

Cruelty, Chaos, and Caprice: Immigration Enforcement and Law in the Wake of Trump

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ABSTRACT

An unprecedented array of recent government initiatives seems designed to deter even the most desperate unauthorized entries, to amplify a sense of precarity among noncitizens and naturalized citizens within the US, to promote massive “self-deportation,” and to exacerbate racial and ethnic tensions. By situating this episode historically within the frameworks of law and politics we may begin to envision ways forward. To be sure, immigration enforcement law has long been deeply problematic. But without an understanding of how the system has deteriorated, proposals for more general “comprehensive immigration reform” will remain not only politically elusive, but normatively barren and legally illegitimate for the millions among us who are not U.S. citizens, and indeed for many who are. This essay suggests focusing on three distinct, but interlocking features: cruelty, chaos, and caprice. None are new. But, taken together, they are much worse now than ever before. These attributes capture the essential aspects of the current enforcement episode while also pointing toward necessary legal reform once the tide turns, which, if history and polls are guides, it likely will—at least to a degree.

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INTRODUCTION

These are unusually challenging times for those who encounter immigration enforcement. To be sure, our “deportation nation” has witnessed recurrent episodes of racist and ideological exclusion and deportation since its founding era.¹ But one feels an extraordinary amount of anxiety, fear, rage, confusion, and exhaustion in

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¹ See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007).

this moment. An unprecedented array of recent government initiatives seems designed to deter even the most desperate unauthorized entries, to amplify a sense of precarity among noncitizens and naturalized citizens within the US, to promote massive “self-deportation,” and to exacerbate racial and ethnic tensions.² As some of the most frenetic aspects of the maelstrom of immigration enforcement during the second Trump Administration (Trump II) seem to have subsided a bit, this is a critical moment to begin conceptualizing the episode’s main features, even as resistance and litigation continue. By situating this episode historically within the frameworks of law and politics, we may begin to envision ways forward. Immigration enforcement law has long been deeply problematic. But without an understanding of how the system has deteriorated, proposals for more general “comprehensive immigration reform” will remain not only politically elusive, but normatively barren and legally illegitimate for the millions among us who are not U.S. citizens, and indeed for many who are.³

How might we conceptualize the politico-legal nature of Trump’s enforcement regime? This essay suggests focusing on three distinct, but interlocking features: *cruelty*, *chaos*, and *caprice*. None are new. But, taken together, they are much worse now than ever before. These attributes capture the essential aspects of the current enforcement episode while also pointing toward necessary legal reform once the tide turns, which, if history and polls are guides, it likely will—at least to a degree.⁴

The triad of cruelty, chaos, and caprice is concededly legalistic and technical compared to other, more volatile descriptions. In mid-2025, for example, Minnesota Governor Tim Walz explicitly compared U.S. Immigration and Customs Enforcement (ICE) to Nazi Germany’s infamous secret police, the *Gestapo*: “Donald Trump’s modern-day *Gestapo* is scooping folks up off the streets,”

² See Am. Immigr. Council, *Trump Immigration Agenda Threatens U.S. Democracy* (July 23, 2025), <https://www.americanimmigrationcouncil.org/press-release/trump-extreme-immigration-agenda-threatens-democracy/> [<https://perma.cc/WEL7-ZTTU>].

³ See Ernesto Londoño & Hamed Aleaziz, *Justice Dept. Targets Hundreds of Citizens in New Push for Denaturalization*, N.Y. TIMES (Apr. 23, 2026), <https://www.nytimes.com/2026/04/23/us/politics/justice-dept-citizens-denaturalization.html> [<https://perma.cc/84QT-AMKL>].

⁴ See, e.g., Marist Poll, *The Actions of ICE* (Feb. 5, 2026), <https://maristpoll.marist.edu/polls/the-actions-of-ice-february-2026/> [<https://perma.cc/AK89-M3LD>]. 65% of Americans thought the actions of Immigration and Customs Enforcement (ICE) went too far, an increase from 54% in June 2025. However, partisan divisions remain strong in this arena. See also Univ. of Mass. Amherst, *New UMass Poll Finds Continued Partisan Division and Erosion of Support for President Trump’s Immigration Policies* (Apr. 1, 2026), <https://www.umass.edu/news/article/new-umass-poll-finds-continued-partisan-division-and-erosion-support-president-trumps> [<https://perma.cc/UUB2-L8BS>]. A March 2026 UMASS poll showed that 59% disapproved of the way that ICE has handled its job, and 50% believed that ICE officers are not adequately trained in conducting their immigration enforcement efforts. Republicans overwhelmingly approved of Trump’s handling of border security (93% approved) and deportations (91% approved), while Democrats were “almost uniformly opposed,” leaving independents (roughly 45% approved) as “the key swing group on immigration enforcement.”

Walz said at the University of Minnesota Law School’s commencement ceremony. As he elaborated:

They’re in unmarked vans, wearing masks, being shipped off to foreign torture dungeons, no chance to mount a defense, not even a chance to kiss a loved one goodbye, just grabbed up by masked agents, shoved into those vans, and disappeared.⁵

Such evocations have had substantial political resonance and bite, even eventually being repeated by Joe Rogan.⁶ But, as most of us know, and as those who have studied the *Gestapo* can explain, the comparison is quite complicated and fraught.⁷

In a slightly less hyperbolic tone, some have labeled Trump’s enforcement techniques “fascist.” As Representative Dan Goldman confronted then-ICE Acting Director Todd Lyons in February 2026:

You said in your opening statement that references to ICE as the Gestapo or secret police encourages threats against ICE agents . . . you have it backwards. People are simply making valid observations about your tactics, which are un-American and outright fascist.⁸

Again, however, this is more a political epithet than a fully convincing comparison. Fascism is a rather specific political ideology with attributes (i.e., a mass political movement of extreme nationalism, militarism, and the supremacy of the nation over the individual) that are not obviously represented by ICE enforcement tactics alone, however brutal and extralegal they have been.⁹

⁵ Gov. Walz refers to ICE as ‘Trump’s modern-day Gestapo,’ YOUTUBE (May 20, 2025), https://www.youtube.com/shorts/PgY_koUpCRM [https://perma.cc/28Z2-LD5B].

⁶ Angela Yang, *Joe Rogan Criticizes ICE Tactics: ‘Are we Really Going to Be the Gestapo?’*, NBC NEWS (Jan. 13, 2026), <https://www.nbcnews.com/pop-culture/pop-culture-news/joe-rogan-criticizes-ice-tactics-podcast-rcna253931> [https://perma.cc/87N7-HHKJ].

⁷ Daniel H. Magilow, *Comparing ICE to the Gestapo Reveals People’s Fears for the US – a Holocaust Scholar Explains Why Nazi Analogies Remain Common, Yet Risky*, THE CONVERSATION (July 21, 2025), <https://theconversation.com/comparing-ice-to-the-gestapo-reveals-peoples-fears-for-the-us-a-holocaust-scholar-explains-why-nazi-analogies-remain-common-yet-risky-260767> [https://perma.cc/5E4R-F5RN].

⁸ Benjamin S. Weiss, *‘Outright Fascist:’ House Democrats Clash with ICE, Border Patrol Chiefs*, COURTHOUSE NEWS SERV. (Feb. 10, 2026), <https://courthousenews.com/outright-fascist-house-democrats-clash-with-ice-border-patrol-chiefs/> [https://perma.cc/A7ZG-UDMG].

⁹ *What Does Fascism Really Mean?*, CFR EDUC. (Oct. 31, 2024), <https://education.cfr.org/learn/learning-journey/what-does-fascism-really-mean/what-is-fascism> [https://perma.cc/RPN7-RM5W].

Somewhat more measured general adjectival descriptions, such as “*maximalist*,”¹⁰ “*hardline*,”¹¹ and “*rogue*,”¹² have also been deployed, together with assessments such as “unprecedented in . . . breadth and reach,”¹³ “dizzying in its scope and speed,”¹⁴ “strikes at the foundation of American democracy,”¹⁵ and, most relevant for the purposes of this essay: “corrosive to the rule of law itself.”¹⁶

I. CRUELTY

A quite specific, politico-legal critique—“*the cruelty is the point*”—emerged in the first Trump Administration (Trump I). It has resurfaced as a ubiquitous challenge to some of the current Administration’s most aggressive tactics.¹⁷ There is considerable evidence to support this charge, though it presents compelling—if challenging—legal questions, including that of the requisite *mens rea* to prove intentional cruelty, whether proof of intentional cruelty is relevant to actual immigration cases, how to define the relationship between deportation and punishment, and how to distinguish the inherent, structural cruelty embedded within much of the *corpus* of U.S. immigration law from the particular cruelty of some current plans and practices.¹⁸ But beyond such arcane legal concerns, it surely seems clear that intentional government cruelty in matters of arrest, detention, family separation, and deportations to third countries represents a moral nadir and a direct assault on human dignity. As Jamelle Bouie put it:

The public face of Immigration and Customs Enforcement is a brutal, paramilitary force of masked men who hunt immigrants and

¹⁰ Michael R. Blood, *Trump Pushes Ahead with Deportations in Face of LA Protests*, AP NEWS (June 10, 2025), <https://apnews.com/article/donald-trump-california-immigration-customs-enforcement-newsom-0482a8935419d88986b890b18db5cc03> [https://perma.cc/RJL9-T7E6].

¹¹ Joanna Walters, *Denied, Detained, Deported: The Faces of Trump’s Immigration Crackdown*, THE GUARDIAN (May 10, 2025), <https://www.theguardian.com/us-news/2025/apr/28/trump-immigration-people-detained-deported-cases> [https://perma.cc/GU69-P66P].

¹² Am. Immigr. Council, *How ICE Went Rogue* (Feb. 11, 2026), <https://www.americanimmigrationcouncil.org/fact-sheet/ice-cbp-legal-analysis/> [https://perma.cc/AWW9-5GA6].

¹³ See Muzaffar Chishti, Kathleen Bush-Joseph & Colleen Putzel-Kavanagh, *Unleashing Power in New Ways: Immigration in the First Year of Trump 2.0*, MIGRATION POL’Y INST. (Jan. 13, 2026), <https://www.migrationpolicy.org/article/trump-2-immigration-1st-year> [https://perma.cc/N95M-VXQV].

¹⁴ *Id.*

¹⁵ See Am. Immigr. Council, *Report: Trump Immigration Agenda Threatens U.S. Democracy* (July 23, 2025), <https://www.americanimmigrationcouncil.org/press-release/trump-extreme-immigration-agenda-threatens-democracy/> [https://perma.cc/9K33-X6YK].

¹⁶ *Id.*

¹⁷ Adam Serwer, *The Cruelty Is the Point*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/> [https://perma.cc/Q5MP-VZHT].

¹⁸ See, e.g., *Trump v. Hawaii*, 585 U.S. 667 (2018) (dismissing allegations of personal racial and religious animus by candidate and President Trump).

terrorize American cities on behalf of the president of the United States . . . ICE operates detention facilities across the country, holding tens of thousands of people arrested on immigration charges. These facilities . . . are cramped, squalid and dangerous.¹⁹

Cruelty also appears as a broad strategic and structural reality. Indeed, as Bouie noted, “[t]he not-so-public face is somehow even worse.”²⁰ Many aspects of immigration enforcement cruelty—whether tactical, strategic, or structural—rely upon decades of incremental devolution. Prominent examples include the passage of disproportionately harsh deportation laws,²¹ the elimination and limitation of ameliorative discretionary “relief” mechanisms,²² the creation and expansion of fast track “shadow” removal systems,²³ limitations on asylum access, the inherent precarity of humanitarian programs such as Temporary Protected Status and parole,²⁴ legislative preclusions to judicial review,²⁵ abdications by courts of meaningful oversight, even when judicial review is undertaken,²⁶ and massive (and increasingly *mandatory*) detention systems.²⁷ Long-term legal residents, thus, for example, now *routinely* face deportation for minor offenses without the possibility of mercy. Parents are *routinely* separated from their children to ease enforcement or to “send a message.”²⁸ And so on. Cruelty, in short, seems to be both the point

¹⁹ Jamelle Bouie, Op-Ed, *The Cruelty Is the Point for ICE*, N.Y. TIMES (Jan. 24, 2026), <https://www.nytimes.com/2026/01/24/opinion/ice-detention-immigrant-rights.html> [https://perma.cc/L9GB-5T3U].

²⁰ *Id.*

²¹ See generally Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

²² See generally Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

²³ See generally Daniel Kanstroom, *Expedited Removal and Due Process: A “Testing Crucible” in the Time of Trump*, 75 WASH. & LEE L. REV. 1323 (2018).

²⁴ See, e.g., *Noem v. Doe*, No. 24A1079, 605 U.S. ____ (May 30, 2025). As Justice Jackson noted in dissent, the Court’s “shadow docket” action “undervalues the devastating consequences of allowing the government to precipitously upend the lives and livelihoods of nearly half a million noncitizens while their legal claims are pending.” See also *FAQs on the Effect of Changes to Parole and Temporary Protected Status (TPS) for SAVE Agencies*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (March 25, 2026), <https://www.uscis.gov/save/current-user-agencies/guidance/faqs-on-the-effect-of-changes-to-parole-and-temporary-protected-status-tps-for-save-agencies> [https://perma.cc/F3JC-VSQ9].

²⁵ See generally 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 (2006).

²⁶ See, e.g., *Trump v. Hawaii*, *supra* note 18 (using rational basis test).

²⁷ See, e.g., CÉSAR CUAUHTÉMOC HERNÁNDEZ GARCÍA, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019); NANCY HIEMSTRA & DIERDRE COLON, *IMMIGRATION DETENTION INC. THE BIG BUSINESS OF LOCKING UP MIGRANTS* (2025).

²⁸ See Sen. Jeff Merkley, *A Year After Exposing Trump Administration’s Child Separation Policy, Merkley Keeps Pushing Back on Cruelty at the Border* (June 3, 2019), <https://www.merkley.senate.gov/a-year-after-exposing-trump-administrations-child-separation-policy-merkley-keeps-pushing-back-on-cruelty-at-the-border/> [https://perma.cc/UG5V-CULF].

and a *throughline*: a consistent, unifying theme that connects the various parts of the story of contemporary U.S. immigration enforcement.

II. CHAOS

But there is more. Beyond concentrated intentional cruelty, some have asserted that *chaos* is actually the point.²⁹ Trump's ostensibly well-planned mass exclusion, detention, deportation, and denaturalization campaigns have actually been marked by ostentatious, sometimes burlesque, and often shockingly chaotic aspects. These have formed a regime apparently designed (or at least intentionally allowed) to inspire fear, confuse opponents, impede legal challenges, and frustrate judicial oversight.³⁰ Such an approach is not unique to immigration enforcement. In many arenas, Trump has demonstrated an impressive ability to "manufacture conflict" to keep himself at the center of public attention while destabilizing the institutions meant to check him.³¹ Such chaos is "not merely noise; it's a tool that exhausts the public, overwhelms the media, and blurs accountability."³² Indeed, Trump's second presidency may be defined as "a living case study in how unpredictability, disruption, and emergent leverage can reshape civic life—often with dangerously performative consequences."³³

In the immigration realm, one sees chaos in many venues and a wide variety of forms. Some seem grounded in intentional decisions, such as the flamboyant disregard of enforcement norms by masked, armed agents; unsupervised violent street encounters; episodic use of detained children as "bait"; violations of well-established policies such as not standing in front of moving vehicles; ignoring warrant requirements; summary rescission of the longstanding "Sensitive Locations

²⁹ The word "chaos" invokes utter confusion or disorganization. However, one may also see aspects of the word's original meaning: "void" or "abyss" (derived from the Greek *khaos* (χάος) and indeed also to the abyss of Tartarus in the underworld). *Chaos*, Online Etymology Dictionary, etymonline.com (last visited June 5, 2026); *Chaos: History and Meaning*, Merriam-Webster, <https://www.merriam-webster.com/wordplay/chaos-meaning-and-history> (last visited June 5, 2026).

³⁰ See Sonia Nazario, *Why Trump's Border Policy Is Creating Chaos*, FOREIGN AFF. (Dec. 6, 2018), <https://www.foreignaffairs.com/articles/mexico/2018-12-06/trumps-border-policy-creating-chaos> [https://perma.cc/BJ59-7BRE]. Regarding Trump II, see, e.g., Bob S. Carey, *When It Comes to Trump Immigration Policy, the Chaos and Cruelty Are the Point*, L.A. TIMES (June 9, 2025), <https://www.latimes.com/opinion/letters-to-the-editor/story/2025-06-09/when-it-comes-to-trump-immigration-policy-the-chaos-and-cruelty-are-the-point> [https://perma.cc/2L9N-4VHN]; Clarence Page, Op-Ed, *Chaos Is the Point of Trump's War in Minnesota*, LAS VEGAS REV. J. (Feb. 5, 2026), <https://www.reviewjournal.com/opinion/clarence-page-chaos-is-the-point-of-trumps-war-in-minnesota-3616666/> [https://perma.cc/Y78E-8RHW].

³¹ Rebecca Good, *Donald Trump's Leadership by Chaos*, FULCRUM (Jan. 20, 2026), <https://thefulcrum.us/ethics-leadership/donald-trump-chaos-leadership-immigration-rebecca-good> [https://perma.cc/MX46-CRJK].

³² *Id.*

³³ David L. Nevins, *Chaos Theory Meets Trump: Why America's Institutions and Psyche Are Under Siege*, FULCRUM (Aug. 23, 2025), <https://thefulcrum.us/ethics-leadership/chaos-theory-trump-presidency-american-institutions-psyche-under-siege> [https://perma.cc/SA3C-2X36].

Policy” to allow ICE surveillance and arrests at churches, schools, and hospitals; and arbitrary detention practices. As Justice Sonia Sotomayor (joined by Justices Elena Kagan and Ketanji Brown Jackson) put it in dissent of the Court’s acquiescence to certain current arrest practices: “We should not have to live in a country where the Government can seize anyone who looks Latino, speaks Spanish, and appears to work a low wage job.”³⁴

A related array of more complex but equally chaotic initiatives has included invocations of the Alien Enemies Act in an executive order to quickly deport alleged Venezuelan gang members,³⁵ illegal removals in violation of judicial orders followed by pugnacious resistance to judicial inquiries,³⁶ and a bizarre attempt to override the authoritative constitutional text, thoroughly adjudicated constitutional history, reaffirmed statutory basis, and century-long accepted understanding of birthright citizenship.³⁷

There has also been a welter of demoralizing *bureaucratic* chaos, including confusing and procedurally improper policy revisions, summary unannounced arrests in immigration courts, massive pressure and ideological litmus tests on immigration judges,³⁸ chaotic “*mega*” hearings,³⁹ and random changes to forms, venues, and fees.⁴⁰ A particularly disturbing example of chaos combined with

³⁴ *Noem v. Vasquez-Perdomo*, No. 25A169, 606 U.S. ____ (2025) (Sotomayor, J., dissenting), https://www.supremecourt.gov/opinions/24pdf/25a169_5h25.pdf [<https://perma.cc/E75U-Y7Z8>].

³⁵ See Proclamation No. 10903, *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, 90 Fed. Reg. 13034 (Mar. 14, 2025) (invoking the Alien Enemies Act (AEA), Rev. Stat. § 4067, 50 U.S.C. § 2).

³⁶ See generally Sergio Martínez-Beltrán, *Federal Judge Orders Return of Venezuelan Migrants Deported to El Salvador Under Alien Enemies Act*, NPR (Feb. 12, 2026), <https://www.npr.org/2026/02/12/nx-s1-5712542/federal-judge-orders-return-of-venezuelan-migrants-deported-to-el-salvador-under-alien-enemies-act> [<https://perma.cc/59EP-5F8N>]; see also Michael Kunzelman, *Appeals Court Orders Judge to End Contempt Investigation of Deportation Flights*, PBS NEWSHOUR (Apr. 14, 2026) <https://www.pbs.org/newshour/nation/appeals-court-orders-judge-to-end-contempt-investigation-of-deportation-flights> [<https://perma.cc/3JVQ-MPGN>].

³⁷ See *Barbara v. Trump*, No. 25-cv-244 (D.N.H. 2025); *Barbara v. Trump*, No. 25-1861 (1st Cir. 2026); *Trump v. Barbara*, 609 U.S. ____ (2026).

³⁸ Nicholas Nehamas, Allison McCann, Steven Rich, Jazmine Ulloa & Hamed Aleaziz, *How Trump Purged Immigration Judges to Speed Up Deportations*, N.Y. TIMES (Apr. 10, 2026), <https://www.nytimes.com/2026/04/09/us/politics/trump-miller-immigration-judges-purge.html> [<https://perma.cc/8U5K-N9WF>].

³⁹ See, e.g., *Immigration Courts Use ‘Mega Masters’ to Speed Deportations*, NPR (May 26, 2026), <https://www.npr.org/2026/05/26/nx-s1-5830474/trump-immigration-courts-mega-masters> [<https://perma.cc/FW3G-HLXF>]; Jazmine Ulloa & Hamed Aleaziz, *As Trump Pushes Deportations, a Skyrocketing Caseload Strains Immigration Courts*, N.Y. TIMES (June 6, 2026), <https://www.nytimes.com/2026/06/06/us/politics/immigration-courts-deportation.html> [<https://perma.cc/X4FA-MKB4>].

⁴⁰ See, e.g., Julie Dahlstrom & Heba Gawayed, *Underinclusion by Design in Human Trafficking Protection*, 112 IOWA L. REV. ____ (forthcoming 2026).

apparent cruelty involved letters sent to an unknown number of U.S. citizens and legal immigrants stating, “*it is time for you to leave the United States*.”⁴¹

In another, more systematic example of apparently weaponized bureaucratic chaos, the Administration deleted thousands of students’ records from the Student and Exchange Visitor Information System (SEVIS), which universities and the government rely on to confirm that students are legally enrolled.⁴² The Administration canceled some 4,700 students’ SEVIS records, which immediately triggered notices to their schools.⁴³ The cancellations were reportedly based on a database check with the National Crime Information Center.⁴⁴ But that database includes traffic tickets and dismissed charges.⁴⁵ Although DHS also deleted SEVIS records for students who retained their legal status in the U.S., all students whose visas were canceled were described in headlines as “identified in criminal records check and/or has had their visa revoked.”⁴⁶ This predictably led schools—which were facing an array of other chaotic initiatives—to tell students that they had lost permission to continue their studies in the United States.⁴⁷ Together, this caused a *Kafkaesque* cascade of anxiety and confusion: any student who left school, missed classes, or quit on-campus jobs might jeopardize their immigration status. Thus, many who tried to comply with university notifications based on incorrect SEVIS

⁴¹ See Am. Immigr. Council, *Mass Deportation: Analyzing the Trump Administration’s Attacks on Immigrants, Democracy, and America* (July 23, 2025), <https://www.americanimmigrationcouncil.org/press-release/trump-extreme-immigration-agenda-threatens-democracy/> [https://perma.cc/WC83-BYFV].

⁴² See Arturo Castellanos-Canales, *Explainer: Revocation of Student Visas and Termination of SEVIS Records*, NAT’L IMMIGR. F. (June 13, 2025), <https://forumtogether.org/article/explainer-revocation-of-student-visas-and-termination-of-sevis-records/> [https://perma.cc/Y9UP-X5KN].

⁴³ See Ashley Mowreader, *ICE Reverses Course on SEVIS Terminations*, INSIDE HIGHER ED. (Apr. 25, 2025), <https://www.insidehighered.com/news/global/international-students-us/2025/04/25/ice-reverses-course-sevis-terminations> [https://perma.cc/VX64-R4FF]; see also Jacob Rosen & Camilo Montoya-Galvez, *Trump Administration Backs Down on Terminating Thousands of Student Visa Records*, CBS NEWS (Apr. 26, 2025), <https://www.cbsnews.com/news/trump-administration-backs-down-student-visa-records> [https://perma.cc/W3RW-G8WS].

⁴⁴ See Jacob Sullum, *Trump’s Mass Cancellation of Student Visas Illustrates the Lawlessness of His Immigration Crackdown*, REASON (May 23, 2025), <https://reason.com/2025/05/23/trumps-mass-cancellation-of-student-visas-illustrates-the-lawlessness-of-his-immigration-crackdown/> [https://perma.cc/2YBW-5HAR].

⁴⁵ See Dakin Andone, *Lawsuits Seek to Restore Dozens of Foreign Students’ Legal Status Amid Targeting by Immigration Authorities*, CNN (Apr. 21, 2025), <https://www.cnn.com/2025/04/21/us/international-students-immigration-lawsuits-visas/index.html> [https://perma.cc/JE4J-Q5QP].

⁴⁶ See Sarah K. Wake, Michael C. Elliott & Mindy M. Sauter, *Termination of Student Visa Registrations Reversed*, MCGUIREWOODS (Apr. 25, 2025), <https://www.mcguirewoods.com/client-resources/alerts/2025/4/termination-of-student-visa-registrations-reversed/> [https://perma.cc/F2Z6-P49T].

⁴⁷ See Jessica Corbett, *After Uproar, Trump Reverses on Mass Suspension of Student Visas*, COMMON DREAMS (Apr. 25, 2025), <https://www.commondreams.org/news/trump-international-students> [https://perma.cc/LQ2Q-C3KJ] (reporting that the record terminations led some universities to inform students that they must immediately self-deport).

cancellations risked losing their status.⁴⁸ Instead of communicating issues with students and universities in an orderly manner, the Administration “ambushed students on campus or told them their visas were no longer valid when they attempted to enter the United States.”⁴⁹ Chaos all the way down, so to speak.

III. CAPRICE

This leads us to the related problem of caprice, which is also a pervasive aspect of the current immigration enforcement regime. This is a more specific problem than chaos and, indeed, it is in some respects more tractable as a matter of law—most typically addressed under the rubric of “arbitrary and capricious” review under the Administrative Procedure Act (APA).⁵⁰ It has included erratic, sometimes irrational policy decisions, misleading notices, sudden staff reductions, and underfunding of adjudication resources. Practitioners have also encountered disorderly, extreme, and sometimes unannounced changes to filing fees, limits on telephone access to agency staff, confusion about mailing addresses, and arbitrary denials of motions.⁵¹ Some of these phenomena could perhaps be attributed simply to incompetence or lack of care. But taken together, they reveal a clear pattern of arbitrary and capricious actions, apparently aimed, together with cruelty and chaos, at achieving tactical and strategic objectives.

This pattern directly implicates the nature of law itself. To be sure, the “rule of law” is “an exceedingly elusive notion” in general, and particularly so in the realm of immigration law.⁵² Still, many current Trump initiatives challenge two of the most basic attributes of law. First, law and law enforcement regimes must respect basic human dignity.⁵³ Second, law must be, so far as possible, “intelligible, clear, and predictable.”⁵⁴ Without this, it is impossible to conform conduct to law or reasonably foresee the consequences of action.⁵⁵ As the Supreme Court put it in a 2011 immigration case, “When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one.”⁵⁶

⁴⁸ In the face of massive litigation, the Administration ultimately agreed to restore the individual SEVIS records.

⁴⁹ See Am. Immigr. Council, *Mass Deportation*, *supra* note 41.

⁵⁰ See Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

⁵¹ See, e.g., *Practice Alert: EOIR Is Circulating Misleading Legal Advisories to Respondents*, AM. IMMIGR. LAWS. ASS’N (Apr. 8, 2026), <https://www.aila.org/library/practice-alert-eoir-is-circulating-misleading-legal-advisories-to-respondents> [https://perma.cc/KGJ8-EWWD].

⁵² BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004). As to the anomalies of immigration law, see Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 21, and Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 22.

⁵³ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *reprinted in* 130 U.N.T.S. 111 (“All human beings are born free and equal in dignity and rights.”).

⁵⁴ TOM BINGHAM, *THE RULE OF LAW* 39 (2011).

⁵⁵ See *id.* (citing the European Court of Human Rights).

⁵⁶ *Judulang v. Holder*, 565 U.S. 42, 45 (2011).

It is no simple matter to discern the precise boundary between law and discretion. But there is no doubt that *excessive* systematic discretion is arbitrary and capricious behavior, not law.⁵⁷ The purposeful abandonment of transparency and procedural regularity at all levels threatens the noncitizens and their families who face such state power. It also undermines the very idea that immigration “law” exists at all.

Again, however, we should note that the current arbitrary and capricious reality is built on foundations that preceded Trump. Much of the immigration law that was achieved through courageous struggles and hewn by lawyers and judges from the late nineteenth into the mid-twentieth centuries has been largely transformed into immigration *caprice*. This was both foreseeable and foreseen. As I wrote in 1997, “If judicial review of administrative orders depriving noncitizens of the opportunity to live in the United States is an essential part of the rule of law, then 1996 may well become known as the year in which the rule of immigration law died.”⁵⁸ Reports of the complete death of law itself were perhaps premature, but the patient is fading fast.

IV. RE-IMAGINING IMMIGRATION LAW

It is tempting—if perhaps a bit facile—to view all of this simply as part of a larger pattern within Trump II: what has been termed the “psychotic state” in which “the administration as a whole lacks a consistent attachment to reality and the ability to organize is thinking coherently.”⁵⁹ While it is clearly true that “incoherence . . . is this administration’s *modus operandi*,”⁶⁰ Trump’s immigration enforcement regime is as much an apotheosis as an aberration. Chaos, cruelty, and caprice are exacerbated, indeed in some ways prioritized, by longstanding structural attributes and pervasive legal ambiguity. The whole field, for example, has long been chaotically regulated by various, partially overlapping sources of law—local, state, federal, and international—and is replete with highly discretionary norms and deferential doctrinal impediments to judicial scrutiny.⁶¹

Various aspirational versions of law may be imagined to counter these systemic failures and the recent ascendancy of immigration law characterized by cruelty, chaos, and caprice. The full breadth of that project—which includes basic reform of the relationship between sovereign power and human rights—is beyond the scope of this essay.⁶² But to begin to envision how to re-create and sustain a

⁵⁷ Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 22.

⁵⁸ *Id.*

⁵⁹ Jonathan Rauch & Peter Wehner, *Trump is Turning America into a Psychotic State*, N.Y. TIMES (Apr. 12, 2026), <https://www.nytimes.com/2026/04/10/opinion/trump-iran-psychotic-state-institutions.html> [https://perma.cc/U9LQ-8H8C].

⁶⁰ *Id.*

⁶¹ See, e.g., Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 21; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 22.

⁶² See DANIEL KANSTROOM, *THE AGE OF DEPORTATION: SOVEREIGN POWER AND LAW’S POTENTIAL* (forthcoming 2026).

legal immigration enforcement system worthy of the adjective “legal,” it is useful to consider cruelty, chaos, and caprice as an *interrelated* set of phenomena in need of collective reform.

To be sure, distinct legal strategies remain essential to counter particular problems. Some of these involve looking back as much as looking forward, given that immigration law has regressed in many respects since the late twentieth century.⁶³ Indeed, the Trump episode returns us to longstanding, unresolved struggles over the relationship between government power and rights that have existed since the founding of the republic.⁶⁴ One thinks of the elegant prose of Justice Robert Jackson, who wrote in dissent in 1953 that procedural fairness and regularity are “the indispensable essence of liberty,” sustaining legitimacy as the “best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur . . .”⁶⁵ This is why, he intoned, “basic fairness in hearing procedures does not vary with the status of the accused.”⁶⁶

But amidst the hysteria of the McCarthy era—as now—executive branch actors and Supreme Court Justices ascended who did not believe that “courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used . . . and . . . that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.”⁶⁷ Henry Hart deployed an evocative biblical analogy to compare these Justices to some of their more enlightened predecessors, writing that they, “*knew not Joseph*.”⁶⁸

A brief survey of some specific issues may help establish priorities and identify important points of convergence. A major foundational question regarding cruelty, for example, is whether deportation or detention, or at least certain forms of each, may constitute “punishment” for constitutional purposes.⁶⁹ The Supreme Court seemed to put this issue to rest in *Fong Yue Ting v. United States*, concluding that, as a general matter, deportation was not punishment.⁷⁰

⁶³ See generally KANSTROOM, *DEPORTATION NATION*, *supra* note 1.

⁶⁴ See, e.g., Thomas Jefferson, Draft of the Kentucky Resolutions of 1798, Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/jeffken.asp [https://perma.cc/T5XE-BARL] (last visited June 20, 2026) (“ . . . the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather has already followed; for already has a Sedition act marked him as it’s [sic] prey . . . ”).

⁶⁵ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224–25 (1953) (Jackson, J., dissenting).

⁶⁶ *Id.*

⁶⁷ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953).

⁶⁸ *Id.* at 1389–91; see also Kanstroom, *The Better Part of Valor*, *supra* note 25, at 163; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 22, at 706.

⁶⁹ See Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 21, at 1897.

⁷⁰ 149 U.S. 698 (1893); *Cf.* *Wong Wing v. United States*, 163 U.S. 228 (1896) (imprisonment of deportable noncitizens at hard labor required the constitutional protections applicable to criminal cases) and *Yamataya v. Fisher*, 189 U.S. 86 (1903) (noncitizens who have entered the U.S. are entitled to due process under the Fifth Amendment); *Wong Wing* represented a potential exception to *Fong Yue Ting*’s anti-constitutionalism and *Yamataya*’s sole reliance on procedural due process

But in the late 1990s, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁷¹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁷² heralded a rather complete convergence between the criminal justice and deportation systems. Deportation became a virtually automatic consequence of a criminal conviction. This convergence, along with the harshness of those laws—their retroactivity, mandatory detention, the automatic and often disproportionate nature of the deportation sanction, and the lack of statutes of limitation—supported arguments that the system had become both normatively cruel and sufficiently punitive to warrant specific constitutional oversight.

The basic doctrinal point was that criminal law theory would seem logically to compel the conclusion that the deportation of long-term lawful permanent residents for post-entry criminal conduct is a form of punishment. It “incapacitates” the deported and serves as a deterrent to others. As exquisitely illustrated during the Trump II surges, it may also be understood as a form of retribution. Because each of these justifications—incapacitation, deterrence, and retribution—is traditionally seen as part of our criminal law, persons subject to these types of proceedings should at least have the most basic constitutional rights accorded to criminal defendants. That such proceedings are initiated by a government enforcement agency, are directly based on criminal conduct, involve incarceration and forced movement of persons, and may result in lifetime banishment all support this logic.⁷³

Still, U.S. courts have generally held that all forms of deportation proceedings are civil rather than criminal, and that deportation, however harsh it may be in practice, is not punishment.⁷⁴ In 2010, however, in *Padilla v. Kentucky*, the Court concluded that because the “drastic measure of deportation or removal” had become virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes had “never been more important.”⁷⁵ Indeed, deportation of this type was viewed as “an integral part of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes.”⁷⁶ Although the logic of *Padilla* was potentially

to protect the rights of noncitizens. This exception involves analysis of three factors: the type of deportation law at issue, the intent of Congress, and the actual sanction imposed. Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 21, at 1897.

⁷¹ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

⁷² Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.).

⁷³ See Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 21, at 1893–95.

⁷⁴ *Cf.* *INS v. St. Cyr*, 533 U.S. 289 (2001) (noting the 1996 laws, AEDPA and IIRIRA, did not repeal federal court jurisdiction to hear *habeas corpus* petitions from deportable noncitizens, and did not apply retroactively to those who had pleaded guilty to crimes before the laws were passed); see Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 416–17 (2002).

⁷⁵ *Padilla v. Kentucky*, 559 U.S. 356, 360, 364 (2010).

⁷⁶ *Id.* at 357–59 (emphasis added).

expansive, the basic proposition that deportation is fundamentally a civil procedure has remained the norm.⁷⁷ Thus, as to the related question of how to address cruelty in the form of a vindictive deportation, the Court has resisted the punishment analogy.⁷⁸

Recent cases involving summary deportations to third countries, where conditions may amount to torture, are currently testing the boundaries of this doctrine while revealing a disturbing link between cruelty and chaos. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits returning any person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷⁹ However, by January 2026, the U.S. had formal agreements in place with at least twenty-five countries, many of which have extremely dubious human rights records.⁸⁰ The agreements include the incarceration of forcibly transferred people in prisons in El Salvador, Eswatini, and South Sudan until eventual onward transfer.⁸¹ As a result, asylum seekers and other immigrants—with almost no warning and little chance to raise fears of persecution—were sent to countries with which they have no ties and where many were subject to “grave mistreatment, including arbitrary detention, torture, or return to danger in the very countries they once fled.”⁸² In its first year, the Trump II Administration forcibly sent people to at least fifteen countries where they lacked citizenship.⁸³ The deported have included individuals with medical or psychological vulnerabilities, people with recognized rights to legal protection, and people previously granted protection under the Convention Against Torture (CAT) or withholding of removal because of likely persecution in their home country.⁸⁴

⁷⁷ See generally Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011).

⁷⁸ See *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (finding the INS generally does not violate the First Amendment even if it undertakes selective enforcement of immigration laws based on disfavored speech or associational activities).

⁷⁹ Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113, art. 3. Under the Foreign Affairs Reform and Restructuring Act of 1998, the government may not send someone to a place where he or she is likely to face torture, or to a country that does not honor international treaties prohibiting the extradition of someone to such a place.

⁸⁰ *Id.* (including Antigua and Barbuda, Belize, Cameroon, Costa Rica, Dominica, Ecuador, El Salvador, Equatorial Guinea, Eswatini, Ghana, Guatemala, Honduras, Kosovo, Liberia, Libya, Mexico, Palau, Panama, Paraguay, Poland, Rwanda, South Sudan, St. Kitts and Nevis, Uganda, and Uzbekistan).

⁸¹ See *id.*

⁸² Third Country Deportation Watch, <https://www.thirdcountrydeportationwatch.org> [https://perma.cc/K96J-VGNW] (last visited June 5, 2026).

⁸³ *Id.* (including Cameroon, Costa Rica, El Salvador, Eswatini, Equatorial Guinea, Ghana, Guatemala, Honduras, Kosovo, Mexico, Panama, Poland, Rwanda, South Sudan, and Uzbekistan). The majority of third country transfers have been to Mexico.

⁸⁴ See, e.g., Exhibit 1 to Declaration of Counsel, *D.V.D. v. U.S. Dep’t of Homeland Sec.*, No. 1:25-cv-10676 (D. Mass. filed March 23, 2025), ECF No. 233-1, <https://www.courtlistener.com/docket/69775896/233/1/dvd-v-us-department-of-homeland-security/> [https://perma.cc/K9JD-2CN9].

As for chaos itself, the legal picture remains murkier. Technical challenges based on the APA's "Notice and Comment" rulemaking requirement have proven somewhat effective in challenging to broad policy initiatives in both Trump administrations. These have included, for example, the attempted rescission of DACA⁸⁵ and attempts to rescind parole status and temporary protected status (TPS).⁸⁶ Many of the SEVIS initiatives were successfully challenged on the grounds that the Administration's actions were *ultra vires* and otherwise violative of procedural norms.

Some obviously chaotic initiatives have been challenged on a wide variety of grounds with mixed results. Deportations pursuant to the Alien Enemies Act, for example, were allowed to continue, but if claims were brought in habeas corpus, the court mandated certain safeguards.⁸⁷ A federal district court in Texas then held that the historical record "renders clear that the President's invocation of the AEA . . . exceeds the scope of the statute and is contrary to the plain, ordinary meaning of the statute's terms." The court concluded that the executive branch could not "rely on the AEA, based on the Proclamation, to detain the Named Petitioners and the certified class, or to remove them from the country."⁸⁸ Illegal removals in violation of judicial orders have inspired judicial anger, some enforceable orders, considerable resistance from the Administration, and much handwringing.⁸⁹ Indeed, as I write this essay in mid-May 2026, a federal judge has just ruled that the Trump Administration most likely violated the law by deporting a Colombian woman to the Democratic Republic of Congo despite the country's refusal to accept her. The judge ordered the Administration to return the woman, Adriana Maria Quiroz Zapata, 55, to the United States. The New York Times described this accurately as "a rare instance of a judge doing so amid the administration's deportation campaign."⁹⁰ On the other hand, in a case that has involved constitutional questions, problems of statutory interpretation, and aspects of

⁸⁵ *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1 (2020) (the attempt to rescind DACA was "arbitrary and capricious" under the Administrative Procedure Act).

⁸⁶ *CHRLA v. Noem*, No. 1:25-cv-00872-JMC, at 65 *et seq.* (D.D.C. filed Aug. 1, 2025) (the action was "arbitrary and capricious"); *Nat'l TPS All. v. Noem*, 773 F. Supp. 3d 807, 814 (N.D. Cal. 2025) (rescission of TPS for Venezuelans) *stayed*, 606 U.S. ____ (2025), https://www.supremecourt.gov/opinions/24pdf/25a326_3ebh.pdf [<https://perma.cc/JB95-Z3QY>].

⁸⁷ The detainees are entitled "to notice and opportunity to be heard appropriate to the nature of the case." *Trump v. J.G.G.*, No. 24A931, 604 U.S. ____ (Apr. 7, 2025), https://www.supremecourt.gov/opinions/24pdf/24a931_2c83.pdf [<https://perma.cc/EK3H-7S5T>].

⁸⁸ *J.A.V. v. Trump*, No. 1:25-CV-072 (S.D. Tex. May 1, 2025), <https://www.aclu.org/cases/jav-v-trump?document=ORDER> [<https://perma.cc/S4GW-26JB>].

⁸⁹ See generally Martínez-Beltrán, *supra* note 36; Sergio Martínez-Beltrán, *Federal Judge Orders Return of Venezuelan Migrants Deported to El Salvador Under Alien Enemies Act*, NPR (Feb. 12, 2026), <https://www.npr.org/2026/02/12/nx-s1-5712542/federal-judge-orders-return-of-venezuelan-migrants-deported-to-el-salvador-under-alien-enemies-act> [<https://perma.cc/3RFQ-ZCJJ>]; Kunzelman, *supra* note 36.

⁹⁰ Pranav Baskar, *Judge Orders U.S. to Return Colombian Woman Deported to Congo*, N.Y. TIMES (May 13, 2026), <https://www.nytimes.com/2026/05/13/world/africa/congo-colombia-deportee-return.html> [<https://perma.cc/U4PZ-WAYW>].

administrative law, Trump’s executive order on birthright citizenship seems likely to be overturned by the Supreme Court if oral arguments are a reliable guide.⁹¹ Many of the other forms of chaos described above, however, have eluded legal challenge almost completely.

Regarding caprice, the results have also been mixed. The Court has been relatively clear about applicable APA norms, following Justice Robert Jackson’s admonition that “it would be a disservice to our form of government and to the administrative process itself if the courts should fail . . . to give effect to [the APA’s] remedial purposes where the evils it was aimed at appear.”⁹² But the manner of their deployment has varied from the most deferential approaches to cases in which APA review of “arbitrary and capricious” action rises to the level of a truly “hard look”⁹³ and indeed may serve as a proxy for more robust normative standards, such as proportionality.⁹⁴ A judicial method of “shadow norms” has a long history in immigration law, due to the combination of doctrinal deference, formalist rejection of robust constitutional norms, and truly hard cases with compelling fact patterns.⁹⁵ Judge Learned Hand, for example, wrote in an early immigration case that deportation decisions cannot be made a “sport of chance.”⁹⁶ This formulation was prominently reiterated in a 1963 Supreme Court case about the definition of “entry,” which embodied an implicitly normative approach to statutory interpretation.⁹⁷

More recently, the 2011 case of *Judulang v. Holder* involved a tortuously complex statutory interpretation issue.⁹⁸ The government sought to deport a lawful permanent resident who had lived in the U.S. since 1974 due to a 1989 voluntary manslaughter conviction. Former INA Section 212(c), however, provided for a “waiver of *excludability*,” which could potentially allow a noncitizen to *enter* the country despite a criminal conviction.⁹⁹ For many years, U.S. courts—for reasons

⁹¹ See Audio of Oral Argument, *Trump v. Barbara*, No. 25-365 (U.S. Apr. 1, 2026), https://www.supremecourt.gov/oral_arguments/audio/2025/25-365 [https://perma.cc/DJ5M-BN5H].

⁹² See *Wong Yang Sun v. McGrath*, 339 U.S. 33, 44 (1950).

⁹³ See *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (requiring “hard look” review of certain types of agency action).

⁹⁴ See, e.g., Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029 (2017).

⁹⁵ See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

⁹⁶ See *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947).

⁹⁷ It would be inconsistent with the general ameliorative purpose of Congress in § 101(a)(13) to hold that an “innocent, casual and brief” excursion by a resident alien outside this country’s borders was “intended” to be a departure disruptive of his status to subject him to the consequences of an “entry” on his return. See *Rosenberg v. Fleuti*, 374 U.S. 449, 455 (1963).

⁹⁸ See 565 U.S. 42 (2011).

⁹⁹ See 8 U.S.C. § 1182(c). Section 212(c) was repealed by IIRIRA, effective on April 1, 1997. However, it remained available if removal was based on certain types of criminal convictions that took place before its repeal. See *INS v. St. Cyr*, 533 U.S. at 326.

of logic, fairness, and equal protection—had required such waivers to be available to lawful permanent residents facing deportation.¹⁰⁰ As to Mr. Judulang, however, the Board of Immigration Appeals (BIA) relied on a baroque method of statutory interpretation that sought to reconcile Sec. 212(c) with entry, exclusion, and deportation. The BIA ruled, and the Ninth Circuit affirmed, holding that because Judulang’s “crime of violence” was not “comparable” to any ground for exclusion, he was ineligible for Section 212(c) relief.

Judulang argued that this statutory interpretation was arbitrary and capricious, as was the agency action derived from it. The Supreme Court agreed. Justice Kagan, writing for the majority, sought to return the Court to an earlier era. She noted that in a 1947 “foundational deportation case,” the Court had recognized the “high stakes” for a noncitizen who had long resided in the country when it reversed an agency decision that would have made his “right to remain here dependent on circumstances so fortuitous and capricious.”¹⁰¹

That case, *Delgadillo v. Carmichael*, was a *unanimous* Supreme Court opinion, an almost unheard-of phenomenon today in immigration cases, or indeed anywhere.¹⁰² It involved three distinct, apparently capricious elements: the facts, the agency’s interpretation of those facts, and the underlying structure of the applicable law of entry, exclusion, and deportation. The facts were unusual: nearly two decades after he had been legally admitted to the United States, Delgadillo, a Mexican citizen, shipped as a seaman on an American ship bound from Los Angeles to New York. The ship was torpedoed. He was rescued, taken to Havana, and then returned to the United States. However, he was later convicted of a “crime involving moral turpitude” committed within five years after his “entry,” and—in addition to a prison sentence—the government sought his deportation.¹⁰³ The Court held that he was not subject to deportation, since his return after being torpedoed was not “the entry of the alien to the United States” within the properly interpreted meaning of the law.¹⁰⁴ The Court held that, although prior cases had held that entry was a physical concept, “those were cases where the alien plainly expected or planned to enter a foreign port or place.” Here, however, he was “catapulted into the ocean, rescued, and taken to Cuba. . . . His itinerary was forced on him by wholly fortuitous circumstances.” To define such a return as an “entry” into the United States for deportation purposes would give to the law “a capricious application.”¹⁰⁵ The last paragraph of Justice William Douglas’s majority opinion is particularly noteworthy:

¹⁰⁰ See *Judulang*, *supra* note 98; see also *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (allowing deportable noncitizens who had left the country and returned to be eligible for Section 212(c) relief, but those who did not leave to be ineligible, violated equal protection principles).

¹⁰¹ *Judulang*, *supra* note 98, at 57.

¹⁰² *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

¹⁰³ *Id.* at 390–91.

¹⁰⁴ *Id.* at 391 (citing § 19 (a) of the Immigration Act of February 5, 1917, as amended).

¹⁰⁵ *Id.* (citing *Di Pasquale v. Karnuth*, *supra* note 96).

Deportation can be the equivalent of banishment or exile. . . . The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme.¹⁰⁶

In *Judulang*, some seventy-five years later, Justice Kagan reasoned similarly. The BIA’s “comparable grounds” approach was arbitrary and capricious. The Court conceded that agencies, including the BIA, have expertise and experience in administering their statutes that no court can properly ignore. But courts must ensure that agencies have engaged in “reasoned decisionmaking.” The BIA had “flunked that test here.”¹⁰⁷ By hinging eligibility for discretionary relief “on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.”¹⁰⁸

CONCLUSION

This brings me to the final point: we must understand all three elements of the Trump II agenda—cruelty, chaos, and caprice—together *as a coordinated attack on the law itself*. The 2020 disagreement between Justices Samuel Alito and Sotomayor in the expedited removal case *Department of Homeland Security v. Thuraissigiam* illustrates this well. Justice Alito wrote for a 5–4 majority that judicial review was *not* available to justify a summary government denial of an asylum claim brought by a noncitizen on U.S. soil.¹⁰⁹ Vijayakumar Thuraissigiam, a Tamil asylum-seeker, claimed that he had been abducted and tortured in Sri Lanka.¹¹⁰ But a low-level asylum officer, after a brief interview, determined that he “did not have a credible fear of persecution.” A supervisor approved, and an administrative immigration judge summarily affirmed the finding, in a quick “check-box” decision.¹¹¹ Thuraissigiam, in short, never had a hearing with legal representation in court, or even “on the record.” Still, he managed to contact a lawyer who filed a habeas corpus petition. A district court judge saw “strict

¹⁰⁶ *Id.*

¹⁰⁷ *Judulang*, *supra* note 98, at 53.

¹⁰⁸ *Id.*

¹⁰⁹ 140 S. Ct. 1959 (2020). The author signed an amicus brief in support of the Respondent. *See* Brief for Immigration Law Scholars as Amici Curiae Supporting Respondent, *DHS v. Thuraissigiam*, No. 19-161 (Jan. 22, 2020).

¹¹⁰ *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 287 F. Supp. 3d 1077 (S.D. Cal. 2018), *rev’d*, 917 F.3d 1097 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 1959 (2019).

¹¹¹ *Thuraissigiam* 917 F.3d at 1101.

restraints on . . . jurisdictional reach to review expedited removal orders” and dismissed the habeas petition.¹¹² On appeal, Thuraissigiam argued that his case could mark the first time that U.S. law had “permitted a noncitizen who entered the country to be removed without judicial scrutiny of the legality of the removal.”¹¹³ However, the Supreme Court held that he had no constitutional right to habeas corpus review. Indeed, as a noncitizen construed to be seeking “initial admission,” [albeit already on U.S. soil] he had *no constitutional due process rights at all*. Alito cited U.S. governmental “plenary” authority over the admission or exclusion of immigrants, arguing that such power would be “meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil.” Thuraissigiam, he opined, stood, in the eyes of the law, “on the threshold of initial entry,” regardless of where he actually stood.¹¹⁴ He was thus a rightless person in a rightless place, albeit on U.S. soil. Indeed, Justice Alito offered a rather cruel parting shot: although “respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka.”¹¹⁵

Justice Sotomayor wrote a stinging dissent that revealed the depth of the disagreement over the reach of the law itself and the inherent connection among cruelty, chaos, and caprice. The Court’s holding, she wrote, meant that noncitizens “who challenge the procedures used to determine whether they may seek shelter in this country or whether they may be cast to an unknown fate” were unprotected. The lack of judicial means to ensure the “integrity” of an expedited removal order, she wrote, “paves the way toward . . . arbitrary administrative adjudications.”¹¹⁶ *Thuraissigiam* leaves many noncitizens on U.S. soil as completely subject to the

¹¹² *Id.* at 1083–84 (declaring final orders).

¹¹³ Opening Brief of Appellant at 17, *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, No. 18-55313 (9th Cir. Mar. 8, 2018); *Thuraissigiam*, 917 F.3d at 1108 (holding this to be unconstitutional); *see* U.S. CONST. art. I, § 9, cl. 2. The Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

¹¹⁴ Justice Sotomayor argued that the so-called “entry fiction” is rightly a limited one: even though an airport is strictly speaking on U.S. soil, a port of entry is different from being unrestricted on U.S. soil. *Thuraissigiam* was past any port of entry and “was actually within the territorial limits of the United States.” He thus had due process rights. *See also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), in which the Supreme Court permitted the use of a *habeas* writ to challenge exclusion. Justice Sotomayor noted that Alito’s logic, if “[t]aken to its extreme . . . would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them.” *Thuraissigiam*, 140 S. Ct. at 1983–84 (Sotomayor, J., dissenting).

¹¹⁵ *Thuraissigiam*, 140 S. Ct. at 1970.

¹¹⁶ *Id.* at 1983–84 (Sotomayor, J., dissenting). As bleak as this is, the ramifications of *Thuraissigiam* for the future of *habeas corpus* are equally worrisome. *See, e.g.*, Amanda L. Tyler, *Thuraissigiam and the Future of the Suspension Clause*, LAWFARE (July 2, 2020), <https://www.lawfaremedia.org/article/thuraissigiam-and-future-suspension-clause> [<https://perma.cc/FNT7-YVPA>]. *See also* Justice Kavanaugh’s rather cavalier assertion in *U.S. Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 591 U.S. 430, 434 (2020), that “foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.”

tender mercies of government agents exercising sovereign power, as those at sea. Indeed, as the Administration has expanded expedited removal, the line between those with rights and the rightless has moved ever further inward and toward those with longer stays.

As Justice Sotomayor put it during oral argument in a 2018 case that upheld the indefinite detention of noncitizens—including lawful permanent residents and asylum seekers—without providing periodic bond hearings: “this is lawlessness . . . basically saying that we’re not a country of law, that we’re a country of arbitrariness . . .”¹¹⁷ She might well have added cruelty, chaos, and caprice.

While it is perilous to predict the future in such a volatile arena, advocacy and protection of venerable legal principles such as dignity, proportionality, predictability, transparency, equal protection, anti-discrimination, and due process would surely be a good place to start.

¹¹⁷ Transcript of Oral Argument at 6, *Jennings v. Rodriguez*, No. 15-1204 (U.S. Oct. 3, 2017), 2017 WL 4517127, at *8. During the October 2017 arguments, Deputy Solicitor General Malcolm Stewart stated that “whatever process Congress chooses to give is due process.” Justice Sotomayor was responding to this broad contention. *See Jennings v. Rodriguez*, 583 U.S. 281 (2018).