CRIMMIGRATION AND THE VOID FOR VAGUENESS DOCTRINE

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Since the Supreme Court's 2015 decision in *Johnson v. United States*—a federal sentencing decision holding that the residual clause of the Armed Career Criminal Act was void for vagueness—the vagueness doctrine has quietly and quickly exploded in the legal landscape governing the immigration consequences of crime. On September 29, 2016, the Supreme Court granted certiorari in *Lynch v. Dimaya*, an immigration case in which the Court will resolve a circuit split addressing whether part of the federal definition of a "crime of violence"—a classification that triggers nearly automatic deportation and immigration detention—is unconstitutionally vague.

This Article argues in favor of applying the void for vagueness doctrine to various statutory provisions that lie at the crossroads of immigration and criminal law, including the provision before the Court in *Dimaya*. The vision of vagueness articulated in this Article complements the Supreme Court's recent jurisprudence with respect to the methodology for assessing the immigration consequences of crime known as the categorical approach, and is consistent with the Court's decision in *Johnson* as well as the values animating the vagueness doctrine. Those twin values—providing reasonable notice and preventing arbitrary or discriminatory law enforcement practices—apply with exceptional force in immigration, an area of law in which the liberty stakes of the crime-based removal grounds are high, notice is critical, and the risk of arbitrariness and discrimination by government actors at multiple levels is acute.

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INTRODUCTION

Courts have used terms such as "nebulous,"[1] "bewildering,"[2] and "labyrinthine"[3] to describe immigration laws. But historically, courts have not found immigration laws "void for vagueness" as a constitutional matter. Not surprisingly, very little scholarship on the void for vagueness doctrine in the immigration context exists.[4] Since late 2015, however, the vagueness doctrine has quietly exploded across the immigration landscape. On September 29, 2016, the United States Supreme Court granted certiorari in *Lynch v. Dimaya*[5] to resolve a circuit split that had quickly developed in the prior year over whether a sub-definition of "crimes of violence" at 18 U.S.C. § 16(b) is

1. *See, e.g.*, *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (describing "extreme hardship"); *Franklin v. INS*, 72 F.3d 571, 573 (8th Cir. 1995) (describing moral turpitude).

2. *Velasco v. United States Citizenship & Immigration Servs.*, No. CV 09-1341 AHM (CTx), 2009 WL 5184419, at *8 (C.D. Cal. Dec. 21, 2009) (describing "the bewildering traps that the immigration laws set in the path of persons trying to comply with such laws"), *vacated*, 452 F. App'x 785 (9th Cir. 2011).

3. *L.D.G. v. Holder*, 744 F.3d 1022, 1024 (7th Cir. 2014) (referencing U visa statutory scheme).

4. One law review article and two student notes have argued for applying the void for vagueness doctrine to the immigration law definition of crimes involving moral turpitude. *See* Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 648 (2012); Derrick Moore, Note, *"Crimes Involving Moral Turpitude": Why the Void for Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 814–16 (2008); Amy Wolper, Note, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of "Crimes Involving Moral Turpitude" in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1908–10 (2010).

5. 803 F.3d 1110 (9th Cir. 2015), *cert. granted sub nom. Lynch v. Dimaya*, No. 15-1498, 2016 WL 3232911 (Sept. 29, 2016) (mem.).

unconstitutionally vague.[6] Under immigration laws, crimes of violence are significant because they constitute "aggravated felonies," a class of offenses that result in nearly-automatic immigration penalties including deportation, detention, and disqualification from many forms of immigration relief.[7] Additionally, the Ninth Circuit found in another case that the Board of Immigration Appeals' (BIA) interpretation of a crime-based removal statute imposing immigration sanctions for "obstruction of justice" crimes—also treated as aggravated felonies in immigration law—potentially raised void for vagueness concerns, and on that basis invoked the canon of constitutional avoidance to refuse to extend deference to the BIA's broad construction of the statute.[8]

The Supreme Court's 2015 decision in a federal sentencing case, *Johnson v. United States*,[9] accounts in large part for courts' recent willingness to apply vagueness analysis to immigration provisions.[10] In *Johnson*, the Court invalidated a provision of the Armed Career Criminal Act (ACCA).[11] The provision in question in *Johnson* involved the ACCA's so-called "residual clause," which defined a "violent felony" as a felony that "involves conduct that presents a serious potential risk of physical injury to another."[12] *Johnson* found that the residual clause's text, in combination with the methodology used by the courts to interpret it, created an intolerable level of indeterminacy under the vagueness doctrine.[13] Indeed, the Supreme Court was willing to depart from *stare decisis* and invalidate the residual clause despite the judicial branch's over thirty-year history of attempting to construe

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6. *Id.* at 1112.

7. 18 U.S.C. § 16 (2012) (defining crimes of violence under federal law as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) *any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*") (emphasis added). The textual similarities between the Armed Career Criminal Act, 18 U.S.C. § 924 (2012), and § 16 apply only to § 16(b), and not § 16(a). *See* 8 U.S.C. § 1101(a)(43)(F) (2012) (including in definition of an "aggravated felony" a conviction that is a "crime of violence . . . for which the term of imprisonment [was] at least one year," and defining crimes of violence by reference to 18 U.S.C. § 16). The identical "crime of violence" definition at 18 U.S.C. § 16 is also used to impose sentencing enhancements in illegal re-entry prosecutions. *See* 8 U.S.C. § 1326(b)(2) (2012) (sentencing enhancement for aggravated felonies). For a more detailed discussion of crimes of violence under void for vagueness doctrine, see *infra* Part IV.B.1.

8. 8 U.S.C. § 1101(a)(43)(S); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 818–19 (9th Cir. 2016).

9. 135 S. Ct. 2551 (2015).

10. *Id.* at 2557–58.

11. *Id.* at 2563.

12. 18 U.S.C. § 924(e)(2)(B) (2012).

13. *Johnson*, 135 S. Ct. at 2557–58; *see infra* text accompanying notes 148–158.

the provision.[14] Furthermore, *Johnson* relaxed the vagueness doctrine by dispensing with the requirement that a statute be vague in all of its applications in order to run afoul of due process.[15] *Johnson* thus potentially invigorates the vagueness doctrine, and has particularly strong implications for immigration provisions that, like the "crime of violence" definition, contain language and employ interpretive methodologies similar to the residual clause.

But the harms of vague statutes in the immigration context extend beyond the concerns articulated in *Johnson*. The vagueness doctrine is principally focused on ensuring that the law provides notice and avoids arbitrary or discriminatory law enforcement practices,[16] and immigration law raises exceptionally strong concerns in each of these areas. Vagueness also applies with heightened consideration to harsh and criminal-like penalties, such as those that apply in the immigration context to noncitizens with prior convictions. Indeed, the entanglement between criminal law and immigration law has become so pervasive and has so deeply shaped immigration law that the term "crimmigration" has become a regular part of the immigration law lexicon.[17] While courts have technically treated deportation as civil in nature, the judicial branch has begun to accept that deportation and immigration detention rival, and even outpace, criminal sanctions in harshness. As the Supreme Court stated in *Padilla v. Kentucky*,[18] "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes,"[19] and deportation is "intimately related to the criminal process,"[20] such that noncitizen defendants have

14. *Johnson*, 135 S. Ct. at 2562–63; *see infra* text accompanying notes 162–172.

15. *Johnson*, 135 S. Ct. at 2560–61; *see infra* text accompanying notes 180–182.

16. *See infra* Part II.

17. Juliet Stumpf first coined the term "crimmigration" a decade ago. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); *see also* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75 (2013); Cristopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131 (2014); Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 WASHBURN L.J. 173 (2015); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About its Present and Future*, 104 CAL. L. REV. 149 (2016).

18. 559 U.S. 356 (2010).

19. *Id.* at 364.

20. *Id.* at 365.

a right to notice of the immigration consequences of a guilty plea through accurate advice from defense counsel.[21]

Immigration statutes that impose sanctions for criminal convictions have long existed and comprise one piece of the crimmigration framework.[22] In the eyes of many commentators, those laws have amounted to an utter failure, both for their failure to provide meaningful notice to noncitizens and because of their discriminatory and arbitrary nature.[23] Over the past several decades, and in particular in 1996,[24] Congress massively expanded the categories of convictions that trigger immigration consequences, many of which simultaneously bar noncitizens from seeking most forms of discretionary relief from removal.[25] The draconian nature of those laws—judicial interpretations of which are often changing and inconsistent—has surprised many noncitizens facing immigration consequences long after they satisfied the terms of their criminal sentences.[26] The laws have imposed extensive human and social costs through the separation of families, the exile of long-term residents with minimal ties to their countries of origin, and the spread of fear and distrust of governmental authorities

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21. *Id.* at 364.

22. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–36 (2009) (describing use of deportation as "adjunct to criminal punishment"); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476–82 (2007) (describing attachment of immigration consequences to criminal convictions). In addition, the crimmigration literature tends to focus on the increase in criminal prosecutions for immigration violations; reliance on the subfederal criminal justice system to achieve immigration law enforcement goals; deployment of criminal-like sanctions through the immigration enforcement system; attempts to expand rights typically associated with criminal procedure to immigration proceedings; and legal, political, and social narratives that erroneously conflate immigrants and migration with criminality. *See generally* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1457–61 (2013) (describing components and factors leading to the development of crimmigration law); Legomsky, *supra* (describing areas of convergence between immigration and criminal law).

23. For critiques of the 1996 laws, see generally BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY (2006); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

24. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009–546.

25. *See Padilla*, 559 U.S. at 360–64 (discussing expansion of criminal grounds of removal).

26. *See* Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 268 (2012) (discussing rise in litigation involving categorical analysis to determine scope of crime-based removal provisions).

and law enforcement throughout immigrant and minority communities.[27] The costs of immigration enforcement today have had a racially disproportionate impact on Latino communities, who comprise the overwhelming majority of those subjected to deportation and detention.[28]

The actors charged with enforcing and adjudicating immigration laws raise serious concerns about arbitrariness. Arbitrariness in discretionary asylum decisions by immigration judges (IJs) and agency officials, for instance, has been thoroughly documented and is so severe that scholars compare asylum decision-making to the gambling game of roulette.[29] Front-line immigration enforcement officers possess extraordinarily high levels of discretion over decisions with profound liberty interests, such as detention and deportation, and yet routinely operate without constitutional checks and often without review from agency attorneys or immigration courts.[30] Immigration prosecutors, too, are not restricted by the accountability mechanisms to which criminal prosecutors must adhere.[31] As a result, vague crime-based removal statutes that fail to set clear guidelines have the potential to exacerbate existing arbitrariness and discrimination inherent in the crimmigration framework.

This Article argues for the application of the void for vagueness doctrine to apply greater scrutiny, as appropriate, to federal statutes that impose adverse immigration consequences on prior criminal activity for noncitizens residing in the United States. The argument is grounded in both the *Johnson* decision as well as in deeper concerns animating the vagueness doctrine. The Article presents a vision of the vagueness doctrine that takes into account concerns extrinsic to the statutory provisions under scrutiny, such as the excessive nature of state power being exercised, the absence of constitutional remedies and systemic problems of notice, arbitrariness, and discrimination in the administrative system implementing the statute. Part II provides necessary history and background on the void for vagueness doctrine,

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27. Angélica Cházaro, *Beyond Respectability: New Principles for Immigration Reform*, 52 HARV. J. ON LEGIS. 355, 361–73 (2015).

28. *See* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disproportionate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 998 (2016); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 602–04 (2015).

29. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 301–02 (2007).

30. *See infra* notes 236–242.

31. *See* Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475, 494 (2015) ("In an immigration proceeding, immigrants face the full power of the Government just as defendants in criminal trials do, but without even the minimal protections available in the criminal setting.").

both by presenting an overview of the factors influencing vagueness jurisprudence and by examining the application of the doctrine in two earlier immigration cases in which the Supreme Court meaningfully addressed vagueness. Part III focuses attention on the Court's decision in *Johnson*, and highlights how the decision invigorated the vagueness doctrine, with important implications for immigration law. Part IV elaborates on how vagueness principles of notice and tempering arbitrary or discriminatory enforcement resonate in the immigration context, particularly in the area of crime-based removal grounds. Part V discusses specific ways that the void for vagueness doctrine could shape the crimmigration landscape.

The Article ultimately argues that *Johnson* and the vagueness doctrine complement a robust, strictly elements-based version of the categorical approach to assessing the immigration consequences of crime, which the Supreme Court has largely adopted in the past several years. Despite the overall workability of a strong categorical approach that minimizes fact-finding, statutes (and statutory constructions) exist in which the application of the categorical approach may still result in indeterminacy. In those cases, courts should invoke the vagueness doctrine. The Article discusses the crime of violence removal ground (which the Supreme Court will address in *Lynch v. Dimaya*) and the obstruction of justice ground as particularly apt examples of how vagueness should shape crimmigration law, either through direct invalidation or through narrow statutory construction. In addition, the Article identifies several other immigration provisions—namely the "crime involving moral turpitude" definition, the meaning of a "single scheme of misconduct," and "particularly serious crime" definition—that seem ripe for further analysis under the vagueness doctrine. As this Article explains, the vagueness doctrine ultimately has the potential to move the system towards greater fairness, evenhandedness, and accountability.

I. UNDERSTANDING VAGUENESS: GENERAL FACTORS AND IMMIGRATION CONTEXT

Before considering the significance of the Supreme Court's decision in *Johnson v. United States*, preliminary background on the vagueness doctrine and its development in immigration cases is necessary. This Part first discusses the factors affecting courts' vagueness jurisprudence, including the stated concerns of notice and avoiding arbitrary or discriminatory enforcement, as well as contextual factors that have shaped judicial approaches to vagueness. It then focuses on vagueness challenges to the federal immigration statute by analyzing two earlier cases in which the Supreme Court assessed immigration laws against the vagueness doctrine.

A. Notice and Arbitrary or Discriminatory Enforcement

The Due Process Clauses' prohibition on the deprivation of life, liberty, or property "without due process of law" serves as the principal source of the void for vagueness doctrine.[32] Under modern jurisprudence, courts have recognized two explicit goals behind the doctrine: (1) notice; and (2) avoiding arbitrary or discriminatory enforcement of the law. The void for vagueness doctrine thus operates to secure a constitutional right that applies to federal and state governments, and that applies to all persons (irrespective of immigration status) subject to those laws.[33]

For a number of years, courts emphasized notice as the primary test for the void for vagueness doctrine. Courts express less concern with providing actual notice, and instead employ a standard focused on ordinary, reasonable persons. As Justice Sutherland's enduring passage from 1926 states, a vague statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[34] The idea that the law should give people an opportunity to shape their behavior in advance, with knowledge of the consequences of their choices, has long motivated the vagueness doctrine. As the Supreme Court has stated, "[v]ague laws may trap the innocent by not providing fair warning."[35] The Court has reiterated its commitment to the notice principle throughout the history of the doctrine, and has affirmed its commitment to an ordinary person standard in more recent cases, stating repeatedly that "[t]o satisfy due process, 'a penal statute [must] define the criminal offense . . . with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . .'"[36]

Critics have noted that despite the doctrine's stated commitment to evaluating statutes based on the knowledge and understanding of "ordinary" people, the reality is that even definitively worded statutes cannot effectively provide notice to the average person.[37] After all, law

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32. *United States v. Williams*, 553 U.S. 285, 304 (2008).

33. *See* U.S. CONST. amends V, XIV; *see also infra* Part IV.A.

34. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

35. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The courts have also recognized that notice is important when laws penalize desired or constitutionally protected conduct, such as engaging in commercial business, conducting abortions, or activity that implicates First Amendment rights. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284 (2003).

36. *Skilling v. United States*, 561 U.S. 358, 402 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

37. *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes – Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 4–5 (1997); John Calvin Jeffries, Jr.,

students learn early on that case law clarifies the meaning of most statutes, and that the text of a statute alone often does not provide conclusive answers as to its meaning. Accordingly, courts have been less inclined to invalidate statutes where external interpretive mechanisms such as case law, legislative history, or agency interpretation can provide sufficient clarification.[38] Along those lines, where a lawyer can reasonably ascertain the meaning of a statute and provide fair notice to her client, notice will typically be satisfied.[39] Even if the notice required by vagueness doctrine amounts to what John Jeffries calls "lawyer's notice,"[40] notice has nonetheless continued to figure prominently—but not exclusively—as a factor in determining the vagueness of a statute through the history of the doctrine. If notice to ordinary persons is a myth, notice in which lawyers and judges can reasonably anticipate the meaning of a statute appears more accurate and attainable.

The second prong of vagueness analysis seeks to avoid laws that encourage arbitrary or discriminatory enforcement. The Supreme Court adopted this factor in the 1970s as an independent basis for finding vagueness.[41] Even before the Court endorsed the fair enforcement portion of vagueness doctrine, Justices Roberts, Frankfurter, and Jackson had connected the two principles in a 1945 dissenting opinion.[42] They stated that "misuse of the criminal machinery is one of the most potential and familiar instruments of arbitrary government," such that "proper regard for the rational requirement of *definiteness* in criminal statutes is basic to civil liberties."[43] In *Papachristou v. City of Jacksonville*,[44] the Supreme Court in 1972 formally added the law enforcement concern to the vagueness test.[45] In a case involving two white women and two black men riding in a car together who were arrested under a city vagrancy ordinance in what was understood as a racially motivated stop,[46] the Court emphasized that the vagrancy law was impermissibly vague both because it failed on notice grounds, but

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Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 207–08 (1985).

38. *See* Holper, *supra* note 4, at 674–75.

39. *See* Jeffries, *supra* note 37, at 211.

40. *Id.* (describing notice in vagueness doctrine as "lawyer's notice").

41. *See* Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 154 (2011) (describing evolution of arbitrary enforcement in vagueness doctrine).

42. *Screws v. United States*, 325 U.S. 91, 138 (1945) (Roberts, J., dissenting).

43. *Id.* at 149 (Roberts, J., dissenting) (emphasis added).

44. 405 U.S. 156 (1972).

45. *Id.* at 162.

46. *See* Sun, *supra* note 41, at 155–57.

also because its vagueness "encourages arbitrary and erratic arrests and convictions."[47] The Court took into account the law's tendency to "increase the arsenal of the police,"[48] its grant of excessive discretion to the police, and its potential to allow pretextual arrests.[49] In *Grayned v. City of Rockford*,[50] which was decided that same year, the Court identified the existence of "explicit standards" in the law as a way to "prevent[]" problematic law enforcement practices, and saw vague laws as dangerous because they "impermissibly delegate[] basic policy matters to policeman, judges and juries for resolution in an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[51] Indeed, the Court has suggested that requiring legislatures to "establish minimal guidelines to govern law enforcement" is the "most meaningful aspect of the vagueness doctrine."[52] Vagueness doctrine's fair enforcement rationale thus views with suspicion laws that fail to rein in the powers of law enforcement actors. In doing so, the doctrine has expressed inherent skepticism towards the ability of criminal law enforcement's existing accountability mechanisms to prevent arbitrary or discriminatory enforcement. The doctrine should thus extend particular scrutiny towards legal regimes that involve liberty deprivations but lack the checks on state power that exist in criminal law.

The courts have invoked the fair enforcement prong to question the competence of a wide variety of actors and enforcement situations in the criminal context. Prosecutors, police officers, judges, and even juries have been identified as actors that may potentially engage in arbitrary or discriminatory practices in the face of vague laws.[53] While courts typically focus their analysis on the content of the statutes before them, one commentator has noted that "the difference between statutes that merely allow arbitrary and discriminatory enforcement and those that encourage it can often be observed in the circumstances surrounding their enactment."[54] The effectiveness of the vagueness doctrine in actually remedying discrimination in law enforcement is

47. *Papachristou*, 405 U.S. at 162.

48. *Id.* at 165.

49. *Id.* at 169 (the ordinance "may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest").

50. 408 U.S. 104 (1972).

51. *Id.* at 108–09.

52. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

53. *See* Goldsmith, *supra* note 35, at 290–91 ("Though the typical articulation of the arbitrary enforcement element of the vagueness analysis focuses on actions taken by law enforcement authorities, in practice the Court has often considered the danger of arbitrary or discriminatory actions by judges and juries, as well.").

54. *Id.* at 293.

debatable.[55] But the Court's normative commitment to preventing arbitrary enforcement and remedying discrimination via the vagueness doctrine persists.

Courts have thus grounded vagueness decisions in either or both of the stated goals of achieving notice or fair law enforcement practices. The Supreme Court has not clarified how it balances the two factors against each other, and it has at times seemed to weigh notice without giving fair enforcement concerns adequate attention, and vice versa.[56] Moreover, as a number of scholars have observed, the doctrine itself seems to lack consistency or predictability.[57] Indeed, the criticism that vagueness is itself an indeterminate doctrine has long existed.[58] As Justice Frankfurter once stated, in dissent, "[i]t has long been understood that one of the problems with holding a statute 'void for indefiniteness' is that 'indefiniteness' is itself an indefinite concept."[59]

B. The Role of Context in Vagueness

Context matters in vagueness analysis, especially since courts' written opinions seem insufficient to explain individual case outcomes solely in terms of providing notice and preventing arbitrary enforcement. Clarifying that the notice and arbitrary enforcement elements are not to be "mechanically applied," the Supreme Court explained in *Village of Hoffman Estates v. Flipside, Hoffman Estates,*

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55. *See* Jeffries, *supra* note 37, at 215 (noting that "those who enforce the penal law characteristically operate in settings of secrecy and informality, often punctuated by a sense of emergency, and rarely constrained by self-conscious generalization of standards" and that "[i]n such circumstances, the wholesale delegation of discretion naturally invites its abuse, and an important first step in constraining that discretion is the invalidation of indefinite laws"). *But cf.* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 593 (1997) (arguing that reliance on greater specificity in criminal statutes is "hopeless" and emphasizing need for continued police discretion).

56. *See generally* Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding a Vagueness Determination in Review of Federal Laws*, 65 SYRACUSE L. REV. 395 (2015) (arguing that the Court has failed in recent years to give full expression to the anti-discrimination component of the doctrine).

57. *See, e.g.*, Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void for Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 76 (2014) (referencing "the conceptual incoherence of the void-for-vagueness doctrine").

58. *See* Bradley E. Abruzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 360 (2012) ("Given the state of the Court's jurisprudence, one could even argue that the void-for-vagueness doctrine is itself standardless, vague and subject to arbitrary or selective enforcement by the courts.").

59. *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting).

Inc.,[60] that "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."[61] Laws triggering First Amendment concerns, for instance, have a substantial history of receiving more scrutiny from courts.[62] Laws with a scienter requirement will more likely survive a vagueness challenge because they tend to provide more notice.[63]

The Court has also acknowledged that real-world circumstances, including the relative access to the law and political capitol that a regulated entity might enjoy, could affect the stringency of the vagueness test. In explaining why it might apply a less rigorous vagueness analysis to economic regulations, the Court in *Village of Hoffman Estates* stated that businesses "can be expected to consult relevant legislation in advance of action," and that corporate entities "may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process."[64] The logic of *Village of Hoffman Estates* is that the relative access to power that businesses enjoy leads to a weaker vagueness standard.[65] Along similar lines, the social marginalization of the regulated group has also led the Court to invoke a stronger version of the vagueness doctrine.[66] In *Papachristou*, the Court expressed concern with the impact of an overly vague statute on minorities and other socially vulnerable groups, such as "poor people, nonconformists, dissenters [and] idlers,"[67] who cannot be expected to have "been alerted to the regulatory schemes" of the law.[68] Immigrants, too, should warrant inclusion on this list.

The Court has also considered the severity of the law's consequences when evaluating vagueness. While concern with severity has led the Court at times to characterize vagueness doctrine as placing criminal laws in a special category, the Court in fact has applied the same vagueness standard to quasi-criminal laws. The Court has explained, for instance, that it tolerated vagueness in civil statutes more than criminal provisions based on the unstable premise that as a practical matter "the consequences of imprecision are qualitatively less

60. 455 U.S. 489 (1982).

61. *Id.* at 498.

62. *See* McCarl, *supra* note 57, at 73–74 (discussing the First Amendment and the vagueness doctrine).

63. *Village of Hoffman Estates*, 455 U.S. at 499 ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.").

64. *Id.* at 498.

65. *See id.*

66. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

67. *Id.*

68. *Id.* at 162–63.

severe" in the civil context.[69] The otherwise formalistic divide between civil and criminal statutes is thus not decisive in vagueness analysis. As Bradley Abruzzi has explained, "[c]ourts will look beneath a law's 'civil' or 'criminal' veneer and consider its specific provisions."[70] As a result, "a statute promising penalties that, 'although civil in description, are penal in character,' will be treated as a 'quasi-criminal' law that calls for 'stricter vagueness review.'"[71] Numerous scholars, in turn, have argued for characterizing the immigration consequences of prior convictions as a quasi-criminal area of law.[72]

Scholars have long acknowledged the inadequacy of courts' stated vagueness factors and have offered broader explanations and prescriptions to guide the vagueness doctrine. Anthony Amsterdam, in an influential student note published over a half-century ago, suggested that "in the great majority of instances the concept of vagueness is an available instrument in the service of other, more determinative, judicially felt needs and pressures."[73] Amsterdam thus explained the vagueness doctrine as it had developed until 1960 as a doctrine less about notice and fairness, and more as a mechanism to create "an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."[74] Put more cynically by Justice Thomas in a concurring opinion in *Johnson*, the Court has used vagueness "to achieve its own policy goals."[75] John Jeffries emphasizes the vagueness doctrine's role in tempering excessive state power. Jeffries explains vagueness doctrine as an adjunct to the rule of law, which he characterizes as laws that "promote regularity, certainty, predictability

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69. *Village of Hoffman Estates*, 455 U.S. at 499.

70. Abruzzi, *supra* note 58, at 363 (quoting *Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 396 (2d Cir. 2004)).

71. *Id.* at 363 (quoting *Advance Pharmaceutical, Inc.*, 391 F.3d at 396); *see also Village of Hoffman Estates*, 455 U.S. at 499–500; *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 122 & n.2 (5th Cir. 1991) (applying closer vagueness scrutiny to a civil statute with significant penalties).

72. *See* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 296 (2008) ("Scholarly criticisms of the civil designation and arguments in favor of the recharacterization of removal proceedings as criminal, or at least quasicriminal, in nature have also persisted with surprising doggedness.").

73. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960).

74. *Id.*

75. *Johnson v. United States*, 135 S. Ct. 2551, 2567 (2015) (Thomas, J., concurring).

and evenhandedness."[76] Vague laws, by contrast, prevent the rule of law and accompanying principles from taking full effect.[77]

Tammy Sun argues that vagueness doctrine should operate as an alternative to equal protection, criminal procedure, and substantive criminal law as a remedy for inequality in criminal law. Echoing Amsterdam and Jeffries, she has asserted that vagueness is "fundamentally . . . preoccupied with the ever-present potential for abuse when coercive powers of the state are left uncontrolled," and that vagueness is "less concerned with how specific individuals wield power than the way structural arrangements of power affect fundamental liberty interests."[78] Sun views the Court's integration of fair enforcement norms into the vagueness test as an outgrowth of "the Court's prominent role in the movement to eradicate racism from American institutions."[79] Rather than read the evolution of vagueness analysis as a politically neutral expansion of the doctrine, Sun asserts that vagueness served as a means for the Court to "indirectly address[] inequality by means of neutral constitutional standards that did not speak of race, but were nonetheless effective in attacking racially motivated state policies and actions."[80]

The normative and descriptive insights of Amsterdam, Jeffries, and Sun permit a conceptualization of vagueness as a doctrine in which courts can address the immigration powers of the government. Under these views, vagueness doctrine does not operate in a contextual void, but is instead contingent on power differentials between the state and its subjects, and operates as a check on governmental power. Although vagueness decisions on their face appear concerned with the details of a particular statute, these critiques suggest that beneath the veneer of narrow interpretive questions lay broader concerns about excessive state power and structural imbalances of that power, to which vagueness can potentially operate as an antidote.

C. Immigration Vagueness Cases Before the Supreme Court

When the Supreme Court considers *Lynch v. Dimaya* this term, it will be the first void for vagueness challenge to an immigration law before the Court in nearly fifty years. The Supreme Court has twice before meaningfully considered void for vagueness challenges to federal

76. Jeffries, *supra* note 37, at 213.
77. *Id.*
78. *See* Sun, *supra* note 41, at 181.
79. *Id.* at 153.
80. *Id.*

immigration provisions. The first case, *Jordan v. De George*,[81] was decided in 1951 and examined the potential vagueness of the phrase "crimes involving moral turpitude"—a phrase that continues to trigger a wide variety of immigration sanctions and that also continues to perplex courts and adjudicators.[82] *Boutilier v. INS*[83] was the Court's second immigration vagueness case, decided in 1967.[84] There, the immigration provision barred individuals who had engaged in "homosexual actions" from entry to the United States, on the grounds that their sexual conduct classified them as having a "psychopathic personality."[85] In both instances, the Court declined to invalidate the statutes in question on vagueness grounds. However, the outcomes in *Jordan* and *Boutilier* should not weigh against invigorating the doctrine in the immigration context today, and in fact lay helpful groundwork for invoking vagueness with modern crime-based removal provisions.

First, the Court in both cases readily acknowledged the applicability of the void for vagueness doctrine on the immigration statutes in question. In most areas of law, simply acknowledging the relevance of a constitutional doctrine would not constitute grounds for reflection. But the judiciary has a longstanding history of refusing to even engage with mainstream constitutional claims in the immigration context under the plenary power doctrine, which stands for the principle that Congress has unreviewable discretion in immigration.[86] Neither party in *Jordan* had even raised vagueness.[87] Writing in 1951—during the Cold War, when the plenary power doctrine operated with full force,[88]—the Court nonetheless applied a then-mainstream version of the vagueness doctrine.[89] In *Boutilier*, the noncitizen raised the

81. 341 U.S. 223 (1951). Prior to *Jordan*, the Court briefly considered and rejected a vagueness challenge to an immigration statute that prescribed deportation for "undesirable residents of the United States." *Mahler v. Eby*, 264 U.S. 32, 40–41 (1924).

82. *Id.* at 225; *see also infra* Part IV.B.3.a (discussing crimes involving moral turpitude).

83. 387 U.S. 118 (1967).

84. *Id.* at 118.

85. *Id.* at 120.

86. *See infra* text accompanying notes 159–80.

87. *Jordan*, 341 U.S. at 223, 229 ("The question of vagueness was not raised by the parties nor argued before this Court.").

88. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (explaining that immigration matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

89. The Court emphasized that the "essential purpose" of the doctrine is to "warn individuals of the criminal consequences of their conduct." *Jordan*, 341 U.S. at 230. Given that the Court had not yet adopted the arbitrary or discriminatory

vagueness claim as a defense to deportation after the immigration agency both denied him the opportunity to become an American citizen through the naturalization process and ordered him deported based on his admissions of sexual activity prior to and after his entry to the United States.[90] Although the Court ruled against Mr. Boutilier on the vagueness claim, at no point did the Court question whether Mr. Boutilier *could* allege vagueness in the litigation. As Nancy Morawetz has stated, "both cases interpret the vagueness doctrine to mean that an immigrant, once she or he has entered the country, has a right to clear laws regarding the circumstances that could lead to deportation and that the Court has the power to enforce that right through the vagueness doctrine."[91]

Second, neither decision allowed courts' treatment of deportation as a civil sanction to operate as a basis for denying the vagueness challenge, as courts have on other occasions.[92] Indeed, the noncitizens in both cases had meaningful ties to the United States, a factor that the Court took into account in weighing the gravity of deportation. Mr. De George had resided in the United States approximately thirty years by the time the Court issued its decision,[93] and Mr. Boutilier had sought United States citizenship after having first entered the country twelve years prior to the decision.[94] The *Jordan* majority especially noted the harshness of deportation for Mr. De George. The Court recognized that the "crime involving moral turpitude" provision was not a criminal statute.[95] Nonetheless, the Court still applied the criminal test for vagueness to the immigration provision,[96] and in doing so emphasized "the grave nature of deportation."[97] Quoting oft-cited language from *Fong Haw Tan v. Phelan*,[98] it stated that "deportation is a drastic measure and at times the equivalent of banishment or exile."[99] Similarly, the *Boutilier* majority stated that the "void for vagueness doctrine [is] applicable to civil as well as criminal actions."[100]

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enforcement prong of the vagueness test, the formulation of the standard in *Jordan* mirrored other vagueness cases' emphasis on notice.

90. *Boutilier v. INS*, 387 U.S. 118, 120 (1967).

91. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 130–31 (1998).

92. Courts have repeatedly used deportation's designation as a civil sanction to justify the absence of constitutional rights. *See* Markowitz, *supra* note 72, at 293–96.

93. *Jordan*, 341 U.S. at 224–25.

94. *Boutilier*, 387 U.S. at 119–20.

95. *Jordan*, 341 U.S. at 231.

96. *Id.* ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case.").

97. *Id.*

98. 333 U.S. 6 (1948).

99. *Jordan*, 341 U.S. at 231 (quoting *Fong Haw Tan*, 333 U.S. at 10).

100. *Boutilier*, 387 U.S. at 123.

The dissenting opinions from both cases highlighted even more forcefully the harsh and punitive nature of deportation as a relevant point of analysis in the vagueness inquiry. Justice Jackson's dissent in *Jordan*, which was joined by Justices Black and Frankfurter, agreed that the quasi-criminal nature of deportation should justify a vagueness analysis no different from the test applicable to criminal statutes, and used even stronger language than the majority to characterize deportation. Justice Jackson described deportation as a "life sentence of exile," "a savage penalty," and "practically" criminal in nature because it would "extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation."[101] Similarly, Justice Douglas' dissent (joined by Justice Fortas) in *Boutilier* emphasized the severity of deportation,[102] imposing a "penalty so severe" that due process is warranted, and also citing *Fong Haw Tan*'s characterization of deportation as the "equivalent of banishment or exile."[103] While the outcomes in *Jordan* and *Boutilier* ultimately did not favor invoking vagueness, the Court was unanimous in both cases that the vagueness standard applicable in the criminal context should apply with full force to immigration statutes.

Third, both *Jordan* and *Boutilier* rejected the vagueness claims after cursory analyses of the claims. Both decisions were issued before the Court's embrace of the fair enforcement rationale of vagueness doctrine, and as such both decisions reflected limited analysis that rested on notice only. The outcome in *Jordan* turned in large part on the fact that the application of the "crimes involving moral turpitude" (CIMT) definition in that case—to a tax fraud conviction—seemed clear.[104] The Court pointed to the fact that fraud had been consistently found to fall within the definition of a crime involving moral turpitude.[105] Refraining from extensive analysis, the Court suggested that because the conviction at issue did not raise significant concerns about fair notice, the existence of less clear cases not before the Court would not render the entire statute vague.[106] Additionally, the *Jordan* Court emphasized that the CIMT definition had a history of prior use, both in the immigration context and outside of immigration law.[107] The Court found significant the fact that the phrase had been "a part of the

101. *Jordan*, 341 U.S. at 243 (Jackson, J., dissenting).

102. *Boutilier*, 387 U.S. at 132 (Douglas, J., dissenting).

103. *Id.* (Douglas, J., dissenting).

104. *See* Moore, *supra* note 4, at 838 ("[T]he [*Jordan*] Court did not appear to have completely considered the constitutional issue of vagueness.").

105. *Jordan*, 341 U.S. at 227.

106. *Id.* at 230–32 ("We have recently stated that doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness. But there is no such doubt present in this case.") (internal citation omitted).

107. *Id.* at 227–29.

immigration laws for more than sixty years."[108] The Court also cited a prior decision in which it had interpreted the CIMT phrase, even though the case had not involved a vagueness analysis.[109]

The Court's cursory analysis in *Jordan* was deeply criticized in Justice Jackson's dissent. Justice Jackson cited to the legislative history of the CIMT definition to assert that the provision was vague from the start, writing that "Congress knowingly conceived it in confusion."[110] Justice Jackson also emphasized that, with the exception of the *Jordan* majority, "there appears to be universal recognition that we have here an undefined and undefinable standard."[111] The dissent suggested that the Court's holding could not be squared with precedent, both with respect to the majority's contention that a sixty-year old statute should enjoy less scrutiny and its analysis of prior case law holding similar definitions vague.[112] Justice Jackson's dissent also connected the vagueness doctrine to concerns broader than fair notice, stating that "[u]niformity and equal protection of the law can come only from a statutory definition of fairly stable and confined bounds."[113] Indeed, several federal courts of appeal have since suggested that *Jordan* was wrongly decided, and Justice Jackson's dissent has arguably withstood the test of time.[114]

The Court also avoided engaging in a meaningful vagueness analysis in *Boutilier*, and instead rested on the plenary power doctrine to assert that because Mr. Boutilier's pre-entry conduct served as the basis for his deportation, he was not entitled to any notice of the immigration laws.[115] As the Court stated, "[t]he constitutional requirement of fair warning has no applicability to standards such as are laid down . . . for admission of aliens to the United States."[116] Despite the fact that Mr. Boutilier had admitted to a gay relationship

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108. *Id.* at 229.

109. *Id.* at 229 n.14 (citing *Winters v. New York*, 333 U.S. 507 (1948)).

110. *Id.* at 233 (Jackson, J., dissenting).

111. *Id.* at 235 (Jackson, J., dissenting).

112. *Id.* at 243–44 (Jackson, J., dissenting).

113. *Id.* at 242 (Jackson, J., dissenting).

114. As the Seventh Circuit stated, "[t]ime has only confirmed Justice Jackson's powerful dissent in the [*Jordan*] case, in which he called 'moral turpitude' an 'undefined and undefinable standard.'" *Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004) (quoting *Jordan v. De George*, 341 U.S. 223, 235 (1951) (Jackson, J. dissenting)); *see also Galeana-Mendoza v. Ashcroft*, 465 F.3d 1054, 1055 (9th Cir. 2006) (quoting *Mei*, 393 F.3d at 741).

115. *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("It has long been held that Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."). The Court also cited *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the foundational case establishing the plenary power doctrine.

116. *Boutilier*, 387 U.S. at 123.

and encounters after entering the United States, the Court insisted that his "post-entry conduct" did not serve as the basis for his deportation.[117] By treating the vagueness claim as trumped by Congress' unrestricted and unreviewable authority to establish rules for admission, it did not have to grapple with the statute's vagueness. Because it decided the case on pre-entry conduct, the Court left open the possibility that the vagueness analysis might have ended differently had post-entry conduct served as the basis for the deportation.[118]

Justice Douglas's dissent in *Boutilier*, which Justice Fortas joined, would have found the provision vague and cited to various studies to support the now-evident spuriousness of the connection between psychopathic behavior and homosexuality, as well as the indeterminacy of the phrase, "psychopathic personality."[119] He emphasized that under the law, "anyone can be caught who is unpopular, who is off-beat, who is non-conformist."[120] The dissent asserted that a "serious question of due process" arose from the majority's willingness to apply the exclusion ground to Mr. Boutilier's conduct.[121] He also saw as relevant the Court's "suspicion [of] those delegations of power so broad as to allow the administrative staff the power to formulate the fundamental policy."[122]

For the past nearly fifty years since *Boutilier*, the Supreme Court has not considered vagueness challenges against immigration statutes. But *Jordan* and *Boutilier* do suggest a place for vagueness doctrine today, particularly for immigrants facing deportation and other criminal-like consequences—such as physical detention and separation from family and community—as a result of conduct in the United States. Following *Jordan* and *Boutilier*, litigants representing noncitizens have not readily incorporated vagueness challenges into their removal defense strategies. To the extent vagueness claims have been raised, lower courts continued to entertain void for vagueness arguments even though pre-*Johnson* challenges have generally not succeeded.[123] The next Part explains how the role of vagueness doctrine in immigration law has changed post-*Johnson*.

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117. *Id.*

118. *Id.* at 124.

119. *Id.* at 131 (Douglas, J., dissenting).

120. *Id.* (Douglas, J., dissenting).

121. *Id.* (Douglas, J., dissenting).

122. *Id.* at 132 (Douglas, J., dissenting).

123. *See, e.g.*, *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013); *Nasubo v. Holder*, 338 Fed. App'x 592 (9th Cir. 2009); *Arriaga v. Mukasey*, 521 F.3d 219 (2d Cir. 2008); *Big Bear Super Market No. 3 v. INS*, 913 F.2d 754 (9th. Cir. 1990).

II. INVIGORATING VAGUENESS: *JOHNSON V. UNITED STATES*

The vagueness terrain shifted in meaningful ways with *Johnson v. United States*, in which the Supreme Court found the so-called "residual clause" of the Armed Career Criminal Act unconstitutionally vague.[124] This Part closely reads the case to provide necessary groundwork for assessing the implications of vagueness doctrine for immigration law's crime-based removal statutes.

Background on the residual clause and other federal sentencing provisions is necessary in order to understand the holding of *Johnson*.[125] The ACCA imposes a mandatory fifteen-year sentencing enhancement on certain defendants with three prior convictions for a "violent felony."[126] The ACCA defines a "violent felony" as a crime that "is burglary, arson, . . . extortion, involves use of explosives," but also includes crimes that, in the words of the residual clause, "*otherwise involves conduct that presents a serious potential risk of physical injury to another*."[127] *Johnson* was the Supreme Court's fifth case involving the meaning of, and methodology for interpreting, the residual clause.[128] The ACCA was enacted during the Reagan era of the 1980s, when Congress increased a wide swath of criminal penalties, and the residual clause was enacted in 1986 in a continued effort to increase law enforcement's ability to incarcerate the population for a range of offenses.[129] As one commentary states, "[t]he ACCA is not only poorly drafted, but its irrational harshness has become one of the engines driving mass over-incarceration in America."[130]

A number of federal sentencing statutes, like the residual clause, describe categories of crimes that trigger sentencing enhancements.

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124. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

125. For background on the residual clause, see David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209 (2010).

126. 18 U.S.C. § 924(e) (2012). The defendant must also be an adult and have pled or been adjudicated guilty pursuant to 18 U.S.C. § 922(g) (guns/ammunition), with three or more prior offenses determined to be either a "violent felony" or "serious drug offense." *Id.* § 924(e).

127. *Id.* § 924(e)(2)(B) (emphasis added).

128. *Johnson*, 135 S. Ct. at 2556.

129. *See Armed Career Criminal Act — Residual Clause* — Johnson v. United States, 129 HARV. L. REV. 301, 307–08 (2015).

130. Stephen R. Sady & Gillian R. Schroff, Johnson*: Remembrance of Illegal Sentences Past*, 28 FED. SENT'G REP. 58, 63 (2015); *see also* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 56 (2015) (describing the ACCA as a "flashpoint for many of the most pressing issues facing criminal law today," and noting that "Hispanic and black offenders receive the ACCA enhancement at higher rates than white offenders do, and ACCA's harsh mandatory minimum may lead many defendants to plead guilty to avoid more extensive prison time").

Since the Court's decision in *Taylor v. United States*[131] in 1990, the courts have employed a categorical approach to assess whether an individual's prior conviction falls within the ambit of the enhancement. Under the categorical approach, courts do not examine the underlying factual circumstances of the individual crime, but instead engage in a statutory comparison of the criminal statute of the defendant's conviction against the federal description of the enhancement-triggering crime.[132] Where the federal statute refers to an existing and familiar crime (say, burglary), then courts would identify the generic elements of that crime (say, an unauthorized entry into a building or structure for the purpose of committing a crime) in order to serve as a baseline comparison to the defendant's statute of conviction.[133] The categorical approach also figures prominently in the immigration law context because a number of immigration statutes, like the ACCA, set forth categories of crimes—crimes involving moral turpitude, burglary, controlled substance offenses, etc.—that require a similar methodology.[134] Federal courts continuously cross-reference immigration and sentencing cases involving the contours, and deviations from, the categorical approach in each context.[135] The residual clause, however, did not articulate generic elements or crimes, instead using the phrase, "otherwise involves conduct that presents a serious potential risk of physical injury to another."[136]

In the absence of a limited set of elements ascertainable through the naming of a generic crime in the residual clause, courts developed a unique variation on the categorical approach. Under the so-called "ordinary case approach" established by the Supreme Court in a 2007 case, *James v. United States*,[137] "the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another."[138] The *James* Court provided only rough guidance on how courts should identify this mythical "ordinary case." Acknowledging that "unusual"

131. 495 U.S. 575 (1990).

132. *See* Koh, *supra* note 26, at 260–61.

133. *See Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013) (discussing generic elements of burglary).

134. *See* Koh, *supra* note 26, at 274–78 (comparing use of categorical analysis in federal sentencing and immigration cases).

135. Although the categorical approach applies with great consistency and similarity across the sentencing and immigration contexts, the use of the categorical approach in the immigration context has a comparatively longer and more deeply established history. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1680 (2011) (describing the history of the categorical approach in immigration).

136. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

137. 550 U.S. 192 (2007).

138. *Id.* at 208 (emphasis added).

cases could be "imagine[d]," the Court emphasized that "[a]s long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another," it would fall within the residual clause.[139] Under the Supreme Court's precedents, for instance, attempted burglary in Florida and vehicular flight in Indiana were "violent felonies" under the residual clause, whereas failure to report to a penal institution in Illinois and driving under the influence in New Mexico were not.[140] In both *James* and the 2011 case *Sykes v. United States*,[141] the Court considered, but rejected, suggestions by Justice Scalia that the residual clause was void for vagueness.[142] But in 2015, after re-scheduling the *Johnson* case for additional briefing and argument specifically on the vagueness issue, and with Justice Scalia writing for a six-Justice majority, the Court turned its attention to the ordinary case approach and invalidated the residual clause on void for vagueness grounds.[143]

First, *Johnson* affirmed the vagueness doctrine's role in providing the guarantee of procedural due process. In setting forth the basic void for vagueness framework, *Johnson* affirmed the due process origins of the doctrine as well as the twin goals of providing adequate notice and preventing arbitrary or discriminatory enforcement.[144] Justice Thomas's concurrence had questioned the due process foundations of the doctrine,[145] but the majority explained that "[t]he Government violates [the Fifth Amendment] guarantee [of due process] by taking away someone's life, liberty or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[146] The Court also clarified that the strands of the vagueness doctrine applicable to

139. *Id.* at 208–09.

140. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (describing the holdings of *James*, *Begay*, *Chambers*, and *Sykes*).

141. 564 U.S. 1 (2011).

142. *See id.* at 29–34 (Scalia, J., dissenting); *James*, 550 U.S. at 230 (Scalia, J., dissenting).

143. Justice Scalia's majority opinion was joined by Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan. *Johnson*, 135 S. Ct. at 2255. Justices Thomas and Kennedy joined in the Court's decision that Samuel Johnson's conviction for possession of a sawed-off shotgun was not a violent felony under the ACCA. *Id.* at 2563 (Kennedy and Thomas, JJ., concurring). But Justices Thomas, Kennedy, and Alito (writing in dissent) did not adopt the majority's vagueness analysis. *Id.* at 2563, 2573–84 (Kennedy and Thomas, JJ., concurring) (Alito, J., dissenting).

144. *Id.* at 2557.

145. Justice Thomas's concurrence also questioned whether the Due Process Clause even served as the source of the vagueness doctrine, and pointed to sixteenth century British legal history in which "courts addressed vagueness through a rule of strict construction of penal statutes, not constitutional law" as a precursor to the modern rule of lenity. *Id.* at 2567 (Thomas, J., concurring).

146. *Id.* at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

criminal law did not apply only to "statutes defining elements of crimes," but to sentencing laws, which describe the consequences of the crimes.[147]

The Court's vagueness finding was ultimately rooted in the notice part of the doctrine, with little meaningful discussion of fair enforcement, but no apparent rejection of the enforcement rationale either. The Court emphasized the lack of coherence that had developed over time in the federal courts with respect to the residual clause, an incoherence that is arguably paralleled in various portions of immigration law. In particular, the Court found that the residual clause reached a level of "indeterminacy" that was not tolerable from a vagueness perspective.[148] The Court focused its attention on how courts evaluate the risk—both as a matter of methodology as well as a matter of degree—necessary to render a conviction a violent felony for ACCA purposes. As the Court stated, "[b]y combining indeterminacy about *how* to measure the risk posed by a crime with indeterminacy about *how much risk* it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[149]

With respect to methodology, *Johnson* anchored its vagueness analysis in the unique version of the categorical approach—the "ordinary case" approach—that the Court had adopted specifically for the residual clause.[150] Under the ordinary case approach, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime"[151] and "ties the judicial assessment of risk to a judicially imagined 'ordinary' case of a crime."[152] Here, the Court asserted that it remained unclear how the courts should "go about deciding what kind of conduct the 'ordinary case' of a crime involves . . . ."[153] Quoting Chief Judge Alex Kozinski of the Ninth Circuit, the Court asked, rhetorically: "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"[154] The Court found that the residual clause's "ordinary case" version of the categorical approach had failed to provide lower courts with sufficient guidance on how to

147. *Id.* at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

148. *Id.* at 2557–59.

149. *Id.* at 2558 (emphasis added).

150. *See Welch v. United States*, No. 15-6418, slip op. at 1, 3 (U.S. Apr. 18, 2016) ("The vagueness of the residual clause rests in large part on its operation under the categorical approach.").

151. *Johnson*, 135 S. Ct. at 2557.

152. *Id.*

153. *Id.*

154. *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

develop a baseline against which to evaluate the violent nature of prior convictions for sentencing purposes.[155]

Second, the Court emphasized that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[156] The ordinary case approach required courts to develop and apply a "judge-imagined abstraction."[157] In other words, even if courts could agree on what the ordinary case was, it remained unclear whether any particular ordinary crime would present the level of risk needed to match the residual clause's language relating to "involv[ing] conduct that presents a serious potential risk of physical injury to another."[158]

The Court focused its attention on the ordinary case approach dimension of the categorical approach and arguably implied, in dicta, that consulting the underlying facts of a case might have saved the residual clause from a vagueness finding.[159] However, it clarified that it had no intention of abandoning the use of the categorical approach in the sentencing context and resorting to factual analysis, despite suggestions from Justice Alito to do so.[160] Echoing several of the rationales given in its 1990 decision in *Taylor v. United States* for the categorical approach—such as the statutory language of the ACCA and the impracticalities produced by after-the-fact reconstruction of the factual record—the Court did not entertain the possibility of changing its fundamental methodology for interpreting the ACCA.[161]

As further evidence of the indeterminacy associated with the residual clause, the Court drew attention to the judiciary's own "repeated attempts and repeated failures to craft a principled and objective standard" from the provision.[162] Tracing the history of the four prior residual clause cases, *James v. United States*,[163] *Chambers v. United States*,[164] *Sykes v. United States*,[165] and *Begay v. United States*,[166] the Court emphasized that each of those cases had interpreted the residual clause through "a different *ad hoc* test to guide our inquiry," that in three of the four cases the Court "failed to establish any generally applicable test," and that *Begay* "took an entirely

155. *Id.* at 2560.
156. *Id.* at 2558.
157. *Id.*
158. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).
159. *See Johnson*, 135 S. Ct. at 2560–61.
160. *See id.* at 2579–80 (Alito, J., dissenting).
161. *See id.* at 2560–61.
162. *Id.* at 2558.
163. 550 U.S. 192 (2007).
164. 555 U.S. 122 (2009).
165. 564 U.S. 1 (2011).
166. 553 U.S. 137 (2008).

different approach" from the others in terms of assessing the level of risk.[167] Turning to the lower courts, the Court noted that "[t]he clause has 'created numerous splits,'" and has been "'nearly impossible to apply consistently.'"[168] The Court also used the lack of consistency created by its own prior decisions to justify its change of position despite *stare decisis*.[169] Using the judiciary's experience with the residual clause over time as evidence of the failure of the provision from a vagueness perspective, the Court asserted that the purpose of *stare decisis* is to create "the evenhanded, predictable, and consistent development of legal principles."[170] Finding that its own precedent regarding the residual clause had failed to be "evenhanded, predictable or consistent," the Court stated that failing to invalidate the provision would ultimately undermine the goals of *stare decisis*.[171] The Court's willingness to depart from its own precedent in *James*, *Chambers*, *Sykes*, and *Begay*, coupled with the strength of the Court's language in the majority opinion, suggest that *Johnson* intended to cast the residual clause as a provision that fell squarely within the vagueness doctrine. In other words, the residual clause's vagueness problem was not a close call.[172]

Another feature of the residual clause that bolstered the Court's vagueness finding, but which was not dispositive to it, involved the clause's reference to other generic crimes, namely "burglary, arson, or extortion," and "involves the use of explosives," which immediately precede the residual clause.[173] Given the lack of a "consistent conception of the degree of risk posed by each of the four enumerated crimes,"[174] the Court found that the residual clause's directive to interpret the level of risk in light of the four enumerated crimes yielded more indeterminacy to the sentencing provision.[175] In its discussion of both the lack of consensus in the courts and the confusion created by the four enumerated crimes, the Court still anchored its concerns in the

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167. *Johnson*, 135 S. Ct. at 2558–59 (emphasis added).

168. *Id.* at 2560 (quoting *Chambers v. United States*, 555 U.S. 122, 133 (2009) (Alito, J., concurring)).

169. *See id.* at 2562–63.

170. *Id.* at 2563 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

171. *Id.*

172. As the Fifth Circuit stated in an initial analysis of *Johnson*, "*Johnson* held that the ACCA's standard was so imprecise that the Court was justified in departing from *stare decisis*," such that a "marginally more precise standard could still be problematically vague." *United States v. Gonzalez-Longoria*, 813 F.3d 225, 234 (5th Cir.), *rev'd en banc*, 831 F.3d 670 (5th Cir. 2016).

173. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

174. *Johnson*, 135 S. Ct. at 2559.

175. *Id.*

instability inherent in the "ordinary case" approach.[176] Addressing judicial disagreements, for instance, the Court reiterated that what made the statute void was not disagreement among the courts per se, but "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider."[177] And in sections raising the inconsistency across burglary, arson, extortion, and crimes involving use of explosives, the Court ultimately drew its attention back to the fact that the residual clause "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime."[178] The Court's concerns with the text of the residual clause lend further weight to the conclusion that the ACCA provision was not a borderline case of vagueness, and that vagueness doctrine should consider both the plain text of a statute as well as the relative success (or failure) of the legal system's experience interpreting it.

Johnson also produced a meaningful shift in the Court's void for vagueness jurisprudence by rejecting the requirement that a statute be vague in *all* of its applications in order to be invalidated as a matter of due process.[179] Prior to *Johnson*, a number of courts had refused to find statutes vague so long as the provision could produce *some* clear cases—including in several immigration cases before the federal courts of appeal.[180] But the *Johnson* Court maintained that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that falls within the provision's grasp."[181] By broadening the scope of the vagueness

176. *Id.* at 2561. The *Johnson* majority addresses the concern that invalidating the residual clause will necessitate the invalidation of "dozens of federal and state criminal laws [that] use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk.'" *Id.* In response, the majority notes that the residual clause, unlike many other statutes that reference various degrees of risk, contains four enumerated crimes. *Id.* at 2558. The majority goes on, however, to emphasize that the primary source of indeterminacy in the residual clause lies with the courts' peculiar use of the ordinary case variation of the categorical approach. *Id.* Furthermore, while the *Johnson* majority asserts that not *all* statutes referencing risk will be found unconstitutional, the decision still leaves room for the possibility that *some* statutes other than the residual clause might face invalidation. *Id.* at 2561.

177. *Id.* at 2560.

178. *Id.* at 2561.

179. *Id.*

180. *See, e.g.*, *Alphonsus v. Holder*, 705 F.3d 1031, 1043 (9th Cir. 2013) ("[T]here is an ascertainable group of circumstances as to which the statute, as interpreted, provides an imprecise but comprehensive normative standard . . . rather than . . . no standard at all.") (citation omitted).

181. *Johnson*, 135 S. Ct. at 2560–61.

doctrine, *Johnson* provides an impetus for courts to reconsider how void for vagueness challenges should fair in the immigration context.[182]

III. VALUING VAGUENESS: SYSTEMIC CHALLENGES IN CRIMMIGRATION

Having established the role of context in vagueness doctrine as well as the openings created by *Johnson*, this Part highlights characteristics of the legal regime at the crossroads of criminal and immigration laws—or "crimmigration"—that matter for vagueness analysis. The Article recognizes that vagueness claims often turn on the particular characteristics of the statutes at issue. But the broader context in which those laws operate—particularly with respect to vagueness doctrine's own values of notice and preventing arbitrary or discriminatory enforcement—should inform the courts' consideration of vagueness challenges. In the case of crimmigration, the liberty stakes are high, notice is critical, and the risk of arbitrariness and discrimination by government actors at various levels is acute.

A. The Special Role of Procedural Due Process in Immigration Claims

Given that the vagueness doctrine is a component of due process, it is worth highlighting the special role that procedural due process claims occupy in the interaction between the Constitution and immigration law. Immigration law has, for centuries, developed without much of the accountability provided by the Constitution. As a leading immigration law textbook explains, "the normal rules of constitutional law simply do not apply."[183] Two fundamental doctrines explain immigration law's relative insulation from constitutional scrutiny. First, the plenary power doctrine has prevented the judiciary from subjecting immigration law to many substantive constitutional claims on the theory that congressional power in immigration is unrestricted and immune from judicial review.[184] Second, the holding that deportation is not punishment has left deportation laws unrestrained by constitutional guarantees against double jeopardy, *ex post facto* laws,

182. *See Armed Career Criminal Act — Residual Clause — Johnson v. United States*, *supra* note 128, at 309–10 (stating that Justice Scalia's majority opinion "significantly revived and broadened the vagueness doctrine, indicating that where a statute was *mostly* vague, but perhaps clearly covered a core of conduct, it could still be violative of a defendant's due process rights and therefore void").

183. STEPHEN H. LEGOMSKY & CRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 113 (5th ed. 2009).

184. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Claims*, 92 COLUM. L. REV. 1625, 1656–59 (1992) (comparing mainstream constitutional law to immigration law).

the right to counsel, and other protections normally associated with the criminal process.[185]

Although courts have rejected the full application of various constitutional norms to immigration claims, they have by contrast readily recognized the influence of procedural due process. Even the late-nineteenth century immigration cases, issued shortly after the Court's adoption of the plenary power doctrine, recognized that noncitizens already in the United States have procedural due process rights in immigration proceedings.[186] As Hiroshi Motomura has stated in his influential scholarship on the relationship between the plenary power doctrine and procedural due process, procedural claims act as a rough surrogate for the absence of substantive constitutional rights in the immigration realm.[187] Additionally, courts often apply what Motomura calls "phantom constitutional norms" when engaging in statutory interpretation of immigration statutes, thereby construing immigration statutes in a manner more favorable to the noncitizen while refraining from outright invalidation on constitutional principles.[188]

Viewing the immigration law field from a macro level, the government—specifically Congress—nonetheless has extreme levels of power over noncitizens. Congressional power in the area of immigration is often left unchecked by the judiciary, except in cases where due process is implicated. If vagueness doctrine is indeed "pre-occupied with the ever-present potential for abuse when coercive powers of the state are left uncontrolled,"[189] then courts should have a particularly salient role to play when applying vagueness doctrine to immigration statutes. At minimum, courts should approach vagueness claims with the same care that they have applied to a myriad of procedural due process challenges to immigration laws.

B. Noncitizens and the Need for Notice

Notice has long operated as a primary component of the vagueness doctrine. Notice matters for noncitizens facing immigration sanctions as a result of criminal convictions,[190] so much so that the Supreme Court

185. *See* Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1314–25 (2011).

186. *See* Motomura, *supra* note 184, at 1632–41.

187. *Id.* at 1628.

188. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

189. Sun, *supra* note 41, at 181.

190. *See* Das, *supra* note 135, at 1728 (discussing the importance of notice for noncitizens facing removal and other immigration consequences as a result of criminal convictions).

in *Padilla v. Kentucky* recognized that effective criminal defense counsel requires advising a noncitizen of any known immigration consequences of a guilty plea.[191] In reaching its holding in *Padilla*, the Court emphasized the "dramatic[]" changes to immigration law that, over the last century, had gradually resulted in the creation of broad classes of offenses that lead to almost automatic deportation.[192] As a result, "the importance of accurate legal advice for noncitizens accused of crimes"—in advance of the actual imposition of immigration sanctions—"has never been more important."[193] *Padilla* thus asserted that refraining from affirmative misadvice regarding the immigration sanctions associated with a guilty plea was not enough. Recognizing that "immigration law can be complex,"[194] the Court held that counsel has an ethical duty to correctly advise where the immigration laws are clear.[195] *Padilla* thus casts serious doubt upon the judiciary's traditional treatment of deportation as a civil sanction that falls short of punishment.[196]

Padilla also arguably gives rise to a duty on the part of criminal defense attorneys to proactively craft "immigration-safe" guilty pleas and otherwise take affirmative steps during the plea process to mitigate the immigration consequences of a conviction.[197] *Padilla* noted that the "informed consideration" of immigration consequences during plea bargaining would serve the interests of both sides.[198] The Supreme Court's post-*Padilla* decisions in *Lafler v. Cooper*[199] and *Missouri v. Frye*,[200] which together suggest that the plea bargaining process is a fundamental component of defense counsel's work, lend further support to the existence of such a duty.[201] In California, recently enacted

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191. 559 U.S. 356, 373–74 (2010).

192. *Id.* at 360–65.

193. *Id.* at 364. The Court went on to say that changes in the immigration law "confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.*

194. *Id.* at 369.

195. *Id.* at 374.

196. *See, e.g.*, Markowitz, *supra* note 184, at 1332–39.

197. Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After* Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1063–64 (2016).

198. *Padilla*, 559 U.S. at 357.

199. 132 S. Ct. 1376 (2012).

200. 132 S. Ct. 1399 (2012).

201. *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653–54 (2013); *see also United States v. Rodriguez-Vega*, 797 F.3d 781, 787 (9th Cir. 2015) (recognizing that had the noncitizen "been properly and timely advised, Rodriguez-Vega could have instructed her counsel to attempt to negotiate a plea that would not result in her removal").

legislation based on *Padilla* states that defense counsel shall "defend against [immigration] consequences," and calls on prosecutors to weigh the mitigation of immigration sanctions during the plea bargaining process as "one factor in an effort to reach a just resolution."[202] Vague laws undercut the ability of defense attorneys to negotiate favorable pleas for their clients, particularly because the imposition of immigration consequences may occur years later. If criminal defenders—much less ordinary persons of reasonable intelligence—do not have notice of how an immigration statute will ultimately apply to a noncitizen's conviction, then the concerns animating *Padilla* will go unaddressed.

But Justice Alito's concurrence in *Padilla* highlighted the following reality: the immigration consequences are not always clear. Citing to a variety of practice manuals, Alito pointed out that, for instance, determining whether a conviction is a crime involving moral turpitude or an aggravated felony is "not an easy task" under the law. This problem is compounded by the fact that multiple administrative agencies and courts interpret the laws, and that even underlying terms such as "conviction," "moral turpitude," or "single scheme of misconduct" are not easily determined.[203] Justice Alito's concurrence devoted entire paragraphs to detailing the complexity of the aggravated felony and related definitions, noting that "determining whether a particular crime is one involving moral turpitude is no easier."[204] Justice Alito relied on the inherent complexity of the law to advocate for a more limited holding in *Padilla*, which would have allowed criminal defense counsel to satisfy their professional obligations by not incorrectly advising their clients.[205] This Article does not suggest that the courts adopt Justice Alito's position in *Padilla* because, as the majority noted, provisions do exist in which the immigration consequences are predictable (such as transporting a tractor-trailer's worth of marijuana, the issue in Jose Padilla's case).[206] But Justice Alito's analysis accurately reflects immigration law practice today,

202. CAL. PENAL CODE § 1016.3(a) (West 2016); *see also* Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 18–19 (2012) (arguing that prosecutors should consider immigration consequences of guilty pleas during the plea bargaining process as a means of incorporating fairness and proportionality into punishment).

203. *Padilla*, 559 U.S. at 377–78 (Alito, J., concurring).

204. *Id.* at 379 (Alito, J., concurring); *see also* César Cuauhtémoc García Hernández, *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 506 (2012) (suggesting that Padilla requires "clear, unequivocal advice" about the immigration consequences of certain crimes, but that "general advice only" may be possible for crimes involving moral turpitude).

205. *Padilla*, 559 U.S. at 378–81 (Alito, J., concurring).

206. *Id.* at 369.

insofar as frequent changes in the law and controversies at the Board of Immigration Appeals, federal appeals courts, and Supreme Court leave practitioners—and their clients—often unable to predict the final outcome of a conviction.[207] The reality underlying Alito's concurrence also suggests that the motivating concerns of the *Padilla* decision—providing noncitizens with adequate notice of the immigration consequences of their criminal convictions—have been difficult to fulfill precisely because of the level of complexity associated with the crimmigration law framework.[208] The vagueness doctrine can thus serve as an additional doctrinal tool for the judiciary to monitor the provision of notice to noncitizens caught at the intersection of immigration and criminal law.

Notice before the imposition of immigration penalties is particularly important because "immigration adjudications do not operate on a level playing field between the parties."[209] Noncitizens facing deportation have no statutory right to government-appointed counsel,[210] despite the fact that noncitizens with lawyers are far more likely to prevail in their cases than those without lawyers.[211] The reality of immigration detention, often pursuant to mandatory detention statutes that prohibit immigration judges from ordering the release of noncitizens on bond, further complicates noncitizens' willingness to contest their cases, ability to hire a lawyer, and ability to gather evidence and witnesses to support their cases.[212] The criminal plea bargain may thus be the only time that a noncitizen can receive the

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207. *See* Koh, *supra* note 26, at 259, 278–91 (discussing frequent changes and circuit splits in courts' assessment of immigration consequences of particular convictions and in the categorical approach).

208. *See also* Lasch, *supra* note 17, at 2149 ("[T]he *Padilla* rule should be understood as shifting responsibility" to avoid deportation "onto the shoulders of criminal defense counsel").

209. Das, *supra* note 134, at 1728.

210. *See* 8 U.S.C. § 1362 (2012); *see also Developments in the Law – Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1658–60 (2013); Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 131–32 (2008); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 76–78 (2012).

211. *See, e.g.*, Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011) (finding that among nondetained immigrants, 74% with counsel have successful outcomes versus 13% without counsel; and that among detained immigrants, 13% with counsel have successful outcomes versus 3% without counsel).

212. *See* César Cuauhtémoc Garciá Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1452–53 (2015).

benefit of counsel to craft and establish expectations regarding the effect of a plea on their ability to remain in the country.

Notice at the time of a guilty plea also matters because substantive restrictions in the law either prevent noncitizens from seeking relief from deportation or place them in fast-track removal procedures that deprive them of the right to an immigration court hearing at all—and often both. Depending on how the conviction is classified under the categorical approach or on the noncitizen's prior immigration history, the law might bar the noncitizen from seeking relief from removal. All noncitizens with aggravated felony convictions, for instance, generally cannot seek discretionary relief from removal.[213] Additionally, noncitizens who do not hold lawful permanent resident status and have aggravated felony convictions are subject to summary removal procedures that bypass immigration courts and depend on low-level officers to make sophisticated legal determinations regarding the nature of the conviction.[214] Noncitizens who have been previously removed are subject to reinstatement of the prior removal order, and are both deprived of a court hearing as well as barred by statute from seeking most forms of relief from removal.[215] Removal orders may thus be entered within a matter of days and under a legal system that affords few defenses.

The absence of meaningful time limitations on the government's power to deport also heightens the need for notice.[216] Minimal statutes of limitations exist in the crimmigration context.[217] As a result, the government can—and regularly does—initiate removal proceedings based on convictions that took place long ago. Safe pleas attempted by noncitizens must therefore withstand years, even decades, of administrative and judicial interpretation of the immigration laws. But shifting interpretations of the crime-based removal statutes mean that a plea that is safe today may no longer insulate one from deportation and detention years later. Time adds another dimension to the importance of

213. *See* Koh, *supra* note 26, at 270–71.

214. *See* 8 U.S.C. § 1228(a)(3) (2012); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. (forthcoming 2017) (manuscript at 23–24), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769620 [https://perma.cc/9K96-RP75] (discussing administrative removal of non-LPRs with aggravated felony convictions).

215. *See* 8 U.S.C. § 1231(a)(5) (2012); Koh, *supra* note 214 (discussing reinstatement of removal).

216. *See* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1743, 1745 (2011).

217. *See id.* at 1746–48 (describing the existence of statutes of limitations in immigration that limit the government's ability to deport where convictions occurred soon after admission to the United States, but imposing no limits on the government's ability to deport based on the date of conviction relative to the initiation of removal proceedings).

notice. From the perspective of the noncitizen, when deportations take place long after a conviction, attachments to the country—such as family and community ties—tend to grow even stronger, as does the possibility of rehabilitation. The passage of time thus makes the sanction of deportation without an opportunity for discretionary relief even harsher, and cuts in favor of providing meaningful notice.

Because of the exceptional need for notice in the immigration context, courts should thus subject statutory provisions that impose immigration penalties for prior convictions to a strong vagueness analysis. In addition, courts should account for the risk of arbitrary or discriminatory enforcement practices that result from excessively vague statutes.

C. Arbitrary and Discriminatory Immigration Enforcement

As discussed at Part I, the fair enforcement norms behind the vagueness doctrine seek to prevent the improper delegation of discretion to frontline law enforcement actors without providing sufficient guidance to prevent arbitrariness or discrimination. This prong of vagueness doctrine has typically focused on the enforcement of criminal laws, and for good reasons. After all, the criminal law landscape has long served as a site in which minorities and other vulnerable groups experience marginalization and deprivation of fundamental liberties, and the criminal justice system's historic impact on African-American communities in particular requires little further explanation.[218] The courts' vagueness decisions addressing arbitrary and discriminatory enforcement generally do not reflect ambitious attempts to remedy systemic problems of racial and other discrimination in law enforcement, at least not on their face. But as discussed earlier, Tammy Sun and others contend that the vagueness doctrine does—and should—engage with broader conditions facing law enforcement and the harms created by excessive state power.[219]

In light of the doctrine's fair enforcement prong, reflecting on the wildly disproportionate effects of current immigration enforcement on Latino communities is warranted. Although immigration laws are race-neutral on their face, they have a long history of racial discrimination.[220] The plenary power doctrine, after all, arose out of the Court's endorsement of unapologetic racial discrimination against

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218. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); BRYAN STEVENSON, JUST MERCY, A STORY OF JUSTICE AND REDEMPTION (2014).

219. *See supra* text accompanying notes 72–79.

220. *See, e.g.*, MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

Chinese immigrants through the Chinese Exclusion Acts,[221] followed by a long pattern of race-based exclusion in immigration law. While some meaningful impact of immigration enforcement on racial minorities may arguably be expected, the current numbers suggest that something more is afoot. From 2008 to 2012, for instance, Latino immigrants comprised seventy-eight percent of all undocumented immigrants.[222] But in 2012, more than *ninety-six percent* of all removed noncitizens were Latino.[223] The most recent statistics show that Latino immigrants comprised ninety-four percent of those removed for criminal offenses and ninety percent of the immigrant detainee population.[224] These statistics, argues Yolanda Vázquez, justify characterizing the crimmigration framework as a "system of radicalized mass or hyper removal."[225]

But the numbers alone do not justify the application of vagueness in the crimmigration context. If the vagueness doctrine has typically sought to remedy excessive discretion and the lack of accountability in criminal law, then it should be all the more concerned with similar problems in immigration enforcement. On one hand, immigration law enforcement uses many of the same coercive tools of criminal law enforcement: jails, arrests, gun-wielding officers, and the deprivation of liberty.[226] However, immigration law lacks many of the tools of accountability that typically accompany the criminal law enforcement process at all levels of immigration enforcement and adjudication.[227] Moreover, immigration law suffers from its own problems of institutional competence and neutrality.

Arbitrary enforcement plagues immigration law. Extraordinary levels of arbitrariness when it comes to discretionary decision-making in immigration cases have already been widely documented.[228] Stark

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221. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For further discussion of race-based exclusion in immigration law, see Gabriel Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Bill Ong Hing, *Institutional Racism, ICE Raids and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Kevin Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

222. Kwon, *supra* note 197, at 1048.

223. *Id.* (citing JOHN F. SIMANSKI, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [https://perma.cc/6A7H-JTK6]).

224. *See* Vázquez, *supra* note 28, at 604 n.12.

225. *See id.* at 604.

226. *See* Legomsky, *supra* note 22, at 489–90.

227. *See also* Keyes, *supra* note 31, at 494–98 (comparing criminal and immigration protections).

228. *See infra* notes 230–33.

disparities in asylum decision-making, by both immigration judges and asylum officers, exist.[229] Arbitrary decision-making also appears to affect a broader range of immigration matters beyond asylum. Immigration advocates know that identifying an immigration judge's proclivity towards denying or granting asylum—which can be easily found through data made publicly available by the Transactional Records Access Clearinghouse (TRAC)[230]—serves as a proxy for an IJ's willingness to grant other relief applications, many of which serve as defenses to removal based on prior convictions. Emily Ryo's preliminary study of immigration judges' decision making in immigration bond hearings suggests wide variations in outcomes across IJs.[231] And although the federal nature of immigration law should suggest the existence of relatively uniform outcomes across courts across the country, certain immigration courts—such as the Atlanta, Georgia Immigration Court—are notorious for denying applications for relief filed by noncitizens.[232]

Compounding documented and anecdotal evidence of arbitrariness and bias is the concern that institutional competence questions are validly raised towards the broader immigration bench. Immigration judges are executive branch employees of the Department of Justice. They enjoy the job security associated with many federal government jobs, but do not have the decisional independence of federal court judges.[233] Many IJs are former immigration prosecutors, even though

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229. *See generally* Ramji-Nogales et al., *supra* note 29.

230. Transactional Records Access Clearinghouse, *Immigration Judge Reports—Asylum*, http://trac.syr.edu/immigration/reports/judgereports/ [https://perma.cc/B7A4-93VX] (last visited Aug. 1, 2016).

231. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y. REV. 117 (2016).

232. The Atlanta Immigration Court has an overall asylum denial rate of ninty-three percent, compared to fifty-two percent across the rest of the country. As one article stated:

> Atlanta immigration judges have been accused of bullying children, badgering domestic violence victims and setting standards for relief and asylum that lawyers say are next to impossible to meet. Given Atlanta immigration judges' reluctance to grant asylum, some immigrants who fear returning to their native countries don't even pursue it.

Elise Foley, *Here's Why Atlanta is One of the Worst Places to be an Undocumented Immigrant*, HUFFINGTON POST (May 25, 2016), http://www.huffingtonpost.com/entry/deportation-raids-immigration-courts_us_574378d9e4b0613b512b0f37 [https://perma.cc/ZQ9R-XAKH].

233. Press Release, Nat'l Ass'n of Immigration Judges, *Releasing Further Information Will Not Lead to Clarity and Will Compound the Harms and Unfair Process: The Problematic* Context of AILA's FOIA Suit (Aug. 3, 2016) ("[T]he position of Immigration Judges is a legal anomaly . . . IJs are considered attorneys by the U.S. Department of Justice. This classification means we are subject to the orders

prior government experience by an IJ tends to lead to a greater unwillingness to grant noncitizens' applications for relief.[234] Findings of outright political bias in IJ hiring during the George W. Bush Administration continue to affect the current IJ bench.[235] Furthermore, the conditions under which IJs work do not lend themselves to fair enforcement of the law, in light of extremely high caseloads, the mental stress of hearing high-stakes claims, and minimal resources.[236]

Front-line immigration officers—analogous to police officers in the criminal context—also possess high levels of decision making power that are immune from accountability mechanisms typically found in criminal law. These officers, employed by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP), have the power to physically incarcerate noncitizens, which is enhanced by the existence of criminal convictions.[237] Similarly, ICE officers make decisions whether to place individuals in removal proceedings at all, often on the basis of their legal assessment of convictions, and "no rule or agency practice requires or even regularly facilitates the review of a [charging document] by *any* attorney before it is filed with the immigration court."[238] In some cases, ICE officers are empowered to play the role of judge, jury, and prosecutor through the use of truncated proceedings that bypass immigration courts altogether.[239] At the investigation stage, allegations of ICE officers trampling on noncitizens' Fourth Amendment rights through the use of pre-dawn

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of supervisors, and like any employee, are at risk of discipline for failure to follow the instructions of our supervisors.").

234. "[W]ork experience in an enforcement capacity with the former Immigration and Naturalization Service or the current Department of Homeland Security made judges less likely to grant asylum." Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, STAN. L. REV. 295, 347 (2007).

235. U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), http://www.justice.gov/oig/special/s0807/final.pdf [https://perma.cc/KW4W-4ZB5].

236. *See* Molly Hennessy-Fiske, *As Immigration Judges' Working Conditions Worsen, More May Choose Retirement*, L.A. TIMES (Aug. 18, 2015), http://www.latimes.com/nation/la-na-immigration-judges-21050818-story.html [https://perma.cc/U9K6-N4SH] ("Though other kinds of judges usually handle 500 cases a year, immigration judges typically handle more than 1,400, and some juggle more than 3,000.").

237. *See* 8 U.S.C. § 1226(c)(1) (2012) (mandatory detention for prior convictions falling under other immigration provisions).

238. Jason Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 70 (2014).

239. *See* Koh, *supra* note 214.

home and other immigration raids have been raised by advocates.[240] In criminal law, forced entries to homes without warrants or other excessive uses of investigatory power are limited by various mechanisms such as the Fourth Amendment or warrant requirements—mechanisms which are imperfect, but nonetheless exist.[241] But the exclusionary rule applies to immigration proceedings only where "egregious" violations of the Fourth Amendment take place, leaving immigration enforcement officers again with minimal accountability.[242]

Furthermore, ICE and CBP agents operate within an administrative agency culture that arguably places a disproportionate emphasis on enforcement and that has a long track record of allegations of racial profiling and bias.[243] While these agencies are technically accountable to the President, even that accountability has been strained.[244] For instance, when President Obama announced the creation of the Deferred Action for Childhood Arrivals (DACA) program, the ICE officers' union soon filed a lawsuit opposing the enactment of DACA.[245] Scholars who have studied immigration enforcement agency culture have concluded that a strong pro-enforcement environment pervades ICE and CBP, and is amplified by the agency's use of metrics that encourage the apprehension, detention, and removal of noncitizens with prior convictions.[246]

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240. For discussions of ICE raids, see Stella Burch Elias, "*Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109 (2008); Elizabeth Young, *Converging Systems: How Changes in Fact and Law Require a Reassessment of Suppression in Immigration Proceedings*, 17 U. PA. J. CONST. L. 1395 (2015).

241. *See, e.g.*, Sun, *supra* note 41, at 151 ("Current Fourth Amendment doctrine . . . precludes any real inquiry into discriminatory enforcement of the law.").

242. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

243. *See* Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 25 (2015).

244. *Id.* at 24–25.

245. Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2012 WL 3629252 (N.D. Tex. Aug. 23, 2012); *see also* Motomura, *supra* note 243, at 23 (discussing *Crane* litigation).

246. According to Nina Rabin, ICE's agency culture tends to "view all immigrants as criminal threats," but also places particular emphasis on immigrants with prior convictions, such that "the sole fact of a conviction—without regard to its seriousness or context—is a nearly irreversible determinant of the agency's approach to any given case." Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 196 (2014). Other scholars have identified immigration agencies' pro-enforcement priorities as an impediment to the fulfillment of competing statutory and regulatory goals. *See* Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1625–26 (2010) (trafficking victims); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L.

Prosecutors for ICE, too, lack many of the accountability mechanisms or constitutional limitations to which criminal prosecutors must adhere.[247] As Jason Cade has demonstrated, ICE attorneys tend to exercise prosecutorial discretion inconsistently, with some attorneys aggressively litigating removal cases in ways that do not comport with relevant legal standards[248] or with the broader goal of justice.[249] Rules against double jeopardy or statutes of limitation do not affect prosecutors' charging decisions.[250] ICE trial attorneys do not have the same discovery obligations of their criminal prosecutor counterparts, despite having access to vast amounts of information in comparison to noncitizens, particularly those pro se.[251] In fact, ICE attorneys may, by regulatory right, amend the charging document in removal proceedings at almost any time,[252] even if interpretations of a crime-based removal ground change during the proceedings. The problem of certain ICE attorneys over-charging noncitizens with crime-based removal grounds presents issues of particular relevance to the vagueness inquiry. One data point to suggest excessive charges alleged by prosecutors is recent statistics obtained through the Freedom of Information Act that show that fifty percent of charges initially filed in immigration court are ultimately rejected by IJs.[253]

As this section has established, the removal system affecting noncitizens with prior convictions is administered by governmental

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REV. 1089, 1120 (2011) (INS's pro-enforcement goals against individual noncitizens impeding progress in enforcement against employers who hire undocumented workers); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 151 (2012) (immigration detention).

247. In the criminal context, prosecutors' powers are systematically limited in a variety of ways, such as: (1) through the constitutional rights of defendants (such as the right to government-appointed counsel, review of probable cause determinations, trial by jury or an impartial judge, or prohibition on double jeopardy prohibition); (2) administrative and statutory rights (such as pretrial motions and hearings, speedy trial rules, and discovery rules); and (3) and practical choices such as vertical prosecution arrangements (in which a case is assigned to a single prosecutor). *See* Cade, *supra* note 238, at 56–57.

248. *Id.* at 35 ("[L]ittle constrains trial attorneys from proceeding with erroneous or overblown allegations.").

249. *Id.* at 20–23 (suggesting that ICE attorneys should act as "ministers of justice").

250. *See* Markowitz, *supra* note 185, at 1315–16; Stumpf, *supra* note 217, at 1746.

251. *See* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 74 BROOK. L. REV. 1569, 1570–71 (2014).

252. 8 C.F.R. § 1240.10(e) (2016).

253. *ICE Targeting: Odds Noncitizens Ordered Deported by Immigration Judge*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Aug. 2014), http://trac.syr.edu/phptools/immigration/court_backlog/apprep_outcome_leave.php [https://perma.cc/QDE3-2JTG]; *see also* Cade, *supra* note 238, at 36 (discussing the significance of the fifty percent termination rate).

actors—namely immigration judges, ICE officers, and ICE prosecutors—who have a track record of enforcing the law in a way that undermines core due process values such as consistency, predictability, and fairness. Discretion in some parts of the system is severely constrained, for instance, with respect to immigration judges' ability to grant discretionary relief or grant release from immigration detention on bond. But discretion in other areas—and in particular, with respect to discretion that immigration enforcement actors are able to exercise in reading and levying penalties for noncitizens that they believe fall within any number of crime-based removal grounds—is extremely high and lacking in constraints. Scrutinizing potentially vague removal grounds, and either invalidating them or reading them narrowly, would thus impose a small but meaningful measure of restraint upon those actors in precisely the manner envisioned by the vagueness doctrine.

IV. EXTENDING VAGUENESS: HOW VAGUENESS DOCTRINE CAN SHAPE CRIMMIGRATION LAW

This Part identifies specific areas potentially impacted by the void for vagueness doctrine post-*Johnson*. It first discusses the categorical approach in immigration cases, which is the methodology used by almost all adjudicators to assess the immigration consequences of crime. It suggests that reading *Johnson* in light of the categorical approach case law does not lead to a critique of the categorical approach itself, as some have suggested,[254] but instead supports a robust, strictly elements-focused version of the categorical approach.

This Part then identifies two specific statutory provisions that have already come before the federal courts of appeal: the definition of a crime of violence at 18 U.S.C. § 16(b), which will be decided by the Supreme Court in *Lynch v. Dimaya*, as well as the definition of "obstruction of justice" crimes. The Article argues that federal courts that have invalidated the crime of violence definition and applied constitutional avoidance to the obstruction of justice definition reflect an appropriate use of the void for vagueness doctrine. The Article also briefly discusses three other provisions that appear ripe for vagueness analysis, namely crimes involving moral turpitude (CIMTs), the removal ground relating to two or more CIMTs not arising out of a

254. *See* Rory Little, *Opinion Analysis: The Court Strikes Down the ACCA's Residual Clause as Vague. But is the Real Problem the "Categorical" Approach?*, SCOTUSBLOG (Jun. 29, 2015, 10:55 AM), http://www.scotusblog.com/2015/06/opinion-analysis-the-court-strikes-down-the-accas-residual-clause-as-vague-but-is-the-real-problem-the-categorical-approach/ [https://perma.cc/VRM9-UP89].

single scheme of criminal misconduct, and "particularly serious crimes."

At least three series of objections may result from the suggestion that courts use the void for vagueness doctrine to invalidate or read narrowly various crime-based removal grounds. One is that extending vagueness beyond the ACCA's residual clause may hamper immigration enforcement's ability to prioritize the removal of noncitizens with prior convictions. Such an outcome is unlikely because the immigration statutes already contain an extensive array of provisions that enable the government to bring removability charges against noncitizens for a vast range of prior convictions. Take crimes of violence, for instance. Invalidating the crime of violence provision at 18 U.S.C. § 16(b) still leaves intact the crime of violence definition at 18 U.S.C. § 16(a), which encompasses any "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[255] Alternatively, the government can seek nearly automatic deportation based on the roughly eighty other aggravated felony sub-definitions, or on any number of other grounds of crime-based removal provisions, including offenses related to controlled substances,[256] firearms,[257] protective order violations,[258] stalking,[259] or child abuse, neglect or abandonment.[260] The normative assumptions behind this objection are also questionable and raise a broader debate over the human costs of the nation's current immigration enforcement framework—particularly the use of punitive tools like detention, the relative absence of discretionary relief, and the impact on American citizens—that are beyond the scope of this Article, but deeply debatable.[261]

A second concern is that judicial intervention in crime-based removal grounds via the vagueness doctrine will give rise to reactionary measures in the other branches of government, particularly Congress, which may be motivated to enact even harsher, albeit clearer, laws. The concern with reactionary responses aimed at unraveling legal advances made on behalf of immigrants is particularly possible with the pending inauguration of Donald Trump and the composition of Congress in 2017. But the Trump campaign's consistent and scathing attacks on immigrants suggest that the future Administration's attempts

255. 18 U.S.C. § 16(a) (2012).

256. *See* 8 U.S.C. § 1227(a)(2)(B) (2012).

257. *See id*. § 1227(a)(2)(C).

258. *See id*. § 1227(a)(2)(E)(ii).

259. *See id*. § 1227(a)(2)(E)(i).

260. *Id*.

261. *See* Angelica Chazaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016) (rejecting normative claim that deportation of immigrants with prior convictions should be prioritized).

to enact more punitive immigration law and policy will take place regardless of other legal developments such as a stronger void for vagueness doctrine. It is also possible that specifying the crimes for which immigration consequences attach may cause individual legislators to be less willing to hide behind broad but politically charged and seemingly serious terms like "aggravated felonies" or "crimes of violence" if, in fact, it is evident that those categories are drafted to encompass crimes that are not aggravated, not felonies, and not violent.

Third, some may wonder whether applying vagueness to crimmigration laws will necessarily result in the invalidation of a much broader swath of related statutes, such as the felony murder rule, crimes of moral turpitude in non-immigration settings, or provisions that (like the residual clause) make reference to unspecified levels of risk. Not every related statute raises the concerns about notice and systematic arbitrariness and discrimination in enforcement to the extent associated with crimmigration. As this Article argues, context does matter. Moreover, the *Johnson* majority addressed the overextension possibility, and emphasized the indeterminacy caused by courts' deviation from a strict categorical approach in its response to this concern.[262] And while *Johnson* asserted that scores of statutes were unlikely to be invalidated as a result of its holding, the Court never suggested that *no* other vague laws should face constitutional scrutiny.[263] The fate of other laws that seem to raise vagueness concerns post-*Johnson* lies outside the scope of this Article. But it may indeed be that significant numbers of statutes are so poorly drafted that further vagueness scrutiny would improve the fairness of the legal system.[264]

Finally, this Article does not call for invalidation with respect to all of the immigration provisions discussed below; in some cases, use of the constitutional avoidance doctrine to read a statute narrowly in order to avoid a vagueness problem may be appropriate.

A. Affirming a Robust Categorical Approach

At first blush, one might read *Johnson* as implying that the categorical approach itself is the source of the vagueness problem in the residual clause.[265] If so, then the very methodology used to interpret scores of federal sentencing and immigration laws would come under

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262. *See Armed Career Criminal Act — Residual Clause — Johnson v. United States*, *supra* note 128, at 307.

263. *Johnson v. Unites States*, 135 S. Ct. 2551, 2561 (2015).

264. *See, e.g.*, Evan Tsen Lee, *Why California's Second-Degree Felony Murder Rule is Now Void for Vagueness*, 43 HASTINGS CONST. L.Q. 1 (2015) (arguing that California second degree felony murder statute is now void under *Johnson v. United States*).

265. *See* Little, *supra* note 254.

question. This Part establishes why *Johnson* does not undermine the essential features of the categorical approach, and instead strengthens it. The crux of the categorical approach is that decision-makers are prohibited from consulting the underlying facts of a prior conviction in order to assess whether that conviction triggers a given sentencing (or immigration) sanction. It is critical to understand that the "ordinary case" approach used in residual clause cases was one variation of that categorical approach, but not representative of the methodology across all relevant statutes.

When describing the ordinary case approach, the Court noted that a fundamental problem with the approach from a vagueness perspective was that it "ties the judicial assessment of risk to a judicially imagined 'ordinary' case of a crime, *not to real-world facts or statutory elements*."[266] The Court's statement thus implied that its inability to review the "real-world facts" constituted one problem in the vagueness analysis in *Johnson*. Although the majority specifically defended the merits of the categorical approach, Justice Alito's dissent advocated for a disposal of the categorical approach itself in favor of a "conduct-specific" one, in which courts would readily assess the underlying facts.[267] A year after *Johnson*, in *Welch v. United States*,[268] the majority opinion contained a peculiar statement about *Johnson* and the categorical approach in holding that *Johnson* would apply retroactively.[269] *Welch* described, imprecisely, the categorical approach as a contrast between employing facts versus the "idealized ordinary case" without recognizing that the "ordinary case approach" used in residual clause cases was itself an atypical variation on the categorical approach.[270]

But a more accurate read of *Johnson*, as well the broader case law addressing the categorical approach, clarifies that the problem in *Johnson* lies with the peculiar *variation* of the categorical approach—the "ordinary case" analysis—adopted by courts when interpreting the residual clause of the ACCA and similar provisions. By the time the case reached the Supreme Court, lower courts had regularly used an "ordinary case" version of the categorical approach with residual clause cases. This ordinary case approach was not anchored in statutory elements, but rather in judges' hypothetical estimations of what an

266. *Johnson*, 135 S. Ct. at 2557 (emphasis added).

267. *Id.* at 2579–80 (Alito, J., dissenting).

268. 136 S. Ct. 1257 (2016).

269. *Id.* at 1264.

270. *Id.* at 1262. The *Welch* majority also went on to state that in *Johnson*, "[t]he residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Id.*

archetypal or standard case involving the crime in question should entail. Reading *Johnson* to mean that adjudicators should review the underlying facts of a conviction in order to avoid a vagueness problem misunderstands both *Johnson* as well as the extensive jurisprudence on the categorical approach. Significantly, every time *Johnson* referenced the prohibition on consulting "real-world facts" to determine the application of the ACCA, it also emphasized the absence of "statutory elements" in the analysis. Writing of its prior decision in *James v. United States*, for instance, the Court highlighted "how speculative (*and how detached from statutory elements*) this enterprise has become."[271] By emphasizing statutory elements, the *Johnson* decision treats vagueness and the categorical approach as consistent with—not opposed to—each other. In other words, a categorical approach that relies strictly on statutory elements is less likely to run afoul of the vagueness doctrine. And while a strictly factual approach might similarly avoid vagueness problems, nothing in the majority opinion suggests an intent by the Court to abandon its longstanding commitment to the categorical approach's counterfactual nature.

In fact, *Johnson* and the concerns animating the vagueness doctrine support the application of the categorical approach in its most robust forms, meaning a categorical approach that turns largely (if not exclusively) on underlying statutory elements and that limits fact-finding.[272] After all, *Johnson* explicitly affirmed the categorical approach in its refusal to depart from the basic framework established by *Taylor v. United States*.[273] While a full discussion of the categorical approach is beyond the scope of this Article, the Supreme Court's recent categorical approach cases—particularly *Descamps v. United States*,[274] *Mathis v. United States*,[275] *Mellouli v. Lynch*,[276] and *Moncrieffe v. Holder*[277]—largely endorse a strictly elements-based version of the categorical approach.[278] *Descamps* and *Mathis* limit the

271. *Johnson*, 135 S. Ct. at 2558 (emphasis added).

272. *See generally* Koh, *supra* note 26 (describing features of a robust categorical approach).

273. *See supra* text accompanying notes 158–60.

274. 133 S. Ct. 2276 (2013).

275. 136 S. Ct. 2243 (2016).

276. 135 S. Ct. 1980 (2015).

277. 133 S. Ct. 1678 (2013).

278. *Torres v. Lynch*, 136 S. Ct. 1619 (2016), and *Nijhawan v. Holder*, 557 U.S. 29 (2009), represent two exceptions to the Court's recent trend in favor of a robust, strict elements-based categorical approach. In *Torres*, the Court found that a connection to interstate or foreign commerce was not a required element for prior convictions to fall within the ambit of an immigration statute defining an aggravated felony as including arson offenses "described in" federal law, even though federal law required a connection to interstate or foreign commerce. 136 S. Ct. at 1624. Justice

range of circumstances in which adjudicators may consult the underlying record of conviction to determine whether a prior conviction triggers either sentencing or immigration consequences, thereby limiting opportunities for fact-finding.[279] In both *Mellouli* and *Moncrieffe*, the Court limited the government's broader construction of drug crimes upon which removability was premised.[280] Those decisions reflect strong endorsements of the categorical approach in the immigration context.

Moreover, the values at the heart of the vagueness doctrine—providing notice to ordinary people and preventing arbitrary and discriminatory enforcement of the law—are consistent with, and best served by, a strong elements-based version of the categorical approach. The categorical approach in its most robust form promotes "efficiency, fairness, and predictability in the administration of immigration law."[281] As the Court stated in *Mellouli*, "the categorical approach is suited to the realities of the system."[282] In many cases, the categorical approach leads to clear and predictable outcomes based on statutory elements and uniform rules of interpretation, and this Article does not advocate applying vagueness to those statutes in which an elements-based categorical approach produces relatively uniform results. But *Johnson* recognizes that statutes for which the categorical approach does not

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Sotomayor's dissent (joined by Justices Thomas and Breyer) reflects the application of a more robust categorical approach, stating:

> Against our standard method for comparing statutes and the text and structure of the INA, the majority stacks a supposed superfluity, a not-so-well-settled practice, and its conviction that jurisdictional elements are mere technicalities. But an element is an element, and I would not so lightly strip a federal statute of one.

Id. at 1642 (Sotomayor, J., dissenting). In *Nijhawan*, the Court endorsed the use of a "circumstance-specific approach" in certain statutes, such as the aggravated felony ground for fraud crimes involving loss to the victim of $10,000 or more. 557 U.S. at 37–40.

279. *Mathis* and *Descamps* addressed the treatment of "divisibility" in the categorical approach, which determines whether certain statutes may be subject to a modified categorical approach involving consultation of the underlying record of conviction. *See Mathis*, 136 S. Ct. 2243; *Descamps*, 133 S. Ct. 2276. While a full treatment of divisibility and the modified categorical approach are outside the scope of this Article, the approach taken in *Mathis* and *Descamps* is consistent with a strong elements-based categorical approach. *See Descamps*, 133 S. Ct. at 2293 ("[T]he modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction.").

280. *Mellouli*, 135 S. Ct. at 1990–91; *Moncrieffe*, 133 S. Ct. at 1692–93.

281. *Mellouli*, 135 S. Ct. at 1987.

282. *Id.* at 1986 (citing Koh, *supra* note 26); *see also Moncrieffe*, 133 S. Ct. at 1685 (the "categorical approach has a long pedigree in our Nation's immigration law") (citing Das, *supra* note 135, at 1688–1702, 1749–52).

yield clarity or consistency in the courts may exist.[283] Measuring consistency is, of course, a potentially elusive process. But evaluating the degree to which lower courts are split on assessing the immigration consequences of particular crimes may provide an initial data point for doing so.[284] In cases where courts seem unable to achieve consensus over time, rather than discard the categorical approach and yield to the temptation to consult the underlying facts (as Alito suggests and as the Attorney General has attempted to do with crimes involving moral turpitude, discussed *infra*[285]), courts should consider whether the problem lies in the statute's vagueness. The next section offers examples of specific immigration provisions in which the best remedy may involve either invalidation or a narrowing construction by courts pursuant to the vagueness doctrine.

B. Evaluating Specific Provisions Against Vagueness

A number of existing immigration provisions raise potential vagueness problems. Depending on the severity of the vagueness, courts should either invalidate those provisions outright or, alternatively, invoke the canon of constitutional avoidance and read those laws narrowly in order to prevent courts and immigration agencies from enforcing laws in an unconstitutionally vague manner. This section examines two removal grounds that have been litigated, one of which—*Lynch v. Dimaya*—will be decided by the Supreme Court this term. It also identifies several others that seem ripe for further analysis under the vagueness doctrine.

1. "CRIMES OF VIOLENCE" AT 18 U.S.C. § 16(B)

On September 29, 2016, the Supreme Court granted certiorari in *Lynch v. Dimaya* to resolve a circuit split on whether the sub-definition of a "crime of violence" under 18 U.S.C. § 16(b) is void for vagueness. "Crimes of violence" accompanied by a term of imprisonment of at least one year constitute one of 80 sub-definitions of an aggravated felony.[286] To understand the significance of crimes of

283. *Johnson*, 135 S. Ct. at 2599–60.

284. For example, Kari Hong has compared cases in circuits following *Descamps* and those applying an analysis advocated by Justice Alito, and found less disagreement among judges adhering to *Descamps*' categorical approach. Kari Hong, Mathis, Descamps *and the End of Crime-Based Deportation*, U.C. DAVIS L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833682 [https://perma.cc/8LX4-6NUW].

285. *See infra* text accompanying notes 328–49, and *supra* text accompanying notes 209–14.

286. 8 U.S.C. § 1101(a)(43)(F) (2012).

violence, brief background on aggravated felonies is necessary. The Immigration and Nationality Act's (INA) definition of an "aggravated felony" sets forth, as the Supreme Court recently put it, "21 subparagraphs [that] enumerate some 80 different crimes."[287] Aggravated felonies are the death knells of immigration. A noncitizen with a prior conviction deemed to be an aggravated felony faces deportation, mandatory detention, and is stripped of the right to seek most forms of relief from removal or affirmative immigration benefits.[288] For noncitizens without lawful permanent residence, aggravated felonies can trigger truncated removal proceedings that deprive them of the opportunity for an in-person hearing before an immigration judge.[289]

Crimes of violence are defined by reference to the federal criminal statute at 18 U.S.C. § 16, which in turn provides two sub-definitions. The first part of the crime of violence definition covers "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"[290]—a provision that courts have not found vague and that is not before the Court in *Dimaya*. However, even if a crime does not fall within subsection (a), the definition at subsection (b) might still subject it to "crime of violence" classification. The latter provision at subsection (b) does raise strong vagueness concerns. That section covers "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[291]

As the Ninth, Sixth, Seventh, Tenth, and Third Circuits have already found, the crime of violence definition at § 16(b) contains striking similarities to the residual clause invalidated in *Johnson*. In *Dimaya v. Lynch*,[292] the Ninth Circuit was the first federal appeals court to find § 16(b) unconstitutionally vague under the holding of *Johnson*, and emphasized these textual similarities to extend *Johnson* to the immigration context.[293] The Sixth Circuit in *Shuti v. Lynch*[294] adopted much of the reasoning of *Dimaya* in another immigration case, and found § 16(b) unconstitutionally vague.[295] The Sixth Circuit agreed with the Ninth Circuit's holding in *Dimaya* despite an earlier decision,

287. *Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016).
288. 8 U.S.C. § 1227(a)(2)(A)(iii); § 1226(c)(1)(B); § 1182(h); § 1229b(a)(3).
289. *See* Koh, *supra* note 214, at 23–28 (describing administrative removal).
290. 18 U.S.C. § 16(a) (2012).
291. *Id.* § 16(b).
292. 803 F.3d 1110 (9th Cir. 2015).
293. *Id.* at 1120.
294. 828 F.2d 440 (6th Cir. 2016).
295. *Id.* at 451.

United States v. Taylor,[296] in which the court had declined to extend Johnson to a federal criminal provision that was nearly identical in language to § 16(b).[297] In the Seventh Circuit, *United States v. Vivas-Cejas*[298] involved a federal criminal prosecution for illegal re-entry in which the noncitizen received an enhanced sentence for having a prior conviction deemed a "crime of violence" under 18 U.S.C. § 16(b).[299] Similarly, the Tenth Circuit, in *Golicov v. Lynch*,[300] has emphasized the evident similarities between § 16(b) and the residual clause, as well as the direct language from the *Johnson* majority.[301] On November 8, 2016, the Third Circuit also found the provision vague.[302] In addition to the basic textual resemblances between the two statutes, the five circuits have emphasized that courts interpreting the crime of violence provision had adopted an identical variation of the categorical approach—the "ordinary case approach"—as had been used with the residual clause cases.[303] Furthermore, the Ninth and Sixth Circuits recognized that the vagueness finding would serve broader concerns of notice, efficiency, predictability, and fairness in the immigration context.[304]

The direct extension of *Johnson* to crimes of violence has also generated considerable dissent, leading to a circuit split that may have compelled the Court to grant certiorari in *Dimaya*. When initially presented with the question, the Fifth Circuit found 18 U.S.C. § 16(b) to be unconstitutionally vague in *United States v. Gonzalez-Longoria*.[305] Two weeks after the first *Gonzales-Longoria* decision was issued, the Fifth Circuit on its own motion decided in favor of rehearing en

296. 814 F.3d 340 (6th Cir. 2016).

297. *Id.* at 379. *Taylor* did not directly involve § 16(b)'s crime of violence definition, but another strikingly similar sentencing provision that imposed a sentencing enhancement for a crime "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B) (2012). *Taylor* had emphasized the unique features of the residual clause and distinguished those from provision before it. But *Taylor*, too, elicited a strong dissent from Judge Helene White, who supported vagueness. 814 F.3d at 393–98 (White, J., concurring in part and dissenting in part). On August 3, 2016, the Second Circuit agreed with the logic of *Taylor* to find that § 924(c)(3)(B) was not void for vagueness. *United States v. Hill*, No. 14-3872, slip op. at 22 (2d Cir. Aug. 3, 2016).

298. 808 F.3d 719 (7th Cir. 2015).

299. *Id.* at 720.

300. No. 16-9530, slip op. (10th Cir. Sept. 19, 2016).

301. *Id.* at 13–15.

302. *Baptiste v. Att'y Gen.*, No. 14-4776, WL 6595943 (3d Cir. Nov. 8, 2016).

303. *See, e.g.*, *Dimaya v. Lynch*, 803 F.3d 1110, 1116 (9th Cir. 2015) (citing *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013)).

304. *See id.* at 1113–14; *Shuti v. Lynch*, 828 F.3d 440, 445 (6th Cir. 2016).

305. 813 F.3d 225, 227 (5th Cir. 2016).

banc.[306] On August 3, 2016, the Fifth Circuit issued an en banc decision that found *Johnson* inapplicable to § 16(b).[307] The Fifth Circuit adopted the government's arguments, which the Sixth, Seventh, and Ninth Circuits before it had rejected. The second *Gonzalez-Longoria* decision emphasized two main distinctions between the ACCA's residual clause and § 16(b). First, the en banc court highlighted the residual clause's reliance on "risk of physical *injury*," which it found to be more indeterminate than the "risk of physical *force*" standard employed by § 16(b) because the former includes "conduct or events occurring after the crime is complete" whereas the latter only includes risks arising "in the course of committing" an offense.[308] Citing the Supreme Court's decision in *Leocal v. Ashcroft*,[309] which analyzed § 16(b) in the immigration context and did not raise vagueness concerns,[310] the court found § 16(b) to be "predictively more sound" than the residual clause.[311] Second, the en banc opinion asserted that the residual clause's history before the Supreme Court suggested more confusion than § 16(b), again pointing to the fact that the *Johnson* opinion did not reference *Leocal*.[312] But the Fifth Circuit decision also generated a vigorous dissent from four judges, who found the distinctions between the two statutes to be inconsequential from a vagueness perspective and characterized the majority's opinion as drifting "into the miasma of the minutiae."[313] Furthermore, the majority in *Gonzalez-Longoria* did not acknowledge broader concerns with notice and fair enforcement as applied to immigration law.[314]

The Supreme Court's decision in *Lynch v. Dimaya* this term will resolve the validity of crimes of violence under § 16(b). The Court should extend the void for vagueness doctrine to 18 U.S.C. § 16(b). The textual similarities between the two provisions are obvious, and *Johnson* leaves enough room to find that statutes need not be a carbon copy of the residual clause in order to run afoul of the vagueness concerns regarding indeterminacy, incoherence, and judicial

306. *United States v. Gonzalez-Longoria*, 815 F.3d 189, 189 (5th Cir. 2016) (en banc).

307. *United States v. Gonzalez-Longoria*, No. 15-40041, slip op. at 1 (5th Cir. Aug. 5, 2016) (en banc).

308. *Id.* at 7 (emphasis added).

309. 543 U.S. 1 (2004).

310. *See id.* at 10–12.

311. *Gonzalez-Longoria*, No. 15-40041, slip op. at 9 (5th Cir. Aug. 5, 2016) (en banc).

312. *Id.* at 11–12.

313. *Id.* at 24 (Jolly, J., dissenting).

314. In addition, the Fifth Circuit found that § 16(b) as applied to Mr. Gonzalez-Longoria was not vague, pointing to the fact that he had been previously convicted under an assault statute. *Id.* at 10–11.

inconsistency. Further, the broader crimmigration context discussed in this Article—in which concerns about notice and fair enforcement resonate widely and are particularly acute given the crime of violence provision's designation as an aggravated felony—should lend further weight to a stronger vagueness analysis in *Dimaya*. But 18 U.S.C. § 16(b) is not the only crimmigration provision potentially impacted by the void for vagueness doctrine, as the next sections demonstrate.

2. OBSTRUCTION OF JUSTICE

Another of the eighty-some sub-definitions of an aggravated felony is an "offense related to obstruction of justice," with a term of imprisonment of at least one year.[315] The INA—as with many crime-based removal grounds—does not shed further light on how adjudicators and courts should define "obstruction of justice." Take, for instance, a conviction for "accessory to a felony" under California Penal Code Section 32 carrying a sentence of probation. In order for such a conviction to constitute an "offense related to obstruction of justice," the criminal statute would have to contain the generic elements of "obstruction of justice."[316] A court might find, for instance, that in order for a conviction to rise to the level of "obstruction of justice," it would have to satisfy the generic elements of interfering with an ongoing proceeding or investigation. Indeed, in May 2011, the Ninth Circuit found in *Trung Thanh Hoang v. Holder*[317]—following existing BIA precedent[318]—the requirement of interference with an ongoing proceeding or investigation to be an element of the obstruction of justice definition.[319] Under such an interpretation, a conviction for accessory to a felony would not trigger the aggravated felony classification because a facial review of California Penal Code Section 32 easily establishes that the statute does not contain a matching element of interference with an ongoing proceeding or investigation.[320]

But after the Ninth Circuit's decision in *Hoang*, the Board of Immigration Appeals (BIA) stripped the requirement of an ongoing

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315. 8 U.S.C. § 1101(a)(43)(S) (2012).

316 . CAL. PENAL CODE § 32 (West 2016).

317. 641 F.3d 1157 (9th Cir. 2011).

318. *See In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 896 (B.I.A. 1999).

319. *Hoang*, 641 F.3d at 1164.

320. California Penal Code Section 32 states:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

CAL. PENAL CODE § 32.

proceeding or investigation from the elements of obstruction of justice. Specifically, in the case of Mr. Valezuela-Gallardo—who had benefitted from the *Hoang* decision as applied to his conviction under California Penal Code Section 32—the BIA *sua sponte* reopened his previously-dismissed proceedings before the Board, and used his case as an opportunity to announce a new, broader interpretation of the elements of obstruction of justice.[321] In *In re Valenzuela Gallardo*,[322] the BIA redefined obstruction of justice as "the affirmative and intentional attempt, with specific intent, to interfere with *the process of justice* . . . ," and emphasized that the existence of ongoing criminal investigation or trial is "not an essential element" of such a crime for purposes of designating it an aggravated felony.[323]

In March 2016, the Ninth Circuit found that the BIA's reformulation of the elements of obstruction of justice—specifically, its use of the concept, "the process of justice"—raised constitutional doubts under the void for vagueness doctrine.[324] *Valenzuela-Gallardo* emphasized that the BIA's definition "leaves grave uncertainty about the plethora of steps before and after an 'ongoing criminal investigation or trial' that comprise 'the process of justice,'"[325] and that the BIA "uses an amorphous phrase—'process of justice'—without telling us what that phrase means."[326] The Court relied heavily on *Johnson*'s concerns that indeterminate statutes—particularly statutes that reflected indeterminacy with respect to the standard to be evaluated—were impermissibly vague.[327] The Ninth Circuit thus refused to extend *Chevron* deference to the BIA's construction of the removal ground by applying the constitutional avoidance doctrine to its analysis under step one of *Chevron*, which seeks to ascertain and give effect to the intent of Congress.[328] It remanded the case to the BIA to develop a new interpretation that would not raise vagueness problems or to adopt the preexisting definition, which had required the existence of an ongoing proceeding.[329] Despite a vigorous dissent from Judge Seabright, the government did not seek rehearing en banc nor did the Solicitor General's Office seek a writ of certiorari with the Supreme Court. The Ninth Circuit's analysis of the obstruction of justice ground, and its

321. *Valenzuela-Gallardo v. Lynch*, 818 F.3d 808, 812 (9th Cir. 2016).

322. 25 I. & N. Dec. 838, 841 (B.I.A. 2012).

323. *Id.* at 841 (emphasis added).

324. *Valenzuela-Gallardo*, 818 F.3d at 819.

325. *Id.* at 820.

326. *Id.* at 822.

327. *Id.* at 819.

328. *Id.* at 815–18, 823–24 (discussing application of constitutional avoidance to the first step of analysis set forth in *Chevron, USA, Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984)).

329. *Id.* at 824.

application of constitutional avoidance to reject the BIA's broad interpretation of the statute, appears poised to potentially influence other immigration statutes that raise similar concerns.

3. Other Potentially Vague Provisions

Several other crime-based removal provisions present potential vagueness problems. This subsection identifies three such provisions: the definition of a "crime involving moral turpitude;" the meaning of multiple crimes "not arising out of a single scheme of misconduct;" and the definition of a "particularly serious crime."

a. Crimes Involving Moral Turpitude

In addition to aggravated felonies, the immigration statute contains a number of other categories of crimes—such as controlled substance grounds or firearms offenses—that trigger immigration sanctions. "Crimes involving moral turpitude" (CIMTs) constitute one such category. Even if CIMTs do not rise to the level of aggravated felonies in terms of harshness, they can still lead to deportation, detention, and—depending on timing, the actual sentence imposed, the potential sentence associated with the conviction, and the noncitizen's length of residence—can also disqualify an individual from seeking discretionary relief irrespective of the merits of the case.[330]

CIMTs may also be the most confusing removal ground in the INA. In general, a number of courts require some kind of fraud, deceit, or base, vile, or depraved conduct that shocks the conscience.[331] As one commentator has observed, for over a century, "[n]o court has been able to define with clarity what [a CIMT] means."[332] Courts have cited prevailing moral standards in analyzing CIMTs, but the personal inclinations of individual judges have arguably shaped this standard.[333] Variations in the definition of a CIMT across federal appeals courts means that seemingly similar state offenses may be classified as CIMTs differently across circuits.[334] Significant controversy surrounding the interpretive methodology and use of the categorical approach for CIMTs has also taken place. From 2008 to 2015, the Attorney General's position was that, pursuant to then-Attorney General Michael

330. *See, e.g.*, 8 U.S.C. § 1229(d)(1) (2012); § 1182(a)(2)(A)(i).

331. *See, e.g.*, *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010) (discussing generic elements of CIMTs).

332. Brian C. Harms, *Redefining Crimes of Moral Turpitude: A Proposal to Congress*, 15 Geo. Immigr. L.J. 259, 259–60 (2001).

333. *See* Holper, *supra* note 4, at 678.

334. *See* Kwon, *supra* note 197, at 1062.

Mukasey's decision in *In re Silva Trevino*,[335] CIMTs could be exempt from the categorical approach's prohibition on examining the underlying facts to assess whether a conviction was a CIMT.[336] As the *Silva-Trevino* decision had stated, "a patchwork of conflicting legal and evidentiary standards" exist in the federal courts with respect to the CIMT designation.[337] *Silva-Trevino*'s attempt to abandon the categorical approach in favor of fact-finding was highly criticized by scholars[338] and the federal courts.[339] In 2015 Attorney General Eric Holder formally vacated his predecessor's decision, emphasizing the disuniformity caused by the 2008 decision as well as the Supreme Court's move towards a stricter categorical approach and directed the BIA to issue a new decision.[340] On October 12, 2016, the BIA announced its new framework for analyzing CIMTs, which adhered more closely to a strict categorical approach.[341] Although the most recent *Silva-Trevino* decision may bring some clarity, the CIMT definition remains fraught with indeterminacy.

The Seventh Circuit's August 24, 2016 decision in *Arias v. Lynch*,[342] particularly Judge Richard Posner's concurrence, illustrates the potential for the very definition of a CIMT to be found void for vagueness irrespective of the proper application of the categorical approach.[343] The Seventh Circuit remanded a BIA decision finding that a conviction for false use of a social security number to work was a CIMT.[344] Judge Posner's concurring opinion did not mince words in questioning the logic of the CIMT definition. Asserting it "preposterous that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law,"[345] Judge Posner described the legal

335. 24 I. & N. Dec. 687 (A.G. 2008).

336. *Id*. at 699.

337. *Id.* at 688.

338. *See* Das, *supra* note 135, at 1713–17; Mary Holper, *The New Moral Turpitude Test, Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241 (2011); Koh, *supra* note 26, at 291–93.

339. *See, e.g.*, *Olivas-Motta v. Holder*, 746 F.3d 907, 911–16 (9th Cir. 2013) (amended opinion); *Prudencio v. Holder*, 669 F.3d 472, 480−84 (4th Cir. 2012); *Fajardo v. United States Att'y Gen.*, 659 F.3d 1303, 1307−11 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of United States*, 582 F.3d 462, 472−82 (3d Cir. 2009).

340. *In re Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015).

341. *In re Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

342. 834 F.3d 823 (7th Cir. 2016).

343. *Id.* at 830–35 (Posner, J., concurring).

344. *Id.* at 828–29. In addition to asserting that a rule in which "every crime that involves any element of deception involves moral turpitude" would produce "troubling results" illustrated by the facts of the case itself, the majority opinion found that the BIA had incorrectly applied both the first *Silva Trevino* decision's framework and the absence of a new framework in the aftermath of *Silva Trevino*'s vacatur. *Id.*

345. *Id.* at 830 (Posner, J., concurring).

dictionary definition of "moral turpitude" as "approach[ing] gibberish," and used CIMTs as a point upon which to critique American legal culture more broadly, asking pejoratively, "Why are we so backward looking? . . . [W]ho talks like that? Who *needs* to talk like that?"[346] Posner characterized administrative agency attempts to define CIMTs as "the product of a disordered mind," making "no sense."[347] Importantly, Judge Posner hinted that the void for vagueness doctrine should have long ago prevented the immigration law's embrace of CIMTs, praising Justice Jackson's dissent in *Jordan v. De George* and lamenting that "a great dissent . . . has been forgotten," a result of which "[t]he concept of moral turpitude, *in all its vagueness*, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work."[348]

The federal judiciary need not prolong its endorsement of CIMTs. Courts are likely to hear arguments that the CIMT definition is void for vagueness, notwithstanding the Supreme Court's decision in *Jordan v. De George*.[349] Under *Johnson*, courts are no longer required to find that the CIMT definition is vague in all of its applications in order to be unconstitutionally vague, thus leaving room for the possibility of facial challenges to the CIMT statute.[350] But as-applied challenges, in which the application of the CIMT definition to particular crimes that seem ill-suited for designation as CIMTs, are also worth further consideration given that the Court in *Jordan* grounded its holding to a large degree in the fact that the application of the CIMT provision to the noncitizen's conviction for fraud, a longstanding CIMT, did not seem to raise vagueness problems. Furthermore, the lack of consistency among federal courts and administrative agencies over the past century may serve as further evidence of the statute's vagueness.[351]

b. Single Scheme of Misconduct

The INA references CIMTs several times in formulating grounds of removability. One example appears at 8 U.S.C. § 1227(a)(2)(A)(ii), which renders deportable a noncitizen who engages in two or more CIMTs "not arising out of a single scheme of misconduct."[352] The provision appears aimed at penalizing individuals who are repeat

346. *Id.* at 832.
347. *Id.* at 833.
348. *Id.* at 835 (emphasis added).
349. *See generally supra* Part I.C.
350. *See supra* text accompanying notes 179–81.
351. *See supra* notes 330–32.
352. 8 U.S.C. § 1227(a)(2)(a)(ii) (2012).

offenders, as opposed to those convicted of multiple crimes following a single event.

In addition to the potentially vague nature of the CIMT prong of this removal ground, the BIA's current interpretation of the phrase, "single scheme of misconduct" may also raise constitutional problems. In *In re Saiful Islam*,[353] the BIA explained its view that a noncitizen might not be able to defend against this removal ground by arguing that multiple CIMTs on their record arose out of a single scheme.[354] As the BIA stated,

> when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.[355]

The BIA gave little guidance to distinguish between crimes arising out of a "single scheme of misconduct" and those that, though "part of an overall plan of criminal misconduct," close in time and similar in nature to each other, would nonetheless not fall under the "single scheme of misconduct" exception. The Board suggested that a single scheme might include acts "performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct."[356] But the examples given by the Board did little to illuminate the meaning of a single scheme.[357] The BIA went on to emphasize that in order for two or more CIMTs to fall within the meaning of a single scheme, the crimes "must take place at one time, meaning that there must be no substantial interruption that would allow the participant to disassociate from his enterprise and reflect on what he has done."[358] Under this construction, two crimes might be the subject of the same police report, same criminal complaint, and same plea colloquy, but still fail to fall within a "single scheme of misconduct" if the immigration judge or officer determines, based on their *post-hoc* assessment, that the

353. 25 I. & N. Dec. 637 (B.I.A. 2011).

354. *See id.*

355. *Id.* at 639 (quoting *In re Adetiba*, 20 I. & N. Dec. 506, 509 (B.I.A. 1992)).

356. *Id.* (quoting *In re Adetiba*, 20 I. & N. Dec. 506, 511).

357. The BIA stated, for instance, that possession and utterance of a counterfeit bill, or breaking and entering with intent to commit larceny in combination with assault with a deadly weapon, might fall within the single scheme exception. *Id.* at 640 (citing *In re Adetiba*, 20 I. & N. Dec. 506, 509).

358. *Id.* at 640 (quoting *In re Adetiba*, 20 I. & N. Dec. 506, 509–10).

noncitizen could have "disassociated" from the events and "reflected" on their actions.

The BIA's construction of the single scheme exception to the multiple CIMT raises vagueness concerns for several reasons. It fails to provide sufficient benchmarks for adjudicators to determine what "disassociating from [an] enterprise" or "reflect[ing] on what [one] has done" means. The BIA's definition similarly injects confusion into the determination over what a "criminal episode" or the "natural consequences of a single act" are. Under *Johnson*, this lack of clarity in the meaning of key concepts seems to raise vagueness problems. Furthermore, leaving this determination to the subjective impulses of front-line immigration adjudicators opens the door to the arbitrary enforcement that the vagueness doctrine seeks to avoid. But crimes involving moral turpitude are not the only provision from which vagueness problems may result, as the next subsection establishes.

c. Particularly Serious Crimes

"Particularly serious crimes" reflect another set of vagueness concerns. Humanitarian aspects of immigration law also dovetail with criminal law, most notably in the "particularly serious crime" bar to asylum and withholding of removal.[359] Under this provision, the government can deport individuals whose prior convictions are "particularly serious crimes" to countries in which they face a fifty percent or more likelihood of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[360] The BIA and federal courts have failed to achieve uniformity or consistency in the methodology or meaning of the particularly serious crime bar.[361] The resulting lack of clarity, along with the high—literally, life-or-death—stakes involved, suggest that vagueness doctrine may be an appropriate framework for future litigation.

The very methodology that courts and adjudicators (which include non-judicial asylum officers) should take to analyze whether a conviction rises to the level of a particular serious crime is unclear. By treating particularly serious crime assessments as "inherently discretionary,"[362] the BIA has taken the position that the traditional categorical approach does not apply.[363] As a result, adjudicators apply what Fatma Marouf has characterized as a "quasi-categorical approach"

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359. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).

360. *Id.* § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(2) (2016) ("more likely than not" standard).

361. *In re N-A-M*, 24 I. & N. Dec. 336, 344–45 (B.I.A. 2007).

362. *Id.* at 344.

363. *Id.* at 344–45.

to particularly serious crimes.[364] As Marouf's work shows, adjudicators sometimes apply something like the categorical approach; however, courts have not settled upon the generic elements of a particularly serious crime.[365] As a result, "a wide range of crimes, violent and non-violent, against people and against property, with or without evil intent, can be considered particularly serious."[366] With the categorical approach unable to yield clear results, adjudicators often look to the underlying circumstances of the crime.[367] Other times they purport to be barred from fact-finding (including where doing so would favor the noncitizen).[368] The absence of standards has left immigration adjudicators free to engage in subjective decisions whether to apply an elements-based approach (in the absence of clear elements), a factual approach, or something in between. These haphazard standards, combined with the extensively documented arbitrariness in the immigration adjudication system for asylum claims, make it extremely difficult for immigration attorneys—much less the applicants—to have notice of whether a conviction will trigger the particularly serious crime bar.

Courts should thus evaluate whether the particularly serious crime bar raises an intolerable level of vagueness. In 2013, the Ninth Circuit in *Alphonsus v. Holder*,[369] a pre-*Johnson* decision, rejected a vagueness challenge to the particularly serious crime bar.[370] *Alphonsus* should not preclude the judiciary from reassessing the bar's continuing validity post-*Johnson*. In *Alphonsus*, the court relied in large part on the existing case law that in order for a statute to be vague, it must be vague in all circumstances and must contain "no standard at all."[371] *Johnson* makes clear, however, that the existence of some limited scenarios to which a statute might be applied will not preserve an otherwise vague statute. The Ninth Circuit also failed to fully evaluate the notice and fair enforcement considerations present in the broader

364. Fatma E. Marouf, *A Particularly Serious Exception to the Categorical Approach*, B.U. L. REV. (forthcoming 2017) (manuscript on file with author).

365. *Id.* (discussing the absence of generic elements, such as intent or the use of force, in making particularly serious crime assessments).

366. *Id.*

367. *Id.*

368. *Id.*

369. 705 F.3d 1031 (9th Cir. 2013).

370. *Id.* at 1041–43.

371. *Id.* at 1043 (quoting *Vill. of Hoffman Estates. v. Flipside, Hoffman Estates., Inc.*, 455 U.S. 489, 495 (1982)). Because the Ninth Circuit found that the "there is an ascertainable group of circumstances as to which the statute, as interpreted, provides an imprecise but comprehensible normative standard, . . . rather than . . . no standard . . . at all," the statute was not unconstitutionally vague. *Id.*

crimmigration context, considerations which this Article contends should weigh in favor of vagueness findings.

CONCLUSION

This Article calls for the invigoration of the void for vagueness doctrine as applied to crime-based removal statutes in which an elements-based categorical approach fails to yield clear and predictable results. The Supreme Court's decision in *Johnson* supports such an extension of the doctrine. The underlying values animating vagueness—providing notice of legal sanctions and preventing arbitrary or discriminatory practices by law enforcement—lend further support to the extension of vagueness to the crimmigration context.

On balance, strengthening the void for vagueness doctrine in the immigration context can provide meaningful benefits to improving the immigration system, a system that is otherwise broken and systematically stacked against noncitizens as a result of broad laws enacted by Congress. Few opportunities to systematically challenge excessively punitive immigration statutes—particularly the crime-based removal provisions—exist. The vagueness doctrine can empower courts to place pressure on the legislative branch to enact meaningful reform, and for the judiciary to take steps to inject fairness, evenhandedness, and meaningful discretion into the immigration system.