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Asymmetries in Immigration Protection

Sabrineh Ardalan[†]

INTRODUCTION

Current procedures afford immigrants in the United States with prior removal orders fewer protections than those who have already been deported and seek to reenter—ostensibly on the assumption that the former have had their day in court. Yet that is not often the case.

Indeed, immigrants are deported every day without having their potential claims to relief fully explored.¹ Many who fear persecution or torture in their home countries are ordered removed *in absentia*, meaning without their presence in court. Such deportations happen for a variety of reasons, including lack of proper notice of scheduled hearing dates or confusion and fear about the process of seeking protection in the United States.²

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¹ This article will not focus on the flaws in the U.S. summary deportation system, given the robust scholarship and extensive human rights reporting on that topic. See *infra* Parts II, III. For further discussion of the numerous due process and human rights violations presented by summary deportation procedures, see, e.g., Jennifer Lee Koh, *When Shadow Removals Collide*, 96 WASH. U. L. REV. 337 (2018) [hereinafter Koh, *When Shadow Removals Collide*]; Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017) [hereinafter Koh, *Removal in the Shadows*]; Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 624–32 (2009).

² See, e.g., Julia Preston, *Fearful of Court, Asylum Seekers Are Banished in Absentia*, MARSHALL PROJECT (July 30, 2017), <https://www.themarshallproject.org/2017/07/30/fearful-of-court-asylum-seekers-are-deported-in-absentia> [https://perma.cc/3AB8-94VC] (noting that “[o]f nearly 100,000 parents and children who have come before the courts since 2014, most asking for refuge, judges have issued rulings in at least 32,500 cases”—of which “[t]he majority—[seventy] percent—ended with deportation orders in absentia, pronounced by judges to empty courtrooms” and explaining that “[m]any immigrants did

Others are ordered removed without the opportunity to fully present their fears of return to an immigration judge due to trauma, lack of representation, or other barriers.³

Until recently, immigration officials had often allowed such immigrants with unexecuted removal orders to remain in the United States for years.⁴ President Trump's January 25, 2017 Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*,⁵ along with his administration's subsequent rescission of the Obama-era "enforcement priorities"⁶ in February 2017, upended that longstanding policy and practice.⁷

The Executive Order included in its expansive list of enforcement targets immigrants who are subject to final orders of removal but who have not yet departed. The memorandum implementing the order underscored that "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of [individuals] from enforcement of the immigration laws."⁸ The effects of these policy changes are now readily apparent: a 42% increase in immigration arrests from January 25, 2017 through the end of the fiscal year, September 30,

not understand what they were supposed to do to pursue their claims and could not connect with lawyers to guide them").

³ See *id.* (describing, *inter alia*, the case of Maria Arita, who fled Honduras in 2013 with her three-year-old son, because gang members had targeted her and her family because of her family membership, and noting that the lawyer she had found and paid several thousand dollars "dropped her case" so she represented herself and her son in court unsuccessfully).

⁴ See Amy Taxin, *Under Trump, Old Deportations Orders Get New Life*, PBS NEWS HOUR (June 8, 2017, 10:36 AM), <https://www.pbs.org/newshour/politics/trump-old-deportation-orders-get-new-life> [<https://perma.cc/JE9A-XDM6>] ("For years, immigrants facing deportation have been allowed to stay in the U.S. provided they show up for regular check-ins with federal deportation agents and stay out of trouble. . . . Now, in cases spanning from Michigan to California, some of these immigrants are being told their time here is up. Immigrants who already have deportation orders and were allowed to stay in the country under the prior administration have become a target . . .").

⁵ *Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

⁶ Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, et al. at 5 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/RZP9-LL4G>]. The Obama administration's enforcement efforts focused on immigrants it identified as posing a threat to national or border security or public safety. Immigration officials considered mitigating factors such as presence in the U.S. from a young age, family and social ties, age, and health conditions in determining whether to exercise discretion in allowing immigrants to remain in the U.S. See *id.* at 1, 5–6.

⁷ See Exec. Order No. 13768, 82 Fed. Reg. at 8800; Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al. at 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/6YTQ-L6B4>] [hereinafter Memorandum from John Kelly].

⁸ Memorandum from John Kelly, *supra* note 7, at 4; see Exec. Order No. 13768, 82 Fed. Reg. at 8800.

2017,⁹ and a 31% increase in the number of people ordered removed by federal immigration courts during the first six months of the Trump administration, as compared to the previous year.¹⁰

Across the country, news outlets are increasingly reporting the arrest and deportation of longtime community members.¹¹ In one case, a Yale College student's father, Melecio Andazola Morales, who had lived in the United States for almost twenty years, was deported to Mexico based on a prior removal order when his daughter petitioned for his green card;¹² in another, an Ohio businessman, Amer Adi Othman, husband of a U.S. citizen and father of four U.S. citizen daughters, who had lived in the United States for almost forty years, was deported to Jordan just two weeks after he was arrested based on a prior deportation order.¹³ Under current procedures, Immigration and Customs Enforcement (ICE) can quickly remove such individuals from the country without a hearing.¹⁴

⁹ U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, at 2–3 (2017). For an in-depth discussion of the changes in enforcement priorities and effects of the new policies under the Trump administration, see AM. IMMIGRATION COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION (Mar. 7, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf [<https://perma.cc/7T3H-JQDS>].

¹⁰ Maria Sacchetti, *Deportation Orders Up Under Trump, Fewer Prevail in Immigration Court*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/local/immigration/deportation-orders-up-under-trump-fewer-prevail-in-immigration-court/2017/08/08/d3f0a6a6-7c74-11e7-9d08-b79f191668ed_story.html [<https://perma.cc/KAT4-Y YJS>] (noting that during the period from February 1, 2017 to July 31, 2017, “judges issued 73,127 final immigration decisions, an increase of 14.5 percent over the same period in 2016. Of those decisions, 49,983 were deportation orders, an increase of nearly 28 percent from the same period in 2016” and “[t]he rest were orders to leave the United States voluntarily”).

¹¹ See, e.g., Taxin, *supra* note 4.

¹² See Britton O'Daly, *Melecio Deported to Mexico*, YALE DAILY NEWS (Dec. 18, 2017, 2:03 AM), <https://yaledailynews.com/blog/2017/12/18/melecio-deported-to-mexico/> [<https://perma.cc/N2ZX-R9CD>]; Britton O'Daly, *Father of Yale Undergraduate Detained for Deportation*, YALE DAILY NEWS (Oct. 13, 2017, 10:32 PM), <https://yaledailynews.com/blog/2017/10/13/father-of-yale-undergraduate-detained-for-deportation/> [<https://perma.cc/5P2Z-P7TL>].

¹³ See Tal Kopan, *How Trump Changed the Rules to Arrest More Non-Criminal Immigrants*, CNN (Mar. 2, 2018, 9:02 AM), <https://www.cnn.com/2018/03/02/politics/ice-immigration-deportations/index.html> [<https://perma.cc/MM23-X3QT>] (“A businessman and father from Ohio. An Arizona mother. The Indiana husband of a Trump supporter. They were unassuming members of their community, parents of US citizens and undocumented. And they were deported by the Trump administration.”); see also Vivian Yee, *A Marriage Used to Prevent Deportation. Not Anymore*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html> [<https://perma.cc/BNE9-5E2N>] (noting that “[i]mmigration lawyers in New England, in particular, say there has been an unmistakable swell in the number of clients arrested at marriage interviews”).

¹⁴ For a discussion of “shadow removals” and “speed deportations,” see generally Koh, *When Shadow Removals Collide*, *supra* note 1; Koh, *Removal in the Shadows*, *supra* note 1; Wadhia, *supra* note 1.

This article identifies a critical gap in the existing doctrine on screening procedures and literature on enforcement and deportations, namely the lack of protections for those with prior unexecuted removal orders who fear return to their home countries. For these immigrants, the only recourse is a motion to reopen the prior removal case. Such motions are, however, subject to time and numeric limitations, as well as restrictions on the legal basis for filing. As a result, they are difficult, if not impossible, to win.¹⁵ The current system thus improperly prioritizes efficiency and finality of proceedings over the United States' obligations under domestic and international law not to return people to countries where they face persecution or torture. In so doing, the system fails to safeguard due process rights, provide access to fundamentally fair proceedings, and ensure that equal protection principles are not violated for all immigrants.¹⁶

Take the cases of Alberto and Manuel.¹⁷ Customs and Border Protection (CBP) officials arrested Alberto reentering the United States after having previously deported him to Honduras. When he expressed a fear of return to his home country, CBP sent him to a detention facility for a "reasonable fear" screening in order to determine whether he should be allowed to file for humanitarian protection in immigration court.¹⁸ In contrast, when ICE officials apprehended Manuel, who had lived in the United States for years, based on an old unexecuted *in absentia* removal order, they did not screen him for a fear of return. They detained him and quickly prepared to deport him. His only option,

¹⁵ ASYLUM SEEKER ADVOCACY PROJECT & CATHOLIC LEGAL IMMIGRATION NETWORK, INC., DENIED A DAY IN COURT: THE GOVERNMENT'S USE OF *IN ABSENTIA* REMOVAL ORDERS AGAINST FAMILIES SEEKING ASYLUM 10–11 (2018).

¹⁶ The immigration court backlog is a reason often cited by government officials for prioritizing efficiency and finality. Yet recent policy decisions have only exacerbated that backlog by attempting to eliminate immigration judges' authority to utilize basic docket management tools, such as continuing cases pending with the U.S. Citizenship and Immigration Service (USCIS) and administratively closing cases. See *Immigration Court Backlog Jumps While Case Processing Slows*, TRACIMMIGRATION (June 8, 2018), <http://trac.syr.edu/immigration/reports/516/> [<https://perma.cc/XAM5-YY4C>] ("As of the end of May 2018, the number of cases waiting decision reached an all-time high of 714,067. This compares with a court backlog of 542,411 cases at the end of January 2017 when President Trump assumed office. During his term the backlog has increased by almost a third (32%) with 171,656 more cases added.")

¹⁷ These vignettes are based on experiences of Harvard Immigration and Refugee Clinical Program clients and their family members. Names, details, and identifying information have been changed to protect confidentiality.

¹⁸ As noted *infra*, the reasonable fear screening process is itself flawed in practice and does not always function in this way, as the Immigration and Nationality Act and accompanying regulations dictate. See *infra* Part II; Lindsay M. Harris, *Withholding Protection*, COLUM. HUM. RTS. L. REV., Spring 2019, at 1, 8–10. Additionally, as explained *infra*, the reinstatement proceedings into which individuals are placed only provides an opportunity to apply for withholding of removal and protection under CAT, not asylum. See *infra* Part IV.

given his fear of return to Guatemala as an indigenous man, was to file a motion to reopen—a long shot in most cases. Against all odds, he won and the immigration court reopened his case. Many do not and are deported to persecution, torture, or even death.¹⁹ Because of how and when they are apprehended by immigration authorities, immigrants in Manuel and Alberto's positions are accorded starkly different protections. This article explores this unjustified distinction.

The United States implemented the reasonable fear screening procedure as a safety valve²⁰ in the draconian²¹ reinstatement of removal context to bring the United States into compliance with its obligations under the Refugee Convention and Convention Against Torture (CAT).²² However, this

¹⁹ This article focuses on the reasonable fear process, not the credible fear process, given the extensive scholarship and advocacy to date on the credible fear process. See generally Memorandum from Bill Ong Hing, Professor of Law, Univ. of S.F. Sch. of Law, to John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Serv. (Apr. 21, 2014), <http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Re%20sponse%20to%20USCIS%20Credible%20Fear%20Memo,%20Bill%20Hing,%2004.21.2014.pdf> [<https://perma.cc/CR64-6EMK>] (critiquing USCIS's revised credible fear lesson plan).

²⁰ I have adopted this term from Jill Family's work. See Family, *supra* note 1.

²¹ Those individuals who seek reentry after having been previously deported are improperly accorded more limited protections than first-time arrivals: they are only eligible for withholding of removal under the Refugee Convention and CAT, not asylum. As noted, *infra* Part II, this issue has been litigated. See, e.g., Brief of Amicus Curiae American Immigration Lawyers Association et al., *Perez-Guzman v. Holder*, No. 13-70579 (9th Cir. Apr. 9, 2014) (arguing that individuals subject to reinstatement of removal should be allowed to apply for asylum, as well as withholding of removal and protection under CAT). An in-depth discussion of why the failure to afford individuals who go through the reasonable fear process access to asylum violates both international law and due process is, however, outside the scope of this article. See Harris, *supra* note 18, at 10–12.

²² Although the current reasonable fear screening process is itself flawed in practice—a failure the government itself has recognized—it is nonetheless an important mechanism, even if it requires improvement. See, e.g., OFFICE OF THE INSPECTOR GEN., OIG-15-95, STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING, at 16 (May 15, 2015) [hereinafter OIG REPORT] (“Border Patrol does not have guidance on whether to refer to Streamline prosecution aliens who express fear of persecution or fear of return to their home countries. As a result, Border Patrol agents sometimes use Streamline to refer aliens expressing such fear to DOJ for prosecution. Using Streamline to refer aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.”); Notice of Proposed Settlement and Hearing in Class Action Involving Detained Non-Citizens Who Are Awaiting a “Reasonable Fear Determination,” *Alfaro Garcia v. Johnson*, 14-cv-01775 (N.D. Cal. 2015) (determining that in compliance with regulations, ICE must refer individuals who qualify for reasonable fear determinations within five days on average, and USCIS must conduct the determination within ten days on average; if the government takes longer than twenty days, it must notify class counsel); see also *Practice Advisory for Alfaro Garcia v. Johnson*, NAT’L IMMIGR. JUST. CTR. (2015), https://www.aclunc.org/docs/20151027-summary_of_alfaro_settlement_practice_advisory.pdf [<https://perma.cc/22XN-8JTD>]. An in-depth discussion of prolonged detention and other flaws in the reasonable fear process is outside the scope of this article. For further discussion, see Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT’L

procedure is not currently accessible to those like Manuel with unexecuted removal orders. This article highlights a pressing need to revisit this procedure in order to ensure it is applied equitably to both sets of people—those who were previously removed and reenter and those who reside in the United States with unexecuted removal orders—as a safeguard for the rights of all those who fear return to their home countries.

The article argues that before deporting individuals with unexecuted removal orders, the U.S. government should provide reasonable fear screenings in accordance with domestic and international law. Without such a screening mechanism, the United States risks returning such individuals to serious harm, torture, or even death. Other state parties to the Convention, including Canada, already engage in a type of pre-removal risk assessment. The addition of this type of screening mechanism to the U.S. system would be an important step toward adhering to *non-refoulement* obligations under domestic and international law.²³

The article first explores U.S. obligations under domestic and international law to provide protection to those who fear return to persecution and torture. Next, the article highlights the shortcomings of the current system in meeting those obligations and suggests that due process and equal protection require expansion of current reasonable fear procedures to provide a uniform and equitable pre-removal risk assessment process. It concludes with prescriptions for amending the current reasonable fear screening process to improve its efficacy and expand its scope to allow all those with prior removal orders (whether apprehended after reentry or apprehended having never left) to apply for protection. Addressing the critical gap in U.S. regulations would bring the U.S. system into compliance with its longstanding duty not to return individuals to countries where they face persecution or torture.

L.J. 243, 309–10 (2013) (“[F]or individuals who claim persecution while awaiting deportation under reinstatement of removal, detention pending the reasonable fear interview violates international human rights standards, at least as the process is currently carried out. . . . Current practice regarding detention after a favorable reasonable fear interview also violates international human rights standards. Individuals who do not pass the reasonable fear interview might be detained, if execution of the confirmed removal order were rapid, without violating international law. However, individuals who have passed the reasonable fear interview fall clearly within the category of persons pending a determination of their immigration status and so may only be detained in limited circumstances.”).

²³ See *infra* Part IV.

I. U.S. NON-REFOULEMENT OBLIGATIONS UNDER DOMESTIC AND INTERNATIONAL LAW

The current practice of deporting individuals with unexecuted removal orders absent a systematic mechanism for evaluating their fears of return contravenes longstanding U.S. obligations under both domestic and international law. In order to meet its obligations, the United States must implement procedures to screen for a fear of return prior to forcible return to countries where individuals face serious human rights violations, torture, or even death. This Part addresses, in turn, U.S. *non-refoulement* obligations under both domestic and international law, which can and should inform U.S. approaches to safeguarding immigrants.²⁴

A. *Non-Refoulement Obligations Under Domestic Law*

When the United States signed and ratified the 1967 Protocol to the Refugee Convention²⁵ over fifty years ago, it committed to provide surrogate protection to individuals whose home countries failed to provide them with the protection they needed.²⁶ Indeed, the United States enacted the 1980 Refugee Act to bring domestic law into compliance with international refugee law and in so doing, enshrined the obligation of *non-refoulement*, the duty not to return a refugee to a country where

²⁴ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *In re Negusie*, 27 I. & N. Dec. 347 (B.I.A. 2018) (drawing on international and comparative sources in interpreting the duress defense); Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner at 6, *N-A-M- v. Mukasey*, No. 08-9527 & 07-9580 (June 19, 2008) (“The Supreme Court has ruled that international law, including both treaty and customary law, is ‘part of our [United States] law,’ and creates enforceable rights and obligations for individuals in United States courts.” (alteration in original) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900))); Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT’L L. & POL. 391, 397–98 (2013).

²⁵ The United States has signed and ratified both the 1967 U.N. Protocol Relating to the Status of Refugees and the U.N. Convention Against Torture. See United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [together hereinafter Refugee Convention]; United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; see also 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (signed and ratified by the United States) (setting forth the obligation not to return individuals to torture where they would suffer irreparable harm under Articles 6 and 7, protecting the right to life and the right to be free from torture or other cruel, inhuman or degrading treatment).

²⁶ DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES ch. 1 (West 2019).

her life or freedom would be threatened on the basis of certain grounds, as defined under the Refugee Convention.²⁷

Under Article 33(1) of the Refugee Convention: “No Contracting State shall expel or return (*refouler*) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁸ As explained further below, this *non-refoulement* obligation applies equally both to those already officially recognized as refugees and to those who have not yet been recognized.²⁹

The U.S. Supreme Court explained back in 1987 in *INS v. Cardoza-Fonseca* the critical importance of the Refugee Convention to understanding U.S. law, emphasizing that “[i]f one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968.”³⁰ Accordingly, the Refugee Act of 1980 contains the following non-return provision: “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”³¹

Additionally, the United States has adopted specific statutory and regulatory provisions incorporating Article 3 of CAT, the duty not to return an individual to a country where the person would likely face torture.³² Article 3 provides that:

²⁷ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); see H.R. Rep. 96-781, at 19–20 (1980) (Conf. Rep.) (stating that both houses of Congress adopted the internationally-accepted definition of “refugee”).

²⁸ Refugee Convention, *supra* note 25, at 176 (emphasis added). Although the United States is a party to the Protocol, not the Convention, the Protocol incorporates the operative parts of the Convention. AM. SOC’Y INT’L LAW, *Human Rights, in BENCHMARK ON INTERNATIONAL LAW* § III.E-1, III.E-50 (Diane Marie Amann ed., 2014), www.asil.org/benchmark/humanrights.pdf [<https://perma.cc/NFX5-X989>].

²⁹ U.N. High Comm’r for Refugees, Note on *Non-Refoulement* (Submitted by the High Commissioner), U.N. Doc. EC/SCP/2 (Aug. 23, 1977) (“In evaluating the practice of States in regard to the principle of non-refoulement, it, should be emphasized that the principle applies irrespective of whether or not the person concerned has been formally recognized as a refugee.”).

³⁰ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citations omitted).

³¹ 8 U.S.C. § 1231(b)(3)(A).

³² See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, § 2242, 112 Stat. 2681–822 (codified at 8 U.S.C. § 1231 note); see also 8 C.F.R. §§ 208.16–18. The Convention Against Torture prohibits state parties, like the United States, from returning an individual to a country “where there are substantial grounds for believing that he would be in danger of being subject to torture.” Convention Against Torture, *supra* note 25, at art. 3. Where an applicant can show that it is more likely than not that she will be tortured if removed to another country, protection under CAT is mandatory. See 8 C.F.R. §§ 208.16–17.

1. 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.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.³³

When CAT was incorporated into U.S. law with the Foreign Affairs Reform and Restructuring Act of 1998, the implementing legislation emphasized that: “It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of *any* person to a country” where the person “would be in danger of being subjected to torture.” To do otherwise would violate U.S. obligations under Article 3 of CAT.³⁴

Supplementary information to the interim rule establishing procedures for raising a claim for protection under CAT explained that “[t]he primary goals of this rule are to establish procedures that ensure that no alien is removed from the United States under circumstances that would violate Article 3 without unduly disrupting the issuance and execution of removal orders consistent with Article 3.”³⁵ It further noted that “[t]o this end, we have designed a system that will allow aliens subject to the various types of removal proceedings currently afforded by the immigration laws to seek, and where eligible, to be accorded protection under Article 3.”³⁶

The interim rule sets forth screening procedures for expedited removal as well as administrative removal and reinstatement of removal³⁷ and explains that “[f]or aliens subject to removal proceedings under section 240 of the Act, . . . a claim to protection under the Convention Against Torture will be raised and considered, along with any other applications, during removal proceedings before an immigration judge.”³⁸

Although the supplementary information to the interim rule does not expressly address the situation of individuals who

³³ Convention Against Torture, *supra* note 25, at art. 3.

³⁴ Foreign Affairs Reform and Restructuring Act of 1998, § 2242, 112 Stat. 2681, 822–23 (emphasis added).

³⁵ Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999). The legislation required that regulations implementing Article 3 be set forth within 120 days, and the interim rule was implemented without the prior notice and comment period ordinarily required due to this time constraint. *Id.* at 8478, 8486.

³⁶ *Id.* at 8479.

³⁷ See *infra* Part II for a discussion of expedited removal, administrative removal, and reinstatement.

³⁸ Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8480.

are apprehended on unexecuted removal orders, the goals set forth in the supplementary information dictate the expansion of the reasonable procedures to protect such individuals who have legitimate fears of return but have never had the opportunity to fully express those fears of return to an adjudicator.³⁹

The expansion and amendment of the reasonable fear process to allow individuals with prior unexecuted orders to access a reasonable fear screening procedure would thus be an important step in bringing the United States into compliance with its domestic and international obligations not to return individuals to persecution or torture.

B. *Non-Refoulement Obligations Under International Law*

International law and guidance from the Office of the United Nations High Commissioner for Refugees (UNHCR) can and should inform the United States' understandings of its *non-refoulement* obligations under the Refugee Convention and CAT, which, as noted, the United States has incorporated into domestic law.⁴⁰ Indeed, the Supreme Court, federal courts, and the Board of Immigration Appeals have repeatedly invoked the relevance of international and comparative guidance and jurisprudence in defining the scope of U.S. obligations under the Refugee Convention and CAT.⁴¹

The Executive Committee of UNHCR, composed of member states, has emphasized that *non-refoulement* is part of customary international law and is not therefore subject to derogation.⁴² Because of *non-refoulement's* established and

³⁹ The United States also has obligations to protect individuals from return to torture, as well as to safeguard the rights to life and liberty of all those in its jurisdiction under the 1966 International Covenant on Civil and Political Rights (ICCPR), which the United States signed in 1977 and ratified in 1992. See 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (signed and ratified by the United States). In ratifying the ICCPR, the United States "declare[d] that the provisions of Articles 1 through 27 of the Covenant are not self-executing," 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992), but no implementing legislation has been passed. AM. SOC'Y OF INT'L L., *supra* note 28, at III.E-52.

⁴⁰ See *supra* note 24.

⁴¹ See *supra* note 24.

⁴² See Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 2-3, 20, 26 (2008) (noting that the 1984 Cartagena Declaration on Refugees signed by Latin American countries also recognizes *non-refoulement* as a rule of *jus cogens*); see also U.N. High Comm'r for Refugees & Lauterpacht Research Ctr. for Int'l Law, Summary Conclusions: The Principle of *Non-Refoulement* ¶ 1 (July 2001), <http://www.unhcr.org/en-us/protection/globalconsult/3baf3117f/summary-conclusions-principle-non-refoulement.html> [<https://perma.cc/37Q5-BFB9>]; U.N. High Comm'r for Refugees, The Principle of *Non-Refoulement* as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR

recognized *jus cogens* status, any relevant policies cannot return a person to face persecution or torture.⁴³ This *non-refoulement* obligation applies whether or not an individual has already obtained protection or has already been recognized as a refugee or asylee—meaning that an adjudicator has determined that the individual meets the refugee definition—because the duty against *refoulement* is absolute.⁴⁴ As the UNHCR explained in its Handbook on Procedures:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the [refugee] definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁴⁵

This guidance reflects an understanding of the barriers to applying for refugee protection, including information gaps, trauma, and inability to find legal representation.⁴⁶

Furthermore, Article 32 of the Refugee Convention prohibits state parties from expelling refugees except under highly limited circumstances and requires that expulsion procedures

1938/93, 2 BvR 1953/93, 2 BvR 1954/93 ¶¶ 1, 17 (Jan. 31, 1994), <http://www.refworld.org/docid/437b6db64.html> [<https://perma.cc/A3GK-CWBW>] [hereinafter *The Principle of Non-Refoulement*] (noting that “[n]o consideration of public order should be allowed to overrule that guarantee” that a refugee “must not be turned back to a country where his life or freedom would be threatened”).

⁴³ See Farmer, *supra* note 42, at 2, 20; see also U.N. High Comm’r for Refugees & Lauterpacht Research Ctr. for Int’l Law, *supra* note 42, ¶ 7; *The Principle of Non-Refoulement*, *supra* note 42, ¶ 2.

⁴⁴ U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol ¶¶ 6–7, 12 (Jan. 26, 2007), <http://www.refworld.org/docid/45f17a1a4.html> [<https://perma.cc/264N-6B3X>] [hereinafter UNHCR Advisory Opinion] (noting that “the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection”); Note on *Non-Refoulement* (Submitted by the High Commissioner), *supra* note 29, ¶ 15.

⁴⁵ U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 28, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992, reissued 2019); see also Exec. Comm. of the High Comm’r’s Programme, *Non-Refoulement* No. 6 (XXVIII), U.N. Doc. 12A (A/32/12/Add. 1) (Oct. 12, 1977) (emphasizing “the fundamental importance of the principle of *non-refoulement* . . . of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees”). Under Article 14 of the Universal Declaration of Human Rights, all individuals have the right “to seek asylum from persecution, and the fundamental principle of *non-refoulement* requires that States not return refugees to territories where their lives or freedom may be endangered.” Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 185, 231 (Erika Feller et al. eds., 2001).

⁴⁶ See Preston, *supra* note 2.

comport with due process principles.⁴⁷ Specifically Article 32 mandates that “[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order” and emphasizes that “[t]he expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law.”⁴⁸ Scholars have argued that the term “lawful” in Article 32 should be interpreted broadly to encompass individuals who the state has previously decided not to expel given the state’s acquiescence to the presence of the individual.⁴⁹ Under Article 32, individuals whose claims for protection were never processed, or were not timely or fairly processed, should therefore be afforded greater protections and rights, including against expulsion.⁵⁰

The UNHCR Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention emphasizes that “[the duty is on the state to establish], *prior to implementing any removal measure*, that the person whom it intends to remove from their territory or their jurisdiction would not be exposed to a danger of serious human rights violations[.]”⁵¹ States that ratify the Refugee Convention and the 1967 Protocol must “necessarily undertake to implement those instruments in good faith,” with attention to “situations where the system of administration may produce results incompatible with the applicable principle or standard of international law.”⁵²

The UNHCR has underscored the need to provide “[a]ll applicants for international protection . . . the same procedural safeguards and rights”—including the provision of a personal interview—to ensure that their fears of return are fully heard and adjudicated.⁵³ When, after a decision has been made, an applicant cites new or previously unheard facts or evidence related to their claim for protection, an applicant for protection cannot be

⁴⁷ Refugee Convention, *supra* note 25, at art. 32 (expulsion); see JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 154–92 (2005).

⁴⁸ Refugee Convention, *supra* note 25, at art. 32 (expulsion); see HATHAWAY, *supra* note 47, at 669–72.

⁴⁹ HATHAWAY, *supra* note 47, at 173–86, 659–66.

⁵⁰ See *id.* at 667.

⁵¹ UNHCR Advisory Opinion, *supra* note 44, ¶ 22 (emphasis added); see Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION*, *supra* note 45, ¶¶ 20, 44, 73–76 (noting that a denial of protection in the absence of a review of individual circumstances is inconsistent with the prohibition of refoulement).

⁵² Goodwin-Gill, *supra* note 45, at 216, 218.

⁵³ U.N. High Comm’r for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, at 242 (Mar. 2010), <https://www.unhcr.org/4c7b71039.pdf> [<https://perma.cc/7K2F-RWB9>].

“removed to his/her country of origin until and unless it is established, following rigorous scrutiny of the new elements or findings together with the previous application, that there is no real risk of persecution or serious harm to the applicant if returned.”⁵⁴ Yet the U.S. system includes no systematic mechanism for such rigorous scrutiny, leaving bona fide refugees in real danger of forced return to persecution or torture.

II. FAILURES OF PROCEDURAL PROTECTIONS FROM REMOVAL AND VIOLATIONS OF U.S. NON-REFOULEMENT OBLIGATIONS

The procedural protections against *refoulement* implemented in the U.S. system fall short in many ways.

In most cases the only recourse available to an individual with a prior unexecuted removal order is filing a motion to reopen. Yet, seasoned attorneys and immigrants alike face hurdles in satisfying the stringent legal requirements for motions to reopen.⁵⁵ Indeed, as one scholar emphasized, “the circumstances that allow reopening are so specific and rare that they are virtually impossible to attain.”⁵⁶ Considered in light of the *non-refoulement* obligation, the current motion to reopen process does not adequately safeguard the rights of individuals who face deportation based on prior unexecuted removal orders to countries where they will be persecuted or tortured. Neither does the current reasonable fear process, which in practice, only provides a limited and flawed screening to those who were previously deported and attempt to reenter the United States.

A. *The Motion to Reopen Process and its Shortcomings*

Courts have repeatedly proclaimed that “[m]otions to reopen . . . are generally disfavored” in an effort to protect the finality of proceedings and deter unnecessary delays of removal

⁵⁴ *Id.* at 392.

⁵⁵ See, e.g., Kristin Macleod-Ball, *Supreme Court to Decide Whether It's Okay to Deprive a Person of His Day in Immigration Court*, IMMIGR. IMPACT (Apr. 30, 2015), <http://immigrationimpact.com/2015/04/30/supreme-court-to-decide-whether-its-okay-to-deprive-a-person-of-his-day-in-immigration-court/> [<https://perma.cc/D3SM-B65B>]; see also Robert L. Koehl, *Perpetual Finality: In Immigration Removal Proceedings, Motions to Reopen Create More Problems Than They Solve*, TEX. A&M L. REV., Fall 2014, at 107, 121 (“Some bases [for motions to reopen] have been subject to inconsistent application and definition, leading to confusion among immigration lawyers and courts alike as to their requirements.”).

⁵⁶ Koehl, *supra* note 55, at 121.

without cause.⁵⁷ Yet, the need for finality must be balanced against the need for justice and the need to protect individuals from *refoulement*—which the very limited motion to reopen procedures generally fail to do.⁵⁸

First, most motions to reopen are subject to strict numerical limitations and deadlines.⁵⁹ Except in limited circumstances, individuals can only file a single motion to reopen or reconsider immigration proceedings.⁶⁰ The time frame for filing is similarly restrictive, as motions to reconsider must be filed within thirty days from when a final administrative order of removal is entered, and motions to reopen must be filed within ninety days of a final order. Such severe limitations and restrictions make it exceedingly difficult for people to have access to this procedural avenue.⁶¹

Second, although motions to reopen in order to apply for asylum, withholding of removal, and protection under CAT based on changed country conditions are exempt from these time and numeric restrictions,⁶² even when exempted from time and numeric restrictions, such motions are nonetheless often difficult to win.⁶³ The evidence of changed conditions presented must be “material” and “not available” or discoverable at a previous proceeding.⁶⁴ Individuals must also show *prima facie* eligibility for the relief sought.⁶⁵ Additionally, it is important to

⁵⁷ *Balyan v. Holder*, 575 F. App'x 763, 767 (9th Cir. 2014); see *Polyakov v. U.S. Att'y Gen.*, 297 F. App'x 844, 845 (11th Cir. 2008) (“Motions to reopen are disfavored”); see also EXEC. OFFICE FOR IMMIGRATION REV., IMMIGRATION COURT PRACTICE MANUAL, at ch. 5.7, <https://www.justice.gov/eoir/page/file/1084851/download> [<https://perma.cc/V8JN-HDJ7>] (describing the narrow circumstances under which motions to reopen may be granted).

⁵⁸ See Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 178–79 (2010) (noting the tension between finality concerns and the “important safeguard” against deportation that motions to reopen can provide (citations omitted)).

⁵⁹ See 8 C.F.R. § 1003.23(b)(1).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² This too is arguably a violation of international law and due process but is outside the scope of this article.

⁶³ See 8 C.F.R. § 1003.23(b)(1); INA § 240(c)(7)(C)(ii) (codified as 8 U.S.C. § 1229a (c)(7)(c)(ii)); 8 C.F.R. § 1003.2(c)(3)(ii); 8 C.F.R. § 1003.23(b)(4)(i).

⁶⁴ 8 C.F.R. § 1003.23(b)(4)(i); see also *INS v. Doherty*, 502 U.S. 314, 324 (1992).

⁶⁵ *INS v. Wang*, 450 U.S. 139, 141 (1981) (per curiam); *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1080 (9th Cir. 2013); 8 C.F.R. § 1003.23(b)(3) (“Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.”).

note that the filing of a motion to reopen does not generally stay removal,⁶⁶ except in certain limited circumstances.⁶⁷

Third, while courts may rescind *in absentia* orders and reopen cases, if individuals can establish that the court should excuse their failure to appear due to “exceptional circumstances” that are beyond the individual’s control, courts have interpreted the avenues to rescinding *in absentia* orders narrowly.⁶⁸ Courts have found, for example, a car’s mechanical failure alone insufficient to meet the exceptional circumstance exception and have entered *in absentia* orders of removal against individuals who arrive late or fail to find the courtroom even if they are in the courthouse.⁶⁹ Exceptional circumstances may include serious health conditions, “battery or extreme cruelty,” or ineffective assistance of counsel.⁷⁰ Motions may also be based on lack of notice of the hearing or the fact that the individual was in federal or state custody at the time of the hearing.⁷¹

The limitations of these procedural protections are particularly glaring in the *in absentia* context given that individuals ordered removed *in absentia* are not afforded an opportunity to be heard by an immigration judge.⁷² Professor Jennifer Lee Koh aptly terms these proceedings, “Removal at the Peripheries of Immigration Court,” given that *in absentia* removal orders “involve token adjudication by [immigration judges]”—although “the orders are signed by [immigration judges] and take place under the auspices of the immigration courts, . . . [they] involve no actual merits-based assessment.”⁷³ As Koh notes, such proceedings are “part of [the] immigration

⁶⁶ See 8 C.F.R. §§ 1003.2(f), 1003.23(b)(4)(i); see also BETH WERLIN, AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: RESCINDING AN *IN ABSENTIA* ORDER OF REMOVAL 2 (Mar. 2010), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf [<https://perma.cc/FZK9-ZAK2>]; Maria Baldini-Potermin, *It’s Time to Consider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations, and the Race to the Courthouse*, 10-01 IMMIGR. BRIEFINGS 1 (2010).

⁶⁷ See 8 C.F.R. § 1003.2(f); INA § 240(b)(5)(C) (codified as 8 U.S.C. 1229a(b)(5)(C)); 8 C.F.R. § 1003.23(b)(4)(ii).

⁶⁸ Koh, *Removal in the Shadows*, *supra* note 1, at 219.

⁶⁹ *Id.* at 219–20 (citing *Perez v. Mukasey*, 516 F.3d 770, 772–73 (9th Cir. 2008); *Thomas v. INS*, 976 F.2d 786, 788, 790 (1st Cir. 1992) (per curiam); *In re Chaman Singh*, No. A72-567-465, 2004 WL 3187212, at *1–2 (B.I.A. Dec. 20, 2004); *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016)).

⁷⁰ INA § 240(e)(1) (codified as 8 USC 1229a(e)(1)); see WERLIN, *supra* note 66, at 8, 10–11.

⁷¹ INA § 240(b)(5)(C)(ii) (codified as 8 U.S.C. 1229a(b)(5)(C)(ii)). The Immigration Judges and the Board may also sua sponte reopen cases as a last resort; there is however limited judicial review of such motions. Vikram K. Badrinath et al., *Time-Barred Motions to Reopen—Tips and Tricks for Success*, AILA IMMIGR. PRAC. POINTERS 801 (2015), <https://www.aila.org/File/Related/14072246b.pdf> [<https://perma.cc/9MGD-T4Z4>].

⁷² See Wadhia, *supra* note 1, at 7 (noting the minimal procedural safeguards in the stipulated removal and *in absentia* removal context).

⁷³ Koh, *Removal in the Shadows*, *supra* note 1, at 214–15.

court's shadows."⁷⁴ Under U.S. law, if an individual misses even one court hearing, regardless of whether the individual appeared at prior hearings, the court "shall" order her removal as long as the government provides evidence that notice was given and the individual is removable.⁷⁵ *In absentia* removals, which accounted for about 40% of court-ordered removals in non-detained cases in fiscal year 2016,⁷⁶ as well as other unexecuted prior removal orders, thus require a failsafe mechanism—a reasonable fear screening prior to removal—to ensure that individuals are not removed without having their fears of return heard.

For example, consider the barriers facing Manuel, the indigenous Guatemalan man apprehended by ICE based on a decade-old *in absentia* removal order.⁷⁷ Manuel did not meet any of the exceptional circumstances necessary to rescind his order and his only option was therefore to try to reopen his prior order based on changed circumstances to then apply for asylum, withholding of removal, and protection under CAT. Manuel had fled to the United States from Guatemala in the 1990s due to ongoing violence and discrimination against his family because of his race and his union organizing efforts. He was caught crossing the border and ordered to appear in immigration court, but he was unrepresented and too scared to go by himself, so he missed his court date and was ordered removed *in absentia*, without ever having his fear of return to Guatemala adjudicated.

⁷⁴ *Id.* at 215; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-828, 110 Stat. 3008 (establishing different forms of non-judicial removal including expedited removal, administrative voluntary departure, reinstatement, administrative removal, and stipulated orders of removal). For further information on the various summary deportation procedures, see ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 10–12 (2014), https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf [<https://perma.cc/Z7E-U-DBY4>] [hereinafter ACLU, AMERICAN EXILE]; 8 C.F.R. § 235.3 (describing expedited removal proceedings). Although reasonable fear screenings should occur within ten days under current regulations, see 8 C.F.R. § 208.31(b), the process in practice is often much slower. See Complaint at 2, *Garcia v. Johnson*, 14-cv-01775 (N.D. Cal. Apr. 17, 2014), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/RFI%20brief%20FINAL%20filed.pdf> [<https://perma.cc/F9FB-XU64>]. Individuals subject to reinstatement of removal are generally detained for the duration of the reasonable fear screening, and subsequent immigration court hearing process (if they pass the initial screening). See Gilman, *supra* note 22, at 308–13.

⁷⁵ Koh, *Removal in the Shadows*, *supra* note 1, at 218 (citing 8 U.S.C. § 1229a(b)(5)(A)). There is a presumption that any properly addressed, stamped, and mailed hearing notice was received by the addressee. See *In Re M-R-A-*, 24 I. & N. Dec. 665, 671 (B.I.A. 2008).

⁷⁶ EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, FY 2016: STATISTICS YEARBOOK, at P4 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/3SL3-ETQ4>].

⁷⁷ "Of the immigration judge decisions rendered in Fiscal Year (FY) 2016, [twenty-five] percent involved *in absentia* orders. The *In Absentia* rate dramatically increased from FY 2012 ([eleven] percent) to FY 2015 ([twenty-eight] percent) but has shown a slight decline from FY 2015 to FY 2016 ([twenty-five] percent)." *Id.* at P1.

Manuel did not know about this *in absentia* order and never left the country. A decade later, he was picked up by ICE during a workplace raid and held in detention, pending removal.

Manuel was lucky that he could afford an attorney who could file a motion to reopen on his behalf based on changed country conditions, namely the resurgence of persecution of indigenous people in Guatemala. However, many who are apprehended on prior removal orders have no access to counsel and are deported without having their fears of return assessed. Although there is a right to counsel in immigration proceedings, the U.S. government does not supply representation, and immigrants facing removal must either find the funds to pay an attorney or find pro bono representation through a nonprofit, law school clinic, or law firm.⁷⁸ Indeed, a recent national study found that fewer than 40% of immigrants facing removal were represented by an attorney in cases decided on the merits,⁷⁹ and approximately 86% of immigrants in detention facilities went unrepresented.⁸⁰

Given that motions to reopen require submission of a written argument along with supporting documentation,⁸¹ it is very difficult, if not impossible, for unrepresented individuals to

⁷⁸ See INA § 240(b)(4)(A) (codified as 8 U.S.C. § 1229a(b)(4)) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”); 8 C.F.R. § 1003.16(b). Immigration proceedings are considered civil proceedings, and asylum seekers who face removal from the United States do not have the same constitutional protections as defendants in criminal proceedings. Scholars have, however, repeatedly argued that due process requires the provision of counsel to indigent immigrants who cannot afford representation. See, e.g., Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011); John R. Mills et al., *“Death Is Different” and a Refugee’s Right to Counsel*, 42 CORNELL INT’L L.J. 361 (2009); Beth J. Werlin, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Cases*, 20 B.C. THIRD WORLD L.J. 393 (2000).

⁷⁹ Although the study does not specifically address motions to reopen, the results are nonetheless informative in considering the motion to reopen context. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 57 (2016) (“[R]emoval respondents were significantly more likely to obtain successful outcomes when represented by counsel. Specifically, after controlling for all of the factors just described (detention status, region of nationality, charge, year, and base city), the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, five-and-a-half times greater that they obtained relief from removal, and almost two times greater that they had their case terminated”); *id.* at 7 (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period”).

⁸⁰ *Id.* at 8; see also ARNOLD & PORTER LLP, AM. BAR ASS’N COMM’N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, at ES-7, http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf [<https://perma.cc/U3N7-9QQ9>].

⁸¹ See 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1); see also *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) (“[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material.”).

file the papers necessary to succeed in reopening their claims.⁸² Moreover, although “[j]udicial review of a motion to reopen serves as a ‘safety valve’ in the asylum process,”⁸³ appealing to circuit courts of appeal may be out of reach for some pro se applicants, and individuals may face deportation before their appeals are heard.⁸⁴

Execution of a prior removal order in a case like that of Manuel thus violates U.S. obligations against *non-refoulement* under both domestic and international law. To the extent that such prior removal orders are executed, at a minimum individuals must be afforded due process and equal protection. Specifically, the reasonable fear screening process, described further below, should be expanded and implemented pre-removal for all those with prior, unexecuted removal orders, given how similarly situated they are to those who have been deported and reenter.

B. *Reinstatement of Removal, the Reasonable Fear Process, and its Shortcomings*

Although an extensive discussion of non-judicial removal is outside the scope of this article, a brief overview is necessary to contextualize the reasonable fear process.⁸⁵ In short, prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), noncitizens in the United States were generally accorded full hearings before an immigration judge who determined, for example, whether they feared return to their home countries and should be allowed to remain in the United States and afforded protection under the Refugee Convention and CAT.⁸⁶ Following IIRIRA, however, Congress created and

⁸² See, e.g., James F. Smith, *United States Immigration Law as We Know It: El Clandestino, The American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 754 n.16 (2005) (“To seek to reopen the matter now, [the noncitizen defendant] or his attorney would have to overcome very difficult legal hurdles such as filing a motion to reopen the order of removal on grounds of ineffective assistance of counsel. But, even if well-presented, it is highly likely that the BIA would deny the motion on the grounds that it was not filed within [ninety] days of the order of removal. While the Ninth Circuit might reverse through the doctrine of equitable tolling, such litigation is far too complex and expensive for most noncitizen defendants.” (citations omitted)).

⁸³ *Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016) (noting that “[s]uch oversight ‘ensure[s] that the BIA lives by its rules and at least considers new information’ bearing on applicants’ need for and right to relief” (quoting *Pilia v. Ashcroft*, 388 F.3d 941, 948 (6th Cir. 2004))).

⁸⁴ See Baldini-Potermin, *supra* note 66.

⁸⁵ For an in-depth discussion, see, e.g., Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013) [hereinafter Koh, *Waiving Due Process*]; Family, *supra* note 1; Wadhia, *supra* note 1.

⁸⁶ Immigration and Nationality Act of 1965, § 10, Pub. L. No. 89-236, 79 Stat. 911, 917–18; see also ACLU, AMERICAN EXILE, *supra* note 74, at 3.

expanded a series of mechanisms to allow for summary deportations of certain individuals without full hearings in front of an immigration judge.⁸⁷ The summary removal procedures permit immigration officers to issue removal or deportation orders, bypassing the courtroom hearing process.⁸⁸

These summary removal procedures include: expedited removal, stipulated orders of removal, administrative removal, and reinstatement of removal, which is the focus of this article. In recent years, the majority of those deported from the United States have been sent back to their home countries through these summary procedures—most through expedited removal or reinstatement of removal.⁸⁹ Expedited removal allows the Department of Homeland Security (DHS) to order removal of certain noncitizens who do not have valid entry documents, with bars on readmission to the United States of five years or more.⁹⁰ Reinstatement of removal allows DHS to order removal of noncitizens who were previously deported and reentered without permission.⁹¹ DHS “reinstates” or, in other words reactivates, the prior removal order, making these individuals “forever deportable” with no statute of limitations.⁹² These prior orders may themselves have been issued *in absentia*, without a hearing on the merits, or in summary proceedings by a DHS official rather than by an

⁸⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 302, 304(d), 305(a)(5), 379(a), Pub. L. No. 104-828, 110 Stat. 3008; ACLU, AMERICAN EXILE, *supra* note 74, at 3.

⁸⁸ ACLU, AMERICAN EXILE, *supra* note 74, at 3.

⁸⁹ BRYAN BAKER, DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 9 (Dec. 2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [<https://perma.cc/ZAM6-MJZ6>] (noting that “nearly [eighty-five] percent were expedited removals or reinstatement of prior removal orders”); *see also* ACLU, AMERICAN EXILE, *supra* note 74, at 3.

⁹⁰ INA § 235(b)(1). Prior to July 2019, expedited removal was only applied to those who were found without proper documentation in the United States within one hundred miles of the border, within fourteen days of entering the country. DHS changed its policy in July 2019, announcing an expansion of expedited removal to encompass any individual found within any part of the United States without valid documentation, within two years of their entry into the country. This expansion was, however, stayed through litigation in federal district court. *See* HILLEL R. SMITH, CONG. RESEARCH SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 1–2 (2019), <https://fas.org/sgp/crs/homesecc/R45314.pdf> [<https://perma.cc/PJ6B-EM2F>].

⁹¹ *See* BAKER, *supra* note 89, at 8–9; *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 305(a)(5).

⁹² Koh, *When Shadow Removals Collide*, *supra* note 1, at 357; Koh, *Removal in the Shadows*, *supra* note 1, at 202–06; *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 305(a)(5).

immigration judge.⁹³ Reinstatement of removal thus allows for immediate deportation without a hearing in immigration court.⁹⁴

In an effort to safeguard noncitizens against return to persecution or torture, the U.S. government created a “safety valve” or “safety hatch”⁹⁵ in some of these summary proceedings, aptly termed “shadow removals” by Jennifer Lee Koh.⁹⁶ For each type of non-judicial removal, the law provides specific procedural protections to screen individuals for fears of return to their home countries. The credible fear process is, for example, the safety valve in expedited removal,⁹⁷ and the reasonable fear process is the safety valve for individuals in reinstatement proceedings and certain types of administrative removal.⁹⁸ Congress established

⁹³ 8 C.F.R. §§ 241.8(a)–(b), 1241.8(b). Judges and scholars alike have decried the due process concerns raised by reinstatement proceedings. *See, e.g.*, Koh, *Removal in the Shadows*, *supra* note 1, at 202–06; Koh, *When Shadow Removals Collide*, *supra* note 1, at 358; *see also* Garcia v. Sessions, 856 F.3d 27, 43 (1st Cir. 2017) (Stahl, J., dissenting) (noting that the majority “ignor[es] the fact that [the noncitizen] was denied due process in his initial removal proceedings”).

⁹⁴ INA § 241(a)(5) (codified as 8 U.S.C. § 1231(a)(5)). Reinstatement only requires that an immigration officer determine (1) the identity of the person in question; (2) whether the person was subject to a prior order of removal, exclusion, or deportation; and (3) whether the person unlawfully reentered the United States. 8 C.F.R. §§ 241.8(a), 1241.8(a). The immigration officer must provide the person with written notice of the reinstatement and allow the person to make a statement contesting the decision. 8 C.F.R. §§ 241.8(b), 1241.8(b). Reinstatement proceedings, unlike expedited removal, may be initiated anywhere in the country. ACLU, AMERICAN EXILE, *supra* note 74, at 19 n.94 (citing a study documenting 8,300 ICE reinstatements in the Chicago area between FY 2007 and FY 2011). DHS can also return people to their home countries under stipulated orders of removal and administrative removal applied throughout the country to bypass the immigration court hearing system. For further discussion of stipulated removals, see Koh, *Waiving Due Process*, *supra* note 85.

⁹⁵ Family, *supra* note 1, at 643.

⁹⁶ Koh, *When Shadow Removals Collide*, *supra* note 1, at 337. Yet, even with these safety valves, summary deportation processes are nonetheless improperly punitive and deny due process to individuals with legitimate claims to protection in the United States. For example, the 2015 Office of the Inspector General report on the Streamline Initiative found that individuals expressing a fear of return to persecution or torture are nonetheless prosecuted, in many cases before the asylum seeker is able to apply for or receive asylum, in violation of U.S. obligations under the Refugee Convention and CAT. OIG REPORT, *supra* note 22, at 16–17 (recommending that Border Patrol “develop, and implement processing and referral guidance for aliens who express a fear of persecution or return to their country of origin at any time during their Border Patrol processing for Streamline” and noting that CBP issued “a guidance memorandum and muster modules to the field to emphasize and further address credible fear determinations in expedited removal cases”).

⁹⁷ *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 302(a). The credible fear process requires border officials placing immigrants in expedited removal to screen for fears of return to persecution or torture and then refer those individuals to USCIS for a credible fear interview with a trained asylum officer. If the immigrant receives a negative credible fear determination, he or she may appeal to an immigration judge for a reinterview. ACLU, AMERICAN EXILE, *supra* note 74, at 33–43.

⁹⁸ *See* 8 C.F.R. § 208.31(c); ACLU, AMERICAN EXILE, *supra* note 74, at 2 (“For many individuals facing reinstatement of a prior order, the only relief they can apply for—assuming they are made aware of it—is mandatory protection for individuals who can demonstrate a reasonable fear of torture or persecution in their country of origin. Again, DHS has the option of using its discretion to terminate the reinstatement process

these safety valves to safeguard individuals, at least in theory, from return to countries where they fear persecution or torture.⁹⁹

Many who undergo the reasonable fear process are individuals with prior removal orders who have returned to the United States for a variety of reasons, including fleeing serious human rights violations in their home countries.¹⁰⁰ Although, as compared to the number of individuals seeking asylum in the United States each year—over 330,000 first time applicants in 2017—¹⁰¹ the number of people who go through the reasonable fear screening process is small, it is nevertheless on the rise. In Fiscal Year 2017, U.S. Citizenship and Immigration Service (USCIS) “clocked in” 10,273 reasonable fear cases¹⁰²—over ten times as many as in Fiscal Year 2008, when 741 were “clocked in.”¹⁰³ USCIS

(and either cancel the reinstatement order, refer the person to a full immigration court hearing, or defer the deportation.”).

⁹⁹ See U.S. Citizenship & Immigration Servs, *Reasonable Fear Screenings: Overview* (Mar. 16, 2011), <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/reasonable-fear-screenings> [<https://perma.cc/JPQ6-UBWK>]; see also Am. Immigration Council, *Removal Without Recourse: The Growth of Summary Deportations from the United States* (Apr. 28, 2014), <https://www.americanimmigrationcouncil.org/research/removal-without-recourse-growth-summary-deportations-united-states> [<https://perma.cc/J3XV-RC3L>]; Family, *supra* note 1, at 643.

¹⁰⁰ See *Complaint* at 1–2, *Garcia v. Johnson*, 14-cv-01775 (N.D. Cal. Apr. 17, 2014), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/RFI%20brief%20FINAL%20filed.pdf> [<https://perma.cc/3VPX-FSZU>]; see also ACLU, AMERICAN EXILE, *supra* note 74, at 3, 19 (noting that “reinstatement of removal,” issued to individuals previously deported who reenter without permission, accounts for the largest single number of deportations ([thirty-nine] percent)” with 159,634 people deported through Reinstatement in FY 2013).

¹⁰¹ U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2017, at 40 (2017), <https://www.unhcr.org/en-us/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html> [<https://perma.cc/ZRW5-H2CK>] (“This represents a [twenty-seven] percent increase from 2016 (262,000) and nearly double the number in 2015 (172,700), and is consistent with a steadily increasing number of asylum claims in the United States of America since 2013.”).

¹⁰² ASYLUM OFFICE DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS, FY2017 REASONABLE FEAR WORKLOAD SUMMARY (2017), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf [<https://perma.cc/29R7-G38C>].

¹⁰³ ASYLUM OFFICE DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS., REP. APCLS344, ASYLUM PRE-SCREENING SYSTEM (Dec. 11, 2014), [hereinafter APSS] (on file with author). The numbers are still low as compared to those who go through the credible fear screening process. For example, from July 2014 to March 2015, USCIS conducted a total of 118 reasonable fear interviews at family detention centers in the United States and reached a decision in 109 cases, with a finding of a reasonable fear of return in 78.9% of cases. By contrast, during that same period, USCIS conducted and decided over 3,400 credible fear interviews at family detention centers, with a finding of a credible fear in 75.3% of cases. See ASYLUM OFFICE DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS, FAMILY FACILITIES REASONABLE FEAR/CREDIBLE FEAR (Apr. 27, 2015), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf> [<https://perma.cc/Y7A8-NJHN>].

found a reasonable fear of persecution or torture in approximately 3,000 cases in FY 2017.¹⁰⁴

Yet, the current fear screening procedures are both unnecessarily narrow and seriously flawed. Reasonable fear interviews, for example, are limited to two types of cases: individuals subject to reinstatement of a prior removal order when found to have “reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, [deportation, or exclusion]”¹⁰⁵ and individuals who are not lawful permanent residents and are convicted of certain aggravated felonies in the United States, who are subject to administrative removal.¹⁰⁶

Moreover, both the credible fear and reasonable fear screening processes are rife with errors, including failures to properly screen for, or listen to, fears of return and pressure to abandon claims for protection.¹⁰⁷ In the reasonable fear

¹⁰⁴ ASYLUM OFFICE DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS, FY2017 REASONABLE FEAR WORKLOAD SUMMARY (2017), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf [<https://perma.cc/922T-PJB8>]. An analysis of data received in a Freedom of Information Act (FOIA) request regarding reasonable fear determinations from January 1, 2013 to December 2014 revealed that out of 9,811 cases decided, women were found to have a reasonable fear of persecution more often than men: 65% of the time, as compared to 51%. FOIA request and results on file with author. The results were analyzed using Stata. During this period, 2,900 reasonable fear of persecution claims involved membership in a particular social group—the most-represented reason for filing a claim—and approximately 78% of these individuals were found to have a reasonable fear. *Id.*

¹⁰⁵ 8 U.S.C. § 1231(a)(5). In this article, I focus on this first category—individuals with prior removal orders caught attempting to reenter the United States, given the similarity of their circumstances to those with unexecuted, outstanding removal orders apprehended within the United States. For comprehensive description of the reinstatement of removal process and requirements for reinstatement of removal, see TRINA REALMUTO, NAT’L IMMIGRATION PROJECT, PRACTICE ADVISORY: REINSTATEMENT OF REMOVAL 4 (2013), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf [<https://perma.cc/848N-JEN8>] (noting that “[t]he plain language of § 241(a)(5) requires an illegal reentry ‘after having been removed or having departed voluntarily, under an order of removal.’ If the client has not departed the country since the removal order, the statute does not apply. However, in this situation, DHS could attempt to execute the outstanding order” (emphasis omitted)).

¹⁰⁶ See 8 U.S.C. § 1228; 8 C.F.R. § 208.31.

¹⁰⁷ Numerous reports have cited flaws in the system, with CBP officers actively discouraging applicants from expressing fears of return and failing to heed the fears articulated. See, e.g., Letter from Keren Zwick et al., Nat’l Immigrant Justice Ctr., to Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep’t of Homeland Sec., and John Roth, Inspector Gen., Dep’t of Homeland Sec., on Inadequate U.S. Customs and Border Protection screening practices block individuals fleeing persecution from access to the asylum process 10–12 (Nov. 13, 2014), <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%2011.13.14%20FINAL%20PUBLIC.pdf> [<https://perma.cc/M5DS-4XP6>] (detailing intimidation tactics by CBP officers and failures to properly acknowledge fears of return); see also “*You Don’t Have Rights Here*,” HUM. RTS. WATCH (Oct. 16, 2014), <http://www.hrw.org/es/node/129878/section/6> [<https://perma.cc/53E6-WMZ4>] (noting that “[b]etween October 2010 and September 2012, the vast majority of Hondurans, 81 percent, were placed in the fast-track expedited removal and reinstatement of removal proceedings; [but] only a miniscule

interview, an asylum officer must assess whether an individual has “a reasonable fear of persecution or torture.”¹⁰⁸ Under the regulations, asylum officers must conduct reasonable fear interviews in “a non-adversarial manner, separate and apart from the general public” and must make sure that the individual being interviewed “has an understanding of the reasonable fear determination process.”¹⁰⁹ The asylum officer must “create a summary of the material facts as stated by the applicant,” which the officer must review with the individual at the end of the interview to provide the individual “with an opportunity to correct errors therein.”¹¹⁰

If an asylum officer determines that an individual has a reasonable fear, then the individual is placed in “withholding only” proceedings and allowed the opportunity to have his or her claim for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA) or for protection under CAT adjudicated in immigration court.¹¹¹ If an asylum officer

minority, 1.9 percent, were flagged for credible fear assessments by CBP”). Under the regulations, absent “exceptional circumstances,” this screening interview must take place within ten days. 8 C.F.R. § 208.31(b). Yet, in practice, many wait weeks or even months and sometimes more than a year, before such a screening takes place and even longer before a decision is reached. Complaint at 2, 7–8, *Garcia v. Johnson*, 14-cv-01775 (N.D. Cal. Apr. 17, 2014), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/RFI%20brief%20FINAL%20filed.pdf> [<https://perma.cc/W65H-82ST>].

¹⁰⁸ 8 C.F.R. § 208.31(c).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* USCIS recently changed its practice with respect to note-taking in the reasonable fear process. Previously, immigrants had to review and sign a sworn statement, which the asylum officer read back to them, and allowed them to correct. Now, asylum officers take interview notes in a question and answer format. In keeping with the regulations, the asylum officer must give the immigrant “a summary of the claim to . . . provide an opportunity [for the immigrant] to correct errors,” as well as an opportunity to “explain any inconsistencies” and “provide more detail concerning material issues.” Memorandum from John Lafferty Chief, Asylum Div., to Asylum Div. Dir’s et al., on Updated Guidance on Reasonable Fear Note-Taking (May 9, 2014), http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2014/MEMO_Updated_Guidance_on_Reasonable_Fear_Note_Taking.pdf [<https://perma.cc/B8V5-NSDR>] [hereinafter Lafferty Memo].

¹¹¹ See 8 C.F.R. §§ 208.31(e), 1208.31(e). Although advocates have repeatedly challenged the limitations inherent in withholding only proceedings, arguing that individuals eligible for asylum should be able to apply for asylum protection as well, multiple circuits have upheld the prohibitions on applying for asylum in withholding only proceedings. See, e.g., *Garcia v. Sessions*, 856 F.3d 27, 30 (1st Cir. 2017) (declining to overturn the Attorney General’s interpretation of the regulations); *R-S-C v. Sessions*, 869 F.3d 1176, 1117 (10th Cir. 2017) (same); *Cazun v. Att’y Gen. U.S.*, 856 F.3d 249, 251 (3d Cir. 2017) (same); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1070 (9th Cir. 2016) (same); see also *Garcia v. Sessions*, 873 F.3d 553, 557 (7th Cir. 2017) (pointing to the plain language of 8 U.S.C. § 1231(a)(5)); *Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017) (same); *Jimenez-Morales v. U.S. Att’y Gen.*, 821 F.3d 1307 (11th Cir. 2016) (same); *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015) (same); *Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010) (same). A discussion of the arguments in support of and against eligibility for applying for asylum in the context of withholding only proceedings is outside the scope of this article.

does not find a reasonable fear of persecution or torture, the individual either is ordered removed or can apply for review of the decision by an immigration judge.¹¹² The immigration judge can then reverse the negative reasonable fear determination and allow the case to go forward for a full hearing in immigration court.¹¹³ The immigration judge can also affirm the negative decision, in which case the applicant can submit a request for re-interview with the Asylum Office, or face removal.¹¹⁴

In order to adequately safeguard all noncitizens against return to persecution or torture, robust fear screening mechanisms need to be applied both to noncitizens who were deported and attempt to reenter and to noncitizens with prior removal orders who were never deported. As set forth in Parts III and IV *infra*, due process and equal protection considerations, as well as U.S. obligations under international law, dictate expansion and amelioration of the reasonable fear process to adequately safeguard the rights of all those who fear removal to a country where they would face persecution or torture.¹¹⁵

III. WHAT CONSTITUTES A MEANINGFUL OPPORTUNITY TO BE HEARD? DUE PROCESS AND EQUAL PROTECTION CONSIDERATIONS

The Supreme Court has repeatedly recognized that “the Fifth Amendment entitles aliens to due process of law in

¹¹² 8 C.F.R. §§ 208.13(f); 1208.31(g); *see also* U.S. Citizenship & Immigration Servs., *Questions & Answers: Reasonable Fear Screenings* (June 8, 2013), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings> [<https://perma.cc/TWX8-TPB5>]. For a full discussion of the ways in which withholding only grantees are disadvantaged as compared to asylum seekers, *see* Harris, *supra* note 18.

¹¹³ 8 C.F.R. §§ 208.13(g)(2), 1208.31(g)(2). USCIS adopted new quality assurance measures in 2014 in an effort to promote consistent decision-making in credible and reasonable fear cases. Prior to 2014, USCIS headquarters reviewed cases with a negative reasonable fear determination; as a result of this new quality assurance measure, headquarters reviews a random sampling of all cases—positive and negative determinations—to promote uniform and unbiased adjudication. *See* Lafferty Memo, *supra* note 110.

¹¹⁴ *See* 8 C.F.R. §§ 208.31(g)(1), 1208.31(g)(1); *see also* Memorandum from Office of Chief Immigration Judge to All Immigration Judges et al., on Implementation of Article 3 of the UN Convention Against Torture 8 (May 14, 1999) (noting the negative RFI review process in immigration court allows for attorney representation, but the role of counsel is limited and at the judge’s discretion).

¹¹⁵ *See, e.g.,* Won Kidane, *Procedural Due Process in the Expulsion of Aliens Under International, United States, and European Union Law: A Comparative Analysis*, 27 EMORY INT’L L. REV. 285, 328 (2013) (noting that the “international standard does not make a distinction between legal and illegal or short-term and long-term residents” in the right to a hearing; “[i]t envisions a situation whereby every alien may be given a right to a hearing before she is expelled”).

deportation proceedings.”¹¹⁶ Noncitizens like Manuel are thus entitled to due process, including an opportunity “to make arguments on [their] own behalf”¹¹⁷ and a “fundamentally fair removal hearing.”¹¹⁸ In addition, noncitizens like Manuel should be afforded equal treatment under the law and should not be subjected to arbitrary and capricious decision-making. In keeping with these principles, noncitizens like Manuel should thus be provided with access to a reasonable fear screening.

A. *Due Process Requires a Meaningful Opportunity to Be Heard*

As the Supreme Court explained in *Mathews v. Eldridge*, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹¹⁹ The Court stressed that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands,” weighing three factors: (1) the private interest affected, (2) the risk of deprivation of this interest under existing procedures and the value of any additional procedural safeguards, and (3) the interest of the government, including the financial and administrative costs of additional procedural requirements.¹²⁰

Where individuals with prior unexecuted removal orders face summary deportation years after the removal order was entered, the private interest affected by the official action is clear, since individuals may face torture or even death if forcibly returned to their countries of origin. The Supreme Court itself has emphasized that “deportation is a drastic measure and at times the equivalent of banishment or exile.”¹²¹ In the *in absentia* removal context, particularly, the risk is high that the

¹¹⁶ *Reno v. Flores*, 507 U.S. 292, 306 (1993); see *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014); see also *Koh, Waiving Due Process*, *supra* note 85, at 487–88.

¹¹⁷ *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001).

¹¹⁸ *Leslie v. Att’y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010) (holding that Fifth Amendment and immigration statute allow for right to counsel of choice); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006) (“The Fifth Amendment guarantees due process in deportation proceedings[, and therefore] an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.” (citations omitted)); *Amadou v. INS*, 226 F.3d 724, 726–27 (6th Cir. 2000) (noting that noncitizens have a “due process right to a full and fair hearing”).

¹¹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹²⁰ *Id.* at 334–35 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹²¹ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

government will deport individuals eligible for protection under the Refugee Convention or CAT, without giving them the opportunity to apply for these or other forms of relief.¹²²

The government's interest in preserving finality, efficiency, and not accruing additional costs with the adoption of new procedures in an already backlogged and overburdened system is clear as well.¹²³ Yet in *Mathews*, the Court emphasized that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular safeguard prior to some administrative decision."¹²⁴ Although the Court noted that the cost of an additional safeguard can at times outweigh the benefit,¹²⁵ the Court focused its analysis on times when judicial procedures are necessary to ensure that procedures are fair.¹²⁶ Federal circuit courts of appeal have echoed this reasoning when reviewing immigration judge decisions, noting the importance of hearing "claims out fully and fairly."¹²⁷

However, unlike in *Mathews*, where established procedures provide a "meaningful opportunity" to be heard as well as "an effective process" and "assure a right to an evidentiary hearing,"¹²⁸ no such assurances or evidentiary hearings are available to individuals with prior unexecuted removal orders. As Jennifer Lee Koh has noted, the statutory rights that apply to immigration proceedings "only become a reality when the immigrant appears for a court hearing."¹²⁹

The Court in *In re Gault* warned of the consequences of failing to safeguard due process, and the "instances, which might

¹²² See Koh, *Waiving Due Process*, *supra* note 85, at 528 (applying *Mathews* and describing the risks of deportation in the stipulated removal context). Although it is difficult to know exactly how many of those with prior, unexecuted removal orders might be eligible for immigration relief, in FY 2016, approximately forty percent of cases presented in immigration court resulted in either a grant of immigration relief, voluntary departure, or termination. See FY 2016: STATISTICS YEARBOOK, *supra* note 76, at C2, C4, O1 (twelve percent of cases in FY 2016 resulted in relief from removal, eight percent in voluntary departure, and twenty percent were terminated). In the stipulated removal context, Jennifer Lee Koh calculated that EOIR's statistics suggested that almost forty-five percent of those who pursued their cases in front of an IJ received "an outcome better than a formal removal order." Koh, *Waiving Due Process*, *supra* note 85, at 536.

¹²³ See TRACIMMIGRATION, *supra* note 16.

¹²⁴ *Mathews*, 424 U.S. at 348.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Colmenar v. INS*, 210 F.3d 967, 973 (9th Cir. 2000); see also *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006) ("The BIA's decision will be reversed on due process grounds if (1) the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) the alien demonstrates prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation." (internal quotation marks and citations omitted)).

¹²⁸ *Mathews*, 424 U.S. at 349.

¹²⁹ Koh, *Waiving Due Process*, *supra* note 85, at 488.

have been avoided, of unfairness to individuals”¹³⁰—unfairness epitomized by the summary removal of individuals with unexecuted removal orders entered in absentia or without a full understanding of the situation facing the individual if forced to return. As the Court noted in *Gagnon v. Scarpelli*, the “loss of liberty entailed is a serious deprivation requiring that the [individual] be accorded due process.”¹³¹

Individuals the government apprehends based on prior unexecuted removal orders despite living in the United States for years generally do not have the opportunity to present their fears of return to an adjudicator. Such would have been the case with hundreds of Iraqis and Somalis summarily targeted for deportation in 2017 and 2018, if the ACLU and the University of Miami Immigration Clinic, among others, had not filed legal challenges to stay their removal. District courts in Michigan and Florida recognized the irreparable harm these individuals faced and stayed their deportations to provide them with time to submit motions to reopen.¹³²

Yet, even with the additional time, the cumbersome motion to reopen process does not provide a “meaningful” opportunity to be heard.¹³³ Accordingly, additional protections in the form of a pre-removal screening procedure, discussed further below, offer the government significant benefits in terms of the “*accurate* and *lawful* adjudication of removal cases” that outweigh any costs.¹³⁴ As Professor Jill E. Family has noted,

¹³⁰ *In re Gault*, 387 U.S. 1, 19 (1967).

¹³¹ *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 790–91 (1973) (noting that “fundamental fairness” is “the touchstone of due process” and finding that that where there was neither a preliminary nor a final hearing, revocation of probation did not meet due process standards).

¹³² See Plaintiffs/Petitioners’ Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq at 2, *Hamama v. Adducci*, 258 F. Supp. 3d 828 (E.D. Mich. 2017) (No. 17-cv-11910-MAG-DRG), http://www.aclumich.org/sites/default/files/Hamama_Motion_to_Expand_Stay_of_Removal.pdf [<https://perma.cc/V2RK-HZXS>] (noting that “the Petitioners face irreparable harm given the ‘significant chance of loss of life and lesser forms of persecution’ which ‘far outweighs any conceivable interest the Government might have in the immediate enforcement of the removal orders’”); Order Extending Stay of Enforcement of Removal Orders Pending Court’s Review of Jurisdiction, 258 F. Supp. 3d 828 (E.D. Mich. 2017), https://www.aclu.org/sites/default/files/field_document/17-11910_hamama_order_extending_stay.pdf [<https://perma.cc/NLD7-BYAQ>]; see also Mila Koumpilova, *Case of Botched ICE Flight to Somalia Signals Legal Shift on Deportations*, STAR TRIBUNE (Feb. 7, 2018), <http://www.startribune.com/case-of-botched-ice-flight-to-somalia-signals-legal-shift-on-deportations/473252303/> [<https://perma.cc/32GG-848L>]; *Class Action for 92 Somalis – Immigration Clinic Files Suit*, MIAMI U. SCH. L. (May 16, 2018), law.miami.edu/news/2018/may/class-action-92-somalis-immigration-clinic-files-suit [<https://perma.cc/3BD3-2RBF>].

¹³³ See *supra* Section II.A.

¹³⁴ Koh, *Waiving Due Process*, *supra* note 85, at 538 (noting that “the government has a strong interest in the *accurate* and *lawful* adjudication of removal cases,” as well as in principles of “family unity, economic growth, and humanitarian concerns” and

“[a]voiding adjudication devalues the accuracy objective,” and “[t]he search for truth” necessarily “take[s] the backseat in a process that steers individuals away from ever accessing the adjudication system.”¹³⁵

To be sure, courts have found that *in absentia* removal proceedings do not violate principles of due process,¹³⁶ and people living in the United States for years with unexecuted removal orders could have attempted to reopen their cases earlier, potentially leading individuals to express a fear of return where they may not have one. But statute and regulations impose harsh penalties, including fines, potential jail time, as well as a bar to eligibility for any immigration relief, on individuals who file frivolous asylum claims, which should deter misuse of the screening mechanism. In any event, the costs of violating the *non-refoulement* principle by deporting refugees to torture or death far outweigh the costs incurred from any potential misuse of the additional procedures.

B. Equal Protection Principles and the Administrative Procedures Act Require Access to Reasonable Fear Screenings for Individuals with Unexecuted Removal Orders

The arbitrary distinctions drawn between those with removal orders who have been deported and reenter and those who reside in the United States with prior orders but have never left violate equal protection principles. Federal courts have noted that “individuals within a particular group”—in this case those with prior removal orders—“may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.”¹³⁷ In the situations at hand, there is no legitimate government interest in drawing distinctions between those with prior orders who left and reentered and those who remained.

As the Second Circuit noted in *Francis*, “[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual

emphasizing that “[o]nce the costs of the current stipulated removal procedure are exposed, it becomes clear that the alternatives are far less costly”).

¹³⁵ Family, *supra* note 1, at 635.

¹³⁶ See, e.g., *Shah v. INS*, 788 F.2d 970, 971–72 (4th Cir. 1986) (upholding immigration judge’s *in absentia* removal of a Pakistani, reasoning, *inter alia*, that petitioner had a reasonable opportunity to be present at the deportation hearing); *Patel v. INS*, 803 F.2d 804, 805–07 (5th Cir. 1986) (same as to Indian petitioner).

¹³⁷ *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

who may leave and return from time to time.”¹³⁸ Similarly, in *Judalang v. Holder*, Mr. Judalang, a lawful permanent resident charged under the aggravated felony crime of violence ground of deportability, argued, and the Supreme Court agreed, that the comparable grounds policy, which arbitrarily distinguished between those who remained in the country and those who left and attempted to reenter in terms of eligibility for discretionary 212(c) relief was arbitrary and capricious under the Administrative Procedures Act.¹³⁹

The Court found that under the comparable grounds policy, the Board improperly limited eligibility for discretionary 212(c) relief from removal based on the grounds of deportability the individual was charged under, despite precedent establishing that lawful permanent residents facing either deportability or inadmissibility charges could seek 212(c) relief. The Court explained that “[b]y hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.”¹⁴⁰ The Court went on to conclude that “[a] method for disfavoring deportable [as opposed to inadmissible] aliens that . . . neither focuses on nor relates to an alien’s fitness to remain in the country—is arbitrary and capricious.”¹⁴¹

Thus, the current distinctions in the law between those with prior removal orders who are covered by the reasonable fear process and those who are not, like the distinctions in *Francis* and *Judalang*, have no rational basis and are arbitrary and capricious.¹⁴²

¹³⁸ *Id.*; see also *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976) (“In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens.”).

¹³⁹ *Implications of Judalang v Holder for LPRs seeking § 212(c) Relief and for Other Individuals Challenging Arbitrary Agency Policies*, NAT’L IMMIGR. PROJECT (Dec. 16, 2011), https://americanimmigrationcouncil.org/sites/default/files/practice_advisory/Judalang-212-c-relief.pdf [<https://perma.cc/2TJ4-S4BG>]. For an in-depth discussion of *Judalang* in the context of reinstatement of removal and expedited, see generally Koh, *When Shadow Removals Collide*, *supra* note 1; Kate Aschenbrenner Rodriguez, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*, 69 OKLA. L. REV. 111 (2017).

¹⁴⁰ *Judalang v. Holder*, 565 U.S. 42, 53 (2011).

¹⁴¹ *Id.* at 55.

¹⁴² See *Song v. INS*, 82 F. Supp. 2d 1121, 1123–24 (9th Cir. 2000) (finding that congressional decisions which draw distinctions between immigrants can be invalidated under the Equal Protection Clause if there is no rational basis for the distinction).

IV. THE NEED FOR EXPANDED SAFEGUARDS AGAINST RETURN TO PERSECUTION OR TORTURE

Unlike the cumbersome motion to reopen process, the reasonable fear screening process affords individuals facing removal from the United States a relatively straightforward mechanism through which to express their fears of persecution or torture to a USCIS asylum officer. Yet by failing to extend protection to individuals subject to unexecuted removal orders, the current reasonable fear regulations do not adequately safeguard individuals who fear persecution and torture in their home countries.¹⁴³ As discussed *supra*, current procedures are thus out of step with U.S. obligations under the Refugee Convention and CAT, as well as principles of due process and equal protection.¹⁴⁴

A. *Expansion of the Reasonable Fear Process and the Need for Additional Safeguards*

The reasonable fear process should be expanded to all those with prior removal orders—including outstanding orders that have not yet been executed—who fear return to their home countries. In its overview of the reasonable fear process on the

¹⁴³ Moreover, the reasonable fear regulations unnecessarily restrict the protection available to those with prior removal orders to withholding of removal under section 241(b)(3) and under CAT, barring them from asylum. Although extensive discussion of this issue is beyond the scope of this paper, advocates have long argued that the reasonable fear process should be expanded to allow for immigrants to apply for asylum, as well. For further discussion of this issue, see, e.g., Brief of Amicus Curiae American Immigration Lawyers Association et al., *Perez-Guzman v. Holder*, No. 13-70579 (9th Cir. Apr. 9, 2014); Letter to Jeh Johnson from Asylum and Immigration Law Practitioners and Scholars (Mar. 2014) (on file with author) (noting that “[i]n New Orleans, ICE officials have asserted to advocates that they have the authority to remove [E- G-V- A#], who was originally granted voluntary departure more than 10 years ago and has remained in the United States, without referring him to USCIS for a reasonable fear interview”). Mr. G-V- was ultimately removed, despite the filing of a motion to reopen by the New Orleans Workers’ Center for Racial Justice, which engaged in extensive advocacy on this issue.

¹⁴⁴ A report filed by U.S. NGOs with the United Nations Committee Against Torture emphasized that “[t]he United States regularly fails in its obligation under Article 3 of the CAT to respect the right to *nonrefoulement* in its immigration laws, policies and practices.” ADVOCATES FOR HUMAN RIGHTS & DET. WATCH NETWORK, VIOLATIONS OF ARTICLE 3 AND 16 RIGHTS OF REFUGEES, ASYLUM SEEKERS AND NON-CITIZENS 1 (Nov. 28, 2014), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18567_E.pdf [<https://perma.cc/D49A-9JJP>] (noting that “[s]ome violations result from the statutory framework itself, while others are a matter of administrative policy, agency practice or lack of accountability for individual bad actors”). The report cites the U.S.’s failure to create “an adequate legal mechanism implementing fully the obligations of Article 3,” criticizing the government’s use of “mandatory removal . . . without a discretionary hearing in a broad category of cases” and summary deportation procedures for their violations of “non-citizens’ rights to due process, access to counsel, presentation of their case before a judge, and other fundamental safeguards of fairness.” *Id.* at 3, 6, 7.

USCIS website, the agency recognizes that ICE “may not remove individuals to a country where they are ‘more likely than not’ going to be persecuted and tortured”¹⁴⁵ and states, “[i]f you have been ordered removed and you express a fear of returning to the country to which you have been ordered removed, ICE must refer your case to an asylum officer who will determine whether you have a reasonable fear of persecution or torture.”¹⁴⁶ U.S. obligations under the Refugee Convention and CAT mandate this more expansive interpretation of the reasonable fear process.

Although the expansion of the reasonable fear process to those who have not yet left the country would involve additional resources from the USCIS Asylum Office, which conducts those screenings, cost alone cannot, as noted, excuse lack of compliance with constitutional requirements or international and domestic obligations of *non-refoulement*.¹⁴⁷ Nor can the government’s interests in finality and efficiency be considered separate from the high costs that come with detention and deportation of refugees who have valid claims for relief.¹⁴⁸

The government must invest further resources in the hiring and training of asylum officers to ensure that such screenings can be conducted efficiently and effectively, providing a more fundamentally fair process for individuals who fear return to serious harm, torture, or even death. An expansion of reasonable fear screenings, in lieu of the motion to reopen process, would also make the process easier to navigate for applicants, the majority of whom are *pro se*.¹⁴⁹

In developing this system, the United States should draw on the Pre-Removal Risk Assessment (PRRA) process in Canada, wherein screenings are offered to those who are “removal ready” and their removals are stayed to allow for assessment of their fears of return. Similarly, individuals who reside in the United States for years after they are ordered removed should periodically be afforded access to reasonable fear screenings. Such a pre-removal risk assessment would safeguard the rights of refugees and ensure that the critical reasonable fear safety valve is applied equitably to all noncitizens.

¹⁴⁵ *Questions & Answers: Reasonable Fear Screenings*, *supra* note 112.

¹⁴⁶ *Id.* When an asylum officer determines that an individual has a fear of persecution or torture, the individual can then seek either withholding of removal or deferral of removal in a hearing before an immigration judge. *Id.*

¹⁴⁷ *See supra* Part II.

¹⁴⁸ *See supra* Section II.A.

¹⁴⁹ *See supra* Section II.B.

B. *What the United States Can Learn from Other Countries*

As noted above, state parties to the Refugee Convention and CAT are obligated to establish procedures to guarantee effective protection against return to persecution or torture for noncitizens on a case-by-case basis prior to removal.¹⁵⁰ The European Court of Human Rights (ECHR) provided the following guidance regarding the required procedures in *Hirsi Jamaa and others v. Italy*, explaining that:

For the refugee-status determination procedure to be individual, fair and effective, it must necessarily have at least the following features:

- (1) a reasonable time-limit in which to submit the asylum application;
- (2) a personal interview with the asylum applicant before the decision on the application is taken;
- (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application;
- (4) a fully reasoned written decision by an independent first-instance body, based on the asylum-seeker's individual situation . . . ;
- (5) a reasonable time-limit in which to appeal against the decision . . . ;
- (6) full and speedy judicial review . . . ; and
- (7) free legal advice and representation and, if necessary, free linguistic assistance¹⁵¹

The ECHR in *Hirsi Jamaa* explained that “[t]he duty not to *refouler* is . . . recognized as applying to refugees irrespective of their formal recognition.”¹⁵² It noted that the duty “encompasses *any measure attributable to a State* which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution.”¹⁵³

In his concurring opinion in *Hirsi Jamaa*, Judge Pinto de Albuquerque emphasized that the principle of *non-refoulement* applies both “to those who have not yet had their status declared . . . and even to those who have not expressed their wish

¹⁵⁰ *Hirsi Jamaa and others v. Italy*, App. No. 27765/09, 2012-II Eur. Ct. H.R. 97, 150, 158–59 (2012) (citing the importance of procedural guarantees to protect the human rights of refugees and noting that “UNHCR stated that the principle of *non-refoulement* involved procedural obligations for States”).

¹⁵¹ *Id.* at 180.

¹⁵² *Id.* at 113 (holding that Somali and Eritrean immigrants being intercepted by Italian authorities in the high seas and being returned was contrary to the principle of *non-refoulement*).

¹⁵³ *Id.* (emphasis added).

to be protected” given the absolute duty to protect against refoulement, and therefore, “neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the non-refoulement obligation.”¹⁵⁴ In so doing, he underscored the key principle that state parties have an obligation to safeguard individuals against *refoulement*, regardless of whether the state has recognized the individual as a refugee or not.¹⁵⁵

The European Asylum Procedures Directive (APD) recognizes the need for “effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts . . . and sufficient procedural guarantees to pursue” a claim for protection.¹⁵⁶ The APD mandates that individuals who express a fear of return be accorded a personal interview, along with “an adequate opportunity to present elements needed to substantiate the application . . . as completely as possible.”¹⁵⁷ The European Qualification Directive similarly requires the assessment of fears of return on an individual basis, taking into account the relevant facts regarding the personal circumstances of the applicant, the country of origin, statements and documents presented by the applicant, if any, among other criteria.¹⁵⁸

¹⁵⁴ *Id.* at 170–71 (separate opinion by Pinto de Albuquerque, J.); see also Chahal v. UK, App. No. 22414/93, 23 Eur. Ct. H.R. 1, 24–25 (1996) (noting that “the Court’s examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 (art. 3) and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe”).

¹⁵⁵ See Case C-534/11, Arslan v. Czech Republic, 2013 E.C.R. 225/21 (May 30, 2013) (concluding that if a person applied for asylum after he was detained and ordered removed then the state must determine his application before removal).

¹⁵⁶ Directive 2013/32/EU, of the European Parliament and of the Council, of 26 June 2013, on Common Procedures for Granting and Withdrawing International Protection, 2013 O.J. (L 180) ¶ 25 (emphasis added) [hereinafter APD 2013].

¹⁵⁷ *Id.* at art. 16; see also *id.* at art. 40.2 (noting that “a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant”). *But see id.* ¶ 36 (“Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.”).

¹⁵⁸ Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011, on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, 2011 O.J. (L 337) 9, 14, art. 4; see also UNHCR Research Project on Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, sec. IV (Mar. 2010) (outlining the requirements for a personal interview). The ECHR has also repeatedly emphasized the special circumstances of asylum seekers, and the need to accord them the benefit of the doubt. See, e.g., *Affaire Singh et autres c. Belgique* [Singh and others v. Belgium], App. No. 33210/11, (Eur. Ct. H.R. Oct. 2, 2012);

Furthermore, the “right to be heard” is recognized as “part of the general principles of EU law” and “is affirmed in Article 41 of the European Charter of Fundamental Rights, which provides for the ‘right of every person to be heard, before any individual measure which would affect him or her adversely is taken.’”¹⁵⁹ Additionally, “Article 13 of the ECHR requires a remedy with automatic suspensive effect when the implementation of a return measure against [an asylum applicant or refugee] might have potentially irreversible effects.”¹⁶⁰

Canada has established a PRRA process to supplement the refugee status determination system, which affords certain individuals fear screenings prior to removal.¹⁶¹ Individuals are generally allowed to apply for PRRA protection a year after their refugee claim was refused and when they have exhausted all remedies.¹⁶² When a person is “removal-ready” the Canada Border Services Agency provides the individual with a PRRA application kit and the individual’s removal is stayed to allow for consideration of the application.¹⁶³ The PRRA defines the test for risk broadly as including grounds in the Refugee Convention and CAT as well as the “risk to life.”¹⁶⁴

The United States can look to the Canadian example and should consider adopting a similar case-by-case pre-removal risk assessment screening procedure for individuals who have unexecuted removal orders. Doing so would be an important step

SF and others v. Sweden, App. No. 52077/10, ¶¶ 68–69 (Eur. Ct. H.R. May 15, 2012); RC v. Sweden, App. No. 418277/077, ¶ 50 (Eur. Ct. H.R. Mar. 9, 2010); Saadi v. Italy, App. No. 37201/06, ¶ 129 (Eur. Ct. H.R. Feb. 28, 2008); Collins and Akaziebie v. Sweden, App. No. 23944/05 (Eur. Ct. H.R. Mar. 8, 2007); Matsiukhina and Matsiukhin v. Sweden, App. No. 31260/04 (Eur. Ct. H.R. June 21, 2005).

¹⁵⁹ U.N. HIGH COMM’R FOR REFUGEES, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS 121 (May 2013) (emphasis omitted).

¹⁶⁰ European Court of Human Rights, Council of Europe, European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders and Immigration 115 (2014).

¹⁶¹ See BENJAMIN R. DOLIN & MARGARET YOUNG, LAW AND GOVERNMENT DIVISION, BP-185E, CANADA’S REFUGEE PROTECTION SYSTEM 15 (Oct. 2002); *Pre-removal Risk Assessment—Refugee Claims in Canada*, CANADA.CA, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/after-apply-next-steps/refusal-options/pre-removal-risk-assessment.html> [https://perma.cc/43Y8-MCK2].

¹⁶² *Processing Pre-Removal Risk Assessment (PRRA) Applications: Intake*, CANADA.CA, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/removal-risk-assessment/applications-intake.html> [https://perma.cc/HWE4-CJ5Q]; see DOLIN & YOUNG, *supra* note 161, at 15 (noting that individuals granted protection through Canada’s PRRA process are also eligible for permanent residence).

¹⁶³ *Processing Pre-Removal Risk Assessment Applications*, *supra* note 162.

¹⁶⁴ DOLIN & YOUNG, *supra* note 161, at 15; see also *Guide 5523 – Applying for a Pre-Removal Risk Assessment*, CANADA.CA, <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5523-applying-removal-risk-assessment.html> [https://perma.cc/3VK2-GGAV].

toward fulfilling U.S. obligations not to return individuals to countries where they fear persecution or torture.

CONCLUSION

Implementation of such a pre-removal risk assessment screening for those with unexecuted removal orders would rectify a fundamental inequity in the current system that existing scholarship has not yet highlighted: the disparate treatment of immigrants with prior removal orders who remain in the United States, as compared to immigrants with prior removal orders who are deported and then reenter.

Although those residing in the United States with unexecuted orders should have had their fears of return heard and adjudicated prior to an immigration judge ordering them removed in the first place, the shortage of adequate legal representation and other systemic flaws mean that this is not often the case. Some may never have had their day in court, if, for example, like Manuel, they were too traumatized to appear or their hearing notices were lost in a bureaucratic shuffle. Others may not have understood the forms of relief available to them or may not have been able to open up fully about their past harm, given the lasting effects of the trauma suffered. Even if they had a court hearing, it might have been truncated or incomplete.

A universal reasonable fear screening prior to removal would protect against improper return of immigrants to persecution and torture in contravention of domestic and international obligations under the Refugee Convention and CAT. While it may be tempting to dismiss individuals with prior orders who express a fear of return as merely looking for a second bite at the apple or as fabricating claims where they have none, the imposition of harsh penalties—including fines, jail time, and bars against eligibility for any immigration relief—for filing frivolous claims for protection, as mandated under current law, would likely deter such abuse of this system.

Given that the mechanism for such reasonable screenings already exists in the reinstatement (as well as administrative) removal context, it would not require the establishment of new procedures, but rather a change in policy to allow for the application of reasonable fear screenings to individuals with prior unexecuted removal orders. The United States, like its counterparts in Europe and Canada, has a responsibility to fully comply with its *non-refoulement* obligations and must take additional steps to prevent the

return of bona fide refugees to countries where they would face persecution, torture, or even death. Extending the reasonable fear process to individuals with prior unexecuted removal orders would also comport with principles of due process and equal protection and ensure that all immigrants who fear for their lives are afforded a meaningful opportunity to be heard.