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Mercy in Immigration Law

*Allison Brownell Tirres**

ABSTRACT

What role should mercy play in immigration law? This Article draws on the robust debate in the criminal law about the role of mercy in the hopes of starting a conversation among immigration law scholars and practitioners. Mercy skeptics argue that mercy contravenes justice, while advocates argue that mercy is a necessary countermeasure to the unrelenting harshness of criminal law today. I argue that the problems of mercy in the criminal law are amplified in the immigration law context. The lack of procedural and substantive protections for immigrants, the acceptance of unfettered discretion and lack of oversight of agency action, and the political subordination of noncitizens all push in the same direction—towards sovereign mercy rather than equitable justice. Sovereign mercy can have laudable effects, as when it encourages the creation of humanitarian programs of immigrant admission. But it can also have harmful effects, departing from important rule of law norms and placing recipients outside the law rather than within its protections. I do not seek to resolve these contradictions but rather to draw our attention to them and to encourage scholars and practitioners of immigration law to look critically at the role of mercy.

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I. INTRODUCTION

Those who advocate for immigration reform today often do so from the standpoint of mercy. Critics of the current system draw attention to the severity of the law, including factors such as rampant overcriminalization, long backlogs for legal migration, separation of families, and prolonged detention.¹ Former President

1. See, e.g., Editorial, *The Great Immigration Panic*, N.Y. TIMES, June 3, 2008, at A22, available at http://www.nytimes.com/2008/06/03/opinion/03tue1.html?_r=0 (“A nation of immigrants is holding another nation of immigrants in bondage, exploiting its labor while ignoring its suffering, condemning its lawlessness while sealing off a path to living lawfully. . . . An escalating campaign of raids in homes and workplaces has spread indiscriminate terror among millions of people who pose no threat.”); Editorial, *How Not to Fix the Immigration System: Harsh Laws Create Trouble for Alabama, Arizona*, CHI. TRIB., Dec. 29, 2011, available at http://articles.chicagotribune.com/2011-12-29/opinion/ct-edit-immig-20111229_1_arizona-s-sb-senate-president-russell-pearce-illegal-immigrants (criticizing the “harsh” and “hardline approach” towards immigration in state legislation); Jennifer Chacon, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); *Comprehensive Immigration Reform: Faith-Based Perspectives Before the Subcomm. On Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 111th Cong. 176 (2009) (statement of the American Friends Service Committee) (“The U.S. government’s punitive focus on arrest, detention and deportation diverts attention from more compelling human, civil and labor rights issues and from the complex causes of immigration. This punitive focus, in its harsh and capricious application, shatters families and stokes fear in communities; creates incentives for individuals and businesses to profit by the incarceration of others; and shames our highest ideals as Americans . . .”).

George W. Bush recently argued that we need a “benevolent spirit” when approaching immigration reform.² Recent articles have called for “compassionate” immigration reform.³ Current proposals for the “path to citizenship”—that is, the legalization of undocumented immigrants—are also sometimes couched in these terms: we need to act mercifully, to provide forgiveness, for those who have broken the law.⁴

2. Tom Benning, *Former President Bush Calls for ‘Benevolent Spirit’ in Immigration Debate*, DALL. MORNING NEWS, Dec. 4, 2012, available at <http://trailblazersblog.dallasnews.com/2012/12/george-w-bush-debate-immigration-policy-with-a-benevolent-spirit.html/>. Bush reiterated this phrase during a naturalization ceremony at the new Bush Presidential Library. Tom Benning, *George W. Bush Calls Once Again for ‘Positive Resolution’ to the Immigration Debate*, DALL. MORNING NEWS, July 10, 2013, available at <http://trailblazersblog.dallasnews.com/2013/07/george-w-bush-calls-once-again-for-positive-resolution-to-the-immigration-debate.html/>.

3. See, e.g., John J. Ammann, *No Need for Comprehensive Immigration Reform: The Incomplete Compassion of U.S. Immigration Policy*, 79 UMKC L. REV. 853 (2011); Steven W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB. L.J. 107 (2010); Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, BROOK. L. SCH. LEGAL STUD. RES. PAPERS 306 (2012) (urging the use of the pardon power to relieve immigrants from deportation because of its “deep roots in mercy”); David Koelsch, *Embracing Mercy: How Comprehensive Immigration Reform Can Use Rehabilitation to Fairly and Efficiently Address Immigration and Criminal Violations* (Oct. 20, 2012) (on file with author); Elizabeth McCormick & Patrick McCormick, *Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy*, 83 U. DET. MERCY L. REV. 857 (2006); Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 157 (1999) (arguing that “[b]oth constitutional protections and human compassion should play a role in ethical immigration policy”). But see Stephen Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1632 (“The case for judicial review [in immigration matters] does not rest on charity. It rests on procedural justice.”).

4. See, e.g., Editorial, *Immigration Reform as a Path to Conscience, Not Just Citizenship*, CHRISTIAN SCI. MONITOR, Jan. 28, 2013, available at <http://www.csmonitor.com/Commentary/the-monitors-view/2013/0128/Immigration-reform-as-a-path-to-conscience-not-just-citizenship> (“At the heart of this political struggle is the issue of forgiving illegal immigrants for breaking US law.”); *Evangelical Immigration Table Leaders Praise Senate’s Historic Vote*, EVANGELICAL IMMIGRATION TABLE (June 27, 2013), <http://evangelicalimmigrationtable.com/2013/06/evangelical-immigration-table-leaders-praise-senate%E2%80%99s-historic-vote/> (comments of Jenny Yang) (hoping for a congressional bill that “provides earned legalization for undocumented immigrants, many of whom have been suffering in the shadows of our society for far too long”); *The Uniting American Families Act: Addressing Inequality in Federal Immigration Law Before the S. Comm. on the Judiciary*, 111th Cong. 24 (2009) (statement of Charles Schumer, D-NY) (citing, with favor, the testimony of Pastor Joel Hunter, that “in order to fix this broken system, we must adopt an immigration system that deems each person is valuable, prioritizes the family, and provides compassion for those most in need”).

It is understandable that immigration reform commentary favors mercy. Immigration law is so harsh and unremitting that any opportunity for leniency is welcomed by immigrant advocates. Reformers laud recent merciful efforts by the Obama administration to change enforcement priorities and defer the deportation of those undocumented immigrants who arrived as children.⁵ Even lawmakers who support harsh and restrictive immigration laws argue for the ability to practice mercy through prosecutorial discretion—although they do not necessarily want to change the statute to provide less harsh laws to begin with.⁶ What we need, the argument from various sides goes, is more mercy to temper the severity of the enforcement regime.

In this essay, I propose that there are costs to seeking more mercy in immigration law. By framing the discussion as one about benevolence, compassion, and leniency, we can lose sight of key components of equity and justice. The orientation is profoundly different: in the language of mercy, immigrants get what the state decides to gift to them; mercy is not a right but a privilege. In the language of justice, immigrants get what they deserve; justice involves fair treatment, due process, and other constitutional and human rights. I posit that those of us who practice, teach, and write about immigration law would benefit from thinking more critically about the place of mercy in immigration law.

In order to ground this theoretical inquiry, I turn to the criminal law, where there is a robust debate about the problem of mercy.⁷ I argue that the mercy debate has some important things to teach those of us who engage with immigration law. Mercy skeptics within criminal law scholarship remind us that mercy is a laudable moral virtue in private life but has particular problems in a legal setting.⁸ It

5. See, e.g., Tadeo Melean, *Deferred Action Provides Temporary Solution*, EL AGUILA, Jan. 25, 2013, available at <http://stanfordelaguila.com/deferred-action-provides-temporary-solution/> (noting that California “advocacy groups and Stanford immigration law experts praise the Deferred Action for Childhood Arrivals (DACA), a White House executive action that grants undocumented youth work authorization among other two-year benefits”).

6. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 31 IMMIGR. & NAT'LITY L. REV. 961, 971 (discussing the post-1996 reactions of members of Congress who “both created stern restrictions to the immigration statute, and then held INS accountable for failing to refrain from enforcing them against individuals who presented compelling equities”).

7. See *infra* Part III.

8. For the phrase “mercy skeptics” I am indebted to Carol Steiker. See Carol S. Steiker,

can contravene rule of law principles:⁹ mercy in practice tends to be unaccountable and unreviewable.¹⁰ Grants of clemency, for example, are not subject to judicial review and can therefore be based on unpalatable factors like race and personal influence—or on no factors at all.¹¹ A practice of mercy by government officials can obscure the injustices of the law as a whole, preventing a larger structural critique. Mercy can contribute to the further subordination of those on the receiving end, who are positioned as supplicants before the sovereign rather than as rights-holders. Mercy skeptics remind us, in short, that there are costs to allowing mercy within a legal regime.

Overall, I argue that the problems of mercy identified in the criminal law literature are actually amplified in the immigration law context. Foundational conceptions within immigration law—particularly the legal fiction that deportation is not punishment and the assertion of congressional and executive plenary power over the lives of migrants—bring new meaning to the phrase “at the mercy of.”¹² Immigrants are regularly subordinated to the sovereign, unable to call upon the Constitution or other mechanisms of the rule of law to establish any rights or privileges. As the Supreme Court noted in one alarming statement, “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹³ What is more, immigrants do not have access to the franchise, thus they are politically marginalized as well.

The story of mercy in immigration law is also a story of change over time. In recent years, our normative commitments to compassion within immigration law have been undermined in

Tempering or Tampering? Mercy and the Administration of Criminal Justice, in FORGIVENESS, MERCY, AND CLEMENCY 27 (Austin Sarat & Nassar Hussain eds., 2007).

9. See Lawrence B. Solum, *Equity and the Rule of Law*, in THE RULE OF LAW 120, 121–22 (Ian Shapiro ed., 1994) (defining the rule of law as “the conjunction of seven requirements,” including generality, publicity, and regularity). See further discussion at *infra* Part III.

10. See *infra* Part III.

11. See, e.g., Jonathan Harris & Lothlorien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 CRIM. L. BRIEF 2, 3 (2007) (describing the historic understanding of clemency as “a broadly discretionary act by an executive free to examine sources of information and circumstances beyond the ken of the courts and the jury, including mitigating circumstances, rehabilitation and redemption, the wisdom, justice and proportionality of the death sentence, and the mental state of the petitioner—in short, not just innocence or guilt, but mercy and humanity”).

12. See *infra* Part IV.

13. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

various ways. What we find is that, though there are many provisions within immigration law that have mercy as their normative justification, this purpose is undercut by numerical limits, stringent eligibility criteria, and automatic bars for criminal behavior.¹⁴ We have also seen the significant rise in unfettered administrative discretion, which translates into a lack of accountability, reviewability, and consistency in the law. In our efforts to humanize immigration law, we commonly overlook these “darker sides” of mercy and compassion.

Yet mercy is also undoubtedly a vital and necessary normative justification within immigration law. Humanitarian aid is a core element of immigration policy as a whole.¹⁵ Mercy animates a large swath of immigration law, especially the areas of refugee and asylum law and deportation relief.¹⁶ This posits difficult questions: Can we embrace mercy as a laudable normative justification of immigration law while simultaneously critiquing mercy as a mode of legal decision-making within immigration law? In other words, is there a way for immigration law to be merciful while also being accountable? Compassionate but not subordinating?

The problem of mercy in immigration law is multi-faceted. Mercy can humanize the law and alleviate suffering, but it can also undermine justice and further oppress the noncitizens who are its supposed beneficiaries. In one sense there is too little mercy—the legal regime provides too few avenues to alleviate suffering. Yet in another sense there is too much mercy—the regime allows for decisions that are unreviewable, inconsistent, and irrational. I do not seek to resolve these contradictions in this essay but rather to draw our attention to them and to encourage scholars and practitioners of immigration law to look critically at the role of mercy.

This essay begins, in Part II, by identifying where mercy resides in immigration law. It focuses on three stages in the process of migration: admission, enforcement, and removal. I show the various

14. *See infra* Part IV(D).

15. *See, e.g.*, ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 847 (6th ed. 2008) (noting that “from the very beginning of federal immigration laws, Congress has recognized that special exemptions may be necessary for otherwise inadmissible or deportable noncitizens who have become political enemies of the government in the nation to which they would be sent”); MARILYN C. BASELER, ASYLUM FOR MANKIND: AMERICA, 1607–1800 (1998).

16. *See infra* Parts II(A) and (C).

opportunities to practice mercy as well as their significant limitations within the law. Part III describes the mercy debate within the law more generally, with a focus on the criminal law. It surveys the arguments of both the skeptics and the advocates of mercy. Mercy has been on the decline in criminal law, in response to criticisms of its departure from rule of law principles. Part IV assesses the implications of the mercy debate for immigration law. It uses the insights of both sides of the mercy debate to evaluate and critique the role of mercy. In contrast to the criminal law, mercy is not on the decline across the board within immigration law but instead has become more pervasive as a mode of legal decision-making. Foundational concepts in immigration law set the stage for a climate of subordination and unfettered sovereign prerogative. This climate makes mercy with immigration law more palatable as both a substantive norm and a procedural method, but at a considerable cost to migrants themselves.

II. IDENTIFYING MERCY IN IMMIGRATION LAW

To begin to assess the role of mercy in immigration law, we must first define it. What is mercy? The Oxford English Dictionary defines mercy as “clemency and compassion shown to a person who is in a position of powerlessness or subjection, or to a person with no right or claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected, especially in giving legal judgment or passing sentence.”¹⁷ Mercy is most commonly associated with leniency: the choice of an individual to treat someone less severely than would normally be required. The ancient Greek philosopher Seneca describes it as “the inclination of the mind toward leniency in exacting punishment.”¹⁸ Mercy has moral force and a long lineage in religion and ethics.¹⁹ It is often discussed alongside, and sometimes conflated with, other moral virtues like forgiveness, compassion, and charity.²⁰ Those who assess the role of

17. *Mercy*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/116713?rskey=wZAckG&result=1&isAdvanced=false#eid> (last visited Oct. 21, 2013).

18. Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 85 (1993) (quoting Seneca).

19. See, e.g., ANTHONY BASH, *FORGIVENESS AND CHRISTIAN ETHICS* (2007).

20. Nassar Hussain & Austin Sarat, *Toward New Theoretical Perspectives on Forgiveness, Mercy, and Clemency: An Introduction*, in FORGIVENESS, MERCY, AND CLEMENCY, *supra* note

mercy do so from different standpoints; some argue that mercy has everything to do with the state of mind of the person granting it, others argue that it has to do with the position of the person seeking it.²¹ Some are concerned with mercy as a private virtue, others with its public, institutional face,²² and some with the interaction between the two.²³

While these colloquial, moral, and religious conceptions of mercy are relevant to my argument, my primary focus here is on the *legal* conception of mercy. Mercy *within the law* has particular valences. In its most basic definition, legal mercy refers to a practice of leniency by a government official acting in his or her professional capacity. Some legal scholars confine the definition of legal mercy to actions that undermine justice—that is, actions that allow a defendant to escape an otherwise deserved punishment.²⁴ In this section, I define mercy more broadly, to encompass official practices of leniency or compassion in the law that are intended to relieve suffering in some form. My definition includes both legislative and adjudicative acts—it includes merciful statutes drafted by legislators as well as individual acts of leniency by judges, law enforcement officers, and administrative officials.

How and when do officials practice mercy in immigration law? In this section, I will canvass the field to demonstrate where mercy does or can appear. This part is divided into three sections that track the lifecycle of immigration enforcement, beginning with the admission

9, at 1 (noting our “incomplete understanding” of the relationship between these different concepts); Jeffrie G. Murphy, *Mercy and Legal Justice*, 4 SOC. PHIL. & POL’Y 3 (noting that mercy is often confused with other virtues like excuse, justification, and forgiveness).

21. As Martha Nussbaum notes, “Both equity and mercy can be spoken of as attributes of persons, as features of judgments rendered by a person, or as moral abstractions in their own right.” Nussbaum, *supra* note 18, at 86 n.4.

22. On the public role of forgiveness, see HANNAH ARENDT, *THE HUMAN CONDITION* 237 (1998) (“Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever . . .”). On the private virtue of mercy, see, for example, Murphy, *supra* note 20, at 11 (“There is thus room for mercy as an important moral virtue with impact upon the law, but it is a virtue to be manifested by private persons using the law—not by officials enforcing the law.”).

23. See, e.g., Heidi Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389, 391 (2007); Nussbaum, *supra* note 18, at 109 (“I have been talking about a moral ideal, which has evident implications for publicly promulgated norms of human behavior and for public conduct in areas in which there is latitude for judicial discretion.”).

24. See discussion *infra* notes 124–39 and accompanying text.

of immigrants, continuing with the enforcement of immigration law, and ending with procedures to remove immigrants. Each section outlines the substantive provisions of the law that are intended to relieve suffering and the procedures used to accomplish them. Each also indicates the limitations of mercy within these legal provisions and procedures.

A. Admissions

Mercy has long animated a broad swath of immigration law. As a proclaimed “nation of immigrants,”²⁵ the United States has embraced the mantle of a place of asylum for those seeking refuge. One has only to look to the plaque at the base of the Statue of Liberty, where the 1883 poem by Emma Lazarus proclaims:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!²⁶

Since the nineteenth century, the federal government has provided for the admission of migrants in either temporary or permanent status because of what are most commonly called “humanitarian” aims.²⁷ Although the word “mercy” does not appear in the statute or regulations themselves, we can place many admissions provisions into this category: as programs that grant some otherwise unavailable immigration benefit based solely on consideration of hardship of some sort, or, going back to the dictionary definition, “clemency and compassion shown to a person . . . with no right or claim to receive kindness.”²⁸ In most cases of humanitarian admission, the applicant has no legal “right or claim to receive kindness” but is instead at the mercy of the sovereign.

The United States Citizenship and Immigration Service

25. See, e.g., JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1964).

26. Emma Lazarus, *The New Colossus* (1883).

27. See ALEINIKOFF, *supra* note 15; Richard Boswell, *Crafting an Amnesty with Traditional Tools*, 47 HARV. J. ON LEGIS. 175, 177–78 (2010) (noting that humanitarian goals are “at the core of U.S. immigration policy”).

28. *Mercy*, *supra* note 17.

(USCIS), which presides over immigrant admission and the granting of related benefits, has a webpage, entitled simply “Humanitarian,” which lists programs that fall under this classification.²⁹ As the prologue states, “USCIS provides a number of humanitarian programs and protection to assist individuals in need of shelter or aid from disasters, oppression, emergency medical issues and other urgent circumstances.”³⁰ The largest such program is the admission of refugees. Refugee law is characterized as a merciful gesture on the part of the sovereign: migrants otherwise ineligible for entry will receive a grant of admission because they have suffered some harm.³¹

Refugee admission can be contrasted with that of other modes of legal permanent resident admission, which are more utilitarian: admitting skilled workers, for example, because they will have a favorable effect on the U.S. economy.³² The other major category of admission, that of family unification, is a hybrid of utility and mercy.³³ Family unification can be thought of as a merciful gesture since it prevents the suffering that accompanies family separation; it is also utilitarian since it encourages migrants to put down roots in their new country of allegiance, roots that will presumably assist the migrant’s incorporation into the country.³⁴ Broadly speaking, then, a merciful approach to admissions is woven into our system. Congress chooses to grant admission to some—namely, refugees and asylees—purely on the basis of their suffering. In other cases, particularly that of family unification, mercy is an important part of the overall normative justification.

There are methods of temporary admission—those that do not grant legal permanent resident status but allow for a temporary

29. *Humanitarian*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, www.uscis.gov/humanitarian (last updated Jun. 18, 2012); see also discussion in Ammann, *supra* note 3, at 862–63.

30. *Humanitarian*, *supra* note 29.

31. See, e.g., Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 156 (noting that the Refugee Act of 1980 is “an instrument of policy to meet the needs of the homeless around the world” and can “serve the country’s humanitarian traditions well”).

32. Immigration and Nationality Act (INA) § 203(b), 8 U.S.C. § 1153(b) (2012) (listing employment-based categories of admission). See also ALEINIKOFF ET AL., *supra* note 15, at 360–61.

33. INA § 203(a) (listing family reunification categories).

34. See, e.g., Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 292–93 (2013) (noting family unification is “[a] long-standing goal of US immigration law” that promotes social welfare); H.R. REP. NO. 101-723 (1990), reprinted in 1990 U.S.C.C.A.N. 6710; H.R. REP. NO. 89-745, at 1, 12 (1965).

stay—that are humanitarian in purpose. Temporary Protected Status (TPS) is a way to allow those who are in the country at the time of a natural disaster or violent conflict in their home country to stay for a temporary period.³⁵ One of the more recent applications of TPS was to Haitians who were allowed to stay in the United States with work authorization because of the devastating earthquake in 2011.³⁶ There are also specific non-immigrant visas, known as T and U visas, available for those who have been victims of human trafficking or other crimes and who can assist in prosecution.³⁷ Here there are mixed motives: Congress allows for admission based on suffering but also based on utility, since victims are expected to “assist law enforcement authorities in the investigation or prosecution” of the crime.³⁸ Additionally, Congress has provided for specific immigration benefits for victims of domestic violence through the Violence Against Women Act.³⁹ In some cases, these provisions can allow for lawful admission when the applicant would have otherwise been ineligible.

These various admissions plans have mercy as a guiding normative justification. Yet these types of admission come with a price: only in limited circumstances do these applicants have any “right” to admission; typically they cannot demand it, but must hope that they will receive a favorable decision by the agency. The definition of a refugee emerges out of the United Nations Convention Relating to the Status of Refugees of 1951 and has been codified in the Immigration & Nationality Act as one who fears return to his or her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴⁰

35. INA § 244.

36. Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476 (Jan. 21, 2010); Ammann, *supra* note 3, at 856–59. Ammann argues that existing humanitarian programs should provide the “starting point” for comprehensive immigration reform. *Id.* at 874.

37. INA § 101(a)(15)(T)(i) (describing the T visa for victims of trafficking); INA § 101(a)(15)(U)(i) (describing the U visa for victims of crime).

38. *Victims of Human Trafficking & Other Crimes*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, www.uscis.gov/humantrafficking (last updated June 6, 2013).

39. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, tit. IV, 108 Stat. 1796 (1994); *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464; INA § 204(a)(1)(A)(iii)(II)(aa)(CC).

40. INA § 101(a)(42)(A).

Scholars and practitioners have criticized this definition for excluding those who are forced to migrate due to economic conditions, environmental disasters, or other threats to subsistence.⁴¹ They have also criticized the failure of international law to place legal obligations on states to accept refugees.⁴² International law, as it now stands, does not demand or require that any country admit refugees. As scholar David Martin notes, “there is no individual right of asylum in international law.”⁴³ Refugee status is an entitlement, and nation states retain the discretion to decide whether to admit refugees or not. There are exceptions; under the principle of *nonrefoulement*, codified in article 33 of the Convention, a state cannot send back to the persecuting country those who meet the definition of a refugee and are already in the host state.⁴⁴ States can still choose to send a refugee to a third country or to refuse to grant any other rights; in other words, *nonrefoulement* does not translate into a right of asylum, but merely a right to not be sent back to the persecuting country.⁴⁵ The United States has codified this principle in the procedure for “withholding of removal.” Withholding is harder to obtain than asylum, however, since the applicant has to demonstrate a “clear probability” of harm rather than a “well-founded fear” of harm.⁴⁶ The Convention Against Torture (CAT), of which the United States is a signatory, provides that the United States cannot send an immigrant back to a country where he or she is likely to be tortured, even if that migrant does not meet the definition of a refugee.⁴⁷ CAT and *nonrefoulement* are two of the very

41. See, e.g., ARISTEDE R. ZOLBERG, ASTRI SUHRKE & SERGIO AGUAYO, ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 269–72 (1989) (criticizing the “restrictive tendencies” of refugee law and advocating a broader definition of *refugee* that would include those who suffer threats of violence).

42. See, e.g., James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT. L. 804, 808–15 (1983) (arguing for a more expansive reading of international law obligations to admit migrants).

43. David Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 31 (Howard Adelman ed., 1991).

44. Convention Relating to the Status of Refugees art. 33, July 25, 1951, 189 U.N.T.S. 150.

45. See, e.g., Martin, *supra* note 43, at 33 (noting that *nonrefoulement* is “a legal obligation . . . of what seems to be exceedingly modest proportions”).

46. See RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 87–88 (2d ed. 2009).

47. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

few limitations on the government's power to decide how to dispense mercy in immigrant admissions. Given the structure of refugee law, it is the rare case when a migrant can claim a right to enter. Instead, refugees seek the privilege—the gift—of entry.

Mercy-based admission is limited both qualitatively and quantitatively. Refugee admissions are capped at a certain number each year, as determined on an annual basis by the President and Congress.⁴⁸ The President can exceed this number only if it is justified by “humanitarian concerns or is otherwise in the national interest.”⁴⁹ This total annual admission number is further allocated to particular regions; only 3000 spaces are undesignated.⁵⁰ Asylum is, as of this writing, only available if one applies within a year of arriving in the United States.⁵¹

These forms of admission are typically revocable at will by the agency. In TPS, for example, the Secretary of the Department of Homeland Security (DHS), which oversees most elements of admissions and removal, can end the designation for specified groups at any time.⁵² The Secretary (most typically his designated officials) can also revoke the approval of any petition for admission as a legal permanent resident, “at any time,” for whatever he deems to be “good and sufficient cause.”⁵³ Mercy in admissions is thus limited temporally and qualitatively: only certain types of suffering can invoke the mercy of the sovereign, and only if the applicant meets specific temporal requirements.

Admissions policies are a form of institutional compassion: they provide a realm of benefits for those who would otherwise not merit admission, based on compassion for suffering. For this reason, these programs are often called the “compassionate” and “humanitarian” side of immigration law.⁵⁴ Yet they also entail a great deal of

Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 113, 114 (“No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

48. Refugee admissions were capped at 70,000 for 2013. Determination No. 2012-17, 77 Fed. Reg. 61,507 (Sept. 28, 2012), *available at* <https://federalregister.gov/a/2012-25035>.

49. INA § 207(b), 8 U.S.C. § 1157(b) (2012).

50. *Id.*

51. INA § 208(a)(2)(B).

52. INA § 244(b)(3).

53. INA § 205 (“Revocation of approval of petitions”).

54. *See, e.g.*, Ammann, *supra* note 3, at 861.

unfettered administrative discretion. When determining whether an applicant meets the criteria for these mercy-based programs, a decision-maker—typically an official with the Department of State, with refugee admissions, an asylum officer, or an immigration judge—must decide if mercy is warranted. These determinations are typically discretionary: decisions regarding the entry of refugees are not reviewable;⁵⁵ individual asylum decisions are reviewable by a court in only limited circumstances.⁵⁶ This process brings with it serious concerns about the rule of law in the context of immigrant admission. An example from refugee and asylum law is instructive. Recent work by Jaya Ramji-Nogales, Andrew Schoenhotz, and Philip Schrag demonstrates that this process is far from uniform, predictable, or just. They draw attention to enormous disparities in asylum grant rates. They acknowledge that all adjudication is subject to some disparity; perfect conformity in adjudication is an unrealistic goal. But, as they write,

[H]ow about a situation in which one judge is 1820% more likely to grant an application for important relief than another judge in the same courthouse? Or where one in U.S. Court of Appeals is 1148% more likely to rule in favor of a petitioner than another U.S. Court of Appeals considering similar cases?⁵⁷

They conclude that Congress needs to implement a range of reforms to improve the adjudication of asylum applications.⁵⁸

In these admission programs, we see the state motivated by mercy—and acting out of compassion for suffering—while also avoiding a large measure of accountability and consistency that we usually expect in the administration of the law. Grants of mercy are themselves limited: mercy is not open-ended but is instead restricted, both quantitatively and qualitatively.

55. On “consular absolutism, which bars judicial review of consular officers’ decisions denying applications for visas,” see Legomsky, *supra* note 3, at 1615, 1619–24.

56. *See, e.g.*, BOSWELL, *supra* note 46, at 170 (decisions denying the right to seek asylum are not reviewable in the federal courts if they are “based on any of the following: protection could have been sought in a safe third country; a prior denial of asylum; failure to file within one year . . . or the asylum-seeker is considered to be a terrorist”) (footnotes omitted).

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

58. *Id.* at 385.

B. Enforcement

There are countless ways that an immigrant can violate immigration law. She can overstay a visa,⁵⁹ for example, or fail to report an address change to immigration authorities.⁶⁰ He can enter the country surreptitiously,⁶¹ or lie on an application for immigration benefits.⁶² Most violations of immigration law make an immigrant deportable, or, in the terminology of the statute, “removable.”⁶³ In order to begin removal proceedings, officials from Immigration and Customs Enforcement (ICE)—which, like USCIS, is under the aegis of the Department of Homeland Security (DHS)—must first file charges against the immigrant.

There are a variety of ways that officials can practice mercy at this stage, prior to the entry by an immigration judge of an order of removal. ICE immigration officers, like prosecutors in the criminal law, have wide latitude to decide what cases to pursue and which defendants to punish.⁶⁴ As Shoba Wadhia has observed, “[p]rosecutorial discretion is an awesome power that affects the fate of more noncitizens than any other government action.”⁶⁵ Prosecutorial discretion is a powerful site for the practice of mercy. Immigration officers can determine—for any reason or no reason—not to pursue removal proceedings. Charging decisions can be scrutinized by officials within DHS, but they are almost always

59. INA § 237(a)(1).

60. INA § 237(a)(3)(A).

61. INA § 237(a)(1)(B).

62. INA § 237(a)(3).

63. In 1996, with the passage of the Illegal Immigration Reform and Control Act (IIRIRA), Congress consolidated exclusion and deportation procedures into one “removal” procedure. *See, e.g.*, BOSWELL, *supra* note 46, at 25 (“Exclusion and deportation hearings are no longer separate and distinct, but are unified as one procedure—a “removal hearing”—for all persons, irrespective of whether the person seeks admission or the government tries to eject him or her following admission.”).

64. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1833–36 (2011); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 31 IMMIGR. & NAT'LITY L. REV. 961, 962 (2010) (explaining that “[p]rosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions”).

65. Wadhia, *supra* note 64, at 964.

unreviewable by the courts, even when there is an allegation of selective prosecution.⁶⁶

Because most decisions not to charge—in either criminal law or immigration law—are not accompanied by any stated rationale, it can be difficult to determine whether these decisions are motivated by mercy. But within immigration law, the executive branch sometimes provides explicit guidance for immigration officers, laying out agency priorities for enforcement. In 2011, ICE officers were instructed by what is known as the Morton Memo.⁶⁷ This document lays out the enforcement priorities of the Obama administration. It encourages a merciful stance towards those who are either meritorious cases—with low-level wrong-doing—or those who would likely experience a high-level of suffering upon removal. Factors to be considered in deciding to exercise prosecutorial discretion not to charge include the age of the alien, length of presence in the United States, ties to the community, family relationships and caretaking responsibilities, mental or physical disability, and health.⁶⁸ Notably, the memo makes clear that this enforcement policy provides “no right” to discretion and can be changed at any time.⁶⁹

Prosecutorial discretion in immigration law can be informal, based on a choice by an individual officer not to proceed against a particular individual, but it can also be formal, through a recognized administrative relief program known as “deferred action.”⁷⁰ A grant of deferred action can temporarily delay or indefinitely suspend removal proceedings. The Immigration and Naturalization Service

66. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999) (holding that an unauthorized immigrant has no constitutional right to assert selective enforcement as a removal defense, even though the government conceded that First Amendment activity was the basis for the prosecution); Matt Caretto, *Selective Enforcement of the Immigration Laws: Is There Any Possible External Constraint on the Exercise of Prosecutorial Discretion?*, 18 *GEO. J. LEGAL ETHICS* 639, 639 (2005) (noting that “[s]elective enforcement of the immigration laws . . . is constitutionally different from unconstitutional selective enforcement of the criminal laws”).

67. JOHN MORTON, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, MEMORANDUM: EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION AND REMOVAL OF ALIENS (June 17, 2011).

68. *Id.* at 4–5.

69. *Id.* at 6 (“[T]his memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit . . .”).

70. *See* ALEINIKOFF ET AL., *supra* note 15, at 778–79.

(INS), the predecessor to today's immigration agencies, issued the first published guidelines for deferred action in 1975.⁷¹ These guidelines are rooted in mercy. The guidelines state that the district director "shall recommend" deferred action "in every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors."⁷² Such factors include considerations of "advanced or tender age," "family situation," and "many years' presence in the United States."⁷³ Later, INS revised these guidelines, making it clear that the district director was not obligated to provide deferred action (replacing "shall" with "may") and providing revised instructions.⁷⁴ The current guidelines are still based, in part, on humanitarian factors, including a consideration of the individual alien's age, physical condition, and other "sympathetic factors."⁷⁵

The most high-profile recent use of "macro-level" deferred action is the program for Deferred Action for Childhood Arrivals (DACA), announced by DHS in June of 2012.⁷⁶ This program came on the heels of the defeat of the DREAM Act in Congress.⁷⁷ The DREAM Act would have provided a path to citizenship for undocumented young people who arrived in the United States as children and who met particular eligibility criteria.⁷⁸ DACA resembles the DREAM Act but does not guarantee a path to

71. (LEGACY) IMMIGRATION AND NATURALIZATION SERV., OPERATIONS INSTRUCTIONS, O.I. §103.1(a)(1)(ii) (1975); see also Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976).

72. *Id.*

73. *Id.*; see IMMIGRATION AND NATURALIZATION SERV., STANDARD OPERATING PROCEDURES FOR ENFORCEMENT OFFICERS: ARREST, DETENTION, PROCESSING AND REMOVAL, PART X (describing factors to be considered in determining whether to grant deferred action).

74. *Id.*

75. *Id.*

76. DEP'T OF HOMELAND SEC., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (Jan. 18, 2013), available at www.uscis.gov/childhoodarrivals.

77. See Audrey Singer & Nicole Prchal Svajlenka, *DACA: Coming of Age at a Time of Immigration Reform*, BROOKINGS INST. (June 19, 2013), <http://www.brookings.edu/blogs/up-front/posts/2013/06/19-daca-immigration-reform-singer-svajlenka>.

78. Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, 112th Cong. (2011).

citizenship. Instead, those who qualify receive work authorization and an indefinite delay of removal.⁷⁹

Prosecutorial discretion provides plentiful opportunities for the practice of mercy. Yet, like pardons and acts of clemency in the criminal law realm, these decisions lack dimensions of transparency, accountability, and consistency.⁸⁰ They are purely discretionary decisions subject to almost no court review.⁸¹ Although prosecutorial discretion provides the opportunity for leniency, it cannot be demanded or claimed by the applicant. There is no formal application for prosecutorial discretion, despite repeated attempts, both in the past and the present, to devise such a system.⁸² Deferred action would seem to give greater possibilities for procedural regularity and court review given that it is a set administrative process. Yet this is not so. Deferred action has been the source of several attempts, by both courts and others, to impose greater transparency, accountability, and consistency.⁸³ All have failed.

Mercy is not open-ended. Immigration officers, like prosecutors in criminal law, are pressured towards greater and more comprehensive enforcement, not less. They are strongly incentivized to punish any sort of criminal activity. Jason Cade has found in his research that ICE officers “almost never exercise [prosecutorial] discretion for the benefit of noncitizens with criminal records,” even though they are within their rights to do so.⁸⁴

DACA is a good representation of both the promise and limitations of mercy in immigration enforcement. Seen in the most

79. *Id.*

80. *See, e.g.*, Wadhia, *supra* note 64, at 983 (noting that “the absence of oversight, accountability and transparency by the agency has negatively impacted undocumented noncitizens and their families”).

81. *Id.* at 1004 (noting the “virtual immunity from judicial review” of prosecutorial discretion in the immigration context).

82. *See, e.g.*, AM. IMMIGRATION LAWYERS ASS’N, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION (Nov. 2011) (noting the failures of ICE field offices to apply the Morton Memo or provide a formalized process of requesting an exercise of prosecutorial discretion).

83. *See, e.g.*, Wadhia, *supra* note 64, at 966–69, 1000–04. DHS has resisted repeated calls for the release of statistics on deferred action or stay of removal rates. *See* Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819 (2004); Robert Hopper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action Status*, 97-06 IMMIGR. BRIEFINGS 1 (1997).

84. Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 364 (2012).

sympathetic light, executive branch mercy as practiced here is a release valve, effectively acting where the law falls short. It allows for humanitarian treatment of those who are not a high priority for enforcement. Notably, DACA provides a more formalized structure for prosecutorial discretion within immigration law that moves it closer to equitable discretion and away from pure sovereign mercy. There is a clearly delineated application process, clear statement of eligibility criteria, and transparency on the part of the administration in record keeping and statistics about DACA decisions.⁸⁵ These are impressive gains in an area that has seen little in the way of transparency. Yet DACA has the downsides of mercy as well. Decisions cannot be reviewed or appealed.⁸⁶ The program can be removed at any time—a fact not lost on those who waited until after the 2012 presidential election to apply.⁸⁷ More importantly, the relief provided is temporary: the enforcement branch is merely promising not to prosecute at the moment, but makes no guarantees of a long-term reprieve. No path to a permanent legal status means a permanent state of legal limbo for those who receive deferred action.

Enforcement decisions provide a key opportunity for leniency, tempering the severity of the immigration regime. Yet these charging decisions remain outside the ambit of courts and cannot be effectively challenged by those affected by them. Immigrants are truly “at the mercy” of immigration officers when they determine whether or not to bring charges and whether to grant deferred action.

C. Removal

Once an immigrant has been charged with a violation of the law, she is requested to attend a removal proceeding (unless she is offered

85. See *Data on Individual Applications and Petitions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1b52d725f5501310VgnVCM100000082ca60aRCRD&vgnnextchannel=1b52d725f5501310VgnVCM100000082ca60aRCRD> (last updated Sept. 13, 2013) (“The cumulative number of requests received and accepted for processing, biometrics appointments scheduled, requests under review, and requests approved and denied are displayed. The report also shows the number of accepted and approved requests from the top countries of origin and location of residence.”).

86. DEP’T OF HOMELAND SEC., *supra* note 76.

87. Laurel Morales, *DACA Applicants Deterred by Romney’s Immigration Stance*, KPBS, Oct. 30, 2012, available at <http://www.kpbs.org/news/2012/oct/30/daca-applicants-deterred-romneys-immigration-stanc/>.

and accepts voluntary departure, which allows a deportee to leave on her own recognizance, without the entry of a final removal order in her record).⁸⁸ The case is brought before an immigration judge (IJ); appeals go before the Board of Immigration Appeals (BIA).⁸⁹ IJs and the BIA are housed in the Executive Office for Immigration Review (EOIR) in the Department of Justice. Frequently, statutory provisions in the Immigration & Nationality Act grant authority to the Attorney General to determine certain discretionary benefits; the Attorney General typically delegates these decisions to the IJs.⁹⁰

There are a variety of mechanisms within immigration law to defer, delay, or permanently rescind an order of removal. They are commonly referred to as “deportation relief” measures, or, after 1996, measures for “relief from removal.”⁹¹ These mechanisms are our closest analog to the typical focus of criminal law discussions of mercy—pardons, clemency, or sentencing decisions—since they relieve a convicted applicant of an otherwise deserved punishment or consequence; they declare that “this punishment, while deserved, should not be imposed.”⁹² Courts have, in fact, directly linked deportation relief provisions to merciful gestures in criminal law. In the 1956 case of *Jay v. Boyd*, the majority opinion likens suspension of deportation—one provision for relief from removal—to sentencing and parole decisions:

Although such aliens have been given a right to a discretionary determination on an application for suspension, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it “comes as an act of grace,” and “cannot be demanded as a right.”⁹³

88. INA § 240B, 8 U.S.C. § 1229c (2012).

89. 8 C.F.R. § 1003.1(b) (2012) (granting noncitizens found removable a right of appeal to the BIA); ALEINIKOFF ET AL., *supra* note 15, at 278–84.

90. *See* ALEINIKOFF ET AL., *supra* note 15, at 783 (“The Attorney General has typically delegated the exercise of discretion in individual cases to immigration judges who preside over removal proceedings.”).

91. *Id.* at 775–827.

92. Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 9, at 36.

93. *Jay v. Boyd*, 351 U.S. 345, 354 (1956) (citations omitted). The opinion continues: And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole’s powers to release federal prisoners on parole. . . . [T]he similarity between the discretionary powers vested in the

The Supreme Court quoted portions of *Boyd* and earlier cases approvingly in 1996:

We have described the Attorney General's suspension of deportation . . . as "an act of grace" which is accorded pursuant to her "unfettered discretion," and have quoted approvingly Judge Learned Hand's likening of that provision to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict."⁹⁴

Deportation relief, like deportation itself, has deep roots.⁹⁵ Rarely have government practices of banishment, exclusion, or removal been unaccompanied by some form of discretionary relief, aimed at preventing undue hardship. The Alien and Sedition Acts of 1798 allowed for discretionary relief—the President was authorized under the Alien Enemies Act to "grant a license" to a suspected alien enemy "to remain . . . for such time as he shall judge proper."⁹⁶ One of the most effective, but indirect, forms of relief in the nineteenth and early twentieth centuries was the statute of limitations on deportation proceedings. Up until 1917, deportation was only practiced against those who had recently entered the country, and usually only because of a violation of some specific condition of entry.⁹⁷ Immigration authorities were not legally permitted to deport

Attorney General . . . on the one hand, and judicial probation power and executive parole power on the other hand, leads to a conclusion that § 244 gives no right to the kind of a hearing on a suspension application which contemplates full disclosure of the considerations entering into a decision. Clearly there is no statutory right to that kind of a hearing on a request for a grant of probation after criminal conviction in the federal courts. Nor is there such a right with respect to an application for parole.

Id. at 344–45.

94. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citations omitted).

95. The roots of modern deportation are in techniques of exclusion practiced by local and state governments in the seventeenth and eighteenth centuries. Colonial towns could, and often did, remove or exclude residents because of poverty, religion, ideology, or immoral or criminal behavior. Poor laws designated legal settlements and those who strayed from their legal residence could be forcibly removed to that place. These early colonial "warning out" systems, which enabled town governments to remove poor settlers from their midst, were practiced with a large degree of discretion, enabling officials to decide whether or not to remove a particular individual. See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 21–90 (2007); Kunal M. Parker, *From Poor Law to Immigration Law: Changing Visions of Territorial Community in Antebellum Massachusetts*, 28 *HIST. GEOGRAPHY* 61 (2000).

96. Act of June 25, 1798, 1 Stat. 570.

97. KANSTROOM, *supra* note 95, at 133 (noting that the 1917 Act "radically changed

migrants who had been in the country for more than a set number of years, even if these migrants had entered unlawfully.⁹⁸ The application of a statute of limitations aided in alleviating the hardships attendant to deportation: it was much less likely that relatively recent immigrants would have developed deep ties of family, property, and community that make deportation so difficult. Long-resident immigrants would have had that opportunity, but they were largely shielded, in the initial years of federal immigration enforcement, from deportation. The statute of limitations was perhaps the purest form of historical deportation relief. The private bill was another form of relief that predated statutory provisions.⁹⁹ An immigrant could apply to a congressional representative who could intercede on the immigrant's behalf by passing a bill that would prevent removal.

The various forms of deportation relief have changed over time, but they all share two characteristics: they have long been considered “discretionary,”¹⁰⁰ and they are widely acknowledged to be “ameliorative”¹⁰¹ in purpose. From its historical beginnings, lawmakers, administrators, and applicants have envisioned deportation relief as a humanitarian measure. Relief is primarily meant to relieve the hardship that deportation would cause for the immigrant or the immigrant's family. Immigration scholars share this view. Daniel Kanstroom, for example, calls discretion—as utilized to prevent deportation—the “last repository of mercy in an otherwise merciless system.”¹⁰² Richard Boswell notes that some deportation

prior law by requiring deportation after entry for a wide variety of reasons and in permitting deportation without time limitation for certain types of cases”).

98. The Act of 1903 extended the period to two years from time of entry; the Act of 1907 extended it to three years from time of entry. Act of Mar. 3, 1903, 32 Stat. 1213 (repealed 1917); Act of Feb. 20, 1907, 34 Stat. 898 (repealed 1917).

99. See Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 277–88 (2004).

100. See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 99 (2003) (noting the discretionary nature of one of the first forms of deportation relief—known as suspension of deportation—created by Congress in 1940).

101. See, e.g., William C.B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885, 926 (1997) (“Congress originally enacted cancellation of deportation relief to ameliorate the harsh effects of deportation on long-term resident aliens.”).

102. KANSTROOM, *supra* note 95, at 230.

relief measures “are forms of amnesty in all but name.”¹⁰³ In 1993, the Seventh Circuit characterized it this way:

Courts and administrative agencies are given discretionary power in order to individualize the application of law, make it flexible and adaptable to circumstances. Without it, the law is apt to be criticized as harsh, unfeeling and unjust. In deportation cases, the Attorney General or her designees, in this case the INS and the BIA, are entrusted with the authority to exercise discretion in order to ameliorate the harsh results that deportation wrecks on aliens and their families by allowing, in certain circumstances, a waiver of deportation.¹⁰⁴

These provisions for relief from removal are legislative, institutional mercy: they are statutory practices of leniency based on perceptions of the suffering or hardship of the applicant, and they relieve the applicant of an otherwise deserved penalty. These provisions are prevalent in the law of immigration, far more prevalent than clemency or pardon in criminal law.¹⁰⁵ Because deportation grounds are fairly cut and dry, most contested cases within immigration law are contested not on the grounds of deportability themselves, but rather on the eligibility for relief. This means that much of the work of an immigration lawyer is in determining whether a client qualifies for some kind of relief.¹⁰⁶

103. Boswell, *supra* note 27, at 177.

104. *Gonzalez v. INS*, 996 F.2d 804, 810–11 (6th Cir. 1993).

105. Relief is a significant feature of immigrant enforcement and admissions. In 2011, immigration judges heard more than 73,000 applications for relief. In 2011, 24% of immigration court proceedings included applications for relief. This percentage number is deceptively low; however, once you subtract the number of unrepresented cases (including failures to appear), which are typically uncontested, the number jumps to 47% (73,493 applications out of 155,185 total proceedings for fiscal year 2011). In some individual immigration courts, the number is much higher. In New York, applications for relief appeared in 65% of total completed cases. Courts in major metropolitan areas, including Baltimore, Boston, Los Angeles, Philadelphia, San Francisco and Seattle, all had relief application rates of more than 40%. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK (2012) [hereinafter EOIR] *available at* <http://www.justice.gov/eoir/statspub/syb2000main.htm>.

106. There is little factual contest in the removal hearing of an immigrant who entered the country without authorization: if the government has no record of her lawful entry, and if she can produce no such record, then she is deportable. Similarly, an immigrant is automatically deportable for having committed certain crimes. A conviction for an aggravated felony, once on the record, leads to deportation regardless of the severity of the crime, the length of permanent residence, or other mitigating circumstances. ALEINIKOFF, ET AL., *supra* note 16, at 750 (“In most removal proceedings, the noncitizen does not seriously challenge

The primary modern forms of post-conviction “relief from removal” are adjustment of status, cancellation, withholding of removal, and asylum.¹⁰⁷ Applicants can still seek a private bill, but this option, which depends upon legislative action, is increasingly difficult to achieve.¹⁰⁸ Certain immigrants may also still qualify for relief that was abandoned or superseded with immigration reform in 1996: 212(c) waivers and suspension of deportation.¹⁰⁹

Most relief decisions consist of two steps.¹¹⁰ First, the applicant must show that he or she is statutorily eligible for relief. The applicant must apply for adjustment of status and cancellation, and the applicant bears the burden of proof to demonstrate eligibility.¹¹¹ Second, he or she must receive a favorable exercise of discretion on the part of the immigration judge. An applicant can be turned down for relief—even if statutorily eligible—if the immigration judge determines that relief is not warranted in the particular case.¹¹²

Mercy here, as in admissions and enforcement, is not open-ended. Relief provisions are limited by numerical caps, stringent eligibility criteria, and categorical exclusions.¹¹³ All three paths to

removability. Instead, the major issue is an application for relief from removal”); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 382 (2006) (“In practice, deciding whether a noncitizen is ‘removable’ . . . is ordinarily straightforward; . . . Much more frequently contested are whether the person meets all the statutory requirements for a particular form of affirmative relief and, if so, whether the applicant deserves the favorable exercise of discretion.”).

107. Prosecutorial discretion, deferred action, and stays of removal are also included in the list of relief provisions. See ALEINIKOFF, ET AL., *supra* note 15, at 775–827. My focus here is on post-conviction relief, which includes adjustment of status, cancellation, withholding of removal and asylum.

108. Hopper & Osuna, *supra* note 83; Griffith, *supra* note 99, at 294–302.

109. INA § 240(e)(III); see also BOSWELL, *supra* note 46, at 75–76.

110. ALEINIKOFF, ET AL., *supra* note 15, at 775.

111. INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (stating that an alien has the burden of proof to demonstrate eligibility for relief).

112. See STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW & PROCEDURE*, §81.09[1] (noting that “it is not uncommon to assume eligibility and to deny relief in the exercise of discretion”).

113. Applications for relief are common but relief is granted to only a slim percentage of deportable migrants each year. In 2011, immigration courts granted approximately 17,000 applications for relief, not including asylum applications. Almost 5000 of these grants were to those who were already legal permanent residents and seeking not to be deported; in these cases, the applicants had already entered under one of the categories of permanent residence. Approximately 12,000 were granted to nonimmigrants (a term of art for those with temporary immigration status, like temporary workers, foreign students, or tourists) or unauthorized immigrants (those who entered the country without permission or who overstayed their legal

cancellation are limited by an annual numerical cap. Section 240A(e) sets out a limitation of no more than 4000 cancellation grants in a given year.¹¹⁴ In 2012, the EOIR reached its limitation by February, in a fiscal year that began in October.¹¹⁵ The cap was added to cancellation without any legislative discussion. We can assume, as have courts, that Congress added the cap to limit the overall relief provided, but by doing so lawmakers have undermined the premise of relief as a measure to relieve hardship. Hardship does not miraculously subside after a certain number of petitions have been granted.

In 1996, Congress introduced reforms that limited relief from removal in various ways. The most formidable exclusions are those for criminal conduct. Cancellation is barred, for example, for anyone who has committed an “aggravated felony.”¹¹⁶ The aggravated felony grounds, added in the 1996 Act, are notorious for sweeping in conduct that would not, to most popular opinion, be called such. As Nancy Morawetz notes, the INA definition can reach crimes that are neither “aggravated” nor a “felony.”¹¹⁷ She aptly notes that this definition has an “Alice-in-Wonderland” quality.¹¹⁸ After 1996, conduct such as engaging in a bar fight or shoplifting can trigger mandatory deportation, with no option for demonstrating extenuating circumstances or applying for relief.¹¹⁹ These grounds of deportation are retroactive—in other words, legal permanent residents can be deported for crimes they committed at any time in the past, even if those crimes were not deportable offenses at that time.¹²⁰ In combination, the mandatory deportation provisions, the

visas). The majority of these—8365—were cancellation or suspension decisions. Petitions for adjustment of status from nonimmigrant to immigrant accounted for 7807 grants. This number exceeds the 4000 numerical cap because of the limited number of pre-IRIRIA, or NACARA, grants that are not subject to the cap. The courts granted 360 cancellations and 72 suspensions that were not subject to numerical limitation. EOIR, *supra* note 103, at R3 tbl.16.

114. INA § 240A(3), 8 U.S.C.A. § 1229b.

115. Nadine Arroyo Rodriguez, *Cap on Immigration Court Cases Puts Many in Limbo*, FRONTERAS (Feb. 23, 2012), <http://www.fronterasdesk.org/news/2012/feb/23/immigration-courts-halt-granting-visas/>.

116. INA § 240A(a)(3).

117. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

118. *Id.*

119. See Philip S. Anderson, Editorial, *Immigration Reform Unfairly Includes Petty Offenses*, MIAMI HERALD, Apr. 9, 1999; Morawetz, *supra* note 117.

120. See Bruce R. Marley, Comment, *Exiling the New Felons: The Consequences of the*

expanded aggravated felony definition, and the bar on cancellation after 1996 have combined to drastically limit the relief options available to migrants convicted of a crime.¹²¹

Even for those who do not have a criminal record, relief is difficult to achieve. To be eligible for cancellation, applicants who are not already legal permanent residents must show good moral character, requisite “physical presence,” and demonstrate that their removal will result in “exceptional and extremely unusual hardship,” not to themselves but instead to a qualifying family member.¹²² Only immediate family members who are citizens or legal permanent residents meet this qualification.¹²³ Meeting this hardship standard is extremely difficult, given the way that the Board of Immigration Appeals has interpreted the language. Pointing to congressional assertions that this level of hardship must be “substantially beyond that which ordinarily would be expected to result from the alien’s deportation,”¹²⁴ the BIA has limited grants to those cases that demonstrate what they consider extraordinary hardship.¹²⁵ This is typically only present in cases where there is a life-threatening illness suffered by a family member that would be impossible to treat in the country of deportation or where one’s financial or family circumstances are particularly egregious.¹²⁶ Despite the Board’s assertion to the contrary, the predominant interpretation of EEUH is that only a “handful of applicants, such as those who have a qualifying relative with a serious medical condition,” will be successful.¹²⁷ The end result is a situation strangely contrary to our normal method of granting long-term residence—the more impoverished and ill one’s family members, the more likely to receive long-term permanent resident status.

Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents, 35 SAN DIEGO L. REV. 855 (1998).

121. Morawetz, *supra* note 117, at 1936.

122. INA § 240A(b)(1).

123. INA § 240A(b)(1)(D).

124. H.R. REP. NO. 104-828, at 230 (1996)(Conf. Rep.).

125. *See, e.g.*, In Re Andazola, 23 I. & N. DEC. 319, 322 (B.I.A. 2002) (finding that respondent failed to meet the “very high standard” of hardship required under the law).

126. *See* MAILMAN & YALE-LOEHR, *supra* note 112, at § 64.04(3).

127. Recinas, 23 I. & N. Dec. 467, 470 (BIA 2002); *see also* MAILMAN & YALE-LOEHR, *supra* note 112, at n.128 (collecting unpublished BIA decisions finding requisite hardship, almost all of which hinge on a medical condition of a qualifying relative).

Even if an applicant meets the eligibility criteria and the numerical cap has not yet been reached, she must also receive a favorable exercise of discretion.¹²⁸ This discretionary determination is left to the immigration judge who hears the request for relief. Immigration judges are supposed to give specific reasons for a denial, and their decisions are reviewable by the BIA. The agency has asserted that “[s]ummary and stereotyped denials are not acceptable,”¹²⁹ but we have little way to understand whether and why such denials are reversed or not. The agency has refused to issue regulations governing the practice of discretion in deportation relief, despite repeated calls for such guidance.¹³⁰ The lack of transparency is further exacerbated by the paucity of published decisions and the lack of internal agency guidance.¹³¹

These programs for relief from removal are symbols of the substantive mercy within the structure of immigration law. They provide a way for applicants to receive a reprieve—to rescind punishment and to begin anew. They are explicitly merciful in purpose. Yet they, like the admissions mechanisms and enforcement discretion, are limited in ways that can defeat their ameliorative purpose. Within relief from deportation we have provisions that are normatively justified from a standpoint of mercy but which are extremely difficult to achieve. Immigration judges have discretion that is free from judicial review but which is tightly cabined by the statutory eligibility criteria. These various restrictions have led

128. With the exception of withholding of removal, all forms of relief are considered discretionary, not a matter of right.

[W]ithholding of removal is a mandatory form of protection that the immigration judge must grant if the applicant is found to have a clear probability of persecution in his or her country of origin, based on race, religion, nationality, membership in a particular social group, or political opinion, provided no mandatory bars apply. EOIR, *supra* note 105, at K4. It is codified at INA § 241(b)(3).

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

130. *See, e.g.*, Maurice Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975) (arguing that uniform standards are needed to avoid dangers of subjectivity in relief decisions). The agency contemplated adding such guidance in proposed regulations but then backed down in 1981, arguing that “[i]t is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances.” Factors to be Considered, 46 Fed. Reg. at 9119.

131. *See* Underwood, *supra* note 101, at 887. For example, between 1962 and 1996, the Board published only twenty-one decisions regarding the interpretation of the hardship standard in cancellation. *In re* O-J-O, 21 I. & N. Dec. 381, 390-95 (1996) (listing and summarizing cases).

commentators over more than half a century to reach the same conclusion: that relief is “deliberately hedged about with restrictions that destroy most of [its] usefulness.”¹³²

This survey of immigrant admissions, enforcement, and removal provisions reveals that mercy is prevalent in all three stages. Many provisions of the law are justified normatively from a standpoint of compassion; Congress clearly intended them to relieve suffering, and the courts have interpreted them in this way. But these substantive provisions are not open-ended. They are limited in a variety of ways, some of which make mercy virtually unobtainable. Furthermore, they are administered in ways that defy rule of law commitments to accountability, transparency, and consistency.

Are these limitations on mercy, or the unfettered discretion used to administer mercy, necessarily problematic? And is the role of mercy in immigration law unique, or does it resemble the treatment of mercy in other areas of law? To better assess the role of mercy in immigration law, it is helpful to turn first to the robust debate among legal philosophers and criminal law scholars about mercy.

III. THE MERCY DEBATE IN LAW

Philosophers have long grappled with the relationship between mercy and justice.¹³³ Does mercy *enhance* justice by allowing for individualized consideration, or does it *contradict* it by allowing a criminal to avoid an otherwise deserved punishment? The question of the relationship between mercy and legal justice has seen a renewal within scholarly circles in the past few decades, beginning in the late 1980s. In the last ten years, numerous articles, law review symposia, and books have appeared on the subject.¹³⁴ Most of these,

132. Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 341 (1956); see also Sylvia G. Cole, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229, 230 (1976) (stating that “because of the difficulty of establishing statutory eligibility and obtaining a favorable exercise of the Attorney General’s discretion, the relief afforded by the suspension provision is often illusory”); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1698 (“Relief is now so circumscribed that it currently plays a role only at the margins in limiting the application of deportation as the primary immigration sanction.”).

133. See David Dolinko, *Some Naïve Thoughts About Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349 (2007) (“The puzzling relationship between justice and mercy has bedeviled philosophers since Aristotle.”); Nussbaum, *supra* note 19 (describing ancient Greek and Roman conceptions of mercy).

134. See, e.g., FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 9; JEFFRIE G. MURPHY

although not all, are focused on mercy and justice in the criminal law. What has emerged is a modern debate about the place of mercy in the law.

A. Mercy's Skeptics

An essay written by philosopher Alwynne Smart in 1968 is credited with sparking the modern debate about mercy.¹³⁵ In her essay, she argues that it is not enough to have a theory of punishment; scholars also need a theory of mercy.¹³⁶ She argues that we must distinguish between “genuine mercy”—which she defines as acts of “benevolently reducing or waiving punishment”—and justice-enhancing mercy—which she defines as acts that “ensure that the punishment fits the crime.”¹³⁷ Jeffrie G. Murphy builds on Smart’s critique. In his important 1986 essay “Mercy and Legal Justice,” and in later works to follow, he argues that mercy has no place in the criminal law.¹³⁸ Mercy is either “redundant,” he writes, because it is a part of justice itself, or a “vice” since it conflicts with justice and thus is equivalent to injustice.¹³⁹ “[I]f we simply use the term ‘mercy’ to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of . . . justice.”¹⁴⁰ But if mercy instead detracts from justice, then it is incompatible with the rule of law and should be avoided.¹⁴¹

& JEAN HAMPTON, FORGIVENESS AND MERCY (1988); Symposium, *Mercy and Clemency*, 4 OHIO ST. J. CRIM. L. 321 (2007) (collecting essays by Stephen Garvey, David Dolinko, John Tasioulas, R.A. Duff, and Heidi M. Hurd); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST (1989); Jeffrie G. Murphy, *Mercy and Legal Justice*, 4 SOC. PHIL. & POLICY 1 (1986); Stephen P. Garvey, *As the Gentle Rain from Heaven?: Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996).

135. Alwynne Smart, *Mercy*, 43 PHIL. 345 (1968); see also Claudia Card, *On Mercy*, 81 PHIL. REV. 182 (1972).

136. Smart, *supra* note 133.

137. *Id.* at 358.

138. Murphy, *supra* note 134.

139. *Id.* at 5.

140. *Id.*

141. Murphy writes that mercy may be appropriate in private law settings; it may be admirable for a private litigant to choose not to pursue a lawsuit, for example, because in that case the public interest in the outcome is not strong (as it is in criminal prosecutions, which are undertaken on behalf of the public). *Id.* at 10–11 (“There is thus room for mercy as an important moral virtue with impact upon the law, but it is a virtue to be manifested by private

Thus Smart, Murphy, and other scholars argue that much of what we colloquially consider “mercy” is actually the enactment of justice.¹⁴² In considering the equities of a defendant’s case during sentencing, for example, a judge is acting justly since she is assuring that the punishment received is the punishment deserved. She is only acting mercifully, and thus outside the realm of the rule of law, if she goes beyond the equities to rescind punishment where punishment is actually due.¹⁴³ In a similar vein, Dan Markel, in his article *Against Mercy*, distinguishes mercy—which he defines as “leniency granted out of compassion, bias, corruption, or caprice”—from equitable discretion.¹⁴⁴ Equitable discretion enhances justice by allowing for consideration of appropriate factors related to culpability, identity, or error,¹⁴⁵ whereas mercy contradicts it by allowing judges to consider extraneous factors.

For the most part, mercy skeptics do not have a problem with compassionate acts that enhance justice, such as a consideration of the equities in a given case. Those acts of mercy that are *not* “justice-enhancing”—acts of what Smart would call “genuine mercy”—are criticized on various levels by mercy skeptics. They argue that mercy is unjust because it allows a defendant to serve less than the deserved punishment. It contravenes principles of non-discrimination and equality because it allows officials to treat like cases not alike.¹⁴⁶ As Malla Pollack asserts, “[a]rbitrary mercy . . . is not compatible with justice in a rights-based system because it violates the equal protection principle of distributive justice.”¹⁴⁷ Ross Harrison and others argue that mercy is not compatible with rationality in the law.¹⁴⁸ Others argue that mercy is immoral, particularly from the

persons using the law—*not* by officials enforcing the law.”).

142. Thus, as Carol Steiker notes, “under this skeptical view of mercy,” as portrayed by Murphy and others, “justice embraces a piece, perhaps a very large one, of what in common parlance goes by the name of mercy.” Steiker, *supra* note 8, at 22.

143. Correspondence with Chad Flanders (on file with author).

144. Markel, *supra* note 134, at 1422 n. 1.

145. *Id.* at 1435–37. This would encompass situations in which the offender is a minor or is insane, was under duress, has pled guilty, or has shown good behavior after the fact.

146. See, e.g., Chad Flanders, *Pardons and the Theory of the “Second Best”*, 65 FLA. L. REV. 1559, 1565 (2013) (arguing that pardons can be “violations of fair or equal treatment”).

147. Malla Pollack, *The Under Funded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice*, 66 UMKC L. REV. 513, 550 (1998).

148. Ross Harrison, *The Equality of Mercy*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 107, (Hyman Gross & Ross Harrison eds., 1992).

standpoint of retributive theory, because it allows one who has done wrong to go unpunished. As Heidi Hurd questions, “What could possibly be good about suspending justice? What could possibly be virtuous about doing what is, *ex hypothesi*, unjust—that is, undeserved? How could moral strength lie in indulging, tolerating, or forgiving another’s weakness, laziness, or viciousness?”¹⁴⁹

A critique that is less common in the criminal law literature, but which will be important in our discussion of immigration law, focuses on the tendency of mercy to subordinate the receiver of mercy. This highlights its undemocratic nature. One of the hallmarks of mercy is its gift-like nature; mercy, as distinct from justice or equity, cannot be demanded by the subject of prosecution or punishment.¹⁵⁰ Mercy is a gift, not an entitlement or a right. This means that it is rarely subjected to the norms of consistency, rationality, and equality. Each is lacking in an operation of the “gift” of mercy—a supplicant can neither demand such a gift from the sovereign nor complain if it is not received. The official does not need to give reasons for choosing to grant or failing to grant. Mercy here is equivalent to a practice of unfettered discretion, in which an official is not required to give any reasons for a decision and is not held to any standards of review. The end result emphasizes the subordination of the defendant or applicant to the sovereign official.¹⁵¹ As Linda Ross Meyer describes it, this view sees mercy as “condescending, treating us not as free and responsible agents but as pitiable victims of circumstance.”¹⁵²

B. Mercy’s Advocates

The growing criticism of mercy in its various forms is countered by those who advocate the continuance of mercy. In some cases, skeptics and advocates seem to be saying the same thing: mercy can

149. Hurd, *supra* note 24.

150. *See, e.g.*, *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985) (“No one is entitled to mercy, and there are no standards by which judges may patrol its exercise.”).

151. Martha Nussbaum, noting that the Greek philosopher Seneca was concerned with this aspect of mercy, writes that “[u]nlike Aristotle, Seneca does not endorse pity or compassion as a correct response to the misfortunes of human life. In his view, to do so would be to give too little credit to the person’s own will and dignity and, frequently, too much importance to external events.” Nussbaum, *supra* note 18, at 102 n.42.

152. Linda Ross Meyer, *The Merciful State*, in FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 8, at 79.

enhance justice. Their disagreement is definitional; mercy advocates would call such instances “true mercy,” and defend them on that ground, whereas skeptics, like Murphy, would say that such instances are simply equitable justice, and mercy has nothing to do with it.

Some, however, argue that mercy is both *distinct* from justice and defensible in its own right. Daniel T. Kobil, for example, posits that mercy-based clemency, despite its departure from retributive justice, may be justified on both instrumental and expressive grounds.¹⁵³ He argues that practices of mercy can have benefits to society that transcend or counter the negative effects of justice.¹⁵⁴ Justice Kennedy seemed to say as much in his remarks to the American Bar Association in 2003, when he asserted that “[a] people confident in its laws and institutions should not be ashamed of mercy.”¹⁵⁵ Mercy can be a symbol of “our strength as a community, not a sign of our weakness,” noted former Ohio Governor Richard Celeste.¹⁵⁶ As such, it may have social value despite its potential departure from rule of law norms.

Martha Nussbaum sees mercy as arising out of equity, which itself is a necessary, but independent, complement to justice.¹⁵⁷ She notes that ancient Greek philosophers thought “that the decision to concern oneself with the particulars is connected with taking up a gentle and lenient cast of mind toward human wrongdoing.”¹⁵⁸ Equity and mercy are themselves innately connected, in her view: one leads to the other. She argues that this “equity/mercy tradition” in ancient philosophy can be an alternative to notions of retributive justice, rather than a way to undermine or support it.¹⁵⁹

153. Kobil, *supra* note 92, at 49–56.

154. *Id.*

155. Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003), *quoted in* Markel, *supra* note 134, at 1423.

156. Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAPITAL U. L. REV. 142 (2003).

157. Nussbaum, *supra* note 18. *See also* Paul M. Hughes, *Forgiveness*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2011), <http://plato.stanford.edu/archives/win2011/entries/forgiveness/> (“Mercy, unlike pardon and forgiveness, is an exercise of equity, which is an application of justice in light of the unique circumstances of individual cases.”).

158. Nussbaum, *supra* note 18, at 87.

159. *Id.* at 85.

Others who are sympathetic to mercy see it as an important part of a cure for the ever-increasing severity of the criminal law. These mercy advocates take a more institutional view. Rachel Barkow notes that these are “punitive, unforgiving times,” when “legislators succumb to get-tough politics, write harsh laws, and tie the hands of judges.”¹⁶⁰ In such times, mercy can be that “necessary counterbalance,” as Carol Steiker argues, to the “ever-upward tending ratchet of punishment.”¹⁶¹ Mercy, in Steiker’s estimation, is a “virtue that can be cultivated not only by the actors who exercise discretion within the criminal justice system but also by the general public through changes in the nature of public discourse about crime and punishment.”¹⁶² Even Murphy, a leading mercy skeptic, admits that “unrepentant viciousness toward criminals has become an increasingly pervasive feature of American society,” and on this basis he calls for more openness to grants of mercy.¹⁶³ Mercy can be one of the only checks on the overbreadth of criminal punishment; it therefore might be necessary even if it does at times contravene justice.

Other mercy advocates have directly challenged the assertion that legal mercy is necessarily immoral. Heidi Hurd notes that it may be a contradiction for us to advocate mercy in personal life and intimate relations yet to also expect government officers—who are, after all, human—to leave that mercy at the door when acting in a professional capacity. As she writes, “[W]e may need to recognize that mercy cannot be exorcized from retribution, for it derives from character traits that persons should cultivate in their private lives that trump in importance those that they should cultivate in their public lives. And so, while retributivists are right that mercy has no philosophical place in a system devoted to retributive justice, they are wrong to think that it has no psychological place.”¹⁶⁴ Hurd’s work, like Nussbaum’s, motions toward other literature within

160. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1333, 1365 (2008).

161. Steiker, *supra* note 8, at 31.

162. *Id.*

163. JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS, 54–55 (2003).

164. Hurd, *supra* note 24, at 421.

criminal law that has queried the role of compassion and empathy in judging.¹⁶⁵

C. The Fall of Mercy in Criminal Law

Each of these critiques—that mercy is unjust, immoral, subordinating, and a contradiction of the rule of law—has been brought to bear on specific forms of mercy within criminal law: clemency, pardons, sentencing, and jury nullification.¹⁶⁶ These criticisms have arisen from, and given steam to, efforts to reform these various areas of the law, leading some scholars to declare and lament the “demise of mercy”¹⁶⁷ in the criminal law.

Within state legislatures, there has been a concerted move away from characterizations of clemency and pardons as arbitrary acts of sovereign grace and towards accountability. Many states have adopted a “two-part clemency test,” in which the petitioner has to prove his or her innocence or demonstrate that there was a failure of due process.¹⁶⁸ Governors are not legally obligated to follow this test, but many do. As George W. Bush said of the exercise of clemency during his time as governor of Texas, “My job is to ask two questions: Is the person guilty of the crime? And did the person have full access to the courts of law? And I can tell you . . . in all cases [of a denial of clemency] those answers were affirmative.”¹⁶⁹ The adoption of this test is a departure from the historic understanding of clemency as pure discretion. On this basis, some have argued that mercy has been pushed out of the process completely. Jonathan Harris and Lothlorien Redmond note that “if clemency is constrained to mean an inquiry and process solely directed at sparing the wrongfully convicted . . . from a death

165. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Nussbaum, *supra* note 18.

166. See, e.g., Flanders, *supra* note 146, at 1594 (“Over the years there have been many proposals from both practitioners and academics to remove the pardon power from the executive or to reduce the power and give it to an independent board or commission.”).

167. Barkow, *supra* note 160, at 1333 (arguing that the rise of administrative law conceptions has led to the decline of mercy in criminal law); Harris & Redmond, *supra* note 11, at 3 (discussing “the dramatic decline in the use of clemency to commute death sentences”); Kobil, *supra* note 92, at 37 (discussing the decline in the use of clemency at the state and federal levels).

168. Harris & Redmond, *supra* note 11, at 2.

169. Doug McGee, *Bush-Rush to Judgment*, NATION, Nov. 13, 2000 (quoting Governor Bush during the 2000 presidential debates).

sentence, then we have so limited the meaning, scope, and exercise of the clemency power so as to define it virtually out of existence.”¹⁷⁰

Legal scholar Rachel Barkow argues persuasively that the turn against mercy in criminal law has been informed in part by the rise of administrative law. As she writes, “The rise of the administrative state has made unchecked discretion an anomaly in the law, and a phenomenon to be viewed with suspicion.”¹⁷¹ The values of the administrative state—“predictable processes, reasoned decision-making, and judicial review”¹⁷²—seem incompatible with merciful gestures in criminal law such as jury nullification and clemency. Importantly, she argues that the critique of mercy is not confined to the criminal law but appears in administrative law settings as well. Unreviewable agency discretion threatens to extend the power of agencies too far; thus Congress and the courts have turned to judicial review and other mechanisms to ensure the control of agency power.¹⁷³ These values, she argues, have moved into the criminal law realm.¹⁷⁴ They help to account for the rise in skepticism about mercy in criminal law.

The debate within criminal law regarding mercy has important implications for other areas of law. Mercy skeptics remind us that the mode of decision-making matters. Unreviewable, capricious, and arbitrary decisions raise profound problems in a legal culture that prioritizes consistency, accountability, and democracy. Those exercises of mercy that are not in accordance with the pursuit of justice tend to undermine the law rather than advance it. Mercy advocates, for their part, remind us that mercy can play an important and necessary part in the administration of justice. It can counter the

170. Harris & Redmond, *supra* note 11, at 2; *see also* CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES (2002); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569 (1991).

171. Barkow, *supra* note 160, at 1334.

172. *Id.* at 1336.

173. *Id.* *See also* David L. Markell & Emily Hammond Meazell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013) (“Judicial review is considered a critical legitimizer of the administrative state. In fact, it is hard to overstate the prominence that role takes—whether expressed by statute, judicial opinion, or in the academic literature. There are good reasons for this view; agencies are uncomfortably positioned in the tri-partite constitutional structure, and the rigors of judicial scrutiny can further democratic accountability and otherwise incentivize legitimizing behaviors.” (citations omitted)).

174. Barkow, *supra* note 160, at 1334.

strong political pressure towards severity in the law, and it can serve other important societal values. In the following section, I will apply these insights to the realm of immigration law in order to assess the role of mercy in that field.

IV. THE PROBLEM OF MERCY IN IMMIGRATION LAW

Immigration law is uniquely situated in the mercy debate. It is a hybrid of criminal and administrative law. It shares characteristics with administrative law: immigration law is promulgated via large administrative bureaucracies, most of which are located in the Executive Branch. Those government employees are tasked with implementing congressional policy, not with doing justice in the criminal law sense. Yet immigration law also shares characteristics with criminal law and civil, private law regimes, which are not about policy *per se* but about exacting punishment. As such, there is pressure on immigration law to adhere to the norms of both criminal law and administrative law—that is, to adhere to administrative law norms of predictability, reviewability, and procedural regularity while also providing some relief from the unrelenting harshness of enforcement—or, in other words, to provide mercy.

Our survey of immigration law in Part II identified numerous moments when mercy appears. It resides at the substantive level, as the primary normative justification for numerous provisions of the law. It resides at the procedural level, as a mode of legal decision-making. As in the criminal law context, there are legally sanctioned moments when an official can act with leniency. In both settings, prosecutors wield the power of mercy in deciding whether or not to pursue a case, and in both settings judges can provide a merciful reprieve from post-conviction punishment. But mercy in immigration law is more frequent and more pervasive than in most other legal settings. Compassion for human suffering underlies a large section of admissions policy; unfettered discretion is the norm in the adjudication of benefits and relief from deportation.

There are complex reasons for the prominence—and continued acceptance—of mercy in immigration law. In this Part, I draw on the insights of scholars on both sides of the mercy debate, as surveyed in Part III, to offer both a preliminary explanation of and a critical reflection on the prevalence of mercy in immigration law. At the root

of the problem of mercy in immigration law is the ambivalent position of the noncitizen vis-à-vis the American polity.¹⁷⁵ Noncitizens are only marginally members, subject to sovereign powers that do not apply to citizens.¹⁷⁶ As the Supreme Court acknowledged in *Mathews v. Diaz*, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹⁷⁷ The plenary power doctrine—which grants Congress and the Executive virtually unfettered power in immigration policy, free of constitutional and judicial oversight—is the foundation of this ambivalent status. The plenary power doctrine gives rise to two interrelated concepts in immigration law that contribute to complacency about mercy: the treatment of deportation as a civil penalty and the acceptance of unprecedented administrative discretion. Each of these core foundations of immigration law is the subject of much scholarly debate and robust critique. My goal here is not to rehash these debates but rather to demonstrate how each of these together facilitates an acceptance of legal mercy. These three conceptions together create a climate of sovereign prerogative and the subordination of the noncitizen. In such a climate, mercy is more intelligible and more normatively acceptable, for better or worse.

Section A describes the foundations of mercy in immigration law, focusing on the doctrine of plenary power. Section B addresses one of the consequences of plenary power: the longstanding characterization of deportation as a civil, rather than criminal, penalty. Section C then addresses the second of these consequences of plenary power: the rise of unfettered administrative discretion. I argue that much of the

175. LINDA BOSNIAK, *THE CITIZEN AND ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 37 (2006) (“In the United States in particular, the law has been chronically ambivalent about the significance of alienage for the allocation of rights and benefits . . . citizens are full members of the national community, while aliens ‘are by definition those outside of this community.’” (citations omitted)); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956 (1988) (“Undocumented immigrants live at the boundary of the national membership community. They have long occupied a unique, deeply ambivalent place in the United States.”); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1726 (2010) (citing a “pervasive national ambivalence about immigration outside the law”).

176. On the status of noncitizens in U.S. law, see generally BOSNIAK, *supra* note 175; GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996).

177. *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976).

discretion practiced in immigration law is itself “merciful,” in that it is unreviewable, inconsistent, and irregular. The last section then describes developments in immigration law in the last two decades that have reduced institutional compassion while simultaneously increasing unfettered discretion.

A. The Foundation of Mercy: Plenary Power

Plenary power vests great power in Congress, largely free of judicial or constitutional oversight, to determine whether and how to admit and remove immigrants and how to treat them when they are in the country. The doctrine of plenary power over the admission of immigrants was first announced by the Supreme Court in the 1889 case of *Chae Chan Ping v. United States* (also known as *The Chinese Exclusion Case*).¹⁷⁸ It was followed shortly thereafter by another case, *Fong Yue Ting v. United States*, which granted Congress plenary power over the deportation of immigrants.¹⁷⁹ These cases, in combination with others during the late-nineteenth century, solidified power in the legislative branch, giving it an unusual amount of control. As the Court later observed in *Kleindienst v. Mandel*, “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”¹⁸⁰

Granted, there are some limits to this power. Noncitizens within the interior who are placed in removal proceedings are guaranteed basic due process rights,¹⁸¹ and the Supreme Court has indicated that immigration statutes are subject to a “limited scope” of review by the courts.¹⁸² But as compared with criminal law or other administrative law agencies, immigration law has far fewer protections for individuals

178. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

179. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

180. *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

181. *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903).

182. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). There are some additional erosions of plenary power. Daniel Kanstroom notes that “plenary power has been mitigated somewhat in deportation law by the tacit recognition of some First Amendment protections, as well as by fluid norms of procedural due process and creative statutory interpretation techniques.” KANSTROOM, *supra* note 95, at 232–33. See also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

enmeshed in the system. Congress has a “virtual blank check”¹⁸³ when it comes to drafting immigration statutes.

This congressional power is amplified by the corresponding political powerlessness of immigrants. Normally we consider members of Congress to be accountable through the judiciary and through the ballot box; if individuals do not like a particular policy, they can vote against a representative who supported it. But immigrants do not have this power since they cannot vote in state or federal elections.¹⁸⁴ This places them outside the political process. Admittedly, provisions for mercy in immigration statutes are “democratically authorized sites for mercy,”¹⁸⁵ to use Dan Markel’s phrasing, since they are created by an elected Congress and promulgated through an elected Executive. Yet, unlike sites of mercy in the criminal law, they are applied solely to those who have no say in those elections. To make matters worse, political pressure on elected officials generally pushes them towards taking a punitive stance rather than a benevolent one. There are “political advantages to elected representatives in taking a ‘tough’ line on immigration,”¹⁸⁶ just as there are in taking a ‘tough’ line on crime.

This has wide-ranging ramifications for the practice of mercy. Plenary power, combined with the political subordination of immigrants, creates a regime of sovereign prerogative. Migrants are positioned as supplicants before the sovereign rather than as citizens who make up the state. Congress has historically been very careful not to grant immigrants any rights via immigration statutes, and courts have followed along.¹⁸⁷ The structure of immigration law makes every grant by the government of some immigration benefit a gift, not a right, making it more difficult for a migrant to hold the government accountable.

Plenary power helps to explain why lawmakers and scholars are more complacent about mercy in immigration law than in criminal law. Plenary power, as announced in *Chae Chan Ping*, seems to put immigration control not just beyond the reach of courts and the

183. Legomsky, *supra* note 3, at 1617.

184. There have been moments in the history of the United States when immigrants could vote in local, state, and/or federal elections. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

185. Markel, *supra* note 134, at 1431.

186. Legomsky, *supra* note 3, at 1625.

187. *Id.* at 1617–18.

Constitution but also outside the law itself. Power over immigration is portrayed as predating the nation, as being an element of “self-preservation” and of “independence.”¹⁸⁸ As the Court stated in *Fong Yue Ting*, “The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace [is] an inherent and inalienable right of every sovereign and independent nation.”¹⁸⁹ In a sense, plenary power is cast as pre-modern, a throwback to sovereignty in a time of monarchy, not democracy, when constitutions could not, or did not, fully control sovereign prerogative. Mercy is more intelligible in this frame than in a modern, rule-of-law state. Mercy in such a context is legitimating of sovereign power, since it reduces the pressure on the law itself to do justice. As one historian writes of Tudor England, “Punishment and pardons worked together as strategies of rule.”¹⁹⁰ Mercy provides cover for unpopular laws. It is “one of the great advantages of monarchy,” notes Blackstone, since it can “endear the sovereign to his subjects.”¹⁹¹ Subjects are more likely to turn a blind eye to the systemic harshness of the laws in place if the sovereign can use mercy strategically.

The way that mercy can obscure the injustice of the law as a whole is observable in the debates over the “path to citizenship” in current immigration reform proposals.¹⁹² Legalization programs—those that make unauthorized immigrants into authorized ones—are sometimes framed, by both advocates and opponents, as “amnesty,” as sort of forgiving of past wrong-doing. But this framing has certain repercussions, as noted by George Lakoff and Sam Ferguson: “Amnesty is a pardoning of an illegal action—a show of either benevolence or mercy by a supreme power. It implies that the fault lies with the immigrants, and it is a righteous act for the U.S. Government to pardon them.”¹⁹³ By arguing for

188. *Chae Chan Ping v. United States*, 130 U.S. 581, 606, 608 (1881).

189. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

190. K.J. KESSELRING, *MERCY AND AUTHORITY IN THE TUDOR STATE 2* (2003).

191. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769*, at 390–91 (1979).

192. S. 744, 113th Cong. (2013).

193. George Lakoff & Sam Ferguson, *The Framing of Immigration*, COGNITIVE POLICY WORKS, <http://www.cognitivepolicyworks.com/resource-center/rethinking-immigration/the-framing-of-immigration/> (last visited Sep. 16, 2013).

mercy, we often place immigrants in the position of powerless and blameworthy supplicants.

Plenary power, more than any other factor, leads to the continued practice of mercy in immigration law. We tolerate a high level of subjugation of individuals and of unfettered power in government officials precisely because immigration law itself is not fully enmeshed in democratic rule-of-law principles. It is a far more problematic example of the practices of legal mercy, therefore, than the relatively infrequent practices in the criminal law of executive clemency and government pardon. At the root, then, of the problem of mercy in immigration law is the status of noncitizens themselves as outside the polity and, thus, too often outside the rule of law.

Plenary power gives rise to two specific concepts within immigration law that also have ramifications for the practice of mercy. The first is the refusal to consider deportation as “punishment”; the second is the acceptance of unusually vast administrative discretion.

B. Deportation as a Civil Penalty

The Supreme Court held in 1893, in *Fong Yue Ting v. United States*, that deportation is not punishment.¹⁹⁴ This meant that those subject to removal would not receive the protections of the Bill of Rights in their deportation trials. The Court held ten years later, in *Yamataya v. Fisher*, that aliens facing deportation were guaranteed only minimal due process protections.¹⁹⁵ These cases, and many that followed, portray deportation as an administrative sorting mechanism rather than a severe penalty. As the Court stated in *Fong Yue Ting*, “The order for deportation is not a punishment for crime . . . [i]t is but a method of enforcing the return to his own country of an alien who has not complied with the conditions” of his entry and residence.¹⁹⁶

A few Supreme Court cases (and many dissents) have acknowledged the severity of deportation. The Court acknowledged, in *NgFung Ho v.*

194. 149 U.S. at 730 (1893).

195. 189 U.S. 86, 100–01 (1903).

196. 149 U.S. at 730 (1893). *See also* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (“The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.”).

White, that deportation can result in “loss of both property and life, or of all that makes life worth living.”¹⁹⁷ Most recently, the Supreme Court ruled in *Padilla v. Kentucky*, in 2011, that failure to inform a defendant of the possible immigration consequences of a guilty plea would be a violation of the Sixth Amendment guarantee of effective assistance of counsel.¹⁹⁸ In this case the court acknowledged that deportation has become more prevalent and virtually automatic in many cases, necessitating greater constitutional protection.¹⁹⁹

Padilla notwithstanding, most rights due to criminal defendants remain out of reach of those facing removal. One of the most drastic departures is the failure to apply the *ex post facto* clause. Retroactivity is acceptable in the law of deportation.²⁰⁰ Immigrants can be removed virtually at any time, even for actions that were not deportable offenses at the time they committed them.²⁰¹

Failing to acknowledge deportation as punishment also means that the sanction—removal—is the same for any and every immigration law violation.²⁰² One can be removed for committing murder or for failing to update USCIS about an address change.²⁰³ This is a reality in striking contrast to the criminal law, in which proportionality is a guiding concept. As Juliet Stumpf writes, “One sanction—deportation—is the ubiquitous penalty for any immigration violation. Neither the gravity of the violation nor the harm that results governs whether deportation is the consequence for an immigration violation. Immigration law stands alone in the legal landscape in this respect.”²⁰⁴ Stumpf contrasts immigration law with criminal law, where “proportionality . . . is the touchstone of criminal punishment,” as well as with schemes in tort and contract law which also take proportionality into account.²⁰⁵

197. 259 U.S. 276, 284 (1922).

198. 559 U.S. 356 (2010).

199. *Id.*

200. *See* *Harisiades v. Shaughnessy*, 342 U.S. 580, 594–96 (1951); *INS v. St. Cyr*, 533 U.S. 289, 316–17 (2001).

201. KANSTROOM, *supra* note 95, at 6 (“[A] noncitizen may be deported for conduct that was not a deportable offense when it occurred.”).

202. Stumpf, *supra* note 132, at 1683.

203. INA § 237(a)(3)(A) (failure to report a change of address a deportable offense); INA § 237(a)(2)(A)(i)-(iii) (commission of crime of moral turpitude or aggravated felony a deportable offense).

204. Stumpf, *supra* note 132, at 1684.

205. *Id.* at 1685–87.

The lack of robust procedural rights and proportionality in immigration law mean that immigrants in removal proceedings are much more “at the mercy of” law enforcement officials than are criminal defendants. The problems that mercy skeptics find with practices like clemency and jury nullification are exacerbated in such a context, where defendant noncitizens have few avenues to challenge the application of the law. There is ample opportunity for the practice of mercy, via unfettered discretion, to conflict with the practice of justice: that is, for officials to fail to make the punishment fit the crime.

C. Discretion and “Acts of Sovereign Grace”

Immigration law—as a civil, administrative area of law—does not have the same protections that adhere in criminal law settings. Yet it also does not have many of the protections that adhere in most administrative law settings.²⁰⁶ It is an accepted maxim in administrative law that agencies should be given a wide range of discretionary action. Yet there are important safeguards in place to ensure compliance with the rule of law. Judicial review is the most notable one. “With the growth of the modern administrative state,” note the authors of one prominent casebook, “the federal courts, staffed with life-tenured judges, have come to be seen as the ultimate guarantors of administrative reliability. Whether or not this great faith in the bench is well-placed, this judicial role is a well-entrenched feature of modern life.”²⁰⁷ Rachel Barkow argues that the solution to fears of unaccountable administrative fiat has been judicial power: “As a result of judges’ broad powers over the statutes that govern the administrative state and their willingness to interpret such statutes to ensure justice in particular cases . . . our legal culture looks to judges as uniquely qualified to solve inequities

206. On immigration law’s departure from administrative law norms, see, for example, Legomsky, *supra* note 3, at 1631–32 (arguing that the antagonism to judicial review in immigration law is an “anomalous pattern” that “deviates sharply from more generic settled norms in constitutional and administrative law”). See also Jill Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566 (2012) (“Immigration law is a type of administrative law, but that is sometimes easy to forget.”); Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”).

207. ALEINIKOFF ET AL., *supra* note 15, at 1148.

in a law's application."²⁰⁸ The Administrative Procedure Act (APA) provides for judicial review of most agency actions,²⁰⁹ and the Supreme Court has ruled that agency actions are generally subject to review.²¹⁰

Yet within immigration law, particularly since the reforms of 1996 and 2005, judicial review has been curtailed dramatically, and not just in deportation relief settings.²¹¹ This has meant the decline of reviewability and accountability for immigration judges and the Board of Immigration Appeals, as well as consular officers and other agency officials.²¹² As Stephen Legomsky notes, noncitizens are, as a general matter, entitled to judicial review of final administrative actions in immigration law.²¹³ Yet this general rule is now subject to "gaping exceptions,"²¹⁴ including numerous court-stripping provisions that remove wide swaths of agency action from court review. The provisions introduced in 1996, he summarizes, "bar judicial review of entire classes of removal orders, preclude judicial review of most discretionary decisions, specifically prohibit the use of particular judicial remedies and forms of action, and otherwise inhibit judicial review."²¹⁵ The REAL ID Act of 2005 added to the difficulty of review by restricting access to habeas in the federal courts, but preserved review "of constitutional claims or questions of law."²¹⁶ There is still the possibility of challenging a discretionary determination as an abuse of discretion, but this is a very difficult

208. Barkow, *supra* note 160, at 1357.

209. 5 U.S.C. § 706(2)(A) (2000). The APA allows for limitations on judicial review when provided for by statute or when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2011).

210. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967).

211. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704 ("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.").

212. Legomsky, *supra* note 3, at 1615 (chronicling the development of "consular absolutism").

213. Legomsky, *supra* note 106, at 372 (citing 8 U.S.C.A. § 1252(a)(1)). Prior to the inclusion of a judicial review provision in the INA in 1961, courts reviewed agency decisions via habeas corpus. See ALENIKOFF ET AL., *supra* note 15, at 1149–50 (noting that "habeas review was the standard basis of court jurisdiction to review agency immigration decisions" until the inclusion of §106 in 1961).

214. Legomsky, *supra* note 106, at 372.

215. *Id.* at 380.

216. 8 U.S.C.A. § 1252(a)(2)(D) (2005).

standard to meet.²¹⁷ Very few denials of relief are overturned because of abuse of discretion.²¹⁸ The fate of some of these various jurisdiction-stripping measures is still unclear, since there are active court challenges.²¹⁹ Yet the fact remains that most of these court-stripping provisions have been upheld by the courts that have considered them.²²⁰ As Gerald Neuman notes, the courts now “police the legal and constitutional boundaries of administrative discretion but no longer review the exercise of discretion within those boundaries for inconsistency or abuse.”²²¹

Courts have been largely complicit in the withdrawal of judicial review. Some courts have argued that courts’ role in reviewing these grants or denials is minimal because acts of mercy are ultimately *outside the law*, rather than a part of it. The Seventh Circuit noted that “the grant of discretionary relief under the immigration laws is a question on which there is ‘no law to apply,’ and when there is no law to apply judicial review is exceedingly constricted.”²²² The opinion defined discretion in a similar manner as clemency or pardon in criminal law: “When there are no rules or standards there is neither legal right nor legal wrong. There may be moral or prudential claims, but such claims are the province of other actors, be they administrators or legislators.”²²³ The decision is not, according to this reasoning, a legal one but rather a moral or ethical

217. 8-104 Immigration Law and Procedure § 104.09 (“It thus appears that one who contests a discretionary determination is battling against heavy odds. He generally alleges that there has been an abuse of discretion or that discretion was exercised arbitrarily and capriciously. But the burden is upon him to prove that charge, and he can satisfy this burden only by showing that the order was without reasonable foundation. If the record shows that discretion actually has been exercised, the courts will be reluctant to substitute their discretion for that of the Attorney General.” (citations omitted)).

218. *See, e.g.*, *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996) (holding that there was not abuse of discretion where the INS interpreted a rule narrowly in a discretionary determination but did not depart from general policy).

219. 8-104 Immigration Law and Procedure § 104.13 (noting that “[t]he effective dates of various [judicial review] provisions, their application to particular cases, and the types of claims that may be precluded continue to be subject to debate”).

220. *But see* *Kucana v. Holder*, 558 U.S. 233 (2010) (holding that the limitation on judicial review under INA § 242(a)(2)(B) applies only to Attorney General determinations made discretionary by statute, not to determinations declared discretionary through regulation).

221. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 626 (2006).

222. *Achacoso-Sanchez v. I.N.S.*, 779 F.2d 1260, 1265 (7th Cir. 1985).

223. *Id.*

one—that is, a matter for mercy outside the law. As the court concluded, “The power to . . . grant an adjustment of status is a power to dispense mercy. No one is entitled to mercy, and there are not standards by which judges may patrol its exercise.”²²⁴

The problem is not limited to the lack of judicial review. It also emerges from decreased administrative oversight. In the past decade, the Department of Justice has instituted several “stream-lining” efforts that cut the number of members of the BIA in half, increased the caseload for individual BIA members and decreased oversight of the immigration judges.²²⁵ As Gerald Neuman notes, these reforms have led to an administrative process where “single-member decisions are now the rule rather than the exception, affirmance without opinion is mandatory where authorized, and BIA members are subject to tight productivity standards.”²²⁶ Many have criticized these efforts, including Judge Richard Posner, who noticed the proliferation of “*short, unhelpful boilerplate opinion[s]*, even when . . . the immigration judge’s opinion contains manifest errors of fact and logic.”²²⁷ Neuman concludes that “the BIA is no longer in a position to promote consistency in the decentralized exercise of discretionary authority by Immigration Judges”²²⁸

In combination, these developments leave the agency with a great swath of unfettered discretion that verges on, or is equivalent to, sovereign mercy: unfettered and arbitrary acts of grace. This creates all the problems mercy skeptics bemoan. As Neuman argues, “Even more than in other areas of administration, salutary discretion creates vulnerability. Discretionary deportation practices tend to reduce the legal position of lawfully admitted aliens to the insecure status tolerated (but not required) by constitutional doctrine, or even to increase that insecurity.”²²⁹

224. *Id.*

225. On streamlining reforms in immigration adjudication, see ALEINIKOFF, *supra* note 15, at 281–84.

226. Neuman, *supra* note 221, at 632.

227. *Iao v. Gonzales*, 400 F.3d 530, 535 (7th Cir. 2005).

228. Neuman, *supra* note 221, at 633.

229. *Id.* at 611.

D. The Rise and Fall of Mercy in Immigration Law

This decline in reviewability does not mean that the practice of immigration law has become less harsh and more systemically merciful. After 1996, immigration judges and the BIA have had more opportunity to practice procedural mercy—that is, to use unfettered, practically unreviewable discretion—yet they are constrained in the scope of mercy they can apply. This is because through legal reform in the 1990s, Congress limited judicial review and simultaneously drastically curtailed the eligibility categories for deportation relief. The Supreme Court noted this modern trend toward severity in *Padilla v. Kentucky*: “While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”²³⁰ The political ratchets have translated into mercy that is unfettered and unreviewable but also tightly cabined and very difficult to achieve.

Modern-day cancellation of removal provides an example of the double-edged sword created by Congress.²³¹ Immigration judges lack discretion in deciding who is legally eligible for cancellation. They cannot, for example, grant cancellation to a non-legal permanent resident who has been in the country for nine years and six months rather than ten years and a day. Nor can they grant cancellation to a legal permanent resident who has been convicted of an aggravated felony. But they hold unchecked discretion in deciding whether one who is eligible “merits” a grant of cancellation. This discretionary determination of merit is almost never subject to review by the federal courts, as we have already seen. The 1996 law also vests immigration judges with deciding, as a matter of unreviewable discretion, whether the applicant meets two of the specific legal eligibility requirements: “good moral character”

230. 559 U.S. 356, 360 (2010).

231. There are certainly other examples of administrative agencies that have discretion only after applicants meet specific legal eligibility requirements. See, for example, the adjudication of social security and disability benefits. Yet few take the convoluted form presented by cancellation: legal rules, discretionary determination of meeting legal rules, plus unchecked discretion, plus a numeric cap. It is an unnecessarily complex, and counterproductive, blending of rules and discretion.

and “exceptional and extremely unusual hardship.”²³² The law thus poses a layering of legal rules and discretionary determinations that vest power in administrative judges while also tying their hands in specific, and some would argue nonsensical, ways.

Immigration law is a unique hybrid of administrative law and criminal law, but that does not mean it should be insulated from foundational questions about justice, equity, and mercy. As this Part has demonstrated, there are profound problems with the practice of mercy in immigration law. The lack of procedural and substantive protections, combined with the acceptance of unfettered discretion and lack of oversight of agency action, combined with political pressure to limit benevolence and punish criminals, combined with the political subordination of immigrants, all push in the same direction: towards sovereign mercy rather than equitable justice. Sovereign mercy can have laudable effects, as when it encourages the creation of humanitarian programs of admission. But it can also have harmful effects, departing from important rule of law norms and placing recipients outside the law rather than within its protections.

V. CONCLUSIONS

To return to our opening question in the Introduction, does immigration law need more mercy? A comprehensive answer to this question is outside the scope of this essay, but I believe we can glean several important insights from this first foray into the subject. First of all, mercy can be an important normative justification for the law itself. Few would argue the refugee admissions should be jettisoned, or that they should somehow be motivated by something other than compassion. The problems that the mercy skeptics identify—mercy’s departure from justice, its failure to comport with rule of law norms, and its tendency to subordinate the one seeking a reprieve—are present in the administration of the law, more so than in the law’s substance.

This distinction between normative motivation and administration of the law leads to our second conclusion, which is that most of the problems of mercy in immigration law reside not in the legislative and institutional provision of compassion but instead in the adjudicative and administrative aspects. Compassionate

232. INA § 240A(b)(1).

substantive provisions, like deportation relief, do not in and of themselves depart from justice; but the way the law is *applied*—that is, the way judges decide who merits relief—might contradict justice. The third conclusion is more disheartening: that it may be impossible, and ultimately undesirable, to separate unfettered discretion from the formulation and adjudication of immigration law because the very foundations of immigration law are anti-democratic and outside the rule of law. This means that seeking mercy, despite its flaws, may be the only realistic way to temper the innate harshness of immigration law.

