

ARTICLES

DARKSIDE DISCRETION IN IMMIGRATION CASES

SHOBA SIVAPRASAD WADHIA*

“Darkside Discretion” refers to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for remedy, but in the end, the adjudicator invokes discretion as the reason the noncitizen loses, resulting in tangible harms. Imagine a woman who arrived in the United States six months ago who meets her burden of proving she is a refugee based on a fear of persecution in the form of severe physical harm or torture by the government in her home country because of her religious beliefs, which are different from the dominant religion, but who is denied asylum for discretionary reasons. Another example might include a father of U.S. citizen children who has lived in the United States for more than a decade, provides for his children financially and emotionally, and meets the statutory requirements, but who is denied relief for undefined discretionary reasons. A final example might include a spouse of a U.S. citizen who is present in the United States, eligible for a green card based on their marriage, and has proven that she is admissible to the United States, but is denied status, without reason, in the exercise of discretion. These outcomes expose the “darkside” of discretion because the government uses the tool of discretion negatively, even in the face of a robust statute and subsequent harms. Some of the remedies examined in this Article include asylum, “adjustment of status,” “extreme hardship” waivers, and waiver under the “travel” ban. This Article is the first to examine a cross section of discretionary decisions across federal agencies under a single normative framework.

* Samuel Weiss Faculty Scholar and Clinical Professor of Law, Penn State Law in University Park; I am grateful for feedback from faculty at the Penn State Law “Brown Bag” (May 2019), DePaul University Law School’s Faculty Colloquium (April 2019), New York University School of Law’s Clinical Writers’ Workshop (September 2019), Syracuse University College of Law’s Faculty Colloquium (March 2020), and University of Houston Law Center’s Colloquium (March 2020). I benefited greatly from individual feedback by Raquel Aldana, Katrice Bridges Copeland, Jud Mathews, Jaya Ramji-Nogales, Steve Ross, and Margaret Taylor. I thank Kaitlyn Box (’20), Sara Riordan (’20), and the editorial team at the *Administrative Law Review* for their research assistance.

This Article argues that discretion in immigration cases should center on humanitarian concerns and be informed by compassion. How discretion is used matters, and discretion functions best when exercised favorably toward the noncitizen. Further, in cases where Congress has already listed statutory requirements for immigration benefits or relief, it is generally unsuitable for agencies to issue a discretionary denial because they undermine the statutory language and legislative purpose for these remedies. Darkside Discretion also causes broader harms by fostering arbitrary decisionmaking and eliminating commonsense from immigration adjudication. This Article is the first to consider broad solutions for responding to Darkside Discretion. One solution is to eliminate the discretionary component in statutory remedies that already include statutory requirements. A second solution is for Congress to create a rebuttable presumption in favor of noncitizens. A final, but less optimal, solution is for agencies to adopt a clearer standard for discretion. This Article shows how eliminating or transforming the discretionary standard in immigration cases will lead to the reduction of haphazard outcomes by federal agencies, adherence to administrative law values, and greater opportunity for federal court review when cases are denied.

INTRODUCTION	368
I. THEORY OF DISCRETION	372
II. DARKSIDE DISCRETION DEFINED	374
A. <i>Hefty Statutory Requirements</i>	376
1. <i>Asylum</i>	376
2. <i>Cancellation of Removal</i>	386
B. <i>Medium Statutory Requirements</i>	389
1. <i>Adjustment of Status</i>	389
2. <i>Survivors of Crime</i>	396
3. <i>Extreme Hardship Waivers</i>	399
C. <i>Broad Waivers</i>	402
III. WHY ELIMINATING OR CLARIFYING DISCRETION MATTERS.....	404
A. <i>Limits on Discretion by the Attorney General</i>	404
B. <i>Reduction of Arbitrary Discretionary Decisions</i>	406
C. <i>Adherence to Administrative Law Values</i>	410
D. <i>Cautionary Notes</i>	411
IV. FINDING SOLUTIONS.....	413

INTRODUCTION

Prosecutorial discretion refers to the choice made by the Department of Homeland Security (DHS) about the scope of immigration enforcement against a person or group of persons. When DHS abstains from taking enforcement action against a person who is otherwise eligible for deportation, DHS is exercising its prosecutorial discretion favorably. The need for this discretion is inevitable because of limited resources and the

humanitarian factors that drive DHS to protect people from deportation.¹ Prosecutorial discretion represents one way the federal government makes immigration enforcement decisions.

Beyond prosecutorial discretion is the discretion used by Executive Branch agencies to sustain, change, or terminate existing immigration policies within their domain. Discretion also lies in the decisions by agencies like DHS, Department of Justice (DOJ), and Department of State (DOS). This Article examines the use of discretion by federal agencies, and serves as a natural extension of previous work on prosecutorial discretion and the existing literature.² This Article examines several remedies that involve “Darkside Discretion” in immigration cases. “Darkside Discretion” refers to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for a remedy, but is denied by an adjudicator in the exercise of discretion.³ The decision is labeled “darkside” not only because the noncitizen loses but also because of the harms associated with a discretionary denial under the current framework. This Article questions whether this discretionary component is necessary and highlights the historical problems associated with Darkside Discretion. This Article proposes that Congress

1. *Arizona v. United States*, 567 U.S. 387, 396–97 (2012) (detailing how discretion in immigration enforcement “embraces immediate human concerns”).

2. *Id.* See generally Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas*, 36 IMMIGR. & NAT’Y L. REV. 71 (2015) [hereinafter Wadhia, *Beyond Deportation*] (placing *United States v. Texas* within the broader context of the history of prosecutorial discretion); Shoba Sivaprasad Wadhia, *Demystifying Work Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016) [hereinafter Wadhia, *Demystifying Work Authorization*] (exploring the relationship between prosecutorial discretion and employment authorization); Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS UNIV. L. REV. 353, 368 (2018) [hereinafter Wadhia, *Immigration Enforcement*] (discussing prosecutorial discretion and the possibility that it may be abused in the current Presidential Administration).

3. See, e.g., Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 752 (1997) (“This form of discretion, which is prescribed expressly by statute and which appears as the end point of a complex, multilayered administrative decision, could be termed delegated discretion.”) (emphasis omitted); see also KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RSCH. SERV., R43782, EXECUTIVE DISCRETION AS TO IMMIGRATION: LEGAL OVERVIEW 4 (2014) (“In several instances, the INA expressly grants immigration officials some degree of discretion over aliens’ eligibility for particular immigration benefits or relief, including adjustment to legal immigration status or authorization to work in the United States. These statutory delegations sometimes provide immigration officials with broad discretion to determine whether and when aliens may be eligible for immigration benefits. In other instances, such delegations may permit immigration officials to waive the application of a statutory requirement that would bar otherwise-qualifying aliens from obtaining particular immigration benefits or relief.”).

eliminate discretion or, in the alternative, create a rebuttable presumption in favor of noncitizens in cases where they have met the statutory criteria.

Maurice Roberts provided some of the earliest thinking on the role of discretion in immigration adjudications, and to the field, as a scholar, former chairman of the Board of Immigration Appeals (BIA or Board), and later Editor in Chief of *Interpreter Releases*, a widely circulated weekly periodical on immigration.⁴ In his seminal 1975 piece, *The Exercise of Administrative Discretion Under the Immigration Laws*, Roberts is concerned about the absence of meaningful standards to guide immigration adjudicators when making discretionary decisions.⁵ He cautioned more than forty years ago that “[t]he importance of achieving a reasonably sound exercise of discretion at the administrative level is underscored by the fact that, in a realistic sense, there is no other place to turn.”⁶

The field of immigration scholars has since swelled, and so, too, has the literature. Scholars have examined the role of discretion in administrative law,⁷ immigration prosecutorial discretion,⁸ and in specific sections of the immigration statute.⁹ Similarly, scholars have written about legislative immigration reform in connection with expanding or shrinking family-based

4. Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 144 (1975).

5. *Id.* at 147–48.

6. *Id.* at 148.

7. See, e.g., David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 715 (1994) (arguing that an agency has more discretion when its policy preferences align with the President’s views); Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 647 (1988) (articulating two viewpoints on the judiciary’s role in governing administrative discretion: one that supports broad deference and the other that advocates for active enforcement of the nondelegation doctrine); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1488 (1983) (stating that the Administrative Procedure Act of 1946 grants broad discretion to administrative action).

8. See, e.g., Wadhia, *Beyond Deportation*, *supra* note 2, at 71 (writing that prosecutorial discretion grants the government the authority to decide an important decision for thousands of individuals); Wadhia, *Demystifying Work Authorization*, *supra* note 2, at 2 (stating that historical precedent grants prosecutorial discretion by allowing noncitizens to apply for work authorization); Wadhia, *Immigration Enforcement*, *supra* note 2, at 353–54 (stating that employees of the Department of Homeland Security (DHS), the Department of State (DOS), or the Department of Justice (DOJ) make decisions about immigration status).

9. See, e.g., Charles C. Foster, *Logic of Adjustment of Status to Permanent Residency*, 24 S. TEX. L.J. 37, 37 (1983); Maurice A. Roberts, *Relief from Deportation: Discretion and Waivers*, 1 DEF. ALIEN 29, 29–30 (1978) (stating that statutory discretion is found when a statute has specific requirements that granted administrative tribunals to determine if relief will be granted); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1301 (1972) (noting that discretion within § 245 can lead to inconsistent results).

immigration, increasing the number of employment-based visas, modifying the rules for foreign students, and finding solutions for long term residents living in the United States without papers or with a temporary status, as well as those coming in the future.¹⁰ While the use of discretion in the immigration space has long been driven by humanitarian factors, macro and micro policy changes in the Trump Administration reveal how discretion can be used for broader purposes, and even misused. Against this backdrop, a close (re)examination of discretion in immigration decisions is critical.

Part I of this Article offers a theory of discretion to support the Article's argument for the elimination of Darkside Discretion or the execution of a similar solution. Part II of this Article explores examples of Darkside Discretion from the DHS, DOJ, and DOS. Specifically, Part II examines the discretionary component in asylum, cancellation of removal, adjustment of status, and waivers of inadmissibility. This section is organized so that remedies with heftier statutory requirements are distinguished from those with medium or broader ones. Every remedy that this Article examines will include both statutory criteria and a largely undefined discretionary component. Part III examines why the need for a standard for discretion matters, the human costs of retaining discretion, and cautionary notes for how creating a standard may negatively affect agencies and people. Part IV considers solutions for limiting the dilemma of Darkside Discretion and favors a proposal to eliminate discretion altogether.

This Article uses the term "remedy" or "remedies" when discussing benefits, waivers, or relief from removal. This Article does not address uses of "prosecutorial discretion" except when identifying parallels or proposals relevant to Darkside Discretion. This Article also does not analyze the

10. See, e.g., Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1639 (2009) (arguing that Congress needs to consider long-lasting immigration reform and must do so by addressing labor migration first); *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 80–81 (2013); Michael A. Olivas, *The Political Economy of the Dream Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009); David B. Thronson, *You Can't Get Here from Here: Toward a More Child Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 59 (2006) (writing that immigration laws impact both the composition of immigrant families and where families live); Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1446 (2008); see also Kevin R. Johnson and Bernard Trujillo, *Immigration Reform, National Security after September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1370 (2007) (stating that the Patriot Act was overbroad); Hiroshi Motomura, *What is "Comprehensive Immigration Reform"?: Taking the Long View*, 63 ARK. L. REV. 225, 241 (2010) (noting that a legalization program is a necessary component of comprehensive immigration law reform); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 891 (2008) (arguing that comprehensive reform must be based on a fair process and basic rights).

factors that drive officers or judges to determine if a person meets a statutory criterion, such as “bona fide marriage” or “extreme hardship,” which “to the degree that it brings into play the adjudicator’s subjective notions . . . has much in common with the application of discretion *qua* discretion.”¹¹

I. THEORY OF DISCRETION

This Article argues that American immigration law generally reflects strict statutory standards for noncitizens. Therefore, if a remedy or benefit under the statute includes a discretionary component, such discretion should generally favor the noncitizen and that compassion should inform the decision. Different harms flow from denials involving Darkside Discretion. Regarding humanitarian protection, like asylum, Darkside Discretion undermines the purpose of Congress to protect those fleeing harm in their home countries. With regard to the ways a person might obtain permanent status, such as through a remedy known as “adjustment of status,” Darkside Discretion disrupts Congress’s goals by allowing for families to be reunited, or for U.S. employers to retain or hire a foreign national who possesses skill that no able or willing American worker can fill. Harms also flow from discretionary denials of waivers used to protect people with close family members whose removal from the United States would create significant levels of hardship. Beyond the individual or familial harms are the system-wide harms that flow from an immigration system where compassion and common sense are no longer a guide for the exercise of discretion. Eliminating Darkside Discretion or providing clearer standards for discretion reduces these harms.

The statutory language of the remedies discussed in this Article illustrates how Congress sought to address these harms. As this Article will show, Congress listed specific and detailed requirements that a noncitizen must satisfy to be eligible for relief. Further, Congress was also explicit about the disqualifying factors that would apply even to those who meet the affirmative requirements of a remedy. These statutory requirements require intensive factfinding by the adjudicator such that discretionary denials would be arbitrary, if not unnecessary. To illustrate, the affirmative requirements for asylum are that a person satisfy the refugee definition or show that they have suffered persecution, or will face similar harm in the future by the government, or a group the government is unwilling or unable to control, because of “race, religion, nationality, membership in a particular social group, or political opinion.”¹² But even for those who qualify as refugees, Congress imposed disqualifying factors that will make a person ineligible for

11. Roberts, *supra* note 4, at 147.

12. Immigration & Nationality Act (INA), 8 U.S.C. § 1101(a)(42).

protection.¹³ For example, a person who has been convicted of certain crimes,¹⁴ or who waits until after one year of arrival before applying for asylum,¹⁵ is statutorily barred from doing so. This pattern of specifying affirmative statutory requirements that an individual must show to prove eligibility and spelling out the reasons a person can be disqualified from relief appears in each of the statutory remedies covered by this Article.

Eliminating Darkside Discretion is also consistent with the legislative purpose behind the statute. In 1952, Congress passed the McCarran–Walter Act, known today as the Immigration and Nationality Act (INA).¹⁶ The purpose of the bill was to replace the historical “piecemeal” immigration provisions with a comprehensive framework for immigration.¹⁷ The 1952 Act permitted qualifying people to acquire permanent residency without having to leave the United States through a tool called “adjustment of status,”¹⁸ and to seek relief from deportation based on close family relationships through a tool called “suspension of deportation.”¹⁹ In describing the 1952 Act, one scholar characterized these remedies as tools of compassion: “The Act vested broad authority in the Attorney General to waive all sorts of restrictions which excluded aliens. In the years after 1952 he did so in thousands of cases involving alleged subversive defectors. He suspended deportation of other thousands guilty of crimes or subversive activities—for compassionate reasons.”²⁰ Congress later amended the statute to create a framework for asylum and overseas refugee admission and was guided by humanitarian principles and a desire to protect those individuals whose home countries could not protect them.²¹ In enacting the Refugee Act of 1980, Congress stated as its purpose:

The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary

13. *Id.* § 1158(a)(2), (b)(2) (setting out various statutory bars to a grant of asylum).

14. *Id.* § 1158(b)(2).

15. *Id.* § 1158(a)(2)(B).

16. McCarran–Walter Act of 1952, Pub. L. No. 82-414, 66 Stat. 163; *see also* C. P. Trussell, *Congress Enacts Immigration Bill over Truman Veto*, N.Y. TIMES, June 28, 1952, at 1, <https://timesmachine.nytimes.com/timesmachine/1952/06/28/84328035.html?pageNumber=1> [<https://nyti.ms/2Y1j4CV>].

17. Trussell, *supra* note 16.

18. § 245(a), 66 Stat. at 217 (codified as amended 8 U.S.C. § 1255).

19. § 244(a), 66 Stat. at 214–16 (repealed in 1996).

20. Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 134 (1966).

21. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (establishing a uniform basis for admission of refugees and granting asylum).

transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.²²

Congress introduced “Cancellation of Removal” in 1996 when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act.²³ With regard to cancellation, the conference report states goals aimed at increasing the standard for cancellation by statute from its predecessor statutes. To illustrate, when explaining the changes to the level of hardship required for non-Lawful Permanent Resident (LPR) cancellation, the conference report states that “[t]he managers have deliberately changed the required showing of hardship from “extreme hardship” to ‘exceptional and extremely unusual hardship’ to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien’s deportation.”²⁴ Finally, the conference report connected to the 1996 immigration laws shows that Congress increased the statutory requirements for 212(h) extreme hardship waivers.²⁵ In sum, legislative goals behind many of the remedies discussed in this Article center on compassion, family reunification, and regularization of status. At the same time, Congress heightened the baseline requirements for eligibility for some of these remedies.

The specific harms tied to Darkside Discretion, coupled with the statutory language and legislative purpose, support the solutions of either eliminating discretion or applying a more specific standard that is favorable to the noncitizen. Broadening the statute could change the relationship between bright-line rules and discretion. In other words, this Article bases its solutions on the current statutory framework. If a future Congress lowers the standard for relief and captures more people living in the United States with their families and contributions, then it might be appropriate to have Darkside Discretion. But this outcome would require broader legislative reform. When the rules are rigid and designed as they are now, discretion should be eliminated.

II. DARKSIDE DISCRETION DEFINED

“Darkside Discretion” refers to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for remedy, but in the end, the adjudicator invokes discretion as the reason the noncitizen loses, producing the harms identified in the previous section. Imagine a woman who arrived in the United States six months ago who meets her burden of

22. *Id.* § 101, 94 Stat. at 102.

23. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

24. H.R. REP. NO. 104-828, at 213 (1996) (Conf. Rep.).

25. *Id.* at 228.

proving she is a refugee based on a fear of persecution in the form of severe physical harm or torture by the government in her home country because of her religious beliefs, which are different from the dominant religion, but who is denied asylum for discretionary reasons. Another example might include a father of U.S. citizen children who has lived in the United States for more than a decade, provides for his children financially and emotionally, and meets the statutory requirements, but who is denied relief for undefined discretionary reasons. A final example might include a spouse of a U.S. citizen who is present in the United States, eligible for a green card based on their marriage, and has proven that she is admissible to the United States, but is denied status, without reason, in the exercise of discretion. These outcomes expose the “darkside” of discretion because the government uses the tool of discretion negatively, even in the face of a robust statute and subsequent harms. This Article examines some of the remedies to Darkside Discretion, such as asylum, adjustment of status, and extreme hardship waivers. This Article is the first to examine a cross-section of discretionary decisions across federal agencies under a single normative framework.

DHS is a cabinet-level agency created by Congress in the wake of the September 11, 2001 terrorist attacks.²⁶ Congress delegated many of the immigration functions to DHS and split these functions into three main units: Customs and Border Protection, U.S. Citizenship and Immigration Services (USCIS), and Immigration and Customs Enforcement.²⁷ DHS has discretion to interpret many legal standards that have been left undefined by Congress. DOJ houses the immigration court system, known as the Executive Office for Immigration Review (EOIR).²⁸ Immigration judges in EOIR have jurisdiction to make many discretionary decisions when deciding whether a person qualifies for relief from removal. Similarly, the BIA is the appellate administrative body within EOIR responsible for hearing challenges to immigration judge decisions made by DHS or the affected noncitizen. Finally, DOS consulates around the world apply discretion every day. Consulates are guided by the immigration laws and the Foreign Affairs Manual (FAM)²⁹ when deciding whether a visa should be issued, and enjoy considerable discretion in deciding whether a noncitizen will be granted or refused a visa.³⁰ The FAM

26. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

27. 6 U.S.C. § 211; *see also* § 1, 116 Stat. at 2135.

28. About the Executive Office for Immigration Review, U.S. DEPT. OF JUST., <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018).

29. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL (2020), <https://fam.state.gov/Fam/FAM.aspx>.

30. James A.R. Nafziger, *Review of Visa Denial by Consular Officers*, 66 WASH. L. REV. 1, 16–17 (1991) (explaining that a consulate's visa denial is controversial because administrative

does not have the force of a statute or regulation, but is a daily guide for consulates making discretionary decisions surrounding waivers. Relevant case law by the BIA is sometimes woven into the FAM.

A. *Hefty Statutory Requirements*

1. *Asylum*

Asylum is available to people already in the United States who have suffered persecution or could face similar harm in the future because of race, religion, nationality, political opinion, or membership in a particular social group.³¹ Congress not only included a specific definition for “refugee” that every asylum applicant should meet but also created statutory limits and bars to relief. For example, an individual must apply for asylum within one year of arrival in the country, and conviction of a serious crime precludes asylum eligibility.³² Nevertheless, asylum is a discretionary remedy. So, even if the asylum officer or immigration judge finds a person qualifies under the statute, they may still deny this life-saving form of protection as a matter of discretion.

The relevant statute reads:

In general. Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.³³

The language of discretion is found later in the statute which reads in part:

The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.³⁴

and judicial review of this decision are limited and advocating for “well-defined checks on consular discretion”).

31. INA, 8 U.S.C. § 1158(b)(1)(B)(i).

32. *Id.* § 1158(a)(2)(B), (b)(2)(B).

33. *Id.* § 1158(a)(1).

34. *Id.* § 1158(b)(1)(A) (emphasis added). As Kate Aschenbrenner points out, until 1996, the asylum statute included the discretionary component in two places, both in using the term “may” as the statute currently does and by including the phrase “in the discretion of the Attorney General.” The pre-1996 statute stated that “an alien . . . may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee” Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (emphasis added).

Whether an asylum seeker applies for protection with an asylum officer in DHS or an immigration judge in DOJ depends on their posture. A person may apply for asylum “affirmatively” with USCIS if they are in the United States in a valid status, or without status but not in the jurisdiction of the immigration court.³⁵ If an asylum officer in USCIS does not find the person qualifies, they are “referred” to the immigration court and will apply for asylum as a “defense” to removal.³⁶ Asylum seekers may also file applications for asylum as a defense to removal with the immigration court for the first time following their placement in removal proceedings.³⁷

Historically, discretion in asylum has been undefined by a clear guideline, but nevertheless guided by precedential decisions by the Board. One of the first cases to analyze the discretionary component was *Matter of Salim*.³⁸ In that case, the Board agreed with the applicant that he would face persecution in his native country, Afghanistan, based on his refusal to “join the Soviet controlled Afghan army in its war against the Afghan rebels opposing the invasion.”³⁹ The Board gave significant weight to an advisory opinion by the DOS that the applicant would face persecution.⁴⁰ The Board then turned to the discretionary question, concluding the applicant’s use of a fraudulently purchased passport bearing someone else’s name to reach the United States was a strong negative discretionary factor and warranted a denial.⁴¹ The Board made a distinction between a person being forced to use a fraudulent document as a means to escape harm and the instant case, where the fraudulent document was obtained *after* the applicant escaped from Afghanistan and, as characterized by the Board, “with the sole purpose of reaching this country ahead of all the other refugees awaiting their turn abroad.”⁴²

In the 1987 case known as *Matter of Pula*,⁴³ the Board took a more generous approach when analyzing discretion:

Aschenbrenner opines that “[t]he removal of this phrase may have been an oversight. It is more likely, however, that the phrase was removed as superfluous, as the statute still states that the adjudicator may, not must, grant asylum to eligible refugees.” Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J. L. REFORM 595, 607 (2012).

35. 8 C.F.R. § 208 (2019); *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last reviewed/updated Oct. 19, 2015).

36. 8 C.F.R. § 1208 (2019); *Obtaining Asylum in the United States*, *supra* note 35.

37. 8 C.F.R. §§ 1208, 1240 (2019); *Obtaining Asylum in the United States*, *supra* note 35.

38. *Salim*, 18 I. & N. Dec. 311, 311 (B.I.A. 1982).

39. *Id.* at 311.

40. *Id.* at 313.

41. *Id.* at 314.

42. *Id.* at 316.

43. 19 I. & N. Dec. 473 (B.I.A. 1987).

Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted. Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant.⁴⁴

When discussing the scenario of a person using a fraudulent document to enter the United States, the Board held that “[t]he use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor while . . . the danger of persecution should generally outweigh all but the most egregious of adverse factors.”⁴⁵ In discussing *Matter of Salim*, the Board in *Matter of Pula* concluded:

[W]e agree with the applicant that *Matter of Salim* [] places too much emphasis on the circumvention of orderly refugee procedures. This circumvention can be a serious adverse factor, but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases.⁴⁶

Matter of Pula remains an influential case in asylum adjudications, and is often the guide used by lawyers and officers alike when deciding if discretion is warranted in cases where asylum applicants meet the statutory criteria. One unique feature of discretion in asylum law is that “*the danger of persecution should generally outweigh all but the most egregious of adverse factors.*”⁴⁷ This passage has long been understood to protect, in most cases, asylum seekers who have suffered persecution or fear similar harm in the future. After *Pula*, Congress expanded the ineligibilities for asylum for crime-based and other reasons.⁴⁸ The *Pula* standard and later choices by Congress to impose more disqualifications for asylum support the elimination of discretion.

44. *Id.* at 473–74. *Pula* has been discussed by scholars. See, e.g., Deborah Anker and Carolyn Patty Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 INT’L J. REFUGEE L. 67, 71 (1989); Aschenbrenner, *supra* note 34, at 612–15 (2012); Kevin R. Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 279, 331–32 (1991); David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 726 (1995).

45. *Pula*, 19 I. & N. Dec. at 474.

46. *Id.* at 473 (citation omitted).

47. *Id.* at 474 (emphasis added).

48. H.R. REP. NO. 104-828, at 162–64 (1996) (Conf. Rep.).

In the 1996 case of *Matter of Kasinga*,⁴⁹ the Board applied discretion favorably toward a woman who entered the United States irregularly and faced persecution in the form of female genital mutilation:

The final issue is whether the applicant merits a favorable exercise of discretion. The danger of persecution will outweigh all but the most egregious adverse factors. The type of persecution feared by the applicant is very severe. To the extent that the Immigration Judge suggested that the applicant had a legal obligation to seek refuge in Ghana or Germany, the record does not support such a conclusion. The applicant offered credible reasons for not seeking refuge in either of those countries in her particular circumstances. The applicant purchased someone else's passport and used it to come to the United States. However, upon arrival, she did not attempt to use the false passport to enter. She told the immigration inspector the truth . . . We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant.⁵⁰

More recent case law reveals several reversals by the Board in discretionary denials made by immigration judges.⁵¹ In one case, the Board was critical of the immigration judge's discretionary denial for an asylum seeker, stating:

The Immigration Judge found that the respondent's decades in the United States, his United States citizen father, and his eight United States citizen children were outweighed by years-old convictions for forgery for writing a "bad check" and false statement to an officer, and for unlawfully bringing his 8-month pregnant wife to join him in the United

49. 20 I. & N. Dec. 357, 368 (B.I.A. 1996) (citations omitted).

50. *Id.* at 367–68 (citations omitted).

51. *See, e.g.*, J-M-B-, AXXX XXX 197 (B.I.A. Feb. 28, 2019) (Wendtland, Greer, Cole) (reversing discretionary denial of asylum upon finding that respondent's extensive family ties in United States were not outweighed by years old convictions and unlawfully bringing wife to United States while eight months pregnant); C-S-N-, AXXX XXX 231 (B.I.A. Feb. 12, 2019) (Adkins-Blanch, Kelly, Mann) (reversing discretionary denial of asylum for applicant who fraudulently attempted to obtain visa prior to fleeing native country and failed to seek asylum in twelve countries prior to entering United States); S-A-N-, AXXX XXX 703 (B.I.A. Feb. 1, 2019) (Grant) (upholding discretionary grant of asylum to applicant with two convictions for possession of marijuana and two convictions for misdemeanor assault); F-N-M-, AXXX XXX 389 (B.I.A. Dec. 26, 2018) (Kendall Clark, Guendelsberger, Grant) (finding immigration judge should not have denied asylum as a matter of discretion based solely on respondent's prior use of false passport in failed attempt to obtain nonimmigrant visa); M-A-B-, AXXX XXX 333 (B.I.A. June 30, 2017) (Pauley, Wendtland, Cole (dissenting)) (reversing discretionary denial of asylum based solely on respondent's five-year stay in Israel prior to arriving in the United States); Jean Pierre Batcha Samba, A088 046 199 (B.I.A. Dec. 19, 2013) (Pauley, Donovan, Wendtland) (finding that making false statements to asylum officer or in removal proceeding not valid basis to deny asylum in exercise of discretion). The Author thanks Ben Winograd from the Immigrant & Refugee Appellate Center (Center) for collecting and making available these unpublished decisions by the Board of Immigration Appeals (BIA).

States []. While the respondent's criminal history is certainly relevant, we disagree that it outweighs the positives and will reverse the determination.⁵²

In another case, the sole question on appeal was "whether the respondent's use of a false Angolan passport in her unsuccessful effort to obtain a non-immigrant visa to escape persecution supports the discretionary denial of the respondent's request for asylum."⁵³ Relying, in part, on *Matter of Pula* and *Matter of Kasinga*, the Board concluded that discretion should be exercised in favor of the asylum applicant.⁵⁴

Federal courts have also reviewed appeals of discretionary denials made by immigration judges and Board members in asylum cases.⁵⁵ The availability of federal court review over final asylum determinations by DOJ is unique to the extent that such review is unavailable for many other discretionary remedies in immigration law.⁵⁶

52. J-M-B-, AXXX XXX at 197.

53. F-N-M-, AXXX XXX at 389.

54. *Id.*

55. *See, e.g.,* Ai Qin Xue v. Holder, 538 F. App'x 35, 37 (2d Cir. 2013) (finding that the BIA did not abuse its discretion in affirming the discretionary denial of asylum by the immigration judge); Inyachkin v. Holder, 334 F. App'x 418, 419–20 (2d Cir. 2009) (denying review of an order by the BIA affirming an immigration judge's decision denying the asylum claim based on the applicant's extensive history of misdemeanor convictions and failure to fully disclose his criminal record); Li Peng Wang v. Holder, 346 F. App'x 615, 616 (2d Cir. 2009) (finding no abuse of discretion in the BIA's finding, and summarizing that "[t]he [immigration judge] found that although Wang's two U.S.-citizen children were a positive factor, it was outweighed by other negative factors, including: (1) Wang's false claim of U.S. citizenship when she attempted to enter the United States; (2) her false testimony before an immigration officer; (3) her initial, false asylum application; (4) her receipt of government funds to pay for her children's medical care; and (5) her husband's continued presence in the United States in violation of his final removal order. The BIA found that the Immigration Judge's discretionary denial was supported by the totality of the circumstances"); Kouljinski v. Keisler, 505 F.3d 534, 543 (6th Cir. 2007) (finding the immigration judge may properly consider the applicant's three drunk driving convictions in making a discretionary denial for asylum). For cases remanded or reversed, see Huang v. INS, 436 F.3d 89, 99 (2d Cir. 2006) (holding that the immigration judge improperly relied on adverse credibility finding and applicant's use of a smuggler as a basis for denying the claim); Kalubi v. Ashcroft, 364 F.3d 1134, 1138–39 (9th Cir. 2004) (holding that applicant's testimony should have been included in consideration of his asylum application, even though the Attorney General has the discretion to determine other factors in his discretion); Andriasian v. INS, 180 F.3d 1033, 1042 (9th Cir. 1999) (finding that BIA had abused discretion by failing to consider governing regulation in denying asylum on the basis of the applicant's stay in Armenia).

56. *See* INA, 8 U.S.C. § 1252(a)(2)(B) ("Denials of discretionary relief[] [n]otwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is

Three observations can be made when reviewing some of the federal court decisions surrounding asylum. First, combing through a decision that was denied in the exercise of discretion can be difficult when a judge has denied relief on other grounds. In other words, discretion is not always the sole basis for denying relief altogether.⁵⁷ Those cases are also less relevant to the solutions considered in this Article, which presuppose that a person meets the statutory requirements, asylum, or otherwise. Second, some of the discretionary denials tied to asylum are related to the criminal history of the asylum seeker.⁵⁸ As discussed, Congress has already limited who may qualify for asylum, and has created statutory bars for those convicted of “particularly serious crimes” or who committed “serious nonpolitical crimes” outside the United States.⁵⁹ Consequently, when a discretionary denial is triggered by the criminal history of an asylum seeker who otherwise qualifies as a refugee, the denial is unjustified and ignores the framework Congress designed with regard to criminal bars.⁶⁰ Third, Congress has expanded the INA’s statutory bars for asylum to include factors that were once discretionary or irrelevant to the adjudication. For example, “firm resettlement” is a bar to asylum and refers to a person’s ability to live safely and permanently in a third country before arriving in the United States.⁶¹ Similarly, Congress injected a filing deadline for asylum applications by requiring applicants to file within one year of their last arrival into the United States.⁶² These changes illustrate that when

made in removal proceedings, no court shall have jurisdiction to review- (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.”)

57. See, e.g., *Li Peng Wang*, 346 F. App’x at 616 (denying applicant’s claim based on false testimony and false applications); *Koulijinski*, 505 F.3d at 543 (denying claim based on three drunk driving convictions).

58. See, e.g., *Inyachkin*, 334 F. App’x at 419–20 (denying claim based on extensive history of misdemeanor offenses); *Koulijinski*, 505 F.3d at 543 (denying claim based on three drunk driving convictions).

59. 8 U.S.C. § 1158(b)(2)(A) (“(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; [or] (iii) there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States.”).

60. Beyond the scope of this Article are the merits of each asylum bar crafted by Congress.

61. 8 U.S.C. § 1158(b)(2)(A) (“(vi) the alien was firmly resettled in another country prior to arriving in the United States.”).

62. *Id.* § 1158(a)(2) (“(B) *Time limit.* — Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien’s arrival in the United States.”)

Congress wishes to impose changes or restrictions on domestic asylum, it has and will do so.

Scholars have also analyzed the discretionary component in asylum cases.⁶³ In his work, *The Proper Role of Discretion in Political Asylum Determinations*, Arthur C. Helton analyzes some early cases involving discretion and limiting principles derived from administrative law, statutes, the U.S. Constitution, and international law. His analysis of *Matter of Salim* and its progeny is particularly rich, as are his cautionary notes about how the government applies discretion. In his analysis, Helton found that asylum seekers were denied protection in the exercise of discretion based on refugees having found a “safe haven” in a third country before coming to the United States, criminal activities in the United States, terrorist activities abroad, and fraud in connection with manner of entry or attempted manner of entry.⁶⁴

Ultimately, Helton was concerned about how discretion “threatens to swallow the right to apply for asylum in the United States” and how discretionary denials can leave genuine refugees in limbo.⁶⁵ Helton discusses one now defunct regulatory reference in *Matter of Salim*:

For example, 8 C.F.R. § 208.8(f)(1) precludes the District Director from granting asylum relief to specific classes of applicants, and 8 C.F.R. 208.8(f)(2) states that the District Director shall consider[] all relevant factors such as whether an outstanding offer of resettlement is available to the applicant in a third country and the public interest involved in the specific case. The regulations, in essence, summarize the specific preclusions in the Act against aliens who persecuted others abroad with this Board’s and the judicially developed principles for the exercise of discretionary relief from deportation.⁶⁶

63. See, e.g., Aschenbrenner, *supra* note 34, at 599–604 (analyzing the use of discretion in asylum cases through the use of case studies); Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1019 (1985) (concluding that the expansion of the role of discretion in asylum cases could threaten the right to apply for asylum in the United States); Johnson, *supra* note 44 (discussing how the Executive Branch failed to establish clear standards circumscribing agency discretion in asylum claims); Martin, *supra* note 44, at 725–27 (1995) (discussing the history of discretionary practices in immigration courts); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PENN. L. REV. 1247, 1249 (1990) (discussing the rise in asylum applications’ pressure on a largely discretionary practice of law).

64. Helton, *supra* note 63, at 1007.

65. *Id.* at 1019.

66. *Salim*, 18 I. & N. Dec. 311, 315 (B.I.A. 1982); see also *Rosenberg v. Woo*, 402 U.S. 49 (1971) (holding that the District Director could exercise discretion to deny asylum to an applicant not explicitly barred by the statute).

Congress made firm resettlement a statutory bar to asylum in 1996.⁶⁷ Under the current statute, all of these factors, except for fraud in connection with manner of entry into the United States, have been codified by Congress as statutory bars to asylum and underscore the conclusion that Congress already lists robust disqualifying factors.⁶⁸ Fraud is more complicated and, as described in this Article, has been treated more sympathetically in cases where asylum seekers use a fraudulent document or enter through fraud as a means of escaping harm.

In her piece, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, Kate Aschenbrenner uses profiles drawn from actual cases to express the detrimental effects a discretionary denial can have on asylum seekers who otherwise meet the refugee definition.⁶⁹ In one case Aschenbrenner profiles, an immigration judge concluded that a woman from Rwanda, Celine, had established her credibility and burden of proving that she faces a well-founded fear of persecution in the future, but denied her asylum as a matter of discretion because they speculated that “she had not told the truth in obtaining the visa she used to come to the United States.”⁷⁰ This applicant was ultimately successful in challenging her discretionary denial, but the entire process took more than two years to be resolved, causing both great human consequences of delay and costs to the government.⁷¹ Aschenbrenner discusses how Celine’s appeal was ultimately successful and how, during the two-plus year time period during which Celine awaited a final decision, she was separated from her family and financially challenged because she lacked work authorization.⁷² Soon after the appeal was granted, Celine passed away.⁷³ Said Aschenbrenner: “Because of the delay caused by the immigration judge’s discretionary denial of her claim to asylum, she was never able to bring her family to the United States.”⁷⁴

Aschenbrenner discusses the limitations that arise when a person is denied asylum and, in the alternative, given a lesser form of relief, known as “withholding of removal,” to argue that discretion should be eliminated.⁷⁵

67. H.R. REP. NO. 104-828, at 164 (1996) (Conf. Rep.); see also CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., RAIIO COMBINED TRAINING PROGRAM: FIRM RESETTLEMENT (2019), https://www.uscis.gov/sites/default/files/files/nativedocuments/Firm_Resettlement_LP_RAIO.pdf.

68. INA, 8 U.S.C. § 1158(b)(2).

69. See generally, Aschenbrenner, *supra* note 34 (relying on case studies to illustrate the detrimental effects of discretionary denial).

70. See *id.* at 599–601.

71. *Id.* at 601.

72. *Id.*

73. *Id.*

74. See *id.*

75. See *id.* at 625–28.

Withholding of removal is a cousin to asylum, but the differences are significant because of the standard a person must prove and that qualifying individuals cannot petition to bring their family members who are currently outside the United States, or include them as “derivatives” on an application.⁷⁶ Indeed, there are dramatic differences between asylum and withholding and removal, which—as shared in more detail below—support the solution to eliminate discretion in asylum.

The politics of discretion in asylum cases have been central in the Trump Administration and showcased in the highly controversial policy published by former Attorney General Jeff Sessions, in which he encouraged his employees to expand discretionary denials.⁷⁷ In the decision *Matter of A-B*,⁷⁸ the former Attorney General cautioned adjudicators about the importance of discretion: “I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA.”⁷⁹ Furthermore, controversial guidance from USCIS on how to implement discretion in asylum cases echoed the language from the footnote in *Matter of A-B*, quoted portions of *Matter of Pula*, and inserted new language that may influence and increase the number of discretionary denials in the future:

USCIS personnel may find an applicant’s illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion. In particular, ‘the circumvention of orderly refugee procedures’ factor may take into account whether the alien entered the United States without inspection and, if not, whether the applicant had other ways to lawfully enter this country. For example, the applicant might show that the illegal entry was necessary to escape imminent harm and that he or she was thereby prevented from presenting himself or herself at a designated United States POE. An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities.⁸⁰

The implication by the former Attorney General is that noncitizens come to the U.S. border and seek asylum without being genuine refugees. Even if

76. See *id.* at 607–08.

77. See *A-B*, 27 I. & N. Dec. 316, 344 n. 12 (A.G. 2018) (encouraging broad use of discretion).

78. *Id.*

79. *Id.*

80. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0162, POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-8* (2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF>.

the distinction created by Sessions—(1) illegal entry to escape harm; and (2) ulterior motives for illegal entry that are inconsistent with an asylum claim—is a reasonable one and created in good faith, discretion should not be the tool used to deny. The statutory requirements for asylum are rigid enough to exclude those in the latter category, who lack a genuine claim to asylum. The foregoing language is also controversial because it presumes bad motive by the asylum seeker and attempts to normalize denials for asylum seekers who arrive at a place other than a port of entry. Finally, the language cannot be read in isolation from the political landscape or policy goals of the Trump Administration to use existing law and create new policies to end asylum at the southern border.⁸¹ Practice advisories in the wake of *Matter of A-B* were critical of the narrative around discretion, which has been historically understood as favorable to the asylum seeker except in the most egregious circumstances.⁸² One advisory by the American Immigration Lawyers Association reminds practitioners that *Matter Pula* remains good law and that case law from the federal circuit courts of appeals may be helpful.⁸³ These documents advise immigration practitioners to explain any discretionary factors in a particular case and to be prepared to explain how and why a client entered the United States.

On June 15, 2020, the DOJ and DHS published a proposed rule that makes dozens of changes to asylum, including discretion. The rule proposes “three specific but nonexhaustive factors” to consider when deciding if asylum should be granted in the exercise of discretion:

81. See, e.g., PHIL SCHRAG, *BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA* ch. 7 (2020); SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP* ch. 6 (2019); *Policies Affecting Asylum Seekers at the Border*, AM. IMMIGR. COUNCIL (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

82. See, e.g., NAT'L IMMIGRANT JUST. CTR., *PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF A-B* (2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%202019%20Update%20-%20Final.pdf>; *Practice Pointer: Matter of A-B- and Discretion*, AM. IMMIGR. L. ASS'N (Oct. 15, 2018) [hereinafter *Matter of Discretion*], <https://www.aila.org/infonet/practice-pointer-matter-of-a-b-and-discretion>.

83. The practice pointer provides an excerpt from a case, *Hussam F. v. Sessions*, 897 F.3d 707 (6th Cir. 2018), where the asylum seeker entered the United States with a fraudulent passport. “Here, Petitioner certainly should have been more forthcoming with immigration officials. But under *Pula*, the Board’s analysis may not begin and end with his failure to follow proper immigration procedures. See *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008) (citing *Pula* and noting that ‘the presence of immigration law violations’ is a relevant factor, but ‘the BIA has cautioned against affording it too much weight’).” *Matter of Discretion*, *supra* note 82 (quoting *Hussam F.*, 897 F.3d at 718).

(1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country; (2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and (3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.⁸⁴

The rule labels one or more of these factors as "significant adverse factors" for the purpose of discretion.⁸⁵ The rule goes further to list nine adverse factors that would ordinarily result in a discretionary denial. These nine factors include but are not limited to: (1) an asylum seeker who spends fourteen days in any one country that permitted an application for protection prior to entering the United States; (2) transit through another country prior to arrival in the United States; (3) certain criminal convictions; (4) unlawful presence for more than one year; and (5) failure to file income taxes.⁸⁶ The changes to discretion are sweeping and, as openly concluded by the agencies, "supersedes the Board's previous approach in *Matter of Pula* that past persecution or a strong likelihood of future persecution 'should generally outweigh all but the most egregious adverse factors.'"⁸⁷ The changes made to discretion in the proposed rule are inconsistent with *Matter of Pula* and its progeny, and underscore the value of eliminating discretion.

2. *Cancellation of Removal*

"Cancellation of Removal" is another remedy in the immigration statute available only to noncitizens in removal proceedings before an immigration judge.⁸⁸ For example, a single undocumented mother who has lived in the United States for more than two decades and is caring for children who were born in the United States, and a parent who is a green card holder, may seek cancellation of removal.⁸⁹ Specifically, for nonpermanent residents seeking relief under cancellation, the statute provides that a noncitizen who is inadmissible or deportable from the United States may be granted relief if they have been physically present in the United States for at least ten years; can show good moral character during that time; can show they have not been

84. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,283 (proposed June 15, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-15/pdf/2020-12575.pdf>.

85. *Id.* at 36,284.

86. *Id.* at 36,284–85.

87. *Id.* at 36,285.

88. See INA, 8 U.S.C. § 1229b.

89. *Id.* § 1229b.

convicted of specific offenses listed in immigration statute; and can establish that their removal would result in “exceptional and extremely unusual hardship” to their U.S. citizen or LPR “spouse, parent, or child.”⁹⁰ For green card holders facing removal, cancellation of removal can serve as a remedy if they can show five years in LPR status, continuous presence for seven years after having been admitted in any status, and have not been convicted of an “aggravated felony.”⁹¹ Finally, Congress set a numerical cap of 4,000 on the number of people who could be granted cancellation annually.⁹²

The discretionary component for cancellation of removal is worded similar to asylum: “The Attorney General *may* cancel removal in the case of an alien who is inadmissible or deportable from the United States”⁹³ Discretionary denials of cancellation of removal can have lasting effects on the immigrant’s family and community. These effects are illustrated by the kinds of equities a person must or may show to qualify for cancellation. For example, if nonresident cancellation requires a significant level of hardship to a family member(s), then deporting the immigrant and separating them from a family can have a devastating impact on those left behind. For many applicants seeking cancellation of removal, a discretionary denial can mean a lifetime separation from family members who, in turn, suffer emotionally, financially, or medically. The Author once represented an adult daughter whose elderly mother, a green card holder, was widowed and suffered from a life-threatening disease. As the only daughter in a Muslim family, she argued that her mother would suffer “exceptional and extremely unusual hardship” if deported. The immigration judge found that the statutory requirements for cancellation of removal had been met and that she qualified in the exercise of discretion. Had the immigration judge denied this case in the exercise of discretion, the mother and daughter would have been permanently separated, and the mother would have lost her only family caregiver. As a counternarrative, if the Author’s client had been convicted of a single misdemeanor or used a fraudulent passport to enter the United States, Darkside Discretion is still unsuitable. Congress has specific detailed requirements and ineligibilities in the statute for cancellation of removal. Giving immigration judges the authority to issue a discretionary denial undermines the statutory language and purpose of cancellation.

Cancellation of removal is a robust statute with strict requirements for qualification, as well as a discretionary component. It seems redundant, at best, to inject a separate discretionary piece given that these statutory requirements, depending on the version, already require continuous physical

90. *Id.* § 1229b(b).

91. *Id.* § 1229b(a).

92. *Id.* § 1229b(c)(1).

93. *See id.* § 1229b (emphasis added).

presence for ten years, “good moral character,” “exceptional and unusual hardship” to a qualifying relative, and continuous or physical residence in the United States.⁹⁴ Noncitizens who can show long time residence in the United States or strong humanitarian factors to a relative should presumably qualify in the exercise of discretion—a term that remains undefined. Any eligible candidate for cancellation of removal has also lived in the United States for at least seven to ten years, which—in the Author’s view—is independently a compelling positive factor.⁹⁵ Given the rigorous requirements and statutory caps already in place for cancellation of removal, there is little purpose in preserving a discretionary feature to this remedy. Finally, to address the countervailing view that how and why people enter and remain in the United States should be weighed against the applicant, it is a useful reminder that the very purpose of cancellation of removal is to protect people who are not in a lawful status and facing removal. Further, Congress valued and made specific rules about the length of time a person is in “continuous physical presence” and “continuous residence.” The statutory language of cancellation of removal is also rigid enough to leave out those without strong equities.

Cancellation of removal is not the only remedy reviewed by immigration judges that includes a discretionary element. There are at least a dozen discretionary remedies that can be brought before an immigration court, including waivers of inadmissibility, adjustment of status, asylum, and suspension of deportation.⁹⁶ Individuals who go before the immigration

94. *Id.* § 1229b(b). Beyond the scope of this Article, but worthy of a note, is the literature and critique surrounding cancellation of removal for nonpermanent residents. *See, e.g.*, Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL’Y & L. 87, 88–89 (2006); Molly Hazel Sutter, Note, *Mixed-Status Families and Broken Homes: The Clash Between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law*, 15 TRANSNAT’L L. & CONTEMP. PROBS. 783, 809–11 (2006); Margaret H. Taylor, *What Happened to Non-LPR Cancellation - Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527 (2015).

95. Political scientist Elizabeth Cohen has examined the role of time as a tool for measuring citizenship. ELIZABETH COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018). As described in this Article, many formal immigration benefits and remedies also hinge on the length of residence of physical presence of a noncitizen in the United States. Finally, the Author has discussed the value of using time as a measure of exercising discretion in previous work. *See, e.g.*, Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 42 (2012) [hereinafter Wadhia, *Deferred Action & Transparency*] (highlighting that 21.5% of approved cases involved persons who resided in the United States for over five years); *see also* HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (providing multiple examples and detailing various types of legal immigration).

96. *See, e.g.*, 8 U.S.C. §§ 1182 (inadmissibility), 1254a, 1255 (adjustment of status).

court with an application for relief for removal have typically conceded removability, or have been found deportable and moved to the “relief” stage of their removal or court proceedings. At the same time, this should not be overstated, as most people who are removed or deported from the United States do not have a formal court proceeding before an immigration judge.⁹⁷

B. Medium Statutory Requirements

1. Adjustment of Status

In “adjustment of status” or “adjustment” cases, DHS uses discretion when a person applies to “adjust” to a green card status while physically present in the United States. In 1952, Congress created § 245 so that immigrants physically present in the United States could “adjust” their status to that of a permanent resident as opposed to having to go abroad for a process known as consular processing.⁹⁸ Section 245(a) of the INA provides:

The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, *in his discretion* and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.⁹⁹

The standard for adjustment is stringent and requires that a person be inspected and admitted or paroled in the United States, be “admissible,” be present in the United States, and have an immigrant visa “available” at the time of application.¹⁰⁰ The existing language of the adjustment statute makes it difficult to identify circumstances under which a discretionary denial would be reasonable. For example, the statutory requirements alone bar a person who entered without inspection, but is married to a U.S. citizen, from

97. See 2016 U.S. DEP’T OF HOMELAND SEC. ANN. REP. IMMIGR. ENF’T ACTIONS 8 tbl.6 https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf; see also Shoba Sivaprasad Wadhia, *Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2 (2014) [hereinafter Wadhia, *Rise of Speed*] (noting that the majority of deported individuals in 2013 did not enter a court); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017) (arguing that the methods of removal that occur outside the court should require a court proceeding); Jennifer Lee Koh & Shoba Sivaprasad Wadhia, *Op-Ed: Deport, Not Court? The U.S. is Already Doing That*, L.A. TIMES (June 30, 2018, 11:10 AM), <https://www.latimes.com/opinion/op-ed/la-oe-koh-wadhia-deportations-20180630-story.html>.

98. See also Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349, 351 (1972).

99. 8 U.S.C. § 1255(a) (emphasis added).

100. *Id.*

qualifying for adjustment because one statutory requirement is that a person be “inspected and admitted or paroled” into the United States.¹⁰¹ Furthermore, those in a family or employment relationship, such as a spouse to a green card holder or an employee from India with an advanced degree sponsored by a U.S. employer, may not meet the requirement that a visa is “immediately available” due to the backlogs.¹⁰² Further, the adjustment statute lists more than one dozen reasons a person may be “inadmissible” for paperwork, crime-based, or related reasons.¹⁰³ One brush with the law many years ago can make a person inadmissible and, therefore, ineligible to adjust status.¹⁰⁴

Adjustment also includes a discretionary component, which means that a person can meet the statutory criteria outlined above but still be denied. Historically, adjudicators in Immigration and Naturalization Service (INS) relied on guidelines, known as the “Operation Instructions,” and precedential decisions by the Board to decide whether a person was eligible for adjustment.¹⁰⁵ Immigration officers made the initial decisions and their superiors reviewed “discretionary denials and any discretionary approvals in cases involving adverse factors.”¹⁰⁶ If a noncitizen was denied Section 245

101. *Id.*

102. *See, e.g., id.* § 1151(c)(1); Kyle A. Knapp, *The Green Card Backlog—Take a Number and Wait . . . A Long Time*, 16 OHIO EMP. L. LETTER (M. Lee Smith Publishers LLC, Brentwood, Tenn.), No. 11, Nov. 2005, at 4. The effects of this backlog have been profoundly felt in the wake of a global pandemic, during which thousands of foreign doctors from India are willing and able to treat patients but remain unable to do so because of the backlogs. Gurmukteshwar Singh, *Op-Ed: I’m an Immigrant Doctor Treating COVID-19 Patients. Death Isn’t My Only Fear Right Now*, L.A. TIMES (Apr. 23, 2020, 1:07 PM), <https://www.latimes.com/opinion/story/2020-04-23/coronavirus-doctor-h1b-visa>.

103. *See generally* 8 U.S.C. § 1182(a).

104. *See generally id.*

105. *See, e.g.,* INS OPERATION INSTRUCTIONS § 245.5(d)(3) *reprinted in* 16 CHARLES GORDON, STANELY MAILMAN, STEPHEN YALE-LOHR, & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 245.5(d)(3) (Matthew Bender, Rev. Ed. 2020) (“Every denial of a section 245 application solely as a matter of discretion, shall be reviewed by a district officer no lower than Assistant District Director, Travel Control before the decision is served.”); *id.* § 245.5(d)(4) (“If an adjudicator determines that a section 245 application should be granted in the exercise of discretion, despite the existence of an adverse supervisory officer before the applicant is notified of the decision. If a formal written decision is not prepared in such a case, the adjudicator shall note Form I-468 to show ‘Approval warranted despite (specify adverse factor or factors) for following reason: (specify).’”).

106. COLIN S. DIVER, ADMIN. CONF. OF THE U.S., AGENCY ARTICULATION OF POLICY 387, 431 (1983) (citing INS OPERATION INSTRUCTIONS § 245.5(d)(3)–(4), *reprinted in* 4 GORDON & H. ROSENFELD, IMMIGRATION LAW & PROCEDURE § 23-522 (1981)); *see also* ADMIN. CONF. OF THE U.S., RECOMMENDATION 71–5, PROCEDURES OF THE IMMIGRATION AND NATURALIZATION SERVICE IN RESPECT TO CHANGE-OF-STATUS APPLICATIONS (1971), <https://>

adjustment, they were able to reapply for adjustment of status before a Special Inquiry Officer¹⁰⁷ and, if denied, appeal to the Board.¹⁰⁸ While the Operations Instructions included a framework for adjudicators to follow when exercising discretion in adjustment cases, the standard was ambiguous and, at best, instructed officers to consider substantial equities and adverse factors as well as published precedential decisions.¹⁰⁹

Early cases by the Board show how both the absence of equities or a preconceived intent to remain in the United States permanently after entering on a temporary visa resulted in discretionary denials.¹¹⁰ In one case called *In re Leger*,¹¹¹ the Board stated “there must be outstanding equities in a generally meritorious case, to warrant the grant of adjustment.”¹¹² In another case, *Matter of Ortiz-Prieto*, a Chilean native was in deportation proceedings because of a visa overstay and was eligible for adjustment of status. The sole question in this case was whether the Board properly exercised discretion. The Board affirmed the discretionary denial from the special inquiry officer, noting that the Chilean native had no outstanding equities because the Chilean native had no close family members or dependents in the United States, or immediate family members living in Chile.¹¹³

Five years later, in 1970, the Board modified the standard for discretion in adjustment cases, holding in the case of *Matter of Arai*:¹¹⁴ “Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion.”¹¹⁵ *Arai* was a twenty-

www.acus.gov/sites/default/files/documents/71-5.pdf (detailing discretionary decisionmaking in various removal proceedings); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1305–06 (1986) (describing how cases go to either Special Inquiry Officers (SIOs) or district directors); Sofaer, *supra* note 98, at 355 (explaining that studying denials provides alternative data, including processes of administrative review, investigation, and enforcement).

107. SIOs functioned as “immigration judges” historically. In 1973, Immigration and Naturalization Service (INS) published a rule defining SIOs as immigration judges. 38 Fed. Reg. 8565, 8590 (Apr. 4, 1973).

108. See Sofaer, *supra* note 98, at 354.

109. See INS OPERATION INSTRUCTIONS, *supra* note 105, § 245.5(d).

110. For a greater dissection into the role of “preconceived intent” as a factor in denying adjustment applications on a discretionary basis, see Foster, *supra* note 9, at 51.

111. 11 I. & N. Dec. 769 (B.I.A. 1966).

112. Roberts, *supra* note 4, at 161 (quoting *Leger*, 11 I. & N. at 797).

113. Ortiz-Prieto, 11 I. & N. Dec. 317, 320 (B.I.A. 1965).

114. 13 I. & N. Dec. 494, 496 (B.I.A. 1970).

115. *Id.*; see also Roberts, *supra* note 4, at 162–64 (explaining that this loosening created ambiguity).

seven year-old specialty cook in Japanese cuisine and first arrived in the United States as a visitor.¹¹⁶ The Board described Arai as a “a young man, in good health, and of a good moral character. His employment is such that a labor certification has been issued. The employment could be of potential benefit to this country.”¹¹⁷ The Board concluded that he had no adverse factors and that, therefore, “outstanding equities” were not necessary to reach a favorable decision in the exercise of discretion.

Under the current framework, whether a noncitizen applies for adjustment as a benefit with DHS or as a “defense” to removal before a DOJ immigration judge depends on their posture. A person who is not currently in removal proceedings would apply for adjustment “affirmatively” with USCIS. A person in removal proceedings would apply for adjustment as a “defense” to removal. This paragraph summarizes some cases involving the latter.¹¹⁸ Most of the decisions reviewed for this Article involved cases where the Board reversed an immigration judge’s discretionary denial, and often included equities, such as long time residence and strong family ties in the United States.¹¹⁹ In other cases reviewed for this Article, the Board

116. *Arai*, 13 I. & N. Dec. at 495.

117. *Id.*

118. The author thanks Ben Winograd from the Center for collecting and making available unpublished decisions by the Board of Immigration Appeals. The decisions summarized in the next section are drawn from cases provided by the Center.

119. *See, e.g.*, N-M-, AXXX XXX 196, 1, 3 (B.I.A. Dec. 1, 2017) (*Pauley*, Greer, Wendtland) (reversing discretionary denial where immigration judge found equities outweighed actions of respondent’s prior husband, who was indicted for war crimes by International Criminal Tribunal for the Former Yugoslavia (ICTY)); Roderico Geronimo Tzum-Sum, A071 575 904, 2–4 (B.I.A. Aug. 18, 2017) (*Wendtland*, Greer, Pauley) (reversing discretionary denial upon finding conviction for misdemeanor sexual battery under Cal. Penal Code 243.4(d)(1) is not a “violent or dangerous” crime, and that respondent resided in the United States for more than 25 years, was married to U.S. citizen, and had a U.S. citizen child with cognitive disabilities); Teresa Moreno-Gonzalez, A200 946 740, 2–3 (B.I.A. June 29, 2017) (*Wendtland*, Cole, O’Connor) (reversing discretionary denial of adjustment application upon finding respondent’s three U.S. citizen children, long marriage to naturalized U.S. citizen, and other positive equities outweigh five arrests that did not result in conviction); Jorge Albeto Rodriguez-Vazquez, A205 292 786, 2 (B.I.A. June 15, 2017) (*Pauley*, O’Connor, Wendtland) (reversing discretionary denial of adjustment application where respondent had close ties to five U.S. citizen children, was active in church, seemed genuinely rehabilitated, and last DUI was more than eight years prior); Zulfiqar Ali Mirza, A099 395 768, 2 (B.I.A. Feb. 19, 2016) (*Pauley*, Greer, Wendtland) (reversing discretionary denial of adjustment application upon finding respondent’s positive equities outweighed alleged involvement in fraudulent petition for religious visa); Jose Alfredo Quijada, A092 041 082 (B.I.A. Feb. 4, 2016) (*Greer*, O’Herron, Pauley (dissenting)) (reversing discretionary denial of adjustment application upon finding respondent’s positive equities were not outweighed by his unlawful entry and a 1989 criminal conviction for which he was placed on probation for two years); Mario Melgar,

remanded for additional factfinding on discretion, affirmed a discretionary grant by the immigration judge after DHS filed an appeal, sustained a DHS appeal and denied adjustment as a matter of discretion, or upheld a prior discretionary denial of adjustment by the immigration judge. In the case of *Jorge Adalberto Sanchez*,¹²⁰ the immigration judge found the applicant was eligible for adjustment under the statute, but was denied in the exercise of discretion based on his criminal history. Sanchez challenged this decision because the immigration judge did not consider positive factors in his case. The Board agreed and remanded the case for additional factfinding.¹²¹ In the case of *Manuel Velasquez Chavez*,¹²² DHS challenged the immigration judge's grant of adjustment under the statute and in the exercise of discretion. The Board upheld the grant, noting:

The respondent¹²³ has presented positive factors which generally weigh in favor of granting his application. He has resided in the United States for over 20 years. The respondent has been gainfully employed, and his employer stated the respondent is an

A200 550 222, 1 (B.I.A. Oct. 14, 2015) (*Grant*, Holmes, O'Leary) (finding respondent merits favorable exercise of discretion despite recent DUI conviction and lack of tax compliance); Ernest Antwi Asamoah, A087 310 643, 1–2 (B.I.A. Sept. 11, 2015) (*Mullane*, Creppy, Malphrus) (failing to disclose DWI conviction on adjustment application was a factor to be considered in the exercise of discretion, but did not render respondent ineligible to adjust status); Gustavo Soto Enriquez, A087 274 650, 2–3 (B.I.A. Aug. 5, 2015) (*Pauley*, Cole, Greer) (reversing discretionary denial of adjustment where immigration judge improperly relied on purported discrepancies between the respondent's testimony and a presentence investigation regarding an alleged offense for which the respondent was not prosecuted); David Aguinaga-Melendez, A200 759 135, 1 (B.I.A. May 19, 2015) (*Grant*, Adkins-Blanch, Guendelsberger) (reversing discretionary denial of adjustment where no evidence existed that respondent was responsible for crime leading to prior arrest for attempted murder or that he benefitted from filing of tax return that inaccurately listed him as married); Andrew Aburu Misumi, A094 075 414, 1 (B.I.A. Dec. 22, 2014) (*Pauley*, Cole, Donovan) (reversing discretionary denial of adjustment because respondent's marriage to U.S. citizen, present employment, and prior care for two U.S. citizen stepchildren outweighed conviction for driving while intoxicated); Elena Hernandez-Hernandez, A074 571 777, 1–2 (B.I.A. Mar. 31, 2014) (*Grant*, Guendelsberger, Hoffman) (holding immigration judge should have accepted partially complete evidence regarding the respondent's efforts to pay delinquent taxes, and failed to analyze her positive and negative equities); Enrique Manuel Vasquez-Perez, A095 802 066, 1 (B.I.A. Nov. 14, 2013) (*Miller*) (reversing discretionary denial of adjustment upon finding positive equities not outweighed by single conviction for driving under the influence).

120. A076 561 900 (B.I.A. Mar. 25, 2019).

121. *Id.* at 2.

122. A094 903 327 (B.I.A. Dec. 10, 2018).

123. In immigration cases, “respondent” refers to the noncitizen who is normally responding to charges by the government alleging a violation(s) of immigration law. This same person would be called an “applicant” if applying for a benefit or a waiver affirmatively with DHS, or a “petitioner” if filing a petition for review in federal court challenging a final removal order.

excellent employee. His employer indicated they wish to retain the respondent as part of their business. The respondent earns a good salary. More than 7 years have passed since the respondent's last offense.¹²⁴

The *Chavez* case serves as a reminder that, even where an immigration judge grants adjustment in the exercise of discretion, DHS has the authority to appeal.

In the case of *Jesus Ramirez-Ortega*,¹²⁵ the respondent argued that the immigration judge failed to consider his equities when denying adjustment in the exercise of discretion. The Board agreed, noting his equities:

The record reflects that the respondent does have significant equities, including that he has lived in the United States for 24 years. He has significant family ties in the United States, including his United States citizen wife, four United States citizen children, his lawful permanent resident parents, and two siblings, one who is a United States citizen and one who is a lawful permanent resident. The respondent has a consistent employment history and strong connections to the community. Moreover, the respondent's wife suffers from serious mental and physical health issues, which make it difficult for her to earn enough money to support her family without the respondent's help. In addition, the respondent's son is in special education classes and has a history of behavioral problems.¹²⁶

The Author has also worked on or examined cases involving male spouses, from predominantly Muslim countries, who lived in the United States during the post 9/11 era and eventually married U.S. citizens, but were denied adjustment in the exercise of discretion because they did not comply with a Muslim registry program, the National Security Entry-Exit Registration System (NSEERS). The NSEERS program—crafted by former Attorney General John Ashcroft—affected thousands of people in the United States who complied with the program, but were issued deportation papers based on an immigration status violation. Importantly, an unknown number of people who did not know about the registration requirements (which were published in the Federal Register, a document not always consulted by men of the age bracket to whom the program applied), or were too afraid to apply because of the negative consequences they witnessed or experienced as a result of Executive Branch policies in the wake of 9/11.¹²⁷ The NSEERS

124. *Chavez*, A094 903 327, at 2 (internal citations omitted).

125. A070 827 672 (B.I.A. May 21, 2018) (*Pauley*, Snow, Kelly).

126. *Id.* at 1–2 (citations omitted).

127. *See, e.g.*, PENN STATE L. CTR. FOR IMMIGRANTS' RTS. CLINIC FOR THE AM.-ARAB ANTI-DISCRIMINATION COMM., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 20 (2009), <http://www.adc.org/wp-content/uploads/2016/12/NSEER-S-ADC-Report.pdf>; PENN STATE L. CTR. FOR IMMIGRANTS' RTS. CLINIC & RTS. WORKING GRP., THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY 15–18 (2012), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc_pubs.

program remained on the books through most of the Obama Administration, but was eventually rescinded years later through a “final rule” days before President Trump’s inauguration.¹²⁸ The impact of NSEERS on those applying for adjustment illustrates how historical policy or political changes can influence future discretionary decisions in problematic ways. If the principle is for discretionary decisions to generally favor the noncitizen, denials of adjustment in cases where a person meets the statutory requirements, but is still denied in the exercise of discretion because of a discredited program, like NSEERS, undermine this principle.

The former Operations Instructions and case law are not dissimilar from more recent guidelines published by USCIS on how the discretionary component for adjustment of status should be considered. The current guidance cites to many of the cases identified above, and states in part: “Absent compelling negative factors, an officer should exercise favorable discretion and approve the application. If the officer finds negative factors, the officer must weigh all the positive and negative factors. The list of issues and factors may include, but is not limited to:

- [1] Eligibility;
- [2] Immigration status and history;
- [3] Family unity;
- [4] Length of residence in the United States;
- [5] Business and employment; and
- [6] Community standing and moral character.”¹²⁹

The USCIS guidance also cautions officers to “[a]void[] the use of numbers, points, or any other analytical tool that suggest quantifying the exercise of favorable or unfavorable discretion.”¹³⁰

Despite the existing case law from the Board and guidelines by USCIS regarding the exercise of discretion in adjustment cases, they are broad enough to result in discretionary denials by the stroke of a pen if an adjudicator decides the positive factors are outweighed by negative ones. In a meaningful number of cases, it is a single negative factor or mark that results in a denial in the exercise of discretion.¹³¹

128. Shoba Sivaprasad Wadhia, *Understanding the Final Rule Ending NSEERS*, YALE J. ON REG.: NOTICE & COMMENT (Dec. 23, 2016), <https://yalejreg.com/nc/understanding-the-final-rule-ending-nseers-by-shoba-sivaprasad-wadhia/>.

129. 7 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL pt. A, ch. 10 (updated ed. 2020), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>.

130. *Id.*

131. *See, e.g.*, Britkovyy v. Nielsen, No. 18-CV-718, 2019 WL 1473094, at *3 (E.D. Wis. Apr. 3, 2019); Yu Mei Chen v. Nielsen, 363 F. Supp. 3d 333, 337 (E.D.N.Y. 2019); Siddiqui v. Cissna, 356 F. Supp. 3d 772, 776 (S.D. Ind. 2018).

2. *Survivors of Crime*

While § 245(a) of the immigration statute is the primary way a person applies for adjustment of status, some classes apply for adjustment under different statutory provisions. For instance, a survivor of crime who has been granted U nonimmigrant status in the United States is eligible for adjustment of status under § 245(m), which in turn requires the survivor to show that the survivor holds U-1 nonimmigrant status, is physically present in the United States for a continuous period of at least three years, has not “unreasonably refused to provide assistance in the investigation or prosecution,” and is not inadmissible under INA § 212(a)(3)(E). Continued presence is justified on “humanitarian grounds, to ensure family unity, or is otherwise in the public interest[,]” and that the survivor qualifies for adjustment as a matter of discretion.¹³²

The discretionary component of U adjustment is worded in the statute as follows: “The Secretary of Homeland Security *may* adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 1101(a)(15)(U) of this title to that of an alien lawfully admitted for permanent residence”¹³³

U adjustment cases are unique because the applicant’s immigration status is tied to the survivor’s helpfulness to law enforcement and experience as a survivor of crime or family member of such survivor.¹³⁴ As a normative matter, one might argue that all survivors of crime who are helpful in the investigation or prosecution of the crime should qualify for adjustment in the exercise of discretion. Having worked with survivors of crime who qualify for U nonimmigrant status, the Author has seen firsthand the courage it takes for a survivor to come forward and report a crime to the police or cooperate in the investigation of a crime. The equities or circumstances in these cases often include the presence of family in the United States, employment, and trauma.

The regulations that govern U adjustment list factors that should be considered when exercising discretion, and state, in part, “[d]epending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the

132. INA, 8 U.S.C. § 1255(m); *see also Green Card for a Victim of a Crime (U Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-a-victim-a-crime-u-nonimmigrant> (last updated May 23, 2018) (noting that derivative U nonimmigrant adjustment status eligibility requires a favorable exercise of discretion).

133. 8 U.S.C. § 1255(m) (emphasis added).

134. *Green Card for a Victim of a Crime (U Nonimmigrant)*, *supra* note 132.

adverse factors, such as a showing might still be insufficient.”¹³⁵ Practically speaking, USCIS has exercised its discretion to deny adjustment applications for U nonimmigrants. One attorney shared with the Author a denial she received on a U adjustment case involving a man with ten years residence and close family relationships in the United States, participation in a youth delinquency program, steady employment, and a 2015 arrest for sexual battery and sexual assault. The noncitizen was fourteen years old at the time of the incident. He was not charged or convicted of any criminal offense. The juvenile probation program was a special diversion program. USCIS found the noncitizen was a risk to public safety and failed to satisfy his burden of proving eligibility for adjustment of status in the exercise of discretion.¹³⁶ A countervailing argument might be to highlight the applicant’s criminal history and support Darkside Discretion as a way to deal with criminal behavior. But the goal here is to highlight the statutory language and legislative purpose for granting adjustment of status and the ways Darkside Discretion undermines this language and purpose. Beyond the scope of this Article is how criminal behavior outside the statutory language should inform the relationship between Darkside Discretion or bright-line rules.

If an attorney or noncitizen is denied adjustment, they may file a motion or appeal to USCIS.¹³⁷ In one case reviewed, known as *Matter of R-M-G*,¹³⁸ the applicant was a native and citizen of Mexico who entered the United States at the age of twenty-two and was a “victim of a felonious assault, whereby he was threatened at gunpoint and his friend was shot in the

135. The full regulation at 8 C.F.R. § 245.24(d)(11) states:

“*Evidence relating to discretion.* An applicant has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such as a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.”

136. E-mail from Attorney A to author (May 30, 2019, 7:04 PM) (on file with author).

137. 8 U.S.C. § 1255; Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 73 (2016).

138. R-M-G-, No. 359092, 2019 Immig. Rptr. LEXIS 4335 (AAO May 21, 2019) (determination).

abdomen and arm.”¹³⁹ He received U nonimmigrant status based on his helpfulness with the investigation of the crime. USCIS denied his adjustment. The Administrative Appeals Office (AAO) summarized the equities in the case as told by the lower agency decision:

The Director acknowledged the positive and mitigating equities present in the Applicant’s case: his lengthy residence and employment in the United States; his LPR spouse, U.S. citizen son, and step-son with work authorization; the financial and emotional support he provided for his mother in Mexico prior to her death; and the numerous letters of support from the Applicant’s friends, coworkers, religious leaders, and acquaintances that described him as a hard-working, responsible, honest, and kind human being. However, the Director highlighted the Applicant’s [redacted] 1999 conviction for driving under the influence of alcohol (DUI) and his [redacted] 1996 arrest on charges of aggravated assault and possession of a weapon during the commission of a crime.¹⁴⁰

The Applicant’s criminal history occurred twenty years ago and predated his grant of a U nonimmigrant status. The AAO remanded the case back to the Director after concluding that they failed to consider all of the mitigating factors in the case.¹⁴¹

The outcome in *Matter of R-M-G* favored the applicant, but it raises broader questions and concerns about the ability for agencies to focus on some factors and ignore others when deciding if adjustment should be granted in the exercise of discretion. Little purpose is served when agencies issue discretionary denials in cases that have already overcome a number of statutory requirements or where several equities are present.

How discretion is exercised in adjustment cases is not just normatively important to the discussion but also practically relevant. A significant number of noncitizens apply for adjustment through family, employment, or humanitarian grounds annually. To provide a snapshot, in the third quarter of Fiscal Year 2019, USCIS received 137,299 adjustment applications, approved 153,071 applications, had 572,276 pending applications, and denied 20,220 applications.¹⁴² The public data does not detail whether an application was denied in the exercise of discretion or because of failure to

139. *Id.* at *1.

140. *Id.* at *2–3 (alterations in original).

141. *Id.* at *7.

142. *Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485_performance_data_fy2019_qtr3.pdf (last updated Aug. 2019). The number of applications “received” include new applications entered into the system during the quarter. “Denied” applications include applications that were denied, terminated, or withdrawn during the quarter.

meet a statutory criterion. The Author's experience in seeking data on prosecutorial discretion in immigration cases is that filing a Freedom of Information Act (FOIA) request is necessary to yield such information and, even then, the data itself is often incomplete.¹⁴³

3. *Extreme Hardship Waivers*

"Extreme Hardship" waivers represent another area where the government uses discretion. Like with adjustment, a person will seek a waiver before DHS or DOJ depending on their procedural posture. For certain noncitizens seeking admission as an immigrant, but otherwise ineligible because of an immigration violation, agencies have discretion to grant a "waiver" if they can meet certain requirements. One criterion an applicant must show is that a relative, who is a U.S. citizen or green card holder, will suffer extreme hardship if the applicant were to be removed.¹⁴⁴ The immigration statute contains three kinds of waivers that include extreme hardship as an element: (1) 212(h) waiver of inadmissibility for certain criminal grounds;¹⁴⁵ (2) 212(i) waiver of inadmissibility for certain misrepresentations or fraud;¹⁴⁶ and (3) 212(a)(9) waiver of inadmissibility for unlawful presence.¹⁴⁷ For each of these waivers, applicants have the burden to prove eligibility for relief and, if successful, will receive a permanent status or "green card."¹⁴⁸

Importantly, every immigrant seeking a waiver under one of these categories must have a basis for receiving permanent status in the first place. For example, the Author once represented a man married to a U.S. citizen wife and with a U.S. citizen child. He qualified for permanent status based on his marriage to a U.S. citizen, but also sought a 212(h) waiver because his criminal history triggered a ground of inadmissibility. In preparing his case, the Author had to show that her client met the requirements for a 212(h) waiver:

143. SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 134–45 (2017); Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 *GEO. IMMIGR. L.J.* 345, 353 (2013); Wadhia, *Rise of Speed*, *supra* note 97, at 4.

144. 8 U.S.C. §§ 1182(h), (i).

145. *Id.* § 1182(h).

146. *Id.* § 1182(i).

147. *Id.* § 1182 (a)(9)(B)(v).

148. Some scholars and practitioners have discussed waivers of inadmissibility in other contexts. *See, e.g.*, Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 *WIS. L. REV.* 345, 353–54 (2007); Julianne Lee, *Tortured Language: Lawful Permanent Residents and the 212(h) Waiver*, 84 *FORDHAM L. REV.* 1201 (2015); Kanstroom, *supra* note 3, at 806; KATHERINE BRADY, *IMMIGR. LEGAL RES. CTR.*, *UPDATE: THE LPR BARS TO § 212(h)—TO WHOM DO THEY APPLY?* 3–4 (2014), https://www.ilrc.org/sites/default/files/resources/212h_matter_of_rodriguez_update_2014.pdf.

The Attorney General *may*, in his discretion, waive the application of [certain criminal grounds of inadmissibility] . . . in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.¹⁴⁹

The term "extreme hardship" is not defined in the statute or federal court decisions. Rather, the definition has been historically guided by agency interpretations of this standard in individual cases.¹⁵⁰ In addition to meeting the extreme hardship standard and other statutory requirements, applicants must also show that a waiver is warranted as a matter of discretion. In *In re Jose Mendez-Morales*,¹⁵¹ a case from 1996, the Board said:

We emphasize that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create any entitlement to that relief. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. We would note, however, that an application for discretionary relief, including a waiver under section 212(h), may be denied in the exercise of discretion without express rulings on the question of statutory eligibility.¹⁵²

The case involved a forty-two year old native of Mexico who entered the United States on a green card but was later convicted of first-degree sexual assault in violation of Nevada law. He was married to a U.S. citizen and (re)applied for adjustment of status based on his marriage, in conjunction with a 212(h) waiver of inadmissibility based on his criminal conviction. Drawing from an earlier, but well-known, case called *Matter of Marin*,¹⁵³ the Board identified lengthy residence, hardship to the applicant and his family, service in the Armed Services, steady employment, business ties, and community service as among the favorable factors to consider when deciding whether discretion is warranted.¹⁵⁴

When applying these and other factors, the Board in *Mendez-Morales* held that discretion was not warranted.¹⁵⁵ The Board recognized the strong equities in the case, including his role as a financial provider, father to three U.S. citizen children, husband to a U.S. citizen wife, and a consistent history of employment.¹⁵⁶ The Board also noted the wife's medical condition and

149. 8 U.S.C. § 1182(h) (emphasis added).

150. *See, e.g.*, *Palmer v. INS*, 4 F.3d 482, 487 (7th Cir. 1993); *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Osuchukwu v. INS*, 744 F.2d 1136, 1142 (5th Cir. 1984).

151. *Jose Mendez-Morales*, 21 I. & N. Dec. 296 (B.I.A. 1996).

152. *Id.* at 301–02.

153. 16 I. & N. Dec. 581 (BA 1978).

154. *Mendez-Morales*, 21 I. & N. at 301–02.

155. *Id.* at 302.

156. *Id.* at 314.

previous suicide attempt at the time her husband was charged criminally.¹⁵⁷ Nevertheless, given the serious nature of the factual events surround the criminal charge and conviction itself, as well as the absence of any “persuasive evidence of rehabilitation,” the Board dismissed the case and agreed with the lower immigration court that discretion was not warranted.¹⁵⁸

Then-Board Member, Lory Rosenberg, issued a powerful dissent critiquing the majority for elevating “rehabilitation” as a determinative factor in discretion and weighing it more heavily than the elements of “close family ties” and “extreme hardship.”¹⁵⁹ She found the decision to be an “abuse of discretion” and also one that “does violence to the statutory language.”¹⁶⁰

Years later, well after the demise of the former INS and creation of DHS, USCIS published guidance for its officers on the application of the discretionary component in waivers. USCIS cites to *Mendez-Morales*:

A finding of extreme hardship permits but never compels a favorable exercise of discretion. If the officer finds the requisite extreme hardship, the officer must then determine whether USCIS should grant the waiver as a matter of discretion based on an assessment of the positive and negative factors relevant to the exercise of discretion. The family relationships to U.S. citizens or lawful permanent residents and a finding of extreme hardship to one or more of those family members are significant positive factors to consider.¹⁶¹

The USCIS guidance also points out how a criminal ground of inadmissibility on which a waiver is based may itself be a negative factor that yields a discretionary denial.¹⁶² While the case law and USCIS guidance underscore how a finding of extreme hardship does not necessarily result in a favorable exercise of discretion, they do not articulate a clear guideline for how this discretion will be considered.

Waivers of inadmissibility illustrate just one category of remedies that include a discretionary component that remains undefined. Despite the presence of a body of case law and guidance by USCIS, one is nevertheless left with a discretionary waiver that lacks a sufficiently clear definition to avoid or challenge abuses. Furthermore, regarding criminal waivers of inadmissibility, the irony of exercising discretion negatively for a criminal charge that is itself the basis for the waiver is not lost upon the Author. A countervailing view would be to highlight the criminality associated with applicants for a 212(h)

157. *Id.* at 303.

158. *Id.* at 305.

159. *Id.* at 307–11 (Rosenberg, dissenting).

160. *Id.* at 315.

161. 9 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL pt. B, ch. 7 (2020), <https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-7> (citing *Mendez-Morales*, 21 I. & N. at 296).

162. *Id.*

waiver. But Congress wrote a statute designed to waive certain grounds of inadmissibility and focused on largely humanitarian reasons or factors a person would have to show in order to qualify. Retaining Darkside Discretion only undermines what the statute was designed to do—waive certain criminal grounds of inadmissibility for people with strong equities.

Like with asylum, cancellation of removal, and adjustment of status, the statutory requirements for waivers of inadmissibility are rigorous enough that noncitizens who meet these requirements should qualify. Similarly, Congress's choice to include only a specified list of criminal grounds that can be waived, or list requirements, like extreme hardship, to an anchor relative who is a U.S. citizen or green card holder, underscores its ability to express limits and rules in connection with waivers. The waiver of inadmissibility is by no means overbroad and, as explained earlier, was made more stringent by Congress in 1996 when it heightened the hardship requirements and disqualifying factors. The statutory limits of the waiver is illustrated by the fact that the waiver is unavailable to noncitizens if they have been convicted of an aggravated felony or have not lawfully resided continuously in the United States for at least seven years, even if previously admitted to the United States as an alien lawfully admitted for permanent residence.¹⁶³

Finally, the number of noncitizens seeking waivers is far from trivial. To illustrate, in the third quarter of 2019, considering all waivers (including some waivers of inadmissibility that are encompassed by this Section), USCIS received 18,904 applications, approved 12,713 applications, and denied 3,608.¹⁶⁴ The public data does not break down waivers by category, nor does it explain how many were denied a waiver in the exercise of discretion. Nevertheless, the numbers show that many applications for waivers of inadmissibility involving a discretionary component are filed with USCIS each quarter and annually.

C. *Broad Waivers*

Consular officers in DOS use discretion in assessing waiver eligibility similar to (but not the same as) the discretion exercised by DHS in the consideration of waivers. To illustrate, when a “nonimmigrant” or one seeking temporary admission through a category, such as students, scholars, or tourists, is also a candidate for “inadmissibility” under immigration laws, they must prove eligibility for a waiver or otherwise be exempt from the

163. INA, 8 U.S.C. § 1182(h)(c)(2).

164. *Number of Service-Wide Forms by Fiscal Year to- Date, by Quarter, and Form Status Fiscal Year 2019*, U.S. CITIZENSHIP & IMMIGR. SERVS. https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q1.pdf (last updated January 2019).

proclamation. Case law and the FAM guide a common waiver, known as the “212(d)(3)” waiver. In the BIA case of *Matter of Hranka*,¹⁶⁵ the Board held:

An application under section 212(d)(3) requires a weighing of at least three factors: (1) the risk of harm to society if the applicant is admitted; (2) the seriousness of the applicant’s immigration law, or criminal law violation, if any; and (3) the nature of the applicant’s reasons for wishing to enter the United States.¹⁶⁶

Congress included a discretionary component for the 212(d)(3) waiver in the statute, which reads, in part:

“(3)(A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and *may* be admitted into the United States temporarily as a nonimmigrant *in the discretion of the Attorney General . . .*”¹⁶⁷

The literature analyzing 212(d)(3) waivers is arguably more expansive than the case law.¹⁶⁸ The FAM also lists the following factors that consulates should consider in deciding whether a waiver is warranted: (1) recency and seriousness of activity or condition; (2) reasons for proposed travel to the United States; (3) positive or negative effect, if any, of proposed travel on U.S. public interests; (4) whether a single, isolated incident or a pattern of misconduct; and (5) evidence of reformation or rehabilitation.¹⁶⁹

The 212(d)(3) waiver is available to those with equities but, unlike many other waivers, is not contingent on the applicant meeting a qualifying family relationship, or some compelling or exceptional case. The lack of exceptionalism in the 212(d)(3) waiver case is “exceptional” compared to other waivers and remedies in the immigration statute, but most relevant here is the fact that DOS officers have the discretion to recommend (or not to recommend) a waiver for nonimmigrants seeking a waiver in this category. The opportunity to qualify for a 212(d)(3) waiver is important to a student

165. 16 I. & N. Dec. 491 (B.I.A. 1978).

166. *Id.*

167. 8 U.S.C. § 1182(d)(3)(A) (emphasis added).

168. *See, e.g.,* Jared Hatch, *Requiring a Nexus to National Security: Immigration, Terrorist Activities, and Statutory Reform*, 2014 BYU L. REV. 697, 712–13 (analyzing the scope and admissibility of waivers); Edward J. Lynch, *Medical Exclusion and Admissions Policy: Statutes and Strictures*, 23 N.Y.U. J. INT’L L. & POL. 1001, 1005–06 (1991) (discussing INS criteria for evaluating applications for admission and waivers from people diagnosed with HIV-AIDS).

169. 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 305.4-3(C), <https://fam.state.gov/FAM/09FAM/09FAM030504.html> (detailing the factors to be considered when adjudicating a waiver under INA § 212(d)(3)).

admitted to a U.S. university or a scholar accepted as a Fulbright at a health institute, but may be inadmissible because of a previous immigration violation or nonviolent criminal history. The list of reasons a person can be labeled as “inadmissible” under the immigration statute is broad and makes remedies like the 212(d)(3) waiver ever important. Further, this waiver reflects a judgment by Congress that qualifying applicants should not necessarily have to prove a compelling case, like a family relationship or serious medical condition. Like with the remedies discussed in the previous section with DHS, the discretionary component of the 212(d)(3) waiver has not been clearly defined.

Beyond the 212(d)(3) waiver is the discretion held by consulates to decide whether other statutory waivers should be granted. This kind of discretion resembles how waivers and discretion function in DHS and DOJ. For example, when an immigrant is seeking admission at a consulate overseas, but in need of a 212(h) “extreme hardship” waiver, the consulate adjudicates that waiver application and the discretionary analysis.

III. WHY ELIMINATING OR CLARIFYING DISCRETION MATTERS

A. *Limits on Discretion by the Attorney General*

One benefit of eliminating delegated discretion or building a clear standard is that it provides a built-in checks and balances for the system. During his tenure as Attorney General, Jefferson Sessions used a tool in the immigration law, known as “certification,” to reclaim cases decided by the BIA and reissue new decisions unilaterally, often shrinking relief or protection for the respondent and future cases in the process.¹⁷⁰ The number and impact of cases certified since the beginning of the Trump Administration is striking.¹⁷¹

170. See 8 C.F.R. § 1003.1(h)(1)(i) (2019) (“The Board shall refer to the Attorney General for review of its decisions all cases that [] [t]he Attorney General directs the Board to refer to him.”).

171. See, e.g., List of Recent AG/BIA Precedential Decisions, Volume 27, U.S. DEPT. OF JUST., <https://www.justice.gov/eoir/volume-27> (last updated June 12, 2019) (listing cases since President Trump assumed office in 2017); see also Dara Lind, *Jeff Sessions is exerting unprecedented control over immigration courts—by ruling on cases himself*, VOX (May 21, 2018, 1:06 PM), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling> (highlighting Jeff Session’s invocation of his power to issue decisions unilaterally); Jeffrey S. Chase, *The AG’s Certifying of BIA Decisions*, JEFFREY CHASE: BLOG (Mar. 29, 2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions> (highlighting Jeff Sessions’ disproportionate use of his position in immigration litigation in comparison to other Attorney Generals). See generally Jennifer S. Breen, *Labor, Law Enforcement, and “Normal Times”: The Origins of Immigration’s Home Within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications*, 42 U. HAW. L. REV. 1 (2019) (examining

To illustrate, and as introduced in Part II of this Article, the Board issued a formative decision for asylum cases in 2014 and explicitly recognized that domestic violence can be a basis for asylum.¹⁷² Specifically, the Board held that “[d]epending on the facts and evidence in an individual case, ‘married women in Guatemala who are unable to leave their relationship’ can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal.”¹⁷³ The case, *Matter of A-R-C-G-*, was not the first time the Board recognized gender or sexual violence as a social group in asylum cases, but it was nonetheless significant and a foundation for future asylum claims. Following the shift in administrations, the Attorney General certified *Matter of A-B-*,¹⁷⁴ and issued a decision that undermines these asylum claims and overrules *Matter of A-R-C-G-*.¹⁷⁵ Authored by the Attorney General, the case leads with “*Matter of A-R-C-G-*, 26 I. & N. Dec. 338 (BIA 2014) is overruled. That decision was wrongly decided and should not have been issued as a precedential decision.”¹⁷⁶

On July 2, 2019, the Trump Administration went one step further by publishing a final rule that expands the Attorney General’s ability to review cases issued by the Board and designate decisions, of their choosing, as precedent.¹⁷⁷ According to one attorney, this new regulation—which became effective in September 2019—allows the Attorney General to sidestep any process before making a final decision or change to immigration law.¹⁷⁸

While the solutions for discretion proposed in this Article do not prevent the power held, or soon to be held, by the Attorney General, the solution

Attorney General certification power and the history of a move of the immigration agencies from the Department of Labor to the DOJ); Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017) (discussing the broad administrative influence of the Attorney General on immigration policies and decisionmaking).

172. A-R-C-G-, 26 I. & N. Dec. 388, 388, 394–95 (B.I.A. 2014).

173. *Id.* at 388.

174. 27 I. & N. Dec. 316 (A.G. 2018).

175. *Id.*

176. *Id.* *Matter of A-B-* has been criticized by several advocates and scholars. See, e.g., Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 752, 754 (2019) (describing the case as “convoluted,” “controversial,” “complicated,” “changing over time,” and “an exceedingly high standard not applied to any area of law”). See generally Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J. L. REFORM 343 (2019) (analyzing the detrimental effect of *Matter of A-B-* on immigration and asylum reform).

177. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31,463, 31,463 (July 2, 2019).

178. Suzanne Monyak, *Revived Rule Ups Barr’s Power to Shape Immigration Law*, LAW360 (July 1, 2019, 10:21 PM), <https://www.law360.com/articles/1174543/revived-rule-ups-barr-s-power-to-shape-immigration-law>.

does set limits. Decisions by the Attorney General issued through certification or designation may not violate statutes or regulations. Beyond the scope of this Article, but a worthy policy question for a future one, is whether the certification rule in title 8 of the Code of Federal Regulations should be rescinded, or whether the immigration courts themselves should be removed from the DOJ.¹⁷⁹ Furthermore, it is hard to imagine that Congress, in crafting a rigorous statutory scheme for remedies and considering discretion, intended there to be political interference in the way Attorney General certification works.

B. *Reduction of Arbitrary Discretionary Decisions*

Eliminating discretion or establishing a clear standard can help reduce arbitrary and capricious discretionary decisions. For example, the arbitrariness of the discretionary component in adjustment cases was analyzed by Abraham D. Sofaer in his study, *Judicial Control of Informal Discretionary Adjudication and Enforcement*.¹⁸⁰ While the agency structure and main players differ from today's design, Sofaer's work remains relevant today.

In his study, Sofaer found that:

Examiners applied different standards in exercising discretion on the merits; that the Service's view of discretion has changed periodically; that extensive and successful political intervention on the merits strongly correlates with the presence of discretionary power that official Service policy on the meaning of discretion permits inconsistent results; and that there are striking variations among INS districts in their rates of denial of section 245 cases that do not appear explainable in terms of the character of the districts involved.¹⁸¹

Sofaer's study also reveals the significant role of political intervention in 245 cases, as noted in his conclusion that "Examiner reversals of discretionary decisions on the same record were overwhelmingly due to political intervention."¹⁸²

179. See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1678 (2010) (overviewing some proposed congressional solutions for resolving administrative immigration issues); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386–87 (2007) (recommending options for improving immigration courts and the immigration Board). See generally Tara Magner, *Immigration Judges Seek Independence from Department of Justice*, 16 GEO. IMMIGR. L.J. 733 (2002) (pointing to the National Association of Immigration Judges' petition for immigration courts to be housed under an independent agency petitions and a congressional report recommending different agencies manage adjudication and enforcement).

180. Sofaer, *supra* note 9, at 1299–1304.

181. *Id.* at 1301.

182. *Id.*

Maurice Roberts also raises concerns about arbitrariness in the absence of guidelines about how discretion is applied: “An intolerant adjudicator could deny relief to aliens whose cultural patterns, political views, moral standards or lifestyles differed from his own. Worse still, a hostile or xenophobic adjudicator could vent his spleen on aliens he personally considered offensive without articulating the actual basis for his decision.”¹⁸³

Reflecting on the dissent by Board member Rosenberg in *Mendez-Moralez*, perhaps the Board would have benefited from a guideline on discretion and reduced the dissonance around the weight accorded to the negative and positive factors in his case. Roberts also stated that “[i]n view of the broad range of discretionary authority thus confided to the Attorney General and his delegates, some standards are clearly needed to preclude arbitrary and capricious decisionmaking by the many delegates of the Attorney General exercising discretion.”¹⁸⁴

A second lens through which to discuss arbitrary decisionmaking is the extent to which adjudicators use the discretionary component in a statutory benefit or waiver to deny relief and foreclose the option for judicial or federal court review. Under the immigration statute, a federal court cannot review most discretionary decisions.¹⁸⁵ However, the line between discretionary and statutory remains elusive. Says Daniel Kanstroom: “Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion.”¹⁸⁶ In examining the relevant statute at § 242(a)(2)(C) of the INA, one source states that “a court cannot review the denial of most types of relief from removal that are granted at the discretion of the immigration officer or immigration judge, including a waiver of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status to lawful permanent resident.”¹⁸⁷ The statute contains some exceptions to the bar on judicial review for discretionary decisions, specifically in cases involving questions of law, constitutional claims, or asylum cases.¹⁸⁸

183. Roberts, *supra* note 4.

184. *Id.* at 158.

185. INA, 8 U.S.C. § 1252(a)(2); see also Daniel Kanstroom, *The Better Part of Valor: the REAL ID Act, Discretion, and the Rule of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 180–81 (2006) (providing the majority rule and an alternative model for jurisdictional discretion in immigration cases); Nancy Morawetz, *Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 115 (2006).

186. Kanstroom, *supra* note 185, at 165.

187. MARGARET MIKYUNG LEE, CONG. RSCH. SERV., R43226, AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS 3 (2013), <https://fas.org/sgp/crs/homsec/R43226.pdf>.

188. *Id.* at 3–5; 8 U.S.C. §§ 1252(a)(2)(D), 1101(a)(42), 1158.

In his empirical piece reviewing 276 immigration cases involving jurisdiction and discretion issues, Kanstroom found that 179 were dismissed for lack of jurisdiction, with nearly half involving an interpretation of “extreme hardship.”¹⁸⁹ Casting extreme hardship as a discretionary decision is problematic because the element of extreme hardship should be treated as a statutory requirement as opposed to a final discretionary decision. Kanstroom’s work shows that many cases involving discretionary determinations are dismissed. Immigration scholar Lenni Benson has explored the degree to which an attorney may recast a case as involving a constitutional or statutory issue in litigation. She remarks, “[k]nowing there is no judicial review of the discretionary decision, an attorney may now recharacterize litigation to raise constitutional or statutory issues. Barring review of the act of discretion has frequently only shifted the litigation strategy not eliminated litigation.”¹⁹⁰

Possibly, the degree to which discretionary decisions are denied vary from one circuit court to the next and hinge on the level to which a challenge is characterized as “discretion” or based on an issue that is reviewable. The Second Circuit precludes judicial review even when a decision is based on the statute, so long as there is any kind of discretionary decision and even where there is no reasoned explanation for the discretionary denial.¹⁹¹ In the case of *Ling Yang v. Mukasey*,¹⁹² the Second Circuit found that it lacked jurisdiction to review the immigration judge’s discretionary decision because the immigration judge provided reasons for denying adjustment independent of the grounds to determine statutory eligibility, and the Board affirmed this denial.¹⁹³ Such a broad approach is troubling because it could influence adjudicators to insert a discretionary reason into a decision they would have ordinarily retained as a statutory reason due to pressure from the agency to create an outcome that eliminates the opportunity for future review in a federal court. This scenario is not unlike the pressure placed by the Attorney General on immigration judges to complete a certain number of cases or follow a particular directive

189. Kanstroom, *supra* note 185, at 192. The parties in the dismissed cases featured extreme hardship, cancellation of removal, adjustment of status, and voluntary departure.

190. Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 52 (2006).

191. *See, e.g.*, *Lin v. Kelly*, 699 F. App’x. 44, 45–46 (2d Cir. 2017); *Marrakchi v. Napolitano*, 494 F. App’x 877, 881 (10th Cir. 2012); *Yang v. Mukasey*, 514 F.3d 278, 279 (2d Cir. 2008).

192. 514 F.3d 278 (2d Cir. 2008).

193. *Id.* at 279.

that disfavors the grant of relief.¹⁹⁴ The undue pressure placed on DHS and DOJ employees to craft a particular outcome in discretionary cases is beyond the scope of this Article, but worthy of discussion.¹⁹⁵

Courts and lawyers continue to grapple with the scope of judicial review in immigration cases. In one statutory provision, known as § 242(a)(2)(D), Congress instructed:

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.¹⁹⁶

The scope of this provision was the subject of oral arguments before the U.S. Supreme Court on December 9, 2019. In the consolidated cases of *Guerrero-Lasprilla v. Barr* and *Ovalles v. Barr*,¹⁹⁷ the Assistant Solicitor General, argued that when Congress used the words “questions of law” in the immigration statute, judicial review was reserved only for “pure” questions of law, and not mixed questions of law and fact.¹⁹⁸ The lawyer for respondents Counsel, Paul Hughes, issued a strong rebuttal concluding that “. . . when Congress created section 2(d), it must have meant for more than just whether or not the Board used the right statement of the standard. It must include whether or not that standard’s used.”¹⁹⁹ Beyond the statutory question, the Court also grappled with the presumption in favor of federal court review. Justice Gorsuch questioned the government, asking “[i]sn’t the presumption pretty ancient really? I mean, it goes back to the common law that the king can’t act arbitrarily without some check, some review, some opportunity to be heard by citizens.”²⁰⁰ Justice Breyer delivered the opinion of the Court on March 23, 2020, concluding that the statute’s Limited Review Provision covered mixed questions of law and fact.²⁰¹ Said the Court: “A longstanding presumption, the statutory context, and the statute’s history all support the

194. See, e.g., Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 600–01 (2009) (listing enormous caseloads and political pressures as constraining factors on immigration judges).

195. Several scholars have discussed solutions that include but are not limited to removing the immigration court out of the Department of Justice. See *supra* note 179 and accompanying text.

196. INA, 8 U.S.C. § 1252(a)(2)(D).

197. 140 S. Ct. 1064 (2020).

198. Transcript of Oral Argument at 31–33, 35–36, *Guerrero-Lasprilla*, 140 S. Ct. 1064.

199. *Id.* at 62.

200. *Id.* at 54.

201. *Guerrero-Lasprilla*, 140 S. Ct. at 1068.

conclusion that the application of law to undisputed or established facts is a ‘question of law’ within the meaning of [the statute].”²⁰²

C. Adherence to Administrative Law Values

A third benefit of eliminating discretion or creating a guideline is that it promotes positive administrative law values. Plenty of immigration scholars have analyzed administrative law values.²⁰³ In her scholarship on prosecutorial discretion in immigration cases, the Author has drawn from administrative law literature and examined how accuracy, consistency, efficiency, and acceptability emerge, as values, from codifying deferred action as a regulation.²⁰⁴ Eliminating discretion or crafting a clear standard for discretion in formal immigration adjudications would yield similar, but not identical, values. Without a well-defined benchmark for discretion, noncitizens and lawyers who represent them, accuracy, consistency among like cases, and transparency are compromised.

In his study, *The Change-of-Status Adjudications: A Case Study of Informal Agency Process*, Sofaer examined 245 applications—“summary, disposition, representation, and bias in the decision of applications—that seem most pertinent to an interest in the consequences of delegating broad discretionary power.”²⁰⁵ Sofaer found that Special Inquiry Officers (SIOs) regularly reversed discretionary denials that immigration adjudicators made, without any change in the facts.²⁰⁶ Sofaer attributes this to the fact that SIOS “at least in New York City, have a radically different view on how discretion should properly be exercised.”²⁰⁷

A similar pattern emerged in the roughly twenty unpublished decisions reviewed and discussed earlier in this Article; a high rate of reversals by the Board in cases where the facts remain largely the same. Treating similarly relevant facts consistently is itself a value, and something the Author has also discussed when analyzing immigration prosecutorial discretion cases. The importance of consistency is magnified when applied to discretion because of the effect across agencies.

The current system lacks efficiency. The statutory criteria crafted by Congress already reflect a policy judgment that, in many cases, are more

202. *Id.* at 1069 (citations omitted).

203. *See, e.g.*, Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215 (2014) (exploring the substantive values and functions of administrative law).

204. Wadhia, *Beyond Deportation*, *supra* note 2, at 94; Wadhia, *Deferred Action & Transparency*, *supra* note 95, at 51–65.

205. Sofaer, *supra* note 98, at 356.

206. *See id.* at 391.

207. *See id.*

stringent than the ordinary balancing test behind discretion. That DHS, DOJ, and DOS officers are required to decide about whether a person meets the statutory requirements and thereafter engage in an analysis about discretion is time-consuming and superfluous at best, or inhumane at worst. By eliminating discretion or setting a clearer standard, applicants may file fewer administrative appeals asserting that the decision is arbitrary, leading to greater efficiency in the agency. The solution is not to reduce the opportunities for an individual to file an appeal. Rather, the solution is to reduce the number of times an appeal is filed because a discretionary denial lacked a sound reason. To echo immigration scholar Benson: “By accepting efficiency as a primary goal, I do not mean to imply that it is the only goal of the adjudication system. The ideal system would also guarantee fair and individualized procedures and that people are not illegally ordered removed.”²⁰⁸

D. *Cautionary Notes*

One trade-off with creating a standard for discretion is the pushback by the government and the potential for greater litigation. Expanded litigation may undermine, or at least diminish, the value of efficiency; one value that informs creating a rule in the first place. The fear of litigation was a reality, not merely a theory, when the INS proposed a rule, on June 21, 1979, to “insure that all applications and petitions submitted to this Service receive consideration under appropriate discretionary criteria and are adjudicated in a fair and uniform manner throughout the United States.”²⁰⁹ The proposed rule premised the need for a discretionary rule on the ability for noncitizens to receive “fair and equal treatment before the Service.”²¹⁰ The proposed rules contained discretionary criteria for a number of waivers and benefits in the immigration context, some of which are detailed in the previous Section. With regard to applications for adjustment under § 245 of the INA, the proposed rule included a paragraph about the exercise of discretion:

In making a decision on an application for adjustment of status, consideration shall be given to all the pertinent factors, favorable and unfavorable The following factors shall be considered among those which adversely affect the exercise of discretion: preconceived intent to remain permanently in the United States at the time of entry as a nonimmigrant; violations of immigration laws; lack of respect for laws of U.S.; adverse foreign relations impact; no viable family ties in United States; abandonment or desertion of spouse and/or dependent children in the United States or in a foreign

208. See Benson, *supra* note 190, at 40.

209. Factors to be Considered in the Exercise of Administrative Discretion, 44 Fed. Reg. 36,187, 36,191 (proposed June 21, 1979).

210. *Id.*

country. The following factors shall be considered as among those which favorably affect the exercise of discretion: advanced or tender age; poor health; lawful permanent resident or U.S. citizen family members dependent on the alien for support; lengthy residence in the United States; need for services in the United States.²¹¹

The proposed rules also included changes to the 212(d)(3) waiver of inadmissibility and the following specific language:

Discretion under sections 212(d)(3)(A) . . . shall be favorably exercised unless there are adverse factors which are not outweighed by favorable factors. The following factors shall be considered among those which adversely affect the application: the activity giving rise to the ground of excludability is recent; the alien has a prior history of immigration violations; the ground of excludability is serious. The following factors shall be considered among those which favorably affect the application: there is evidence of recent good conduct and rehabilitation; the ground of excludability is relatively minor or based on circumstances remote in time; the need to enter the United States is great.²¹²

The proposed regulations were robust and covered several immigration adjudications involving discretion, but INS ultimately cancelled them in 1981.²¹³ The cancellation was striking in contrast to the length of the proposed regulations. INS reasoned:

The proposed rule is cancelled because it is impossible to foresee and enumerate all of the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion. Listing some factors, even with the caveat that such a list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion.²¹⁴

INS highlighted one particular commentator, who stated, “[y]ou must make every effort to not eliminate discretionary powers by converting discretionary powers into a body of law.”²¹⁵ Thus, INS chose to cancel the rule “to avoid the possibility of hampering the free exercise of discretionary authority”²¹⁶

In reacting to INS’s choice to cancel the rule, Colin Diver opined, “[a]t least the Service is consistent: its explanations are no more transparent than its rules.”²¹⁷ Nevertheless, the lesson here is that proposing clear rules can sometimes result in pushback by both commentators from the public and, ultimately, by the agency suggesting the rules in the first place. If the counterpoint to publishing rules or standards is to ensure the exercise of

211. *Id.*

212. Factors to be Considered in the Exercise of Administrative Discretion, 46 Fed. Reg. 9119, 9119 (proposed Jan. 28, 1981).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 94 (1983).

discretionary powers, what is the balance? Is there a balance? An undefined standard for discretion in formal decisions, like those described in this Article, is more vulnerable to abuses of discretion. If the trade-off is that agencies have less discretionary power in the presence of a clear standard, the Author finds the trade-off is worthwhile for the values discussed in this Article. Sofaer also shows how such rulemaking may increase efficiency by lessening the number of appeals made and reversed when initially denied, especially in the case of adjustment applications.²¹⁸ Diver also challenged the efficiency of avoiding rulemaking, noting, “[g]reater clarity would, of course, entail additional *ex ante* rulemaking costs. But that investment would undoubtedly be repaid by the reduced explanatory burden on individual adjudicators.”²¹⁹ Finally, creating a clearer standard would increase the humanitarian and administrative law values that guide its solution.

IV. FINDING SOLUTIONS

One option is for Congress to eliminate discretion in cases where the statutory criteria are already rigorous and reflective of Congress’s policy goals. There is a strong argument for removing discretion for remedies with hefty statutory requirements. In the case of cancellation of removal, Congress requires similar standards and, for non-green card holders, an even higher showing of hardship to an anchor relative. In the case of asylum, Congress has created a definition that requires a person to show past or future harm that rises to the level of persecution, and harm that is tied to specific reason, like race or religion. Removing discretion for waivers with medium statutory requirements is also appropriate to consider. In the case of waivers, Congress has set strict requirements surrounding residence, family relationships, and hardship. Finally, for those waivers written most broadly, Congress intended for the nonimmigrant waiver under 212(d)(3) to be broad, revealed by their choice and ability to impose more requirements for other waiver schemes in the statute. At the same time, Congress spelled out specific ineligibilities.

In every example covered by this Article, a statutory grant without discretion would still require adjudicators to refer to statutes, regulations, and case law to determine whether a person qualifies. Some of these decisions would still be subjective or quasi-discretionary because of the inherent nature of certain choices, such as whether an applicant’s relative would suffer the requisite hardship, or whether an asylum applicant would face persecution. In other words, many of the statutory criteria remain undefined, and inevitably require adjudicators to rely on case law and

218. *Id.* at 95.

219. *Id.*

individual circumstances. Nevertheless, eliminating discretion would increase efficiency by removing the layer of discretion.

A second option is for Congress or the Executive Branch to craft a regulation that creates a rebuttable presumption of discretion in favor of the noncitizen. The DHS, DOJ, and DOS could jointly issue the regulation. The idea of housing a standard in more than one agency is not new.²²⁰ How to craft a rule is no less challenging than understanding the trade-offs of developing one in the first place. In his work, Diver talks about the “trade-offs” when considering different formulations of language and the importance of having a guiding principle.²²¹ In the case of option two, creating a presumption in support of the noncitizen is worth the trade because it reduces the harms identified in Section II and is consistent with the statutory language, which is currently robust in the number of prongs a person must prove and in the number of disqualifying factors. A rebuttable presumption is also consistent with the legislative purpose of the statute—humanitarian protection in the case of asylum, regularizing status for people already in the United States in the case of adjustment, and family unity in the case of waivers.

The Executive Branch may also explore a final solution of providing more clarity for discretion in waivers and remedies that include this component. This was the kind of standard proposed by Maurice Roberts more than forty years ago, when he acknowledged the scenarios when a discretionary denial might be legitimate, but was concerned about the lack of uniformity or precision in how discretion is applied.²²² Roberts advocates for more meaningful standards in statutory remedies through published regulations or precedent by the BIA.²²³ This third option may work better for the broad waivers, namely, the 212(d)(3) and travel ban waivers, as they lack the same rigor or language in the statute. The third option comes with challenges, many of which were described by Diver.²²⁴ Another concern with creating a new standard is that it could make the process less efficient by adding prescribed factors that adjudicators would have to weigh and apply in making every discretionary decision. Further, officers and judges who do not favor a new standard for political or personal reasons may shift their focus on interpreting other quasi-discretionary factors, like exceptional and extreme hardship, more strictly; though, the precise culture and trigger for

220. See, e.g., Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10,922, 10,922 (Mar. 6, 2003) (reflecting delegation of authority to transfer INS from DOJ to DHS).

221. Diver, *supra* note 217, at 70–71.

222. Roberts, *supra* note 4, at 164–65.

223. *Id.*

224. Diver, *supra* note 217, at 70–71.

such decisions (or what one scholar refers to as bureaucratic buy-in)²²⁵ are beyond the scope of this Article.

This Article reveals the important role of discretion in immigration law. It showcases several statutory remedies that involve a discretionary component and argues that if discretion is applied, it should generally favor the noncitizen. To support this argument, this Article identifies the specific harms that flow from Darkside Discretion and inconsistency with the statutory language and legislative purpose. This Article also explores how reform could help reduce arbitrary decisionmaking while also opening the door for judicial review and greater adherence to administrative law values. This Article proposed three different possible solutions for solving the dilemma of Darkside Discretion and contributes to the literature on immigration law in a meaningful and forward-looking manner.

225. Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1225, 1233–35.