately 400 immigration judges nationwide are struggling under the weight of a backlog of nearly a million cases,[33] and they do so in the midst of a chronic lack of resources and antiquated systems. The current DOJ approach to reducing the backlog of cases is to implement policies to pressure judges to speed up adjudications, which will certainly not foster an environment in which research into areas of law that may be seen as extraneous (and politically undesirable) is likely to be encouraged. The BIA functions under similar pressures.

Courts already recognize that a lack of expertise can mean that they should not defer to the BIA in certain areas of law. It is well established, for example, that the Board and immigration courts are not given deference on questions of whether a particular criminal offense will trigger immigration consequences.[34] This is because they have no advantage over the federal courts in interpreting criminal statutes. And just as the Board lacks expertise that would warrant deference in criminal law interpretation, it has no interpretive advantage over the courts in applying Refugee Act provisions that are rooted in international law and have been interpreted by an international legal community. The courts are expert in statutory interpretation, and especially where international and comparative law are implicated—as they are in Refugee Act cases—it makes little sense for courts to defer to the BIA or the Attorney General on expertise grounds.

Fundamental Human Rights, "Policy," and Political Accountability

Finally, there is the question of whether interpretation of Refugee Act provisions is truly a question of "policy" for which we should desire political accountability. Does interpretation of the proper reach of asylum and withholding law implicate "competing views of the public interest" (to use the *Chevron* Court's definition of policy) among which immigration agencies are free to choose? And is the protection of people fleeing persecution a matter for which Congress would likely find political accountability to be an advantage—or even acceptable?

There are plenty of public policy choices reflected in the INA—and many competing views on whether or not these choices serve the public good. For just one example, there are genuine debates about whether it is in the public interest to have more or fewer visas issued each year based on family relationships and whether it will enhance or harm the public good to regularize the status of individuals who entered the country illegally. And the immigration agencies regularly make implementation choices that implicate those questions of policy. A good example is the Obama administration's decision to implement a provisional waiver procedure to assist spouses of U.S. citizens who had entered the country illegally to become permanent residents.[35] A different administration could have easily decided not to implement such a procedure, as a policy choice in favor of deterring unlawful entry. Either of these normative, policy-based agency choices would be permissible under the INA, and each represents a competing view of the public interest with some support in the statute.

Contrast this with many of the provisions of the Refugee Act, which did not implement policies chosen by Congress of its own accord but rather incorporated the nation's non-negotiable obligations under the Refugee Convention. Just as the substance of those provisions was dictated by the Convention, so must their interpretation be in the implementation phase. Given the non-negotiability of the obligations, there are many questions on which the executive is no freer than Congress was to favor or disfavor policies addressed by the Convention. While there are aspects of asylum and withholding law in the INA that go beyond Convention requirements (on which there is room to legislate policy choices), to the extent that INA provisions derive from the Refugee Convention, the executive is obligated to implement them in accordance with the nation's treaty responsibilities. This is fundamentally different from many other parts of the INA: the Convention-based provisions reflect external obligations, not policy choices made freely by Congress. As such, it is incumbent on the courts to engage in robust review to ensure that the executive's interpretations of those provisions comply with the nation's Convention obligations and with the intent of Congress to fulfill those obligations.

Recognizing that Refugee Act provisions are not the type of "policy" matters for which political accountability would be desirable is also consistent with our legal system's protectiveness of the fundamental rights of vulnerable minorities. The *Chevron* Court presumed that political accountability would be preferable for the decider of the type of policy questions it envisioned—to reflect the will of the majority on substantive questions of normative importance. Yet the will of the majority has never been a proper touchstone in the protection of persecuted minorities such as those at risk in asylum and withholding cases. To the contrary, in many cases political accountability and pressure are likely to be negative influences and actually impair the quality of protection decisions for vulnerable individuals who may defy majority

expectations in some way. Asylum and withholding of removal law are specifically intended to protect individuals with minority political views, those with unpopular religious beliefs or practices, and members of marginalized social groups (such as those who defy gender norms), all of whom face serious harm and sometimes even the threat of death because of who they are and what they believe. Furthermore, large movements of refugee populations often evoke large-scale political opposition that has nothing to do with the legitimacy of their claims as refugees, as evidenced by the backlash against Syrian refugees in both Europe and the United States or the treatment of Central American asylum seekers at our southwest border. The protection of these vulnerable outsiders is the *last* context in which political accountability is likely to improve the quality of decision-making.

The role of the courts in guaranteeing individual humanitarian protection is analogous to their role in the civil rights context, where it has long been recognized that a higher level of protection and scrutiny is appropriate for discrete, insular, and vulnerable minorities.[36] Asylum seekers are universally disenfranchised, by definition, as individuals who are outside their countries of citizenship. It follows that they are—equally by definition—not able to advance their own interests through normal political channels, rendering meaningless for them the political accountability justification for *Chevron*. The executive agencies, for their part, have limited political incentives to rigorously enforce the protection of these vulnerable people, who have no vote and little influence in the political system. To the contrary, agencies and administrations have powerful incentives to run roughshod over this protection, to reap the benefit of public perceptions of strong border control. This demonstrates the extent to which majoritarian political accountability is a distinct *dis*advantage in protecting the fundamental rights of politically vulnerable minorities and the importance of rigorous, independent judicial review of agency decisions.

Conclusion

Contemporary *Chevron* jurisprudence supports an argument that courts should not defer to the BIA or the AG in matters of asylum and withholding of removal. Taken as a whole, the politically responsive and prosecutorial role of DOJ in immigration enforcement, the lack of any meaningful interpretive advantage in the BIA or the AG over the courts, the fundamental nature of the right to protection, the political powerlessness of those seeking protection, and the non-negotiable nature of Refugee Convention-based obligations all weigh heavily against agency deference. Litigators should make a Step Zero argument on these grounds against *Chevron* deference and in favor of vigorous judicial review of Justice Department decisions on asylum and withholding of removal.

Notes

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1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. *Chevron*, 467 U.S. at 844.
3. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 S. Ct. Rev. 1, 29 (2013).
4. "[The Court's] duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive." City of Arlington v. FCC, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).
5. Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring); *e.g.,* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1148–56 (10th Cir. 2016) (Gorsuch, J., concurring); Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).
6. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (quoting *Chevron* at 843, n.9).
7. Marbury v. Madison, 5 U.S. 137, 177 (1803).
8. 139 S. Ct. at 2414. *Kisor* involved deference to interpretation of regulations, so-called *Auer* deference. Chief Justice Roberts, in the controlling opinion, stated that the decision was not relevant to *Chevron* analysis, but its underlying principles appear to apply to both *Auer* and *Chevron* analysis. *See also* City of Arlington v. FCC, 569 U.S. 290, 309 (Breyer, J., concurring) (ambiguity alone does not indicate congressional intent to delegate to an agency).
9. United States v. Mead Corp, 533 U.S. 218, 237 (2001).
10. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) ("This is not a case for the IRS"). *See also* Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014).
11. Crandon v. United States, 494 U.S. 152, 177–78 (1990) (Scalia, J., concurring).
12. Pereira v. Sessions, 138 S. Ct. 2105, 2119 (2018).
13. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).
14. *Abbott v. Abbott* is a good example of this type of analysis by the Supreme Court. 560 U.S. 1, 9–10 (2010).
15. Kisor v. Wilkie, 139 S. Ct. 2400, 2414–18 (2019).
16. *Cardoza-Fonseca*, 480 U.S. at 446, 448.
17. INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (holding it was "clear" that principles of *Chevron* applied to withholding and overturning a circuit court decision for failing to give deference to a BIA interpretation); Negusie v. Holder, 555 U.S. 511, 516 (2009) (citing to *Aguirre-Aguirre* and lifting almost verbatim the proposition that "it is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme'").
18. *See Cardoza-Fonseca*, 480 U.S. at 437 (Congress intended U.S. law to conform with the U.N. Protocol that mandated compliance with Refugee Convention).
19. Public Law 96-212, section 101(a).
20. *See* Trac Reports, Table 2, Top Charges Filed, http://trac.syr.edu/tracreports/crim/446/ and Fig.1: Criminal Immigration Prosecutions over the last 20 years.

21. Matter of A–B–, 27 I&N Dec. 316 (AG 2018), *overruling* Matter of A–R–C–G–, 26 I&N Dec. 388 (BIA 2014).

22. Vivian Salama & Alex Leary "Trump Says Southern-Border Asylum Seekers Are Running a 'Scam,'" Wall St. J., Apr. 5, 2019, https://www.wsj.com/articles/trump-threatens-to-override-mexico-trade-deal-with-car-tariffs-unless-border-is-secured-11554479894.

23. 27 I&N Dec. 581 (AG 2019).

24. Barr v. East Bay Sanctuary Covenant, No. 19A230, 2019 U.S. LEXIS 4619, at *1 (Sept. 11, 2019); Press Release, U.S. Dep't of Justice, The Dep't of Justice and Dep't of Homeland Sec. Issue Third Country Asylum Rule (July 25, 2019), https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-issue-third-country-asylum-rule; and Press Release, U.S. Dep't of Justice, DOJ and DHS Issue New Asylum Rule (Nov. 8, 2018), https://www.justice.gov/opa/pr/doj-and-dhs-issue-new-asylum-rule.

25. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 359, 377 (2007) (documenting "sudden and lasting decline in the rate of success by asylum applicants" in wake of Ashcroft's "reforms").

26. Dana Leigh Marks, *Now Is the Time to Reform the Immigration Courts*, Int'l Aff. F., Winter 2016, at 47, 50, http://www.ia-forum.org/Files/QNEMHW.pdf.

27. Canada separates its Refugee Protection and Appeal Divisions institutionally from the Immigration Division. *Organizational Structure*, Immigration and Refugee Board of Canada, https://irb-cisr.gc.ca/en/organizational-structure/Pages/index.aspx. USCIS has asylum officers, trained and dedicated exclusively to making asylum determinations in credible fear interviews, affirmative applications and children's cases.

28. *Crandon v. United States*, 494 U.S. at 177–78 (Scalia, J., concurring).

29. Alina Das, Unshackling Habeas Review: *Chevron* Deference and Statutory Interpretation in Immigration Detention Cases, 90 N.Y.U. L. Rev. 143, 189 (2015) (arguing from Chief Justice Roberts' dissent in *City of Arlington v. FCC*).

30. *Id.* at 151–58.

31. Abbott v. Abbott, 560 U.S. 1 (2010).

32. *See id.,* 560 U.S. at 9–10; INS v. Cardoza-Fonseca, 480 U.S. 421, 449–50 (1987).

33. *See* Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated Aug. 2019).

34. *See, e.g.*, Matter of Silva-Trevino (III), 26 I&N Dec. 826, 833 (BIA 2016) ("reaffirming that the application of the categorical approach is not a matter upon which [the BIA] receives deference").

35. 78 Fed. Reg. 536–78 (Jan. 3, 2013); 8 C.F.R. § 212.7(e).

36. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

Vicarious Trauma and Ethical Obligations for Attorneys Representing Immigrant Clients

A Call to Build Resilience Among the Immigration Bar

Hannah C. Cartwright, Lindsay M. Harris, Liana M. Montecinos, and Anam Rahman*

Abstract: This article analyzes the ethical obligations for attorneys representing immigrant clients and the consequences of vicarious trauma, compassion fatigue, and burnout for the immigration bar and immigrant clients. The authors identify barriers for immigration attorneys in preventing, recognizing, and responding to vicarious trauma in themselves and colleagues and suggest practical ways that the immigration bar can and should seek to build resilience.

Trauma is embedded in the practice of immigration law, especially for attorneys who represent clients seeking humanitarian and discretionary immigration relief. This article analyzes trauma within the practice of immigration law, the ethical obligations for attorneys representing immigrant clients under the ABA Model Rules of Professional Conduct, and the consequences of vicarious trauma among the immigration bar. The authors then identify barriers for immigration attorneys in preventing, recognizing, and responding to vicarious trauma and suggest practical ways that the immigration bar can build resilience.

Trauma and Immigration Law

Scholars from the fields of psychology and social work describe three potential periods of trauma for migrants: trauma suffered in the country of origin, trauma suffered during the migration journey, and trauma of relocating.[1] This "triple trauma paradigm," however, does not necessarily acknowledge that being undocumented in the United States often also traumatizes clients, because this concept was originally theorized in the context of refugees who already possess status upon arrival. The theory also does not encompass the reality that many immigrants are vulnerable to additional traumas once in the United States, including criminal victimization. Nor does this theory acknowledge that the

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process of applying for relief before an immigration court or U.S. Citizenship and Immigration Services (USCIS) may in itself be an additional source of trauma once an individual has arrived in the United States or is forced to start the process through the Migrant Protection Protocols (MPP) in Mexico.

Given the layers of trauma that immigrant clients may be exposed to before even entering law offices, it is no surprise that many immigration attorneys—like others who find themselves in helping professions, such as public defenders, civil legal aid attorneys, and family law attorneys—find themselves regularly exposed to trauma as a part of their legal practices. This article places special emphasis on the experience of immigration attorneys engaged in removal defense and affirmative practices that involve applying for humanitarian relief such as asylum, withholding of removal, protection under the Convention against Torture (CAT), discretionary waivers, and relief under the Violence Against Women's Act (VAWA), including self-petitions and U-visas. All of these forms of relief require "the lawyer to prepare the client to tell the story of their pain, to tell the story of the torture they have experienced. . . . Thus, the trauma becomes the centerpiece of the representation and [requires attorneys to] engage it as a critical mass of legal data and evidence."[2] In other words, the trauma that the client has experienced becomes integral to the attorney-client representation itself, as does the evidence of the trauma that immigration attorneys must review and present to sustain a client's burden of proof. This wide range of evidence may include gruesome photos, death certificates, police reports, and newspaper articles documenting harm; forensic psychological and medical reports; and international reports on human rights abuses.

Attorneys and legal staff describe the "impact" of confronting these client narratives and documentary evidence in a variety of terms, in part because the legal profession has not adequately trained attorneys to recognize the spectrum of negative impact that working with traumatized populations may bring to the surface. Given this professional limitation, this article relies on the definitions delineated in the social work profession in order to better address the consequences and professional responsibility that attorneys have in addressing the impact of this work.

Colloquially, the term "burnout" is often used. However, "professional burnout" describes a specific phenomenon in which a professional's personal experiences, combined with the negative cumulative effects of providing services to clients over a particular time *and* organizational dynamics of the advocate's employment environment, result in "emotional exhaustion, depersonalization, and reduced sense of personal accomplishment."[3] In contrast, "secondary trauma" or "secondary traumatic stress" results from engaging in an empathetic relationship with an individual suffering from a traumatic experience and bearing witness to the intense or horrific experiences of that particular person's trauma.[4] "Compassion fatigue" is best described as a state in which an advocate—most often a professional engaged in a helping profession such

as psychology, social work, or legal aid lawyering—is experiencing symptoms of both burnout and secondary trauma.[5]

While all three—professional burnout, secondary trauma, and compassion fatigue—are consequences that attorneys may attempt to avoid in order to find sustainability in their professional lives, it is vicarious trauma that is most concerning and risky from a professional and ethical perspective. Vicarious trauma describes "the resulting cognitive shifts in beliefs and thinking that occur . . . in direct practice with victims of trauma."[6] These changes in beliefs and thinking include alterations in "one's sense of self" as well as changes around fundamental issues such as "safety, trust, and control; and changes in spiritual beliefs."[7] This shift may manifest itself in a variety of negative trauma exposure responses, such as the minimization of others' experiences, inability to embrace complexity, diminished creativity, avoidance and inability to listen, inability to empathize, and an inflated sense of importance related to one's work as well as corresponding feelings of helplessness—any one of which may cripple an attorney's ability to establish trusting relationships with clients and advocate zealously on their behalf.[8] Additionally, other trauma exposure responses such as cynicism, anger, fear, guilt, hypervigilance, intrusive images, physical ailments and somatic symptoms ranging from headaches and stomachaches to more severe ailments, substance abuse, and chronic exhaustion may not only affect an attorney's representation but also their health and wellness.[9] These negative trauma exposure responses may affect how attorneys think, react, and practice, thereby putting at risk the fundamental ethical obligations that attorneys have to immigrant clients.

Ethical Obligations of Immigration Attorneys

Many of the symptoms of vicarious trauma described above affect the most fundamental aspects of the attorney-client relationship. Thus, unabated negative trauma exposure responses may lead to serious ethical issues. This section will cover the ethical obligations of immigration attorneys and ethical issues that arise with attorneys experiencing vicarious trauma.

For immigration attorneys, there is no single comprehensive authority for guidance on ethics. Although USCIS and Executive Office for Immigration Review (EOIR) regulations address the discipline of attorneys and non-attorney representatives, they do not provide detailed guidance on actual ethical issues faced by immigration lawyers. Instead, the ethics rules applicable to immigration lawyers are the rules of ethics for the state in which the lawyer is licensed to practice. For purposes of this article, however, references will be made to the Model Rules of Professional Conduct (Model Rules) drafted by the American Bar Association (ABA). The majority of states, including the District of Columbia, have adopted the Model Rules either completely or with relatively minor changes.

Competent Representation (Model Rule 1.1)

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Although Model Rule 1.1 may seem elementary and simply worded in its requirement of competence, maintaining the level of knowledge and thoroughness necessary to represent immigration clients is an ever-increasing challenge. Especially now, with immigration law and policy changing almost daily, it is critical that attorneys research and study the law to keep abreast of changes that may affect a client's case. The ethical duty of competence requires thoroughness and adequate preparation in handling a client matter, particularly considering the drastic consequences that removal or visa refusal have on our clients and families. Because the stakes are so high in immigration cases, immigration attorneys are under more pressure than ever to competently represent their clients.

For an attorney suffering from vicarious trauma, she must be especially mindful about whether she is able to provide competent representation as required under Model Rule 1.1. Indeed, even a knowledgeable, experienced, and dedicated immigration lawyer may be unable to provide competent representation if she is suffering from symptoms of vicarious trauma or burnout. For example, an attorney feeling overwhelmed, disoriented, and hopeless may be inclined to procrastinate until the last moment and then rush through the work or put off the required preparation altogether. Whether the lapse of competent representation is checking off the wrong box on an employment authorization renewal or failing to include crucially obvious supporting documentation, the prejudice to the client may be dire. Thus, prior to accepting representation, an attorney must consider whether she is are capable of providing competent representation and also must self-monitor themselves throughout representation to ensure that they are maintaining the required level of competence.

Moreover, as others have recognized, the duty to provide competent representation to clients who have experienced trauma includes an obligation to understand trauma and its impact.[10] Knowledge and skills in working with clients who have survived trauma as well as in managing one's own trauma exposure responses are necessary to avoid retraumatizing clients. Without such knowledge and skills, attorneys are impeded from undertaking basic critical tasks such as interviewing a trauma survivor, counseling a victim on available options, gathering facts and evidence in support of a claim, and presenting a victim's testimony.[11] As such, reasonably necessary thoroughness and preparation may very well include consulting with a mental health professional to improve upon the attorney's knowledge and skills working with survivors of torture and also to aid with any specific trauma-based symptoms the attorney may be experiencing. In addition, competent representation requires that immigration attorneys and staff be attentive and culturally competent in their

work in order to build trust with clients from diverse backgrounds, many of whom may have differing cultural experiences, religious beliefs, race, class, and gender from the attorneys representing them.[12]

> **Diligent Representation (Model Rule 1.3)**
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.

> **Communication (Model Rule 1.4)**
>
> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Often associated with the concept of "zealous representation," reasonable diligence and promptness require that an attorney do whatever must be done to provide the agreed upon legal services without any unjustified delay. And, just as with a lack of competence, an attorney's failure to handle a matter with reasonable diligence and promptness may result in dire consequences for an immigrant client. For example, an attorney's failure to file an adjustment of status application prior to expiration of the client's status could result in denial of the application and placement in removal proceedings. Similarly, an attorney's failure to file an application for asylum within one year of a client's arrival may bar the client from obtaining asylum relief altogether. Beyond potentially irreparable injury to the client, an attorney's lack of diligence and promptness could also cause the client to lose confidence in the attorney and erode the attorney-client relationship.

An attorney suffering from vicarious trauma may manifest symptoms that impair her ability to exercise reasonable diligence and promptness in a client's case. Comment 3 for Model Rule 1.3 notes how "[p]erhaps no professional shortcoming is more widely resented than procrastination." Avoidance, a symptom of vicarious trauma, can certainly lead to procrastination. For instance, an attorney who is triggered by a client's past sexual abuse due to the attorney's own past sexual abuse may procrastinate working on the client's case or not sufficiently delve into the facts of the prior abuse for the client's affidavit and testimony. Or an attorney who has been practicing for

many years representing clients with similar claims might subconsciously or consciously minimize the harm a client suffered and fail to elicit all of the facts from the client. Not only could such avoidance result in the attorney's failure to uncover harm or experiences that could make a client eligible for a particular form of immigration relief, but also if a client testifies or offers evidence about previously undisclosed harm in immigration court, the omission could result in credibility challenges by the Department of Homeland Security. Additionally, an attorney's avoidance, inability to embrace complexity, and diminished creativity may also affect the ability of the attorney to conduct legal research, zealously advance articulate and creative legal arguments, and write complex legal briefs. In short, failure to combat or mitigate trauma exposure responses can result in weaker immigration cases, which may rise to the level of ineffective assistance of counsel.

Going hand-in-hand with Model Rule 1.3's ethical requirement for reasonable diligence and confidence, Model Rule 1.4 requires that an attorney keep her clients reasonably and promptly informed. This obligation includes the attorney's duty to inform a current or former client of the lawyer's material error. An attorney suffering from vicarious trauma might avoid the client's phone calls and not keep the client apprised about the status of the case, especially when the news involves denial of the benefit or relief sought. Additionally, in a practice area where communicating with clients often requires the use of interpreters or translators, working with family or community members as intermediaries, or even working with clients who are legally incompetent,[13] an attorney's avoidance of client communication can seriously undermine the attorney-client relationship.

> **Responsibilities of a Partner or Supervisor Lawyer**
>
> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Finally, the Model Rules address the responsibilities of attorneys serving in a supervisory capacity over other lawyers as well as legal staff who carry out legal work on behalf of an attorney, law firm, or organization. This rule lays out another guideline implicating the work of attorneys in group settings and suggests that attorneys serving as leaders and supervisors must ensure that firm culture and policies allow for proper training, recognition, and mitigation of negative trauma exposure responses in order to both prevent and respond to vicarious trauma among reporting staff.

This ethical responsibility is particularly challenging during a time when the entire immigration bar is negotiating negative trauma responses as well as constantly changing policies from the Trump administration that directly affect the practice. It is easy for vicarious traumatization to lead to a negative

organizational culture and toxic workplaces. For example, practitioners often engage in the coping mechanism of minimizing the experiences of others around them because "we feel saturated to the point that we can't possibly let any more information in .... [W]e are literally at capacity."[14] However, as author Laura van Dernoot Lipsky explains, when professionals engage in minimization in a workplace, there are consequences; if a colleague expresses irritation and anger, that colleague may be less approachable to others in a time of conflict and may make it difficult for the conflict to be resolved in a healthy manner.[15] Minimization can also lead to competition for resources and an attitude of scarcity, particularly in a field where there is no right to counsel and a seemingly never-ending stream of clients in need of representation.[16]

The risk of vicarious trauma as a supervisory concern for firms and organizations can have very real practical consequences, including high employee turnover and consequently increased hours devoted to hiring, lower productivity, and lower morale.[17] Unfortunately, in addition to loss of income for firms and financial resources for legal aid organizations, the result also directly impacts the quality of representation provided to clients due to the inexperience of new attorneys and support staff. Additionally, client representation is often inconsistent and interrupted due to attorney or staff departures, especially over the long course of non-detained immigration cases in jurisdictions where clients wait many months or years for immigration court hearings or USCIS office interviews. While some departures are unavoidable and even reflect natural attrition, the scale of attorney burnout in the immigration bar may lead to the opposite of trauma-informed care where firms and organizations are crippled by attorney departures and as such are not able to provide trauma-informed services in ways that create reasonable client expectations and build trust between staff and clients.

The Barriers to Recognizing, Preventing, and Responding to Vicarious Trauma for Immigration Lawyers

Barriers to recognizing, preventing, and responding to vicarious trauma emerge in law school and solidify in both private and nonprofit practice settings. Some of these barriers are the realities of immigration lawyering: high caseloads due to community needs and the need for firm revenue; tight deadlines before certain courts and asylum offices juxtaposed with incredibly lengthy deadlines with more backlogged courts and asylum offices, which make continuing long-term client relationships and managing case preparation a challenge; and a constantly changing legal landscape that generates feelings of constant crisis. Additionally, the heavy politicization of immigration makes it difficult for attorneys to "leave work at home" when immigration policies are constantly discussed on television, radio, and social media and among friends and family.

However, beyond these practical and contextual barriers, a substantial barrier to recognizing, preventing, and responding to vicarious trauma stems from the foundations of the legal profession and corresponding legal culture. From the moment law students step inside the door of the law school, they are taught to "think like a lawyer." However, this mode of thinking has, at least historically, not been associated with being compassionate, being in touch with one's emotions, or acknowledging vulnerability to colleagues, supervisors, or clients.[18] Instead, generations of attorneys have been applauded for their skills at compartmentalizing, pushing down emotions, and demonstrating their ability to persevere "in the trenches." Lawyers then reinforce these expectations with younger attorneys whom they mentor and train, perpetuating patterns of lawyer conduct and generational patterns of vicarious trauma in workplaces. Yet within this "stiff upper lip" culture, stories, like these below provided by the authors, are shared from attorney to attorney:

> "I gasped for air until I woke up at approximately 3:00 A.M. I was in shock and terror, even minutes after I realized it was just a nightmare. I had seen the gang muffle a man's mouth and strap his feet and hands to a chair, rendering him immobile. I recognized the man as my brother. I could see what they were doing to him, but I was too far away to intervene. When I woke from the dream, my eyes were widened as I lunged, my body howling, but no sound came out of my mouth. This nightmare was an incident one of my asylum-seeking clients shared with me, but in my nightmare, it was happening to my brother. It was in this moment I realized that I needed to be more cognizant of signs of vicarious trauma in my practice of immigration law."

> "I had a client erroneously put in expedited removal. We badgered ICE with release requests until my colleagues filed a successful habeas petition. That all felt like the normal fight. But a month later, I spent two days of advocating with multiple CBP and ICE offices to help him comply with a "check-in" with CBP only to have to tell the client that he was likely going to be re-detained. He broke down in tears on the phone. Even though we averted re-detention, the sound of helplessness in my client's voice stuck with me. The rest of the week, I found myself lacking motivation and feeling physically exhausted. I could not understand why, especially because we were successful! But I've come to realize that when individual clients confront unilateral, oppressive systemic policies that have little or no opportunity for redress that triggers me. I guess I feel like what good am I as an attorney if I am helpless against ICE, too?"

> "I once represented a detained client diagnosed with paranoid schizophrenia in seeking asylum. The Immigration Judge first denied the case, and then I obtained a supplemental psychological evaluation, which resulted in the judge reopening the case and eventually granting asylum. The case was very emotionally taxing on me due to the individualized needs of the client and high demands of the complex legal case. I was thrilled to win the case

> and kept in touch with the client after his release from ICE detention, even going so far as giving him my cell phone number in case of emergency. A few months after his release, I learned that my client had passed away in a tragic car accident. I was shaken to my core. I tried to compartmentalize my emotions and didn't discuss it with my colleagues, staff, family, or friends. I buried my feelings and let the plight, struggles, and needs of my other clients fill in the void I was feeling, without truly addressing the grief head on."

These stories are consistent with documented negative trauma exposure responses including intrusive thoughts, hypervigilance, psychosomatic symptoms ranging from chronic exhaustion, headaches, and stomach aches to more severe ailments.[19] Yet, while these negative trauma exposure responses are normalized in the literature, such responses are not uniformly normalized or accepted as natural responses among the immigration bar.

Building Resilience Among the Immigration Bar

Rather than deny or debate the existence of vicarious trauma symptoms, the immigration bar should instead focus on helping member attorneys engage in a practice of "trauma stewardship" and cultivating resilience. Author Laura van Dernoot Lipsky describes trauma stewardship as "a daily practice through which individuals, organizations, and societies tend to the hardship, pain, or trauma experienced by humans … even the most urgent human and environmental conditions in a sustainable and intentional way."[20] For immigration attorneys, this means cultivating a legal practice that allows us to engage diligently with our clients, while not "internalizing [client] struggles or assum[ing] them as our own" nor allowing our negative trauma exposure responses to affect our ability to competently provide representation, make our work unsustainable, or contribute to toxic or dysfunctional work culture.[21] This section explores ways in which law schools, individual practitioners, and supervisors can build such resilience.

Law School Education and Continuing Legal Education Seminars

Law schools have started to recognize the need for students to reflect on and be in touch with their whole being as they transition to becoming lawyers. Mindfulness has made inroads into law school curriculums, with some schools offering meditation or mindfulness for lawyers courses for credit, or, in some instances, even making a mindfulness course a mandatory part of the first year curriculum.[22] Mindfulness and meditation can be just one of many tools in preventing and addressing symptoms of secondary trauma, but an explicit focus on the subject is lacking within most law schools. Clinical courses in

which students provide representation to traumatized individuals do usually engage this topic,[23] but insufficient attention and energy is typically devoted to a discussion of vicarious trauma.

Therefore, much can be done within law schools to increase trauma literacy and train trauma-informed, self-aware lawyers. The most logical place to start with reform is within experiential education; if a student finds her way into an immigration clinic, it is somewhat likely that the clinical instructors will include at least one class session on working with survivors of torture and trauma, which may include a component on vicarious trauma or self-care. In addition to this session, professors should weave discussions of trauma and vicarious trauma into the clinic curriculum. Additional steps may include:

- Discussing trauma and vicarious trauma in official clinic documents, including the syllabus and any articulation of learning objectives or goals;[24]
- Teaching specific classes focused not only on trauma-informed client representation but also addressing vicarious trauma and providing students with tools to self-assess within those classes;[25]
- Revisiting the topic during weekly supervision meetings or through reflection memos;[26]
- Administering various self-tests or quizzes to measure vicarious trauma and burnout;[27]
- Explicitly discussing trauma and vicarious trauma at the mid-semester and final evaluation;[28]
- Periodically opening the clinic seminar class with a brief pulse check around the room—asking students to share one word about how they are feeling about their case work, about how they would describe their work-life balance or self-care, or other reflective prompts;[29] and
- Incorporating a social worker or therapist into the clinic[30] or for specific clinic projects,[31] or even creating a dual-disciplinary clinic incorporating social work students fully into the clinic.[32] Cross-disciplinary and community partnerships are key.[33]

Immigration professors and supervisors within internships, externships, and job placement should also consider honestly and openly sharing their own trauma journey. Modeling how to address vicarious trauma and an admission that you as the "professor" or as the "lawyer" (or both) can be a powerful way to normalize discussions of trauma. One method of coping with vicarious trauma is to ensure adequate debriefing with colleagues and those within the zone of confidentiality associated with the particular client work at hand. If the supervising professor is able to share her own experiences, this can help open up discussions in groups or one-on-one with students who may also be experiencing symptoms of vicarious trauma.[34]

It is important to note that not all law schools have immigration clinics, and not all immigration lawyers will take a clinic, let alone an immigration clinic, before graduating law school. We must, therefore, look beyond the walls of the law school for more comprehensive solutions to address the gap in knowledge, awareness, and discussion of vicarious trauma. For example, in the context of continuing legal education (CLE) courses, bar associations and organizations conducting CLEs need to move beyond providing "self-care and trauma 101" trainings for attorneys attending such courses and seek to engage trauma stewardship as an ethical issue throughout legal education curricula.

Additionally, for legal aid organizations that regularly partner with pro bono attorneys, especially attorneys who conduct pro bono work from outside the immigration profession, there is a need for these attorneys to develop trauma stewardship skills as well. Training pro bono attorneys to engage in trauma stewardship not only will prevent negative trauma exposure responses from prejudicing clients during the course of the pro bono representation but may increase the likelihood that pro bono attorneys will continue to provide pro bono representation to immigrant clients.

Trauma Stewardship by Individual Attorneys/Advocates

For individual practitioners, developing a trauma stewardship practice involves both taking steps for vicarious trauma prevention and addressing symptoms *when* symptoms of vicarious trauma arise. The reality is that attorneys and legal staff engaged in direct representation of clients will suffer negative trauma exposure responses that may lead to instances, episodes, or seasons of vicarious trauma. This is not to say that practicing immigration law is a hopeless endeavor, but merely acknowledges that experiencing vicarious trauma over the course of one's career is normal. The goal of trauma stewardship is to develop awareness to mitigate these symptoms and prevent episodes of vicarious trauma that result in ethical violations, harm to clients, or transitions out of removal defense representation.

Discussing vicarious trauma prevention can devolve into a laundry list of "self-care" tips and techniques or "pop culture" notions of commoditized self-care. It is true that for all professionals, developing self-care practices around health and wellness (such as getting sufficient sleep, regular exercise, healthy eating habits, and having good practices regarding amount of screen time) is important. Certainly, prioritizing client work over engaging in these healthy behaviors can in and of itself be a symptom of vicarious trauma, such as when traumatized attorneys feel that they can never do enough or have an overinflated sense of the importance of legal representation to the point of developing a savior complex. However, wellness behaviors alone will not mitigate the long-term effects of vicarious trauma. Nor will "pop culture" notions of self-care, more appropriately characterized as self-soothing, which

can range from getting manicures to spending time with therapy dogs. As attorney Bea Bischoff puts it, "all the self-care in the world won't change the fact that I work in a place and within a system in which asylum cases are granted only around 3 percent of the time. . . . It is hard to experience the relaxation promised by a lavender pillow mist when your clients are trapped in detention centers without access to proper hygiene or food."[35] Rather, trauma stewardship is a set of client practice skills described below that all attorneys can cultivate and deepen over time.

Trauma Time Management

Attorneys engaged in trauma stewardship engage in time management in ways that acknowledge the risk of vicarious trauma. They may limit how many client meetings they conduct per day or how many fact-intensive affidavits they or their staff write with clients in a particular time frame. Attorneys should be mindful of how they respond when finishing filings, writing briefs, or doing trial preparation, and should take steps to de-escalate after long periods of writing or testimony preparation. This can take careful planning and awareness of work patterns to allow for sufficient time to monitor and feel emotions instead of pushing on to the next case or just burying emotions that may bubble to the surface at another (more inconvenient) time—or worse, that manifest while interacting with another client. Attorneys should also intentionally use their time off in ways that increase the sustainability of their advocacy. For some, that may mean taking one long vacation each year and completely going "off the grid," while for others it may be shorter vacation periods after large trials or intense cases. Beyond vacation, attorneys should also take sick days and mental health days and encourage colleagues and support staff to do the same.

Set and Keep Client Boundaries

While boundary setting is important for all attorneys to enable sustainable ethical practices, it may take different forms. Boundary setting ranges from deciding if and when you give out your cell phone number to clients to making exceptions for irregular meeting times to accommodate client schedules or needs outside business hours. However, working with clients who have experienced trauma or who may still be experiencing trauma may feel different from working with clients who have not. Monitoring responses and finding boundaries enable healthy relationships for both attorney and client. For example, if a client is experiencing a crisis or high level of distress, or is subject to constant levels of crisis by virtue of immigration detention or risks because of immigration status, finding ways to demonstrate empathy and being of assistance while still demarcating clear expectations is consistent with a trauma-informed, relationship-centered approach to legal representation.[36]

Self-Monitor and Create a Personal Safety Plan

Attorneys should develop habits of self-monitoring responses and behavior patterns based on their reactions to different client experiences. For instance, some attorneys may find themselves particularly triggered by testimony about domestic violence or targeting by law enforcement. Other advocates may find it is a client's current behavior or an emotional or indifferent response to the trauma that she suffered that activates their experience of secondary trauma. It is common for responses to ebb and flow over time, which may mean scheduling time annually or biannually to take a day or afternoon to attend to mental and emotional health, rather than addressing these issues only in crisis moments. Some individuals may even want to regularly complete the free professional quality of life scale compiled by the Center for Victims of Torture.[37]

Every attorney should have a safety plan or vicarious stewardship toolbox of behaviors and activities they can access after moments of crisis or when feeling particularly triggered. These practices could include engaging in mindfulness techniques or breathing exercises, going to a place that feels calming or safe, engaging in physical activities specifically aimed at releasing any tension triggered by secondary trauma, or reaching out to a trusted colleague or attorney who may be able to cover a hearing or assist in a task without a long explanation or self-disclosure that may result in backlash.

Part of self-monitoring for attorneys is being aware of one's own background. Attorneys and advocates who themselves have suffered migration-related *or other* trauma in the past may also be triggered by certain client narratives, which in turn requires specific attention and management. This by no means suggests that immigrants are not outstanding, zealous advocates. Each individual attorney brings their own mix of experiences, privileges, strengths, and vulnerabilities to his or her work and may over time develop coping mechanisms that either mitigate or exacerbate vicarious trauma. However, self-awareness is key. Beyond self-monitoring, the immigration bar should also encourage attorneys to seek assistance from mental health professionals to assist in developing healthy coping mechanisms. Attorneys should also be mindful of the proclivity within the broader legal profession toward alcoholism and substance abuse and seek help from lawyer assistance programs offered by local bar associations.

Cultivate a Support Team

Practitioners should cultivate their own support team, from whom they may not only seek support but who they know will speak honestly and openly with them if their behavior changes. The most precarious situation is an attorney who has started to show symptoms of vicarious trauma that endangers ethical responsibilities but has not yet behaved in a way that has come to the attention of a disciplinary bar.[38] In this situation, if an attorney

does cross a line and violate ethical boundaries, other attorneys or community members may hesitate to speak up or confront the attorney, when in reality, such behavior if goes unchecked may escalate or create significant problems for the colleague and his or her clients. If an attorney becomes aware of her own symptoms of burnout, secondary trauma, compassion fatigue, or vicarious trauma that impede her ability to represent clients with reasonable diligence, promptness, and communication, the attorney should seek support from colleagues, support staff, friends, and family so that the attorney can meet their ethical requirements.

Engage in Activism or Work Directly with Immigrant Communities

Many attorneys may find that engaging in immigration-related political activism or efforts to make policy change—or, for attorneys whose day-to-day work is advocating for macro-level change, spending time engaging with clients and immigrant communities directly—may mitigate some symptoms of vicarious trauma, particularly symptoms of helplessness.[39] Such activism may include participating in a community protest, engaging in an advocacy day organized by AILA or another immigration advocacy organization, contacting congressmen to advocate for immigration reform, or engaging with local community organizations. It may mean collaborating with clients and the press to widely publicize their plights or sharing advocacy experiences within professional or personal circles. It may also be powerful to visit immigrant neighborhoods where immigrants are engaging in day-to-day activities unrelated to their immigration case or to the systemic hardships that they endure. Connecting with immigrants outside of the power structure of a law office may help advocates perceive immigrants as survivors and not victims. However, an attorney should self-monitor to be aware of her own needs and boundaries; for some attorneys, the activities noted above may mitigate vicarious trauma, but for other attorneys, over-engagement or overexposure to immigration issues outside of the workplace may exacerbate symptoms of vicarious trauma. All attorneys need to engage in practices that work for them individually.

The Role and Responsibility of Experienced Attorneys, Supervisors, and Bar Leaders

Leaders and supervisory attorneys within law firms, nonprofits, and clinics have a responsibility to create safe spaces for trauma stewardship. For example, beyond advocating for policies such as vacation time, sick time, flex time, comp time, and mental health days, supervisors must actually encourage employees to *use* this time. Further, supervisors must work institutionally to ensure that mental health care is covered by any employer-provided healthcare plans. Less concrete but equally important steps include making efforts to acknowledge,

address, and normalize vicarious trauma. As discussed above in the context of law schools and clinics, supervisors should model disclosure of vicarious trauma and explore ways to open the door to conversations with junior staff. It is important to offer training to new staff and consistently raise the topic of vicarious trauma throughout an employee's tenure. Further, supervisors must take care to avoid creating a culture where new or junior staff feel they are expected to show that they are "tough" or unaffected by trauma. Supervisors must make clear that showing emotions and empathy is valuable, but oftentimes takes a toll on the individual. Supervisors must strike a balance and ensure that vicarious trauma symptoms are neither penalized nor ignored but are instead acknowledged and mitigated.

Conclusion

This article is intended to ignite conversation among attorneys, law students, law professors, supervisors, and leaders in immigration law on the pervasiveness of vicarious trauma within the field, the barriers to preventing and addressing vicarious trauma, and the ethical imperative to do so effectively. However, further research and discussion is needed. In February 2020, one of the authors, Lindsay Harris, launched a national survey of immigration attorneys handling asylum cases to measure levels of burnout, stress, and vicarious trauma.[40] The purpose of this survey is to gather additional data on best practices to train practicing immigration attorneys and build resilience in their current practices. In addition, more research is needed on the effects of re-traumatization on immigrants seeking relief through the immigration legal process in order to better train immigration attorneys on how to mitigate re-traumatization and vicarious trauma experienced by counsel and legal staff.

Notes

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1. Denise Michultka, "Mental Health Issues in New Immigrant Communities," in Fernando Chang Muy, *Social Work with Immigrants and Refugees: Legal Issues, Clinical Skills, and Advocacy* § 145-146 (2009), *quoting* John Orley, "Psychological Disorders among refugees: some clinical and epidemiological considerations," *Amidst Peril and Pain: The Mental Health and Well-Being of the World's Refugees* (1994).

2. Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion,* 19 Touro L. Rev. 847, 860 (2004).

3. Jason M. Newell & Gordon A. MacNeil, *Professional Burnout, Vicarious Trauma, Secondary Traumatic Stress, and Compassion Fatigue: A Review of Theoretical Terms, Risk Factors, and Preventive Methods for Clinicians and Researchers*, 6 Best Practice in Mental Health 2, 57–68 (2010).

4. *Id.* at 60.

5. *Id.* at 61.

6. *Id.* at 60.

7. *Id.*

8. Laura van Dernoot Lipsky & Connie Burk. *Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others*, § 41-112 (2009).

9. *Id.*

10. *See, e.g.*, Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 Geo. Immigr. L.J. 163, 177–80 (2007); Jean Koh Peters, *Representing Children in Child Protective Proceedings*, 467 (2007) ("[B]oth the duty to contain our counter-transference in any individual case, and the duty to address our vicarious traumatization as the overall context of our ongoing work for all of our clients, are ethical imperatives.").

11. Parker, *supra*, 177–79, n.67.

12. *See, e.g.*, Bryant, Susan, *Five Habits: Building Cross-Cultural Competence in Lawyers.* 8 Clinical L. Rev. 33–107 (2001).

13. *See, e.g.*, Hannah Cartwright, Gregory Pleasants & Megan Hope, *Self-Care in an Interprofessional Setting Providing Services to Detained Immigrants with Serious Mental Health Conditions,* 65 Social Work 1 (2020).

14. Van Dernoot Lipsky & Burk, *supra* note 8.

15. *Id.* at 81.

16. *Id.* at 151–55 (profiling the Northwest Immigrant Rights Project and the decision by the leadership to shut down intake during a particularly untenable period experienced by the NWIRP staff).

17. The Center for Victims of Torture, *Vicarious Traumatization* (2018), https://www.proqol.org/uploads/VT_Handout_3.2018.pdf.

18. Silver, Portnoy & Peters, *supra* note 2 at 869.

19. Van Dernoot Lipsky & Burk, *supra* note 8 § 41-112.

20. Van Dernoot Lipsky & Burk, *supra* note 8 § 11.

21. *Id.*

22. *See, e.g.,* Tim Iglesias, *Offering and Teaching Mindfulness in Law Schools,* 49 University of San Francisco L. Rev. Forum 24 (2015).

23. *See, e.g.,* Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center,* 21 Geo. Immigr. L.J. 163 (2007) (discussing the need for specialized training of law students working with survivors of trauma); Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder,* 4 Hastings Race & Poverty L.J. 235 (2007) (discussing PTSD and sharing techniques for attorneys to help an asylum seeker suffering with PTSD to tell a credible, consistent, detailed story); Julie M. Marzouk, *Ethical and Effective Representation of Unaccompanied Minors in Domestic Violence-Based Asylum Cases*, 22 Clinical L. Rev. 395, 399 (2016) (focus on training law students to ethically represent children survivors of trauma avoiding re-traumatization as much as possible); Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clinical L. Rev. 359, 363 (2016) (recognizing the four key components of trauma-informed lawyering as identifying trauma, adjusting the lawyer-client relationship, adapting litigation strategy, and preventing vicarious trauma).

24. The Syllabus for the Columbia Law School Immigrants' Rights Clinic, for example, specifies the following goals: **"**Learn how to engage in challenging work on a sustained basis; Develop an ability to maximize your compassion satisfaction and reduce burnout; Be mindful of secondary traumatic stress." *See* email on file with authors from Elora Mukherjee.

25. For example, within the University of the District of Columbia (UDC) Law Immigration and Human Rights Clinic we use the "Fill Your Life Well" exercise adapted from an exercise shared by Liala Buoniconti, social worker with Harvard's Immigration and Refugee Clinical Program. Students complete a worksheet to reflect which activities "drain" their well of energy and which "refill" the well. We then share, as a group, as much as students are willing, and revisit the well-draining and filling concept throughout the semester.

26. The University of Baltimore's Immigrant Rights Clinic assigns a reflection memo specifically on the topic of self-care and vicarious trauma. *See* email on file with authors from Nickole Miller.

27. A variety of different tools are currently used including, for example, the ProQOL, Center for Victims of Torture. Developed by B. Hudnall Stamm, Professional Quality of Life: Compassion Satisfaction and Fatigue Version 5 (ProQOL) (2009–2012), https://www.proqol.org/uploads/ProQOL_5_English_Self-Score_3-2012.pdf. The ProQOL is used within Harvard's Immigration and Refugee Clinical Program. *See* Email on file with author from Sabrineh Ardalan and within the Columbia Immigrant Rights' Clinic. *See* email on file with authors from Elora Mukherjee. The Seattle University Gender Violence Immigration Clinic, for example, administers a stress assessment and a self-care assessment. *See* email on file with authors from Monika Bashra Kashyap.

28. At the Northwestern Immigrant Justice Clinic, for example, Hemanth C. Gundavaram reports that the students take a self-care assessment around a month into the semester and revisit throughout, including at the mid-semester stage and during their exit interview.

29. We frequently use this tool in the Immigration and Human Rights Clinic at the UDC Law School and find that it helps to inform the direction we need to be taking to support students throughout the semester.

30. *See, e.g.*, Sabrineh Ardalan, *Constructive or Counterproductive? Benefits and Challenges of Integrating Mental Health Professionals into Asylum Representation*, 30 Geo.

Immigr. L.J. 1 (2015). Boston University's Immigrants' Rights and Human Trafficking program has established a partnership with the school of social work through which office hours and other support is offered to students. *See* email on file with authors from Sarah Sherman Stokes. The University of Tulsa's clinical program has partnered with a psychology professor who specializes in trauma and vicarious trauma. *See* email on file with authors from Mimi Marton.

31. *See, e.g.*, Lindsay M. Harris, *Learning in Baby Jail: Lessons Learning from Law Student Engagement in Family Detention Centers*, 25 Clinical L. Rev. 155, 172, 207, 215 (2018) (discussing partnerships with social workers for clinics engaged in intensive fieldwork within family detention centers, including traveling with a social worker as part of the team).

32. Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*. 7 Clinical L. Rev. 403 (2001).

33. For example, the Center for the Human Rights of Children (CHRC) at Loyola University Chicago, School of Law, has established materials to address vicarious trauma for their new Immigration Law Practicum through partnerships with the Illinois Child Trauma Coalition, Refugee and Immigrant subcommittee, and faculty partners within the University's Psychology Department. *See* email on file with authors from Katherine Kaufka Walts. At Tulane University within the immigration practicum, Professor Laila Hlass has partnered with a social worker to create an exercise to assist with issue spotting trauma and vicarious trauma issues. *See* email on file with authors from Laila L. Hlass.

34. Lindsay Muir Harris, *An Open Book? Self-Disclosure in Clinical Teaching*, Clinical Law Prof. Blog (Nov. 17, 2017), https://lawprofessors.typepad.com/clinic_prof/2017/11/an-open-book-self-disclosure-in-clinical-teaching.html.

35. Bea Bischoff, *I'm an Immigration Attorney in Trump's America and the Stress Took Over My Life,* The Huffington Post (Jan. 8, 2019), https://www.huffpost.com/entry/immigration-attorney-compassion-fatigue_n_5c33a4fde4b01b7197a2dcb3.

36. University of Buffalo Center for Social Research, *What Is Trauma-Informed Care?*, http://socialwork.buffalo.edu/social-research/institutes-centers/institute-on-trauma-and-trauma-informed-care/what-is-trauma-informed-care.html; Substance Abuse and Mental Health Services Administration (SAMHSA). *SAMSHA's Concept of Trauma and Guidance for Trauma-Informed Approach*. U.S. Department of Health and Human Services (2014), https://store.samhsa.gov/system/files/sma14-4884.pdf; *see supra* Katz & Haldar note 23; *see supra* Cartwright, Pleasants & Hope note 13.

37. *See supra,* n.27.

38. Christina Rainville, *Understanding Secondary Trauma: A Guide for Lawyers Working with Child Victims*, American Bar Association, https://www.americanbar.org/groups/public_interest/child_law/resources/ child_law_practiceonline/child_law_practice/vol-34/september-2015/understanding-secondary-trauma--a-guide-for-lawyers-working-with/.

39. Rebecca Raney, *Compassion Fatigue: A Side Effect of the Immigration Crisis*, American Psychological Association (Oct. 15, 2019), https://www.apa.org/members/content/compassion-fatigue?fbclid=IwAR0sT-xJjU3XlIfS98yY0smsjJF_DWYC0-b9KczXiwCshGWMuLX50M8j61c.

40. Survey can be accessed at https://www.aila.org/about/announcements/participate-in-an-asylum-attorney-burnout-stress?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily.

The Tax Consequences of Expatriating from the United States

Patrick J. McCormick*

Abstract: Familiarity with the tax consequences of leaving the United States is important for immigration advisors, particularly for those working with individuals either renouncing citizenship or abandoning green card holder status. This article details the U.S. tax considerations in the expatriation context—first discussing the tax benefits of expatriation, then exploring the special tax rules applicable upon departure. Options to avoid tax consequences on expatriation are considered, discussing benefits and pitfalls of these options.

The inaugural issue of the *AILA Law Journal* included an excellent article by Kehrela Hodkinson exploring the non-tax reasons a U.S. citizen might renounce their citizenship. As Hodkinson noted explicitly, the article excluded an analysis of the tax rules associated with expatriation; as she stated, however, "[T]ax and renunciation go hand in glove, and compliance with the set of regulations governing one but not the other does not make for a complete exit from U.S. regulatory requirements."[1]

This article provides an overview of the tax considerations for expatriates. For tax purposes, expatriates are either U.S. citizens or long-term U.S. green card holders. It provides background information on income and transfer tax differences between U.S.-based taxpayers and nonresidents, illustrating the tax benefits of expatriation. The article also details the tax considerations relevant when a U.S. taxpayer expatriates, focusing on "covered expatriates"—those for whom special tax rules apply. It then discusses the tax ramifications borne by covered expatriates (requiring tax recognition of built-in gain on worldwide assets at expatriation) and rules applicable to future beneficiaries of the covered expatriate. Finally, the article considers strategies for avoiding covered expatriate status and timing considerations associated with avoidance techniques.

U.S. Tax Background

Taxation of U.S. Individuals

U.S. citizens and tax residents are taxable on their worldwide income, no matter where they reside or how the income is generated (*i.e.*, even if all activities associated with generating the income occurred outside the United States).[2] When compared to tax residency, citizenship determinations are

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usually more straightforward—individuals born citizens keep that status until they (formally) renounce it, even if they live overseas full time.

Statutorily, U.S. income tax residency includes two general non-elective categories (for income tax purposes): (1) those lawfully admitted for permanent residence in the United States, and (2) those meeting substantial presence standards;[3] only the former are subject to covered expatriate status.[4] Individuals lawfully admitted for permanent residence are U.S. green card holders; importantly, green card holders, like citizens, are taxed on worldwide income irrespective of their actual physical presence, although, unlike for citizens, this result can be modified by income tax treaty "tiebreaker" provisions.[5]

Income tax treaties—agreements entered between two countries to facilitate economic activity between the countries' residents—allow green card holders to be reclassified as U.S. nonresidents. Reclassification is permitted if the relevant individual is classified as both a tax resident of the United States and a treaty party country, and if the individual's connections to the other country are closer than to the United States (normally focusing on the person's "center of vital interests").[6] Critically, a long-term green card holder who reclassifies after years of U.S. presence risks classification as a covered expatriate by virtue of a reclassification election.[7]

Transfer taxes—estate and gift taxes—are also assessed by the United States. American citizens and domiciliaries (U.S. residents with no present intention of leaving the country) are subject to transfer taxes on gratuitous transfers of worldwide assets (gift taxes for transfers made during their lifetime, and estate taxes for transfers made at death).[8] For transfer tax purposes, an individual is treated as a U.S. domiciliary when he or she is a U.S. resident and has no present intention of leaving the United States.[9]

Citizens and domiciliaries receive a lifetime exclusion for estate and gift tax purposes, protecting a set amount of transfers from U.S. tax. For 2020, this exclusion amount is $11,580,000.[10] Exclusion amounts can be combined for married couples through portability, allowing a decedent's executor to transfer any unused exclusion amount to the surviving spouse. Importantly, the current exclusion amount is set to be halved in 2026, and further variance/revision of the exclusion amount (either upward or downward) is entirely plausible.[11]

Taxation of Nonresident Aliens

Nonresidents are taxed by the United States on income connected to the United States, either by virtue of being: (1) effectively connected with the nonresident's conduct of a U.S. trade or business, or (2) U.S.-sourced income not connected with a nonresident's U.S. trade or business and not capital gains income (fixed or determinable annual or periodic income or "FDAP Income").

Case law dictates that a U.S. trade or business exists where profit-oriented activities that are regular, substantial, and continuous, are carried on in the

United States.[12] Effectively connected income (ECI) is taxable in the United States at graduated rates. Income tax treaties (slightly) elevate the statutory standard, typically providing that residents of a treaty party country can instead elect to use a "business profits attributable to a United States permanent establishment" threshold.

Nonresidents are generally not subject to capital gains tax by the United States for gains not effectively connected with a U.S. trade or business attributable to a permanent establishment. A nonresident disposing of a U.S. real property interest, however, is subject to tax on any gain from the disposition, as this income is statutorily classified as effectively connected income.[13]

FDAP income includes dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodic gains, profits, and income sourced to the United States.[14] Unlike most other types of income (including a nonresident alien's ECI), FDAP income is taxed at a flat 30 percent rate, with no deductions permitted and tax primarily collected through payor withholdings.

Nonresidents are subject to U.S. transfer tax on a limited scope of assets but are given only a fraction of the exemption amounts available to U.S. citizens and domiciliaries. Estate tax is assessable on all property (whether tangible or intangible) situsted to the United States, subject to exceptions.[15] For estate tax, nonresidents receive a $60,000 estate tax exclusion with a maximum 40 percent rate of tax applicable.[16] Gift tax is assessed on lifetime gratuitous transfers of tangible property within the United States by nonresidents.[17] Nonresident individuals receive no specific lifetime exclusion, though they are permitted to utilize annual gift exclusions of $15,000 per donee (an exception also available for U.S. taxpayers).[18]

Classification Considerations/Expatriation Motivations

U.S. tax requirements for nonresidents are significantly more limited than for U.S.-based taxpayers, though U.S. tax results for nonresidents are often more punitive where tax is assessed (particularly in the transfer tax realm). Individuals almost always prefer classification as a nonresident for income tax purposes, given that it both generally removes foreign-sourced income from U.S. tax and also precludes taxation of specified U.S.-sourced income items such as certain U.S.-sourced capital gains.

Determinations as to ideal classification for transfer tax purposes are more fact specific. U.S. citizens and domiciliaries are subject to tax on worldwide assets but receive significant lifetime exemptions. Nonresidents are subject to a narrower transfer tax scope but receive a comparatively miniscule exclusion. Critically, however, nonresidents typically can avoid U.S. transfer tax exposure with proper tax planning (which is usually focused on not having the nonresident own assets in their individual capacity). Nonresidents aware of the U.S.

transfer tax rules thus are not overwhelmingly concerned with transfer taxes, and nonresident status is clearly preferable for certain taxpayers—those of current significant net worth or those concerned that future events (whether accretions to their net worth or reductions in U.S. exclusion amounts) will leave them subject to transfer tax as citizens or domiciliaries.

Expatriation and Exit Tax

Once an individual has decided to forfeit their American status, the U.S. tax consequence of expatriation is exposure to the "exit tax"—a mark-to-market regime designed to capture (and tax) gains that have accrued during the individual's period as a U.S. taxpayer. Initial analysis of whether an individual could be subject to the exit tax focuses on whether the individual is a covered expatriate; only covered expatriates are subject to the imposition of exit tax. An expatriate is defined by the Internal Revenue Code as: (1) a U.S. citizen relinquishing their citizenship, and (2) a long-term U.S. resident who ceases to be a lawful permanent resident.[19] A long-term resident is a noncitizen individual who is a green card holder for at least 8 out of the past 15 tax years.[20]

All renouncing U.S. citizens are classified as expatriates; however, shorter-term green card holders (*i.e.*, those who have not held their green card for 8 years) avoid expatriate classification. This is an important consideration for green card holders not anticipating a lifelong stay in the United States—renunciation of a green card prior to meeting the "8 out of 15 tax years" standard allows avoidance of any exit tax or covered expatriate considerations.

A covered expatriate is any expatriate (under the definition above) who meets one of three tests: (1) the individual's average net income tax for the period of five tax years ending before the cessation date is greater than $171,000 for 2019 (the "tax liability test"), (2) the net worth of the individual as of the cessation date is $2,000,000 or more (the "net worth test"), or (3) the individual fails to certify under penalty of perjury that U.S. tax requirements have been met for the five preceding tax years (the "certification test").[21]

An expatriate meets the tax liability test if his or her average net income tax liability for the five years pre-expatriation exceeds $171,000 for 2020.[22] Individuals filing joint income tax returns must base calculations on the net income tax reflected on the joint return. Certain credits are available for purposes of determining the net income tax liability; foreign tax credits are an often-beneficial credit taken into account.[23]

Most often, individuals will be classified as covered expatriates based on the net worth test, met when the expatriating individual's net worth (as of their expatriation date) exceeds $2,000,000.[24] For valuation purposes, asset values are generally determined under gift tax principles (with the value of property generally being the price a willing buyer and seller would agree upon). A taxpayer must use good faith estimates as to asset values; however, formal

appraisals are not required. Liabilities (such as mortgages) are deducted for purposes of the net worth test. An individual's interest in a trust is also included for net worth purposes; a two-step process is undertaken to determine the value of the trust attributable to the expatriate. First, interests in trusts are allocated proportionately among all beneficiaries by considering all facts and circumstances; interests allocable to the expatriate are then valued.

Expatriates are classified as covered expatriates if they cannot certify compliance with the Internal Revenue Service (IRS) requirements for the five years prior to expatriation.[25] This requirement (at least hypothetically) can cause an individual without significant net income or net worth to be subject to the exit tax. Cognizance of the certification test, however, usually leads to avoidance of failing it: even individuals who historically have been noncompliant with U.S. tax obligations (most often, those who have lived overseas for an extended period pre-exit) have straightforward options to cure retroactive failures.[26] The required certification is made by filing Form 8854.

An individual meeting either the tax liability test or the net asset test can avoid classification as a covered expatriate by meeting one of two statutory exceptions. These exceptions apply to an individual who: (1) became at birth a dual citizen of the United States and another country, remains a citizen of that other country as of his or her expatriation date, and did not reside in the United States for more than 10 of the past 15 tax years (ending with the tax year during which expatriation occurs); or (2) relinquishes U.S. citizenship before age 18½ and did not reside in the United States for more than 10 taxable years before the date of relinquishment.

Exit Tax: The "Mark-to-Market" Regime

Under exit tax principles, an expatriate is treated as selling at fair market value their worldwide holdings (subject to a few exceptions), creating a fictional recognition event for built-in gain (referenced as the "mark-to-market" rules). Gain is reported on the individual's Form 1040 (as the recognition occurs the day before expatriation, *i.e.*, while they are still subject to worldwide taxation by the United States).

Mark-to-Market Mechanics

Fair market value and basis of assets must be determined (with taxable gain being the excess of the fair market value after subtraction of basis). A covered expatriate is treated as owning any property that would be treated as part of their estate and is also considered to be the owner of any beneficial interests in trusts. Fair market value of assets held is also determined under general estate tax guidelines.[27]

An individual's basis generally follows normal principles for determination of basis, with one important deviation: the basis of long-term residents in their assets is the fair market value of those assets on the date their residence in the United States began.[28] This can be an important benefit for assets that appreciated in value prior to the expatriate becoming a U.S. resident.

Once the fair market value and basis of each asset has been ascertained, gain (and loss) is aggregated to determine the amount of gain recognition under the mark-to-market regime. Some relief is available—the first $737,000 (for 2020; this number is also adjusted annually for inflation) of gain under mark-to-market rules is not subject to tax.[29] After this allocation, gains (and losses) are reported on the Form 1040 (and applicable schedules) depending upon the character of each asset.[30] A deferral for payment of the exit tax is available by election, and is made on an asset-by-asset basis. Where the election is made, payment of tax is not required until each asset for which an election was made is sold.[31]

The mark-to-market regime is inapplicable to three types of assets: (1) deferred compensation items, (2) specified tax-deferred accounts, and (3) interests in non-grantor trusts.[32] For eligible deferred compensation items, the payor must withhold a tax of 30 percent on any taxable payment to a covered expatriate; for ineligible deferred compensation items, an expatriate is subject to tax as if it were received the day prior to expatriation. Tax-deferred accounts are treated as having their entire balance distributed to the expatriate on the day before his or her expatriation date. For distributions of property from a non-grantor trust to a covered expatriate, the trustee of the trust withholds 30 percent of the taxable portion of the subsequent distribution.

Post-Expatriation Ramifications

Most would assume that, once expatriation has occurred, U.S. tax implications finally and mercifully cease; however, this belief (at least for covered expatriates) can be mistaken. Special rules have been enacted for gifts or bequests from covered expatriates to U.S. beneficiaries; these transfers are statutorily subject to tax at the highest applicable rate for gifts/bequests (currently 40 percent).[33] Tax owed is paid by the recipient of the gift or bequest (a departure from the normal U.S. tax rules, where transfer taxes are paid by the transferor).[34]

For this inheritance tax to apply, transfers must be made to U.S. citizens or residents; where transfers are made to nonresidents, the inheritance tax is inapplicable. For these purposes, however, a gift/bequest made indirectly by a covered expatriate to a U.S. beneficiary by using a foreign intermediary (*i.e.*, covered expatriate making a gift to a nonresident, who then gifts the asset to the U.S. person) is a covered gift/bequest.

Critically, satisfaction of requirements for the inheritance tax is deferred until the IRS issues guidance on the tax; proposed regulations regarding gifts and bequests from covered expatriates were issued in 2015, but deferment of obligations continues at present.[35] Form 708 is to be used to report such gifts or bequests, but has yet to be issued; the IRS has provided that Form 708 will be issued when the Sec. 2801 regulations are finalized, with time then provided to taxpayers to meet requirements.[36]

Planning for Expatriation/General Expatriate Tax Considerations

Individuals subject to the exit tax can face drastic tax ramifications on (and after) expatriation; however, they can take steps prior to expatriation to either avoid covered expatriate status or, where avoidance is not possible, mitigate its tax impact.

In planning for the tax consequences of expatriation, focus is primarily on gifting strategies using the individual's lifetime exclusion amount (currently $11.58 million) prior to his or her expatriation. Individuals who would be classified as covered expatriates under the net worth test can make gifts while still classified as U.S. citizens/domiciliaries to reduce net worth. Assessment of whether an individual meets the net asset test is based on net worth as of the date of relinquishment of U.S. citizenship/green card status; the expatriate's net worth can be lowered prior to this date (particularly when factoring in that the first $737,000 of gain generated by the mark-to-market approach is exempt from tax).

Mark-to-market rules (and the exit tax rules generally) do not allow an expatriating individual to automatically apply their existing lifetime exclusion to shield gain on expatriation; thus, proactive exhaustion of this amount provides a major tax benefit. Care must be undertaken in a number of respects, however. First, transfers must be made in the year prior to expatriation; gifts in the year of expatriation cannot be offset by the lifetime exclusion amount.[37] Often, this creates a delay in expatriation so that, if needed, proper tax planning can occur.

Any exit tax planning should ensure that gifts made do not leave the expatriate with insufficient net worth to live their desired lifestyle moving forward (understandably, the expatriate's age is often a relevant factor in determining appropriate amounts to gift). Given the scope of what is included as assets for net worth purposes—any assets for which the expatriate would have gift tax obligations in the United States if the transfer were made while still a U.S. taxpayer—transfers can be structured to avoid inclusion of assets for net worth test purposes while permitting benefit from the assets moving forward.

Outside the exit tax, risk that future gifts or bequests to U.S. beneficiaries could subject those beneficiaries to inheritance taxes is disconcerting to expatriates. As provided, the inheritance tax is currently not enforced, but the IRS has left open the possibility that it will be in the future, and has done nothing to preclude retroactive application of requirements. Risk of a prospective inheritance tax can be the primary reason to avoid covered expatriate status, particularly for individuals who, under the mark-to-market regime, would face little or no exit tax on expatriation.

Conclusion

As immigration practitioners are well aware, a multitude of non-tax (and non-financial) factors can motivate a U.S.-based individual to cease their U.S. residency. Cognizance of tax repercussions is needed by any advisor working with an expatriating individual. With proper design, immigration/residency goals can be met while shielding the expatriates—or their future heirs—from unexpected tax impact.

Notes

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1. Kehrela Hodkinson, "Renunciation of U.S. Citizenship: Why Would a Client 'Give It All Up'?" 1 AILA Law Journal, 71, 71 (April 2019).
2. 26 U.S.C. § 1.
3. Substantial presence requirements are met when an individual spends at least 31 days in the current year in the United States, and the sum of days in the previous three years, after the use of applicable multipliers, exceeds 183.
4. 26 U.S.C. § 7701(b)(1)(A).
5. 26 U.S.C. § 7701(b)(1)(A)(i).
6. *See* United States-United Kingdom Income Tax Treaty, Art. 4(4).
7. Reclassification under income tax treaties, which requires the reclassifying green card holder to have a stronger level of connection with another country, poses assorted immigration-focused questions outside the focus of this article.
8. 26 U.S.C. § 2001; 26 U.S.C. § 2501.
9. *See* 26 C.F.R. § 20.0-1(b); 26 C.F.R. § 25.2501-1(b).
10. 26 U.S.C. § 2010.
11. For contextual purposes, the estate tax exclusion was $2,000,000 in 2008, and $1,000,000 in 2001. *See* "Federal Estate, Gift and GST Tax Rates and Exemptions," McDermott Will and Emery.

12. *See* U.S. v. Balanovski, 236 F.2d 298 (2d Cir. 1956); U.S. v. Northumberland Insurance Company, 521 F. Supp. 70 (D.N.J. 1981).
13. 26 U.S.C. § 897(a).
14. *See* 26 U.S.C. § 1441(b).
15. 26 C.F.R. § 20.2104-1(a)(1). Exceptions are granted for life insurance proceeds, bank accounts not used in connection with a U.S. trade or business, and stock or securities generating portfolio interest.
16. 26 U.S.C. § 2001(c).
17. 26 C.F.R. § 25.2511-3.
18. 26 U.S.C. § 2503(b).
19. 26 U.S.C. § 877A(g)(2).
20. 26 U.S.C. § 877A(g)(3)(B).
21. 26 U.S.C. § 877(a)(2).
22. 26 U.S.C. § 877(a)(2)(A). *See also* Revenue Procedure 2016-55. The $171,000 amount is indexed annually for inflation.
23. *See* 26 U.S.C. § 27.
24. 26 U.S.C. § 877(a)(2)(B).
25. 26 U.S.C. § 877(a)(2)(C).
26. For citizens/green card holders residing overseas, an especially appealing option is the Streamlined Filing Offshore Procedures, which provide a penalty-free method to come into compliance with U.S. tax obligations.
27. Notice 2009-85.
28. 26 U.S.C. § 877A(h)(2).
29. 26 U.S.C. § 877A(a)(3).
30. Notice 2009-85.
31. 26 U.S.C. § 877A(b)(1).
32. 26 U.S.C. § 877A(d)-(f).
33. 26 U.S.C. § 2801(a).
34. 26 U.S.C. § 2801(b).
35. *See* Notice 2009-85; *Internal Revenue Bulletin* 2015-39.
36. *See* Announcement 2009-58.
37. *See* 26 U.S.C. § 2505.

Fake Problems with Faulty Solutions

Why a Physical Barrier Is Not a Viable Answer to Trump's Purported "Crisis" at the Border

Heather Adamick*

Abstract: The border between the United States and Mexico has evolved significantly throughout this country's history. It has long been a source of contention and has become the focal point of Donald Trump's presidency. Through the use of antagonizing rhetoric, Trump has created a new wave of nationalism—convincing his supporters that undocumented immigrants are a threat to the American people and claiming that a newly constructed wall along the border is the only way to eliminate that threat. This article explores the history of the border wall and seeks to demonstrate that a wall is an unnecessary expense that will not solve the problem Trump insists exists.

Introduction

"Build that wall, build that wall!"[1] It is the political slogan that set the tone for Donald Trump's polarizing and unpredictable 2016 presidential campaign. A campaign promise that has turned into one of the most divisive subjects in politics today.

The United States is often referred to as a "nation of immigrants." Although the United States started out as a welcoming, immigrant-friendly nation, the country's history has been tainted with policies of exclusion and nationalist sentiments. These sentiments have substantially increased in the past few years under Donald Trump's presidency and do not appear to be subsiding any time soon. Trump's proposal for a border wall is just one of the many actions he has taken as president in an effort to maintain the admiration of his supporters through the promotion of these exclusionist policies.

Although Trump assured his supporters from the beginning of his campaign that the construction of the border wall was one of his main priorities, none of these plans has come to fruition until recently. Although efforts made by Trump's administration and supporters pushing for the construction of the wall have been persistent, as well as quite shocking, organized efforts opposing the Trump administration's agenda have had some success in combatting these nativist movements.

This paper attempts to discern the "why" behind the sudden outcry for a reinforced wall at the border by diving into the development of the U.S.-Mexico border in the past century. The paper will then analyze the Trump

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administration's reasoning behind the need for a border wall and will demonstrate why those reasons are invalid. Lastly, the paper will present two potential problems the Trump administration has and will continue to encounter in its attempt to erect a wall along the border.

History of the Border with Mexico

Spanish Rule and Mexican Independence

Prior to Mexico's independence from Spain, the United States' southern border was defined by the Adams-Onís Treaty.[2] Signed by Secretary of State John Quincy Adams in 1819, the treaty transferred Florida and the Gulf lands east of the Mississippi River to the United States and defined the existing border between the two countries as beginning at the mouth of the Sabine River in the southeast, and stretching up to the northwest to what is now known as Oregon. In exchange for these concessions, the United States recognized Spain's control over Texas.[3]

Following Mexico's independence from Spain in 1821, the United States made several attempts to purchase Texas. Mexico refuted all of these offers, but recognized the need for colonization, as the Mexican population on these borderlands was sparse and the Native Americans vastly outnumbered them.[4] To address this issue, Mexico allowed American families to settle in Texas, as long as they agreed to convert to Catholicism, learn to speak Spanish, and take Mexican citizenship.[5] As a result, hundreds of American families made the trek to settle in Texas.

Texas Revolution and Texas Annexation

By 1830, the Anglo-American population grew to 16,000. With so many Anglos migrating to the Texas territory, tensions began to rise between the native Mexicans and the American colonists. Anglo-Americans refused to abide by the rules set forth by the Mexican government—they did not learn Spanish, they segregated their children into their own schools, and they conducted the majority of their trade with the United States. Mexican authorities began to fear that a revolution was imminent and imposed a series of laws reasserting Mexico's prohibition of slavery, forbidding further immigration from the United States, and restricting trade with the United States.[6]

Despite these new restrictive laws, the American colonists had hope that the newly elected president of Mexico, Antonio Lopez de Santa Anna, would allow Texas to be a self-governing state. However, two years into his presidency tensions culminated when Santa Anna declared himself a dictator and

abolished all state governments, leading colonists and Mexican liberals to draft their own Constitution and create a temporary government.[7]

Out of this newly formed government came the Texas Revolution. Although the revolution lasted less than a year, it was filled with several important battles and led to the capture of Santa Anna by Texan troops. The revolution came to an end with the Treaties of Velasco, requiring all Mexican troops to retreat south of the Rio Grande river, restoring all private property that had been confiscated by Mexicans, and returning all prisoners of war. Santa Anna also negotiated his release through the signing of a secret treaty, in which he recognized Texas as an independent republic and agreed that the Texas-Mexico border would be the Rio Grande river.[8] The Republic of Texas was an independent sovereign state for nearly 10 years before being annexed as the twenty-eighth state of the United States in 1845.[9]

Mexican-American War and the Gadsden Purchase

Along with the annexation of Texas came strained relations between the United States and Mexico. The tension arose from a disagreement over the designated border between the new state and Mexico. Mexico believed the border extended to the Nueces River, and Texans argued that the border began at the Rio Grande. In 1846, President Polk attempted to purchase Mexican territory that is now known as California and New Mexico, but his offer was quickly rejected.[10] In response to this rejection, Polk moved troops into the disputed territory between the Rio Grande and Nueces rivers. Mexican forces attacked the troops in this disputed zone, causing the United States to declare war against Mexico.

The Mexican-American War lasted two years and drastically altered the territorial composition of both the United States and Mexico. Under the Treaty of Guadalupe Hidalgo, Mexico recognized the annexation of Texas, established the Rio Grande as the border, and agreed to sell all territory north of the Rio Grande to the United States for $15 million. The treaty resulted in the loss of nearly one million square miles of land for Mexico.[11]

In 1853, the Gadsden Purchase was made—establishing the U.S.-Mexico border as we know it today. The agreement between the U.S. and Mexico handed the United States over 29,000 square miles of territory—including what eventually became parts of Arizona and New Mexico.[12]

Although these treaties clearly defined the border on maps, the clarity did not translate to the border on the ground. Many of the markers that had been placed along the border had been destroyed. In response to the ambiguity of the border, Mexican and American governments created a joint commission to reassess the situation at the border. Upon the recommendation of the commission, the United States ordered a 60-foot grass path to be installed

along the border at Nogales in 1897, which was later extended to other parts of the border.[13]

Mexican Revolution and World War I

Although the border was well-established, both on maps and on the ground, at the turn of the twentieth century, there was no infrastructure to monitor illegal border crossings. As violence and turmoil began to explode along the border due to the Mexican Revolution, swarms of people began to spill over into Texas. During the revolution, between the years 1910 and 1920, more than 890,000 Mexicans migrated to the United States.[14]

The revolution brought never-before-seen violence and disorder to the border. This increased violence, coupled with the United States' entry into World War I in 1917, instilled a fear in Americans that violence and foreign World War I spies could spill over the border as well. It was the fear derived from these two events that caused the first physical barrier to be built—a six-foot wooden fence along the border of Nogales.[15] Fences similar to these began popping up along other parts of the border, particularly at ports of entry.

Shortly after these wars were over, Congress passed the Immigration Act of 1924, establishing the Border Patrol and imposing strict national origins quotas—capping immigration visas to 2 percent of each nationality in the United States as of 1890.[16] Interestingly, Mexico was excluded from these quotas as a result of extensive lobbying on the part of Texas farmers, who viewed Mexican labor as essential to their economic survival.[17]

World War II and the Bracero Program

As working-class American men left in swarms to fight in the World War II, the United States found itself with an extreme shortage of labor. To fill this void, the United States and Mexico formed the Bracero Program in 1942.[18] The program sent nearly five million Mexicans to the United States to work on short-term, primarily agricultural labor contracts.

Although the program was represented as being mutually beneficial, opponents of the program existed in both nations. U.S. labor unions argued that a labor shortage did not exist at all so an influx of Mexican workers was unwarranted.[19] Mexican laborers were concerned with violations of the agreement. Although the braceros were guaranteed free sanitary housing, access to medical care, paid round-trip transportation, pay of at least the prevailing wage, and protection from discrimination through this cooperative labor program, American farm owners typically did not honor these aspects of the braceros' contracts.[20] Notwithstanding the program's controversy in both countries, the Bracero Program was a pivotal piece in the development of the

United States' reliance on Mexican migrant workers to fill low-wage jobs in undesirable industries, and the effects of the program are still apparent today.

1965–1990

Congress passed the Immigration and Nationality Act in 1965, doing away with the Bracero Program and eliminating the nationality-based quota system. The new immigration system created by the Act focused on family reunification and skilled immigrants through a seven-category preference system.[21]

Prior to 1965 there were no caps on immigration from Mexico. With the new limitations on visas under the 1965 Act came a stream of undocumented immigration. When the guest worker program ended, many braceros continued to enter the country regularly to find work—oftentimes with the same employers as when the program was still up and running. The termination of this program, as well as the new changes to legal immigration, generated the upsurge of undocumented immigration.[22]

Operation Gatekeeper

In 1993, the Clinton administration signed off on Operations Safeguard and Hold the Line, beginning the initial federal push for the construction of the border wall. These bills authorized the construction of fencing along the borders of Arizona and Texas.[23] Shortly thereafter, on October 1, 1994, President Clinton launched "Operation Gatekeeper," an enhanced border security strategy in southern California that doubled the budget for border security personnel and authorized the construction of fencing along the border in California.[24]

All three of these Clinton-era enhancements of border security were enacted in the hopes of deterring illegal immigration in its entirety. However, they have not been successful in this goal, but rather have pushed immigrants to more dangerous methods of crossing the border. Some individuals have resorted to crossing through dangerous zones of the desert in between legal ports of entry, subjecting themselves to life-threatening conditions. Others rely on smugglers to get them into the United States and are often exploited and forced to pay thousands of dollars for the journey while living in deplorable conditions.[25]

Secure Fence Act of 2006

In 2006, President Bush signed the Secure Fence Act into law. The act authorized and partially funded the construction of 700 miles of double-layered fencing along the U.S.-Mexico border in five zones from Tecate, California to Brownsville, Texas.[26] Additionally, the act implemented surveillance for the

land and sea borders of the United States, including unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras.[27] The fence was never completed due to a lack of funding and a change in the political make-up of Congress after the midterm elections in 2006.

The Border During Trump's Reign

The Trump administration has been rolling out restrictive immigration policies since President Trump took office in early 2017. Although the list of these policies is immense, summarized below are three of the most notorious anti-immigrant policies Trump has enforced since he was elected.

In April 2018, then-Attorney General Jeff Sessions announced that the administration would be implementing a zero-tolerance immigration policy, including prosecuting anyone who illegally crosses the border and separating children from their parents rather than keeping them together in detention centers.[28] Legally, the government is not permitted to detain children for prolonged periods of time with their parents in prisons, as per the *Flores* Settlement Agreement.[29] To get around this, the administration instead separated children from their parents and placed them in detention centers around the country. The children were later sent to shelters, foster care homes, or other family members living in the United States.[30] The Obama administration also separated families at the border, although this was never done in the systematic way that has characterized the Trump administration's policy.[31]

Although Trump's zero-tolerance policy was announced in April 2018, recent studies have shown that the separations actually began in 2017.[32] In response to this policy, several lawsuits were filed against the administration, and in June 2018 a federal judge in San Diego ordered the government to stop separating families and to reunite children with their parents.[33] President Trump rescinded the policy later that month, although it has been shown that the policy is still in effect today.[34] The government reported that nearly 3,000 children were separated from their parents under this policy,[35] but other sources report the number to be over 5,000.[36]

Late last year the Trump administration announced that it was replacing the old "catch and release" policy with a "catch and return" policy. In other words, rather than being detained or released into the United States with a notice to appear in court for their asylum claim, individuals are now being sent back to Mexico until their court date, even if they are not citizens of Mexico. The "Remain in Mexico" policy has made it more difficult and dangerous to apply for asylum. U.S. immigration attorneys have a harder time communicating effectively with their clients, as they are largely unable to meet with them in person.[37] Additionally, shelters in these dangerous border towns in Mexico are overflowing, forcing families to subject themselves to the dangers of living in tent cities under bridges. The ACLU brought suit against the administration for this policy, and in April 2019 a federal judge in San Francisco granted a

request to halt the catch and return practice.[38] However, a three-judge panel of the United States Court of Appeals for the Ninth Circuit has since issued a stay of the district court's preliminary injunction.[39] In October 2019 oral arguments for this case were heard in the Ninth Circuit.[40] It is estimated that the United States has sent approximately 51,000 migrants back to Mexico since the policy was implemented.[41]

Lastly, the Trump administration has employed a tool made possible by our immigration laws to further restrict asylum seekers from entering the country. Under the Immigration and Nationality Act, the United States is permitted to bar asylum to those individuals who can be returned to a "safe third country."[42] These agreements require migrants to seek asylum in the first safe country they pass through when fleeing their homes. A country is deemed safe if the life or freedom of an individual would not be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion *and* where the individual would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.[43] The Trump administration utilized this provision to pressure three Central American countries—El Salvador, Honduras, and Guatemala—into signing bilateral agreements with the United States this year, requiring nearly all asylum seekers wishing to enter the United States to ask for protection from one of those countries first. Unfortunately, these agreements will not address the root causes of the recent influx of migration into the United States.[44] Instead, it will force migrants to take more dangerous, alternative routes into the country, and will return thousands to undeniably unsafe conditions, with a 2018 study naming El Salvador, Honduras, and Guatemala the first, fifth, and sixth most dangerous countries in the world, respectively.[45]

The accumulation of strict immigration policies implemented throughout Trump's presidency have created what experts have coined the "invisible wall."[46] This wall, while not as famous as Trump's coveted physical barrier, has been extremely effective in achieving the goals the physical wall proposes to accomplish. As a 2019 article from the *Huffington Post* aptly puts it, "A small, dedicated crew of hardliners has put up bureaucratic barriers that are far harder to overcome than any hunk of concrete on the border."[47]

The Trump administration is chock-full of these "hardliners," who are determined to effectively limit every class of potential immigrants from entering, or remaining in, the United States. In addition to the policies mentioned above, targeting humanitarian applicants, Trump has implemented rules and guidelines aimed at deterring employment-based individuals, family-based applicants, and students as well.[48] Requests for Evidence (RFEs) have dramatically increased for skilled workers, processing times and government fees are increasing at an unprecedented rate, and denials of all applications, petitions, and forms of relief are on the rise.[49]

Alongside these restrictive policies, the hostility created through the administration's rhetoric surrounding immigrants has had a slight impact on foreign nationals traveling to or remaining in the country.[50] A report issued by

AILA provides startling numbers. H-1B petitions received by the U.S. Citizenship and Immigration Services (USCIS) declined in 2018 for the first time in 5 years, international student enrollments in U.S. Colleges and Universities fell 4 percent in the 2016-2017 school year, and there was a 3.8 percent drop in visitors coming to the United States for the first 3 quarters in 2017.[51] Despite the "success" of these deterrent policies, President Trump continues to assert that a physical wall is necessary to keep the country safe.

Trump's Arguments as to Why the Wall Is Necessary

Although Trump has received substantial criticism throughout his presidency, he has been undeniably successful in his quest to maintain his base of loyal supporters. He has represented himself as a martyr for American values, identifying the influx of immigrants into the country as a threat to those values, and has promised to take necessary action to eliminate the source of that threat.

Since entering the White House, Trump has painted an unrealistic, exaggerated picture of the situation at the border, describing it as a "humanitarian and security crisis"[52] and has tarnished the image of immigrants in general. In his Oval Office address to the nation regarding immigration on January 8, 2019, President Trump summarized four main reasons why he believes the wall is necessary: (1) to end the growing crisis at the border, (2) to protect American workers, (3) to keep the drugs out, and (4) to shield Americans from crime.[53]

End the Crisis at the Border

President Trump began his speech by introducing skewed, inaccurate numbers that supported his position.[54] In describing why there is currently a "growing crisis" at the border, Trump spoke about the number of undocumented immigrants who are apprehended by border patrol on a daily basis, stating that "every day, customs and border patrol agents encounter thousands of illegal immigrants trying to enter our country."[55]

First, Trump's use of the word "growing" in reference to a crisis at the border is unwarranted. The number of illegal border crossings in the past year were lower than during the Obama era, and significantly lower than their peak in 2000. Mexican undocumented immigration has seen particularly low numbers in recent years—decreasing around 1.3 million since 2010.[56] Furthermore, with regard to Trump's claim that border patrol agents are encountering *thousands* of illegal immigrants trying to enter our country each day, Customs and Border Patrol reported numbers in the hundreds for the month of March 2019.[57] While many would agree that the stream of undocumented immigrants coming into the United States is a problem that needs to be addressed, it certainly should not be deemed a "growing" crisis, as the numbers display the opposite.

Second, in addition to the numbers themselves dropping, the demographics of those crossing the border have changed significantly. Rather than individuals crossing and attempting to evade any contact with border patrol agents, the country is now seeing an influx of families and unaccompanied children who are turning themselves into Border Patrol officials in an attempt to seek asylum.[58]

Third, the Trump administration's own policy of requiring asylum seekers to remain in Mexico while awaiting immigration proceedings in the United States has only added to the problem that Trump claims he is aiming to fix. This policy has forced many families and children to choose between waiting for months in the border towns of Mexico, exposing themselves to dangerous conditions, or crossing the border in between ports of entry with the hope of turning themselves into the first border patrol agent they find. Thus, President Trump himself has created the problem he is complaining about.

While it is undoubtedly true that the flow of undocumented immigrants through the southern border is still substantial today, the numbers and language consistently used by the Trump administration to describe the situation at the border are improperly relied upon by his supporters in wrongfully justifying the need for a border wall to deter undocumented immigration.

Protect Americans

A common concern regarding undocumented immigration that has been around since the country enacted the Chinese Exclusion Act in the late nineteenth century is that of protecting Americans' jobs, wages, and public benefits. Trump hit this point early on in his address, saying that "America proudly welcomes millions of lawful immigrants who enrich our society and contribute to our nation, but all Americans are hurt by uncontrolled illegal migration. It strains public resources and drives down jobs and wages. Among those hardest hit are African Americans and Hispanic Americans."[59]

According to a report by the National Academies of Sciences, Engineering, and Medicine, immigration "has an overall positive impact on the long-run economic growth in the U.S."[60] Studies have shown that most undocumented immigrants do not receive public benefits and tend to take jobs that boost other parts of the economy.

First, most public benefits are not available to immigrants. Undocumented individuals are barred from receiving nearly all federal public benefits, including those that are need based, though they are eligible for a handful of benefits that are "deemed necessary to protect life or guarantee safety in dire situations . . . ," such as emergency Medicaid, access to treatment in emergency rooms, or access to health care and nutrition programs under the Special Supplemental Nutrition program for Women, Infants, and Children (WIC).[61] About half of the states allow undocumented immigrants to receive benefits.[62] Although individuals who have been legal permanent residents for

five years may qualify for most benefits, many either do not qualify as they are above the maximum income threshold or they choose not to receive the benefits because they feel ashamed.

Second, undocumented immigrants are contributing a substantial amount of money into state and local economies each year, an estimated $11.74 billion.[63] However, the same individuals who are putting that money into the system are unable to reap the benefits of these public benefit programs.

Trump's second assertion that undocumented immigrants are taking away jobs from Americans and lowering wages is inaccurate when given out of context. The same report mentioned above found that immigration is "integral to the nation's economic growth" because immigrants contribute new ideas and add to an American labor force that would be shrinking without them, helping ensure continued growth into the future.[64] Additionally, undocumented immigrants protect certain American industries from being completely uprooted.

One particular industry that would be decimated without the labor of undocumented immigrants is the agricultural industry. It is estimated that 50 percent of the agricultural industry's workforce is made up of undocumented immigrants. The primary reason there is such a high concentration of undocumented workers in this industry is that employers have not been able to find enough American workers to do these jobs. According to a study performed by the Cornell Farmworker Program in 2017, 30 New York dairy farmers said that they turned to undocumented immigrants because they were unable to find reliable U.S. workers to do the jobs.[65] The same can be said for other industries in which the jobs are similarly dirty, physically demanding, and dangerous, including landscaping, manufacturing, and construction.[66]

Trump's claim regarding the depression of U.S. workers' wages by undocumented immigrants does have some truth to it, but it needs context in order to be fully understood. While it is true that the influx of undocumented immigrants has lowered wages for those American workers who dropped out of high school, the overall wages of less-skilled workers found "virtually no effect on the wages or unemployment rates of less-skilled workers. . . ."[67] Additionally, Trump fails to mention other forces that may be lowering the wages of blue-collar workers, such as increased automation, globalization, declining unionization, and government policies on overtime, including a decision by the Trump administration to do away with an Obama-era rule that made workers who made less than $47,000 per year eligible for overtime.[68]

Lastly, Trump's claim that African American and Hispanic Americans are the most affected by illegal immigration is unfounded. Although there are a handful of unreliable studies that suggest this, existing data does not show a correlation between undocumented immigration and unemployment rates among U.S.-born racial and ethnic minorities.[69] A study conducted by the Economic Policy Institute showed that "in the aggregate, immigration has essentially the same relative effect on native blacks as it has on native whites—a small *positive* relative impact on wages."[70]

Keep Drugs Out

Trump's next point in his Oval Office address to the nation regarding immigration was related to the flow of drugs coming into the U.S. from Mexico. He said, "Our southern border is a pipeline for vast quantities of illegal drugs including meth, heroin, cocaine and fentanyl. Every week, 300 citizens are killed by heroin alone, 90% of which floods across from our southern border. More Americans will die from drugs this year than were killed in the entire Vietnam War."[71]

Trump is absolutely right when he suggests that there is a drug epidemic going on in the United States. Thousands of Americans die each year due to the presence of illegal drugs and most would agree that it is an issue that needs to be addressed by this administration. It is also true that a large portion of the drugs in the United States come from Mexico. However, there is no factual support showing that building a wall "to keep the damn drugs out"[72] will actually have the effect of eliminating or even limiting the drug flow into the United States from the southern border.

First, the majority of drugs are not smuggled across the border between legal ports of entry, but rather are brought in through legal entrances. According to the 2018 National Drug Threat Assessment written by the U.S. Department of Justice Drug Enforcement Administration (DEA), only a "small percentage of heroin seized by CBP along the land border was between Ports of Entry (POEs)." Similarly, the assessment by the DEA also found that the southwestern border remains the principle entry point for the majority of cocaine entering the United States, with most seizures occurring "at POEs . . . or United States Border Patrol checkpoints." The same can be said for fentanyl, methamphetamine, and marijuana. A border wall would be virtually useless in stopping the mass quantity of drugs from crossing through legal ports of entry.[73]

Second, even when drugs are smuggled across the border in between legal ports of entry, there are a wide array of mechanisms that can be used to get the drugs over the border that a wall would not be able to deflect. Tunnels are a commonly used method. Since 1990, U.S. officials have discovered more than 230 tunnels that were at one time used to transport drugs into the United States.[74] Drug cartels have also turned to the ocean—using both boats and submarines—to get drugs into the country.[75] Although not as common, catapults have also been used to fling drugs up and over the current wall from Mexico into the United States.[76] With the advances in modern technology, cartels are also now turning to drones to transfer drugs into the country.

Although the drug flow from the southern border has created an epidemic in the United States that needs to be stopped, a border wall is not the solution. Rather, the Trump administration should focus on lowering the demand for drugs within the United States. Drug cartels operate like businesses. As long as there is a high demand for their product, they will continue finding ways in which they can get their product into the hands of their customers.

Protect Americans from Crime

In the midst of announcing his run for the Republican nomination for President, Trump made his personal perception of Mexican immigrants clear: "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems to us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[77]

Despite public outrage in response to Trump's outright racist comment, he has continued to insist that unauthorized immigrants are bringing crime into the United States at devastating levels. He has taken to both social media and official presidential speeches to express his concerns, oftentimes spitting out statistics that are either used out of context or are flat-out incorrect. One such instance was in his Oval Office address, when he once again attempted to prove his point through inexplicable numbers. He said, "In the last two years, ICE officers made 266,000 arrests of aliens with criminal records, including those charged or convicted of 100,000 assaults, 30,000 sex crimes, and 4,000 violent killings. Over the years, thousands of Americans have been brutally killed by those who illegally entered our country and thousands more lives will be lost if we don't act right now."[78]

These numbers are misleading. The offenses involve a combination of serious and nonviolent offenses, including immigration violations. Additionally, four separate studies conducted since Trump took office have found that undocumented immigration does not increase the occurrence of violent or drug-related crimes. One of those studies, published by the Cato Institute in February 2018, analyzed the rate of crimes committed by undocumented immigrants specifically in Texas.[79] The study found that native-born residents are much more likely to be convicted of a crime than both documented and undocumented immigrants.

Notwithstanding Trump's attempts to bolster the threat of criminals penetrating the border by telling heartbreaking stories about the brutal murders of U.S. citizens at the hands of undocumented immigrants, the statistics above prove that undocumented immigration has no effect on the crime rate in the United States. It is unfair to highlight the horrendous acts of a small, unrepresentative sector of the undocumented population in order to promote an immoral barrier that would serve no purpose in decreasing the threat of violence to the American people.

President Trump's January 8 address thus highlights all that is wrong with his stance on the border wall and immigration in general. He has utilized misleading or completely inaccurate statements in an attempt to convince the American public that undocumented immigrants are a dangerous breed of people and that a border wall will help keep this threat out of our country. As demonstrated above, the reasoning behind the statements made in his Oval

Office address is deeply flawed and should not be given any credence when determining whether a border wall is necessary.

A Glimpse into Potential Problems with Building the Wall

As explained in the previous section, there is not sufficient evidence to prove that there is a real crisis at the border that demands the need for a border wall. Aside from the lack of necessity for a wall, there are a multitude of other problems that demonstrate why the construction of a new wall at the southern border would be a mistake. What follows is a summary of the two primary barriers Trump will face in his attempt to build the wall: funding concerns and issues with eminent domain.

Funding

The first problem that has arisen in Trump's push for a border wall is that of funding. As evidenced by the record-long government shutdown, allotting the billions of dollars needed to build the border wall is a substantial obstacle faced by this administration.

There is a wide range of estimates of how much the wall is going to cost, spanning from $8 to $67 billion. Whatever the number, it is large—even in relation to the federal budget. In his initial proposal for the wall, Trump promised that Mexico would be footing the bill. However, both prior President Enrique Pena Nieto and current President Andres Manuel Lopez Obrador have vehemently refused to fund the wall. Trump denies ever having stated that Mexico will directly pay for the wall through the form of writing out a check, instead claiming that he meant Mexico would pay for it indirectly by imposing fees on Mexican diplomats and workers and through the new United States-Mexico-Canada Agreement, the updated version of the North American Free Trade Agreement. None of these plans has come to fruition yet.[80]

Due to Mexico's refusal to fund the border wall, Trump was forced to revise his strategy. His subsequent attempt to secure funding for the wall led to the longest government shutdown in history. This shutdown began because of President Trump's refusal to sign a bipartisan funding agreement in 2018, as it did not include the $5.7 billion he requested, and lasted from December 22, 2018, until January 25, 2019, a total of 35 days.[81] The shutdown ended with President Trump signing a bill that allots $1.375 billion for new physical barriers along the southwest border. There are strict parameters regarding how this money can be spent, including the provision that it must cover 55 miles of new barriers and that it cannot be used for concrete walls.[82]

Trump's efforts to bully Congress into setting aside his desired funds in the annual budget by threatening a potentially never-ending government shutdown proved unsuccessful. Realizing this, he has turned to other, arguably unconstitutional, executive powers to acquire the additional funding he needs to complete the border wall while bypassing Congress.

On February 15, 2019, President Trump declared the "crisis" at the border a national emergency—giving him access "to roughly $8 billion worth of money that can be used to secure the southern border."[83] That $8 billion includes the $1.375 that Congress allotted in the latest spending plan, $3.6 billion to be diverted from military construction accounts, and $2.5 billion from Defense Department efforts to fight illicit drugs.[84] In declaring the emergency, Trump reiterated that the wall is immediately necessary due to the invasion of narcotics, human traffickers, and criminals coming into the country. Shortly after he deemed the situation at the border to be an immediate threat to the country, Trump undermined its classification as an emergency by stating, "I could do the wall over a longer period of time, I didn't need to do this, but I'd rather do it much faster."[85]

Trump's national emergency declaration was met with severe pushback. Since the declaration was made, 16 states, the House of Representatives, and a handful of non-profit organizations have filed lawsuits against the Trump administration attacking the constitutionality of the declaration. Shortly after the declaration, Congress passed a resolution that would terminate the national emergency.[86] Although the resolution was vetoed shortly thereafter by Trump, and Congress was unable to secure the two-thirds majority needed to override the veto, it is a clear example of the divide that exists on this issue, and foreshadows the difficult trek ahead for Trump to secure funding for his beloved wall. However, the administration has had some success in its fight for funding. In July 2019, the Supreme Court allowed the Trump administration to redirect $2.5 billion approved by Congress for the Pentagon to help build the wall.[87]

Eminent Domain

Eminent domain—or the power of the government to take private property and convert it into public use—is the legal power Trump is going to have to invoke in order to secure the land needed to construct the border wall. Eminent domain was used to protect the land where the Battle of Gettysburg was fought in 1896, and more recently was invoked when the Secure Fence Act was passed in 2006.[88] As per the Fifth Amendment, in order to be successful in seizing property from private landowners, the government must show that (1) the land being seized is for public use, and (2) the landowner will be justly compensated for the land.[89]

The first requirement, that of public use, generally means infrastructure—roads, bridges, or even a wall. The Supreme Court has approved the widespread use of the power of eminent domain and has frequently given deference to the government. Therefore, the Trump administration's argument that the land is being used for national security purposes is likely to be sufficient to prove that the land seized from private individuals will be designated for public use.

However, the government will face a greater obstacle when it attempts to seize the lands of Native American tribes, such as the Tohono O'odham Nation, which stretches along 62 miles of the U.S.-Mexico border and covers 2.8 million acres of land.[90] Tribal lands begin just south of Casa Grande in southern Arizona and extend into the Mexican state of Sonora. A handful of laws grant indigenous tribes rights to draw on cultural and natural resources across international borders, including the United Nations Declaration on the Rights of Indigenous Peoples, the Jay Treaty of 1794, the American Indian Religious Freedom Act, and the 1990 Native American Graves Protection and Repatriation Act. Additionally, U.S. law requires that the federal government consult Native American nations on the U.S.-Mexico border in federal border enforcement planning. President Trump will have to circumvent the aforementioned laws in order to move forward with building the wall in those territories.[91]

The second requirement, that the landowner is justly compensated for their land, will cause the government more trouble. The general standard for determining just compensation is the market value of the property, though landowners can argue this value. Historically, landowners who are poor end up being unfairly compensated for their property, as they do not have the funds to afford an attorney and are generally unaware of their rights.

However, the process of bringing all of these cases to court will not be a simple one for Trump. Landowners will be notified of the government's intent to acquire their land in something called a condemnation notice. The government will then send an official to meet with the owners and discuss the appropriate amount of compensation. If the property owner agrees with the amount proposed by the government official, the government will pay the landowner and the landowner loses his or her rights to the land. If the property owner does not agree with the price, the landowner will then have a right to request a jury trial in order to determine what constitutes just compensation. Eminent domain cases from 2006, when the Secure Fence Act was passed, are still in litigation over 10 years later.[92] Additionally, legal advocacy groups in borders states, such as the Texas Civil Rights Project, are gearing up for the upcoming eminent domain cases by assembling a team of pro bono attorneys and providing free know your rights seminars along the border.

Although the government is most likely to come out victorious in any lawsuit filed against it by private landowners, the process is still going to be extremely costly and time-consuming for this administration. As of

November 15, 2019, the Trump administration filed 29 eminent domain suits tied to border wall construction.[93]

Conclusion

Despite Trump's constant reassurance to his supporters that over 500 miles of border fencing will be built by the end of 2020, he has made very little progress toward fulfilling this promise. Although he claims that the wall is "going up rapidly,"[94] the majority of the efforts at the border have been dedicated to rebuilding preexisting sections of the wall. Construction on the first *new* section of the border wall did not begin until early November 2018, and it is only expected to add a total of eight miles to the wall.[95]

While construction of the wall has been slow, it is still unclear what is in store for the border in the future. What is clear is that both the Trump administration and his supporters are willing to do whatever it takes to get the wall built, including creating a GoFundMe account for concerned American citizens to fund the wall themselves and implementing strict immigration policies that have created an invisible wall.

The United States has a long history of anti-immigrant policies and sentiments, and it is disheartening to see Trump encouraging this new wave of nationalism. As demonstrated above, Trump has not effectively shown that a border wall will deter undocumented immigrants from entering the United States. Instead, he has created one of the greatest divides this country has ever seen.

Notes

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2019 Visalaw.ai Case Management Survey Report

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Abstract: One of the most critical (and expensive) choices immigration lawyers must make in the management of their practices is the selection of case management software. While the software needs to handle basic functions like populating government forms and keeping track of client data, the demands of today's practice are forcing practitioners to look for a number of additional features and lean more heavily on their software vendors for support. And while the immigration bar is small compared to other areas of law, there are a large number of vendors providing immigration-customized products, as well as large general legal market vendors that are now targeting the immigration bar. Confusion abounds. The author has conducted a detailed survey of lawyers on their views of the various products in order to help members of AILA make more informed choices and presents his latest findings in this article.

In the spring of 2019, the author of this article conducted a market survey of immigration lawyer users of immigration case management systems. This was the follow-up to a similar survey conducted in 2018. In 2018, 178 individuals completed the 13-question survey. In 2019, an additional question was added and the number of people who responded to the survey increased to 219.[1]

What was the point of the research? Case management software is central to an immigration lawyer's practice. Without it, cases would take considerably longer to prepare, the odds of mistakes (such as missed deadlines) would increase, and lawyers would have much less of an understanding of the state of their practice. Despite the small size of the immigration bar compared to other practice areas,[2] there are numerous immigration-specific case management products as well as general systems used by practitioners. The costs of a case management system can be one of the most expensive items in a law firm's budget. Yet in an age in which people rely on ratings from consumers to evaluate every major purchase—think of sites like TripAdvisor, Amazon, Yelp, and Angie's List—immigration lawyers have virtually no way of knowing what their fellow lawyers think of the available products. The author set out to help solve this problem.

The survey began by requesting demographic information regarding the law practices of each respondent, particularly the lawyer's type of immigration work and firm size.

The survey also attempted to determine the market share of each of the products. This was done in two ways—first based on the raw response, and then adjusted based on the size of the firms of the respondents.

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The author researched features and capabilities of dozens of general and immigration-specific case management systems in order to design questions that allowed respondents to get "into the weeds" as to their opinions of these products and to discuss their desires for specific new capabilities for their systems. The survey also delved into additional questions on subjects like pricing models and the preference for immigration-specific or customizing general case management systems.

Finally, while the author did not set out with this intention, he has come to realize that the survey can also benefit case management system vendors, and not just because some who ranked high will have bragging rights. In many cases, candid comments were received that may help vendors improve their products. And knowing what features lawyers really want versus what they hope they want can only be useful.

Findings

The following is a question-by-question analysis of the survey findings:

Q1: Which case management system do you use for immigration matters? If you use more than one system, pick the one primarily used for immigration forms management.

Respondents were asked to choose among the following options:

- Cerenade eImmigration Air
- INSZoom
- LawLogix
- Tracker
- BlueDot
- Prima Facie
- Lolly Law
- Clio
- Rocket Matter
- MyCase
- Time Matters
- Immigrant Pro
- ProLaw
- Amicus
- Practice Master
- Practice Panther
- Time Matters
- Abacus Law
- Docketwise

- Innovation Law Lab
- Salesforce
- Microsoft Dynamics
- Camp Legal
- Info Tems
- Other (with respondents requested to list the product)

The selections included products listed in a 2016 American Immigration Lawyers Association (AILA) survey,[3] as well as additional products the author has become aware of that are being used by immigration practitioners, including products people identified in the 2018 survey.

The popularity of the products can be measured based on the selection of each survey respondent. However, the second survey question was designed to provide a way to re-weight the responses to reflect overall user numbers by looking at the number of users in a respondent's firm or organization.

> *Q2: How many users does your firm currently have for your case management system? If possible, please specify how many are paralegals and how many are attorneys.*

So, for example, if product X is used by five respondents and they have only two users per firm, but product Y is used by two respondents with 10 users per firm, then product Y is actually being used by twice as many users, even though the number of respondents was substantially fewer. Here is the unweighted tally from the 2019 survey:

Product	**Percent of respondents**	**Total**
INSZoom	21%	45
Cerenade eImmigration Air	20%	42
LawLogix	15%	32
Tracker	7%	16
Docketwise	6%	12
Clio	6%	12
Immigrant Pro	6%	12
BlueDot	3%	7
MyCase	3%	6
Lolly Law	2%	4
Prima Facie	1%	3
Practice Panther	1%	3
Innovation Law Lab	1%	3
Time Matters	1%	2

Product	Percent of respondents	Total
ProLaw	0%	1
Abacus Law	0%	1
Salesforce	0%	1
Camp Legal	0%	1
Other	6%	12

The products listed by the respondents who did not see their product in the selection list were the following:

- Custom-made systems
- Google Drive
- MyKWA
- Adobe Acrobat Pro and USCIS.gov forms
- Smokeball
- Sunapsis (a university-targeted product)

Weighted by number of users, the results are as follows:

Product	Responses[4]	Total number of users
INSZoom	45	627 (average: 4.6 lawyers/9.3 staff)
LawLogix	32	441 (average: 5.34 lawyers/8.43 staff)
Tracker	16	267 (average: 5.87 attorneys/10.81 staff)[5]
Cerenade eImmigration Air	42	215 (average: 2.88 lawyers/2.2 staff)
Clio	12	72 (average: 2.25 attorneys/3.75 staff)
BlueDot	7	48 (average: 2.71 attorneys/ 4.14 staff)
Immigrant Pro	12	31 (average: 2.83 attorneys/2.08 staff)
Docketwise	12	29 (average: 1.66 attorneys/.75 staff)
Lolly Law	4	24 (average: 2.5 attorneys/3.5 staff)
Time Matters	2	24 (average: 12 attorneys/0 staff)
Sunapsis	3	21 (average: 1.66 attorneys/5.33 staff)
Prima Facie	3	17 (average: 2 attorneys/ 3.66 staff)
MyCase	6	14 (average: 1.83 attorneys/0.5 staff)
Innovation Law Lab	3	9 (average: 2 attorneys/3 staff)
Google Drive	2	6 (average: 2 attorneys/1 staff)
Practice Panther	3	6 (average: 1.66 attorneys/.33 staff)

Firm sizes varied. In 2018, most products in the survey were used by firms in the one- to four-attorney range, which is consistent with the AILA

Marketplace study from 2019 showing that approximately 76 percent of AILA members are in firms with three or fewer lawyers. This year, the firms at the top also had a somewhat larger average attorney size, which may reflect the growth of immigration practices. Readers may find the average size and attorney/paralegal data useful as a possible indicator of what type of firm is typically using each product.

Q3: What type of cases does your firm handle? Check all that apply.

Respondents were given the following options:

- Family matters
- Business, investor, and employment matters
- Asylum matters
- Removal matters
- I-9 and E-Verify matters
- Other types of immigration matters

Respondents answered as follows:

Answer choices	**Response percentage**	**Number of responses**
Family matters	87%	187
Business, investor, and employment matters	71%	154
Asylum matters	53%	114
Removal matters	56%	120
I-9 and E-Verify matters	27%	58
Other types of immigration matters	44%	95

The data were largely consistent with 2018 except that the percentage of respondents handling asylum matters increased by 5 percent and those handling removal matters increased by 12 percent. Most respondents practice family immigration as well as handle employment matters.

Q4: On a scale from 1 (not important) to 5 (extremely important), please rate how you regard each of the following case management features. If you are not sure, please leave that rating box blank.

Feature	**Average score**
Creating government forms and saving client information in them	4.54
Creating customized reports	3.66
Suggested case checklists and process steps that are customizable	3.69

Feature	Average score
A client portal allowing clients to complete online intake forms that flow into government forms, upload/download documents, make payments, etc.	3.90
The ability to send mass emails to clients based on set criteria (nationality, case type, industry, etc.)	2.74
Integration with third-party software such as your email/calendaring system, accounting software, package tracking, etc.	3.46
Pulling in data from DOS, USCIS, and other agencies to alert you to news for particular clients	3.23
Billing and accounting capabilities (built into the system versus integrating with third-party software)	2.62
Document management (the ability to pull information from your client database to create documents (cover letters, petition letters, etc.))	3.80
Tracking case deadlines	4.29
Electronic filing for cases with DOS, DOL, and USCIS	2.95
Phone system integration (dialing/faxing from the app)	1.90
A customizable dashboard showing upcoming deadlines and updates on matters from team members	3.89
Integration with general case management systems (such as Clio)	2.60
Ability for HR to initiate a case or add employee	2.67
Ability to automatically send clients/lawyers texts regarding matters	2.71

The results are largely similar to 2018, with the ability to populate government forms and track deadlines remaining the two "must have" features that most respondents listed. Document/email management, creating customized reports, providing case checklists that are customizable, and client portals also scored highly. But as the responses show, respondents are interested in a broad array of features in a case management system. Two new features were added to the 2019 survey—having the ability for human resources professionals to request the initiation of a case or addition of an employee and the ability to automatically send clients/lawyers texts regarding matters from the case management system.

Q5: On a scale of 1 to 10, rate your current case management system.

Respondents indicated a lukewarm level of satisfaction with their case management systems and gave an overall rating of 6.21, down from 6.52 in 2018. Of the companies with a larger market share, the cluster was tight as far as user overall satisfaction with less than one point on a scale of 10 separating them. INSZoom and Immigrant Pro on the low end of the cluster had a score

of 5.84 while Prima Facie had the highest score of 7.33 in the cluster with the other products falling in between. Included below are ratings for systems that received more than a single vote.

Case management system	**Score**
Prima Facie	7.33
Tracker	5.94
Innovation Law Lab	8.00
Lolly Law	6.67
Clio	6.58
BlueDot	6.71
Cerenade eImmigration Air	6.08
LawLogix	6.48
INSZoom	5.84
Immigrant Pro	5.84
Time Matters	5.5

Q6: Which features does your system lack that you would use if available?

Q8: What do you dislike most about your current system?

In these questions, users were permitted to provide a free-form text response rather than having to choose from a list. Users were interested in many features, some of which are available in systems on the market and others not easily found. Respondents also used these questions to "vent" and provided critical feedback in each question. The following, without identifying the specific vendor, are critical comments:

Vendor 1

- Customization options lacking
- CRM/customized mass emails to clients not available
- Integration with other products difficult
- Difficult to use; too many steps to add a case
- Lacks automatic appointment reminders and billing
- No pop-up alerts
- No e-filing
- Lack of ability to pull in data from USCIS/DOS
- Billing system inadequate
- Price too high
- Reports aren't intuitive
- Client email feature "clunky"
- Slow

- Forms not updated quickly enough
- Online intake form "clunky"; forms don't have all the needed questions

Vendor 2

- Needs easier-to-use team management reports; better reports and analytics
- Needs calendaring integration with G Suite
- No e-filing; uploading of data to State Department forms frequently doesn't work
- Needs customization of process flow and questionnaires
- Needs better email editing and attachment capabilities
- Billing software too difficult; needs third-party billing and accounting integration
- Lack of integration with Outlook
- Too difficult to master; "clunky and not intuitive"; too many steps
- Integration with HR systems
- Client portal difficult to use
- Ability to text from software
- Better document assembly capabilities
- Poor support
- Slow; crashes frequently
- PDF conversion not good (particularly if Adobe version isn't recent)
- Buggy; intake forms not being mapped to government forms
- Editing in emails difficult
- Lack of right click copy/paste functionality
- Expensive
- Mobile site not user-friendly
- Oriented too much to employment immigration

Vendor 3

- Need to be able to do ETA 9089s for non-PERM cases
- Difficult to customize reports; need to be able to pull priority date reports by client and immigrant visa category
- Need option to get training for corporate clients on using the system
- More difficult to enter notes than it used to be
- Difficult to navigate
- Questionnaire forms not adequate for some types of cases (*e.g.*, E-1 and E-2)
- Too many glitches in version 8
- Too much redundant data entry
- Not customizable enough

- Needs a more robust dashboard feature
- Needs to handle DS forms better
- Needs better text searching
- Not as good for in-house lawyers as for firms
- Difficulty integrating with accounting system
- Client portal needs to be more intuitive
- Questionnaire forms need to be more customizable
- Structure for HR view access is confusing
- Users kicked off too quickly for inactivity
- Lack of support; development team not responsive to requests

Vendor 4

- Lack of robust accounting/billing features
- Interface not intuitive
- Reliability; "features do not work consistently"
- Lack of e-filing
- Needs better document integration
- Messaging with clients weak
- Lack of alternate languages for intake forms
- Online appointment scheduling
- Mobile version "constantly crashing"
- Reports feature is "cumbersome"
- Can't send text alerts to clients
- Lack of CRM
- Can't integrate with third-party software
- Forms not updated quickly enough (especially DOS); questionnaires not updated as forms change
- Needs easier way to send forms/documents for client review
- Integration with G Suite
- Needs to allow more than one email at a time to be uploaded to system
- Saving forms is slow process
- Transfer of data from intake forms to government forms labor intensive
- Slow to innovate
- Client portal instructions weak
- Paying per case is a problem
- Outlook/Word integration weak
- Feels antiquated

Vendor 5

- No document assembly
- No Outlook integration
- No integration with billing systems

- No integration of Visa Bulletin data
- Lack of ability to create and assign tasks to staff
- No e-filing
- Limited capabilities
- Updates not delivered in time promised

Vendor 6

- Not easy to monitor case progress and deadlines
- Integration with third-party software inadequate
- Autofill errors an ongoing problem

Vendor 7

- Can't fill in forms directly; forms don't appear until they are downloaded
- Can't email directly from the program
- No e-filing
- No ability to pull data from government agencies
- No client portal
- Needs checklists
- "Not fully functional yet"
- Too many steps to delete or change something

Vendor 8

- Needs immigration forms feature
- Better integration of data with companion immigration program
- More immigration specific capabilities
- No e-filing
- Client questionnaires/client portal not adequate
- Buggy
- Not intuitive

Vendor 9

- Needs a customizable dashboard
- Needs on-site training option
- Lacks deadlines and rules for family-based cases
- Not specific for immigration so a second immigration-specific program is needed
- Credit card billing is too expensive
- Not enough third-party integrations

Vendor 10

- No integrating with third-party software
- No client portal

- No calendaring/deadline tracking
- No text messaging
- No place to keep case notes
- No case checklists
- No pulling in data from USCIS
- Upgrades when forms change take too long
- No e-filing
- Not intuitive; no help function
- Not cloud-based
- No reports

Vendor 11

- Lack of forms
- Checklists that trigger actions
- Document assembly
- Workflow time estimates don't change as the case progresses
- Client portal not user friendly

Vendor 12

- Needs form-specific questionnaires
- Needs billing functionality
- "Glitchy"; company is getting worse in dealing with bugs
- Not intuitive
- Third-party software integration doesn't work well
- Doesn't cover every immigration area well yet

Vendor 13

- Needs form-filling capability
- Needs accounting feature
- Needs to better track priority dates
- Interface is "chaotic"
- Reports not comprehensive enough

Q7: What do you like best about your current system?

Users were again allowed to provide their own text response to this question. Note that some contradict the negative comments above. Here are features grouped by vendor that users liked:

Vendor 1

- Pricing
- Ease of use
- Priority date tracker
- Online questionnaires

- Forms work well
- Rarely crashes
- Cloud storage
- Interface
- Quickly updated

Vendor 2

- Online questionnaires and data integration
- Forms updated automatically
- Price fair
- Uploading of documents
- Easy to navigate
- Ability to mine data
- Reports
- Ability to keep case notes
- Document upload and storage
- Calendaring features (including deadline tracking)

Vendor 3

- Easily searchable
- Good cloud storage
- Good client portal
- Customizability
- Good government forms feature (especially ability to change font sizes)
- Reporting and process flows helpful
- Ability to edit PDF forms helpful
- Good user interface
- Reliable/stable

Vendor 4

- Client questionnaire forms easy to use/clients can upload documents/client portal
- Email reminders of coming expiration dates
- Ability to customize
- Forms auto populating; forms "just work"
- Document assembly/email templates
- Seldom crashes
- Ability to print multiple forms at once
- Easy to use
- Robust report customization

Vendor 5

- Price
- Speed
- Ease of use
- Online client questionnaires
- "Reliably updated consistently"

Vendor 6

- Speed
- Reliable (not "buggy")
- Intuitive

Vendor 7

- Gmail/G Suite integration
- Simplicity
- Customizable
- Uncluttered interface

Vendor 8

- Intuitive
- Online credit card payments
- Integration with many programs
- Outlook integration
- Integration with immigration programs like Prima Facie
- Timekeeping
- Cloud document storage
- Billing capabilities
- Price
- Dashboard
- Calendar

Vendor 9

- Billing system
- Simple/easy to use
- Price
- Online intake forms
- Reports

Vendor 10

- Easy to use
- Price
- Deadline reports

- Reliable
- Good support

Vendor 11

- Client portal
- Third-party integrations
- One intake form auto-populates all immigration forms at once

Vendor 12

- User interface simple; easy to train your staff on it
- "Great for intake"
- Questionnaires easy to use
- Inexpensive

Vendor 13

- Easy to use
- Facilitates intra-office communications
- Easy to track case steps
- Reasonable pricing

Q9: Please rate your system in the following areas (on a scale of 1 to 5).

In 2018, we reported on the overall scores for various features. This year, we are adding the per-feature scores for individual software packages. We are only including vendors that had at least three customers completing the survey. Overall, the vendors performed worse on features in 2019, with the exception of keeping government forms updated and in the area of data security.

Scores for each system are in columns 1 to 12 in the table on the next page.

Q10: Have you switched from another case management system to the one you are currently using? If yes, please list the product or products in the comment field.

Nearly half of all respondents (47.68%) reported having switched from one case management system to another. That was almost precisely the number reported in 2018 (47.78%). As was the case in 2018, there were no companies that fared well—the companies from which people switched and to which people switched were across the spectrum of products.

Q11: Are you considering switching to a new case management system in the future? If so, please state in the comment field which products you are considering and why.

Of those surveyed, 38.6 percent of respondents indicated they are planning on switching to a new case management system. The range of products being

	2018	2019	1	2	3	4	5	6	7	8	9	10	11	12
Usability	3.77	3.58	3.54	3.20	3.41	3.25	4.14	3.67	4.67	3.92	4.33	3.92	4.67	4.67
Aesthetics	3.43	3.30	3.28	2.87	3.24	3.03	4.14	4.67	4.00	3.92	3.67	3.82	4.67	4.17
Training and support	3.30	3.18	3.38	2.87	3.00	3.09	3.86	3.67	3.50	3.25	3.33	3.25	4.67	4.00
Updating forms quickly	3.57	3.67	3.95	4.20	4.06	3.22	4.00	4.33	4.75	4.00	1.00	2.22	3.00	2.40
Cost	3.53	3.54	3.79	3.18	3.67	3.00	4.33	3.33	4.25	4.08	5.00	3.18	3.67	4.00
Customization options	3.05	2.77	2.69	2.70	2.41	3.13	3.14	3.00	3.50	2.92	2.67	2.55	4.00	3.33
Adding useful features regularly	2.76	2.61	2.51	2.40	2.59	2.75	3.14	3.00	3.50	2.50	2.67	2.82	3.00	3.83
Data security	3.93	3.81	3.76	3.70	3.71	3.66	4.17	3.67	4.25	4.00	4.33	3.83	4.67	4.33
For web-based systems, system is virtually never offline	4.20	4.18	4.26	4.09	3.93	4.13	4.43	4.00	4.50	4.55	4.67	4.42	4.67	4.67
Mobile friendly	2.56	2.64	2.69	2.13	2.64	2.42	3.43	3.00	2.67	2.92	2.00	3.83	4.67	3.83

Legend: 1. Cerenade eImmigration Air; 2. INSZoom; 3. Tracker; 4. LawLogix; 5. BlueDot; 6. Prima Facie; 7. Lolly Law; 8. Docketwise; 9. Innovation Law Lab; 10. Clio; 11. Practice Panther; 12. MyCase.

considered was varied, but a number have indicated an interest in switching to (or possibly adding in) a non-immigration case management system. Twenty-three percent said they were unsure. Forty-one percent said they were not considering switching. In many of those cases, however, the reason for this was not that they are satisfied with their vendor, but that they felt that switching would be too time consuming or that the other products on the market were likely not going to solve their problems either.

Q12: Web-based case management software in the immigration field is usually priced on a monthly per-user or on a per-case basis. Please comment on what you think is the preferred model and what you think is a fair monthly price to pay. Feel free to add any other comments on how you think these products should be priced.

Users overwhelmingly preferred a per-user fee versus a per-case fee. Of those surveyed, 93 percent preferred a per-user fee billed either monthly or annually. A few respondents wanted a different model with a flat fee for an entire firm per month versus breaking it out per user.

Users had a variety of views on this question. Of the 36 respondents who preferred paying on a per-user basis, the amount they were willing to pay ranged from $10 to $200 per month with an average of $58.84 per user per month (versus $66.23 per user per month in our 2018 survey) being considered acceptable. None of those who preferred per-case pricing offered a suggested price. Note that only LawLogix charges using this model.

Q13: One of the factors immigration lawyers consider in evaluating case management systems is whether they want to use an immigration-only case management system or a general case management system (e.g., Clio, Practice Panther, etc.) that is customized for immigration matters (including populating government forms). Which type of system do you prefer? Provide comments on why you made that choice.

This was a new question for 2019. We wanted to see if the anecdotal evidence from last year that many people were thinking about switching to the general systems was supported by data. Seventy percent of respondents said they preferred an immigration-only case management system, while 30 percent want a general case management system with immigration capabilities (including forms management).

For those who commented in favor of the immigration-only systems, the following were reasons offered:

- No time to customize a general system
- Immigration programs are more attuned to the needs of immigration lawyers
- Not paying for features irrelevant to immigration lawyers

- Prefer one system instead of two
- Better pricing because you're only paying for one system

For those who favored the general systems, here are reasons offered:

- The firm has other practice areas, so a general system meets the overall needs
- The general systems are more robust and stable,
- The general systems have more features
- They integrate better with third-party software
- They are better-designed and intuitive
- Better pricing because of larger market
- Better tested because of larger market

Conclusion

This is not a report that shows a healthy industry with happy clients. At best, the leading vendors get lukewarm reviews and the fact that a huge percentage of respondents are actively looking to switch products—nearly half—is alarming, given the tremendous time that goes into moving data and re-training employees.

Overall ratings for the products in the market declined from 6.52 in 2018 to 6.21 in 2019. And, as noted in the scores for individual vendors and the range of comments received, users are interested in seeing their vendors improve in a variety of areas. The market is set to become more competitive as large, general case management systems start turning their sights on the immigration bar.[6] And Microsoft recently started marketing an immigration case management system that could shake up the marketplace.[7] As integrations between web-based products become easier and easier, it is quite possible that many lawyers will piece together multiple small, inexpensive systems to replace a conventional case management system.

And there is an open question about how artificial intelligence tools will work their way into case management. Will systems of the future not only be a place to collect data, but also help lawyers pick strategies, predict the likelihood of a request for evidence, automatically create petitions, etc.? Another question is how systems will change as e-filing inevitably expands at the various agencies that handle immigration matters. To date, those agencies have not made it easy for vendors to link their software with the agencies' filing systems. At some point, USCIS may take an approach similar to the IRS, which makes it a lot easier for vendors to build products that can e-file tax returns.[8]

What is clear is that the immigration bar is becoming more tech savvy. Tech conferences are popular destinations for immigration lawyers.[9] Many are starting their own technology ventures. AILA's new Practice Management

Interest Group has hundreds of members. Add to this the number of vendors in the case management space and it is not hard to predict that vendors who don't step up their game will not make it.

Notes

* Greg Siskind (gsiskind@visalaw.com) is an immigration lawyer from Memphis, Tennessee, who serves on the AILA Board of Governors and is the author of five books on immigration law and law practice management subjects. He also created the first immigration law web site in 1994 and the first lawyer blog in 1998.

1. The surveys were conducted using the SurveyMonkey.com platform. The 2019 survey was conducted in June and July 2019. The 2018 survey was conducted in May and June 2018. The author set out in each year the survey was conducted to find a wide cross-section of respondents. A number of American Immigration Lawyers Association (AILA) chapters distributed the survey link on their listservs as well as AILA's practice management interest group.

2. There are approximately 15,000 AILA members (www.aila.org/about) compared to the 1,352,027 overall number of lawyers in the United States, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf.

3. https://www.aila.org/practice/management/finance-fees/2016-marketplace-study-focus-immigration-law, Exhibit 61, p. 45.

4. Only companies receiving more than one response are included in this table.

5. Note that 150 users were at a single firm.

6. A major news story illustrating the potential threat to small immigration-specific vendors is Clio receiving $250 million in venture funding in late 2019, https://news.crunchbase.com/news/canadian-startup-clio-raises-250m-for-legal-tech-as-vertical-saas-continues-to-perform/.

7. https://appsource.microsoft.com/en-us/product/dynamics-365/microsoft_labs.d365immigrationmanagementsystem?tab=Overview.

8. https://www.irs.gov/e-file-providers/become-an-authorized-e-file-provider.

9. This includes AILA, which holds multiple practice management conferences each year, including its Technology Summit set for San Francisco in 2020.

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The American Immigration Lawyers Association is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

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