Legal Order at the Border

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For generations, the United States has grappled with high levels of illegal immigration across the U.S.-Mexico border. This Article offers a novel theoretical framework to explain why legal order remains elusive at the border. Drawing inspiration from Lon Fuller's "interactional view of law," I argue that immigration law cannot attract compliance unless it is general, public, prospective, clear, consistent, and stable; obedience with its rules is feasible; and the law's enforcement is congruent with the rules as enacted. The flagrant violation of any one of these principles could frustrate the development of a functional legal order. Remarkably, U.S. immigration law violates all of these principles in its treatment of asylum seekers. As the number of asylum seekers pursuing entry to the United States has risen sharply in recent years, these legality deficits have become increasingly salient. No wonder, then, that even the most aggressive deterrent measures — from mass prosecution to family separation to the construction of steel border walls — have failed to solve the United States' border crisis. The United States faces an urgent dilemma: it may preserve the Immigration and Nationality Act ("INA") in its current form, denying protection to too many forced migrants and reserving broad discretion to the Executive Branch, or it may establish a functional legal order at the border. It cannot have both.

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If lawmakers were serious about establishing legal order at the border, there are measures they could take to strengthen the immigration system's structural integrity. They could eliminate the Attorney General's discretionary authority over asylum. They could clarify ambiguities in the INA to promote greater consistency, stability, and congruence in immigration adjudication and enforcement. They could extend protection to all forced migrants who face a serious risk of death, torture, rape, or other serious harm abroad, including victims of gang violence and gender-based violence. In short, they could enact laws that asylum seekers could rationally obey. To the extent that lawmakers are unwilling to take these steps, it is fair to question their commitment to establishing a functional legal order at the border.

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INTRODUCTION

Policymakers on both sides of the political spectrum have expressed concern that the rule of law is under siege at the U.S.-Mexico border. Conservatives have lamented the high incidence of illegal border crossings and have demanded that the White House do more to enforce domestic immigration law.[1] Liberals have raised different concerns, taking the government to task for policies that prevent asylum seekers from accessing relief guaranteed under domestic and international law.[2] Thus, while conservatives tend to emphasize the government's responsibility to ensure that *foreign nationals* obey the law, liberals tend to stress the *government*'s obligation to treat foreign nationals fairly and humanely as required by law.

In this Article, I argue that these two critiques of the U.S. immigration system are interconnected in ways that policymakers and legal scholars have yet to fully acknowledge. Drawing inspiration from Lon Fuller's "interactional view of law," I make the case that there is a link between the state's adherence to principles of legality, on the one hand, and foreign migrants' compliance with restrictive immigration laws, on the other

[1] *See, e.g.*, Lora Ries & Peter Hoekstra, *Time for Joe Biden to Become a Realist on Border Crisis*, HERITAGE FOUND. (Apr. 21, 2021), https://www.heritage.org/immigration/commentary/time-joe-biden-become-realist-border-crisis [https://perma.cc/8H48-ZPRB] ("[E]very government that respects the rule of law must police its borders [and] get illegal immigration under control . . . ."); Stephen Sorace, *Biden 'Abandoned the Rule of Law' at Border, Sending Texas Costs Soaring, Gov. Abbott Says*, FOX NEWS (May 2, 2021, 2:03 PM EDT), https://www.foxnews.com/politics/biden-border-crisis-texas-costs-greg-abbott [https://perma.cc/8D2W-9F9U] (quoting Texas Governor Greg Abbott's complaint that the Biden administration's insufficient commitment of resources to "border security" threatens "the rule of law").

[2] *See, e.g.*, Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019), https://www.americanprogress.org/article/restoring-rule-law-fair-humane-workable-immigration-system [https://perma.cc/72JL-ARFD] ("But far from being loopholes, the country's system of asylum protections is essential in order to meet legal obligations under U.S. and international law to offer protection to those facing the threat of torture, persecution, and death.").

hand.[3] As Fuller observed in *The Morality of Law*, legal rules cannot attract compliance unless they are general, public, prospective, clear, consistent, and stable; obedience is feasible; and enforcement is congruent with the rules as enacted.[4] Remarkably, U.S. immigration law violates every one of these principles in its treatment of asylum seekers.[5] As the number of asylum seekers seeking entry into the United States has climbed sharply in recent years,[6] these legality deficits have become increasingly salient. No wonder, then, that even the most aggressive efforts to curb illegal immigration have not delivered consistent results. As long as U.S. immigration law violates principles of legality, it will struggle to generate compliance. Thus, if the United States hopes to achieve a functional legal order at the U.S.-Mexico border, it must first repair the glaring legality deficits in the Immigration and Nationality Act ("INA").[7]

I develop this argument in three parts. Part I motivates the project by showing how previous efforts to suppress illegal immigration at the U.S.-Mexico border have fallen short. For decades, the United States has endeavored to convince foreign migrants to comply with domestic immigration law in order to reduce the federal government's reliance on coercive exclusion and removal.[8] Yet, no matter how resolutely the government has worked to deter illegal entry, the goal has remained

[3] LON L. FULLER, THE MORALITY OF LAW 221 (rev. ed. 1969) [hereinafter THE MORALITY OF LAW].

[4] *See id.* at 33-94 (discussing these features of an interactional legal order).

[5] *See infra* Part II.B.

[6] EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ADJUDICATION STATISTICS: TOTAL ASYLUM APPLICATIONS 1 (2022), https://www.justice.gov/eoir/page/file/1106366/download [https://perma.cc/ZU7K-BUQB] [hereinafter ADJUDICATION STATISTICS] (documenting a dramatic rise in asylum applications between 2014 and 2019).

[7] Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (2018). To be clear, although I argue that adherence to principles of legality is a *necessary* condition for legal order, I do not defend the more ambitious (and doubtful) claim that adherence to Fuller's eight desiderata would be *sufficient* to achieve legal order at the border. The social psychology of law compliance is complex and depends not only upon the form, content, and application of legal norms (Fuller's concerns), but also upon the perceived legitimacy of public authorities that author, enforce, and adjudicate the law. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 40-57 (2006) (marshalling empirical research to support the claim that legitimacy shapes public compliance with law). To better understand how these dynamics inform compliance with immigration law at the border would require collaboration across multiple disciplines, including psychology, social science, economics, and law. Interdisciplinary research could also illuminate factors that promote compliance among visa holders — a matter of no less importance, given that most illegal immigration to the United States involves visa overstays rather than illegal border crossings.

[8] *See infra* Part I.C.

elusive: hundreds of thousands of foreign migrants continue to enter the United States illegally every year.[9] The failure of the United States' deterrence-oriented strategy underscores the need for fresh thinking about the success conditions for cultivating compliance with domestic immigration law.

Part II explains how Fuller's interactional view of law clarifies why deterrence alone cannot produce a functional legal order at the border. Fuller conceptualizes legal order as a cooperative enterprise that requires effective communication and coordination between a lawmaker and legal subjects. When legal rules reflect prudent design and implementation, they can facilitate the establishment of a stable legal order based on shared expectations and robust compliance. However, when legal rules do not satisfy principles of legality — when they make demands that legal subjects cannot comprehend or obey — legal order cannot easily take root.

This is precisely the challenge that the United States now confronts at its southern border. Increasingly, foreign migrants who attempt to enter the United States from Mexico are asylum seekers.[10] Many seek protection from human trafficking, domestic violence, food insecurity, or predatory gangs and drug cartels.[11] Unfortunately, where these "survival migrants" are concerned,[12] U.S. immigration law suffers from grave deficits of generality, publicity, prospectivity, clarity, consistency, feasibility, stability, and congruence. Part II therefore develops and defends the

[9] *See* U.S. BORDER PATROL, FISCAL YEAR SOUTHWEST BORDER SECTOR APPREHENSIONS 1 (2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF [https://perma.cc/HND2-SYRA] [hereinafter BORDER SECTOR APPREHENSIONS] (documenting annual border apprehensions).

[10] *See* CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 5-6 (2019) (showing an extraordinary rise in credible fear referrals and defensive asylum applications between 2013 and 2018); Nick Miroff & Carolyn Van Houten, *The Border Is Tougher to Cross than Ever. But There's Still One Way into America.*, WASH. POST (Oct. 24, 2018, 10:43 AM EDT), https://www.washingtonpost.com/world/national-security/theres-still-one-way-into-america/2018/10/24/d9b68842-aafb-11e8-8f4b-aee063e14538_story.html [https://perma.cc/RP8V-U23G] (providing charts showing that as border apprehensions fell between 2008 and 2018, an ever-greater number of apprehended migrants filed defensive applications for asylum).

[11] *See* Paul J. Angelo, *Why Central American Migrants Are Arriving at the U.S. Border*, COUNCIL ON FOREIGN RELS. (Mar. 22, 2021, 9:00 AM EST), https://www.cfr.org/in-brief/why-central-american-migrants-are-arriving-us-border [https://perma.cc/K8V2-2NTY] (discussing these factors).

[12] ALEXANDER BETTS & PAUL COLLIER, REFUGE: TRANSFORMING A BROKEN REFUGEE SYSTEM 44 (2017) (defining "survival migrants" as "people who leave their countries because they simply cannot secure the minimum conditions of human dignity in their country of origin").

predictive claim that legal order will remain elusive at the U.S.-Mexico border until the law better conforms to principles of legality.

Part III explains how the United States could extricate itself from this predicament. Although critics tend to pin the blame for the border crisis on the White House, I argue that this criticism is largely misplaced. No matter how resolutely the Executive Branch were to police the border, it could not realistically achieve legal order without congressional assistance. To promote fidelity to law, Congress would have to revise the INA to rein in the Attorney General's discretion over asylum. It would also have to clarify ambiguities in the INA and expand legal relief for migrants who flee serious risks of death, torture, rape, and other serious harm. The Department of Justice ("DOJ") would have to reduce outcome disparities in administrative adjudication, and the Department of Homeland Security ("DHS") would have to adopt stronger quality controls to ensure that U.S. Customs and Border Protection ("CBP") agents faithfully apply the law. Against skeptics on both the right and the left who might prefer to abandon the quest for legal order at the border, I join Fuller in arguing that adherence to principles of legality is not only a worthy aspiration, but also a moral duty for American lawmakers.

I. THE ELUSIVE QUEST FOR DETERRENCE

For generations, the United States has aspired to establish an orderly legal system to govern migration across its southern border.[13] Congress has enacted detailed rules for determining which foreign migrants qualify for admission, and it has constructed a complex bureaucracy to administer and enforce these rules. Experience has shown, however, that it is one thing to enact restrictive immigration laws and quite another thing to convince foreign nationals to comply with those laws. Despite repeated overhauls of the INA and an extraordinary national investment in border security, the United States has yet to achieve a functional legal order at the U.S.-Mexico border.

[13] *See* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 75 (2003) (chronicling how the United States began enforcing immigration law at the border in earnest beginning in the 1920s).

A. Where Legal Order Falls Short at the Border

Two challenges, in particular, have become sources of perennial frustration for federal lawmakers.[14] First, illegal immigration remains persistently high. No one knows precisely how many migrants enter the United States without authorization each year because many elude apprehension — often with the assistance of professional smugglers or traffickers.[15] DHS does track CBP encounters with undocumented immigrants at the border, however, and these figures are used widely as a barometer for illegal immigration.[16] The numbers paint a bleak picture. For the past fifty years, annual border apprehensions have never fallen below 300,000.[17] During fiscal year 2021, CBP conducted nearly two million apprehensions along the U.S.-Mexico border — an all-time high.[18] In fiscal year 2022, border apprehensions exceeded 2.7 million.[19] Although politicians on the left and right of the political spectrum disagree about how the United States should respond to these challenges, they

[14] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476-82, 504-05 (2007) (discussing how immigration law reforms since the mid-1980s have concentrated on countering illegal immigration and frivolous asylum claims).

[15] *See* OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., EFFORTS BY DHS TO ESTIMATE SOUTHWEST BORDER SECURITY BETWEEN PORTS OF ENTRY 1 (2017), https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf [https://perma.cc/5YGQ-9ZYU] ("[I]t is difficult to precisely quantify illegal flows because illegal border crossers actively seek to evade detection, and some flows are undetected.").

[16] *See id.* (noting that the federal government traditionally has turned to "alien apprehensions as its proxy measure of illegal immigration between ports of entry").

[17] *See* BORDER SECTOR APPREHENSIONS, *supra* note 9, at 1 (documenting annual border apprehensions).

[18] *See CBP Enforcement Statistics Fiscal Year 2023*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics (last visited Jan. 26, 2023) [https://perma.cc/NH9N-VXPK] [hereinafter *CBP Enforcement Statistics*] (reporting 1,956,519 total enforcement actions in fiscal year 2021); Nick Miroff, *Border Arrests Have Soared to All-Time High, New CBP Data Shows*, WASH. POST (Oct. 20, 2021, 9:28 AM EDT), https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html [https://perma.cc/BQ24-3BMG] (reporting that apprehensions in fiscal year 2021 were an all-time high). The high number of apprehensions reflects, at least in part, foreign migrants attempting repeat entries. *See* Maureen Meyer & Adam Isacson, *High Levels of Migration Are Back. This Time, Let's Respond Without a Crackdown*, WOLA (Aug. 5, 2021), https://www.wola.org/analysis/high-levels-of-migration-are-back-this-time-respond-without-a-crackdown [https://perma.cc/V3EY-9QYP] (noting the high rate of apprehensions and attributing this, in part, to "a high number of repeat crossings").

[19] *See CBP Enforcement Statistics*, *supra* note 18 (reporting 1,946,780 apprehensions with two months to go in fiscal year 2022).

generally concur that the failure to rein in unauthorized immigration is an embarrassment for a country that aspires to the rule of law.[20]

A second challenge relates to the United States' asylum system. When migrants encounter border patrol officers — whether at a port of entry or when taken into custody following an illegal entry — they commonly request asylum[21] and withholding of removal[22] based on dangerous conditions in their home countries.[23] Increasingly, asylum seekers at the border hail from the three "Northern Triangle" countries of Central America — El Salvador, Guatemala, and Honduras — where criminal violence, sexual and gender-based violence, food insecurity, government corruption, and other dangers threaten their survival.[24] As long as there is a "significant possibility" that an asylum seeker "can establish eligibility for asylum . . . or for withholding of removal," CBP must refer them for

[20] *See Statement on Sanctuary Cities Ruling*, WHITE HOUSE (Apr. 25, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/statement-sanctuary-cities-ruling [https://perma.cc/4WM8-XVKU] (characterizing immigration enforcement as "a fight between . . . the rule of law and lawlessness"); Sabrina Rodriguez, *'The Crisis Is in Washington': Overwhelmed Border Officials Urge D.C. to Act*, POLITICO (Mar. 20, 2021, 6:12 PM EDT), https://www.politico.com/news/2021/03/20/us-mexico-border-immigration-crisis-477277 [https://perma.cc/CG3Q-57UD] (quoting Representative Vicente Gonzalez (D-TX): "Donald Trump's strategy was inhumane, brutal and un-American . . . . But what we're doing now is also a failure").

[21] *See* 8 U.S.C. § 1158(b)(1)(A) (2018) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum . . . if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of [the INA].").

[22] *See id.* § 1231(b)(3) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

[23] *See* ADJUDICATION STATISTICS, *supra* note 6 (documenting a dramatic rise in asylum applications between 2014 and 2019). These numbers have tailed off during the COVID-19 pandemic since the U.S. government began summarily removing most asylum seekers at the border without entertaining asylum applications. *See* AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf [https://perma.cc/63SF-7U87] (discussing these measures and their impact); ADJUDICATION STATISTICS, *supra* note 6.

[24] *See* Jonathan T. Hiskey, Abby Córdova, Mary Fran Malone & Diana M. Orcés, *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 LATIN AM. RSCH. REV. 429, 430 (2018) ("Since 2009, apprehensions of non-Mexican border arrivals have increased over 350 percent, outnumbering for the first time in decades the number of apprehensions of Mexican migrants at the southwest border.").

proceedings before an immigration judge.[25] While immigration proceedings are pending, asylum seekers are eligible for release from detention.[26] Critics therefore contend that the asylum process enables unqualified migrants to reside in the United States without legal justification, effectively creating a back door for illegal immigration.[27]

B. Three Obstacles to Legal Order at the Border

Conventional wisdom attributes illegal immigration and meritless asylum petitions to several factors. First, foreign nationals often have powerful incentives to violate U.S. immigration law. Many flee violence

[25] 8 C.F.R. § 208.30 (2023); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii) (2018) ("If [an asylum] officer determines . . . that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum.").

[26] Prior to 2019, undocumented immigrants detained between ports of entry who passed a credible fear interview were eligible for release on bond. Attorney General William Barr attempted to eliminate this eligibility in *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), but a federal district court enjoined this action, holding that detaining asylum seekers who posed no flight risk or threat of harm would be unconstitutional. *See* Padilla v. U.S. Immigr. & Customs Enf't, 387 F. Supp. 3d 1219, 1223 (W.D. Wash. 2019); HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 28 (2019) (discussing this history). This litigation continues. *See* U.S. Immigr. & Customs Enf't v. Padilla, 141 S. Ct. 1041, 1041-42 (2021) (vacating and remanding for further consideration in light of *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020)); Padilla v. U.S. Immigr. & Customs Enf't, 41 F.4th 1194, 1195 (9th Cir. 2022) (same).

[27] *See* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 416 (2006) (raising concerns about "the asylum system" becoming "a loophole" for "'ordinary' immigrants"); *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. DEP'T OF JUST. (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/3BA3-SNDS] ("The [asylum] system is being abused to the detriment of the rule of law . . . . [It] was intended to be a lifeline for persons facing serious persecution. But it has become an easy ticket to illegal entry into the United States."); *Blackburn Joins Inhofe, Colleagues to Introduce Asylum Abuse Reduction Act*, MARSHA BLACKBURN: U.S. SENATOR FOR TENN. (July 26, 2019), https://www.blackburn.senate.gov/2019/7/blackburn-joins-inhofe-colleagues-introduce-asylum-abuse-reduction-act [https://perma.cc/3DAE-P8CV] (quoting Senator Kevin Cramer's assertion that "the current crisis at our southern border" is the product of "loopholes" in "[t]he asylum system"); *Fact Sheets: President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis*, WHITE HOUSE (Apr. 29, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis [https://perma.cc/E5LN-5F8T] (quoting President Donald J. Trump).

or poverty in their home countries.[28] Others aspire to reunite with a spouse or children. When vital interests such as these are at stake, it makes sense that some migrants would conclude that the benefits they would reap from a successful illegal entry or meritless asylum petition (e.g., physical security, family reunification) outweigh the associated risks (e.g., civil and criminal penalties).

Second, prospective immigrants often have little to gain from complying with U.S. immigration law. In most cases, they do not have a realistic pathway for lawful immigration.[29] Unlike U.S. citizens, who benefit in innumerable ways from the national community's collective effort to maintain legal order, would-be immigrants are excluded from these benefits as long as they remain outside the United States. The robust relationship of mutual allegiance and concern that characterizes the state-citizen relationship does not obtain when the United States engages with foreign nationals abroad. Thus, foreign migrants may reasonably ask themselves why they should obey U.S. law when the U.S. government does not claim to have their best interests at heart and offers little in return for their compliance other than freedom from coercion.

Third, domestic immigration law is less likely to guide foreign migrants' behavior when the law is at odds with settled social norms and practices. As long as migrant communities view illegal immigration as normatively permissible and even desirable, the U.S. government may struggle to convince them that they should cooperate in cultivating legal order at the border.[30]

C. Governing Through Deterrence

Policymakers tend to assume that the best way — and perhaps the only way — for the United States to achieve legal order at the border is through

[28] *See* Angelo, *supra* note 11 (discussing how these factors contribute to forced migration).

[29] *See Fact Sheet: Why Don't Immigrants Apply for Citizenship? There Is No Line for Many Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Oct. 7, 2021), https://www.americanimmigrationcouncil.org/research/why-don't-they-just-get-line [https://perma.cc/6EY2-XD54] (discussing the limited pathways to lawful immigration to the United States).

[30] *See* LON L. FULLER, THE ANATOMY OF LAW 109 (1968) (emphasizing that a legal order operates most effectively when it "draw[s] much of its guidance from standards implicit in the social environment in which it functions"); Gerald J. Postema, *Implicit Law*, 13 LAW & PHIL. 361, 368 (1994) (characterizing this insight as Fuller's "congruence thesis").

deterrence. Yet, despite bipartisan support for this strategy,[31] the results have consistently underwhelmed.

1. Prevention

For generations, the United States has endeavored to establish legal order by excluding and removing foreign nationals who cross the U.S.-Mexico border illegally.[32] Because the federal government cannot realistically police all 2,000 miles of the border, officials in the 1990s began to characterize exclusion and removal as tools for deterring migrants from attempting illegal entry in the first place.[33] Pursuant to this new approach, they established a more visible presence at the border by erecting fences, installing surveillance systems, and concentrating agents at strategic locations along popular migration corridors.[34] Congress authorized border patrol agents to employ "expedited removal" procedures to facilitate the brisk expulsion of undocumented immigrants.[35]

During the tenure of President Donald J. Trump, the effort to enhance border security reached its high water mark. The federal government commenced construction of a multi-billion dollar steel wall, hired thousands of additional border control agents and hundreds of law enforcement officers, deployed National Guard troops, and invited local

[31] *See, e.g.*, OFF. OF INSPECTOR GEN., OPERATION GATEKEEPER: AN INVESTIGATION INTO ALLEGATIONS OF FRAUD AND MISCONDUCT § I.C (1998), http://www.usdoj.gov/oig/special/9807/index.htm [https://perma.cc/AE3K-RTPH] (describing how in 1993, "the traditional strategy of allowing aliens to enter and then apprehending them was abandoned in favor of a strategy that emphasized deterrence"); *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations*, U.S. DEP'T OF HOMELAND SEC. (July 10, 2014), https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations [https://perma.cc/VU8T-2AGG] (requesting supplemental appropriations to support an "aggressive deterrence strategy focused on the removal and repatriation of recent border crossers").

[32] *See generally* Ngai, *supra* note 13, at 72-81 (reviewing this history).

[33] *See* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661, 662 (2001) (finding that enhanced border security does not deter illegal immigration but does encourage migrants to settle permanently in the United States).

[34] *See id.* at 663 (discussing the United States' strategy of enhanced presence at the U.S.-Mexico border).

[35] *See* 8 U.S.C. § 1225 (2018) (authorizing expedited removal). *See generally* 8 C.F.R. § 235.3 (2023) (establishing standards for expedited removal); Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002) (establishing procedures for expedited removal and detention of inadmissible aliens).

law enforcement officials to enforce federal immigration laws.[36] Although critics dismissed some of these measures as exorbitantly expensive and ineffective,[37] few questioned the underlying strategic justification that preventing migrants from entering the United States would promote "law and order" at the border.[38] Notably, although President Joseph R. Biden, Jr. has denounced his predecessor's anti-immigrant agenda, he has quietly continued the effort to prevent as many migrants as possible from crossing the border without authorization.[39]

This bipartisan "deterrence through prevention" strategy has not worked. A growing body of social science research indicates that exclusion and removal do not consistently deter foreign migrants from pursuing illegal immigration.[40] For example, in one pioneering study, a team of sociologists studying unauthorized immigration from Mexico found "no support for the view that apprehension deters migration."[41]

[36] *Immigration: President Donald J. Trump Achievements*, DONALD J. TRUMP FOR PRESIDENT, [https://perma.cc/4ZNB-AYVY] [hereinafter Achievements] (celebrating these measures).

[37] *See, e.g.*, *Schumer, Gillibrand Condemn Trump Administration's Decision to Redirect Essential Funding for Military Construction Projects at West Point and Across the United States to Fund Border Wall*, CHARLES E. SCHUMER: U.S. SENATOR FOR N.Y. (Sept. 4, 2019), https://www.schumer.senate.gov/newsroom/press-releases/schumer-gillibrand-condemn-trump-administrations-decision-to-redirect-essential-funding-for-military-construction-projects-at-west-point-and-across-the-united-states-to-fund-border-wall [https://perma.cc/9GM7-EXAE] (criticizing President Trump for "stripping billions of dollars [from the military] . . . to build an ineffective and misguided southern border wall").

[38] Achievements, *supra* note 36.

[39] *See* Camilo Montoya-Galvez, *Biden Administration Increases Border Deportations and Prosecutions to Deter Migration*, CBS NEWS (Aug. 10, 2021, 7:31 AM), https://www.cbsnews.com/news/immigration-border-deportations-prosecutions-deter-migration-biden-administration [https://perma.cc/T8LH-MCKB] (citing comments from a CBP spokesman that prosecution and deportation are intended "to discourage . . . irregular migration").

[40] *See, e.g.*, Cornelius, *supra* note 33, at 665, 677 (finding that enhanced border enforcement has increased the physical risks associated with illegal entry but "has not translated into a strong deterrent effect," as "migrants are not 'giving up' after their first, second, third, fourth, or even fifth apprehension"); Katharine M. Donato, Jorge Durand & Douglas S. Massey, *Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act*, 29 DEMOGRAPHY 139, 139 (1992) (finding "no support for the view that apprehension deters migration"); Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOCIO. 1557, 1564 (2016) ("[T]he militarization of the border cannot be expected to deter undocumented migrants from coming . . . .").

[41] Donato et al., *supra* note 40, at 150 (discussing these features of the study).

Although there was "a fairly high probability" that CBP would catch Mexican migrants who attempted to enter the United States illegally, "all migrants simply tried until they succeeded. Apprehended or not, every migrant who attempted to enter the United States eventually got in."[42] Rather than deter illegal immigration, the primary impacts of enhanced border security have been to push migrants to attempt multiple entries, often relying on professional smugglers and traveling through more hazardous routes like the Sonoran Desert, and then to remain in the United States permanently after a successful entry.[43]

Does preventing entry dissuade migrants from seeking asylum and withholding of removal? The Trump administration tested this proposition in 2019, when it introduced the so-called "Migrant Protection Protocols" ("MPP"), requiring most asylum seekers to remain in Mexico while their petitions for asylum and withholding of removal were pending in immigration court.[44] Previously, migrants who sought asylum and withholding of removal at a port of entry or following an unauthorized entry were detained,[45] then most were paroled into the United States for the duration of their proceedings in immigration court.[46] DHS anticipated that excluding migrants at the border while their applications for relief were pending would discourage them from entering illegally and filing meritless asylum petitions.[47] Although MPP might have reduced illegal

[42] *Id.*

[43] *See* Cornelius, *supra* note 33, at 669 ("By making it more costly and difficult to gain entry illegally, the US government has strengthened the incentives for permanent settlement in the United States."); Massey et al., *supra* note 40, at 1576, 1590 (observing that "the militarization of the border transformed [use of human smugglers] . . . into a universal practice adopted by all migrants," while "pushing migrants away from relatively benign crossing locations . . . into hostile territory in the Sonoran Desert and through Arizona").

[44] *Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [https://perma.cc/QM3V-7R5Y] [hereinafter *MPP*].

[45] *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (2018) (providing that asylum seekers who show a "credible fear" of persecution in their home country "shall be detained for further consideration of [her] application").

[46] *See* Mons v. McAleenan, No. 19-1593, 2019 WL 4225322, at *2 (D.D.C. Sept. 5, 2019) (observing that beginning in 2009, "DHS released asylum-seekers on parole at a 90% rate nationwide subsequent to their credible-fear determinations").

[47] *See MPP*, *supra* note 44 ("The MPP . . . will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum.").

After the Biden administration attempted to revoke MPP, a federal district judge in Texas issued a preliminary injunction reinstating the policy, reasoning that it would be arbitrary

entry, the extent of its impact is uncertain.[48] One thing is clear, however: MPP has not put a stop to illegal immigration. Unauthorized border crossings have remained high under MPP.[49] Meanwhile, backlogs in the immigration courts more than doubled under the Trump administration, from 542,411 cases pending when President Trump took office to

and capricious to eliminate a program that could contribute significantly to deterring illegal immigration and meritless asylum petitions. *See* Texas v. Biden, 554 F. Supp. 3d 818 (N.D. Tex. 2021), *stay request denied*, 142 S. Ct. 926 (2021). In October 2021, Secretary of Homeland Security Alejandro Mayorkas offered a more fulsome justification for the decision to revoke MPP. *See* Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Troy A. Miller, Acting Comm'r, U.S. Customs & Border Prot., Ur M. Jaddou, Dir., U.S. Citizenship & Immigr. Servs. & Robert Silvers, Under Sec'y, Off. of Strategy, Pol'y & Plans, Termination of the Migrant Protection Protocols 1 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-memo.pdf [https://perma.cc/D4WF-8SZW] (announcement); U.S. DEP'T OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS 3 (2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf [https://perma.cc/3XDL-UB4D] [hereinafter EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS]. The district judge once again enjoined the administration's attempt to revoke MPP, *see* Texas v. Biden, No. 21-CV-067, 2021 WL 5399844 (N.D. Tex. Nov. 18, 2021), *aff'd* 2021 WL 5882670 (5th Cir. Dec. 13, 2021), only to be reversed by the U.S. Supreme Court, *see* Biden v. Texas, 142 S. Ct. 2528 (2022) (reversing and remanding for further consideration), enabling the Biden administration to terminate MPP once again, *see* Nick Miroff, *DHS to End 'Remain in Mexico,' Allow Asylum Seekers to Enter U.S.*, WASH. POST, https://www.washingtonpost.com/national-security/2022/08/08/mpp-biden-asylum-mexico (last updated Aug. 8, 2022, 11:47 PM EDT) [https://perma.cc/EF5W-W3MH].

[48] Although CBP border encounters dropped sharply during MPP, the extent to which this change was attributable to MPP, rather than other factors, is unclear. *See* EXPLANATION OF THE DECISION TO TERMINATE THE MIGRATION PROTECTION PROTOCOLS, *supra* note 47, at 23 ("The relevant data is simply insufficiently precise to make an exact estimate of the extent to which MPP may have contributed to decreased flows at the southwest border."). Another important factor was the onset of the COVID-19 pandemic, which significantly contracted global migration. During the early months of the pandemic, the Trump administration expelled unauthorized entrants on public health grounds under Title 42 — a policy that the Biden administration has preserved. *See Major Swings in Immigration Criminal Prosecutions During Trump Administration*, TRAC IMMIGR. (Dec. 18, 2020), https://trac.syr.edu/immigration/reports/633 [https://perma.cc/E6HQ-XPV9] (discussing these health-related expulsions under Title 42).

[49] CBP statistics suggest that border encounters in 2020 roughly mirrored 2018 levels. *See Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last updated Feb. 10, 2023) [https://perma.cc/37DW-VXYS]. How many of these encounters involved repeat crossings is unclear.

1,290,766 cases at the close of his term.[50] These trends have continued under the Biden administration, leaving the United States no closer to achieving legal order at the border.[51]

2. Punishment

In addition to prevention, Congress and the Executive Branch have experimented with punitive measures, such as criminalization, civil penalties, immigration-related penalties, harsh detention practices, and separating parents from their minor children. Under the INA, illegal entry is a misdemeanor punishable by up to six months in prison,[52] and illegal reentry is a felony carrying a possible sentence of up to twenty years,[53] depending on the basis for the initial removal.[54]

The Executive Branch has embraced these criminal aspects of U.S. immigration law. By the midpoint of the Obama administration, federal prosecutors generated more convictions for illegal entry and illegal reentry than for all other federal crimes combined.[55] In 2018, DOJ announced that it would take prosecution to the next level by endeavoring to prosecute every single migrant who entered the United States without authorization.[56] Then-Attorney General Jeff Sessions explained that this "zero tolerance" policy reflected "the Trump Administration's commitment to [secure] the rule of law" through unrelenting enforcement.[57] Although the Biden administration rescinded the zero tolerance policy in January 2021, thereby authorizing prosecutors to make

[50] *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), https://trac.syr.edu/immigration/reports/637 [https://perma.cc/6TZY-L7TT].

[51] *See Immigration Court Backlog Tool*, TRAC IMMIGR., (URL unavailable) (last visited Sept. 19, 2022) [https://perma.cc/3YLD-MK9T] (reporting a backlog of 1,917,464 cases in August 2022).

[52] 8 U.S.C. § 1325(a) (2018).

[53] *Id.* § 1326(b).

[54] Most migrants charged with illegal reentry receive relatively short sentences in exchange for guilty pleas. *See* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 509, 512 (2010) (reporting that garden-variety guilty pleas for illegal reentry in certain jurisdictions result in sentences ranging from 30 to 180 days).

[55] *See id.* at 484 (discussing these statistics).

[56] *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP'T OF JUST. (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/J2XQ-9Y9D].

[57] *Id.*

individualized assessments in charging decisions,[58] deterrence-oriented prosecution remains a central pillar of immigration policy today.[59]

In addition to criminal penalties, Congress has attempted to suppress illegal immigration and frivolous asylum claims with civil fines and other penalties. Under the INA, illegal entry triggers a civil fine up to $250.[60] This civil penalty doubles if a migrant later attempts another illegal entry.[61] Illegal entry and reentry also trigger the INA's inadmissibility provisions. A foreign national who is removed from the United States after an illegal entry is ineligible to return to the United States without the Attorney General's consent for five years.[62] If an undocumented immigrant manages to elude apprehension and settle in the United States before they are removed, the statutory bar to admission automatically extends to ten years.[63] A foreign migrant who files a "frivolous" asylum claim also becomes "permanently ineligible" for admission to the United States.[64]

Through the first decade of the 2000s, the federal government's multifaceted strategy for punishing illegal immigration appeared to be working. CBP encounters with undocumented immigrants at the border declined steadily.[65] However, this downward trend did not last; border

[58] Memorandum from the Acting Att'y Gen. to all Fed. Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a) (Jan. 26, 2021), https://www.justice.gov/ag/page/file/1360706/download [https://perma.cc/4W3D-NCHB].

[59] *See* Montoya-Galvez, *supra* note 39 (documenting deterrence-oriented prosecution by the Biden administration).

[60] 8 U.S.C. § 1325(b)(1) (2018).

[61] *Id.* § 1325(b)(2).

[62] *Id.* § 1182(a)(9)(A)(i).

[63] *Id.* § 1182(a)(9)(A)(ii).

[64] *Id.* § 1158(d)(6). Asylum applications are "frivolous" if they involve the deliberate fabrication of material facts or evidence. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,274 (June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235) (discussing this definition). Toward the end of the Trump administration, DHS and DOJ attempted to expand the definition of "frivolous" "to deter the filing of [meritless] applications." *Id.* at 36,275. However, a federal district court enjoined the regulation because the Acting Secretary of Homeland Security who approved the regulation lacked authority to do so. *See* Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 512 F. Supp. 3d 966, 972-77 (N.D. Cal. 2021).

[65] *See* John Gramlich, Image of Monthly Migrant Encounters at U.S.-Mexico Border Are Near Record Highs, *in Monthly Encounters with Migrants at U.S.-Mexico Border Remain Near Record Highs*, PEW RSCH. CTR., https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs (last updated Jan. 13, 2023) [https://perma.cc/NA8C-B3EF].

encounters flattened out between 2010 and 2017,[66] prompting some policymakers to establish even stiffer penalties to close the remaining compliance gap.[67]

The Trump administration pushed this punitive strategy to its limits. In 2017, it began systematically separating detained parents from their minor children at the border without developing plans for their eventual reunification.[68] Federal officials later confirmed in interviews that family separation was not merely an accidental byproduct of the zero tolerance policy but rather was intended to deter migrants from attempting illegal entry and filing meritless asylum petitions.[69] DHS also attempted to discourage illegal immigration by promulgating a regulation disqualifying migrants from receiving asylum if they had entered the United States illegally.[70] Federal courts eventually blocked these measures,[71] but not

[66] *See id.*

[67] *See, e.g.*, Mike DeBonis & David Nakamura, *Tougher Immigration Policies Face First Major Legislative Test of Trump Era*, WASH. POST (June 28, 2017), https://www.washingtonpost.com/powerpost/tougher-immigration-policies-face-first-major-legislative-test-of-trump-era/2017/06/28/20ea6090-5c3c-11e7-9b7d-14576dc0f39d_story.html [https://perma.cc/7V3E-ZKKK] (discussing draft legislation that would increase penalties for certain illegal reentries).

[68] *See A Timeline of the Trump Administration's Family Separation Policy*, AM. OVERSIGHT, https://www.americanoversight.org/a-timeline-of-the-trump-administrations-family-separation-policy (last visited Oct. 13, 2022) [https://perma.cc/D5BG-7VHG] (documenting how the zero tolerance policy led to family separation).

[69] *See, e.g.*, Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018, 12:14 PM EDT), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent [https://perma.cc/YC4C-NGYC] (quoting federal officials who confirmed that the family separation policy was intended to deter illegal immigration and meritless asylum claims).

[70] *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims 83 Fed. Reg. 55,934, 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) (barring noncitizens from eligibility for asylum if they did not pass through a port of entry).

[71] *See* O.A. v. Trump, 404 F. Supp. 3d 109, 118 (D.D.C. 2019) (concluding that the asylum rule was inconsistent with 8 U.S.C. § 1158 and vacating the rule); E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (granting a nationwide preliminary injunction to prevent the asylum rule from taking effect), *aff'd* E. Bay Sanctuary Covenant v. Biden, 932 F.3d 742 (9th Cir. 2021); Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (ordering that the U.S. government reunite families separated at the border). *But see* Ms. L. v. U.S. Immigr. & Customs Enf't, 415 F. Supp. 3d 980 (S.D. Cal. 2020) (declining to enjoin a family separation policy that was tailored more narrowly to ensure child welfare).

before the administration delivered its message that violators of U.S. immigration law would be subject to harsh penalties.

None of these measures curbed unauthorized border crossings. As humanitarian crises in Central America escalated under the Trump administration,[72] illegal immigration rebounded — first in 2019, and then once again in late-2020 and 2021, with border apprehensions skyrocketing to levels not seen for two decades.[73] Migration researchers working in Central America determined that the Trump administration's "efforts to deter future emigration from countries with high levels of crime and violence" were "unlikely to persuade many of the individuals in these countries who are directly experiencing the tragically high levels of crime and violence."[74] Instead, the Trump administration's experiments with enhanced deterrence served primarily to delegitimize the U.S. immigration system in the eyes of foreign migrants, undermining the United States' effort to cultivate a culture of compliance with immigration law.[75]

3. Financial Disincentives

A third prong of the United States' deterrence strategy focuses on eliminating financial incentives for illegal immigration and meritless asylum applications. The INA prohibits employers from hiring or continuing to employ foreign nationals who lack work authorization.[76] Employers who violate these requirements are subject to fines and

[72] *See* Angelo, *supra* note 11 (discussing overlapping crises driving emigration from El Salvador, Guatemala, and Honduras).

[73] *See* Gramlich, *supra* note 65 (discussing these developments).

[74] Hiskey et al., *supra* note 24, at 442; *see also* Jeremy Slack, Daniel E. Martínez, Scott Whiteford & Emily Peiffer, *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. ON MIGRATION & HUM. SEC. 109, 116 (2015) (finding that Operation Streamline, a federal policy requiring the prosecution of all foreign migrants who attempted illegal entry within a particular area, produced only "a slight, but not statistically significant decrease" in illegal entry).

[75] *See* Emily Ryo, *The Unintended Consequences of U.S. Immigration Enforcement Policies*, 118 PROC. NAT'L ACAD. SCIS. 1, 3 (2021) (reporting survey results indicating that "making salient the possibility of immigration detention . . . in the removal process did not have a significant effect on the respondents' intentions to migrate" but "foster[ed] widespread legal cynicism among immigrant detainees"). *See generally* TYLER, *supra* note 7, at 162 (presenting empirical evidence that when "legitimacy diminishes, so does the ability of legal and political authorities to influence public behavior and function effectively").

[76] *See* 8 U.S.C. § 1324(a)(1)-(2) (2018) (criminalizing the hiring or continued employment of foreign nationals without work authorization).

imprisonment,[77] as are migrants who attempt to evade these requirements using false documentation.[78] The expectation seems to be that if migrants cannot readily find work in the United States, they will refrain from pursuing entry in the first place.[79]

To further discourage migrants from making meritless asylum claims, the Executive Branch has limited asylum seekers' access to work authorization. In 1996, the Immigration and Naturalization Service ("INS") adopted a rule that prevented asylum seekers from applying for work authorization until their applications for asylum or withholding of removal had been pending for at least 150 days.[80] The rule also gave the INS thirty days to grant or deny the application for work authorization, extending the wait time to approximately 180 days.[81] In 2020, the Trump administration revised these rules to extend the timeline further. The applicable rules now state that an asylum seeker must wait a full year before applying for work authorization.[82] The new rules also remove the thirty-day deadline for a decision, leaving asylum seekers in employment limbo indefinitely,[83] and they make some asylum seekers categorically ineligible for work authorization, including those who enter illegally.[84] The explicit purpose of these restrictions is deterrence — namely, "to (1) reduce incentives for aliens to file frivolous, fraudulent, or otherwise

[77] *See id.* (imposing fines and imprisonment for violations of the INA's employment restrictions).

[78] 18 U.S.C. § 1546(b) (2018) (prohibiting the use of another's documentation or fraudulent documentation to secure unlawful employment).

[79] *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. L.F. 193, 205-14 (arguing that employment restrictions do not deter unauthorized immigration but do enable exploitation of undocumented employees).

[80] *See* Rosario v. U.S. Citizenship & Immigr. Servs., 365 F. Supp. 3d 1156, 1158 (W.D. Wash. 2018) (discussing this earlier version of 8 C.F.R. §§ 208.7(a)(1), 274a.12(c)(8), & 274a.13(d) (2023)).

[81] *See id.* (discussing the earlier version of 8 C.F.R. § 208.7(a)(1) (2023)).

[82] *See* Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532, 38,626 (June 26, 2020) (to be codified at 8 C.F.R pts. 208, 274a) (revising 8 C.F.R. §§ 208.3, 208.4 (2023)).

[83] *See* Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 Fed. Reg. 37,502, 37,502 (July 6, 2020) (to be codified at 8 C.F.R pt. 208) (revising 8 C.F.R. § 208.7(a)(1) (2023)).

[84] *See generally* Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. at 38,554 (explaining that the purpose for revising 8 C.F.R. § 208.4 is "to remove the incentives for aliens to come to the United States solely for economic reasons and to eliminate meritless asylum filings solely to obtain work authorization").

non-meritorious asylum applications . . . , and (2) discourage illegal entry into the United States."[85]

American immigration law also seeks to deter illegal entry and meritless asylum claims by denying access to public assistance. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[86] and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[87] Congress authorized state and local governments to deny welfare and Medicare assistance to undocumented immigrants, including asylum seekers,[88] subject to limited exceptions.[89] Congress has also excluded undocumented immigrants from health insurance under the Affordable Care Act.[90] In addition, federal regulations limit other federal cash assistance to asylum seekers, including funds earmarked for special refugee resettlement programs.[91] Accordingly, undocumented immigrants who enter the United States through Mexico are on their own; they must find a way to meet their essential needs — including not only room, board, and transportation, but also legal

[85] *Id.* at 38,533. Whether the Biden administration will revisit the Trump administration's changes remains to be seen, but it is possible that courts will vacate the rules based on procedural errors. *See* Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs., 496 F. Supp. 3d 31 (D.D.C. 2020) (preliminarily enjoining implementation of the rules changes); Casa de Md. v. Wolf, 486 F. Supp. 3d 928 (D. Md. 2020) (same).

[86] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA].

[87] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of Titles 8, 26, and 42 of the U.S. Code).

[88] *See* 42 U.S.C. § 1396b(v)(1) (2018) (providing that the federal government generally shall not make Medicare payments to states "for medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law"); IIRIRA § 503 (limiting social security payments); IIRIRA § 553 (authorizing state and local governments to prohibit or otherwise limit or restrict the eligibility of non-citizens or classes of non-citizens for programs of general cash public assistance).

[89] *See* 42 U.S.C. § 1396b(v)(2)-(4) (2018) (providing exceptions for emergency care, pregnant women, and children).

[90] *See id.* § 18032(f)(3) ("If an individual is not . . . a citizen or national of the United States or an alien lawfully present in the United States, [they] . . . may not be covered under a qualified health plan . . . .").

[91] *See* 45 C.F.R. § 400.44 (2022) ("An applicant for asylum is not eligible for assistance under title IV of the Act unless otherwise provided by Federal law.").

representation for their immigration proceedings — without lawful employment or public assistance.[92]

If these financial disincentives were enough to deter illegal immigration and meritless asylum claims, we might expect to see a marked decline in border encounters, as well as fewer applications for asylum, after Congress imposed these measures. In reality, the historical record is more complex and difficult to interpret. Following the landmark legislative and regulatory reforms of 1996, border apprehensions remained high for several years, peaking in 2000 before dropping 76% over the next eighteen years.[93] Border encounters then shot up once again at the end of the Trump administration and have continued to rise under President Biden.[94] Meanwhile, asylum claims at the border rose dramatically for a decade[95] until the U.S. government severely restricted access to asylum in response to the COVID-19 pandemic.[96] These trends suggest that illegal immigration and asylum applications likely have less to do with financial incentives than with humanitarian crises and political instability in Latin America.

D. The Limits of Deterrence

Thus far, this Part has considered three types of measures that the United States has deployed to discourage illegal immigration and meritless asylum claims: prevention, punishment, and financial disincentives. The purpose of this discussion has not been to render a comprehensive account

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[92] *See* Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. REV. L. & SOC. CHANGE 29, 46 (2016) (discussing these challenges).

[93] Lori Robertson, *Illegal Immigration Statistics*, FACTCHECK, https://www.factcheck.org/2018/06/illegal-immigration-statistics (last updated June 7, 2019) [https://perma.cc/3PKK-NDSV]. At least part of this shift may be attributable to the 2008 financial crisis, which significantly depressed global migration. *See* DEMETRIOS G. PAPADEMETRIOU, MADELEINE SUMPTION & AARON TERRAZAS, MIGRATION AND IMMIGRANTS TWO YEARS AFTER THE FINANCIAL COLLAPSE: WHERE DO WE STAND? 1 (Migration Pol'y Inst. ed., 2010).

[94] Gramlich, *supra* note 65.

[95] *See* Manuela Tobias, *Has There Been a 1,700 Percent Increase in Asylum Claims over the Last 10 Years?*, POLITIFACT (June 21, 2018), https://www.politifact.com/factchecks/2018/jun/21/donald-trump/1700-percent-increase-asylum-claims [https://perma.cc/WF6C-9NDG] (confirming that asylum applications increased nearly 1700% during the preceding decade).

[96] *See* Ashley Binetti Armstrong, *Co-Opting Coronavirus, Assailing Asylum*, 35 GEO. IMMIGR. L.J. 361, 366-73 (2021) (discussing these restrictions).

of the United States' deterrence efforts,[97] but rather to demonstrate how the deterrence strategy has failed time and again to achieve a culture of compliance at the border.

Some might wonder whether deterrence could succeed if Congress were to enact even harsher penalties, but this does not seem likely. Empirical research suggests that ratcheting up penalties does not reliably augment the deterrent power of legal sanctions.[98] Moreover, even if augmented deterrence might influence legal subjects' decision making in other contexts, there are good reasons to question whether traumatized asylum seekers can be expected to engage in the kind of rational cost-benefit analysis that is presumed by deterrence theory.[99] Yet, there is an even more basic reason why the United States' deterrence-oriented strategy continues to fall short: deterrence can succeed only if it is paired with legal rules that asylum seekers can rationally obey. No matter what penalties the United States imposes, its efforts to discourage illegal immigration and meritless asylum claims will miscarry if the law's directives are formulated in such a way that they cannot guide asylum seekers' behavior. This challenge lies at the heart of the United States' perennial border crisis, as I argue in the Part that follows.

II. WHY LEGAL RULES FAIL AT THE BORDER

This Part explains why deterrence alone cannot achieve legal order at the U.S.-Mexico border. The United States' deterrence strategy is predicated on the expectation that prevention, punishment, and financial disincentives can persuade foreign migrants to respect domestic immigration law. Perhaps this strategy might work if the pursuit of economic opportunity was the sole motivation for illegal immigration. That is plainly not the case, however, at the U.S.-Mexico border today. As scholars of global migration have recognized, a primary driver of twenty-

[97] Other tactics not discussed in this Part include mandatory detention, the denial of procedural rights, and so-called "safe third country" agreements. *See* Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. IMMIGR. L.J. 567, 595, 599 (2021) (characterizing these measures as a "multi-pronged assault on asylum law").

[98] *See* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 252 (2013) (observing that empirical research offers "little evidence that increasing already long prison sentences has a material deterrence effect").

[99] *See* Evan J. Criddle, *The Case Against Prosecuting Refugees*, 115 NW. U. L. REV. 717, 785-87 (2020) (arguing for this reason that asylum seekers with a well-founded fear of persecution abroad should have excuse defenses against prosecution for illegal entry and reentry).

first century migration is violent disorder arising in fragile states.[100] Migrants from such states often cannot be dissuaded from entering the United States by traditional deterrents, such as enhanced border security, threats of jail time, or the denial of employment authorization. The time has come, therefore, for the United States to retire its old playbook for achieving legal order at the border and develop a new strategy that is responsive to the realities of twenty-first century forced migration.

As a first step, policymakers need a more sophisticated understanding of the factors that enable legal rules to attract compliance. A natural starting point is Lon Fuller's classic monograph, *The Morality of Law*, which explains how the design of legal rules can either sustain or subvert lawmakers' efforts to establish a functional legal system.[101] This Part therefore offers a brief primer on Fuller's "interactional view of law" and explains how the U.S. government's failure to account for Fuller's insights has frustrated its efforts to establish a functional immigration system. In particular, I argue that U.S. refugee and asylum law does not satisfy Fuller's success conditions for legality and that these legality deficits, in turn, have prevented the United States from achieving legal order at the U.S.-Mexico border. If the United States wants its immigration law to attract compliance, it must first enact legal rules that foreign migrants can rationally obey.

A. Fuller's Interactional View of Law

1. How Legal Rules Generate Legal Order

Fuller characterizes law as "the enterprise of subjecting human conduct to the governance of rules."[102] When public authorities govern through law, they appeal to legal subjects' rational agency by inviting them to comply with rules.[103] In healthy legal systems, legal subjects engage in

[100] *See* T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME 93 (2019) ("A significant majority of the millions of refugees under UNHCR's mandate are persons who fled situations of generalized violence in their home countries . . . ."); BETTS & COLLIER, *supra* note 12, at 4-5, 16, 18 (explaining how national and international laws do not adequately address survival migration and observing that "state fragility" is now "the single most salient cause of displacement around the world today").

[101] FULLER, THE MORALITY OF LAW, *supra* note 3, at 33-94; *see also* KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 33-34 (2012) (discussing Fuller's aspiration to identify conditions that enable legal order to flourish).

[102] FULLER, THE MORALITY OF LAW, *supra* note 3, at 106.

[103] *Id.* at 39-40.

self-monitoring and self-enforcement, eliminating the need for omnipresent state coercion.[104] Even when legal subjects do not like particular legal rules, they may choose to comply for a variety of reasons, such as to escape sanctions, reap reputational benefits, or sustain the legal system as a whole. Whatever their reasons for compliance, it is their capacity for rational, self-directed action — their active cooperation as rule followers rather than mere passive objects of state coercion — that makes legal order possible as a distinctive form of social ordering.[105]

Under Fuller's interactional view, legal order establishes a relationship of reciprocity between a lawgiver and legal subjects:[106]

> On the one hand, the law-giver must be able to anticipate that the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to judge his actions.[107]

Reciprocity is integral to legal order because neither the lawgiver nor legal subjects can maintain legal order without the other's cooperation. To achieve legal order, the lawgiver must promulgate rules that can coordinate social action, and legal subjects must comply with these rules. Through the reciprocally reinforcing cooperation of the lawgiver and legal subject, law produces a "concordance of . . . wills on a single objective."[108] Legal order therefore constitutes a "human achievement"[109] based on a

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[104] *See id.* at 216 (asserting that a lawmaker "can[not] bring a legal system into existence by himself" because "he requires the acquiescence and cooperation of those subject to his direction"); Steven Viner, *Fuller's Concept of Law and Its Cosmopolitan Aims*, 26 LAW & PHIL. 1, 9 (2007) ("Fuller believes that if they are to be successful at accomplishing the aim of law, the law-maker and the law-administrator will need to use means other than force or in addition to force . . . . [They] must perform their job in ways that are conducive to 'binding' rational people to the rules they make and administer regardless of the threat of a sanction.").

[105] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 162-63.

[106] *See id.* at 216, 219.

[107] LON L. FULLER, *Human Interaction in the Law*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 212, 235 (Kenneth Winston ed., 1981) [hereinafter *Human Interaction*].

[108] Kenneth I. Winston, *The Ideal Element in a Definition of Law*, 5 LAW & PHIL. 89, 108 (1986) (quoting a 1950 letter from Fuller to Samuel Mermin).

[109] Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958).

genuinely "cooperative effort — an effective and responsible interaction — between law-giver and subject."[110]

An important insight of Fuller's interactional view is that legal order requires effective communication between a lawgiver and legal subjects. A lawgiver can expect law to guide subjects' behavior only if legal rules are intelligible and capable of implementation.[111] If a lawgiver does not promulgate rules that subjects can understand and obey, law cannot provide "a sound and stable framework" for social interactions.[112]

To illustrate how efforts to establish legal order can miscarry, Fuller relates the tragic story of King Rex, an inept sovereign who fails to achieve his ambition "to make his name in history as a great lawgiver."[113] Through a series of miscues, all of Rex's efforts to establish a functional legal order culminate in disaster.[114] First, Rex undertakes to resolve disputes through ad hoc judgments, but both he and his people are unable to detect any general patterns in these judgments that would shed light on what the law requires.[115] Second, Rex adopts a legal code, but he fails to publicize the code's contents.[116] Third, Rex publishes the code but applies it only retroactively, leaving his people guessing about whether the same rules will apply to future controversies.[117] Fourth, Rex reverses course and agrees to apply his legal code prospectively, but the code's impenetrable prose proves to be incomprehensible even to sophisticated lawyers.[118] Fifth, once Rex revises the code using clear language, the public discovers that every single provision is contradicted by another provision, making full compliance impossible.[119] Sixth, Rex purges the code of contradictions but adds new provisions that make infeasible demands.[120] Seventh, Rex subjects the code to a constant stream of amendments that

[110] FULLER, THE MORALITY OF LAW, *supra* note 3, at 219; *see also* JOHN RAWLS, A THEORY OF JUSTICE 235 (1971) ("A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.").

[111] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 210.

[112] *Id.*

[113] *Id.* at 34.

[114] *See id.* at 33-38.

[115] *Id.* at 34.

[116] *Id.* at 34-35.

[117] *Id.* at 35.

[118] *Id.* at 35-36.

[119] *Id.* at 36.

[120] *Id.* at 36-37.

prevent the public from staying abreast of changes.[121] Lastly, Rex assumes responsibility for adjudicating controversies that arise under the code, but his subjects discover to their dismay that there is "no discernable relation between [his] judgments and the code they purported to apply."[122] Ultimately, each and every one of these initiatives leads to disaster because Rex never enacts rules that his subjects can actually follow.

Fuller uses this allegory to highlight eight desiderata that he claims are integral to the establishment of a functional legal system: generality, publicity, prospectivity, clarity, consistency, feasibility, stability, and congruence.[123] "A total failure in any of these directions does not simply result in a bad system of law," he argues; "it results in something that is not properly called a legal system at all" because it cannot establish shared expectations between a lawgiver and legal subjects.[124]

Fuller's most important insight, for present purposes, is that a legal system cannot flourish without legal rules that can attract compliance from rational subjects.[125] A state that aspires to achieve legal order should therefore enact legal rules (generality), those rules should be both formally realizable (publicity, prospectivity, clarity, consistency) and practically realizable (feasibility, stability), and legal subjects should be able to rely on public officials to apply the rules as enacted (congruence). A state that consistently violates the eight principles of legality — for example, when regulating cross-border migration — will struggle to establish a robust culture of compliance because legal subjects will not be able to comply with the law.

2. The Morality of Legality

Fuller argues that principles of legality are not merely instrumentally valuable in enabling compliance with legal rules, but also morally consequential in their own right.[126] In a passage titled "The View of Man

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[121] *Id.* at 37.

[122] *Id.* at 38.

[123] *See id.* at 46-91.

[124] *Id.* at 39.

[125] *See* Timothy Stostad, *An Unobeyable Law Is Not a Law: Lon Fuller's "Desiderata" Reconsidered*, 7 DREXEL L. REV. 365, 400 (2015) (arguing that all eight of Fuller's desiderata are concerned with "obeyability").

[126] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 162-63, 200-24 (defending this proposition). *See generally* Colleen M. Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW & PHIL. 239, 262 (2005) (explicating this aspect of Fuller's interactional theory). Joseph Raz disputes this proposition, arguing that Fuller's eight principles have only instrumental value because they are compatible with the iniquitous

Implicit in Legal Morality," Fuller asserts that lawmaking presupposes an attitude of respect toward legal subjects' capacity for rational self-determination.[127] "To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[128] When enacted rules accord with principles of legality, a lawmaker honors legal subjects' dignity as rational, self-determining agents. Conversely, "[e]very deviation from the principles of the law's inner morality is an affront to man's dignity as a responsible agent."[129]

For Fuller, a lawmaker's moral obligation to refrain from enacting legal rules that legal subjects cannot obey has an important corollary: legal subjects' moral obligation (if any) to obey legal rules depends on the lawmaker's adherence to principles of legality:[130]

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he acted, or was unintelligible, or was contradicted by another rule

ends (e.g., slavery, death camps). JOSEPH RAZ, THE AUTHORITY OF LAW 221-26 (2d ed. 2009). As John Tasioulas and others have observed, however, "[a] more nuanced . . . account of the rule of law would stress that it possesses significant moral value in its own right" as an expression of respect for subjects' rational agency, but that its moral value "is in complex ways conditional on the value of the goals that a law or legal system seeks to pursue; it is not simply a morally neutral instrument for achieving those goals." John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117, 125, 127 (John Tasioulas ed., 2020); *see also* Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS 79, 94 (1989) ("Though the rule of law is only a necessary condition for justice, the relation is not a contingent one — it is more like the relation of part to whole. Legality captures part of what is needed if individual autonomy is to be respected . . . ."). Raz also asserts that principles of legality "minimize the danger created by the law itself," RAZ, *supra*, at 224, but the better view is that these principles are responsive to dangers associated with state power generally, not law per se, *see* RUNDLE, *supra* note 101, at 152 (emphasizing this point).

[127] FULLER, THE MORALITY OF LAW, *supra* note 3, at 162.

[128] *Id.*

[129] *Id.*

[130] Compliance with Fuller's principles of legality might be a necessary feature of any legal system that generates a moral obligation to obey legal rules, but few would argue that it is sufficient to generate such an obligation. *See, e.g.*, Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1163 (2008) (observing that under a consent-based theory of political obligation, compliance with principles of legality would not generate a duty to obey law without legal subjects' consent).

> of the same system, or commanded the impossible, or changed every minute. . . . [T]here is a kind of reciprocity between government and the citizen with respect to the observance of rules. . . . When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.[131]

Throughout *The Morality of Law*, Fuller presents the state-citizen relationship as the paradigm case for his interactional view of law. Within the state-citizen relationship, the state's duty to respect principles of legality arises "either through an explicit reciprocity or through relations of tacit reciprocity embodied in the forms of an organized society."[132] Fuller also recognizes, however, that a legal system's "moral community" need not be limited by citizenship.[133] Just as states bear duties to treat their own citizens with dignity as rational, self-determining agents, others who reside within a state's borders — including disenfranchised racial minorities and, presumably, undocumented residents — are entitled to be treated with dignity in accordance with the rule of law.[134] When people "have lived together for many years" and "have together produced a common culture," Fuller observes, it would be an affront to human dignity to fail to govern them in accordance with principles of legality.[135]

Do the same principles apply to foreign nationals at the border? Fuller does not address this question directly, but there are hints that he would support an inclusive approach. In explaining why legal order should not be reserved only for a favored "in-group,"[136] Fuller initially cites the biblical parable of the Good Samaritan[137] for the principle that "we should aspire to enlarge [our moral] community at every opportunity and to include within it ultimately, if we can, all men of goodwill."[138] The implication appears to be that extending principles of legality to foreigners

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[131] FULLER, THE MORALITY OF LAW, *supra* note 3, at 39-40. *See generally* RUNDLE, *supra* note 101, at 3 ("If a lawgiver fails to observe the requirements of the internal morality of law, the legal subject can justifiably withdraw her fidelity because, as an agent and bearer of dignity, she cannot be expected to comply with the lawgiver's demands in the face of such disrespect for her status.").

[132] FULLER, THE MORALITY OF LAW, *supra* note 3, at 182.

[133] *See id.* at 181.

[134] *See id.* at 182-83.

[135] *Id.* at 183.

[136] *Id.* at 182.

[137] *Luke* 10:25-37.

[138] FULLER, THE MORALITY OF LAW, *supra* note 3, at 182-83.

would be a worthy aspiration, but not necessarily a moral imperative.[139] Fuller immediately pivots, however, to defend the idea that the state cannot in good conscience reserve the rule of law only for its own people. Paraphrasing the Talmud, Fuller invites readers to reflect on their common humanity: "'If we are not for ourselves, who shall be for us? If we are for ourselves alone, what are we?' Whatever answer we may give to this last question, it must be predicated on the assumption that we are above all else human beings."[140] In other words, a society cannot coherently claim moral entitlements for its own members based on their innate dignity as rational, self-determining agents while simultaneously denying the same moral entitlements to others. If some human beings are entitled to be treated with dignity based on traits intrinsic to their humanity, then every human being qualifies for the same privilege.[141]

Ultimately, therefore, Fuller is best read as endorsing the idea that states are morally obligated to respect principles of legality whenever they regulate human behavior. Governing cross-border migration in accordance with principles of legality is essential, in Fuller's view, to respect foreign migrants as members of the common moral community of humanity. This account of the moral basis for principles of legality resonates with a rich tradition of cosmopolitan legal and political theory.[142]

3. Legal Order or Managerial Direction?

Fuller's interactional view of law has attracted its share of critics. Most famously, H.L.A. Hart engaged Fuller in a spirited and wide-ranging

[139] *See id.* at 183.

[140] *Id.* (paraphrasing Mishnah Aboth 1:14); *see also* Viner, *supra* note 104, at 24 (explaining that for Fuller, the "inclusion" of all human beings within the ambit of law's moral community "is a manifestation of the reciprocity that holds this activity together").

[141] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 183. For a different reading of Fuller, see David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, 18 SOC. PHIL. & POL'Y 176, 202-04 (2000) (questioning Fuller's cosmopolitanism based on the assumption that "those whose self-determining agency law aims to further need not include the entire population subject to the law").

[142] *See, e.g.*, GARRETT WALLACE BROWN, GROUNDING COSMOPOLITANISM: FROM KANT TO THE IDEA OF A COSMOPOLITAN CONSTITUTION 4-9 (2009) (tracing the cosmopolitan tradition through the writings of such eminent theorists as Cicero, Bartolomé de las Casas, Francisco de Vitoria, Francis Bacon, John Locke, Denis Diderot, Hugo Grotius, Thomas Paine, Voltaire, and Immanuel Kant); Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 48-49 (1992) (explaining that cosmopolitans share a commitment to three propositions: (1) *individualism* — "the ultimate units of concern are human beings"; (2) *universality* — "the status of unit of ultimate concern attached to every human being equally"; and (3) *generality* — "this special status has global force").

debate over the correct conception of law, how law contributes to social order, the relationship between law and morality, and a variety of other topics.[143] Hart argued that rules qualify as law if they have been adopted in accordance with a socially accepted "rule of recognition."[144] Unlike Fuller, he contended that the existence of a legal system *vel non* does not depend on whether legal subjects are able to understand and comply with legal rules. What matters is that public officials, applying the rule of recognition, are able to recognize and enforce the rules.[145] Because legal rules need not be capable of attracting compliance to function as law, they might even treat legal subjects as passive "sheep" being led to "the slaughterhouse" without losing their character as law.[146]

In the second edition of *The Morality of Law*, Fuller devotes a full chapter to rebutting Hart's critique.[147] Fuller questions Hart's "assumption that the essential reality of law is perceived when we picture it as a one-way projection of authority originating with government and imposing it[self] upon [legal subjects]."[148] He argues that Hart's conception of law is better characterized as "managerial direction."[149] According to Fuller, managerial direction arises when an authority issues directives for subordinates to apply in ways that impact other legal subjects only indirectly.[150] In contrast, in a genuine legal system, a legal subject "*follows* [legal rules] in the conduct of his own affairs," becoming an active participant in maintaining legal order.[151] For Fuller, then, the compliance-oriented structure of legal order is fundamentally distinguishable from a

[143] Important salvos in this debate include FULLER, THE MORALITY OF LAW, *supra* note 3, at 133-45, 187-242; H.L.A. HART, THE CONCEPT OF LAW 155-212 (2d ed. 1994); FULLER, *Human Interaction*, *supra* note 107; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing the first edition of *The Morality of Law*).

[144] HART, *supra* note 143, at 94-95, 100-10.

[145] *See id.* at 116-17.

[146] *Id.* at 117. *See generally* Kristen Rundle, *The Impossibility of an Exterminatory Legality: Law and the Holocaust*, 59 U. TORONTO L.J. 65, 112 (2009) (analyzing this aspect of the Hart-Fuller debate). Hart recognized that a system of rules cannot function unless "a sufficient number . . . accept it voluntary," but this minimal level of acceptance is necessary only to ensure that there will be someone to impose the rules "by force." HART, *supra* note 143, at 196.

[147] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 187-242 ("A Reply to Critics").

[148] *Id.* at 207.

[149] *Id.*

[150] *See id.*

[151] *Id.*

managerial regime in which public officials apply intragovernmental directives to legal subjects.

Most legal theorists have concluded that Hart's rule of recognition offers a more philosophically rigorous conception of law.[152] Hart's account also has advantages as an interpretivist theory of law because it is better able to account for some important features of contemporary legal systems, including broad statutory delegations to administrative agencies.[153] However, these critiques of Fuller's interactional theory miss the point. In distinguishing "legal order" from "managerial direction," Fuller's primary objective is not to define the concept of law per se, but rather to determine what features legal rules must have to attract compliance and satisfy lawmakers' moral obligations to legal subjects. In these respects, the distinction Fuller draws between "managerial direction" (in which legal rules address public officials) and "legal order" (in which legal rules address legal subjects directly) is important and powerful.[154] However ubiquitous managerial direction may be in modern legal systems, the fact remains that legal systems do address many legal rules to legal subjects directly, leveraging their compliance to achieve the law's purposes. As Fuller recognizes, legal rules cannot attract compliance in this way if they flagrantly transgress principles of legality.[155] Even Fuller's detractors tend to accept this insight that adherence to principles of legality is a moral

[152] *See, e.g.*, Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 864 (2006) ("Revisiting this part of the Hart-Fuller debate leaves the reader with little doubt as to whose argument was presented with greater philosophical acumen and analytic precision."). In Fuller's defense, he is concerned less with clarifying the concept of law per se than with identifying factors that enable a legal system to function effectively in sustaining a cooperative social order.

[153] *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 397-408 (1989) (arguing that some of Fuller's eight desiderata are not suitable for application to statutory delegations to administrative agencies). Cass Sunstein and Adrian Vermeule argue that a core purpose of administrative law is to ensure that agencies respect principles of legality when they translate Congress's managerial directives into legal rules that apply directly to the public. *See* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 38-115 (2020).

[154] Although Hart disputes Fuller's argument that law must demand compliance from the public at large, he does not dispute that the distinction between legal rules addressed to legal subjects and those addressed exclusively to officials may be practically and morally consequential. Indeed, as Michael Wilkinson has observed, Hart's comment about laws potentially leading legal subjects like "sheep to the slaughterhouse" serves as a "sober warning" about the risks associated with managerial direction. Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673, 716.

[155] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 33-94 (developing this thesis).

obligation for lawmakers because it is essential to manifest due respect for legal subjects as rational, self-determining agents.[156]

Fuller's conception of legal order captures the kind of relationship the United States aspires to establish with foreign migrants at its borders: a culture of compliance with legal rules, not indirect bureaucratic management. Foreign nationals are expected to obey the INA's prohibitions against illegal entry and reentry, as reflected in the criminal penalties, civil fines, and immigration-related sanctions threatened against violators.[157] The INA also assigns a proactive role to asylum seekers by relying on them to apply for asylum[158] and by requiring them to prove eligibility for withholding of removal[159] and relief under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").[160] Thus, far from representing "a one-way projection of authority,"[161] the INA invites foreign nationals to cooperate with the United States in cultivating legal order at the border.[162]

There are sound practical reasons why even lawmakers who would prefer to exclude foreign migrants from the United States' moral community might nonetheless opt to establish an interactional legal order at the border. As Fuller recognizes, an interactional legal order can establish shared expectations that promote compliance.[163] Self-monitoring and self-enforcement reduce the need for omnipresent governmental

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[156] *See, e.g.*, RAZ, *supra* note 126, at 221-22 (emphasizing "that observance of the rule of law is necessary if the law is to respect human dignity"); Kristen Rundle, *Form and Agency in Raz's Legal Positivism*, 32 LAW & PHIL. 767, 776 (2013) (discussing this aspect of Raz's engagement with Fuller).

[157] *See supra* Part I.C.

[158] 8 U.S.C. § 1158(a)(1) (2018).

[159] *Id.* § 1231(b)(3)(C).

[160] U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. An applicant's burden to prove eligibility for relief under the Torture Convention is specified in 8 C.F.R. § 208.16(b) (2023).

[161] FULLER, THE MORALITY OF LAW, *supra* note 3, at 207.

[162] The INA thus differs from statutes that are directed primarily at public officials. For an excellent discussion of the distinction between "transitive" and "intransitive" legislation, see Rubin, *supra* note 153, at 380-85.

[163] *See* Jeremy Waldron, *Why Law — Efficacy, Freedom, or Fidelity?*, 13 LAW & PHIL. 259, 275-76 (1994) (arguing that "the valuable core of Fuller's jurisprudence" is that allegiance to law "may be expected to sustain itself, even when people waver or weaken in their enthusiasm for the substantive goals that legal institutions are designed to achieve").

monitoring and enforcement.[164] In contrast, if the United States were to abolish its outward-facing immigration laws and govern through purely inward-facing managerial direction, the relationship of reciprocity that sustains legal order would dissolve. Public officials could *apply* managerial directives, but foreign migrants would have nothing to *follow*. Without legal rules to establish a baseline of common expectations, the administrative costs of managing migration at the border would increase exponentially. It makes sense, therefore, that U.S. lawmakers have chosen to govern immigration through legal rules that invite foreign migrants' cooperation.

B. Legality Deficits in U.S. Immigration Law

Immigration law scholarship has neglected Fuller's interactional theory of legal order.[165] This is unfortunate, because Fuller's theory helps to explain why the United States has struggled to achieve a functional legal order at the U.S.-Mexico border despite devoting unprecedented resources to prevention and deterrence. Immigration law cannot generate a culture of compliance unless its rules are general, public, prospective, clear, consistent, and stable; obedience with the rules is feasible; and enforcement is congruent with the rules as enacted. Unfortunately, U.S. immigration law does not satisfy any of these requirements with respect to asylum claims.

1. Generality

Fuller's principle of generality favors governing immigration through rules, treating like cases alike, rather than through ad hoc commands.[166] Without established rules, immigration law could not generate legal order

[164] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 216; Ronald Dworkin, *The Elusive Morality of Law*, 10 VILL. L. REV. 631, 632-33 (1965) (arguing that even evil rulers must comply with Fuller's principles to make effective law).

[165] A handful of scholarly articles on immigration law cite *The Morality of Law*, but only in passing. *See, e.g.*, Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 156 n.307 (2017) (citing Fuller in support of the congruence principle); Niraj Nathwani, *The Purpose of Asylum*, 12 INT'L J. REFUGEE L. 354, 372 (2000) (connecting Fuller's feasibility principle to asylum law); Jacqueline Stevens, Heather Schoenfeld & Elizabeth Meehan, *The Case Against Absolute Judicial Immunity for Immigration Judges*, 37 LAW & INEQ. 309, 312-13 (2019) (citing Fuller's desiderata without elaboration).

[166] *See* Henry S. Richardson, *Administrative Policy-Making: Rule of Law or Bureaucracy?*, *in* RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 309, 309-10 (David Dyzenhaus ed., 1999) ("General law must be uniform across persons, treating like cases alike.").

because migrants would have no guidance to follow and could not anticipate in advance how public officials would exercise power at the border.

To be sure, no one would describe U.S. immigration law as lacking rules. The INA contains hundreds of pages of Byzantine rules, and those rules are further elaborated in thousands of pages of administrative regulations and judicial decisions. Much of the INA, including provisions that govern asylum and withholding of removal, was designed to replace ad hoc decision making with general rules so that like cases would be treated alike.[167] Detractors are therefore more likely to fault the INA for having too many rules, generating a bewildering legal labyrinth that asylum seekers cannot realistically navigate without the assistance of counsel.[168]

Nonetheless, some important aspects of U.S. immigration law have resisted rule-based codification. For example, the INA empowers the Attorney General to make the final decision to grant or deny asylum[169] — a power that the Attorney General has delegated to the immigration courts.[170] Even if an asylum seeker satisfies all other legal requirements for asylum, the Attorney General may still deny relief if she determines at her discretion that granting relief would be detrimental to the interests of the United States.[171] Although courts have identified relevant

[167] *See* J. Michael Cavosie, Note, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 420-28 (1992) (explaining how the Refugee Act aimed to replace ad hoc decision-making with rule-based decisions). Prior to *INS v. Chadha*, 426 U.S 919 (1983), Congress's legislative veto also enabled ad hoc decision making in immigration proceedings.

[168] *See* John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 361-62 (2009) (emphasizing the challenge of navigating "the morass of immigration law" without the assistance of counsel); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 55-56 (2008) ("Asylum seekers represented by counsel were three times more likely to succeed in their claim than pro se applicants.").

[169] *See* 8 U.S.C. § 1158(b) (2018) (providing only that the Attorney General "may" grant asylum).

[170] *See* 8 C.F.R. § 208.14(a) (2023) (authorizing immigration judges to grant or deny asylum).

[171] *See* Kate Aschenbrenner, *Discretionary (In)justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 604-11 (2012) (discussing the Attorney General's discretionary power over asylum).

considerations that should inform this inquiry,[172] critics lament that the Attorney General is free at the end of the day to "consider essentially anything he wishes in making a discretionary determination."[173] This power to render ad hoc decisions prevents asylum seekers from being able to anticipate with confidence whether the United States will grant asylum in their individual cases.[174]

More troubling still, in practice, the administrative adjudication of asylum and withholding claims often turns on subjective and arbitrary factors. Legal scholars have documented jaw-dropping inconsistencies in the success rates for asylum applications depending on where and by which immigration judge the applications are adjudicated.[175] Some immigration judges have dramatically higher grant rates than others in the same courthouse, and some regional immigration courts are dramatically more likely than others to grant applications.[176] There are also shocking disparities in asylum applicants' success rates in some federal circuits relative to others.[177] Some scholars attribute these disparities to differences in how immigration judges conduct fact-finding, including assessments of

[172] *See, e.g.*, Zuh v. Mukasey, 547 F.3d 504, 510-11 (4th Cir. 2008) (providing a non-exhaustive list of factors that may be relevant to this determination); Shahandeh-Peh v. INS, 831 F.2d 1384, 1387-88 (7th Cir. 1987) (same).

[173] Aschenbrenner, *supra* note 171, at 624.

[174] Immigration courts' handling of deportation cases is beset by similar generality problems. *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2069-94 (2021) (explaining how generality deficits in U.S. immigration law compromise the rule of law).

[175] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 7-11 (2008), https://www.gao.gov/assets/gao-08-940.pdf [https://perma.cc/86QZ-HKG8] [hereinafter GAO] (finding significant variability in outcomes for asylum applications across immigration judges and courts); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 147-48 (2013) (finding disparities in the treatment of domestic violence asylum cases); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 301 (2007) (documenting staggering inconsistencies in U.S. asylum adjudication).

[176] *See* GAO, *supra* note 175, at 25 ("The likelihood of being granted asylum differed considerably across immigration courts, even after we statistically controlled simultaneously for the effects of a number of factors."); Ramji-Nogales et al., *supra* note 175, at 325-61 (noting disparities among immigration judges and exploring possible explanatory factors).

[177] *See* Ramji-Nogales et al., *supra* note 175, at 361-71 (noting differences in voting patterns among federal circuit judges).

asylum seekers' credibility and background country conditions.[178] Others speculate that immigration court "[d]ecisions may ultimately turn on measures of [particular migrants'] worthiness or desirability, even if this influence is subtle or often unacknowledged."[179] When immigration judges approach their common role in such radically different ways, with random case assignments making case outcomes unpredictable, the law's ability to establish clear reciprocal expectations between the U.S. government and asylum seekers is greatly diminished.

2. Publicity

Most of U.S. immigration law, including the INA and related agency regulations, is readily accessible to anyone with internet access.[180] Federal courts publish their precedential decisions, and many decisions designated as "non-precedential" are accessible online for the price of admission to Westlaw or Lexis.[181] The federal government and the immigration bar have made a wealth of information available online concerning the process and criteria for seeking admission to the United States.[182] Generally speaking, therefore, the United States cannot be fairly accused of governing its borders through secret immigration laws.

There are, however, some notable exceptions. Federal appellate courts do not publish many of their substantive decisions,[183] despite the fact that

[178] *See* Bookey, *supra* note 175, at 121 (determining that in domestic violence asylum cases, applications were sometimes denied based on lack of credibility or failure to show the government was unable or unwilling to protect).

[179] Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 492-93 (2020).

[180] *See Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act (last updated July 10, 2019) [https://perma.cc/SQ53-N8HL]; *Regulations*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/regulations (last updated July 7, 2019) [https://perma.cc/V9QU-FZAC].

[181] *See* Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 684, 687-88 (2018) (discussing the availability of some non-precedential decisions on Westlaw and Lexis, but emphasizing that many substantive decisions resolving immigration appeals are unpublished).

[182] *See, e.g.*, *Programas Humanitarios*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/es/programas-humanitarios (last visited Dec. 16, 2022) [https://perma.cc/ZLB8-98ZJ] (offering guidance regarding the legal criteria for asylum, withholding of removal, and other relief).

[183] *See* Kagan et al., *supra* note 181, at 699 (finding that the Ninth Circuit leaves hundreds of immigration decisions unpublished every year).

parties are allowed to cite such decisions.[184] In addition, immigration judges do not make their orders available for public consumption, and the Board of Immigration Appeals ("BIA") historically has published only a small fraction of its decisions.[185] The vast majority of decisions rendered by federal and administrative courts in immigration cases are therefore inaccessible to the general public — despite the fact that such decisions are commonly cited and relied upon by government attorneys, immigration judges, and the BIA itself.[186] This means that much of U.S. immigration jurisprudence has been accessible only to the government.

Courts are beginning to grapple with legal challenges to these practices. In 2021, a major legal services provider sued to compel the BIA to make its unpublished decisions available for public inspection pursuant to the federal Freedom of Information Act ("FOIA").[187] After the district court declined to order disclosure,[188] the U.S. Court of Appeals for the Second Circuit reversed, holding that FOIA's remedial provision authorizes federal courts to order administrative bodies like the BIA to create an "electronic reading room" to facilitate public access to their decisions.[189] The Second Circuit therefore remanded the case back to the district court with instructions to "craft remedies that take into account the potentially significant burden on the agency of complying with any such order, and work with the parties to establish realistic timelines for compliance."[190] The parties thereafter concluded a settlement agreement in which the government agreed to make unpublished BIA decisions

[184] *See id.* at 693 (observing that Federal Rule of Appellate Procedure 32.1 permits parties to cite unpublished federal appellate decisions).

[185] *See* N.Y. Legal Assistance Grp. v. Bd. Immigr. Appeals, 987 F.3d 207, 209 (2d Cir. 2021) ("Unpublished [BIA] opinions . . . are not readily available to lawyers representing clients in immigration proceedings.").

[186] *See id.* at 208-09 ("'[U]npublished opinions' constitute the vast majority of the final decisions issued by the BIA each year, and are cited and relied upon by the BIA itself, by immigration judges, and by lawyers representing the government in immigration proceedings.").

[187] *See id.* (addressing the availability of relief under 5 U.S.C. § 552(a)(2) (2018)).

[188] *See* N.Y. Legal Assistance Grp. v. Bd. Immigr. Appeals, 401 F. Supp. 3d 445, 447 (S.D.N.Y. 2019).

[189] *See* N.Y. Legal Assistance Grp. v. Bd. Immigr. Appeals, 987 F.3d 207, 224 (2d Cir. 2021). The court recognized that this remedy could be burdensome for the government, given that the BIA had rendered over 750,000 unpublished decisions within the previous twenty-five years. *Id.* at 224-25.

[190] *Id.* at 225.

available for electronic download by October 15, 2022.[191] Whether this important development will lead eventually to broader public access to immigration case law beyond the BIA remains to be seen.

Another significant publicity concern relates to the process for pursuing asylum claims. Federal agencies do not always give asylum seekers adequate guidance regarding the steps they must take to apply for asylum and other relief from removal. For example, it is not uncommon for asylum seekers to receive no notice in their native language of the time and place where they must appear for hearings.[192] When asylum seekers do not know how to pursue relief, it should come as no surprise that they fail to appear for hearings, default on their claims, and end up residing in the United States in violation of removal orders.

3. Prospectivity

Although Congress has authority to enact retroactive immigration laws, within constitutional limits,[193] the Supreme Court has indicated that such laws should not be given retroactive effect "absent a clear indication from Congress."[194] This presumption against retroactivity has not dissuaded the Executive Branch from aggressively lobbying the judiciary to apply new immigration laws retroactively.[195] Courts have rejected these arguments in

[191] Stipulation of Settlement at 3, N.Y. Legal Assistance Grp. v. Bd. Immigr. Appeals, No.18-cv-09495 (S.D.N.Y. Feb. 7, 2022), https://www.citizen.org/wp-content/uploads/72-Signed-stipulation.pdf [https://perma.cc/F5ZX-984N].

[192] *See* ASYLUM SEEKER ADVOC. PROJECT & CATH. LEGAL IMMIGR. NETWORK, INC., DENIED A DAY IN COURT: THE GOVERNMENT'S USE OF *IN ABSTENTIA* REMOVAL ORDERS AGAINST FAMILIES SEEKING ASYLUM 16-18 (2019), https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court-2019-Update.pdf [https://perma.cc/X9LB-BFR7] (citing deficient notices and physical, geographical, and language obstacles, such as notices that were incorrectly translated by third parties, as common reasons for why families fail to attend immigration court and receive *in absentia* orders); HUM. RTS. FIRST, IMMIGRATION COURT APPEARANCES RATES 3 (2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/Immigration_Court_Appearances_Feb_2018.pdf [https://perma.cc/T52G-CHQJ] (citing gaps by immigration agencies in providing asylum seekers with adequate information related to appearance and supervision requirements that have had serious consequences).

[193] *See* INS v. St. Cyr, 533 U.S. 289, 316 (2001) ("Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect.").

[194] *See id.*

[195] *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 139-40, 146, 149-50 (1998) (discussing legal issues and litigation related to the retroactive application of the 1996 immigration reforms).

some cases,[196] but in others they have sided with the government.[197] Whether courts have decided these cases correctly is a question for another day. What matters for present purposes is how the threat of retroactive lawmaking affects the interactional relationship between the United States and asylum seekers. If asylum seekers cannot be confident that the legal rules currently in force will apply to them in the future, then the law loses a good deal of its power to attract compliance. Indeed, the harder and more consistently DHS attorneys advocate for retroactive application of new immigration laws, the more they may undermine the reciprocity of expectations that is necessary to sustain a healthy legal order.

4. Clarity

Another significant challenge for the U.S. immigration system is a lack of clarity in INA provisions that protect asylum seekers. Three provisions are of particular importance. First, the INA authorizes asylum if, subject to various exceptions, a foreign migrant is "unable or unwilling to return" to her country of origin based on "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[198] Second, withholding of removal is available if an asylum seeker's "life or freedom would be threatened in [her home country] because of race, religion, nationality, membership in a particular social group, or political opinion."[199] Third, forced migrants may access relief from removal under the Torture Convention, which obligates the United States to refrain from "return[ing] . . . or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[200] Each of these provisions raises challenging questions of

[196] *See, e.g.*, Vartelas v. Holder, 566 U.S. 257, 260-61 (2012) (holding that IIRIRA's inadmissibility ground did not apply to a crime committed prior to the act's passage); *St. Cyr*, 533 U.S. at 321-23 (holding that IIRIRA's repeal of discretionary relief from deportation did not apply retroactively).

[197] *See, e.g.*, Fernandez-Vargas v. Gonzales, 548 U.S. 30, 35 (2006). *See generally* Austen Ishii, Note, *There and Back, Now and Then: IIRIRA's Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 FORDHAM L. REV. 949, 970-82 (2014) (explaining how the Supreme Court and the Court of Appeals have applied some, but not all, IIRIRA provisions retroactively).

[198] 8 U.S.C. § 1101(a)(42) (2018).

[199] *Id.* § 1231(b)(3).

[200] Torture Convention, *supra* note 160, art. 3(1).

statutory interpretation and construction that have not been clarified definitively by the U.S. Supreme Court[201] or in agency regulations.[202]

Some of these textual ambiguities involve issues that are especially relevant to the claims that Central American asylum seekers tend to raise at the U.S.-Mexico border. For instance, what types of harms qualify as "persecution"? What is a threat to "freedom"? What does it mean for an asylum seeker to fear harm "on account of" a protected ground, including the amorphous category of "membership in a particular social group"? Depending on the answers to these and other questions, refuge may or may not be available for asylum seekers fleeing criminal violence, domestic abuse, food scarcity, economic destitution, natural disasters, infectious diseases, and other threats.

Four decades removed from the landmark Refugee Act,[203] Congress still has not resolved these ambiguities in the INA through legislation, leaving federal appellate judges and the BIA to fill in the gaps as best they can. To their credit, the courts have produced a massive and sophisticated body of case law that addresses many of these issues.[204] Nonetheless, important issues of statutory interpretation and construction remain unresolved. These lingering uncertainties have generated two systemic pathologies: *inconsistency* in how federal adjudicators interpret the INA and *instability* in how government actors construe the INA over time.

5. Consistency

A good illustration of inconsistency in U.S. immigration law is how courts have divided over whether a victim of gender-based violence can

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[201] *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 423-24, 450 (1987) (clarifying the burden of proof for asylum); INS v. Stevic, 467 U.S. 407, 409, 413 (1984) (clarifying the burden of proof for withholding of removal).

[202] *See, e.g.*, 8 C.F.R. § 208.13(b)(2) (2023) (clarifying the legal rules governing asylum eligibility); *id.* § 208.18(e) (clarifying the legal rules governing eligibility for relief under the Torture Convention); *id.* § 1208.16(b) (establishing the burden of proof for Torture Convention claims).

[203] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). Congress's more recent contributions include clarifying that victims of forced abortion and involuntary sterilization qualify for asylum, *see* IIRIRA § 601 (codified at 8 U.S.C. § 1101(a)(42) (2018)), and clarifying that a protected ground, such as race or political opinion, need only be "one central reason" — not the sole reason — "for persecuting the applicant," *see* Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat. 231, 303 (2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2018)).

[204] For discussion of this case law in the context of particular legal issues that arise in asylum litigation, see generally DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES (2022).

qualify as a member of "a particular social group" ("PSG") under the INA.[205] For decades, federal courts have expressed divergent views about the proper criteria for determining whether victims of gender-based violence can establish a PSG nexus.[206] Between 2006 and 2014, the BIA attempted to resolve these divisions in a series of precedential opinions.[207] Most federal circuits followed the BIA's guidance that PSG analysis requires an applicant to show that they belong to a group that is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[208] The Third and Seventh Circuits rejected the BIA's particularity and social distinction requirements, however, arguing that they were inconsistent with other BIA decisions that extended relief to, among others, potential victims of female genital mutilation.[209] As a result, some PSG claims qualify for relief in the Third and Seventh Circuits but not in other circuits.[210]

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[205] 8 U.S.C. § 1101(a)(42) (2018); *id.* § 1231(b)(3).

[206] *See* Paloka v. Holder, 762 F.3d 191, 197 (2d Cir. 2014) (noting inconsistency in past circuit court decisions and citing examples). The United Nations High Commissioner for Refugees ("UNHCR") has taken the position that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex." UNHCR, Guidelines on International Protection: "Membership in a Particular Social Group" Within the Context of Article 1A(2) of the Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 15, at 4, U.N.Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Guidelines]; *see also* UNHCR Asylum Law.'s Project, United Nations High Comm'r for Refugees, UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender 1 (Oct. 2016), https://www.unhcr.org/en-au/580a6b9f4.pdf [https://perma.cc/Q6Y6-ZDJM] (explaining UNHCR's "view that that the refugee definition . . . may . . . encompass claims from Central American women facing gender-based violence").

[207] *See* Kenneth Ludlum, Note, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 120-24 (2015) (describing these developments).

[208] Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (U.S. DOJ, B.I.A. 2014). Many cases demonstrate courts following the BIA's guidance, *see, e.g.*, Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021); Cordoba v. Barr, 962 F.3d 479, 482 (9th Cir. 2020); Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 404 (11th Cir. 2016); Hernandez-De La Cruz v. Lynch, 819 F.3d 784, 786-87 (5th Cir. 2016); Ngugi v. Lynch, 826 F.3d 1132, 1138 (8th Cir. 2016); Paiz-Morales v. Lynch, 795 F.3d 238, 243-44 (1st Cir. 2015); Rodas-Orellana v. Holder, 780 F.3d 982, 990-91 (10th Cir. 2015); *Paloka*, 762 F.3d at 195-96; Umana-Ramos v. Holder, 724 F.3d 667, 671 (6th Cir. 2013).

[209] Valdiviezo-Galdamez v. U.S. Att'y Gen., 663 F.3d 582, 603-08 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 614-16 (7th Cir. 2009).

[210] *Compare* Rreshpja v. Gonzales, 420 F.3d 551, 555-56 (6th Cir. 2005) (holding that "young (or those who appear to be young), attractive Albanian women who are forced into

A schism has also emerged within the Courts of Appeals over whether former gang members may establish a PSG nexus.[211] Deferring to the BIA, some federal circuits have held that former gang members do not qualify for relief from removal.[212] The Second, Fourth, and Ninth Circuits have concluded that former gang members are not sufficiently socially distinct to qualify as a "particular social group."[213] Similarly, the First Circuit has embraced the BIA's determination that relief is unavailable to former gang members because granting relief "would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country" and would "offer an incentive for aliens to join gangs here as a path to legal status."[214] In contrast, the Sixth and Seventh Circuits have held that former gang members may satisfy the statutory requirements for asylum under the PSG nexus.[215]

DHS and DOJ have attempted to combat inconsistencies like these by offering their own statutory interpretations. The Attorney General occasionally intervenes in asylum cases to provide authoritative guidance.[216] From time to time, DHS and DOJ also collaborate on regulations that promote uniformity in the interpretation of federal law.[217]

prostitution" are insufficiently particularized to constitute a particular social group), *with* Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013) ("[W]e . . . reject the Sixth Circuit's reasoning that the group of young-looking, attractive Albanian women who are forced into prostitution is not a cognizable social group because it is too broad and sweeping of a classification.").

211 *See* Claudia B. Quintero, *Ganging up on Immigration Law: Asylum Law and the Particular Social Group Standard — Former Gang Members and Their Need for Asylum Protections*, 13 U. MASS. L. REV. 192, 195-96 (2018) (discussing relevant cases).

212 *See* Nolasco v. Garland, 7 F.4th 180, 187-90 (4th Cir. 2021); Quintanilla-Mejia v. Garland, 3 F.4th 569, 587-91 (2d Cir. 2021); Reyes v. Lynch, 842 F.3d 1125, 1137-38 (9th Cir. 2016); Cantarero v. Holder, 734 F.3d 82, 85-86 (1st Cir. 2013).

213 *See Nolasco*, 7 F.4th at 187-90; *Quintanilla-Mejia*, 3 F.4th at 587-91; *Reyes*, 842 F.3d at 1137-38.

214 *See Cantarero*, 734 F.3d at 85-86.

215 *See* Urbina-Mejia v. Holder, 597 F.3d 360, 366-67 (6th Cir. 2010); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009).

216 *See* Jonathan P. Riedel, Note, Chevron *and the Attorney General's Certification Power*, 95 N.Y.U. L. REV. 271, 312-25 (2020) (identifying 227 immigration cases where this occurred between 1940 and 2019).

217 In late 2020, DHS and DOJ collaborated on a sweeping rule that would have clarified many aspects of the federal government's approach to asylum and withholding of removal. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274, 80,274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235). Critics branded the regulation "death to asylum rule" because it would have significantly restricted access to relief. *See, e.g.*, Bill Frelick, *The Trump Administration's Final Insult and Injury to Refugees*, HUM. RTS. WATCH (Dec.

However, agency statutory interpretations can only promote consistency if federal courts defer to their guidance. Although judicial deference to agency statutory interpretations is the norm in asylum and withholding cases,[218] it cannot be taken for granted.[219] As long as federal appellate courts disagree among themselves about whether agency statutory interpretations merit deference, inconsistency will remain a serious challenge.[220]

6. Stability

Agency lawmaking also suffers from instability across time. Legal rules adopted by agency heads are vulnerable to reconsideration when leadership changes occur. Rules that change from one year to the next cannot sustain shared expectations between lawmakers and foreign migrants.

Consider, for example, DOJ's vacillating guidance concerning asylum claims based on domestic violence. In 1999, the BIA issued a precedential decision, *Matter of R-A-*, rejecting an applicant's asylum claim based, in part, on the conclusion that the proposed particular social group — "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male

11, 2020), https://www.hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees [https://perma.cc/H2DK-M57W] (characterizing the rule as the "death to asylum rule"); *New Rule Spells Death for the Asylum System – AILA and the Council Urge the Biden Administration to Prioritize Its Undoing*, AM. IMMIGR. L. ASS'N (Dec. 10, 2020), https://www.aila.org/advo-media/press-releases/2020/new-rule-spells-death-for-the-asylum-system [https://perma.cc/E6MQ-JDWF] (criticizing the rule for, among other things, "making protection from persecution impossible for almost everyone"). A federal district judge prevented the regulation from taking effect because it had been promulgated by an "Acting" Secretary of Homeland Security who lacked statutory authority. *See* Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 512 F. Supp. 3d 966, 974 (N.D. Cal. 2021).

[218] *See* Michael Kagan, Chevron*'s Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119, 1120 (2021) ("Chevron deference is at the height of its powers in refugee and asylum cases . . . .").

[219] *See* Juan P. Caballero, *An Inconsistent* Chevron *Standard: Refining* Chevron *Deference in Immigration Law*, 52 LOY. U. CHI. L.J. 179, 188 (2021) ("[T]he Supreme Court still maintains an inconsistent record of applying Chevron deference in immigration cases.").

[220] Inconsistencies between the United States' commitments under international law and its domestic laws and practices also send conflicting signals to asylum seekers. *See* James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 483-84 (2000) (noting that the U.S. asylum system is "strikingly anomalous" in its "impoverished understanding of refugee law").

domination" — lacked the necessary social distinction.[221] Attorney General Janet Reno vacated the BIA's decision and stayed the case in anticipation of a proposed regulation that never entered force.[222] The BIA eventually adopted a more generous approach to domestic violence claims in *Matter of A-R-C-G-*,[223] concluding that an applicant could qualify for asylum as a member of a particular social group composed of "married women in Guatemala who are unable to leave their relationship."[224] The BIA reasoned that this social group was defined by "immutable characteristics" (e.g., gender, marital status),[225] exhibited particularity based on "commonly accepted definitions within Guatemalan society,"[226] and was recognized as socially distinct in Guatemala.[227] Several years later, however, Attorney General Sessions overruled the BIA's approach.[228] In *Matter of A-B-*, Sessions asserted that "claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors" generally "will not qualify for asylum," in part because they lack the requisite particularity and social distinction.[229] According to Sessions, the groups asserted in domestic violence asylum claims typically cannot establish a PSG nexus under the INA because they do not "'exist independently' of the harm asserted in an application for asylum."[230] A few weeks later, Sessions interceded in another asylum case, *Matter of L-E-A-*, to make it equally difficult for asylum seekers to qualify for relief based on their membership in a particular social group composed of their immediate family.[231]

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[221] Matter of R-A-, 22 I. & N. Dec. 906, 917-19 (B.I.A. 1999) (en banc).

[222] Matter of R-A-, 22 I. & N. Dec. 906, 906 (B.I.A. 2001). Attorney General Michael Mukasey eventually invited the BIA to revisit *R-A-* in light of subsequent BIA decisions, *see* Matter of R-A-, 24 I. & N. Dec. 629, 629 (Att'y Gen. 2008), and DHS stipulated to the applicant's eligibility for asylum in December 2009. *See* Theresa A. Vogel, *Critiquing* Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 367 (2019) (discussing these developments).

[223] 26 I. & N. Dec. 388 (B.I.A. 2014).

[224] *Id.* at 388-89.

[225] *Id.* at 394.

[226] *Id.* at 393.

[227] *Id.* at 394.

[228] Matter of A-B- (A-B- I), 27 I. & N. Dec. 316, 346 (Att'y Gen. 2018).

[229] *Id.* at 320.

[230] *Id.* at 334.

[231] *See* Matter of L-E-A-, 27 I. & N. Dec. 581, 582, 589 (Att'y Gen. 2019) (asserting that specific immediate families will rarely qualify as "particular social groups" because they are not usually recognized as such by the whole society). Federal courts did not

The 2020 presidential election produced another abrupt course correction. On June 16, 2021, new Attorney General Merrick Garland referred the ongoing proceedings in *A-B-* to himself and vacated Sessions's earlier opinion.[232] Garland explained that Sessions's approach to PSG claims "threaten[ed] to create confusion and discourage careful case-by-case adjudication of asylum claims" because its broadest language "could be read to create a strong presumption against asylum claims based on private conduct."[233] The same day, Garland vacated Sessions's opinion in *L-E-A-* for similar reasons.[234] Rather than articulate new legal standards, Garland encouraged the BIA to follow its previous case law, including *A-R-C-G-*, while DHS and DOJ completed work on new regulations clarifying the scope of permissible PSG claims.[235] Consequently, the immigration bar currently awaits further clarification from the federal government.

Even if the Biden administration follows through on its plan to clarify the INA through regulation, its action will not necessarily be the final word on the subject. The immigration bar has proven to be remarkably adept at finding federal district judges who will enjoin new immigration rules.[236] Moreover, a regulation adopted by the Biden administration would be vulnerable to rescission or revision following leadership changes at DHS and DOJ. A future Republican administration could replace the Biden administration's PSG rule with a more restrictive interpretation of the

uniformly follow Sessions's guidance in *A-B-* and *L-E-A-*. Some promptly embraced Sessions's approach, *see, e.g.*, Gonzales-Veliz v. Barr, 938 F.3d 219, 232 (5th Cir. 2019) (applying *A-B-*), but others distinguished the decisions, *see, e.g.*, Rosales Justo v. Sessions, 895 F.3d 154, 166 n.9 (1st Cir. 2018) (holding that the applicant satisfied the standards articulated in *A-B-*), or enjoined federal officials from following the guidance, *see* Grace v. Whitaker, 344 F. Supp. 3d. 96, 145-46 (D.D.C. 2018) (granting a permanent injunction to prevent implementation of the Attorney General's *A-B-* guidance in credible fear interviews).

[232] Matter of A-B- (*A-B- II*), 28 I. & N. Dec. 307, 308-09 (Att'y Gen. 2021).

[233] *Id.* at 309.

[234] Matter of L-E-A-, 28 I. & N. Dec. 304, 305 (Att'y Gen. 2021).

[235] *See id.* (explaining that the President had directed the agencies to pursue rulemaking on these subjects in Exec. Order No. 14,010, § 4(c)(ii), 86 Fed. Reg. 8,267, 8,271 (Feb. 2, 2021)); *A-B- II*, 28 I. & N. at 308-09 (same).

[236] *See, e.g.*, Texas v. Biden, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021) (enjoining the Biden administration's rescission of the "remain in Mexico" policy), *stay request denied*, 142 S. Ct 926 (2021); E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018) (granting a nationwide preliminary injunction to prevent the Trump administration's asylum rule from taking effect), *aff'd*, 993 F.3d 640 (9th Cir. 2021).

INA's ambiguous text.[237] Thus, as long as the United States relies on administrative adjudication and rulemaking to clarify the law governing asylum and withholding of removal, the resulting rules will be vulnerable to instability over time.

7. Feasibility

While they were in force, Attorney General Sessions's interventions in *A-B-* and *L-E-A-* blocked some asylum seekers from accessing protection from sexual and gender-based violence, gang-related violence, and other threats. DHS construed Sessions's guidance to mean that "claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution."[238] The BIA likewise construed *A-B-* to mean that "victims of private criminal activity" could not qualify for asylum or withholding of removal.[239] These restrictive constructions of the INA resulted in the exclusion and expulsion of forced migrants at the United States' doorstep.[240]

Although Garland has rescinded Sessions's guidance in *A-B-* and *L-E-A-*, the United States continues to deny relief to some migrants who credibly fear death or other serious harm abroad. Recall that a well-founded fear of serious harm is not enough to qualify for asylum or

[237] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework . . . if the agency adequately explains the reasons for a reversal of policy . . . ."). *But see* Kagan, *supra* note 218, at 1124 ("[S]ome courts have used arbitrary-and-capricious review to restrain the political instability that may result from a straightforward application of Chevron deference.").

[238] Policy Memorandum from U.S. Citizenship and Immigr. Servs., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* 6, PM-602-0162 (July 11, 2018), https://www.aila.org/infonet/uscis-guidance-processing-fear-matter-of-a-b- [https://perma.cc/JY6G-EWZF].

[239] *A-B- II*, 28 I. & N. at 309.

[240] *See, e.g.*, Gonzales-Veliz v. Barr, 938 F.3d 219, 232 (5th Cir. 2019) (discussing Sessions's opinion in *A-B-* and concluding that "Honduran women unable to leave their relationship" is not a "particular social group" under the INA because it is "defined by, and does not exist independently of, the harm — i.e., the inability to leave"); Kate Jastram & Sayoni Maitra, Matter of A-B- *One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT'L L. 48, 51 (2020) ("[I]t is apparent that former Attorney General Jefferson Sessions' decision has closed the door on many meritorious asylums [sic] claims by survivors of domestic violence, gang brutality, and other harms inflicted by non-state actors.").

withholding of removal under U.S. law. Rather, an asylum seeker must also show that the danger would be "persecution" based on their "race, religion, national origin, membership in a particular social group, or political opinion."[241] Too often, survival migrants cannot satisfy these requirements. For example, in the weeks immediately following Garland's interventions in *A-B-* and *L-E-A-*, federal courts declined to vacate removal orders granted against a Salvadoran business owner targeted by gangs for violent extortion,[242] a former MS-13 gang member who had received death threats,[243] and a mother whose life was in jeopardy because she had refused to work for a drug cartel.[244] In each of these cases, courts determined that the applicants did not qualify for relief — regardless of whether they had a well-founded fear of death or other serious harm — because they could not demonstrate that they were members of a qualifying "particular social group."[245] Cases like these illustrate why establishing legal order continues to be such an intractable challenge at the border. As long as asylum seekers fear for their lives in their home countries, it is unrealistic to expect them to comply with U.S. immigration restrictions.[246]

The INA places other significant obstacles in the path of survival migrants.[247] If an asylum seeker expresses a fear of persecution from

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[241] 8 U.S.C. §§ 1101(a)(42), 1231(b)(3) (2018).

[242] Sanchez-Lopez v. Garland, No. 18-72221, 2021 WL 3912145, at *1-2 (9th Cir. Sept. 1, 2021); *see also* Gutierrez-Jose v. U.S. Att'y Gen., No. 20-11852, 2021 WL 4197723, at *1, *4-5 (11th Cir. Sept. 15, 2021) (rejecting a similar claim for a Guatemalan asylum seeker).

[243] Nolasco v. Garland, 7 F.4th 180, 185, 187-90 (4th Cir. 2021).

[244] Rosales-Reyes v. Garland, 7 F.4th 755, 758-60 (8th Cir. 2021). *See generally* Helen P. Grant, *Survival of Only the Fittest Social Groups: The Evolutionary Impact of Social Distinction and Particularity*, 38 U. PA. J. INT'L L. 895, 924 (2017) (discussing gaps in protection under *A-R-C-G-*).

[245] *See Nolasco*, 7 F.4th at 188-90 (concluding that the proposed social group lacked distinctness); *Rosales-Reyes*, 7 F.4th at 759-61 (finding insufficient social distinctness); *Sanchez-Lopez*, 2021 WL 3912145, at *1 (concluding that the proposed social group lacked particularity).

[246] Remaining in Mexico or other transit countries is not a safe alternative because these countries have a track record of arbitrarily deporting asylum seekers. *See* AMNESTY INT'L, USA: 'YOU DON'T HAVE ANY RIGHTS HERE' 6 (2018), https://www.amnesty.org/en/documents/amr51/9101/2018/en [https://perma.cc/9JT5-3TZ7] ("Mexican immigration officials routinely deport[] asylum-seekers to potential persecution in their countries-of-origin, in violation of Mexican and international law.").

[247] *See* Quinteros Romero v. U.S. Att'y Gen., 843 F. App'x 431, 432-34 (3d Cir. 2021) (denying relief to a youth who fled El Salvador after he was threatened with death for refusing to join MS-13); Bautista-Lopez v. U.S. Att'y Gen., 813 F. App'x 430, 434-36 (11th Cir. 2020) (holding that the petitioner had not satisfied her burden to establish that

private parties, asylum and withholding of removal are available only if she can prove that "the government is unable or unwilling to control such actions."[248] To qualify for relief under the Torture Convention, an asylum seeker must show that she would "more likely than not"[249] suffer "severe pain or suffering, whether physical or mental" and that this pain or suffering would occur with a foreign government's "consent or acquiescence."[250] These evidentiary burdens are often difficult to satisfy — even when the dangers asylum seekers face on removal are grave and indisputable.[251]

During the COVID-19 pandemic, the United States took even more drastic steps to exclude survival migrants. In March 2020, DHS closed all land ports of entry to asylum seekers.[252] Those apprehended crossing the border were to be returned immediately to Mexico unless they could show "an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to."[253] DHS based this action, in part, on an interim final rule issued by the Secretary of Health and Human Services suspending immigration across the border pursuant to Title 42 of the U.S. Code based on the conclusion that the threat of COVID-19 transmission posed a "serious danger" to the United

the government of El Salvador was unwilling or unable to protect her from her domestic abuser); Espinoza-Tenelcia v. Barr, 839 F. App'x 617, 619-20 (2d Cir. 2020) (holding that the petitioner had not shown that the Ecuadorian government was unwilling or unable to control her domestic abuser); Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, IMMIGR. BRIEFINGS, Oct. 2012, at 1 ("[S]ocial groups defined by refusal to join or opposition to gangs face substantial resistance at all levels of adjudication.").

[248] Pan v. Holder, 777 F.3d 540, 543 (2d Cir. 2015).

[249] 8 C.F.R. § 1208.16(c)(2) (2023).

[250] *Id.* § 1208.18(a)(1).

[251] *See Quinteros Romero*, 843 F. App'x at 432 ("Gang violence is horrifying. But ordinary fear of gang violence is not enough to get relief from deportation."); Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109, 109-10 (2013) (identifying "gaps in asylum protection for those who refuse gang recruitment, those who oppose gangs, and, in some cases, former gang members or youth with former gang involvement").

[252] *See* Zolan Kanno-Youngs & Kirk Semple, *Trump Cites Coronavirus as He Announces a Border Crackdown*, N.Y. TIMES, https://www.nytimes.com/2020/03/20/us/politics/trump-border-coronavirus.html (last updated Mar. 27, 2020) [https://perma.cc/T4XC-VANA] (discussing this development).

[253] U.S. CUSTOMS & BORDER PROT., COVID-19 CAPIO 4, https://s3.documentcloud.org/documents/6824221/COVID-19-CAPIO.pdf (last visited Apr. 11, 2023) [https://perma.cc/V6EA-SWVX].

States.[254] Despite having campaigned on a promise to dismantle the Trump administration's anti-immigrant policy agenda, the Biden administration continued for over a year to turn away asylum seekers pursuant to Title 42,[255] to the dismay of immigration advocates and in violation of the United States' obligations under international law.[256] The Biden administration began screening asylum seekers at the border to determine whether they would face persecution or torture following a Title 42 expulsion only after a federal court enjoined the Attorney General from excluding asylum seekers without such an inquiry.[257] As long as the Title 42 expulsions were carried out without an opportunity to seek relief from return to persecution or torture, compliance with U.S. immigration law was not feasible for many asylum seekers.

Some might question whether denying protection to survival migrants violates Fuller's feasibility principle. After all, when Fuller introduces the feasibility desideratum in his allegory of King Rex, he focuses primarily on circumstances where voluntary compliance could be beyond human capacity.[258] In contrast, there is an obvious way that asylum seekers could obey the INA: they need only remain in their home countries, accepting the grave risks that attend that choice.[259]

The better reading of Fuller is that feasibility has a more practical character. The question is not whether compliance is possible in the abstract, but rather whether a lawmaker could reasonably expect rational

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[254] *See* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559, 16,563 (Mar. 24, 2020) (to be codified at 40 C.F.R. pt. 7).

[255] After the Centers for Disease Control and Prevention ("CDC") announced that the Title 42 expulsions would end in May 2022, a federal district judge preliminarily enjoined the agency's action. *See* Louisiana v. Ctrs. for Disease Control & Prevention, No. 22-CV-00885, 2022 WL 1604901, at *23 (W.D. La. May 20, 2022).

[256] *See* Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law*, 62 WM. & MARY L. REV. 1067, 1124-26 (2021) (explaining how Title 42 exclusions violate international law).

[257] *See* Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146, 167, 177 (D.D.C. 2021). The preliminary injunction was stayed until the D.C. Circuit affirmed the order in March 2022. *See* Huisha-Huisha v. Mayorkas, 27 F.4th 718, 731-35 (D.C. Cir. 2022).

[258] For example, Rex requires citizens to report to the throne within ten seconds of receiving a summons. FULLER, THE MORALITY OF LAW, *supra* note 3, at 36.

[259] Some of the prohibitions in Fuller's allegory arguably have a similar character. For example, a citizen might be able to obey Rex's prohibition against coughing, sneezing, hiccoughing, fainting, or falling down in the king's presence by avoiding the king's presence entirely. *See id.*

human beings to comply.[260] If legal rules are too cruel — for example, because they would trap migrants in countries where their lives would be threatened — then the rules cannot generate a robust culture of compliance. As Kristen Rundle has explained in her illuminating study of Fuller, for legal order to thrive, a lawmaker must "create and maintain a workable legal order within which [each legal subject] might be able to live her life."[261] To the extent that U.S. immigration law violates this principle of feasibility with respect to survival migrants, it is no wonder that the United States has struggled to cultivate a culture of compliance at the U.S.-Mexico border.

8. Congruence

The United States' failure to comply with its own laws also compromises its efforts to cultivate a relationship of reciprocity with asylum seekers at the border. The preceding Subsections have highlighted some disturbing lapses in the government's compliance with domestic law, including the disastrous family separation policy and the categorical denial of asylum to those who cross the border outside an official port of entry.[262] The United States has also violated its obligations under international law by removing bona fide refugees to countries where they have a well-founded fear of persecution and by prosecuting asylum seekers for illegal entry and reentry.[263] These incongruities between the law's requirements and its implementation have eroded the coherence and perceived legitimacy of the U.S. immigration system, undermining its capacity to inspire fidelity.[264]

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[260] *See* RAWLS, *supra* note 110, at 236-37 ("[T]he actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid."); Luban, *supra* note 141, at 192 (characterizing Fuller's feasibility principle as a "precept[] of reasonable expectation").

[261] RUNDLE, *supra* note 101, at 89; *see also* HART, *supra* note 143, at 191-93 (stating that legal order is concerned "with social arrangements for continued existence, not with those of a suicide club"); Fuller, *supra* note 109, at 644 (explaining that legal order "is certainly not that of a morgue or cemetery").

[262] *See supra* Part I.C.2.

[263] *See* Criddle, *supra* note 99, at 720-21 (explaining how these practices violate international law).

[264] *See* Ryo, *supra* note 75, at 5 (explaining how immigration detention policies have undermined the legitimacy of the U.S. immigration system).

Another regrettable incongruity is CBP's erratic handling of asylum claims. Under the INA's "expedited removal" procedures,[265] CBP agents are required to refer undocumented immigrants who fear persecution to an asylum officer for a "credible fear" screening interview.[266] Studies have shown, however, that CBP agents do not always refer asylum seekers for credible fear interviews as required by law, and they sometimes mischaracterize asylum seekers' statements when preparing official intake records.[267] These practices prevent asylum seekers from receiving full and fair access to the U.S. immigration system.[268]

The inconsistencies between what U.S. immigration law requires and what the government actually does in practice have undermined the United States' effort to establish a relationship of reciprocity with asylum seekers. Reciprocity has two sides, after all; if the United States wants to cultivate a culture of compliance among asylum seekers, it must do its part to show that it will be a credible partner. Survival migrants must know that federal

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[265] *See* 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(I) (2018) (authorizing DHS to apply expedited removal to (1) noncitizens "arriving in the United States," and (2) noncitizens "as designated by [DHS]" who entered without authorization and who have not been continuously present for two years).

[266] *See id.* § 1225(b)(1)(A)(ii) (2018); 8 C.F.R. § 235.3(b)(4) (2023).

[267] *See* ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 37 (2014) (reporting that most asylum seekers interviewed in a study "said they were never asked about their fear of being deported," and those who "did attempt to tell border officials that they were in danger and needed assistance . . . were still not referred to an asylum officer" for a credible fear interview); ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 19-23 (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf [https://perma.cc/H36V-LQNG] (observing that during a previous study, the Commission officers at the border more often than not "failed to read the required information advising the non-citizen to ask for protection without delay if s/he feared return," and finding ongoing failures to follow required procedures); John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies that Can Sabotage Asylum Claims*, INTERCEPT (Aug. 11, 2019, 9:20 AM), https://theintercept.com/2019/08/11/border-patrol-asylum-claim [https://perma.cc/S37U-P38M] (reporting that CBP intake forms are often riddled with incorrect statements).

[268] Compounding these concerns, in July 2019, DHS established a pilot program along most sectors of the U.S.-Mexico border allowing CBP agents to conduct credible fear interviews in the place of qualified asylum officers. A federal district judge ordered CBP to suspend this program because the INA did not authorize CBP agents to assume this role. A.B.-B. v. Morgan, 548 F. Supp. 3d 209, 221-22 (D.D.C. 2020); *see also* 8 U.S.C. § 1225(b)(1)(B)(i), (E)(i) (2018) (requiring that every credible fear interview be conducted by an "asylum officer" who has received "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications").

officials will take their fears seriously, as required under the INA.[269] Otherwise, migrants will bypass authorized entry points in favor of clandestine border crossings. Thus, there is a direct link between the government's fidelity to law and its quest to achieve legal order at the border.

C. Why Legal Order Remains Elusive at the Border

Having explored some of the legality deficits in U.S. immigration law, we are now better equipped to explain why the United States continues to fall short in its efforts to cultivate a culture of compliance at its southern border. The United States' deterrence-oriented strategy cannot deliver legal order, at least in part, because U.S. immigration law lacks the features necessary to attract obedience. In too many respects, the rules that govern asylum and withholding of removal are not sufficiently general, public, prospective, clear, consistent, or stable to put asylum seekers on notice as to whether they are entitled to relief. Compliance with the law is not feasible for too many migrants who are fleeing mortal dangers, and the government too often conducts enforcement in a manner that violates the law. These legality deficits have prevented the United States from cultivating a robust culture of compliance with domestic immigration law.

To be sure, fixing the legality deficits in U.S. immigration law would not necessarily guarantee a smooth path to legal order. Social science research suggests that people decide whether to comply with legal rules based on a complex mix of factors, including their practical self-interest (e.g., economic opportunities), social influences (e.g., peer pressure), and normative concerns (e.g., whether public authorities are perceived to be legitimate).[270] Even if the United States fixed all of the legality deficits in its immigration law, some migrants who could feasibly remain abroad would almost certainly continue to enter illegally in pursuit of family reunification, employment opportunities, or other benefits. Others might bypass lawful avenues to protection based on their ignorance of the law or

[269] *See, e.g.*, 8 U.S.C. § 1231(b)(3) (2018) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

[270] *See* Tom R. Tyler, *Understanding the Force of Law*, 51 TULSA L. REV. 507, 517-18 (2016) (emphasizing "[t]he importance of situational factors" in the complex dynamics of law compliance).

their distrust of U.S. authorities.[271] Thus, even if the United States could bolster legal order by respecting principles of legality, it is unrealistic to expect that this step alone would be sufficient to suppress illegal immigration across the U.S.-Mexico border.

One thing is clear, however: legal order will never flourish at the border as long as U.S. immigration law flagrantly violates principles of legality. Laws that do not satisfy principles of legality cannot be obeyed, and laws that cannot be obeyed cannot facilitate the kind of social coordination that is necessary to sustain a robust legal order. Thus, until lawmakers shore up the legality deficits in U.S. immigration law, legal order will suffer at the U.S.-Mexico border.[272]

III. PROMOTING LEGAL ORDER AT THE BORDER

In law, as in medicine, diagnosing a disorder is often far easier than developing a cure. This is certainly true for the many legality deficits in the U.S. immigration system. Some of these deficits have become deeply ingrained; they will not be removed without invasive intervention. To make matters worse, lawmakers are unlikely to reach consensus about the best course of treatment. Eradicating immigration law's legality deficits would require significant legislative reforms, including an expansion of the INA's protection for forced migrants. Border hawks might prefer to abandon the quest for legal order altogether, rather than embrace the kinds of measured reforms that would promote a robust culture of compliance.

Without losing sight of these obstacles to reform, this Part charts possible pathways forward. Contrary to conventional wisdom, I argue that the United States cannot realistically achieve legal order at the border without Congress taking a leading role. While all three branches can play important roles in advancing the rule of law, congressional leadership is indispensable to align the INA with principles of legality. Anticipating normative objections, I argue further that U.S. lawmakers bear moral obligations to cultivate legality at the border.

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[271] *See* Melissa Carlson, Laura Jakli & Katerina Linos, *Refugees Misdirected: How Information, Misinformation, and Rumors Shape Refugees' Access to Fundamental Rights*, 57 VA. J. INT'L L. 539, 553 (2018) (finding that for asylum seekers who travel through Greece, "engagement with misinformation . . . can lower their willingness to comply with government policies and decrease their interactions with government officials").

[272] *See* RAZ, *supra* note 126, at 224 ("Conformity to the rule of law is essential for securing whatever purposes the law is designed to achieve.").

A. Institutional Pathways to Legal Order

A preliminary question is where to begin. If the United States was truly committed to establishing a functional legal order at its southern border, which organ of the federal government would be best equipped, institutionally speaking, to deliver this result? Which should take the lead — the President, the agencies, the judiciary, or Congress?

1. The President

Those who lament the United States' failure to achieve legal order at the border tend to lay the blame at the President's feet.[273] The assumption is that the President, who bears special constitutional responsibility to "take Care that the Laws be faithfully executed," possesses all the power and authority necessary to ensure compliance with the law at the border.[274] This is a mistake.

Certainly, the President may take steps to ensure that officials carry out immigration enforcement in a manner that is congruent with applicable laws. He may also discourage DHS from asking courts to apply new laws retroactively to the detriment of foreign migrants. Perhaps he may even use the discretionary power of his office to set enforcement priorities that effectively expand relief for survival migrants, though this remains deeply controversial.[275] However, there are limits to the President's authority to achieve legal order at the border unilaterally. Although the INA confers considerable powers on the President, including the power to suspend immigration in a national emergency,[276] it does not empower him to issue binding interpretations of the statutory provisions that govern asylum,

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[273] *See, e.g.*, Rep. Fred Keller, *How to Solve the Border Crisis*, HILL (Apr. 16, 2021, 2:00 PM ET), https://thehill.com/blogs/congress-blog/politics/548686-how-to-solve-the-border-crisis [https://perma.cc/G8AJ-42JC] ("President Biden could end this crisis tomorrow by . . . reversing the decision to cease construction of the border wall and reinstating the 'remain in Mexico' policy . . . ."); Ashley Parker, Nick Miroff, Sean Sullivan & Tyler Pager, *'No End in Sight': Inside the Biden Administration's Failure to Contain the Border Surge*, WASH. POST (Mar. 20, 2021, 4:24 PM EDT), https://www.washingtonpost.com/politics/biden-border-surge/2021/03/20/21824e94-8818-11eb-8a8b-5cf82c3dffe4_story.html [https://perma.cc/ZN9S-GW36] (discussing criticisms directed at the White House).

[274] U.S. CONST. art. II, § 3.

[275] *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (upholding a preliminary injunction to prevent implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program).

[276] *See* 8 U.S.C. § 1182(f) (2018).

withholding of removal, and relief under the Torture Convention. This authority resides with the Attorney General and the Secretary of Homeland Security.[277] Thus, notwithstanding the President's preeminent role in immigration policymaking generally,[278] any serious effort to promote legal order at the border would require a broader coalition of committed institutional players.

One way the President can promote cooperation for legality is by encouraging the Attorney General and the Secretary of Homeland Security to promulgate new rules on asylum and withholding of removal. In February 2021, President Biden signed Executive Order 14010, directing DHS and DOJ to develop "a comprehensive regional framework . . . to provide safe and orderly processing of asylum seekers at the United States border."[279] Included in the order were instructions "to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards" and to promulgate new regulations for "addressing the circumstances in which a person should be considered a member of a 'particular social group.'"[280]

Executive Order 14010 might catalyze the development of new regulations that clarify and expand the scope of protection currently available under the INA. If successful, this move has the potential to improve the United States' adherence to principles of legality. In and of itself, however, Executive Order 14010 does not change the primary rules that govern forced migration. In Fuller's terminology, executive orders are "managerial direction";[281] they address public officials, impacting foreign migrants only indirectly. This limits the contribution they can make to interactional legal order. For measures like Executive Order 14010 to make a difference, therefore, the President must rely on federal agencies to address the INA's legality deficits.

2. The Agencies

Pursuing legal order through administrative rulemaking or adjudication offers greater promise for success, but it is also an imperfect solution. The

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[277] *See id.* § 1103(a)(1).

[278] *See generally* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020) (documenting and defending the President's dominant role in immigration policymaking, including enforcement).

[279] Exec. Order No. 14,010, 86 Fed. Reg. 8,267, 8,267 (Feb. 2, 2021) (quoting the Executive Order's title).

[280] *Id.* at 8,271.

[281] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 207.

Attorney General and the Secretary of Homeland Security could work together to promulgate rules and guidance materials that would enhance immigration law's generality, prospectivity, publicity, and clarity. They could also expand protection for forced migrants, eliminating some of the feasibility problems that have prompted forced migrants to pursue illegal entry rather than request relief at official ports of entry. By intervening in BIA litigation, the Attorney General could also contribute to immigration law's generality, publicity, and clarity. The Executive Office for Immigration Review ("EOIR"), the DOJ division that houses the immigration courts, could bolster legality by publishing more immigration court decisions and offering more training and oversight to foster greater consistency in case outcomes.[282] These measures would make meaningful contributions to the establishment of a robust legal order at the border.[283]

Yet, administrative action alone cannot solve all of the legality deficits in U.S. immigration law. Under the INA, both the Attorney General and the Secretary of Homeland Security have authority to clarify the statutory provisions that govern relief for asylum seekers.[284] Experience has shown that they do not always coordinate their actions effectively, leading to inconsistency in the applicable legal rules.[285] In addition, U.S. immigration law will continue to lack stability as long as rules developed by one administration are reversed when the White House welcomes a new occupant. If agencies are not attentive to the demands of federal administrative law, courts may set aside agency actions for being arbitrary and capricious, an abuse of discretion, contrary to law, in excess of jurisdiction, or unsupported by required procedures.[286] Even if regulations

[282] *See* Ramji-Nogales et al., *supra* note 175, at 378-87 (recommending these and other changes to improve consistency in immigration adjudication).

[283] In the current era of hyper-partisan polarization, administrative actions like these might offer the most politically feasible pathway for enhancing legality in U.S. immigration law.

[284] *See* 8 U.S.C. § 1103(a)(3) (2018) ("[The Secretary of Homeland Security] shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter."); *id.* § 1103(g)(2) ("The Attorney General shall establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section."); *id.* § 1158(d)(5)(B) ("The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.").

[285] *See* Jessica Marsden, Note, *Domestic Violence Asylum After* Matter of L-R-, 123 YALE L.J. 2512, 2548-50 (2014) (observing that "instances of coordination" between DHS and DOJ "have been relatively rare," resulting in inconsistencies).

[286] *See* 5 U.S.C. § 706(2) (2018) (authorizing courts to "hold unlawful and set aside agency actions, findings, and conclusions" for these and other reasons).

withstand legal challenge, prolonged litigation can cast a shadow of uncertainty over agency rules, frustrating migrants' efforts to predict how the law will apply to them. These features of administrative decision-making tend to undermine generality, consistency, and stability, frustrating the United States' efforts to forge a functional legal order at the border.

The INA itself also constrains federal agencies' authority to align immigration law with principles of legality. The Attorney General and the Secretary of Homeland Security cannot unilaterally revise clear statutory requirements that violate principles of legality. Short of refusing to enforce aspects of the INA, there may be little that DHS and DOJ can do to promote legality in some settings without congressional assistance.

3. The Courts

Adjudication in Article III courts has some advantages over presidential and administrative lawmaking, but it suffers from similar weaknesses. Supreme Court opinions have promoted consistency and stability in immigration law by resolving circuit splits and clarifying ambiguous statutory provisions.[287] The Circuit Courts have also published many decisions clarifying the INA's semantic meaning and contextual applications.[288] Ultimately, however, the judiciary's institutional advantages are less impressive than they might appear at first blush.

Deferential standards of review limit the federal courts' influence over immigration law. Findings of fact by the immigration courts are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[289] In addition, federal courts are generally expected to follow DHS and DOJ interpretations of the INA unless the interpretations are contrary to the INA's clear text or are otherwise unreasonable.[290] Supreme Court precedent supports deference to agency statutory interpretations even when the interpretations change from one

[287] This is not to say that the Supreme Court has handled these cases well. *See* Andrew Schoenholtz, *Beyond the Supreme Court: A Modest Plea to Improve Our Asylum System*, 14 GEO. IMMIGR. L.J. 541, 541 (2000) (noting that the Supreme Court's "decisions have had an adverse effect on important protection issues").

[288] *See* Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 10 (2006) (observing that by 2006, the U.S. Court of Appeals was deciding tens of thousands of appeals a year from the immigration courts).

[289] 8 U.S.C. § 1252(b)(4)(B) (2018); *see also* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) ("Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established.").

[290] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

administration to the next, compromising the law's stability.[291] Some legal scholars have proposed dismantling these deferential standards to better promote rule of law values.[292] Thus far, however, Congress and most federal judges have shown little inclination to dial down immigration law's deferential standards of judicial review.[293] As a result, federal courts are ill-suited to take a leading role in dismantling the legality deficits in U.S. immigration law.

4. Congress

By process of elimination, Congress emerges as the institution best equipped to lead the United States' efforts to cultivate legal order at the border. There are good reasons why Fuller treats establishing legal order primarily as a legislative responsibility.[294] Save perhaps for constitutional amendments (which are exceptionally rare), legislation is generally the best option for establishing general, prospective, consistent, and stable rules.[295] Clearly articulated legislation can better enhance immigration law's consistency and stability relative to interpretive glosses or gap-filling rules adopted unilaterally by the White House, federal agencies, or the federal courts. Moreover, only Congress can revise the INA to expand the scope of protection available to forced migrants, thus ensuring that those who face mortal danger abroad have rational grounds to obey U.S. immigration law. The natural starting point for promoting legal order at the border is therefore the U.S. Capitol Building — the seat of legislative power — not the White House.

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[291] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005) (affirming that *Chevron* deference applies even when an agency has changed its interpretation).

[292] *See, e.g.*, Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581 (2013) (arguing for less deference to agency fact-finding); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021) (explaining why *Chevron* deference should not apply to immigration adjudication).

[293] *But see* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1672 (2007) (explaining how "a growing number of federal judges review decisions by the immigration courts with apparent skepticism" due to the poor quality of these decisions).

[294] *See* Kenneth Winston, *Legislators and Liberty*, 13 LAW & PHIL. 389, 390 (1994) ("The most striking feature of Fuller's analysis of freedom is that it is conducted from a particular perspective, namely, that of legislators . . . .").

[295] *See* Jastram & Maitra, *supra* note 240, at 81 ("While litigants must fight their cases as best they can in this convoluted and bewildering area of the law, the real solution is fixing the law itself.").

Designing a comprehensive legislative plan to align the United States' immigration system with Fuller's principles of legality is beyond the scope of this Article. To achieve success, lawmakers would have to combine insights from legal theory, sociology, and moral theory, on the one hand, with the political savvy of expert legislator-negotiators, on the other. Viewed purely from the perspective of ideal legal theory, however, Fuller's interactional view of law suggests some concrete prescriptions that could guide legislative reform:

- ***Generality***: Congress could promote rule-based decision making by eliminating the Attorney General's discretionary authority to deny asylum to otherwise qualified applicants.
- ***Publicity***: Congress could direct EOIR and federal courts to publish all immigration decisions that may be cited or relied upon in their proceedings.
- ***Clarity, Consistency, Stability***: Congress could define ambiguous terms in the INA to provide more precise direction to federal agencies and federal courts. Statutory definitions could clarify, *inter alia*, when persecution is "on account of" a protected ground and what features distinguish "a particular social group."[296] Ideally, Congress could follow the United Nations High Commissioner for Refugees' ("UNHCR") guidance concerning the interpretation of parallel language in the Refugee Convention.[297]
- ***Feasibility***: More ambitiously, Congress could extend protection to all asylum seekers who have no reasonable choice but to leave their home countries based on a well-founded fear of serious harm, irrespective of whether the danger qualifies as persecution related to a protected ground.[298] Congress could also state expressly that

[296] 8 U.S.C. §§ 1101(a)(42), 1231(b)(3) (2018).

[297] *See, e.g.*, UNHCR Guidelines, *supra* note 206 (providing guidelines for PSG analysis).

[298] This recommendation tracks a proposal advanced by Alexander Betts and Paul Collier to identify refugees based on "the concept of *force majeure* — the absence of reasonable choice but to leave. More specifically, the threshold for refuge would be: fear of serious harm. And the test would be: when would a reasonable person not see her- or himself as having a choice but to flee?" BETTS & COLLIER, *supra* note 12, at 44; *see also* ALEINIKOFF & ZAMORE, *supra* note 100, at 93 (focusing on "'necessary flight': the idea that some form of international response is merited for persons whose lives become so intolerable at home that flight is a reasonable and justified response"); MATTHEW J.

migrants who qualify for asylum, withholding of removal, or relief under the Torture Convention are not subject to criminal penalties for illegal entry or reentry.

These legislative reforms would lay the foundation for a more robust culture of compliance at the border.

To be sure, Congress cannot achieve legal order simply by enacting legislation. DOJ would also have to take more aggressive measures to reduce fact-finding disparities in immigration adjudication. CBP would have to ensure that its agents give asylum seekers a full and fair opportunity to pursue relief at the border. Federal courts would have to play their role, as well, by ensuring that agency officials apply the law faithfully. When in doubt, agency decision makers and federal courts would have to resolve ambiguities in the INA in a manner that comports with principles of legality.[299] Government attorneys would do well to refrain from lobbying courts for retroactive applications of federal immigration law. In short, every participant in the United States' immigration system — from frontline CBP agents to the justices of the Supreme Court — would have to cooperate in the common project of promoting fidelity to law at the border.[300]

B. Who Doesn't Want Legal Order

Having explored how the United States could promote legal order at the border, it is time for a dose of realism. In the current era of partisan gridlock, the prospects for Congress actually reforming the INA to achieve legal order at the border look bleak in the near term. Even if Democrats and Republicans could agree to prioritize cultivating legal order at the

GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES 7 (2004) (proposing a similar approach).

[299] *See* DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER 160-61 (1998) ("Judges who assume that a legislature must be taken to intend to respect the rule of law do so in order to make sense of their role as one faithful to the duty to administer the law . . . . If judges fail to do that . . . they fail in their duty as judges."); FULLER, THE MORALITY OF LAW, *supra* note 3, at 132 ("It would . . . be an abdication of the responsibilities of his office if a judge were to take a neutral stand between an interpretation of a statute that would bring obedience to it within the capacity of the ordinary citizen and an interpretation that would make it impossible for him to comply with its terms.").

[300] *See* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 14 (2006) ("[A]ny plausible conception of the rule of law is one that . . . requires that all three branches of government regard themselves as participating in a common project of realizing those values.").

border, it is unclear how many lawmakers would support the measures that are necessary to achieve this goal.

Some politicians believe the United States already admits too many asylum seekers.[301] Others might worry that expanding the legal grounds for asylum and withholding of removal would expose the United States to unpredictable, unstable, and potentially overwhelming immigration flows if country conditions in Latin America deteriorate further in the future. It is unrealistic to expect that lawmakers will be keen to expand forced migrants' access to legal protection, even if this is the price of achieving legal order at the border.[302] Ironically, conservative politicians who decry the erosion of "law and order" at the border may be least receptive to legislative reforms that are essential to promote this ideal.[303]

Turning to the other side of the political spectrum, advocates for asylum seekers might also harbor misgivings about legislative reform. Some have resisted calls to clarify the meaning of "persecution" in the INA because the term's ambiguity provides flexibility that national authorities can use to ensure relief when novel harms emerge.[304] There is also a risk that clarifying other ambiguous terms in the INA, such as "particular social group," would result in excluding some genuine survival migrants. Progressives might also question whether promoting legal order at the

[301] *See* Abigail Hauslohner, *Trump Wants a Different Kind of Immigrant: Highly Skilled Workers Who Speak English and Have Job Offers*, WASH. POST (May 15, 2019, 7:54 PM EDT), https://www.washingtonpost.com/immigration/_trump-wants-a-different-kind-of-immigrant-highly-skilled-workers-who-speak-english-and-have-job-offers/2019/05/15/9c1d8eca-772b-11e9-bd25-c989555e7766_story.html [https://perma.cc/ZBQ9-E8WF] (reporting President Trump's aspiration to scale back migration from Central America in favor of highly skilled workers from elsewhere).

[302] *See* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1268-69 (1990) ("[Asylum] gravely threatens the overall structure of deliberate control over immigration — control that is also highly valued by the public, and by politicians and judges.").

[303] For example, Senator Ron Johnson has attributed the United States' border crisis, at least in part, to "broken laws," *see* Aubree Eliza Weaver, *Illegal Immigration Remains Biggest Problem at Border, Ron Johnson Says*, POLITICO, https://www.politico.com/story/2019/05/26/immigration-border-health-flu-ron-johnson-1345021 (last updated May 26, 2019, 1:53 PM EDT) [https://perma.cc/7Y2L-NVYL], but he has sponsored draft legislation that would expressly exclude virtually all victims of gang violence from receiving asylum, *see* Asylum Reform and Border Protection Act of 2021, H.R. 759, 117th Cong. § 13 (2021).

[304] *See, e.g.*, Ramji-Nogales et al., *supra* note 175, at 379 (arguing against defining "persecution" with greater precision "because the nature of persecution and our understanding of it keep changing").

border should take precedence over other policy concerns, such as facilitating transnational labor mobility and family reunification.

Thus, promoting legal order is not the only objective that conscientious lawmakers might consider when designing legal rules to govern migration across the border. When principles of legality are in tension with other important objectives, such as maximizing human rights protection or safeguarding national security, it is not self-evident that lawmakers should always prioritize legality.

C. A Morality of Aspiration and a Morality of Duty

These objections would not have surprised Fuller. Although Fuller argues that principles of legality are morally consequential, he never claims that they are absolute moral trumps. Instead, he freely acknowledges that tensions may arise among the principles of legality,[305] necessitating careful trade-offs.[306] He also cautions that other moral considerations will sometimes justify relaxing fidelity to principles of legality.[307] For these reasons, Fuller stresses that a "utopia, in which all eight of the principles of legality are realized to perfection, is not actually a useful target for guiding the impulse toward legality."[308] Instead, he urges lawmakers to view principles of legality primarily as "a morality of aspiration" that should appeal to their "sense of trusteeship and the pride of a craftsman."[309]

Some of Fuller's principles lean more obviously toward the aspirational. For example, Fuller observes that the principles of clarity, consistency,

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[305] *See* FULLER, THE MORALITY OF LAW, *supra* note 3, at 45 ("[A]ntinomies may arise within the internal morality of law itself.").

[306] *See id.* at 92 ("A neglect of clarity, consistency, or publicity may beget the necessity for retroactive laws . . . . Carelessness about keeping the laws possible of obedience may engender the need for a discretionary enforcement which in turn impairs the congruence between official action and enacted rule.").

[307] *See id.* at 44 ("[C]hanges in circumstances . . . may demand changes in the substantive aims of law, and sometimes disturbingly frequent changes."). Under Fuller's account of legislative role morality, lawmakers arguably may withhold asylum and statutory withholding of removal from asylum seekers who would pose a serious security threat. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(ii) (2018) (denying asylum to any foreign national who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"); *id.* § 1231(b)(3)(B)(ii) (same for withholding of removal). Moral reciprocity goes both ways: if asylum seekers wish to be treated with dignity as objects of moral concern, they must afford the same respect to residents of the receiving state.

[308] FULLER, THE MORALITY OF LAW, *supra* note 3, at 41.

[309] *Id.* at 43.

and stability have an "affirmative and creative quality," in that they could be implemented in a variety of ways.[310] Because there are no obvious criteria for determining whether a lawmaker has satisfied these principles, they "lend [themselves] badly to realization through duties, whether they be moral or legal."[311] Accordingly, some of the prescriptions I have proposed for legislative reform are framed in an open-ended fashion (e.g., clarifying statutory ambiguities) or address legality problems that might be resolved in other ways (e.g., eliminating the Attorney General's discretion over asylum, following UNHCR's interpretive guidance).

This does not mean that lawmakers can never be fairly blamed for failing to respect principles of legality in immigration law. As architects and engineers of legal order, lawmakers are responsible for maintaining the immigration system's structural integrity. Flagrant violations of Fuller's eight desiderata rupture the bond of reciprocity between lawmakers and foreign migrants and breach lawmakers' moral duties to treat foreign migrants with dignity as self-determining agents. Avoiding flagrant violations of Fuller's principles of legality is therefore fundamental to the moral obligations associated with the lawmaking enterprise.

The idea that aspirational obligations can contain firm duties is not foreign to legal discourse. Consider, for example, the right to adequate housing under the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[312] The ICESCR obligates states to "take steps, . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the [right to adequate housing]."[313] The ICESCR does not furnish clear criteria for determining whether a state-party has satisfied this obligation. Nonetheless, international human rights bodies have concluded that the right to adequate housing, like various other social and economic rights, has a hard "minimum core" that imposes concrete legal duties.[314] Pursuant to this

[310] *Id.* at 42.

[311] *Id.* at 43.

[312] *See* G.A. Res. 2200A (XXI), art. 11.1 (Dec. 16, 1966) ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing . . . .").

[313] *Id.* art. 2.1.

[314] *See, e.g.*, Comm. on Econ., Soc. & Cultural Rts., Rep. on Its Fifth Session, U.N. Doc. E/1991/23, at 86 (1991) ("[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."); SCOTT LECKIE, U.N. DEV. PROGRAMME, UNDP HUMAN DEVELOPMENT REPORT 2000 § 18 (1999), https://hdr.undp.

minimum core, a state-party may never resort to forced evictions that "result in individuals being rendered homeless or vulnerable to the violation of other human rights."[315] A state-party could violate this duty, for example, if it bulldozed homes without ensuring that residents could access alternative accommodations.[316] Thus, although the human right to adequate housing obviously has an aspirational and programmatic aspect, it also imposes a hard duty of forbearance.

This Article does not afford the space necessary to develop in detail the argument that Fuller's principles of legality have a similar minimum core. It is not hard to imagine, however, how we might construct such an argument on the foundation of Fuller's respect for legal subjects' dignity as self-determining agents. For instance, Fuller himself acknowledges that it is "readily imaginable" that the principle of publicity might entail a "moral duty with respect to publication" because this would enable "the subject — or at least the lawyer representing his interests — [to] know where to go to learn what the law is."[317] Other minimum moral duties are no less readily imaginable, including duties to refrain from imposing retroactive *malum prohibitum* criminal laws (prospectivity) and to avoid codifying and enforcing irreconcilable legal duties (consistency). More important for present purposes, the feasibility principle arguably has a minimum core that establishes moral duties relative to the treatment of asylum seekers. While keeping in mind Fuller's warning that there is "no hard and fast line" for evaluating which rules can be obeyed and which cannot,[318] respect for asylum seekers' dignity as rational, self-determining agents would surely prohibit forcing asylum seekers to choose between compliance with domestic law and submitting to life-threatening dangers abroad. Significantly, this moral duty to refrain from returning asylum seekers to serious harm (*non-refoulement*) closely parallels the minimum core of the right to adequate housing; in both contexts, the state must

org/system/files/documents/leckiepdf.pdf [https://perma.cc/5M43-MRWA] (affirming that under the ICESCR, "all States possess a minimum core obligation to ensure the satisfaction of essential levels of each of the rights found in this decisive legal text").

315 ESCR Comm., General Comment No. 7, The Right to Adequate Housing: Forced Evictions ¶ 16, U.N. Doc. E/1998/22, Annex IV (1997) ("Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.").

316 *Cf.* South Africa v. Grootboom, Judgment, (1) SA 46 (CC), ¶¶ 4-10, 27-69 (S. Afr. 2001) (considering a similar set of facts, invoking the concept of a "minimum core" under the ICESCR, and finding a violation of the South African Constitution's right to access adequate housing).

317 FULLER, THE MORALITY OF LAW, *supra* note 3, at 43-44.

318 *Id.* at 79.

exercise forbearance, refraining from taking actions that would render legal subjects effectively homeless.[319]

The legality-based account of lawmakers' moral duties to asylum seekers complements other philosophical theories that affirm states' moral obligations to protect survival migrants. Scholars who study forced migration generally agree that states bear moral obligations to protect migrants who are fleeing existential threats abroad.[320] Most conceptualize these moral obligations either as freestanding sovereign responsibilities or as collective responsibilities derived from the cosmopolitan moral obligations of individual constituents.[321] Without calling into question these conventional theories, the Fullerian account developed in this Article reconceptualizes the moral duty of *non-refoulement* as an element of legislative role morality grounded in respect for foreign migrants' dignity as self-determining agents. Under this Fullerian account, moral duties intrinsic to the lawmaking enterprise prohibit states from enacting rules to prevent migrants from escaping territories where they would face a serious risk of death, torture, rape, or other serious harm.

Compared to comprehensive philosophical theories of global justice, the Fullerian account developed in this Article is relatively modest in its prescriptions. It demands only that immigration restrictions be formally and practically capable of attracting obedience from rational actors when

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[319] *See* Rosenberg v. Yee Chien Woo, 402 U.S. 49, 55 (1971) (characterizing refugees as "the world's homeless people").

[320] *See, e.g.*, JOSEPH CARENS, THE ETHICS OF IMMIGRATION 196-97 (2013) (identifying several possible grounds for moral obligations to refugees); SIR MICHAEL DUMMETT, ON IMMIGRATION AND REFUGEES 34 (2001) ("To refuse help to others suffering from or threatened by injustice is to collaborate with that injustice, and so incur part of the responsibility for it. Hence those who are forced by fear for their lives or of torture, rape or unjust imprisonment to flee their own countries have a valid claim on other human beings to afford them refuge."); COLIN GREY, JUSTICE AND AUTHORITY IN IMMIGRATION LAW 85 (2015) (arguing that states must act in a manner that "they consider justifiable to reasonable migrants as well as to reasonable members"); DAVID OWEN, WHAT DO WE OWE TO REFUGEES? 10-11 (2020) (arguing that states bear political obligations to refugees "that arise as conditions of the political legitimacy of the international order of states considered as a global regime of governance"). *But see* DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 82-92 (2016) (agreeing that states have moral obligations to provide refuge but questioning whether this extends to all survival migrants); Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109 (2008) (arguing that states are presumptively entitled based on freedom of association to close their borders to all foreign migrants).

[321] *See, e.g.*, CARENS, *supra* note 320, at 196 ("Because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous.").

backed by public enforcement.[322] It does not require, for example, that legal rules be designed in such a way that foreign migrants would accept them voluntarily in the absence of state coercion,[323] nor does it ask that legal rules be fully justifiable to migrants based on reasons that apply to them.[324] It is also modest relative to some accounts of the rule of law that emphasize substantive values such as formal equality[325] or human rights.[326] For these reasons, its comparatively parsimonious prescriptions might not satisfy moral theorists who favor a broader liberalization of national immigration policies.[327] Yet, despite its relative restraint, the Fullerian account still manages to pack a punch by insisting that lawmakers cannot satisfy their moral obligations to asylum seekers if they adopt restrictive immigration laws that asylum seekers cannot rationally obey.

CONCLUSION

In *The Morality of Law*, Fuller describes his eight principles of legality as being similar to "the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he is building to remain

[322] For a different reading of Fuller, see DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY 235, 251 (2d ed. 2010) (arguing that Fuller's principles of legality point toward a more substantively demanding conception of the rule of law in which all state actions are designed to advance the interests of legal subjects).

[323] *See* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 5 (1998) (asserting that moral theory should focus on "what could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject").

[324] *See* JOHN RAWLS, POLITICAL LIBERALISM 17 (2005) (arguing for a conception of "justice as fairness" based on "principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality").

[325] *See* PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 4 (2016) (defending the proposition that the rule of law requires that "rules must be actually justifiable to all on the basis of reasons that are consistent with the equality of all"); Matthew Lister, *Can the Rule of Law Apply at the Border? A Commentary on Paul Gowder's* The Rule of Law in the Real World, 62 ST. LOUIS U. L.J. 323, 324-26 (2018) (observing that Gowder's theory might exclude migrants at the border from the rule of law).

[326] *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 68 (2010) (arguing that the rule of law should be understood to require respect for fundamental human rights); Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 LAW & PHIL. 533, 576-78 (2008) (arguing that Fuller's account of the rule of law requires respect for human rights).

[327] *See, e.g.*, Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37 (2008) (arguing that democratic theory requires open borders); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987) (developing Rawlsian, Nozickean, and utilitarian arguments for open borders).

standing and serve the purpose of those who live in it."[328] Just as a carpenter must respect the laws of physics if she wants to construct a house that will remain standing, public officials must respect principles of legality if they want to establish a stable legal order.

By these standards, the United States' rickety immigration system is badly in need of repair. The INA does not speak clearly to the root causes of twenty-first-century survival migration, including gang violence and sexual and gender-based violence enabled by fragile, corrupt, or apathetic states. Consequently, federal agencies and courts have struggled to construct a consistent and stable jurisprudence that could sustain a relationship of reciprocity with forced migrants. Even when immigration law does provide clear rules, compliance with these rules often is not feasible due to the grave dangers that asylum seekers face abroad. These legality deficits have ruptured the bond of reciprocity that makes legal order possible, driving the U.S. immigration system to the brink of collapse.

The United States can still salvage legal order at the border, but it will take more than physical barriers, threats of imprisonment, and military deployments to achieve this goal. It will take sober legislative action to clarify and standardize the legal criteria for asylum and withholding of removal, while ensuring protection for all asylum seekers who face serious harm abroad. The White House and the immigration bureaucracy must also act aggressively to reduce outcome disparities in immigration adjudication and ensure that public officials who administer the immigration system faithfully execute the law. None of these measures can be accomplished without political courage and cooperation among the three branches of government and across the political aisle.

Ultimately, lawmakers face an urgent choice: they may preserve the United States' current immigration laws, or they may establish a functional legal order at the border. They cannot have both. Some lawmakers might hesitate to embrace the substantial reforms that would be necessary to promote a culture of compliance. If they decline to cooperate in this effort, however, it is fair to question their commitment to achieving a functional legal order at the border.

[328] FULLER, THE MORALITY OF LAW, *supra* note 3, at 96.