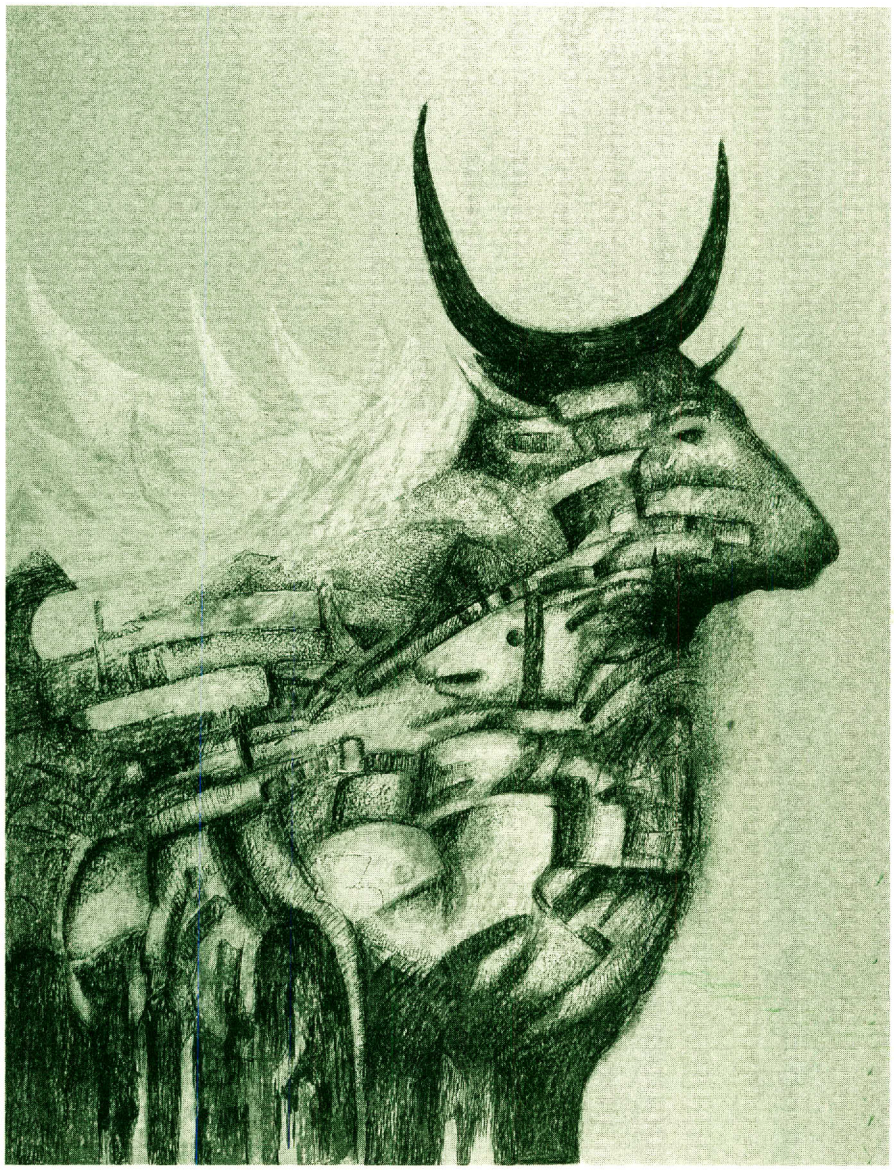
TEXAS HISPANIC JOURNAL OF LAW & POLICY
THE UNIVERSITY OF TEXAS SCHOOL OF LAW

Spring 2014 Volume 20



Tauro **Alberto Jimenez Quinto**

TEXAS HISPANIC JOURNAL OF LAW & POLICY

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

VOLUME 20 SPRING 2014

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ISSN 1547-4887
The University of Texas at Austin School of Law Publications, Inc.

Cite as: Tex. Hisp. J.L. & Pol'y

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ARTICLES

SET UP FOR ABDUCTION AND EXTORTION BY THE IRS: DOES THE REPORTING OF INTEREST PAID ON U.S. BANK DEPOSITS UNDERMINE THE GOVERNMENT'S OBLIGATION TO AVOID INSTIGATING TERRORISM BY FOREIGN CRIMINAL GANGS AND DRUG CARTELS?

DARREN A. PRUM* & CHAD G. MARZEN**

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* Assistant Professor of Legal Studies, The Florida State University.
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I. INTRODUCTION

Overturning ninety years of foreign and tax policy while initiating a possible exodus of huge sums of private investment funds from financial institutions in the United States due to numerous concerns over corruption in foreign governments, the Internal Revenue Service (IRS) finalized and codified its efforts to report interest income earned at domestic banks for accounts held by nonresident aliens.[1] This effort by the IRS to require the reporting of interest income began under the Clinton administration,[2] stalled under the Bush administration,[3]

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1. Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. 23,391 (Apr. 19, 2012) (to be codified at 26 C.F.R. pts. 1, 31).

2. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 76 Fed. Reg. 1105, 1106 (Jan. 7, 2011) (to be codified at 26 C.F.R. pts. 1, 31) (noting that the IRS and Treasury Department initially published a notice of proposed rulemaking regarding this effort on January 17, 2001).

3. *See* Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 67 Fed. Reg. 50,386, 50,386-87 (Aug. 2, 2002) (to be codified at 26 C.F.R. pts. 1, 31) (describing the withdrawal of the regulations proposed in 2001 and the issuance of new, less expansive regulations in 2002).

and became finalized by the Obama administration on April 19, 2012, because the agency deemed the policy as vital to its efforts to fight against offshore tax evasion.[4]

Ignoring strong opposition from industry[5] and members of Congress representing both political parties,[6] the IRS felt that its need to collect data outweighed any concerns raised against its proposal.[7] However, this decision by the IRS has the potential to trigger broad consequences across many facets of tax, commerce, and international policy and law, as well as the war against terrorism.

Since many nonresident aliens routinely face political unrest in their home countries, they highly value the confidentiality and stability afforded by this U.S. policy.[8] Thus, even a small threat to their safety and security will invariably lead to the repositioning of their investment funds. This is especially true considering that they will now rely on the IRS to safeguard their private information, and any miscalculation or lapse in judgment when the IRS exchanges this data with foreign governments could lead to a disastrous personal situation in a nonresident alien's home country. Consequently, a nonresident alien will not take such risks when they can easily move their funds to another country's financial institution that need not adhere to the IRS's policies and does not pose such potentially severe liabilities.

In reviewing the scholarly legal literature on this new reporting policy by the IRS, one commentator explored the early proposals in the context of privacy concerns,[9] whereas other scholars examined a combination of the tax and/or international law aspects of such a

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4. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,391-92 (describing the objectives of the regulatory action).

5. *See* Robert Goulder, *News Analysis: How the U.S. is a Tax Haven for Mexico's Wealthy*, 124 TAX NOTES 739, 743-44 (Aug. 24, 2009) ("[T]he revised regulation drew vocal opposition from the banking industry and its Capitol Hill allies.").

6. *See* Letter from the Florida Congressional Delegation to President Barack Obama (Mar. 2, 2011) (on file with author).

7. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,391-94 (discussing and dismissing concerns voiced in response to the IRS's proposed regulatory action).

8. *See* Letter from the Florida Congressional Delegation to President Barack Obama, *supra* note 6. Mexico provides a perfect example of such a country because of its proximity to the United States coupled with the violence, kidnappings, and extortion that now frequently occur there. *See* Goulder, *supra* note 5, at 740 (describing the violence in Mexico that has resulted from a crackdown on the illegal drug trade). Many Mexican citizens are less concerned with paying taxes than with the terrorist threat of being extorted by someone who knows the balance of your bank account, so they deposit their savings and investment funds into U.S. financial institutions as a security measure. *Id.* ("The appeal of U.S. bank secrecy . . . exists for the many thousands of affluent or middle-class Mexicans who earn legitimate incomes. Why would they put their money in a Mexican bank? U.S. banks are widely regarded as more secure, better regulated, and better managed.").

9. *See* Cynthia Blum, *Sharing Bank Deposit Information With Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579, 602-06 (2004) (discussing privacy concerns related to one's financial information).

policy but did not apply their analysis to this particular issue.[10] With this in mind, this article explores the history and policy decisions that created the current bank secrecy provisions for earned interest on nonresident alien bank accounts held at domestic financial institutions while also examining how the new reporting requirements adopted by the IRS will produce claims against the U.S. government under the Federal Torts Claims Act and the Alien Tort Claims Act,[11] as well as give ground in the war against global terrorism.

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10. *See, e.g.*, Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1033-34 (1997) (discussing dilemmas involved in international taxation); Laura Szarmach, Note, *Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case*, 43 CORNELL INT'L L.J. 409, 423-25 (2010) (discussing multilateral options and other tax policy measures to address tax evasion).

11. The Alien Tort Claims Act, 28 U.S.C. § 1350 (2006), has been the subject of numerous works of legal scholarship. Recent scholarship ranges in focus from **corporate liability:** Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and The Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247 (2009) [hereinafter Dhooge II]; Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO L.J. 2161 (2012); Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heel in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227 (2011); Frank Cruz-Alvarez & Laura E. Wade, *The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch*, 65 U. MIAMI L. REV. 1109 (2011); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2011); Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79 (2011); Daniel Prince, *Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?*, 8 SETON HALL CIRCUIT REV. 43 (2011); Joel Slawotsky, *The Conundrum of Corporate Liability Under the Alien Tort Statute*, 40 GA. J. INT'L & COMP. L. 175 (2011); Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385 (2010); Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931 (2010); Frank Christian Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding and Abetting Liability Under the Act*, 25 QUINNIPIAC L. REV. 751 (2007); Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005); Edwin V. Woodsome, Jr. & T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a "Reason to Know" Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 26 LOY L.A. INT'L & COMP. L. REV. 89 (2003); **labor rights:** Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203 (2004); Vanessa R. Waldref, *The Alien Tort Statute After Sosa: A Viable Tool in the Campaign to End Child Labor?*, 31 BERKELEY J. EMP. & LAB. L. 160 (2010); **human rights litigation:** Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393 (2006) [hereinafter Dhooge I]; David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J. INT'L L. 121 (2010); **the historical foundations of the statute:** Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); John C.P. Goldberg, *Tort Law at the Founding*, 39 FLA. ST. U. L. REV. 85 (2011); M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316 (2009); Martha Lovejoy, Note, *From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute*, 12 YALE HUM. RTS. & DEV. L.J. 241 (2009); and **defenses to claims under the Act:** Seth Korman, *The New Deference-Based Approach to Adjudicating Political Questions in Corporate ATS Cases: Potential Pitfalls and Workable Fixes*, 9 RICH. J. GLOBAL L. & BUS. 85 (2010); Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT'L L. REV. 455 (2008); Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245 (2006).

As such, we cover the U.S. government's policy on the reporting of earned interest in domestic banks held by nonresident aliens in section I. The history of this particular tax policy starts with the passage of the XVI Amendment to the U.S. Constitution, evolves over the past century until the proposals put forward by the IRS starting in 2001, and concludes with the adoption of a final rule in 2012.

In section II, we assess the current threat posed by foreign criminal gangs and drug cartels with respect to the IRS reporting requirements for earned interest on nonresident alien accounts held in U.S. financial institutions. Given the immediate and real threat posed by these organizations, we describe the past and current rise in power and influence of these criminal gangs and drug cartels while spelling out how lucrative this information could be when targeting, kidnapping, and extorting innocent victims.

In section III, we discuss the aggressive response of the United States government to the Mexican drug cartels and transnational criminal organizations through its cooperation with Mexico in the Merida Initiative, and that the United States government acknowledges that the drug cartels remain an ever-present and serious threat to national security. Section IV contends that the rule change will result in increased litigation in the federal courts with claims arising from the Federal Tort Claims Act and Alien Tort Claims Act and analyzes potential causes of action under both statutes. In section V, we contend that the policy weakens longstanding U.S. economic policies that encourage foreign bank deposits and threatens a fragile economy in recovery, violates international legal obligations of the United States under the Convention Against Torture, and hinders the fight against terrorism. In conclusion, with the balancing of policy considerations regarding the rule change, change in a longstanding policy significantly hinders U.S. economic and foreign policy interests—change is truly not better here.

II. Reporting of Interest Paid to Nonresident Aliens

In its second attempt in 11 years, the IRS finally succeeded in adopting regulations that require the reporting of accrued interest by U.S. banks on accounts held by nonresident alien individuals.[12] Despite vigorous opposition and a policy founded on encouraging investment in the U.S. and its competitiveness around the world, the IRS decided that its need to gather data and the ability to exchange it with foreign governments outweigh the need to follow a longstanding and thoroughly discussed approach.[13] Prior to any discussion on the implications of such an important decision by the IRS, the historical rationale and modern

12. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,394-95 (setting forth the amendments to the relevant regulations).

13. *See id.* (discussing the rationale behind and adoption of the IRS's new reporting policy).

debate provide the necessary contextual backdrop. As such, we describe the pertinent legislation and history, as well as the announcements and reasoning by the IRS in making its final decision.

A. Tax Policy in the United States

In examining the treatment of the interest earned by nonresident alien account holders in U.S. banks, three distinct periods of public policy exist. With the passage of the XVI Amendment to the U.S. Constitution making an income tax legal, the U.S. government deferred to common law principles in developing source rules that determined to treat this type of interest as taxable income. However, Congress decided to adopt a policy that followed a state income tax approach and that encouraged investment by implementing new source rules that classified the interest earned from nonresident alien bank account holders as foreign subsequent to World War I. This approach lasted until 1966 when Congress modified its philosophy to declare all bank interest generated in the U.S. as taxable income; but it provided an exemption for nonresident aliens. Accordingly, the proposal and finalized regulations by the IRS that require the reporting of interest with respect to nonresident alien bank accounts in the U.S. undermines congressional intent over the past 90 years.

1. Policy Origins

Regarding the decision to exclude the reporting of interest for bank accounts held by nonresident aliens, the origins of the policy date back to Congress' inquiries into supporting World War I efforts through the imposition of a war profits or excess profits tax and the Treasury Department's Professor Thomas S. Adams' effort to change the country's international tax policy by creating the foreign tax credit (FTC).[14] In 1918, taxation on the same interest income from both foreign and U.S. governments posed serious obstacles to those Americans doing business and investing outside the country because World War I triggered a global escalation in tax rates.[15] As such, Congress passed the Revenue Act of 1918, which included the foreign tax credit; it allowed U.S. citizens to claim the credit against their domestic income taxes and permitted resident aliens to do the same, so long as their

14. *See* Graetz & O'Hear, *supra* note 10, at 1044-45 (highlighting Adams' contributions to international tax policy). Professor Thomas S. Adams served as the Treasury Department's principal advisor on tax policy and administration from 1917 until 1923. *Id.* at 1029. Prior to his time at the Treasury Department, Professor Adams assisted with formulating and drafting the first successful progressive income tax in the country, the Wisconsin Income Tax Law. *Id.* As the Treasury Department's spokesman before the House Ways and Means Committee and the Senate Finance Committee, Professor Adams played a central role in shaping tax policy in the early days after the adoption of an income tax. *Id.* at 1029-30. After serving in the Treasury Department, Professor Adams became the main spokesman for the U.S. government in the international tax treaty movement. *Id.* at 1030.

15. *Id.* at 1045.

home country provided a similar policy to ex-patriot Americans.[16] Moreover, the legislation required the payors of fixed or determinable annual or periodic income to withhold a percentage of the income for nonresident aliens.[17]

Following this legislation, Congress and Professor Adams quickly recognized the need to adjust the credit and clarify the applicable source rules because the FTC offered American investors very generous tax relief and some policymakers feared imminent abuse by savvy taxpayers.[18] In the meantime, the Attorney General established source rules through written opinions based on common law principles on how to classify income as foreign or domestic due to the lack of direction from the Revenue Act of 1918.[19]

As expected, a difference of opinion emerged between the Attorney General's Office and Professor Adams at the Department of Treasury with respect to the source rules for business income and interest income.[20] Under the Attorney General's approach, the origination point of the interest income served as the jurisdiction in which to levy taxes, whereas Professor Adams looked to the states for precedent in his effort to change the taxation policy.[21] Professor Adams advocated for an approach where the residence of the taxpayer served as the foundation for determining the payment of taxes and not the jurisdiction that generated the income.[22]

To bolster his arguments, Professor Adams explained that the Departments of State and Commerce maintained a "very active interest" in this policy,[23] as it aligned with the economic and political interests of the country. Those interests included a focus on funneling private capital to assist in rebuilding post-war Europe, providing a means to payoff the

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16. *Compare* Revenue Act of 1918, Pub. L. No. 65-254, ch. 18, § 222(a)(1), 40 Stat. 1057, 1073 (1919) (crediting U.S. citizens with "the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States"), *with id.* § 222(a)(3) (crediting alien residents of the United States with "the amount of any such taxes paid during the taxable year to [their home country], upon income derived from sources therein, if such country, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country").

17. *Id.* § 221(a).

18. *See* Graetz & O'Hear, *supra* note 10, at 1057 (describing the reaction of Congress and Adams to the FTC legislation).

19. *See, e.g., Internal Revenue: Hearings Before the Committee on Finance of the United States Senate on H.R. 8245*, 67th Cong. 256 (1921), *reprinted in* 95A INTERNAL REVENUE ACTS OF THE UNITED STATES 1909–1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS 6, 67 (Bernard D. Reams, Jr. ed., 1979) [hereinafter *Hearings*]; Income Tax–Whether Certain Foreign Corporations and Partnerships Derive Income From Sources Within the United States, 32 Op. Att'y Gen. 336 (1920).

20. *See Hearings*, *supra* note 19, at 66-67. The difference of opinion emanated from the use of precedent. *Id.* The Attorney General used common law traditions, whereas Professor Adams followed tax policy considerations. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

wartime debt owed to the U.S. government, and helping facilitate peace.[24] In effect, adopting the policy meant that lenders from the United States would receive credits against their tax liability in our country for the taxes on interest income they paid to a foreign government.

To assuage any concerns, Professor Adams testified to Congress that he developed his source rules from existing domestic and international practices and that he studied this provision more so than any other in the legislation.[25] With this in mind, Congress included a comprehensive set of source rules provided by Professor Adams in the legislation that explained the treatment of interest, dividends, rents and royalties from real, personal and intangible property, personal services, gains from the sale of real and personal property and the manufacture and sale of personal property.[26] Hence, the source rules included in the Revenue Act of 1921 set the modern policy that treats the interest earned by nonresident alien account holders in U.S. banks as foreign income.

2. Modern Approach

Left alone for 45 years, Congress agreed to modify its attitude towards exempting the interest earned by nonresident alien account holders in U.S. banks in 1966. Congress underwent a philosophical adjustment in its position, leading it to amend its treatment of these situations by implementing an explicit tax and exemption rather than following a sourcing rule approach.[27] The resulting legislation imposed a thirty percent tax coupled with an exemption that would sunset at a later date.[28] In order to "provide an opportunity to review the exemption in view of developments in the balance-of-payments situation and other factors," Congress selected a termination date of December 31, 1972 to soften any residual effects from this change in philosophy.[29]

In continuing to monitor the effects of removing the special treatment for nonresident alien account holders in U.S. banks, the Committee on Ways and Means

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24. *See* Graetz & O'Hear, *supra* note 10, at 1051-53 (describing the arguments in favor of Adams' proposed approach).

25. *See Hearings*, *supra* note 9, at 67.

26. *See* Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, § 217, 42 Stat. 227, 243–45 (detailing how to calculate net income for nonresident alien individuals).

27. *See* H.R. REP. No. 89-1450, at 7, (1966).

28. *See* Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 103(a)(1), 80 Stat. 1539, 1547 (setting out provisions regarding tax on nonresident alien individuals).

29. H.R. REP. NO. 89-2327, at 5-6 (1966) (Conf. Rep.). This decision to move towards a change in policy with regard to the taxation of interest received by nonresident alien bank accounts held in the United States became more apparent in the 1976 Senate debate on whether to make the exemption permanent or to continue studying it. *See* 122 CONG. REC. 23,874-77 (daily ed. July 26, 1976).

reported in 1969 the need to postpone the termination date because the country continued to run deficits in its balance of payments.[30] The report explained:

> In anticipation of the elimination of the special treatment, foreign persons might withdraw their bank deposits from the United States during the next year or two. This outflow of funds from the United States, if it were to occur, would further harm the balance of payments. The further postponement of the effective date of the removal of the special treatment will forestall this possibility and will provide your committee with an additional opportunity to reconsider the balance-of-payments situation and the impact on that situation of the removal of this exemption.[31]

Consequently, Congress agreed to lengthen the time to evaluate the policy and changed the termination date of the special treatment for nonresident alien account holders in U.S. banks to December 31, 1975.[32]

With the special treatment for bank interest earned by nonresident aliens sunsetting, Congress debated the fate of the policy during its 1976 session. The Senate wanted to continue the approach started in 1966 and extend the exemption three more years[33] while the House of Representatives desired to make it permanent.[34] Senators Robert Packwood of Oregon and Edward Kennedy of Massachusetts felt the disparity in treatment between nonresident aliens and U.S. taxpayers required eventual elimination of the exemption but felt that the existing economic concerns overshadowed their ideology, so they advanced the three-year continuation provision.[35]

In response, Senator Richard Stone of Florida explained that in gateway cities like Miami, bank deposits from Latin Americans amount to as much as one-third of all balances.[36] Senator William Brock of Tennessee responded by commenting that no U.S. financial institution could survive the loss of one-third of its deposits in a short period of months.[37] The Senate voted to extend the exemption for three years, and the conference report followed the House bill.[38] As a result, the 1976 Tax Reform Act made the exemption permanent.[39]

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30. H.R. REP. NO. 91-413, at 131 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1645, 1781-82.
31. *Id.*
32. Tax Reform Act of 1969, Pub. L. No. 91-172, § 435, 83 Stat. 487, 625.
33. 122 CONG. REC. 23,874-75 (statement of Sen. Packwood).
34. S. REP. NO. 94-1236, at 462 (1976) (Conf. Rep.).
35. 122 CONG. REC. 23,877 (statement of Sen. Kennedy).
36. *Id.* at 23,875 (statement of Sen. Stone).
37. *Id.* (statement of Sen. Brock).
38. S. REP. NO. 94-1236, at 462 (1976).
39. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1207(d), 90 Stat. 1520 (1976).

Subsequently, Congress tackled tax reform again in 1986 and subtly addressed the issues related to bank interest earned by nonresident alien account holders. During this policy review, the Senate committee explained, "[W]here it is desirable to provide a U.S. tax exemption for specific classes of interest income, it should generally be done directly rather than through modifications to the general source rules. The committee, therefore, grants overt exemptions for appropriate classes of income."[40]

This viewpoint continued with the tax overhaul of 1986 and led Congress to treat bank deposits established in the United States by nonresident aliens as domestically sourced income but exempt from the withholding tax.[41] Therefore, the present law originates from and continues to build upon a policy designed to encourage investment in the United States and strengthen the country's competitiveness while avoiding actions that might drive bank deposits elsewhere.

B. The Clinton Administration's Proposal

For many years, the IRS wanted to require U.S. banks to report the interest paid on deposits held by nonresident alien individuals.[42] On January 17, 2001, in the waning hours of the Clinton administration, the IRS announced its intention to expand its prior decision that compelled the reporting of interest paid on bank accounts owned by Canadian citizens not residing in the United States to those from other countries.[43] In taking a more inclusive approach to gathering financial information, the IRS believed that it could strengthen its existing compliance efforts through a broader reporting requirement that included all nonresident alien account holders.[44]

In proposing this expanded treatment, the IRS explained its actions as a natural extension of the current program for Canadian citizens, since it could assist in domestic compliance efforts and aid in the transfer of financial data and transparency with respect to

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40. S. REP. NO. 99-313, at 335 (1985).

41. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1214(c)(1), 100 Stat. 2085, 2542 (1986) (amending 26 U.S.C. § 871, which relates to taxes on nonresident aliens).

42. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 76 Fed. Reg.1106 (Jan. 7, 2011) (to be codified at 26 C.F.R. pts. 1, 31) (providing some background on the proposed regulations). The publication of this proposed regulation occurred in the last three days of the Clinton administration, making it an immediate issue for the incoming Bush administration to resolve. *See* Goulder, *supra* note 5, at 743 (describing the proposed regulation and response to it).

43. *See* Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 66 Fed. Reg. 3925, 3926 (Jan. 17, 2001) (to be codified at 26 C.F.R. pts. 1, 31) ("The proposed regulations extend the information reporting requirement for bank deposit interest paid to nonresident alien individuals who are residents of other foreign countries.").

44. *See id.* ("[R]equiring routing reporting to the IRS of all bank deposit interest paid within the United States will help to ensure voluntary compliance by U.S. taxpayers by minimizing the possibility of avoidance of the U.S. information reporting system.").

international tax treaties.[45] With respect to assisting the IRS's compliance efforts, the agency asserted that this type of reporting could dissuade some individuals from wrongly claiming foreign status because they will know the government receives information on the amount of money earned from a bank account.[46]

Moreover, the IRS defended the requirement as part of a comprehensive foreign policy to advance the country's cooperative efforts through existing international tax treaties.[47] The IRS acknowledged the receipt of requests from other nations to turn over information relating to the bank deposits of individual residents of another country via bilateral tax treaties they maintain with the U.S. government.[48] The IRS turned to this new expansion in the reporting policy to "facilitate . . . the effective exchange of all relevant tax information with our treaty partners" as a means towards "encouraging voluntary compliance and furthering transparency."[49] The IRS based this secondary position on a *U.S. Senate Executive Report* that evaluated whether to support ratification of a tax convention with the Republic of Italy.[50]

In the Senate report, the committee compared the exchange of information language supplied by the Organization for Economic Co-operation and Development (OECD) model with one advanced by the U.S. government.[51] The Committee found that the two different models generally maintained similar language, but the proposed treaty's bank secrecy provision constituted a significant departure from that articulated by the U.S. government.[52] The Committee believed the ability of the two countries to exchange information obtained from banks and other financial institutions to be essential, and it thus viewed this difference as contrary to the treaty's purpose in preventing tax avoidance or evasion systems.[53]

Upon weighing alternative solutions to the policy dilemma, the Committee weighed the ramifications of striking the provision altogether from the treaty against allowing its inclusion based on written assurances from the Italian government.[54] However, the policy

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45. *See id.* (providing justifications for the proposed regulatory action).
46. *See id.* (mentioning the significance of the exchange of tax information with respect to voluntary compliance).
47. *See id.* ("[S]everal countries that have tax treaties or other agreements with the United States have requested information concerning bank deposits of individual residents of their countries.").
48. *Id.*
49. *Id.*
50. *See id.* (citing to S. EXEC. REP. NO. 106-8, at 15 (1st Sess. 1999)).
51. S. EXEC. REP. NO. 106–8, at 15 (1st Sess. 1999).
52. *Id.* The committee noted that the preferred language of the U.S. government states, "[N]otwithstanding the limitations described in the preceding paragraph, a country has the authority to obtain and provide information held by financial institutions, nominees, or persons acting in a fiduciary capacity. This information must be provided to the requesting country notwithstanding any laws or practices of the requested country that would otherwise preclude acquiring or disclosing such information." *Id.*
53. *See id.* (discussing the significance of the provision as included in the proposed treaty).
54. *Id.*

objectives of the U.S. government created a significant obstacle with respect to the issue of transparency.[55] Should the Committee follow a strategy that removed the bank secrecy provision, other nations might interpret such an action as a lack of commitment towards increased transparency of transactions from third parties, which could create difficulties when negotiating similar treaties in the future.[56] The removal of such a provision by another country against the United States would also create reservations with the Committee as to willingness of the other nation to accommodate full exchanges of information regardless of its internal laws.[57] Despite giving a reluctant recommendation to approve the tax treaty without the bank secrecy provision and attach a condition that the Italian government provide requested information obtained from financial institutions when asked, the Committee reiterated its unwavering support for the policy requiring full exchanges of information from other treaty partners.[58]

Thus, the IRS's proposed rule to expand the policy that U.S. banks report the interest income to comprise all nonresident alien account holders appears to emanate from a deterrence perspective on both a basic and more sophisticated level that includes broader policy objectives.

C. *The Bush Administration's Counterproposal*

Following this rule announcement by the preceding administration, the IRS entered an evaluation period of its January 17, 2001 proposal, during which it held meetings and solicited written opinions on the expansion of reporting requirements for U.S. banks to include nonresident alien account holders.[59] During this time, the IRS collected and analyzed comments from the public to aid in its determination of a proper course of action with respect to the proposed regulations.[60] As a result, under the Bush administration, the IRS decided to withdraw the original regulations and proposed new ones for ratification.[61]

In its analysis of the 2001 proposal, the IRS noted that the majority of comments it received took a highly critical tone.[62] Some of the responses held the position that the admin-

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55. *See id.* at 16 ("The broader issue of transparency of transactions involving third parties is a significant issue internationally. The United States has attempted to advance greater transparency in its treaty negotiations.").

56. *See id.* (expressing concerns about the implications for future treaty negotiations).

57. *Id.*

58. *Id.*

59. *See* Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 67 Fed. Reg. at 50,386-87 (describing hearings on and comments received regarding the previously proposed regulations).

60. *Id.* at 50,386.

61. *Id.* at 50,387.

62. *See id.* ("Most of the comments received on the 2001 proposed regulations were highly critical of the regulations.")

istrative imposition caused by reporting and collecting the information would overshadow any benefits the IRS could derive, while other replies expressed technical concerns over how joint accounts would be handled.[63] Finally, a number of comments expressed concern that this policy would cause nonresident aliens to withdraw their deposits in U.S. banks due to apprehensions of misuse by the government or by others who obtained their personal information.[64]

Based on the public's backlash and guidance from the Bush administration, the IRS determined that the original regulations requiring U.S. banks to report deposit interest paid to a nonresident alien were "overly broad."[65] In response, the agency basically chose to narrow the original requirement that included citizens of all nations to only those residents of Australia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom.[66] The IRS justified this new proposal as a more narrowly tailored approach that could assist in achieving the government's foreign policy goal of collecting financial information from U.S. banks without imposing too heavy of an administrative burden while giving it the necessary data for information exchanges when necessary.[67]

However, the IRS also reserved the right to propose a modification to the list of countries included in the reporting program when warranted.[68] Hence, the IRS found a compromise position to the 2001 proposal when it announced a more targeted approach in August 2002 but never chose to finalize or withdraw it from implementation.

D. The Obama Administration's Proposal and Final Rule

Most recently, under the leadership of the Obama administration, the IRS served notice in the *Federal Register* on January 7, 2011, that it desired to once again expand the reporting requirements to nonresident aliens of all nations.[69] This time, the IRS justified the reevaluation of the application of the reporting program to all nations for three reasons.[70]

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* While the newly proposed regulations compelled reporting on nonresident aliens of specific nations, the IRS explicitly stated that it also allowed U.S. banks to determine at their own discretion whether to include residents of other countries not mentioned in its list. *Id.*
67. *Id.*
68. *Id.*
69. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 76 Fed. Reg. at 1106 ("These proposed regulations withdraw the 2002 regulations and provide new proposed regulations that expand the information reporting requirement to include bank deposit interest paid to nonresident alien individuals who are residents of any foreign country.").
70. *See id.* (setting forth the three justifications for the rule change).

First, the IRS believed the recently agreed upon international standards for exchanging information would make it feasible for the United States to alter its policies and assuage data security concerns to become more in line with other nations that value these types of cooperative efforts.[71] Second, the IRS explained that the expansion of reporting requirements reinforced the U.S. government's programs for exchanging information.[72] Last, the agency claimed once again that taxpayer compliance rates would improve by reducing false claims of foreign status.[73]

Following this announcement, the IRS entered a comment period and held a public hearing on May 18, 2011.[74] The IRS served notice on April 19, 2012, that it would require the reporting of interest paid to certain nonresident alien account holders earning more than $10 during a calendar year at a U.S. bank.[75] Pursuant to these regulations, nonresident aliens who reside in countries that maintain an income tax or other convention or bilateral agreement relating to the exchange of tax information with the U.S. government will fall within the mandatory reporting categories.[76] This announcement meant that the IRS intends to exchange the collected information with only those governments maintaining an agreement with the United States and only when they satisfy certain additional requirements.[77]

Moreover, the banks need not report the interest information for nonresident aliens who reside in countries outside of the information-sharing agreement listed in the Revenue Procedure.[78] The IRS recognized that this portion of the policy may create an administrative burden for the banks, so it allows for an institution to report interest payments on all of their

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71. *Id.*

72. *Id.*

73. *Id.*

74. *See* Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,391 (noting the comment period and public hearing).

75. *Id.* The applicable countries whose residents fall under the regulations include: Antigua & Barbuda, Aruba, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Canada, China, Costa Rica, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Egypt, Estonia, Finland, France, Germany, Gibraltar, Greece, Grenada, Guernsey, Guyana, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Jamaica, Japan, Jersey, Kazakhstan, Korea (South), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Morocco, Netherlands, Netherlands island territories: Bonaire, Curacao, Saba, St. Eustatius and St. Maarten (Dutch part), New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Slovak Rep., Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, and Venezuela. Rev. Proc. 2012-24, 2012-20 I.R.B. 913.

76. Rev. Proc. 2012-24, 2012-20 I.R.B. 913.

77. Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,392-93 (discussing the IRS's options for appropriate forms of exchange). The IRS explained that no requirement exists to compel the exchange of information with a foreign government, but it will determine the appropriateness of the exchange based on the proposed use of the information and other factors, such as the foreign government's ability to protect the confidentiality of the data. *Id.*

78. *Id.* at 23,393.

nonresident alien account holders.[79] Consequently, a nonresident alien who lives in a non-sharing country can become subject to this reporting requirement even though their circumstances do not compel or merit inclusion under the finalized regulation.

In justifying its actions, the IRS asserts that the end results will help identify potential U.S. taxpayers that evade taxes by hiding income and assets offshore and that the information exchange will bolster these efforts.[80] To this end, this enforcement action will also help improve voluntary compliance by making it more difficult for persons in the United States to avoid the information-reporting system by falsely claiming nonresident alien status.[81]

New to the IRS's arsenal of arguments, the agency adds further support to its finalized regulation as being necessary to show sympathy with the directives of the Foreign Account Tax Compliance Act (FATCA), which compels foreign financial institutions to report to the IRS information on their U.S. customers.[82] Under FATCA, the United States and other countries began developing a framework that will require signatory governments to cooperate in overcoming legal restraints placed on their resident financial institutions to identify pertinent accounts and report information to the IRS.[83] As a result, the IRS explained that the adoption of these regulations will enable it to have something of value to exchange with foreign governments that also desire to detect offshore tax evasion by their own residents.[84]

Finally, the IRS certifies that its final rule and regulations will not have a significant economic impact.[85] In conducting its analysis, the IRS estimates that the regulations will affect a significant number of small entities, but it disagrees with the notion that it will create new administrative burdens on financial institutions in the United States and disproportionately affect states in which nonresident aliens prefer to conduct business.[86] By responding that financial institutions already maintain systems to collect and report this data, the IRS

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79. *See id.* ("To address any potential burden associated with reporting on this basis, the final regulations provide that for any year for which the information return under § 1.6049-4(b)(5) is required, a payor may elect to report interest payments to all nonresident alien individuals.").

80. *See id.* at 23,391 ("The reporting required by these regulations is essential to the U.S. Government's efforts to combat offshore tax evasion for several reasons.").

81. *Id.* at 23,392.

82. *Id.*

83. *Id.*

84. *See id.* ("These regulations will facilitate intergovernmental cooperation on FATCA implementation by better enabling the IRS, in appropriate circumstances, to reciprocate by exchanging information with foreign governments for tax administration purposes.").

85. *Id.* at 23,393-94.

86. *Id.* at 23,394.

completely dismisses the alternative assertions regarding the economic impact upon business and states that conduct business with nonresident aliens.[87]

Thus, the IRS appears to manipulate the responses it gathered during its comment period in favor of its own opinion and chooses to address concerns where it maintains strong arguments in order to support the rule it promulgated. Hence, the question remains as to whether the IRS's need to gather the data is worth the risks it presents to citizens of other nations, which in turn affect the United States economically. And, in a world that has seen the rise of the Mexican drug cartels, the risks of this policy foreseeably harm not only innocent Mexican civilians but also hinder the war on the cartels.

III. THE IRS'S RULE CHANGE AND THE THREAT POSED BY FOREIGN CRIMINAL GANGS AND DRUG CARTELS

The IRS's rule change concerning reporting of income on accounts of nonresidential aliens unfortunately intersects with the terrorist threat posed by criminal gangs and drug cartels operating in Latin America and in particular, Mexico. Drug cartels, particularly in Mexico, not only utilize bazookas, hand grenades, and semiautomatic weapons in the commission of their crimes but also large military vehicles, such as the "narco tank."[88] However, with the capturing and exchanging of sensitive financial information under the IRS regulations, criminal gangs and drug cartels will potentially have a resource of another variety—the financial information of U.S. nonresident aliens. With this financial information at hand, the drug cartels could conceivably target individuals on the basis of their financial wealth for extortion, kidnapping, and ransom.

With a variety of sophisticated technological tools and information in their arsenals, the criminal gangs and drug cartels currently pose a significant threat to the safety and security of the United States, Mexico, and Latin America. Today's threat to the safety and stability of the United States and Latin America by criminal gangs and drug cartels has unfortunately been a longstanding one in history.

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87. *See id.* (discussing concerns raised in some comments received and why the Treasury Department and IRS disagree with them).

88. *See* William Booth, *Mexican Cartels Now Using 'Tanks,'* WASH. POST (June 7, 2011), http://www.washingtonpost.com/world/americas/mexican-cartels-now-using-tanks/2011/06/06/AGacrALH_story.html ("The Mexican military has discovered that gangsters south of Texas are building armored assault vehicles, with gun turrets, inch-thick armor plates, firing ports and bulletproof glass.").

A. *The History of Criminal Gangs and Drug Cartels in Latin America*

For over a century, drug trafficking organizations have operated in Latin America.[89] The narcotics trade within Mexico has been at the front and center of the drug trafficking world for decades.[90] By the 1940s, Mexico was a major source of the trade in both marijuana and heroin to the United States.[91] From 1929 to 2000, during the period of essentially one-party rule and governance in Mexico by the PRI (Institutional Revolutionary Party), the Mexican government pursued a policy of "accommodation" during which the government rhetorically continued an official policy of eradicating drug crops.[92] In practice, however, corruption led to a certain degree of cooperation between the Mexican authorities and drug trafficking leaders.[93]

During the 1980s, drug cartels in Colombia became the major contributor to world-wide drug trafficking.[94] Despite the presence of a violent civil war that pitted the government of Colombia against peasant guerrillas of the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN),[95] the Cali and Medellin drug cartels supplied approximately 80 to 90 percent of the cocaine imported to the United States.[96] Pablo Escobar, the "Godfather" of the Medellín cartel, became the most renowned and feared Colombian drug trafficker.[97] He utilized some of his funds to build public housing and contribute to city improvements in Medellín.[98] However, Escobar developed a reputation as one of the most ruthless and vengeful traffickers. He was responsible for the murders of numerous politicians, judges, journalists, and countless innocent civilians.[99] In one particular incident, he struck back at two suspected informers by orchestrating the bombing of an Avi-

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89. *See* Steven Hyland, *The Shifting Terrain of Latin American Drug Trafficking*, 4 ORIGINS: CURRENT EVENTS IN HIST. PERSP. (Sept. 2011) (discussing the history of drug trafficking operations in Latin America); JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE VIOLENCE 6 (2013) (describing the history of drug trafficking organizations in Mexico).

90. *See* BEITTEL, *supra* note 89, at 6-9 (providing an overview of drug trafficking operations in Mexico and their effects).

91. *Id.* at 7-8.

92. *Id.* at 8.

93. *Id.*

94. *See Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), http://www.npr.org/templates/story/story.php?storyId=9252490 (providing a timeline of key events in the history of drug trafficking operations and America's response to them).

95. For a comprehensive history of the Colombian Civil War, see BERT RUIZ, THE COLOMBIAN CIVIL WAR (2001).

96. PETER CHALK, RAND, THE LATIN AMERICAN DRUG TRADE: SCOPE, DIMENSIONS, IMPACT, & RESPONSE xvi (2011), http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1076.pdf.

97. *Cf.* MIKE GRAY, DRUG CRAZY: HOW WE GOT INTO THIS MESS & HOW WE CAN GET OUT 119 (1998).

98. *Id.*

99. *Id.* at 119-120.

anca 727 airplane, which killed the informers as well as approximately 100 passengers and crew.[100]

During the 1980s, the administrations of both Presidents Ronald Reagan and George H.W. Bush developed policies in response to the drug cartels. Under the Reagan administration, the Anti-Drug Abuse Act of 1986,[101] which appropriated approximately $1.7 billion to fight drugs,[102] became one of the first major pieces of congressional legislation in the contemporary war on drugs. The administration of President George H.W. Bush followed in the footsteps of the Reagan administration by pursuing an aggressive anti-drug policy. In one of his first major actions, President Bush established the Office of National Drug Control Policy, which primarily promotes governmental "efforts to reduce illicit drug use, manufacturing and trafficking, drug-related crime and violence, and drug-related health consequences."[103] During his first prime-time speech to the nation during his presidency in September 1989, President Bush reaffirmed his support for the Colombian government and the fight against "cocaine killers," emphasizing the national security threat to the United States posed by drug traffickers.[104]

Just two months later, one of the firmest actions in the war on drugs took place when President Bush ordered a U.S. invasion of Panama in pursuit of Manuel Noriega.[105] Despite having an uneasy but coexistent relationship with the United States during the 1970s and 1980s,[106] Noriega became a material supporter of the international narcotics trade throughout the 1980s[107] and allowed drug traffickers such as Pablo Escobar to ship cocaine and other illicit narcotics through Panama.[108] The Bush administration articulated several justifications

100. *Id.* at 119.

101. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

102. *Timeline: America's War on Drugs*, *supra* note 94.

103. *About ONDCP,* OFFICE OF NAT'L DRUG CONTROL POLICY, THE WHITE HOUSE, http://www.whitehouse.gov/ondcp/about (last visited July 9, 2013).

104. GRAY, *supra* note 97, at 124.

105. *Id.* at 126.

106. RUSSELL CRANDALL, GUNBOAT DEMOCRACY: U.S. INTERVENTIONS IN THE DOMINICAN REPUBLIC, GRENADA, & PANAMA 171 (2006) ("During the 1970s and 1980s, successive U.S. administrations viewed Noriega as an unsavory but critical and efficient provider of intelligence.").

107. *Id.* ("By the mid-1980s, Noriega's increasingly vicious behavior, above all his involvement in the international narcotics trade, made him a liability to the United States, especially at a time when the American public's concern about illegal drugs was reaching its peak.").

108. *Timeline: America's War on Drugs*, *supra* note 94.

for its decision to intervene,[109] but a key rationale was to bring Noriega to trial for his material support of drug trafficking.[110]

While a number of legal scholars have comprehensively discussed the foreign policy and international implications of the invasion,[111] in historical retrospect, the intervention and capture of Noriega appears to signify a major event in the fight against the drug cartels. Following the invasion, the governments of the United States and Colombia implemented a "kingpin" strategy that targeted the highest-level drug trafficking officials of the Cali and Medellin organizations throughout the 1990s.[112] In December 1993, the Medellín cartel took a fatal hit when its leader, Pablo Escobar, was killed.[113] Soon thereafter, the Colombian and U.S. governments turned their focus to key leaders of the Cali cartel.[114] Today, as a result of such strategy, both the Medellín and Cali cartels have been largely dismantled.[115]

Despite success in the war against the Colombian drug cartels, Mexico has become the epicenter of the war on drugs. In the wake of dismantling the Colombian cartels, new cartels in Mexico, as violent if not even more so than their Colombian counterparts, have begun to dominate the drug trade to the United States.

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109. *See* William C. Plouffe, Jr., *Sovereignty in the "New World Order": The Once and Future Position of the United States, a Merlinesque Task of Quasi-Legal Definition*, 4 TULSA J. COMP. & INT'L L. 49, 69 (1996) ("The justifications offered for the invasion included: 1) that Noriega himself declared that a 'state of war' existed with the United States, 2) the right of self defense, 3) that Noriega's actions threatened the interests of the United States, i.e., the Panama Canal, 4) to bring Noriega to trial in the United States concerning drug trafficking, to restore democratic government to Panama, and to protect the lives of United States citizens.").

110. *See id.* at 71 (explaining that the United States likely invaded Panama primarily to arrest Noriega and bring him to trial).

111. *See* Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 502 (1990) ("[T]he U.S. action was in disregard of the pertinent norms and principles of international law."); Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 312-13 (1991) (contending that the invasion violated principles of the United Nations Charter and lacked any "color of justification"); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 292 (1991) ("[The invasion] was based on legitimate considerations and valid international objectives. It was truly a just and a lawful cause."); Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUM. J. TRANSNAT'L L. 609, 619 (1991) (laying out arguments for and against self-defense as a primary justification for America's invasion of Panama); Frances Y.F. Ma, *Noriega's Abduction from Panama: Is Military Invasion an Appropriate Substitute for International Extradition?*, 13 LOY. L.A. INT'L & COMP. L.J. 925, 926 (1991) (analyzing the question of whether the United States' justifications for invading Panama comport with international law).

112. BEITTEL, *supra* note 89, at 4.

113. GRAY, *supra* note 97, at 128.

114. *Id.* at 129-130.

115. BEITTEL, *supra* note 89, at 4.

B. The Contemporary Rise of Criminal Gangs and Drug Cartels in Mexico

The 2000 election of Vicente Fox of the PAN (National Action Party) to the Mexican presidency ended 71 years of one-party governance in Mexico.[116] Greater democratization in Mexico replaced the remnants of a solidly PRI-controlled nation and upset the tenuous balance between the government and drug traffickers.[117] As the Colombian cartels fell, Mexican drug cartels replaced them as the major suppliers of heroin, methamphetamine, and marijuana to the United States.[118]

Today, the Sinaloa and Los Zetas are the two major drug cartels operating in Mexico among the twelve to twenty different significant organizations.[119] The cartels are engaged in an industry that collects billions in profits annually.[120] Estimates of annual financial profits from the United States to Mexico resulting from the overall drug trade range from a low of approximately $8 billion by the State Department to a high of $29 billion by the Department of Homeland Security.[121]

In addition to the financial growth of the cartels, many cartels now have "de facto" control over large areas of the country. Significant areas of Monterrey, one of Mexico's finest cities, are under the control of drug cartels. William Finnegan, a renowned international journalist, recently reported that the police have essentially lost control of the streets of Monterrey, as members of the rival Zetas and Gulf cartel have engulfed the city in violence.[122] The state of Michoacan has been particularly beset by the influence of cartels.[123] The phrase "two Mexicos" has been utilized to describe Michoacan province—one under the influence of the government, and the other under the influence of violent cartels.[124]

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116. Kate Milner, *Profile: Vicente Fox*, BBC NEWS (June 6, 2003), http://news.bbc.co.uk/2/hi/americas/1049574.stm.

117. *See* BEITTEL, *supra* note 89, at 8 (describing the effects of Vicente Fox's election).

118. *Id.*

119. *Id.* at 10.

120. *See id.* at 38-39 (providing various estimates on annual profits from drug trafficking).

121. *Id.* at 38.

122. *See* William Finnegan, *The Kingpins: The Fight for Guadalajara*, THE NEW YORKER, July 2, 2012, at 47 ("Some Guadalajarans find cold comfort by looking north, to Monterrey, where security has been in free fall for the past two years. It is Mexico's third-largest city, and its wealthiest. But the police have lost control of the streets. Kidnapping, extortion, robbery, and murder are commonplace. The number of killings there tripled between 2009 and 2010, then nearly doubled again in 2011. Army checkpoints now lace the city. Guadalajara has experienced nothing close to Monterrey's nightmare. . . . The Zetas and the Gulf cartel started a war. The local police reportedly went to work en masse for the cartels. Now the Zetas are pillaging the city.").

123. *See* Will Grant, *Mexico Election: Drugs War in Spotlight in Michoacan*, BBC NEWS (May 24, 2012), http://www.bbc.co.uk/news/world-latin-america-18171636 (describing the heavy presence of drug-related violence in Michoacan).

124. *See id.* (discussing the power and impact of cartels in Mexico).

The violence of the Mexican drug cartels is one of their most appalling features. Cartels target not only members of rival cartels but also the Mexican police and even innocent civilians.[125] The shocking incidents are gruesome, numerous, and vary in nature. For example, forty-nine decapitated bodies were discovered on a road outside of Monterrey in 2012.[126] In early 2011, mass graves and the bodies of 177 victims were found in San Fernando in the province of Tamaulipas,[127] sadly evoking memories of mass graves discovered in the wake of the post-Saddam Hussein era in Iraq[128] and the *desaparecidos* ("disappeared") of El Salvador[129] and Argentina[130] in recent decades.

Drug cartel-related violence has also led to a number of attempts to assassinate Mexican politicians who speak out or advocate policies against the cartels. In 2012, approximately eight mayors were assassinated throughout the country[131] and a June 2010 assassination cost the life of Dr. Rodolfo Torre Cantú, the PRI gubernatorial candidate in Tamaulipas province.[132] The escalating violence has even cost the lives of U.S. citizens. In March 2010, three individuals associated with the U.S. consulate in Ciudad Juárez were assassinated.[133] In February 2011, U.S. Immigration and Customs Enforcement (ICE) Special Agent Jaime Zapata was killed by members of the Zetas drug cartel while driving between Monterrey and Mexico City.[134] The violence has not only engulfed many parts of Mexico but now threatens the national security of the United States, as violence has spilled over into U.S. territory. In June 2012, five individuals, likely the victims of a hit by the Zetas cartel, were found dead in a

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125. *See* Will Grant, *Mexico Violence: Fear and Intimidation*, BBC NEWS (May 14, 2012), http://www.bbc.co.uk/news/world-latin-america-18063328 (explaining intimidation and terrorist strategies that cartels use against civilians).

126. *Id.*

127. Nick Miroff & William Booth, *Mass Graves in Mexico Reveal New Levels of Savagery*, WASH. POST (Apr. 24, 2011), http://www.washingtonpost.com/world/mass-graves-in-mexico-reveal-new-levels-of-savagery/2011/04/23/AFPoasbE_story.html.

128. *See* John F. Burns, *Uncovering Iraq's Horrors in Desert Graves*, N.Y. TIMES (June 5, 2006), http://www.nytimes.com/2006/06/05/world/middleeast/05grave.html?pagewanted=1&_r=1&ei=5088&en=f61682fbc3536b01&ex=1307160000&partner=rssnyt&emc=rss (discussing the discovery of mass graves in Iraq in the years after Hussein's regime).

129. *See* Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 325-26 (1994) (explaining how the government of El Salvador and its agents "disappeared" persons during the country's civil war).

130. *See* Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina's "Living Disappeared,"* 27 HARV. WOMEN'S L.J. 235, 239-40 (2004) (discussing the disappearances in Argentina during the country's "Dirty War").

131. BEITTEL, *supra* note 89, at 28.

132. *See* Nacha Catlan, *Rodolfo Torre Cantu Assassination: Why Are Drug Cartels Killing Mexican Candidates?*, THE CHRISTIAN SCIENCE MONITOR (June 28, 2010), http://www.csmonitor.com/World/Americas/2010/0628/Rodolfo-Torre-Cantu-assassin ation-Why-are-drug-cartels-killing-Mexican-candidates (discussing Cantú's assassination).

133. BEITTEL, *supra* note 89, at 6.

134. *See* Frederic J. Frommer, *Julian Zapata Espinoza, Drug Cartel Member, Pleads Guilty to Killing of U.S. ICE Agent in Mexico*, HUFFINGTON POST (May 23, 2013), http://www.huffingtonpost.com/2013/05/23/julian-zapata-espinoza-pleads-guilty-killing-ice-agents_n_3328748.html (describing the involvement of Zeta cartel members in the murder of ICE Agent Zapata); Sharyl Attkisson, *ICE Agent's Family Files Wrongful Death Claim Against Justice Dept.*, CBS NEWS (June 20, 2012), http://www.cbsnews.com/8301-31727_162-57457277-10391695/ice-agents-family-files-wrongful-death-claim-against-justice-dept/ (discussing Zapata's murder by suspected drug cartel members).

burned vehicle in remote southern Arizona.[135] In the midst of rising cartel violence, the prospect of it spilling over remains a serious foreign policy and national security concern of the United States.[136]

Most alarmingly, to fund their criminal enterprises, the cartels have moved outside of their traditional drug trafficking activities into other criminal actions. Children are now recruited by the cartels to carry out crimes,[137] and an estimated 1,000 children have been victims of the violence over the past several years.[138] Disturbingly, there are also a growing number of instances in which the cartels have forced women into prostitution.[139] Some of the women have endured multiple rapes and others have been killed.[140]

Along with drug and human trafficking, the drug cartels in Mexico are increasingly moving into the crimes of abduction and ransom of wealthy individuals. Recent estimates indicate that since 2007, kidnappings in Mexico have risen by 188% and extortion has grown by 101%.[141] The appalling rise of abductions and extortion has even led to the rise of a new industry where private firms are hired to resolve unsolved abductions and kidnappings.[142] These firms currently receive more cases involving abductions and kidnappings in Mexico than any other foreign country.[143]

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135. *See* Richard A. Serrano & Molly Hennessy-Fiske, *Deaths in Arizona Could Signal Spread of Drug Cartel Violence*, L.A. TIMES (June 4, 2012), http://articles.latimes.com/2012/jun/04/nation/la-na-nn-arizona-bodies-20120604 (highlighting signs that drug cartel violence is spilling over from Mexico to the United States).

136. KRISTIN M. FINKLEA, WILLIAM J. KROUSE, & MARC R. ROSENBLUM, CONG. RESEARCH SERV., R41075, SOUTHWEST BORDER VIOLENCE: ISSUES IN IDENTIFYING & MEASURING SPILLOVER VIOLENCE 1 (2011).

137. *See* Luz E. Nagle, *Criminal Gangs in Latin America: The Next Great Threat to Regional Security and Stability?*, 14 TEX. HISP. J.L. & POL'Y 7, 9 (2008) ("The simple act of strolling nearly any street in El Salvador, Honduras, Nicaragua, and several cities in Mexico is quickly becoming a potentially fatal exercise as criminal gangs of disaffected and abandoned youth roam the streets and engage in random acts of violence, ritualistic gang beatings and killings, brutal acts of intimidation against innocent citizens, and entrenched warfare between warring sects struggling for control of poor and middle class neighborhoods.").

138. Anne-Marie O'Connor, *Mexican Drug Cartels Targeting and Killing Children*, WASH. POST (Apr. 9, 2011), http://articles.washingtonpost.com/2011-04-09/world/35262019_1_drug-violence-mexican-drug-cartels-ciudad-juarez (noting that between 2006 and 2010, nearly 1,000 children were killed in drug-related violence and adding that such estimates are probably low due to the media's fear of reporting on such issues).

139. Anne-Marie O'Connor, *Mexican Cartels Move Into Human Trafficking*, WASH. POST (July 27, 2011), http://www.washingtonpost.com/world/americas/mexican-cartels-move-into-human-trafficking/2011/07/22/gIQArmPVcI_story.html.

140. *Id.*

141. BEITTEL, *supra* note 89, at 20.

142. *See* Nick Miroff, *As Kidnappings for Ransom Surge in Mexico, Victims' Families and Employers Turn to Private U.S. Firms Instead of Law Enforcement*, WASH. POST (Feb. 26, 2011), http://www.washingtonpost.com/wpdyn/content/article/2011/02/26/AR2011022603384.html (discussing the evolving role of private U.S. firms hired to help with ransom and abduction cases).

143. *Id.*

In the wake of escalating cartel violence the past several years, both the governments of Mexico and the United States have taken firm steps of cooperation to curtail the power and influence of the cartels.

IV. The Response of Mexico and the United States to Criminal Gangs and Drug Cartels

A. *Felipe Calderón and the Mexican War on Drugs*

Following his election in 2006, Mexican President Felipe Calderón launched an aggressive war on organized crime and the drug cartels.[144] A key component of President Calderón's strategy against the cartels, he deployed approximately 50,000 military and federal police officers throughout the country to combat drug trafficking organizations.[145] Similar to the "kingpin" strategy employed against the Colombian cartels in the 1990s, President Calderón has employed the same strategy in aggressively pursuing the top leaders of the cartels. To date, approximately twenty-two of the top thirty-seven Mexican cartel leaders have been either killed or captured by the Mexican military and police.[146]

In addition to the "kingpin" strategy, the Calderón administration has also made fighting endemic corruption a priority. For years, *mordidas* (bribes) have been a part of conducting business for some in the country.[147] This can be seen in the de facto "accommodation," which occurred between the drug cartels and the government of Mexico during the years of PRI-dominated governance. But, even after the end of PRI governance, corruption has continued within elements of the judiciary, police, and government. Today, an estimated $100 million dollars is distributed each month by criminal entities to state and local cops.[148] In response to such corruption, the Calderón administration purged more than 3,000 federal police officers from the police ranks in August 2010[149] and arrested and charged four former military officers (three former generals) with aiding and abetting drug trafficking organizations in May 2012.[150]

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144. Gabrielle D. Schneck, Note, *A War on Civilians: Disaster Capitalism and the Drug War in Mexico*, 10 Seattle J. for Soc. Just. 927 (2012).

145. Beittel, *supra* note 89, at 33.

146. *Id.* at 1 ("In March 2012, the head of the U.S. Northern Command, General Charles Jacoby, testified to the Senate Armed Services Committee that Mexico had at that time succeeded in capturing or killing 22 out of 37 of the Mexican government's most wanted drug traffickers.").

147. *See generally* Rodrigo Labardini, *The Fight Against Corruption in Mexico*, 11 U.S.-Mex. L.J. 195 (2003) (explaining and summarizing efforts by the Mexican government to fight corruption).

148. Dudley Althaus, *Despite Millions in U.S. Aid, Police Corruption Plagues Mexico*, Hous. Chron. (Oct. 18, 2010), http://www.chron.com/news/houston-texas/article/Despite-millions-in-U-S-aid-police-corruption-1710872.php.

149. Beittel, *supra* note 89, at 34.

150. *Id.*

Calderón's administration has not only sought to fight the drug cartels directly but to also address some of the underlying causes of instability in Mexico. The administration pursued a plan entitled "Todos Somos Juárez," which sought to decrease unemployment and bolster the education system to better combat the cartels.[151]

Despite the successes in capturing or killing top leaders, and the advances in fighting corruption, cartel violence still engulfs Mexico. Approximately 47,000 Mexicans have lost their lives in the violence since 2006.[152] With the election of Enrique Peña Nieto to the Mexican Presidency in July 2012, it is unclear where the new administration will chart the course of the current drug war.[153] But, it is clear that the United States will be closely following all developments, as border security and spillover violence from the cartels remain serious concerns.

B. U.S. - Mexico Cooperation: The Merida Initiative

The United States has given strong support to the efforts of the Calderón administration in the war on the cartels through its cooperation with Mexico in the Merida Initiative.[154] Originally proposed by the Bush administration in 2007 and continued by the Obama administration, the initiative is a more than $1.6 billion effort to provide the Mexican government, military and police with training and equipment to curtail the influence of the cartels.[155] It currently revolves around "Four Pillars" of cooperation: (1) Disrupt Organized Criminal Groups; (2) Strengthen Institutions; (3) Build a 21st Century Border, and; (4) Build Strong and Resilient Communities.[156]

While the initiative provides equipment, such as Black Hawk Helicopters, to the Mexican military to be used in their counternarcotics operations, it also furnishes scanners, x-ray machines and other inspection equipment for the Mexican authorities to better detect drugs at checkpoints.[157] Beyond military and equipment supplies, the program provides for training of officials in the Mexican justice system and strengthens social networks and com-

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151. *Id.*

152. Eric Sabo, *Pena Nieto Bets on Pablo Escobar Nemesis to Win Drug War*, BLOOMBERG BUS. WK. (July 3, 2012), http://www.businessweek.com/news/2012-07-03/pena-nieto-bets-on-pablo-escobar-nemesis-to-win-mexico-drug-war.

153. *See id.* (discussing prospects for the drug war under the leadership of Mexican President Nieto).

154. For a comprehensive discussion of the Merida Initiative, see Steven E. Hendrix, *The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107 (2008).

155. *See Merida Initiative*, U.S. DEP'T OF STATE, http://www.state.gov/j/inl/merida/ (last visited July 10, 2013) (highlighting the Merida Initiative's programs and activities).

156. *Id.*

157. *See id.* (outlining some of the key features of the Merida Initiative).

munity cohesion by promoting civil society.[158] The State Department has been a strong supporter of the initiative.[159]

As noted earlier, despite the joint efforts between the United States and Mexico, the drug cartels pose a growing threat to U.S. national security. Both the Obama administration and Congress have acknowledged this serious threat. On numerous occasions over the past several years, Congress has heard testimony concerning the violence in Mexico, U.S. foreign aid to Mexico, and border security issues.[160] On July 25, 2011, President Barack Obama issued an Executive Order that declared that the transnational criminal organizations constitute "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[161] In addition, the State Department issued a "Travel Warning" for Mexico, and current rules prohibit U.S. government employees from driving from the U.S.-Mexico border to the interior of Mexico for personal reasons.[162] The Warning highlights the threat of abductions and kidnappings, stating:

> The number of kidnappings and disappearances throughout Mexico is of particular concern. Both local and expatriate communities have been victimized. In addition, local police have been implicated in some of these incidents. We strongly advise you to lower your profile and avoid displaying any evidence of wealth that might draw attention.[163]

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158. *See id.* (outlining some of the key features of the Merida Initiative).

159. *Is Merida Antiquated? Part Two: Updating U.S. Policy to Counter Threats of Insurgency and Narco-Terrorism: Hearing Before the H. Foreign Affairs Subcomm. on the W. Hemisphere and H. Homeland Sec. Subcomm. on Oversight, Investigations & Mgmt*, 112th Cong. (2011) (statement of William R. Brownfield, Assistant Secretary, Bureau of International Narcotics & Law Enforcement Affairs), *available at* http://www.state.gov/j/inl/rls/rm/175007.htm ("There is no doubt in my mind, ladies and gentlemen, that the United States is better and safer today thanks to our support for the Merida Initiative.").

160. *See* BEITTEL, *supra* note 89, at 6 (noting that Congress has held dozens of hearings on these topics in recent years).

161. Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (July 24, 2011). President Obama stated that the Zetas organization and three other organizations:

> are becoming increasingly sophisticated and dangerous to the United States; they are increasingly entrenched in the operations of foreign governments and the international financial system, thereby weakening democratic institutions, degrading the rule of law, and undermining economic markets. These organizations facilitate and aggravate violent civil conflicts and increasingly facilitate the activities of other dangerous persons. I therefore determine that significant transnational criminal organizations constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

Id.

162. *See Travel Warning: Mexico*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE (Nov. 20, 2012), http://travel.state.gov/travel/cis_pa_tw/tw/tw5815.html (citing restrictions on personal travel for government employees as a consequence of dangerous conditions in Mexico).

163. *Id.*

These actions signify the United States' acknowledgment that the cartels in Mexico pose a significant threat to national security and that corruption in Mexico is a significant issue. But, despite these concerns, the IRS still moved forward with the rule change.

V. THE IRS REPORTING PROGRAM: POTENTIAL LIABILITY OF THE U.S. GOVERNMENT AND U.S. OFFICIALS

With the above considerations in mind, abductions and kidnappings for ransom have become increasingly significant problems in Mexico. The U.S. government itself acknowledges that a display of wealth would draw the attention of a would-be kidnapper. In the wake of the Mexican cartels' use of abductions and ransom, it is certainly foreseeable that the cartels, if they obtain tax information from corrupt Mexican officials, could begin to target nonresident aliens with bank deposits within the United States. And, if a nonresident alien is targeted, abducted and tortured because of tax information released under the IRS's reporting requirements, there are potential liability issues for U.S. officials, particularly the Commissioner of the IRS, who implemented the rule change.

A. Potential Liability under the Federal Tort Claims Act

Because the information concerning interest income received by nonresident aliens in U.S. banks will be shared with the Mexican government, it is possible that drug cartels could use bribes to or otherwise obtain this tax information to target wealthy Mexicans for abduction, ransom, and even torture. Would the Commissioner of the IRS, or any other federal official, incur any such aiding-and-abetting liability for torture? A possibility exists under the Federal Tort Claims Act and perhaps the Alien Tort Statute.

Enacted in 1946, the Federal Tort Claims Act ("FTCA") codifies a more limited waiver of the sovereign immunity of the federal government and its agencies.[164] The FTCA makes the United States liable under 28 U.S.C. § 1346(b)(1):

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private per-

164. HENRY COHEN & VANESSA BURROWS, CONG. RESEARCH SERV., ORDER CODE 95-717, FEDERAL TORT CLAIMS ACT 1 (2007).

> son, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[165]

In addition, pursuant to the Westfall Act, the Attorney General of the United States is required to substitute the U.S. government in the place of government officials as a defendant[166] upon certification "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose."[167]

Today, the FTCA remains the exclusive remedy for common law torts committed by federal employees working within the scope and course of his or her employment.[168] But, could a plaintiff plead a claim of aiding-and-abetting liability for torture against the United States under the FTCA? Assume a court endorses the Restatement (Second) of Torts § 876 concerning civil aiding-and-abetting liability. It provides that:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[169]

Liability under subsection (a) would be difficult to prove, as it would be a stretch to claim that the Commissioner of the IRS acted pursuant "to a common design" with the drug cartels. Similarly, liability under (c) would fail as the promulgation of the rule change, separately considered from the tortious conduct of cartel members, would not constitute a breach of duty to a third person.

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165. 28 U.S.C. § 1346(b)(1) (2012).

166. Paul Hoffman & Adrienne Quarry, *The Alien Tort Statute: An Introduction for Civil Rights Lawyers*, 2 L.A. PUB. INT. L.J. 129, 149 (2010).

167. 28 U.S.C. § 2679(d)(1) (2012).

168. Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 46 (2006).

169. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

However, under (b), it may be possible to bring such a claim against the United States government. The IRS intends to share tax information on nonresident alien income deposits with the Mexican government, despite the fact that it knows elements of the Mexican government are corrupt and that individuals in Mexico are targeted on the basis of their wealth.[170] In essence, information concerning corruption in the Mexican government, the targeting of individuals because of their wealth for abduction, ransom, and torture, and the violence wrought by the drug cartels can be imputed to the United States government by its own statements and conduct. In addition, the release of this confidential tax information by the IRS under the rule change arguably constitutes "substantial assistance" to the drug cartels, as the release of information is a conduit for the drug cartels to target Mexican individuals on the basis of their income and/or wealth for abduction, ransom, and quite possibly, torture.

Even though a claim against the United States for aiding-and-abetting torture might be stated under Restatement (Second) of Torts § 876(b), several applicable exceptions could bar the claims of a plaintiff who is abducted, placed for ransom, and tortured by the members of a drug cartel. Two major exceptions to the FTCA may operate to bar a claim: the "foreign country" exception[171] and the "discretionary function" exception.[172]

1. The "Foreign Country" Exception

The FTCA bars claims "arising in a foreign country."[173] Under a plain reading of this exception, if an abduction, kidnapping, ransom and torture occurred on Mexican soil, then the claims would be barred. However, what about the argument that an act essential to the completion of the torture occurs on U.S. soil (i.e., the moment when the U.S. government releases the confidential information on interest income)? Is the "foreign country" exception inapplicable when the aiding-and-abetting act of releasing the confidential bank information occurs within the United States?

This question was answered by the United States Supreme Court in the *Sosa v. Alvarez-Machain* case in 2004.[174] In *Sosa,* a Mexican citizen sued the United States and the

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170. *See Travel Warning: Mexico, supra* note 162 (acknowledging that local police in Mexico have been implicated in a number of kidnappings and disappearances and suggesting that those traveling there "avoid displaying any evidence of wealth that might draw attention").

171. *See* 28 U.S.C. § 2680(k) (noting that the provisions of 28 U.S.C. § 1346(b) do not apply to claims arising in foreign countries).

172. *See id.* § 2680(a) (noting that the provisions of 28 U.S.C. § 1346(b) do not apply to the exercise, performance, or failure of a discretionary function by a federal agency or employee).

173. *Id.* § 2680(k); *see also* Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 735-37 (2006) (discussing the foreign country exception to the FTCA).

174. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) ("We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or

United States Drug Enforcement Agency (DEA) for its role in assisting the Mexican authorities in abducting him and transporting him to the United States to face prosecution for his role in the torture and murder of a DEA agent on Mexican soil.[175] The Supreme Court held that under the FTCA, the "foreign country" exception is applicable if the injury alleged occurred in a foreign country, irrespective of where the tortious act or omission may have taken place.[176] Thus, under *Sosa*, any claims of torture occurring in Mexico or any other nation other than the United States would be barred by the foreign country exception.

However, what about a claim where torture occurs on United States soil? With the violence from the drug cartels now spilling over into the United States,[177] it is not inconceivable that a situation could arise where because of the release of interest income on deposits under the IRS's rule change, a wealthy nonresident alien could be targeted by members of a drug cartel while on a visit to the United States. If the drug cartel has operations just north of the U.S.-Mexico border, and torture occurs on United States soil, the foreign country exception would be inapplicable to bar torture claims against the United States.[178]

Assuming a Plaintiff injured within the United States could file a civil aiding-and-abetting liability claim and overcome the foreign country exception, could the claim against the United States then proceed to trial? That Plaintiff could face an additional hurdle under the FTCA's "discretionary function" exception.

2. The "Discretionary Function" Exception

The FTCA also bars claims arising from an official's "discretionary function[s]."[179] The FTCA is not applicable to:

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omission occurred."); Seamon, *supra* note 173, at 735 (explaining the Supreme Court's broad interpretation of the foreign country exception in *Sosa v. Alvarez-Machain*).

175. *Sosa*, 542 U.S. at 697-98 (providing a factual history of the case); Seamon, *supra* note 173, at 735 (summarizing the relevant facts from *Sosa v. Alvarez-Machain*).

176. *See Sosa*, 542 U.S. at 712 (holding as much); Seamon, *supra* note 173, at 735 ("For purposes of the foreign country exception, the Court held, an action arises where the injury occurs, even if the tortious conduct occurred elsewhere.").

177. *See* Serrano & Hennessy-Fiske, *supra* note 135 (suggesting that increased deaths in the Arizona desert could be a manifestation of drug-related violence spilling over the border).

178. The IRS's rule change also exposes another frightening and perverse scenario. Given the amount of violence in Mexico, where members of drug cartels fight members of other drug cartels, a situation could arise where members of one cartel group torture a family member of a rival cartel group on U.S. soil after targeting that individual because of financial information obtained from this rule change. Such a lawsuit is not likely but hypothetically could arise because of the rule change.

179. 28 U.S.C. § 2680(a); *see also* Seamon, *supra* note 173, at 737 (discussing the discretionary function exception to the FTCA).

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[180]

Professor Richard Henry Seamon has explained that the exception contains two parts – first, a "due care clause" and second, the "discretionary function clause."[181] The first clause, the "due care clause," protects the government and its officials from suits based upon an employee's exercise of "due care" in the execution of a statute or regulation.[182] This first clause would be largely inapplicable to the scenario in question.

However, the "discretionary function" clause protects discretionary decisions that are "susceptible to [public] policy analysis, meaning decisions that, by their nature, call for the making of political, social, and economic judgments."[183] The United States Supreme Court discussed the applicability of the FTCA's "discretionary function" exception in the *Berkovitz v. Gaubert* case, noting:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.[184]

The *Gaubert* test presents a high hurdle for any claim by a nonresident alien tortured within the United States by members of a drug cartel. Empirical research has shown that from approximately 1991 to 2007, the U.S. government succeeded in dismissing approximately 76% of FTCA actions under the "discretionary function" exception in federal courts

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180. 28 U.S.C. § 2680(a).
181. Seamon, *supra* note 173, at 737.
182. *Id.*
183. *Id.* at 747-748 (internal quotation marks omitted).
184. United States v. Gaubert, 499 U.S. 315, 324-25 (1991).

when that exception was at issue.[185] In essence, the Plaintiff has to make a showing to the court that "no conceivable policy consideration could have justified the allegedly tortious conduct"[186] in order to withstand a motion to dismiss.

Thus, it is probable that the FTCA claims of any nonresident alien injured within the United States would be barred by the discretionary function clause. Despite the high hurdles an FTCA claim presents, a Plaintiff in the scenario discussed may not be out of remedies in a U.S. court—the Alien Tort Claims Act may provide an opportunity for relief.

B. Potential Liability Under the Alien Tort Claims Act (ATCA)

1. The Background of ATCA

The Alien Tort Claims Act (or "Alien Tort Statute"), the "Lohengrin"[187] of the law, is one of the longest-lasting and most intriguing laws of the land. The Alien Tort Statute, 28 U.S.C. § 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[188] In essence, under a textual reading of the statute there are three jurisdictional requirements: the case must involve (1) a civil action, (2) which involves an alien, and (3) a tort must be committed in violation of a treaty or the "law of nations."

Prior to 1976, only several reported cases involved allegations under the Alien Tort Claims Act, which has been a part of U.S. law since 1789. Before that time, only two cases were reported in which jurisdiction was sustained.[189] However, in 1980 the Second Circuit Court of Appeals gave renewed vigor to the ATCA with its decision in *Filartiga v. Peña-*

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185. *See* Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 296 (2009) (providing that after *Gaubert*, the government dismissed approximately 76.30% of reported federal district court cases under the discretionary function exception by way of summary judgment).

186. Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 431 (2012).

187. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) ("This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, s 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.").

188. Alien Tort Claims Act, 28 U.S.C. § 1350 (2012).

189. *See* Bolchos v. Darrel, 3 Fed. Cas. 810, 810-11 (D.S.C. 1795) (No. 1607) (involving allegations of capture of neutral property on an enemy's ship which violated a treaty); Adra v. Clift, 195 F. Supp. 857, 864-65 (D.C. Md. 1961) (involving a custody dispute that led to the violation of international tort law).

Irala.[190] In *Filartiga,* the Second Circuit held that official torture constituted a violation of the "law of nations" and was actionable under the ATCA.[191]

The effects of *Filartiga* were far-reaching and enabled victims of human rights abuses to seek redress in tort in domestic courts.[192] In more recent years, with a number of courts eliminating the requirement of "state action" for a breach of the "law of nations,"[193] litigation now includes suits against multinational corporations based upon human rights violations.[194]

One of the most commonly litigated questions involving the ATCA today is which norms constitute a violation of the "law of nations" and are actionable. In 2004, the Supreme Court of the United States gave guidance on this issue in *Sosa v. Alvarez-Machain.*[195] In *Sosa,* the Supreme Court held that a claim based upon the "law of nations" must meet three requirements: (1) the violation must rest on a norm of an international character; (2) the norm must be "accepted by the civilized world;" and (3) the norm must be specifically defined.[196]

Today, most norms of a "jus cogens"[197] nature have been held as actionable under the ATCA following the prohibition against torture in the *Filartiga* decision. These norms include the prohibition against genocide,[198] the prohibition against war crimes,[199] the

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190. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (discussing ATCA, the basis of the appellants' primary argument in support of federal jurisdiction).

191. *See id.* at 884 ("Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists[,] we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.").

192. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III,* 42 VA. J. INT'L L. 587, 589 (2002) ("The *Filartiga* decision paved the way for international human rights litigation in U.S. courts. Since the decision, numerous lawsuits have been brought in the United States challenging human rights abuses around the world, ranging from political oppression in Ethiopia, to genocide and war crimes in Bosnia, to violence by the Guatemalan military.").

193. *See id.* (crediting the expansion of litigation to a Second Circuit decision, which held that a violation of the law of nations may occur without state action).

194. *Id.*

195. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724-28 (2004) (providing reasoning behind the Court's requirements for claims to successfully be based upon the law of nations).

196. *See id.* at 725 (setting forth requirements for claims based on the law of nations); Chad G. Marzen, *The Furundzija Judgment and Its Continued Vitality in International Law,* 43 CREIGHTON L. REV. 505, 522 (2010) (noting the three requirements for claims based on the law of nations).

197. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens,* 34 YALE J. INT'L L. 331 (2009) ("In international law, the term 'jus cogens' (literally, 'compelling law') refers to norms that command peremptory authority, superseding conflicting treaties and custom.").

198. *See* Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995) ("The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987 . . . which criminalizes acts of genocide without regard to whether the offender is acting under color of law . . . if the crime is committed within the United States or by a U.S. national.") (citations omitted).

prohibition against crimes against humanity,[200] the prohibition against racial discrimination,[201] the prohibition against the use of child labor,[202] and most recently, even allegations concerning terrorism.[203]

In the past decade, several landmark cases have expanded the reach of the statute to private liability, particularly cases against multinational corporations. The Ninth Circuit Court of Appeals was first to endorse private liability in *Doe I v. Unocal.*[204] In *Doe I v. Unocal,* a case involving allegations of Unocal working in concert with the Burmese government to subject villagers to forced labor, murder, rape and torture during the construction of a gas pipeline in the Tenasserim region,[205] the Ninth Circuit held that pleading a theory of aiding-and-abetting liability was permissible under the statute.[206] The following year, the United States District Court for the Southern District of New York followed suit, endorsing the pleading of aiding-and-abetting liability in the *Presbyterian Church of Sudan v. Talisman Energy* case.[207] Quite significantly, the Second Circuit Court of Appeals endorsed aiding-and-abetting liability in *Khulumani v. Barclay National Bank, Ltd.* in 2009.[208] The *Khulumani* court held that aiding and abetting a violation of a norm of the "law of nations" is actionable if the defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with

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199. *See id.* at 243 ("The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremburg after World War II . . . and remains today an important aspect of international law.") (citations omitted).

200. *See* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007) ("Plaintiffs here have alleged several claims asserting jus cogens violations that form the least controversial core of modern day ATCA jurisdiction, including allegations of war crimes, crimes against humanity and racial discrimination.").

201. *See id.* at 1209 ("Acts of racial discrimination are violations of jus cogens norms.").

202. *See* Roe I v. Bridgestone, 492 F. Supp. 2d 988, 1022 (S.D. Ind. 2007) ("In light of ILO Convention 182, the court believes that the allegations of child labor in Count Two meet the *Sosa* standard for ATS claims. It would not require 'judicial creativity' to find that even paid labor of very young children in these heavy and hazardous jobs would violate international norms.").

203. *See* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007) ("In sum, in light of the universal condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population, this court finds that such conduct violates an established norm of international law."). *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) ("While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.").

204. *See* Doe I v. Unocal Corp., 395 F.3d 932, 945-46 (9th Cir. 2002) (discussing ATCA liability in cases against private parties).

205. *Id.* at 939.

206. *Id.* at 953.

207. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320-21 (S.D.N.Y. 2003) (finding that aiding and abetting are actionable under the ATCA).

208. *See* Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 260 (2d Cir. 2007) ("We hold that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA.").

the purpose of facilitating the commission of that crime."[209] With the extended reach of the ATCA to private actors through aiding-and-abetting liability, scholars have comprehensively discussed the potential reach of the statute to directly address areas as diverse as labor rights,[210] environmental human rights,[211] and even the liability of private military contractors that have assisted the United States military in the conflicts in Iraq and Afghanistan.[212]

While a significant development, the imposition of civil aiding-and-abetting liability has left ATCA jurisprudence fractured and murky.[213] A circuit split has developed on the question of whether or not corporations can be held liable under the statute. Caselaw in the Ninth Circuit reasons that since private actors can be held liable under international law, this liability extends to corporations as well.[214] Similarly, in *Romero v. Drummond Company,*

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209. *Id.* at 277.

210. *See* Pagnattaro, *supra* note 11, at 262 ("There is certain to be opposition to U.S. courts adjudicating ATCA claims brought by workers who were employed or subject to forced labor outside the United States. Yet, to the extent that companies under the jurisdiction of U.S. courts treat their international workers with impunity or are knowingly complicit in acts that violate international law, they should be held accountable.").

211. *See* Dhooge I, *supra* note 11, at 442-47 (examining the right to a healthy environment as set forth in various international instruments and its potential as a subject of ATCA litigation); James Boeving, *Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 138 (2005) (providing conclusions about the prospects for environmental plaintiffs in light of the *Sosa* decision); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 395 (1997) ("Alien Tort Statute jurisprudence and international environmental human rights law have evolved to a point at which suits by indigenous environmental plaintiffs against multinational corporations appropriately can be brought in U.S. district courts.").

212. There is a vast new literature concerning the responsibility and liability of private military and security contractors under the Alien Tort Claims Act. This scholarship includes: Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT'L L. 321 (2011); Efrain Staino, Comment, *Suing Private Military Contractors for Torture: How to Use the Alien Tort Statute Without Granting Sovereign-Immunity Related Defenses*, 50 SANTA CLARA L. REV. 1277 (2010); Jenny S. Lam, Comment, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459 (2009); Matthew C. Dahl, *Soldiers of Fortune – Holding Private Security Contractors Accountable: The Alien Tort Claims Act and Its Potential Application to Abtan, et al. v. Blackwater Lodge and Training Center, Inc., et. al.*, 37 DENV. J. INT'L L. & POL'Y 119 (2008); Thomas B. Harvey, Comment, *Wrapping Themselves in the American Flag: The Alien Tort Statute, Private Military Contractors, and U.S. Foreign Relations*, 53 ST. LOUIS U. L.J. 247 (2008); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); Laura A. Dickinson, *Filartiga's Legacy in an Era of Military Privatization*, 37 RUTGERS L.J. 703 (2006); Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493 (2006); Scott J. Borrowman, Comment, *Sosa v. Alvarez-Machain and Abu Ghraib – Civil Remedies for Violations of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371 (2005); Mark W. Bina, Comment, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237 (2005).

213. *See* Dhooge II, *supra* note 11, at 294 ("[T]he Second Circuit [in *Khulumani*] provided minimal guidance to potential plaintiffs, transnational corporations, and lower courts and largely disregarded the consequences of its holdings. The corporate liability imposed in *Khulumani* was undoubtedly beyond the expectations of the corporate defendants at the time the transactions in question occurred.").

214. *See* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *9 (N.D. Cal. Aug. 22, 2006) ("Defendants' final argument is that international law does not extend to corporations, and that corporations therefore cannot be held liable under the ATS. The Court disagrees. The dividing line for international law has traditionally fallen between states and private actors. Once this line has been crossed and an international norm has become sufficiently

Inc., the Eleventh Circuit held corporations could be held liable under the ATCA.[215] In the 2010 case of *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit came to the opposite conclusion and the stage was set for the U.S. Supreme Court to issue a decision on corporate liability in 2013.[216]

The United States Supreme Court issued its much anticipated decision in *Kiobel* in April 2013. In *Kiobel,* a group of Nigerian nationals filed a class action suit against certain Nigerian, Dutch, and British corporations under the ATCA, alleging that the corporations aided-and-abetted the Nigerian government in the commission of the following in association with oil exploration activities in Nigeria: "(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the right to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[217]

In a unanimous decision, the Supreme Court held that the petitioners lacked jurisdiction.[218] Analyzing the text and history of the statute,[219] the Supreme Court noted that there is a general presumption against the extraterritorial reach of the ATCA.[220] While the *Kiobel* decision further limits the contours of corporate liability under the ATCA,[221] the Supreme Court did leave open the possibility that corporate liability could be found under the ATCA where the presumption against extraterritorial application is overturned:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corpo-

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well established to reach private actors, there is very little reason to differentiate between corporations and individuals.").

215. *See* Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) ("The text of the Alien Tort Statute provides no exception for corporations . . . and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.").

216. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010) ("Customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.").

217. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (U.S. 2013).

218. *See id.* at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. There is no clear indication of extraterritoriality here . . . and the petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.") (citations and internal quotation marks omitted).

219. *See id.* at 1666 ("Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign.").

220. *Id.* at 1664-65.

221. *See* Robert Barnes, *Supreme Court Limits Civil Lawsuits Alleging Atrocities Committed Abroad*, WASH. POST (Apr. 17, 2013), http://articles.washingtonpost.com/2013-04-17/politics/38603721_1_kiobel-alien-tort-statute-corporate-complicity (discussing the implications of the *Kiobel* decision).

> rations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[222]

Thus, *Kiobel* does not definitively close claims based upon corporate liability under the statute. In addition, *Kiobel* does not completely shut the door on claims based on activity occurring outside of the United States. Such an outcome would bar any liability for the vast majority of claims based upon violations of *jus cogens* norms by any foreign criminal gangs. As the fate of actionable violations outside the territorial sovereignty of the United States still has not been completely resolved by the United States Supreme Court,[223] the ATCA may be a possible source of relief for a nonresident alien seriously harmed by the IRS's rule change.

2. Potential Liability Under ATCA

Despite significant hurdles with a potential claim under the FTCA, a potential plaintiff tortured by members of a drug cartel because of the release of sensitive bank account information might be able to state a cause of action under the Alien Tort Claims Act (ATCA) in the federal district courts. There are two distinct possible claims that potentially might be pursued. First, there is a claim against the actual torturers themselves, which would be more likely to proceed to the merits. In addition, the Plaintiff may pursue a claim against the federal governmental officials who promulgated the IRS's rule change, but such claim at present would face an uphill battle.

a. Claims Against Members of Drug Cartels Who Commit Acts of Torture

A victim in the current scenario could possibly assert a civil tort claim against the actual individual(s) who commit the torture. All of the jurisdictional requirements under the ATCA would be met if torture occurred: the claim involves a civil action, the Plaintiff is a nonresident alien, and the commission of torture involves an act violating the "law of nations."[224] It is important to note that the commission and/or the aiding-and-abetting of torture would be the only actionable tort since the prohibition against kidnapping and abduction does not rise to the level of an international norm under the "law of nations."[225]

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222. *Kiobel*, 133 S. Ct. at 1669 (citations omitted).

223. *See* Michael Bobelian, *Supreme Court Could Redraw The Reach of America's Courts*, FORBES (Apr. 29, 2013), http://www.forbes.com/sties/michaelbobelian/2013/04/29/supreme-court-could-redraw-the-reach-of-americas-courts/ (discussing the uncertainty over the issue of jurisdiction under the ATCA).

224. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d. Cir. 1980) ("We conclude that official torture is now prohibited by the law of nations.").

225. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.").

Early landmark cases under the ATCA involved this very situation—a foreign national suing another foreign national in federal district court based upon a violation of the prohibition against torture or another *jus cogens* norm of international law. In the *Filartiga* case, a Paraguayan doctor and opponent of the dictatorial regime of President Alfredo Stroessner brought a successful ATCA claim for the torture and murder of his son by the Inspector-General of the Police of Asuncion, Paraguay.[226] Similarly, in *Kadic v. Karadzic,* a group of Bosnian-Serb plaintiffs brought forth claims of torture, rape, war crimes and crimes against humanity against Radovan Karadzic, the former self-proclaimed President of the Republic of "Srpska," who in fact exercised a significant degree of de facto control over large parts of Bosnia-Herzegovina.[227]

Despite the Plaintiff having recourse by way of a civil claim under the ATCA for torture or other violation of a *jus cogens* norm against the responsible members of a drug cartel, significant barriers remain with service of process and personal jurisdiction. In almost all cases involving the ATCA, the defendants were personally served with service of process while physically present within the United States.[228] Service of process remains a hurdle given the insidious nature of the operations of drug cartels. However, it is much more likely that a cartel member who participated in committing torture could be served following a police arrest. Also difficult is any potential claim against the Commissioner of the IRS or any other federal governmental officials responsible for promulgating the IRS's rule change.

b. Claims Against Federal Governmental Officials

Potential claims against the Commissioner of the IRS or other federal governmental officials for aiding-and-abetting acts of torture committed by members of drug cartels because of the rule change are an uphill climb for a plaintiff.

The first major question is whether a court would allow a claim for civil aiding-and-abetting liability for torture to proceed. As mentioned earlier, the courts in *Doe I v. Unocal*,[229] *Presbyterian Church of Sudan*,[230] and *Khulumani*[231] have all held that a claim of aiding-and-abetting liability is actionable under ATCA. Assuming this hurdle is overcome, the Westfall Act and sovereign immunity issues once again arise as a formidable roadblock to claims against governmental officials.

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226. *Filartiga*, 630 F.2d at 878.
227. Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).
228. *See* Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941, 963 (2001) ("[O]ther factors which limit the number of [ATCA] suits . . . from being brought in U.S. courts are the requirements of valid service of process and good personal jurisdiction.").
229. Doe I v. Unocal Corp., 395 F.3d 932, 953 (9th Cir. 2002).
230. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003).
231. Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 277 (2d Cir. 2007).

Under the Westfall Act, federal governmental officials are entitled to absolute immunity if working within the scope and course of their employment when they commit a tort,[232] and the FTCA provides an exclusive remedy.[233] However, under the Westfall Act, immunity is conferred upon a federal governmental official only for a "negligent or wrongful act or omission."[234]

The question becomes whether a "wrongful" act or omission pursuant to the Westfall Act would encompass civil aiding-and-abetting liability for torture. Lawsuits filed by former Afghan and Iraqi detainees detained during the wars in Afghanistan and Iraq against former Secretary of Defense Donald Rumsfeld and other high-ranking U.S. military officials provide some insight. For instance, in *Ali v. Rumsfeld,* several former Afghan and Iraqi detainees filed claims under the Alien Tort Statute and several other legal theories alleging damages and declaratory relief as a result of alleged torture formulated and implemented by the defendants while in United States custody.[235]

The Court of Appeals for the District of Columbia Circuit held that all of the defendants worked within the scope of their employment and that the Westfall Act does not provide an exception for "egregious torts that violate *jus cogens* norms,"[236] such as torture. Furthermore, the Court of Appeals held that the ATCA is strictly a "jurisdictional statute"[237] and does not confer any new rights or obligations that would trigger the applicability of the Westfall Act's exception, which does not confer immunity in cases where a suit is "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."[238]

Applying this to the present scenario, barring a holding that interprets "wrongful" under the Westfall Act not to encompass torts that violate *jus cogens* norms, any suit against the Commissioner of the IRS or other federal government officials based on an ATCA theory is likely to be governed by the FTCA. Professor Seamon notes that "the FTCA generally provides the exclusive remedy for official misconduct even when it provides no remedy at all" in cases involving torture because of application of the FTCA's "foreign country" and "discretionary function" exceptions.[239] In essence, these two statutes currently work together to bar most torture claims against U.S. governmental officials.[240]

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232. 28 U.S.C. § 2679(d)(1) (2012).
233. *Id.* § 2679(b)(1).
234. *Id.*
235. Ali v. Rumsfeld, 649 F.3d 762, 764-65 (D.C. Cir. 2011).
236. *Id.* at 774-75.
237. *See id.* at 776 ("[T]he Supreme Court has clarified that 'the ATS is a jurisdictional statute creating no new causes of action.").
238. 28 U.S.C. § 2679(b)(2)(B).
239. Seamon, *supra* note 173, at 770.
240. Hoffman & Quarry, *supra* note 166, at 148-51.

Even though there are significant roadblocks for a plaintiff to prevail under an FTCA or ATCA claim, the IRS's rule change is likely to produce more federal tort claims that challenge current case law and place further pressure on already endangered and precious judicial resources.[241] Significantly, the IRS's new regulations also weaken and harm U.S. economic and foreign policy, and the clear risks presented by the rule change outweigh any benefits that might accrue.

VI. THE IRS REPORTING PROGRAM EFFECTS UPON U.S. ECONOMIC AND FOREIGN POLICY

Outside of the IRS, no one in Congress appears to have thought about the policy exempting the payment of taxes on earned interest held by nonresident aliens at U.S. banks from 1976 until 2001. It seems as if the IRS believed it could quietly adopt a rule that had broad ramifications under the guise that the reporting required by these regulations became "essential to the U.S. government's efforts to combat offshore tax evasion."[242]

The IRS's decision to adopt these regulations maintains the potential to wreak havoc upon an economy in recovery and hinders and harms U.S. foreign policy interests. The sharing of information concerning interest income on deposits of nonresident aliens with the Mexican government is very dangerous considering that corrupt officials within the Mexican government could leak this information to members of drug cartels. The policy, despite repeated governmental acknowledgment of the threats of the Mexican drug cartels, also hinders and runs contrary to U.S. obligations under the Convention Against Torture. Furthermore, in the wake of an aggressive joint effort to fight the drug cartels by the Mexican and United States governments, the policy weakens the United States' national security strategy and fight against terrorism.

A. The IRS Reporting Program Weakens Longstanding U.S. Economic and Tax Policies

Given the gravity of the policy decision, the determination by the IRS to require the reporting of this bank interest appears to use the need to exchange tax information with foreign governments as a tool that undermines this longstanding approach by Congress on two fronts. First, it shows a complete disregard for the policy espoused by Congress over the

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241. *Judicial Emergencies,* U.S. COURTS (Sept. 15, 2012), http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx (noting that as of September 15, 2012, thirty-three total federal judicial emergencies exist).

242. Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. at 23,391 (Apr. 19, 2012) (to be codified at 26 C.F.R. pts. 1, 31).

past ninety years to attract capital to the U.S. that could provide additional sources of private investment and stimulate the economy. Support for this policy appears to transcend time[243] and party lines[244] because a change in course like the one charted by the IRS can and will cause severe economic harm.[245]

As explained by Senators Stone and Brock in the 1976 debate on the Senate floor, many of the financial institutions in gateway cities count as much as one-third of their deposit base from nonresident aliens and suffering a loss of that proportion would not be survivable.[246] More recently, the Florida congressional delegation sent a letter to President Obama explaining that:

> According to the Commerce Department, foreigners have $10.6 trillion passively invested in the American economy, including nearly "$3.6 trillion reported by U.S. banks and securities brokers." In addition, a 2004 study from the Mercatus Center at George Mason University estimated that "a scaled-back version of the rule would drive $88 billion from American financial institutions," and this version of the regulation will be far more damaging.[247]

Second, it opens the door to remove the exemption for the withholding tax in order to generate a new revenue stream for the government. While it may not seem like a large step, the collection of data on the interest earned by nonresident alien bank accounts held in the United States makes subsequent removal of the exemption easier. The IRS could effortlessly persuade a cash-strapped Congress to remove the exemption by dangling a sizable amount of projected revenue in front of it, basing its estimates on an analysis of the reported data. Aside from the financial impact, the existing infrastructure maintained by the financial institutions and the IRS would make the implementation easy, with very little cost to the public.

Accordingly, the IRS may gain information and revenue by pursuing its policy to require U.S. financial institutions to report the earned interest on accounts held by nonresident aliens, but the steep costs associated with losing the investment funds will undoubtedly cause more economic harm than good.

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243. *See supra* Part I.
244. *See, e.g.*, Letter from the Florida Congressional Delegation to President Barack Obama, *supra* note 6.
245. *Id.*
246. 122 CONG. REC. 23,875 (daily ed. July 26, 1976) (statements of Sen. Stone and Sen. Brock).
247. *See* Letter from the Florida Congressional Delegation to President Barack Obama, *supra* note 6.

B. *The IRS Reporting Program Weakens the U.S. Commitment Against Torture and Commitment to International Law*

This policy will not only cause economic harm—it also significantly weakens the United States' commitment against torture and the Obama administration's fight against terrorism. Entered into force in 1987, the United Nations Convention Against Torture codifies the prohibition against torture as a *jus cogens* norm of international law, irrespective of exigencies.[248] The Convention defines "torture" in Article 1, Paragraph 1 as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[249]

Pursuant to Article 1, Paragraph 1, actions inflicted upon an individual that cause severe mental or physical suffering constitute torture.[250] The definition also requires that the act of torture must be committed either by a public official or a private individual acting with the instigation, consent, or acquiescence of a public official.[251]

Further, the Convention Against Torture requires foreign states that are parties to the Convention in Article 2, Paragraph 1 to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[252] Finally, Article 4 requires parties to the Convention to "ensure that all acts of torture are offences under its criminal law" and that the same applies "to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."[253]

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248. *See* Isaac A. Linnartz, Note, *The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1491 (2008) (discussing the U.N. Convention Against Torture).

249. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, ¶ 1, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

250. *See* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW & APPLICATION TO INTERROGATION TECHNIQUES 1-2 (2008) (discussing the definition of "torture" under the Convention).

251. *Id.* at 2.

252. Convention Against Torture, *supra* note 249, art. 2, ¶ 1.

253. *Id.* art. 4, ¶ 1.

The obligations imposed by these articles are internationally binding on the United States as a signatory and ratifying party to the Convention.[254] Despite the fact that the Convention's provisions are non-self-executing for juridical effect as part of domestic law,[255] political leaders in the United States remain rhetorically committed to condemning torture. On June 26, 2009, President Barack Obama gave the following statement concerning torture:

> Torture violates United States and international law as well as human dignity. Torture is contrary to the founding documents of our country, and the fundamental values of our people. It diminishes the security of those who carry it out, and surrenders the moral authority that must form the basis for just leadership. That is why the United States must never engage in torture, and must stand against torture wherever it takes place.[256]

Despite this rhetorical commitment of the United States government against torture, the IRS's new regulations will likely lead to the occurrence of more acts of torture, which runs afoul of international treaty obligations imposed by Article 1, Paragraph 1 of the Convention Against Torture. In that article, torture is prohibited in all circumstances in cases where a public official "acquiesces" to the acts of torture.[257] With the IRS's rule change, it is foreseeable that drug cartels will obtain tax information released and shared with the Mexican government, and that wealthy individuals may be targeted, abducted, and quite possibly tortured because of their wealthy status. In this case, the IRS has arguably done more than actually "acquiesce" in torture for purposes of Article 1, Paragraph 1. In essence the release of the information is an actual facilitator, not merely an acquiescent act, for any torture that occurs.

Guidance on the domestic interpretation of "acquiescence" can be found in the field of immigration law. The U.S. government understands "acquiescence" in the context of torture to mean that a public official must, "prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to

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254. *See* Linnartz, *supra* note 248, at 1495 (explaining the implementation of the Convention Against Torture in the United States).

255. *See id.* ("The Senate's reservations and understandings for the Convention Against Torture included a provision stating that 'the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing,' meaning that the obligations imposed by those articles had to be legislatively modified to have the force of law.") (citations omitted).

256. *Statement by President Barack Obama on United Nations International Day in Support of Torture Victims*, OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE (June 26, 2009), http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-united-nations-international-day-support-torture-v.

257. *See* Convention Against Torture, *supra* note 249, art. 1, ¶ 1 (providing a definition of "torture" for the purposes of the Convention).

prevent such activity."[258] In the area of immigration law, there are regulations that bar the removal of aliens to foreign countries where it is more likely than not that the individuals would face torture.[259] In *Zheng v. Ashcroft,* the Ninth Circuit Court of Appeals held that for a plaintiff to obtain immigration relief from removal pursuant to the Convention Against Torture, the plaintiff must prove that acts of torture by a third party were carried out while foreign government officials had "awareness" of such acts, a concept that includes both "actual knowledge" and "willful blindness."[260]

In the case of the IRS's new regulations, Mexican authorities are arguably "aware" of the acts of torture being committed by members of the drug cartels. Certainly, there is "actual knowledge" present, as the Mexican government has acknowledged there is a war against the drug cartels. In addition, there is also a "willful blindness" on the part of many authorities, despite the Calderón administration's aggressive efforts. Some authorities in Mexico are not "willfully blind" to torture and the crimes committed by the cartels. But, corruption remains a critical concern in Mexico, which is all-too evident by the Calderón administration's purge of the police force.[261] And, some political scientists even argue that Mexico has fallen into the category of a "failed state,"[262] meaning that it is a nation that is "tense, deeply conflicted, dangerous, and bitterly contested by warring factions."[263]

Despite these concerns, the IRS decided to move forward with a policy that will likely harm innocent Mexican civilians, expose the nature and extent of their wealth, and open the door for cartels to target them. Just as our country should not remove an individual to a foreign nation if it is more likely than not that the individual would be tortured there, so too should the IRS decline to release and share interest income received at U.S. banks with

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258. *See* 8 C.F.R. § 1208.18(a)(7) ("Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."); GARCIA, *supra* note 250, at 6-7 (citing SEN. EXEC. REP. No. 101-30 (1990)) (emphasis in original).

259. GARCIA, *supra* note 250, at 7; *see* 8 C.F.R. §§ 1208.16(c) (explaining eligibility for withholding of removal under the Convention Against Torture), 1208.17(a) (explaining deferral of removal under the Convention Against Torture).

260. *See* Zheng v. Ashcroft, 332 F.3d 1186, 1195 (9th Cir. 2003) ("The Senate Committee on Foreign Relations expressly stated that the purpose of requiring awareness, and not knowledge, 'is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.'' S. EXEC. REP. 101-30, at 9.").

261. *See* BEITTEL, *supra* note 89, at 34 (discussing the impact of a corrupt police force on Calderón's anti-drug efforts).

262. *See generally* GEORGE W. GRAYSON, MEXICO: NARCO-VIOLENCE & A FAILED STATE? 3-4 (2011) (presenting arguments from scholars who believe that Mexico is a "failed state").

263. Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators, in* STATE FAILURE & STATE WEAKNESS IN A TIME OF TERROR 1, 5 (Robert I. Rotberg, ed., 2003). Rotberg explains, "*Failed* states are tense, deeply conflicted, dangerous, and contested bitterly by warring factions. In most failed states, government troops battle armed revolts led by one or more rivals. Occasionally, the official authorities in a failed state face two or more insurgencies, varieties of civil unrest, different degrees of communal discontent, and a plethora of dissent directed at the state and at groups within the state." *Id.* (emphasis in original).

the authorities of nations where torture is more than likely to occur if the information is released and ends up in the wrong hands. With the adoption of the reporting regulations for interest earned by nonresident aliens in domestic banks, the U.S. government is pursuing a policy contrary to the letter and spirit of Article 1, Paragraph 1 of the Convention Against Torture, and the policy runs afoul of U.S. international legal obligations.

C. *The IRS Reporting Program Weakens the Obama Administration's Fight Against Terrorism*

The IRS's rule change weakens the United States' national security strategy. One of the main tenets of the current national security strategy is to deny Al-Qa'ida and its affiliates safe haven in any foreign state[264] and to disable their "financial, human and planning networks."[265] With regard to U.S. national security, much scholarship has focused on the legal implications of the global fight to dismantle Al-Qa'ida.[266]

A significant part of the Obama administration's national security strategy also concerns the situation in Mexico. The current National Security Strategy of the United States notes that "[s]tability and security in Mexico are indispensable to building a strong economic partnership, fighting the illicit drug and arms trade, and promoting sound immigration policy."[267]

The disabling of the financial, human and planning networks of the Mexican drug cartels is a necessary component of the fight against terrorism. In July 2011, the Obama administration released its Strategy to Combat Transnational Organized Crime, which is

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264. *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 19 (2010) [hereinafter NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (describing the United States' "global campaign against al-Qa'ida and its terrorist affiliates").

265. *Id.* at 21.

266. Recent legal scholarship concerning legal implications of the fight to globally dismantle Al-Qa'ida includes: Upendra D. Acharya, *International Lawlessness, International Politics, and the Problem of Terrorism: A Conundrum of International Law and U.S. Foreign Policy*, 40 DENV. J. INT'L L. & POL'Y 144 (2011-2012); David Aronofsky, *The War on Terror: Where We Have Been, Are, and Should Be Going*, 40 DENV. J. INT'L L. & POL'Y 90 (2011-2012); Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT'L L.J. 367 (2012); Nathan Alexander Sales, *Self-Restraint and National Security*, 6 J. NAT'L SECURITY L. & POL'Y 227 (2012); Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1 (2011); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569 (2011); Ryan T. Williams, *Dangerous Precedent: America's Illegal War in Afghanistan*, 33 U. PA. J. INT'L L. 563 (2011); Tung Yin, *"Anything But Bush?": The Obama Administration and Guantanamo Bay*, 34 HARV. J. L. & PUB. POL'Y 453 (2011); Tung Yin, *Broken Promises or Unrealistic Expectations?: Comparing the Bush and Obama Administrations on Counterterrorism*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 465 (2011); Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces – The First Year*, 30 PACE L. REV. 340 (2010); Ved P. Nanda, *Introductory Essay: International Law Implications of the United States' "War on Terror"*, 37 DENV. J. INT'L L. & POL'Y 513 (2009).

267. NATIONAL SECURITY STRATEGY, *supra* note 264, at 42-43.

aimed at dismantling international criminal networks, including the drug cartels in Mexico.[268] A key part of this strategy focuses directly on eliminating the drug cartels' use of financial tools and instruments. The Strategy states:

> The United States remains intent on improving the transparency of the international financial system, including an effort to expose vulnerabilities that could be exploited by terrorist and other illicit financial networks. At the same time, the United States will enhance and apply our financial tools and sanctions more effectively to close those vulnerabilities, disrupt and dismantle illicit financial networks, and apply pressure on the state entities that directly or indirectly support [transnational organized crime].[269]

The contemporary fight against terrorism is not only fought with the enactment of executive and congressional policies but also in the courtrooms of the United States. U.S. courts, such as the Eastern District of New York in *Almog v. Arab Bank*,[270] have affirmed the growing principle that corporate banks can incur civil liability for facilitating acts of terrorism.[271] Just as a corporate entity like a bank was held to complicitly facilitate suicide bombings and other terrorist attacks,[272] as noted previously, a federal governmental entity in this situation (the IRS) may be arguably complicit facilitating of abduction, ransom, and torture if these acts occur as a result of the release of nonresident interest income from a bank(s) in the United States and this information falls into improper hands.

This potential scenario, foreseeable under the adopted regulations, greatly weakens and undermines the national strategy of the United States to combat the cartels by disrupting their financial networks. If anything, the policy will likely result in the targeting of more wealthy individuals in Mexico and have no effect in deterring acts of terrorism—tragically, it could in fact facilitate those strongly condemned acts.

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268. *See* THE WHITE HOUSE, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME 9 (2011), *available at* http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf (describing the threat that transnational organized crime presents in the Western Hemisphere).

269. *Id.* at 20.

270. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007) ("Civil aiding and abetting liability, as well as conspiracy liability, is available under the ATA, and Arab Bank's alleged conduct falls within the scope of such liability.").

271. Juan Pablo Bohoslavsky & Mariana Rulli, *Corporate Complicity and Finance as a 'Killing Agent': The Relevance of the Chilean Case*, 8 J. INT'L CRIM. JUST. 829, 836 (2010).

272. *See Almog*, 471 F. Supp. 2d at 293 ("Arab Bank provided practical assistance to the organizations sponsoring the suicide bombings and helped them further their goal of encouraging bombers to serve as 'martyrs.'").

VII. CONCLUSION

Four words—"change is not better"—aptly describe the IRS's rule change requiring nonresident aliens to report income received on bank accounts. For decades, torturers and human rights abusers escaped accountability and prosecution for their crimes as they committed their atrocities in a world which did not yet have established international regimes and laws to prevent the most egregious offenses against human dignity.[273] With developments in the twentieth century, including the implementation of international treaties, such as the Convention Against Torture, and judicial enhancement of domestic legislation, such as the Alien Tort Statute in the United States, torturers and human rights abusers can no longer hide from accountability in the shadows of darkness. Much progress toward the advancement of human rights in international and domestic legal contexts has been made. These developments have also been coupled with the rise of the United States throughout the past several decades as a preeminent economic stronghold in the world, as its innovation and investment policies have stimulated growth.

However, the IRS's adopted regulations will hinder this progress. The IRS's decision disregards decades of work and advocacy by Congress to attract foreign capital to the United States and provide sources of private investment that will help stimulate the economy. In today's economy, this policy change has the potential to wreak havoc on a fragile recovery and lead to a steep loss of foreign bank deposits within the United States. The costs of today's adopted regulations are too great and outweigh any of the purported benefits of additional revenue.

The reporting requirements may also lead to danger for nonresident aliens by criminal gangs and drug cartels, who could obtain financial information to be utilized in targeting individuals for kidnapping, extortion, ransom, and possibly torture. Far from assisting the war on criminal gangs and drug cartels, the policy will undermine it and likely subject the government of the United States to litigation in domestic courts. Moreover, the policy weakens the foreign policy of the United States against torture, deteriorates the United States' general commitment in the fight against terrorism and drug cartels in the Mexican drug war, and generally weakens international law. For many economic, legal, and moral reasons, the IRS's rule change is the wrong policy choice. Change is not better.

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273. The phrase "human dignity" appears in a number of fundamental texts of international law. For example, the Preamble of the United Nations Charter states that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person." U.N. Charter Preamble. In addition, Article 1 of the Universal Declaration of Human Rights affirms that "[a]ll human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1949), at art. 1. For a comprehensive discussion of the concept of human dignity and its appearance in domestic and international legal texts, see Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

REMEDIAL AND PREVENTIVE RESPONSES TO THE UNAUTHORIZED PRACTICE OF IMMIGRATION LAW

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INTRODUCTION

Unauthorized practice of immigration law (UPIL),[1] often called "notario fraud,"[2] continues to be rampant in the United States.[3] Practitioners of UPIL are individuals or

1. UPIL is a distinct kind of unauthorized practice of law (UPL). Federal law, federal regulations, and federal judicial and administrative precedent govern the substance, procedures, and processes of immigration, including who may lawfully represent or otherwise assist individuals in immigration cases. *See* Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1778 (2013). Authorized representatives are limited to attorneys in good standing, federally accredited representatives who can only work under prescribed circumstances and only for federally recognized non-profit organizations, and other narrowly construed categories of people whose assistance must be case-bound, provided without remuneration, and approved by the adjudicator. 8 C.F.R. § 1292.1 (2013). Federal immigration law also defines the conduct that constitutes legal practice, assistance, and representation in immigration cases. *See id.* § 1001.1 (providing relevant definitions); *infra* Part IV (providing a more detailed discussion).

2. "Notario" is a term misunderstood in many Latino immigrant communities in the United States to mean a person with legal expertise and authorization to practice law, including immigration law. It derives from the Spanish language phrase "notario publico" which, literally translated, means notary public. Unlike state-licensed notaries in the United States who perform limited non-attorney functions, in many Spanish-speaking countries a "notario" is an attorney or law-trained professional licensed to practice law. A common form of UPIL occurs when fraudsters working in Latino communities identify themselves as "notarios" without explaining that they are not authorized to practice law in the United States. *See, e.g.*, Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1 (2004) (explaining that notarios often rely on immigrants' cultural and linguistic misunderstandings as well as their lack of familiarity and knowledge about the U.S. legal system to persuade those looking for immigration assistance that they have the expertise and credentials to assist them). Notario fraud in Latino communities has linguistic and cultural analogues in other immigrant populations. *See id.* at 5-6. For example, eastern European immigrants sometimes turn to travel agents for assistance in regularizing their legal status because in their home countries, travel agents can help secure immigration visas. *Id.* In Chinese communities, asylum seekers are often directed to appearance attorneys by the travel agents or smugglers, also known as "snakeheads," who helped arrange their passage to the United States. *See* Richard L. Abel, *Practicing Immigration Law*

organizations that (1) "hold themselves out as immigration law experts, even though they are not attorneys" or (2) "act as gatekeepers for 'appearance attorneys' with limited or no knowledge of their client's immigration case."[4] Individuals properly accredited through a federally recognized organization charging only nominal fees are excluded from this definition.[5]

Although notarios sometimes provide useful services,[6] they can irreparably damage the lives of immigrants[7] and their citizen family members.[8] Families are separated, and individuals are deported to countries they scarcely remember and where they often have no relatives or friends. Immigrants may lose thousands of hard-earned dollars to scammers who falsely promise "papers" that would allow them and their families to live lawfully in the United States. Immigrant workers and their families can lose their livelihoods, and U.S. employers lose valuable workers. UPIL also compromises the rule of law and faith in the U.S. legal system.

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in Filene's Basement, 84 N.C. L. REV. 1449, 1454 (2006) (discussing case studies of smuggling in Chinese immigrant communities). Other common terms used by non-lawyers who engage in UPIL are "immigration consultants," "visa consultants," and "immigrant assistants." *Id.* at 1488.

3. *See* Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074, 1077 n.4 (9th Cir. 2007) (stating that the "immigration system in this country is plagued with 'notarios' who prey on uneducated immigrants").

4. Avagyan v. Holder, 646 F.3d 672, 675 n.2 (9th Cir. 2011). Gatekeeper notarios are also referred to as "intermediaries." *See* Abel, *supra* note 2, at 1488. They characteristically "charg[e] clients; choos[e], switch[ ], and pay[ ] lawyers; collect[ ] and translat[e] documents; maintain[ ] the file; 'prepar[e]' clients for hearings; interpret[ ]; and even choos[e] litigation strategies. . . . In some cases the client will not even know who his lawyer is . . . who is actually doing the work for him." *Id.* at 1488, 1488 n.312 (quoting JEROME E. CARLIN, LAWYERS ON THEIR OWN 163 (1962)).

5. *See infra* Part IV.A.2.b (discussing federal and state regulation of immigration practice).

6. *See, e.g.*, Anne E. Langford, *What's in a Name? Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 126 (2004) (noting that "notarios have stepped forth to fill the gap between the demand among Latino immigrants for affordable and culturally and linguistically competent help from the legal community and the supply of such services.").

7. Unless otherwise indicated, in this article we use the word "immigrant" colloquially to mean any non-citizen residing in the United States temporarily or permanently, with or without authorization. When we need to make clear that an individual may be in the United States without authorization, we use the descriptors "undocumented" or "unauthorized." Where appropriate, we also use the word "alien." The Immigration and Nationality Act (INA) defines an "alien" as "any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). Under the INA, "the term 'immigrant' means every alien except an alien who is within [an enumerated] class[ ] of nonimmigrant[s]." INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). The "immigrant" designation ordinarily refers to an individual who intends to reside permanently in the United States but is not a U.S. citizen or national. *See id.* (defining "immigrant" by way of exclusion). Synonymous terms for individuals with immigrant status include: permanent resident; green card holder; and resident alien. A "non-immigrant" is an alien in the United States temporarily for a specific purpose permitted by law. *Id.* Common nonimmigrant statuses include: visitors (B-1 visa holders); foreign students (F-1 visa holders), agricultural and non-seasonal, unskilled workers (respectively, H-2A and H2B visa holders). *See id.* (listing classes of non-immigrants).

8. We use the term "immigration consumer" to refer to non-U.S. citizens seeking immigration benefits or relief from removal and their U.S. citizen or legal permanent resident family members or employers who want to assist them in the process of seeking to reside lawfully in the United States.

Several factors contribute to the prevalence of UPIL: the sheer number of immigration consumers;[9] the multiple vulnerabilities of people seeking to obtain or retain immigration status;[10] the scarcity of affordable and competent immigration representation;[11] and the inadequate regulation and punishment of UPIL.[12] A meaningful response to the problem of notario fraud must address all of these realities.

In the last few years private and governmental actors have begun to challenge the persistence of UPIL in several ways, including: (1) conducting campaigns to educate the public about the harm that notarios can cause, how to identify the unlawful practice of immigration law, and what individuals and communities can do about it;[13] (2) enacting laws that more effectively address unauthorized immigration practice;[14] (3) undertaking capacity-building efforts aimed at building a greater pool of lawyers and government-accredited representatives to represent immigrants;[15] and (4) taking civil and criminal legal action against alleged notarios.[16] In a particularly welcome development, federal, state, and local government actors increasingly coordinate these efforts with one another and with non-government entities.[17]

Current models for addressing notario fraud can be roughly conceptualized as: (1) prevention-oriented actions such as regulation of immigration law-related practices, capacity building, and public education; (2) remedial approaches such as civil and administrative re-

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9. Approximately 39 million documented and undocumented foreign-born residents live in the United States. *See, e.g.*, CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, PETITION TO THE FEDERAL TRADE COMMISSION TO TAKE ENFORCEMENT ACTION, AND PROMULGATE INDUSTRY GUIDANCE, AND CONSUMER EDUCATION CONCERNING DECEPTIVE ACTS AND PRACTICES IN THE IMMIGRATION CONSULTING INDUSTRY 3 (filed Feb. 3, 2009) [hereinafter CATHOLIC CHARITIES PETITION]; Judge Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor* (Feb. 28, 2007), *in* 62 THE RECORD 287, 290 (2007) (citing then-Second Circuit Chief Judge John M. Walker, Jr.'s 2006 estimate that immigration cases comprise approximately 50% of the circuit's docket).

10. *See, e.g.*, Abel, *supra* note 2, at 1488 (explaining that immigrants are often poor, uneducated, "ignorant of language and culture, and threatened with losing everything they have so painfully won"); Katzmann, *supra* note 9, at 292 (highlighting the vulnerabilities of immigrants).

11. *See* Katzmann, *supra* note 9, at 301 (describing the significant need among immigrants for competent legal representation).

12. *See* Moore, *supra* note 2, at 2-3 (discussing the prevalence of UPIL practices and resultant setbacks to the immigration administrative system).

13. *See, e.g.*, CATHOLIC CHARITIES PETITION, *supra* note 9, at 17-18 (highlighting consumer education initiatives to combat the unauthorized practice of immigration law).

14. *See, e.g.*, *id.* at 14 (describing various legislative initiatives intended to address the unauthorized practice of immigration law).

15. *See infra* Part VI (discussing capacity building efforts).

16. *See, e.g.*, CATHOLIC CHARITIES PETITION, *supra* note 9, at 15-16 (describing state enforcement actions and private litigation for violation of state consumer protection statutes).

17. *See, e.g.*, *USCIS Initiative to Combat the Unauthorized Practice of Immigration Law: Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (Mar. 10, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD&vgnextoid=25d08f0c04ccc210VgnVCM100000082ca60aRCRD (describing coordination of efforts between various governmental and private entities).

storative actions; and (3) deterrence measures such as enhanced enforcement and punishment. These efforts depend on better reporting and information-sharing mechanisms among government and non-government federal, state, and local actors. The Federal Trade Commission's (FTC) "sentinel system," which collects reports of suspected fraud, is one such example.[18]

In this article, we examine recent initiatives to fight UPIL and the roles played by community-based organizations, federal, state, and local governmental agencies, national professional associations, judges, private attorneys, and federal and state legislators. We conclude that these generally positive, but still piecemeal, approaches to combat UPIL could be rendered more effectively with the adoption of multi-pronged strategies that consciously seek to integrate legal actions, regulation and oversight, education, capacity building, and to coordinate the work of diverse private and public actors at national, state, and local levels.

Isolated approaches to fight notario fraud will achieve limited success. Public education, for example, goes only so far if immigrants and their families do not have access to attorneys and federally accredited representatives competent in immigration law. Therefore, capacity-building measures are as necessary as education campaigns. Similarly, the ability to pursue successful legal remedies is limited because they require significant expenditures of time, money, and labor, all of which immigrant families often lack. Criminal prosecution, likewise, is money and labor intensive, especially given the evidentiary burden required to prevail. Adopting legal rules to strengthen safeguards against UPIL results in mere negligible gains if unaccompanied by strong enforcement of those rules.

The authors urge public and private stakeholders to consider, in a deliberate manner, how best to exploit the connections and complementary relationships that exist among preventive, remedial, and deterrent responses to notario fraud when developing anti-notario strategies.[19] In an effort to spur further thought about a comprehensive approach to reducing UPIL as well as the individual and systemic harm it causes, this article brings together in one

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18. *See, e.g.*, *Consumer Sentinel Network*, FED. TRADE COMM'N, http://www.ftc.gov/sentinel/index.shtm (last visited Oct. 23, 2013) (describing the FTC's sentinel system).

19. The authors live and work in Idaho and Eastern Washington, largely rural areas. Historically, immigrant populations have been concentrated in urban areas; however, recent years have seen significant growth outside of major cities. CATHOLIC CHARITIES PETITION, *supra* note 9, at 3. Procuring access to quality immigration assistance in the rural United States is particularly challenging. The difficulties arise from geography, demographics, and virtually non-existent public transportation. Small towns are separated by vast stretches of fields, rangeland, and wilderness. Many immigrants in the region cannot obtain drivers' licenses or car insurance, or afford the cost of gasoline to drive long distances from town-to-town. Immigrants in rural areas are often further isolated in remote labor camps. It is generally not cost-effective for attorneys to set up offices in such areas, and without private or public transportation, immigrants cannot travel to secure appropriate representation. Such isolation makes it relatively easy for a notario who may be shut down in one community to move a short distance away to start up in a new community without detection. Government and non-governmental organizations in rural regions need to develop strategies to increase access to competent legal assistance, and marshal enforcement and education resources efficiently to ultimately reduce instances of notario fraud.

place an analysis of existing responses to the problem. As comprehensive immigration reform moves closer toward becoming a reality, the need for creative solutions grows even more urgent.

In Part I, we categorize the kinds of harms notario fraud can inflict on individuals, families, and the broader legal system. Part II discusses the limited procedures available to victims of UPIL that try to "undo" harm to their immigration cases and offers a compendium of legal remedies that may provide them monetary relief. This section addresses the application of traditional remedial approaches, a model that has received relatively scant attention in legal literature on UPIL. Part III lays out legal mechanisms that could potentially stop individual notarios from repeating their UPIL. Part IV analyzes federal and state regulation and sanctioning of unauthorized practitioners of immigration law. Parts V and VI address public education efforts including reporting initiatives and capacity-building programs, respectively, and stress the need for further joint actions among federal, state, and local governmental and private entities.

I. HARMS CAUSED BY UNAUTHORIZED IMMIGRATION SERVICE PROVIDERS

A. The Dangers of UPIL

The Ninth Circuit recognizes that "[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate."[20] The Supreme Court is blunt in its assessment, acknowledging that "nothing is ever simple with immigration law."[21] By entrusting their cases to notarios or to the appearance attorneys with whom notarios sometimes work, immigrants face an elevated risk of irreparable harm to their claims.

The Immigration and Nationality Act (INA) and the regulations implementing its provisions exceed 2,000 pages.[22] Each year, federal appellate courts, the U.S. Supreme Court, and the Board of Immigration Appeals ("BIA" or "Board") issue hundreds of decisions interpreting immigration statutes and regulations. These decisions frequently turn on the interaction of immigration law with federal and state laws and precedent that govern subjects such as family relationships and criminal conduct.

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20. Biwot v. Gonazales, 403 F.3d 1094, 1098 (9th Cir. 2005).

21. Padilla v. Kentucky, 559 U.S. 356, 378 (2010) (quoting R. MCWHIRTER, AMER. BAR ASS'N, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS & ANSWERS 130 (2d ed. 2006)).

22. *See, e.g.*, Thomas West, FEDERAL IMMIGRATION LAWS AND REGULATIONS (2013).

Unlike what many immigration consumers believe—and what notarios often fail to tell them—obtaining immigration benefits is not simply a matter of filling out forms correctly, paying application fees, living in the United States for a long time, or having U.S. citizen relatives. Reliance on notarios for immigration assistance can result in the denial of claims, deportation, and permanent inadmissibility. Trying to undo the harm is often impossible. The following examples illustrate several common problems.

1. Family-Based Immigration Law Examples

Contrary to popular perception, immigration through family members is limited and turns on definitions of family peculiar to immigration law.[23] For instance, in the immigration context, an "immediate relative" refers only to the spouse, minor unmarried child, and parent of a son or daughter twenty-one years of age or older who is a U.S. citizen.[24] The spouse, minor unmarried child, and parent of a son or daughter twenty-one years of age or older of a legal permanent resident are not considered "immediate relatives" under immigration law; they fall into the "family preference" category.[25] The distinction is huge. Immediate relatives can become permanent residents when paperwork has been processed and a successful adjudication is complete.[26] By contrast, family preference relatives often have to wait years, sometimes decades, to become permanent residents and cannot live lawfully in the United States during that time.[27] Notarios often do not know or do not bother to tell immigration consumers about this difference.

In most cases, both immediate relative and family preference beneficiaries who entered the United States without inspection cannot become permanent residents by adjusting status in the United States. Instead, they have to return to their home countries to process their applications through a U.S. consulate. If they resided unlawfully in the United

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23. Qualifying relationships are limited to spouses, children, parents of a child who is at least 21 years old, and siblings of adult U.S. citizens. *See* INA § 201, 8 U.S.C. § 1151; INA § 203(a), 8 U.S.C. § 1153. Family-based immigration is further constrained by laws that result in lengthy waiting periods—even after approval of a petition—before individuals can apply for permanent resident status and live lawfully in the United States. *See Family-based Immigrant Visas*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/immigrants/types/types_1306.html (last visited Oct. 23, 2013) (discussing wait times for family-based immigrant visas). For example, the current waiting period for Chinese-citizen sibling beneficiaries of petitions filed by U.S. citizens is approximately twenty-four years. *See id.* (showing that Chinese-citizen sibling beneficiaries of petitions filed by their U.S. siblings in 1989 only became eligible to apply for legal permanent residence in March 2013). The waiting period for Mexican spouses and minor children of lawful permanent residents is approximately two-and-a-half years. *See id.* (providing an estimate of the waiting period). Mexican unmarried sons and daughters of lawful permanent residents currently wait approximately twenty years. *See id.* (providing an estimate of the waiting period).

24. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

25. INA § 203(a)(2), 8 U.S.C. § 1153(a)(2).

26. *See Family-based Immigrant Visas*, *supra* note 23 (explaining family-based visa petitions and processing).

27. *See Visa Bulletin*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/bulletin/bulletin_1360.html (last visited Oct. 23, 2013) (providing links to visa bulletins that indicate wait times).

States for more than 180 days but less than one year, they are barred from return for three years, notwithstanding an approved application.[28] Immigrants who resided unlawfully in the United States for more than one year are barred from return for ten years.[29] Notarios often do not explain to immigration consumers that unlawful presence bars exist, and parents, children, and spouses can find themselves separated from one another for the duration of the re-entry prohibition.

Waivers may be available to individuals who establish that separation would cause "extreme hardship" to their spouses or parents in the United States.[30] In many cases, proving extreme hardship is challenging. Although the INA does not define "extreme hardship," "mere separation" from family is not, by itself, considered to be sufficient for an extreme hardship waiver.[31] Competent attorneys and government-accredited representatives know that demonstrating extreme hardship requires an evaluation of a family's circumstances to determine whether there are factors that individually or cumulatively constitute extreme hardship for purposes of the waiver. They also know that the waiver application must be accompanied by ample documentation of the claimed hardship. Notarios often fail to advise consumers about waiver options or that they must submit solid evidence of extreme hardship.

2. Criminal Law Examples

Notarios also frequently do not know or do not bother to advise customers that certain criminal convictions[32] with negligible consequences for U.S. citizens can result in the removal of non-citizens (including legal permanent residents), no matter how long they have lived in the United States.[33] If such non-citizens file immigration applications, they risk the

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28. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I).

29. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

30. INA § 212(a)(9)(v), 8 U.S.C. § 1182(a)(9)(v). Note that immigration law does not provide for waivers for extreme hardship to children. *See id.*

31. *See, e.g.*, *In re* Teresa de Jesus Losada, 2004 WL 2952349, at *2 (BIA 2004) ("[M]ere separation from friends and family has been held not to constitute . . . extreme hardship.").

32. The Supreme Court recently commented on a peculiarity of the meaning of "conviction" under the INA, observing that "[a] disposition that is not a 'conviction' under state law may still be a 'conviction' for immigration purposes." Padilla v. Kentucky, 559 U.S. 356, 380 n.2 (2010) (citing *In re* Salazar-Regino, 23 I. & N. Dec. 223, 231, (BIA 2002) (en banc)). Additionally, a criminal conviction typically remains a conviction for immigration purposes notwithstanding subsequent dismissal of the conviction by the adjudicating court. *See* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 668 (2008) (discussing the treatment of dismissals by federal immigration agencies). Even an admission to the elements of a criminal offense, without a conviction, can bar a non-citizen from lawfully entering or residing in the United States. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

33. For example, in the course of representing a non-citizen client who suffered from an eating disorder, University of Idaho College of Law Immigration Clinic interns discovered that shoplifting a $5.00 box of laxatives could be deemed a crime of moral turpitude for purposes of immigration law and preclude an otherwise eligible individual from remaining in the United States. A guilty plea to the possession of a marijuana pipe typically precludes non-citizens

government initiating removal proceedings against them and will have wasted thousands of dollars pursuing an immigration status that they will never get. Unauthorized practitioners of immigration law are also less likely to know about case law or statutory waivers that could prevent removal.

B. Harms to Immigration Consumers

Stories of harm caused by notarios are legion.[34] Harm typically falls into one or more, and sometimes all, of the following categories: (1) removal—often to countries with which immigrants no longer have ties or where they have experienced or risk serious physical harm;[35] (2) loss of documents needed to establish eligibility for an immigration benefit;[36] (3) bars to regularizing immigration status;[37] (4) long-term or even permanent separation of families;[38] (5) financial damage caused by paying for useless or harmful procedures, including payment for applications that are never filed;[39] (6) loss of employment;[40] and (7) long-term detention.[41] Harm can also be physical, as in the case of an asylum applicant who is tortured or killed if deported to her country of origin because of UPIL.[42] The following stories are representative of hundreds of thousands of others.

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from remaining in the United States, whereas a plea to a one-time possession of less than thirty grams of marijuana can be waived. *See* INA § 212(h), 8 U.S.C. § 1182(h) (describing discretionary waiver for possession of thirty grams or less of marijuana).

34. *See, e.g.*, ELIZABETH COHEN, CAROLINE VAN WAGONER, & SARA WARD, TO PROTECT AND SERVE: ACCESS TO JUSTICE FOR VICTIMS OF NOTARIO FRAUD IN THE NATION'S CAPITAL (2013), *available at* http://www.ayudainc.org/index.cfm/news_protect-and-serve-justice-for-notario-fraud-victims; Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 584-86 (2009).

35. *See infra* notes 55-71 and accompanying text.

36. Many immigration claims, particularly those that require proof of long-time residence in the United States or of persecution in an asylum applicant's home country, turn on documentation in the form of letters, photos, signed affidavits, and records from foreign and sometimes defunct governments. Often only one copy exists of a required document. If documents are lost, so too may be the ability to establish eligibility for lawful immigration status. For this reason, immigration lawyers typically do not retain original documents until necessary for a formal CIS appointment for adjudication or immigration court hearing. Ironically, attempts by law enforcement to shut down a notario's business may inadvertently exacerbate the problem of missing documents if the offices of the notario become a crime scene, and law enforcement retains paperwork as potential evidence in a criminal proceeding. *See infra* notes 43-51 and accompanying text.

37. *See supra* notes 28-31 and accompanying text.

38. *See supra* notes 23-31 and accompanying text.

39. *See* Complaint, Idaho v. Perez (2010) (No. 2010-0056) [hereinafter Perez Complaint] (describing financial harm to consumers).

40. *See infra* notes 134-38 and accompanying text.

41. *See infra* notes 58-64 and accompanying text.

42. The Indiana Supreme Court wrote the following regarding the unauthorized practice of immigration of law and the potential for particularly horrifying consequences for individuals whose opportunities to obtain asylum are ruined:

> The practice of law without a license is not a 'victimless crime' because the legal interests of people assisted by those who are not qualified to act as attorneys can be irreparably damaged. This is espe-

1. Celia Perez's Customers

Celia Perez, operator of "an immigration and naturalization consultation service" in Jerome, Idaho, is the subject of numerous complaints of notario fraud made by immigration consumers and attorneys assisting individuals seeking to rectify the harm she caused.[43] According to a 2010 complaint filed by the Idaho Attorney General under the Idaho Consumer Protection Act,[44] Ms. Perez ran an immigration consultation business for many years,[45] charging customers thousands of dollars to perform tasks related to completing and filing applications with U.S. Citizenship and Immigration Services (USCIS).[46] Allegedly misrepresenting herself to immigration consumers as an attorney,[47] Ms. Perez was in fact a licensed Idaho notary public.[48] Individual immigration consumers assert that they paid Ms. Perez as much as $28,000 each over a period of several years to provide legal advice, prepare and submit paperwork to USCIS, and cover fees charged by the agency.[49] Some appear to have been undocumented immigrants seeking to legalize their immigration status. Others were in the United States lawfully and wanted to apply for citizenship or to assist others to secure lawful immigration status. Ms. Perez's alleged victims stated that they were not trying to buy forged immigration documents but rather that "they were trying to take the legal route."[50]

Immigration consumers involved with Ms. Perez claimed not only irreparable financial harm but also lost opportunities to regularize their status, missing documents, emotional and physical harm, and deportation of family members. Although a default judgment was entered against her, as of this writing, even people who subsequently retained

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> cially true in immigration cases, where the consequences of incompetent representation may be the lost opportunity for permanent residence, deportation, and perhaps even death for unsuccessful asylum seekers.

State *ex rel.* Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433, 443 (Ind. 2005) (citation omitted).

43. *See* Perez Complaint, *supra* note 39; Andrea Jackson, *Deputies Probe Possible Immigration Fraud in Jerome*, TIMES-NEWS (Sept. 10, 2009), http://magicvalley.com/news/local/deputies-probe-possible-immigration-fraud-in-jerome/article_f574d9c7-2ba7-5c20-a0a0-8f88c6038f5e.html; Ashley Smith, *Swindled Citizenship*, TIMES-NEWS (Sept. 21, 2009), http://magicvalley.com/news/local/swindled-citizenship/image_df4b35e1-9ece-5b41-914e-d3fe816f7fec.html.

44. IDAHO CODE ANN. §§ 48-601-48-619 (2012).

45. Perez Complaint, *supra* note 39, ¶¶ 7-8.

46. *Id.* ¶ 8.

47. *Id.* ¶¶ 8-9.

48. *Id.* ¶10. Idaho Code § 51-110 permits a notary public to charge no more than $2.00 for performing a notarial act. The statute states in relevant part:

> Official misconduct of a notary public includes: (a) engaging in fraudulent or deceptive conduct related in any way to his capacity as a notary public . . . (c) representing or implying by the use of his title that he has qualifications, powers, duties, rights, or privileges that by law he does not possess; (d) engaging in the unauthorized practice of law.

Id. § 51-112.

49. Perez Complaint, *supra* note 39, ¶¶ 12-14; *see also* Smith, *supra* note 43 (describing incidents involving Celia Perez).

50. Jackson, *supra* note 43.

competent counsel have not been able to recover documents she took from them or court-ordered restitution.[51] On October 8, 2013, a federal grand jury in Idaho indicted Ms. Perez on twelve charges of mail fraud related to her alleged notario activities after investigations conducted by the Department of Homeland Security (DHS), the U.S. Postal Inspection Service, and USCIS.[52] The U.S. Attorney's Office for the District of Idaho, which is prosecuting the case, noted that mail fraud is punishable by up to twenty years in prison, a maximum fine of $250,000, and up to three years of supervised release.[53] A spokesperson for the Idaho Attorney General stated that: "Now that [Ms. Perez] has been indicted, the state is exploring its options trying to collect the [2011 civil court] judgment" against her for defrauding immigration consumers; Ms. Perez pleaded guilty on February 12, 2014 to "two counts of using the mail to execute an immigration services fraud scheme," and sentencing is scheduled for April 29, 2014.[54]

2. Yi Quan Chen

Yi Quan Chen left China in April 1995, seeking refuge from officials who wanted to punish him and his wife for conceiving a child in violation of China's family planning laws.[55] He paid smugglers to help him flee to the United States.[56] He thought he was also paying them for bona fide legal representation.[57]

Immigration authorities detained Mr. Chen immediately upon his arrival in the United States.[58] Trusting the immigration "assistant" who visited him in detention, Mr. Chen signed an asylum application in English, a language he did not understand.[59] Instead of explaining why he fled China, however, the application gave an entirely different reason for his claim.[60] Consequently, because Mr. Chen's written application conflicted with his

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51. *See* Alison Gene Smith, *Hearing Scheduled for Woman Accused of Swindling Immigrants,* TIMES-NEWS (Oct. 16, 2013), http://www.magicvalley.com/news/local/crime-and-courts/hearing-scheduled-for-woman-accused-of-fraud (explaining that in 2011 a state court judge issued a default judgment against Perez for $103,500, which included $85,000 in restitution for six of Perez's victims, and that according to an Idaho Attorney General's Office spokeswoman, "[Perez] never responded and we never collected any money.").

52. *Jerome Woman Indicted for Mail Fraud*, THE U.S. ATTORNEY'S OFFICE FOR THE DIST. OF IDAHO, U.S. DEP'T OF JUSTICE (Oct. 11, 2013), http://www.justice.gov/usao/id/news/2013/oct/perez10112013.html [hereinafter *Jerome Woman Indicted for Mail Fraud*]; John Sowell, *Defendant Pleads Not Guilty in Immigration Scam*, IDAHO STATESMAN (Oct. 16, 2013), http://www.idahostatesman.com/2013/10/16/2818853/defendant-pleads-not-guilty-in-fraud.

53. *Jerome Woman Indicted for Mail Fraud*, *supra* note 52.

54. Smith, *supra* note 51; *Jerome Woman Admits Using U.S. Mail in Immigration Fraud Scheme*, THE U.S. ATTORNEY'S OFFICE FOR THE DIST. OF IDAHO, U.S. DEP'T OF JUSTICE (Feb. 12, 2014), http://www.justice.gov/usao/id/news/2014/feb/perez02122014.html.

55. Chen v. INS, 266 F.3d 1094, 1097 (9th Cir. 2001).

56. *Id.*

57. Brief for Petitioner-Appellant at 4, Chen v. INS, No. 00-70478 (9th Cir. Feb. 14, 2001).

58. *Chen*, 266 F.3d at 1097.

59. Brief for Petitioner-Appellant, *supra* note 57, at 4.

60. *Chen*, 266 F.3d at 1097.

courtroom testimony, the immigration judge (IJ) made an adverse credibility finding and ordered him deported.[61]

Once Mr. Chen returned to China, government officials arrested and severely beat him.[62] After escaping detention in China, Mr. Chen fled to the United States for the second time.[63] Immigration authorities again apprehended him, and he remained in custody for several years while he fought deportation.[64] Mr. Chen filed a new asylum application based on his real reason for seeking asylum. However, an IJ again ruled against him on a finding of adverse credibility due to inconsistencies between his new application and the 1995 application, which had been filed on his behalf by the immigrant consultant.[65] The IJ ordered him deported, and the BIA affirmed the ruling.[66]

The University of Idaho Legal Aid Clinic, appointed by the Ninth Circuit pro bono program, discovered that Mr. Chen was one of many victims of immigration fraud involving attorney Robert E. Porges, a Harvard Law School graduate, and his Chinese-born wife, Sherry Lu Porges, immigration "assistants" engaged in UPIL and immigrant smugglers.[67] The criminal prosecution against them revealed that they had constructed stock asylum applications based on claims they fabricated. Porges and his assistants would file one of the fictitious applications for clients such as Mr. Chen, and Porges or one of his employees would then appear in court on behalf of the client.[68] Porges, his wife, and twelve of their employees were convicted in 2002 of several charges, including racketeering, immigration fraud, alien smuggling, and tax evasion, and sentenced to eight years in prison.[69] The government estimated that between 1993 and 2000 Porges made profits of more than $13.5 million from defrauding his clients.[70] After sentencing, Porges's lawyer argued that his client had been unfairly singled out and that he was "going to jail for conduct which is conducted every day

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61. *Id.*

62. *Id.*

63. *Id.* at 1098.

64. Author Monica Schurtman served as the attorney of record for Mr. Chen during appellate review and recalls the difficulties she faced in working to get Mr. Chen released from detention, even after he prevailed at the Ninth Circuit.

65. *Chen*, 266 F.3d at 1098.

66. *Id.*

67. Brief for Petitioner-Appellant, *supra* note 57, at 7; Susan Sachs, *Law Firm Charged in Aiding Smugglers of Chinese to U.S.*, N.Y. TIMES (Sept. 21, 2000), http://www.nytimes.com/2000/09/21/nyregion/law-firm-charged-in-aiding-smugglers-of-chinese-to-us.html.

68. Brief for Petitioner-Appellant, *supra* note 57; Mark Hamblett, *Government Outlines Case Against Porges*, N.Y.L.J. (Sept. 27, 2000), http://www.porges.net/FamilyTreesBiographies/RobertPorges.html.

69. Benjamin Weiser, *Couple Sentenced for Roles in Immigrant Smuggling Ring*, N.Y. TIMES (Aug. 10, 2002), http://www.nytimes.com/2002/08/10/nyregion/couple-sentenced-for-roles-in-immigrant-smuggling-ring.html. The judge also ordered Porges to forfeit to the government six million dollars, which prosecutors said were proceedings from the enterprise's activities. *Id.*

70. *See* Matt Hayes, *Corrupt Lawyers Aid Immigration Woes*, FOX NEWS (Apr. 29, 2002), http://www.foxnews.com/story/2002/04/29/corrupt-lawyers-aid-immigration-woes/.

by people in this business."[71] Mr. Chen received no compensation for the years he spent in immigration detention nor for the considerable sum he had spent for Porges's fraudulent services, but, unlike many of Porges's victims, he did eventually obtain asylum.

C. *Systematic Harm Caused by UPIL*

In addition to wreaking havoc in the lives of immigrants and their families, practitioners of UPIL cause systemic harm by compromising the rule of law. They mock and manipulate government functions. Their improper conduct and the obstacles their victims face in trying to repair the damage foster distrust of the law.[72] The limited recourse available to victims of notario fraud creates the perception by immigrant communities that they simply cannot obtain justice in the United States.

Confidence in the legal profession is undermined when notarios hold themselves out as lawyers or work in concert with attorneys to defraud immigrants. Furthermore, UPIL fosters public distrust of immigrants themselves. In the wake of the Porges prosecution, for example, advocates saw increased cynicism about the legitimacy of Chinese asylum cases.[73] As one observer noted, "[B]oilerplate asylum claims put forth by shady practitioners make it hard to win legitimate cases."[74]

UPIL causes additional systemic harm by burdening USCIS, IJs, and the federal courts of appeal. Specifically, "[i]ncomplete, unwarranted, unnecessary, or inaccurate petitions and applications filed by [notarios] burden the administrative and judicial docket[,] increasing administrative costs and delaying the processing" of legitimately filed cases.[75] Judges and government officials spend time trying to sort out what to do with cases that have been tainted by notario malfeasance. For example, the Porges firm's immigration fraud

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71. *Id.* Several months after Porges, his wife, and twelve of their "immigration assistants" were convicted, attorney Joseph Muto was disbarred for acting as an appearance attorney for an "immigration agency," a group of non-lawyers who filed applications on behalf of Chinese immigrants. *Id.* According to many observers, such practices are common in Chinese immigrant communities. *Id.*

72. Commenting on the conviction of Idaho notario Crystal Tijerina, ICE-HSI special agent Leigh Winchell made exactly this point, observing that "fraud schemes like this not only victimize the most vulnerable in our society, they also potentially undermine the integrity of our legal immigration system." *Idaho Woman Sentenced for Mail Fraud, Misuse of U.S. Government Seals*, IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC. (Oct. 13, 2011), http://www.ice.gov/news/releases/ 1110/111013boise.htm. People not only relied on Tijerina's false assertions that she knew the immigration system and was authorized to practice immigration law, she deceived them into believing that they had obtained the right to live and work in the United States. *See* Jackson, *supra* note 43 (discussing the plight of Tiburcio Bedolla after becoming a victim of immigration fraud).

73. *See* Hamblett, *supra* note 68 ("[T]here will be more cynicism about Chinese [asylum] cases.").

74. Elizabeth Amon, *The Snakehead Lawyers*, NAT'L L. J. (Sept. 15, 2013), http://www.law.com/jsp/article.jsp?id=900005531170&slreturn=20130815151954.

75. CATHOLIC CHARITIES PETITION, *supra* note 9, at 10.

caused the government to conduct a special review of an estimated 7,000 asylum cases nationwide.[76]

Finally, immigration consultant fraud raises due process questions about whether an alien's right to a full and fair hearing has been compromised. More specifically, would a negative outcome in an immigration case have been positive absent notario involvement? In his dissent in *Angeles Castro v. Gonzalez*, Ninth Circuit Judge Harry J. Pregerson eloquently articulated both the individual and the systemic harms that UPIL causes:

> We are a country that believes in fairness. We are a country that believes in the rule of law. We believe that those who are called into our courts deserve the aid of a counselor who will advocate for the client vigorously and with professionalism. And yet the system we have in place makes a mockery of these things we claim to hold dear. Not only does it deprive a vulnerable group of people of competent representation, it does so in a context in which people believe they are receiving competent representation. We tolerate the inevitable result of proceedings like this: that families are broken up, and that United States citizen children are discarded from this country because their parents could not afford better representation. Removing a person from the United States-a person who has set down roots, who has become part of our community, who has children and family here-should be a grave act attended with the utmost caution. To remove a person whose only guides have been notarios and appearance attorneys is to secure a cheap victory at the cost of fairness. . . Because prejudice is inherent in this notario system, I would grant the petition solely on the basis of egregious violations of Petitioners' constitutional right to due process.[77]

II. Remedies to "Undo" Harm Done by Notarios

A. *Immigration Law Remedies*

Notario fraud sometimes results in the denial of an otherwise meritorious immigration claim. Immigration remedies for victims are limited, even for people who may have had—or currently have—a strong immigration case but for the fraud. Not only do few remedies exist, they characteristically involve complex procedures, formidable burdens of proof, and an understanding of how to persuade and negotiate with government officials. Absent

76. Hayes, *supra* note 70.
77. Angeles Castro v. Gonzalez, 176 F. App'x 866, 869 (9th Cir. 2006).

competent counsel, obtaining immigration relief based on notario fraud is usually impossible, especially if a court has issued a removal order.

This section of the article addresses three mechanisms that have the potential to remedy an individual's immigration case: motions to re-open, fraud waivers, and U visas.[78] Notably, not only are these processes limited as a matter of law and practice, every one of them is discretionary. They also require payment of additional filing fees, sometimes amounting to thousands of dollars, beyond what the victim has already paid. Because these fees are non-refundable, if remedial efforts fail, victims lose even more money than what they have already wasted because of notario fraud.

Despite these obstacles, pursuing one or more of these approaches may prove worthwhile in certain cases. If nothing else, a sympathetic government official presented with compelling facts might agree to a review of the merits of the underlying immigration claim. And, as a matter of broader advocacy, the more frequently judges, USCIS adjudicators, and government attorneys are presented with the realities of notario fraud, the more willing they may become to exercise favorable discretion.

1. Motions to Re-open Removal Orders

A successful motion to re-open results in *de novo* consideration of a claim for immigration relief. Most courts analyze motions to re-open UPIL cases under Fifth Amendment due process standards or principles of basic fairness and equity.[79] In *Avagyan v.*

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78. USCIS may adjudicate requests to re-open in limited circumstances. *See* 8 C.F.R. §103.5(a)(2) (2013) (describing requirements for motions to re-open). For an excellent "nuts-and-bolts" discussion of filing requests to re-open with USCIS, see AYUDA & THE CMTY. JUSTICE PROJECT, NOTARIO FRAUD REMEDIES: A PRACTICAL MANUAL FOR IMMIGRATION PRACTITIONERS 60-62 (2013) [hereinafter NOTARIO FRAUD REMEDIES]. Victims of notario fraud may also ask U.S. Immigration and Customs Enforcement (ICE) to exercise prosecutorial discretion. In the immigration context, "prosecutorial discretion includes decisions about whether or not to arrest, detain, and charge non-citizens with immigration violations, to proceed with removal proceedings . . . to execute final orders of removal, and to re-open proceedings in order to permit a non-citizen to seek immigration status." Anna Marie Gallagher, *Prosecutorial Discretion in the Immigration Context*, 12-11 IMMIGR. BRIEFINGS 2 (Nov. 2012). Individuals deciding whether or not to file a request for prosecutorial discretion should exercise particular caution and explore the potential pros and cons with a competent immigration attorney. *See* NOTARIO FRAUD REMEDIES, *supra* note 78, at 26-37 (describing prosecutorial discretion possibilities for victims of notario fraud), Appendix Sec. IIB(1) (providing a sample request for prosecutorial discretion based on notario fraud).

79. The stronger safeguards of the Sixth Amendment do not apply in immigration cases, which are civil, rather than criminal, in nature. *See, e.g.*, Hernandez v. Mukasey, 524 F.3d 1014, 1017-18 (9th Cir. 2008) (distinguishing Sixth Amendment rights in criminal versus civil immigration proceedings). Accordingly, there is no Sixth Amendment right to effective counsel in immigration proceedings. *Id.* However, courts have recognized that immigrants have an important liberty interest in not being deported, which triggers the Fifth Amendment right to due process. *See id.* at 1017 (discussing Fifth Amendment rights in immigration proceedings). Under this theory, grossly ineffective assistance of counsel constitutes a denial of due process. *Id.* Additionally, 8 U.S.C. § 1362 confers on immigrants in removal cases a statutory right to counsel at no expense to the government. *Id.* Consequently, the Fifth Amendment should give non-

Holder, the Ninth Circuit explained that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."[80] Some notarios work in tandem with "appearance attorneys."[81] In such instances, the notario serves as a conduit to the attorney, often recruiting clients and engaging in authorized practice of law; meanwhile, the attorney may have met the client briefly, if at all, before appearing in court for a hearing on the merits of the client's immigration claim.[82] Because an attorney is involved in the fraud, ineffective assistance of counsel and Fifth Amendment due process rights are implicated.[83]

The BIA and appellate courts typically frame cases involving motions to re-open for "notario-only" fraud in terms of fairness and equity rather than directly under the Fifth Amendment, because the conduct of an actual attorney is not at issue. Accordingly, consideration of motions based on "notario-only" fraud is rooted in an immigrant's reliance on the deception, fraud, or error of notarios holding themselves out as lawyers.[84]

Regardless of which analytical construct is applied, significant and complex procedural and substantive law challenges make winning a motion to re-open based on UPIL an uphill battle. Motions to re-open are generally disfavored and are therefore granted sparingly.[85] Immigrants face additional hurdles, such as compliance with the requirements of *Matter of Lozada*,[86] as well as the exhaustion of administrative remedies, due diligence, establishing prejudice, time-consuming processes and backlogs.

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citizens who retain an attorney a due process right to effective assistance of counsel. *See id.* (citing Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985)).

80. Avagyan v. Holder, 646 F.3d 672, 677 (9th Cir. 2011) (quoting Ray v. Gonzalez, 439 F.3d 582, 587 (9th Cir. 2006)) (internal quotation marks omitted); *see also* Santiago-Rodriguez v. Holder, 657 F.3d 820, 834 (9th Cir. 2010) (providing the same); Maravilla Maravilla v. Ashcroft, 381 F.3d 855, 857-58 (9th Cir. 2004) (providing the same); Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985) (providing the same); Paul v. INS, 521 F.2d 194, 198-199 (5th Cir. 1975) (discussing fundamental fairness).

81. *See supra* note 4 and accompanying text.

82. *See, e.g., Avagyan*, 646 F.3d at 675 (explaining that Avagyan retained a notario who said that an attorney would represent her for $2000 and that Avagyan first met the attorney at her removal hearing, where the attorney did not ask her any questions about her case); Morales Apolinar v. Mukasey, 514 F.3d 893, 896 (9th Cir. 2008) (discussing how Morales Apolinar's attorney provided ineffective assistance of counsel).

83. *See* Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345, 349 (2010) (discussing Fifth Amendment Due Process issues that arise in ineffective assistance of counsel motions to re-open removal orders).

84. *See, e.g.*, Mejia-Hernandez v. Holder, 633 F.3d 818, 824 (9th Cir. 2011) (granting petitioner's motion to re-open because he relied on the false statements, misconduct, and erroneous advice of a notario claiming to be an attorney).

85. *See* INS v. Doherty, 502 U.S. 314, 315 (1992) ("Motions for re-opening immigration proceedings are disfavored for the same reasons as are petitions for rehearing ad motions for a new trial on the basis of newly discovered evidence.").

86. *See* Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988) (specifying the requirements for motions to re-open).

a. Compliance with Lozada *and Other Prerequisites*

Individuals who seek to re-open a removal case based on notario wrongdoing in which an attorney was involved must first comply with requirements established by the BIA in *Matter of Lozada.*[87] Lozada affirmed previous rulings that, although respondents in deportation proceedings may have a Fifth Amendment right to effective assistance of counsel, they must take certain actions before filing a motion to re-open based on deficient representation.[88] The BIA held that compliance with the *Lozada* rules is important to: (1) reassure the agency that the ineffective assistance of counsel claim is legitimate and (2) increase its ability to monitor lawyers representing individuals in proceedings.[89]

Lozada has three requirements. First, individuals who seek to re-open based on alleged ineffective assistance of counsel must submit an affidavit detailing the agreement with counsel about the actions to be taken in the immigration case, any representations or promises that counsel made about the case, and whether counsel explored all avenues of relief available to the alien.[90] Second, they must notify counsel of the specific allegations of ineffective assistance and provide counsel the opportunity to respond.[91] Finally, they must file a complaint with an appropriate disciplinary authority, such as the BIA or the attorney's state bar, explaining why they believe that the lawyer violated reasonable or ethical legal standards.[92] After the respondent satisfies the *Lozada* requirements, the agency may con-

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87. *See id.* (specifying the requirements for motions to re-open).

88. *See id.* at 638 (explaining what a non-citizen must show to demonstrate denial of due process in an immigration proceeding due to ineffective assistance of counsel). The George W. Bush Administration called these principles into question when Attorney General Michael Mukasey held that respondents in removal proceedings have no constitutionally protected right to counsel and therefore no right to file a motion to re-open based on alleged ineffective assistance of counsel. *In re* Compean, 24 I. & N. Dec. 710, 726 (BIA 2009) [hereinafter *Compean I*]. *Compean I* effectively overturned decades of precedent that guaranteed Fifth Amendment due process to individuals in removal proceedings. *See id.* at 712 (noting the implications of the decision on precedent). Several months later, Eric Holder, Attorney General under the Obama Administration, withdrew Mukasey's order and directed the BIA and immigration judges to continue to apply *Lozada,* pending the results of a rulemaking process regarding ineffective assistance of counsel claims. *See In re* Compean, 25 I. & N. Dec. 1, 3 (BIA 2009) [hereinafter *Compean II*] ("[T]his Order vacates *Compean* in its entirety. . . . [T]he Board and Immigration Judges should apply the *pre-Compean* standards to all pending and future motions to reopen based upon ineffective assistance of counsel.").

89. *Matter of Lozada*, 19 I. & N. Dec. at 639-40.

90. *Id.* at 639.

91. *Id.*

92. *Id.* Alternatively, movants may explain why they did not file such a complaint. *See id.* (providing that if a complaint has not been filed with the proper disciplinary authorities the movant should specify why not). One reason might be that the attorney admitted his or her failure to provide effective assistance of counsel. The Ninth and Second Circuits have maintained a flexible approach to meeting the *Lozada* requirements. Avagyan v. Holder, 646 F.3d 672, 676 n.4 (9th Cir. 2011) (stating that although petitioners must generally comply with *Lozada*, failure to do so "is not necessarily fatal to a motion to re-open"); Yang v. Gonzalez, 478 F.3d 133,143 (2d Cir. 2007) (finding that the *Lozada* requirements "are not sacrosanct if the facts are plain on the administrative record"). The other circuits' approaches to *Lozada* vary. *See generally* Kaplan, *supra* note 83, at 351 ("Courts . . . differ in their willingness to re-open claims based on ineffective assistance of counsel especially when the alien does not meet all three *Lozada* factors.").

sider whether the attorney's alleged malfeasance violated the due process guarantees of the Fifth Amendment.[93]

Failure to file a *Lozada* complaint is generally less problematic if the basis of a motion to re-open is "notario-only" fraud.[94] The touchstone here is fairness. Movants must demonstrate that the notario's deception, fraud, or error actually or constructively precluded them from undertaking actions necessary to their immigration cases, thereby depriving them of a fair hearing and causing injury.

b. Exhaustion of Remedies

Whichever kind of notario fraud is involved, an immigrant must exhaust all available administrative remedies before filing a motion to re-open. This means that movants must first file the motion with either immigration court or the BIA, depending on the procedural posture of the case and when they discovered the fraud or ineffective assistance of counsel. If they learned of it after an IJ entered a removal order but before the BIA assumed jurisdiction over the case (or if the movant did not file an appeal to the BIA), they must file a motion to re-open with immigration court. If they discovered the misconduct after the BIA affirmed an IJ's removal order, they must file the motion with the BIA.

The exhaustion requirement is complicated by the deadlines imposed on motions to re-open, which are ninety days after an administrative decision and removal order is entered or 180 days in the case of an in-absentia order.[95] Unfortunately, people usually do not become aware of the notario fraud until after the deadlines have past. Given the slipshod nature of notario practice, notarios may not even notify their clients of the outcomes until long after the re-opening time has passed.

c. Due Diligence and Equitable Tolling

When a motion to re-open is filed after the expiration of the ordinary time limit, new hurdles arise. In such case, establishing a prima facie case for a violation of due process or

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93. *See* Mohammed v. Gonzalez, 400 F.3d 785, 793 (9th Cir. 2005) ("Although there is no Sixth Amendment right to counsel in a deportation proceeding the due process guarantees of the Fifth Amendment still must be afforded to an alien petitioner."); Kaplan, *supra* note 83, at 375-376 (discussing *Mohammed v. Gonzales*).

94. Although filing a *Lozada* complaint is not required in cases which do not involve an attorney, aggrieved individuals should still strongly consider filing a complaint with the FTC, BIA, USCIS, a state consumer fraud division, bar, notary licensing agency, or a similar entity. First, filing a formal complaint will strengthen the motion to re-open. Second, complaints to the appropriate state and federal agencies may assist them in identifying individuals and organizations who engage in a pattern and practice of fraudulent immigration representation, and thereby enhance broader efforts to combat notario fraud. See *supra* notes 85-86 for a discussion of the challenges of filing a complaint.

95. *See* INA § 240(c)(7)(C); 8 U.S.C. § 1229a(c)(7)(C) (providing the deadline for motions to re-open).

fundamental fairness due to notario fraud is not sufficient to persuade the agency to re-open a removal proceeding. The movant must also persuade the agency to equitably toll the time limit.[96] Equitable tolling rests on a movant's ability to demonstrate to the agency's satisfaction that she exercised due diligence in discovering the fraud, deception, or error caused by the ineffective assistance of counsel or notario and attempted to remedy it.[97]

d. Establishing Prejudice

The next challenge in a motion to re-open for ineffective assistance of counsel or notario fraud is to prove that that the representation "was so inadequate that it may have affected the outcome of the proceedings."[98] In other words, movants must demonstrate that the proceeding was so fundamentally unfair that they were prevented from reasonably presenting their case.[99] Movants must therefore not only show grossly inadequate representation, they must also establish that they would likely have had an immigration remedy available but for the incompetence or fraud.[100]

e. Time-Consuming Process and Immigration Court Backlogs

The final obstacle an immigrant may face in ultimately prevailing on a motion to re-open based on notario fraud relates to the exhaustion doctrine.[101] If an IJ denies a motion to re-open for notario fraud, the respondent may appeal to the BIA by filing a notice of appeal within thirty days of the denial.[102] The BIA can either affirm the IJ's denial, reverse the decision, or remand for further proceedings. If the BIA denies a motion to re-open in the first instance or affirms the denial of an IJ's decision, the movant can file a petition for review with the federal court of appeals where the case arose. Even if notario victims can persuade an appellate court that the agency erred in denying their motions to re-open, the exhaustion doctrine usually requires the court to remand the case to the agency for addi-

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96. *See, e.g.*, Mejia-Hernandez v. Holder, 633 F.3d 818, 824 (9th Cir. 2011) (explaining and applying the equitable tolling principle). Currently, most circuits have found that the INA's deadlines for re-opening are non-jurisdictional claim processing rules subject to equitable tolling and that therefore motions to re-open after the prescribed time limits may be considered in certain instances, including situations of alleged ineffective assistance of counsel and notario fraud. *See, e.g.*, Ruiz-Turcios v. U.S. Attorney Gen., 717 F.3d 847, 851 (11th Cir. 2013); Pervaiz v. Gonzales, 405 F.3d 488, 490-91 (7th Cir. 2005); Borges v. Gonzalez, 402 F.3d 398, 406 (3d Cir. 2005); Iavorski v. INS, 232 F.3d 124, 127 (2d Cir. 2000).

97. *See Mejia-Hernandez*, 633 F.3d at 825-27 (holding that the BIA failed to properly assess due diligence in denying the petitioner's motion to re-open for notario fraud and remanding the case for further consideration).

98. Iturribarria v. INS, 321 F. 3d 889, 899-900 (9th Cir. 2003).

99. Ray v. Gonzalez, 439 F.3d 582, 587 (9th Cir. 2006) (quoting Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999)).

100. *See* NOTARIO FRAUD REMEDIES, *supra* note 78, at 64-66 (providing suggestions on how to document prejudice).

101. *See supra* notes 78 -84 and accompanying text.

102. *See* 8 C.F.R. §1003.38(b) (explaining deadlines for appealing the decision of an immigration judge to the BIA).

tional action consistent with the court's decision. Consequently, even with a court victory, notario victims may have to wait years for a final resolution of their immigration claims.

2. Section 212(i) Fraud Waiver

Not surprisingly, UPIL victims who do not have removal orders entered against them face fewer hurdles in trying to regularize their immigration status. Nevertheless, obstacles exist. These victims may be eligible or subsequently become eligible for permanent residence—*but for the fraud committed by the notario.*

These situations arise, for example, when an individual qualifies for permanent residence, but the government imputes to the applicant the fraud committed by a notario in a previously filed application.[103] In such cases, the government may charge that the applicant is inadmissible under INA § 212(a)(6)(C)(i), which states that "any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under [the Immigration and Nationality Act] is inadmissible."[104]

In situations where a notario included fraudulent information in previously filed paperwork, the applicant can challenge fraud allegations by arguing a lack of knowledge and intent to commit fraud. If an applicant decides not to pursue such a challenge or the challenge fails, advocates should explore whether the applicant qualifies for a discretionary fraud waiver under INA § 212(i) ("212(i) waiver").[105] Absent such a waiver, a non-citizen typically cannot adjust status.[106]

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103. University of Idaho Immigration Clinic participants recently spoke with an individual referred to here as "A.B." A.B., who has resided in the United States for more than 30 years, relied on a notario decades ago to file a claim for permanent residence. The notario filed an application that contained apparently fraudulent facts even though A.B. may have actually had a valid claim for permanent residence. A.B. was devastated when he discovered that USCIS denied his application and subsequently revoked his work authorization. His adult daughter, who recently naturalized, now wants to file an immediate relative petition for him so that he can apply for permanent residence. The information in the original application may require him to return to his country of origin to apply for admission as a legal permanent resident. Such departure would likely trigger the unlawful presence bar, and he would be prohibited from reentering the United States for ten years. Additionally, the false information contained in A.B.'s original application may render him inadmissible under INA § 212(a)(7). Although a discretionary hardship waiver exists for this kind of fraud, it is not clear that A.B. will meet its requirements. *See* INA § 212(i), 8 U.S.C. § 1182(i) (describing the discretionary hardship waiver). Notario fraud, although performed many years ago, may now prevent A.B. from becoming a permanent resident and result in his eventual removal.

104. INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

105. INA § 212(i)(1), 8 U.S.C. § 1182(i)(1) (describing discretionary waiver for extreme hardship).

106. *See, e.g.*, Jun Min Zhang v. Gonzales, 457 F.3d 172, 174 (2d Cir. 2006) (explaining that an alien who has engaged in immigration fraud cannot adjust status absent a waiver of inadmissibility under INA § 212(i)).

Section 212(i) authorizes an immigration judge or a USCIS adjudicator, as an exercise of discretion, to waive a finding of fraud or misrepresentation under INA § 212(a)(6)(C)(1). The section 212(i) statute states, in pertinent part, that such a waiver may be granted

> in the case of an immigrant who is the *spouse, [adult] son, or [adult] daughter of a United States citizen or of an alien lawfully admitted for permanent residence if* it is established to the satisfaction of the [judge or adjudicator] that the *refusal of admission* to the United States of such immigrant alien *would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.*[107]

In effect, section 212(i) is limited to applicants for permanent residence who can show that their removal from or inadmissibility to the United States would cause extreme hardship to their U.S. citizen or legal permanent resident spouse or parent. Under the plain language of the statute, extreme hardship to other family members, including minor children, will not be considered.

An applicant for a waiver must establish extreme hardship to the qualifying relative if the qualifying relative remains in the United States without the applicant *and* if the qualifying relative accompanies the applicant to the applicant's home country.[108] The phrase "extreme hardship" is not defined by statute,[109] and whether or not extreme hardship exists is determined on a case-by-case basis, taking into account the totality of the circumstances.[110] The Supreme Court has held that the term, although flexible, may be construed narrowly.[111] In *Perez v. INS*, for example, the Ninth Circuit stated that "'extreme hardship' is hardship that is 'unusual or beyond that which would be normally expected' upon deportation."[112] That court found, for example, that uprooting family and separation from friends and community does not necessarily amount to extreme hardship "but represents the type of inconvenience and hardship experienced by the families of most aliens being deported."[113]

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107. INA § 212(a)(6)(C)(i)(1), 8 U.S.C. § 1182(a)(6)(C)(i)(1) (emphasis added).

108. *See In re* Cervantes-Gonzalez, 22 I. & N. Dec. 560, 567 (BIA 1999) (considering what is required to show "extreme hardship").

109. *See id.* at 565 (noting that the phrase "extreme hardship" does not have a fixed meaning).

110. *See id.* ("Extreme hardship is not a definable term of fixed and inflexible meaning, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case."); Matter of Chumpitazi, 16 I. & N. Dec. 629, 635 (BIA 1978) (providing the same); Matter of Kim, 15 I. & N. Dec. 88, 89 (BIA 1974) (providing the same); Matter of Sangster, 11 I. & N. Dec. 309, 313 (BIA 1965) (providing the same).

111. *See* INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981) ("The Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so.").

112. Perez v. INS, 96 F.3d 390, 392 (9th Cir. 1996).

113. Shooshtary v. INS, 39 F.3d 1049, 1051 (9th Cir. 1994).

The BIA and federal courts have come to a general consensus that factors relevant to determining extreme hardship include: (1) the qualifying relative's family and community ties in the United States and in the applicant's home country; (2) the financial impact on the qualifying relative if the applicant cannot reside in the United States; (3) whether or not the qualifying relative has health problems that require treatment in the United States or for which suitable treatment in the applicant's home country is unavailable; (4) the strength and kind of relationship the qualifying relative has with the applicant, including the emotional impact on the qualifying relative if separated from the applicant; (5) the age of the qualifying relative; (6) whether or not the qualifying relative depends on the applicant for assistance in caring for children or parents; (7) economic, political, and social conditions in the country to which the qualifying relative would have to relocate; or (8) other circumstances that would cause undue hardship to the qualifying relative.[114]

These factors are illustrative rather than exhaustive, and a proper determination should rest on whether "the combination of hardships takes the case beyond those hardships ordinarily associated with deportation."[115] Accordingly, in a case of notario fraud, an adjudicator should take into account hardships directly related to the fraud. Depending on the particular circumstances, an extreme hardship assessment might include the emotional impact on qualifying relatives who believed, to their detriment, that a notario's assurances that the contents of the application filed were true or the economic consequences for a qualifying relative of the applicant's removal as well as the money paid to the notario for a useless application and the expenses involved in trying to rectify the problems.

3. U-Visas

The U visa, for which victims of certain crimes may qualify, offers another potential immigration remedy for notario fraud.[116] The results of U visa petitions based on notario offenses are decidedly mixed. During the last half of 2013, however, anecdotal evidence suggests that USCIS may be more willing to approve U visas rooted in UPIL-related conduct.[117]

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114. *See id.* (discussing factors considered in making an extreme hardship determination); *Jong Ha Wang*, 450 U.S. at 144-46 (discussing the same); Palmer v. INS, 4 F.3d 482, 487-88 (7th Cir. 1993) (discussing the same); Hernandez-Cordero v. INS, 819 F.2d 558, 562-64 (5th Cir. 1987) (discussing the same); Matter of L-O-G-, 21 I. & N. Dec. 413, 416-20 (BIA 1996) (discussing the same); Matter of O-J-O-, 21 I. & N. Dec. 381, 382-84 (BIA 1996) (discussing the same); Matter of Ige, 20 I. & N. Dec. 880, 882-83 (BIA 1994) (discussing the same); Matter of Anderson, 16 I. & N. Dec. 596, 597-98 (BIA 1978) (discussing the same).

115. *Matter of O-J-O-*, 21 I. & N. Dec. at 383.

116. INA §§ 101(a)(15)(U), 212(d)(14), 214(p), 245(m); 8 U.S.C. §§ 1101(a)(15)(U), 1182(d)(14), 1184(p), 1255(m); 8 C.F.R. § 214.14. In certain situations a victim's parents, guardian, next of friends, and unmarried siblings under age 18 may also qualify for relief under the U statute. INA § 101(a)(15)(U)(i)-(ii); 8 U.S.C. §§ 101(a)(15)(U)(i)-(ii). Limited categories of "indirect" victims may also be eligible. 8 C.F.R. § 214.14(a)(14).

117. National Immigration Project List Serve Postings (June 6, 2013—Dec. 18, 2013) (on file with authors).

Law enforcement and humanitarian purposes motivated Congress to enact the U visa statute. First, it is intended to encourage undocumented victims to report crime without fear of deportation and to cooperate with law enforcement officials in the investigation and prosecution of alleged perpetrators. Second, the statute seeks to afford victims protection and assistance.[118] To help meet these objectives, the statute permits certain victims of the following twenty-six qualifying crimes to petition for a U visa:

> [R]ape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage taking, peonage, involuntary servitude, slave trade, kidnapping, abduction, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, attempt, conspiracy, or solicitation to commit any of the above-listed crimes, or any similar activity in violation of federal, state or local criminal law.[119]

U visa beneficiaries are authorized to remain in the United States temporarily and to apply for employment authorization. In certain circumstances, the individual may qualify for lawful permanent residence after three years in U status.[120]

Petitioners for a U visa must demonstrate that they (1) have suffered substantial physical or mental abuse as a result of having been a victim of one or more of the twenty-six qualifying criminal activities; (2) possess credible and reliable information establishing knowledge of the facts of the qualifying crime upon which the visa petition is based; (3) have been helpful, are being helpful, or are likely to be helpful to a certifying federal, state, or local agency in the investigation or prosecution of the qualifying criminal activity; and (4) have been a victim of the qualifying criminal activity in the United States or of a federal offense that provides for extraterritorial jurisdiction.[121]

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118. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464 (2000) (describing the purpose of providing protection to crime victims); U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS PUBLISHES NEW RULE FOR NONIMMIGRANT VICTIMS OF CRIMINAL ACTIVITY (Sept. 5, 2007), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/U-visa_05Sept07.pdf ("Many immigrant crime victims fear coming forward to assist law enforcement because they may not have legal status. . . . We're confident that we have developed a rule that meets the spirit of the Act; to help curtail criminal activity, protect victims, and encourage them to fully participate in proceedings that will aid in bringing perpetrators to justice.") (internal quotation marks omitted).

119. INA §§ 101(a)(15)(U); 8 U.S.C. §§ 1101(a)(15)(U). The term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.

120. INA § 245(m); 8 U.S.C. § 1255 (m).

121. INA §§ 101(a)(15)(U)(i); 8 U.S.C. §§ 1101(a)(15)(U)(i). Because our discussion of U visas focuses on threshold eligibility hurdles that notario victims face, we have not included guidance about the actual filing of a U visa petition and supporting evidence. For a comprehensive treatment of the practicalities involved in such a filing, see NOTARIO FRAUD REMEDIES, *supra* note 78, at 44-56, Appendix IIB(1)-(7).

a. The Challenges that Notario Victims Face in Qualifying for a U-Visa

In general, victims of notario fraud can meet three of the above four criteria required for securing a U visa. The frequency with which successful investigation or prosecution of immigration scammers is based on information and assistance provided by their victims demonstrates that many victims both possess credible, reliable, and detailed information about the crime, and that they are willing to cooperate with law enforcement. Also, notario fraud typically, though not always, occurs in the United States. The main hurdle that notario victims face in obtaining U visas is establishing that they were victims of qualifying criminal activity and that they suffered substantial physical or mental abuse as a result of having been victimized.

i. Establishing Qualifying Criminal Activity

"Fraud" alone is not a qualifying crime for purposes of the U statute. Notario fraud, however, sometimes includes conduct that comes within the ambit of several of the crimes enumerated in U statute. Extortion, blackmail, perjury, and obstruction of justice constitute common qualifying crimes suffered by victims of notario fraud.[122] Other qualifying criminal behavior, such as assault, may occur in the context of notario fraud, especially when victims confront perpetrators.

Regulatory guidance supports such an approach in defining the qualifying criminal activity. The Federal Register states that for the purposes of U eligibility, "[q]ualifying criminal activity may occur during the commission of non-qualifying criminal activity. For varying reasons, the perpetrator may not be charged or prosecuted for the qualifying criminal activity, but instead, for the non-qualifying criminal activity."[123] Consequently, framing the qualifying crime turns on the original qualifying criminal activity investigated or prosecuted rather than the ultimate offense of conviction. This approach extends to civil actions; the key question is whether an underlying crime was committed, even if the cause of action is civil. Immigration attorney James A. Benzoni explains this concept by pointing to the RICO statute, which is "a civil action based on underlying criminal conduct (predicate crimes). The crimes need not have been charged, only committed."[124] Accordingly, in preparing U visa petitions, advocates should strive to frame notario fraud as a qualifying crime enumerated in the U statute.

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122. *See* NOTARIO FRAUD REMEDIES, *supra* note 78, at 41-42.

123. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, and 299).

124. National Immigration Project List Serve Posting (Oct. 19, 2012) (on file with authors).

ii. Establishing Substantial Physical or Mental Harm as a Result of a Qualifying Crime

For purposes of U visa eligibility, "[p]hysical or mental abuse means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim" as a result of the qualifying crime.[125] In determining whether abuse is substantial, a number of factors are considered, individually and cumulatively, including but not limited to:

> The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.[126]

The harms suffered by notario fraud victims typically affect their mental health and soundness. They can be severe, serious, and permanent, particularly when the result is removal or inability to lawfully reside in the United States.[127] As the Supreme Court has stated on several occasions, deportation may deprive a person "of all that makes life worth living."[128]

For many victims, uncertainty about their future and afraid of separation from family members carries with it extreme depression and anxiety. In the case of asylum applicants who fled egregious physical harm, threat of removal exacerbates existing mental health problems such as post-traumatic stress disorder. In some cases, the shock, shame, and self-recrimination for having blindly relied on a fraudster adds to this psychological unmooring. Further, the financial ruin frequently caused by notario fraud may result in further psychological damage. Finally, violence and threats of violence by notarios against victims causes emotional harm and in some cases, physical harm.[129]

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125. 8 C.F.R. § 214.14(a)(8).

126. *Id.* § 214.14(b)(1).

127. *See supra* Part I.

128. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). Similarly, the Court declared in Fong Haw Tan v. Phelan, *333 U.S. 6, 10 (1948)*, that "deportation is a drastic measure, and at times the equivalent of banishment or exile."

129. *See* NOTARIO FRAUD REMEDIES, *supra* note 78, at 44-46 (discussing how to prove substantial harm); COHEN, *supra* note 34, at 39-40 (discussing the same).

iii. Obstruction of Justice and Perjury as Qualifying Crimes

The "U" regulations specifically address harm suffered because of obstruction of justice and perjury, stating in relevant part, that U visa petitioners may be considered qualifying victims if they have been:

> Directly and proximately harmed by the perpetrator of . . . the obstruction of justice or perjury; and . . . there are reasonable grounds to conclude that the perpetrator committed the . . . obstruction of justice or perjury at least in principal part, as a means . . . to further the perpetrator's abuse or exploitation of or undue control over the petitioner through the manipulation of the legal system.[130]

Some fraud victims suffer substantial harm as a result of a notario's perjury and obstruction of justice. It is not uncommon for notarios to commit obstruction of justice, perjury, or analogous offenses to further their control over victims through misuse of the legal system.[131] For example, in a recent Idaho case, a notario used U.S. government seals to deceive immigrants into believing she was authorized to provide immigration assistance.[132] In announcing the judgment against the notario, the Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) special agent who investigated and helped prosecute her characterized her actions as undermining the integrity of the legal system.[133]

b. Recommendations

The U visa statute supports relief for certain victims of notario fraud, despite the fact that fraud is not specifically enumerated as a qualifying crime. Several strategies could maximize the possibility that notario fraud victims may secure U visas. Advocates need to explain to law enforcement officials the importance of investigating and prosecuting a qualifying crime related to notario fraud or to characterize the crime as such in the law enforcement certifications required by statute. Similarly, advocates should explain to USCIS adjudicators that notario fraud may relate to a qualifying crime.

Ideally, Congress should amend the U visa statute to explicitly include notario fraud as a qualifying crime. In the absence of a statutory amendment, USCIS should issue official guidance making clear that the U statute should, in appropriate circumstances, be inter-

130. 8 C.F.R. § 214.14(a)(14)(ii).

131. *See supra* Part I.C (discussing systemic harm caused by UPIL).

132. *Idaho Woman Sentenced for Mail Fraud, Misuse of U.S. Government Seals*, *supra* note 72.

133. *Id.*

preted to include notario fraud. Such an approach would be consistent with the agency's emphasis on reducing notario fraud.

B. Monetary Relief for Victims

Some notarios are deliberate fraudsters who alight in a community, bilk people, and then move on to another community. Other times, lay people slip into UPIL in a misguided attempt to help immigrants. Their apparent good-heartedness does not obviate the extreme harm that they can do, and they should not have to be told more than once that they have strayed from their legitimate endeavors.[134] Many notarios fall in a middle ground, running multi-service business enterprises that handle travel arrangements, divorce papers, taxes, and immigration work.[135] Some or much of the immigration work they do may cross the line into UPIL, often with disastrous results. These notarios are often well established in the community, owning both businesses and personal property, but they are often reckless in their promises and forays into legal territory. The following discussion of remedies will refer back to these three UPIL scenarios—the "fraudster notario," the "strayer," and the "business notario"—and identify the mechanisms best suited to each UPIL situation.[136]

A discussion of these mechanisms begins with a list of the likely monetary harms suffered by the victim. Most obviously, the victim has lost the fees paid to the notario for non-existent or improperly handled services. Additionally, the notario's errors or mishandling of documents may proximately cause the victim to incur legal fees to repair the legal harm done or simply alleviate victims' uncertainty over their immigration status.[137] Also, if the notario's errors caused a delay in obtaining status, the victim has lost the monetary gains that come with legal status, usually in the form of better employment opportunities.

Remedies law requires certainty. Lost employment opportunities may be too speculative to be recoverable, but in an unusual case the victim may be able to produce evidence of

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134. The first time the person missteps may not be deliberate, but harm to the public good has still occurred. Certainly if, after admonition, the individual persists in engaging in UPIL, his or her "good-heartedness" is called into question and that person becomes more like a business notario.

135. Those businesses may be engaged in other forms of unauthorized practice of law, if they dabble in, for example, divorce law. They may misstate what the law is to their customers and potentially encourage their clients to engage in fraud, especially in the tax area. *See, e.g.*, Complaint at 4-5, Vargas v. Casa Latina, Inc., No. 1:12-CV-1568 (D.N.Ga. May 4, 2012) [hereinafter Complaint, Vargas v. Casa Latina]; SAMUEL C. ROCK, AMER. IMMIGR. LAWYERS ASS'N, THE INTERSECTION OF INCOME TAX AND IMMIGRATION LAW WITH A BRIEF DISCUSSION ON TAX BENEFITS FOR HAITIAN TPS RECIPIENTS 797, 802 (2010).

136. These categories of notario are being made for the purpose of matching the best remedy to the situation, as opposed to the "gatekeeper" or "stand alone" categories. The gatekeeper type of notario referenced above could fall into either the fraudster or the notario business category. *See supra* note 4 (describing gatekeeper-type notarios).

137. For a successful example of this recovery, which includes a thoughtful analysis by the court, see *Nationwide Mutual Ins. Co. v. Holmes*, 842 S.W.2d 335 (Tex. Ct. App. 1992).

a contract or solid offer that could not be fulfilled because of the lack of proper immigration documentation. Additional monetary harm may be proven, for instance, if an individual had to sell his or her home because of deportation and sold it at a loss. Normally, the victim has suffered emotional harm, including prolonged stress, shock at the betrayal by the notario, uncertainty about how to proceed, worry, fear of separation from loved ones, and so forth. In sum, notarios' errors can cause immense financial and emotional damage. As happens so often in the law, the more cataclysmic the harm, the more difficult damages may be to prove.

Remediation of harm is possible through various mechanisms. Restitution may be available from governmental prosecution of the notario under federal or state statutes prohibiting unfair or deceptive practices, or state penal codes. Alternatively, the victim may sue in a private action under state Unfair and Deceptive Acts and Practice (UDAP) laws or state common law, including traditional restitution and small claims. These remedial mechanisms may be combined, as long as the recovery is not duplicative. Collections are a challenge, but various practical suggestions have emerged from recent successful cases against notarios.[138]

1. Victim Compensation Through Governmental Prosecutions of Notarios

a. Unfair or Deceptive Acts or Practices[139]

The federal government and all states have consumer protection acts that prohibit unfair or deceptive practices.[140] Section 5(a) of the Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce."[141] An "unfair" practice is defined as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[142]

Notario fraudsters easily fall within this prohibition, and business notarios usually do as well. The consumers are substantially injured, as described above. The consumers have sometimes only recently arrived in the United States and are non-lawyers, not fluent in English, and not accustomed to our legal system. As such, they usually cannot see through the

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138. Not all footnoted cases arise in the UPIL context. Effort has been made to find apposite or analogous factual contexts, where possible. Cases are cited for general propositions of law and concentrate on Idaho, Washington and Texas.

139. To get an overview of UDAP law, see NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (7th ed. 2008) [hereinafter UNFAIR AND DECEPTIVE ACTS AND PRACTICES].

140. *See* Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a)(1) (2006). State acts are sometimes called "little FTC Acts." *See* MARY DEE PRIDGEN, CONSUMER PROTECTION & THE LAW § 2:10 (2006). Others have names reflecting their concern with Deceptive Trade Practices, Consumer Protection, or Fair Business Practices.

141. 15 U.S.C. § 45(n).

142. *Id.*

misrepresentations of scurrilous notarios and lack an understanding of the intricacies of immigration law. Notarios often misrepresent that they have authorization to provide immigration and naturalization services, that fees paid cover all costs associated with submitting documents to USCIS, that customers can obtain immigration documents not actually available to them, or even that the notario's "immigration service" is affiliated with the United States government.[143]

The Federal Trade Commission prosecutes violations of the FTC Act in U.S. district court. In addition to seeking civil or criminal penalties and cease and desist orders, the FTC usually requests "monetary equitable relief"[144] in the form of consumer refunds or redress. The refunds are essentially intended to be restitutionary and to prevent defendants from profiting from their wrongdoing; they are viewed as equitable disgorgement[145] and are neither full compensatory nor punitive damages.[146] When the FTC sues, the victim can get a refund of the moneys paid to the notario, but the statute does not contemplate compensation for other consequential financial, emotional, or physical harm.[147]

All states have UDAP laws.[148] Prohibitions relevant to notario fraud include: "causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;"[149] representing that a person has a status, connection, qualifications or license that he does not have; representing that services are of a particular standard, quality or grade when in fact they are not; representing that services are needed if they are not; providing services that are not needed; and "[e]ngaging in any act or practice

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143. Complaint for Permanent Injunction and Other Equitable Relief at 7-12, F.T.C. v. Immigration Ctr., No. 311-CV-00055 (D. Nev. Jan. 31, 2011) [hereinafter Complaint Against Immigration Ctr.].

144. FTC Act § 13(b), 15 U.S.C. § 53(b). Administrative adjudication is an alternative procedural route through which the FTC seeks cease and desist orders. FTC Act § 5(b), 15 U.S.C. § 45(b). After such order is granted, the FTC may go to district court and seek redress for consumer injury caused by the conduct at issue in the administrative proceeding. FTC Act § 17b, 15 U.S.C. § 57b.

145. The nomenclature for the types of equitable monetary relief available under the FTC Act differs to some extent from traditional restitution described in the Restatement (Third) of Restitution and Unjust Enrichment. *See infra* notes 171, 205-08 and accompanying text. The FTC distinguishes between restitution (repayment to victims in the amount that they paid to the defrauder, which essentially amounts to a rescission of the fraudulent contract) and disgorgement (paid to the U.S. Treasury and measured as gross profits less allowable costs). *See* FTC v. Gem Merch. Corp., 87 F.3d 466, 468-470 (11th Cir. 1996) (interpreting FTC Act § 13(b), 15 U.S.C. § 53(b)). Another source of consumer redress is Section 19(b) of the FTC Act. *See* 15 U.S.C. § 57b (discussing civil actions). Disgorgement is discussed at greater length in Part IV.

146. FTC v. Febre, 128 F.3d 530, 537 (7th Cir. 1997) (explaining the character of such monetary damages).

147. CONSUMER PROTECTION LAW DEVELOPMENTS 278 (August Horvath & John Villafranco, eds., 2010) ("The major purpose of the FTC Act is to protect consumers from economic injury. . . . ").

148. Federal discussion on the FTC Act informs interpretation of state UDAP law, and vice versa. *See* Amback v. French, 173 P.3d 941, 944 (Wash. Ct. App. 2007) ("[T]he [Washington] legislature expressed its intent that Washington courts should be guided by federal decisions and orders of the federal trade commission when construing the CPA.").

149. *See, e.g.*, IDAHO CODE ANN. § 48-603(3) (2013); TEX. BUS. & COM. CODE ANN. § 17.46(b)(3) (2007). Thirty-eight states use this phrasing.

that is otherwise misleading, false, or deceptive to the consumer."[150] The essence of the proof is not the mens rea of the service provider—his intent to defraud—nor any actual damage to the public; rather, the question is whether the practice "possesses a tendency or capacity to deceive consumers."[151] A few states expressly proscribe "any unconscionable method, act or practice in the conduct of any trade or commerce."[152] This includes behavior where an individual "knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his interest because of . . . ignorance, illiteracy, inability to understand the language, . . . or similar factor."[153] Other state legislatures leave the prohibition general by providing, for example, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade of commerce are hereby declared unlawful."[154] Such general language leaves further refinement to enforcement agencies and courts.[155]

Deceptive trade acts do not fail because of a consumer's contributory negligence in failing to realize that the tradesperson is a fraud,[156] nor must the government prove that victims suffered actual harm from the notarios' deceptive trade practices. The harm is in the deception.[157]

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150. *See, e.g.*, IDAHO CODE ANN. § 48-603(17).

151. State *ex rel.* Kidwell v. Master Distribs., Inc., 615 P.2d 116, 122 (Idaho 1980). The state of Washington has a "public interest" requirement, meaning that a private dispute does not rise to the level of a UDAP violation. But, as previously discussed, notario fraud has implications beyond those of the single victim and the notario. In Washington, a pattern or practice with real and substantial potential for repetition would be actionable, especially when many consumers are affected by even one instance of deception. *See* Hangman Ridge Training Stables Inc. v. Safeco Title Vin. Co., 719 P.2d 531, 537-538 (Wash. 1986) (describing the "inducement-damage-repetition" test and factors relevant to establishing public interest). Washington has its own statutory protection against notarios. *See* WASH. REV. CODE § 19.154.060 (2011).

152. *See* IDAHO CODE ANN. § 48-603(18) (using such language); MICH. COMP. LAWS §§ 256.687, 256.695 (2013) (describing unconscionable practices or acts).

153. *See, e.g.*, IDAHO CODE ANN. § 48-603C(2)(a) (using such language).

154. *See* WASH. REV. CODE § 19.86.020 (using such language).

155. Smith v. Stockdale, 271 P.3d 917, 922 (Wash. Ct. App. 2012) (discussing the meaning of the terms "unfair and deceptive"). *Compare* State v. Pac. Health Ctr., Inc., 143 P.3d 618, 629-30 (Wash. Ct. App. 2006) (declining to prosecute purveyors of natural medicine since no finding of a deceptive practice), *with* Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 197 (Wash. 1983) (upholding prosecution of title agent for UPL). The court in *State v. Pac. Health Ctr., Inc.* concluded, "A party practicing law or medicine without a license does not deceive the public if they do not claim to be licensed and are, in fact, competent or skilled in doing what they represent they can do. Someone who practices law or medicine without a license is not necessarily incompetent to perform the service that constitutes the practice of law or medicine. Under *Bowers*, the issue is whether that person in fact misrepresented his or her level of competence." 143 P.3d at 629-630.

156. The Supreme Court has written, "There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception." FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937).

157. Notarios in Texas attempted to argue that because an alleged victim obtained her citizenship, their violation of state UDAP, "if any, [was] not serious." Avila v. State, 252 S.W.3d 632, 637 (Tex. Ct. App. 2008). This evidence was properly excluded, and the proper inquiry is the gravity of the act, not the gravity of the harm done by engaging in the act. *Id.* at 637-38; *see also* State *ex rel.* Kidwell v. Master Distribs., Inc., 615 P.2d 116, 122-23 (Idaho 1980) (discussing

Monetary relief for victims is contemplated under state consumer protection laws.[158] State attorneys general may recover, on behalf of wronged consumers, amounts needed to restore the victims. The primary measure of these amounts is the fees paid for the notario's services.[159]

Victims need not testify or be named in the government's complaint to recover restitution.[160] For instance, *Thomas v. State* illustrates the breadth and flexibility of the government's remedies in the notario context.[161] The State of Texas, acting through the Consumer Protection Division of the Attorney General's Office, sued Ruth and John Thomas, who conducted business as *Tramites Migratorios*.[162] After presenting "abundant evidence"[163] that the defendants violated the Notary Public Act and the state UDAP Act, the state used defendants' own receipt books[164] to prove that each defendant had "acquired $469,416.50 by means of an unlawful act or practice."[165] Restitution to consumers was allowed even though the state had not specified the persons entitled to the restitution nor how much each identified person should be paid.[166] Allocation of the money among consumers was left to "the sole discretion" of the Texas Attorney General's office.[167] The appellate court allowed restitution for amounts dating back further than the two-year statute of limitations; the court held that the two-year limitation expressly attached only to "actual damages," distinguishing

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unfair and deceptive acts); State v. Kaiser, 254 P.3d 850, 858 (Wash. Ct. App. 2011) (discussing what the State must prove in a Consumer Protection Act suit).

158. IDAHO CODE ANN. § 48-606(1)(c) (noting possibility of monetary relief); WASH. REV. CODE § 19.86.080 (discussing possibility of monetary relief),

159. *See, e.g.*, IDAHO CODE ANN. § 48-606(1)(c). States can also recover their own attorneys' fees. *See, e.g.*, Molano v. State, 262 S.W.3d 554, 563 (Tex. Ct. App. 2008) (explaining recovery of attorneys' fees).

160. *See, e.g.*, State *ex rel.* Kidwell v. Master Distribs., Inc., 615 P.2d 116, 125 (Idaho 1980) (discussing who may recover restitution); State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 553 P.2d 423, 439 (Wash. 1976) ("The restitution applies to all aggrieved consumers. It is not limited to the consumers who testified at trial.").

161. Thomas v. State, 226 S.W.3d 697 (Tex. Ct. App. 2007) (dealing with remedies for violations of the Notary Public Act and Deceptive Trade Practices Act).

162. *Id.* at 700.

163. *Id.* at 704.

164. *See id.* at 705 (discussing of hearsay and business records evidence rules in this context).

165. *Id.* at 704.

166. Some states with differently worded statutes have reached contrary results, whereas some other jurisdictions are in accord and have found that this does not violate defendants' constitutional rights. *See* State *ex rel.* Reno v. Barquet, 358 So.2d 230, 231 (Fla. Dist. Ct. App. 1978) (holding that the State Attorney may not obtain damages on behalf of the State under Florida's Deceptive and Unfair Trade Practices Law); State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 510 P.2d 233 (Wash. 1973) (discussing the issue in the context of used car sales).

167. *Thomas*, 226 S.W.3d at 707. In Idaho, the district court may establish the allocation of money to consumers. *See* State *ex rel.* Kidwell v. Master Distribs., Inc., 615 P.2d 116, 126 (Idaho 1980) (giving that the district court may establish allocation of money to consumers); *Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 553 P.2d at 438 (discussing appropriate procedures for allocation of money).

"restitution" as an equitable remedy.[168] These rulings were sustained even though the matter was not brought as a class action because it was "a de facto class action."[169]

UDAP laws also provide more indirect benefits to victims through assessment of civil penalties.[170] These penalties are paid to the state, and their primary purpose is punishment and prevention. Sometimes, however, the state diverts the money in a way that addresses victims' harm, or at least the sufferings of people similarly situated to the victims. For example, in Massachusetts a false advertising case against a mattress company was settled by requiring the company to provide $100,000 worth of bedding for local homeless shelters.[171] This approach could be applied in a UPIL scenario. The government, for instance, could use monies fraudulently received to pay for educational efforts to caution recent immigrants away from notarios.

A different approach was taken in an unfair condominium sale in California. Although "no cognizable direct victim" was identified, the court mandated the seller to be disgorged of money illegally acquired and deposited in a "fluid" recovery fund that could ultimately be used to benefit people similarly situated to plaintiffs.[172] Careen Shannon thought along these same lines in her article calling for a statute governing UPIL. As part of a multi-faceted plan, she suggested that some of the funds collected in civil damages and paid to the state be put into a trust for funding immigration legal services around the state. Her plan goes beyond helping the victims of notario fraud in that it would prevent notarios from getting a foothold by diverting their clientele to legitimate providers.[173]

b. Restitution for State Crimes

State prosecutors may charge notarios with crimes, as discussed later in this article. Criminal prosecution opens the door for victims to recover lost money by using reparation or restitution statues in effect in many states. These statutes "allow and facilitate the monetary

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168. *Thomas*, 226 S.W.3d at 705-10; *accord* Avila v. State, 252 S.W.3d 632, 646 (Tex. Ct. App. 2008) (finding that 2,181 consumers had paid at least $150 to the defendant notarios).

169. *Thomas*, 226 S.W.3d at 710; *see also* Molano v. State, 262 S.W.3d 554, 560-61 (Tex. Ct. App. 2008) (discussing de facto class actions).

170. *See* discussion *infra* Part IV (examining civil penalties).

171. UNFAIR AND DECEPTIVE ACTS AND PRACTICES, *supra* note 139, § 15.5.4.3 (citing a news release of the Massachusetts Office of Attorney General from Dec 9, 1992).

172. People v. Thomas Shelton Powers, M.D., Inc., 3 Cal. Rptr. 2d 34, 41 (Cal. Ct. App. 1992), *abrogated by* Kraus v. Trinity Mgmt. Servs., Inc., 96 Cal. Rptr. 2d 485, 507-08 (Cal. 2000); *see also* Stan Karas, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services*, 90 CALIF. L. REV. 959, 970-71 (2002) (discussing the concept of fluid recovery).

173. *See* Careen Shannon, *To License Or Not To License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 483 (2011) [hereinafter *To License Or Not To License*] (describing the need to establish a trust fund to finance the provision of free immigration legal services).

compensation of crime victims."[174] In addition to criminal penalties, some states punish crimes of fraud by requiring that the perpetrator pay the victim treble the victim's actual loss. For instance, a fraudulent investment counselor in Arizona was ordered to pay his victims three times their actual loss, for a total of $1.6 million.[175] Such case law, though not within the notario context, could guide recovery for victims in a notario prosecution.

2. Private Actions by Victims

a. UDAP

The federal FTC Act does not allow for private actions,[176] but victims have the right to sue in every state under state UDAP laws.[177] Victims of all types of UPIL[178] should seek "out of pocket" costs, primarily the amounts paid to the notario,[179] and proximately-caused consequential damages, including lost jobs, time,[180] and additional legal fees.[181] Wages lost by taking time away from work to deal with the legal tangles created by notarios may also be recoverable.[182] In some states, elderly or disabled people bringing actions may recover enhanced damages.[183]

Damages for mental anguish or emotional distress should be allowed as well,[184] unless the state UDAP statute excludes them. Some UDAP statutes require business or prop-

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174. George Blum, Annotation, *Measure and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute*, 15 A.L.R. 5th 391, 432. The use of the word "restitution" in the Restatement differs somewhat from its use in this context, as here the word more describes compensatory damages paid to undo at least some of the harm caused by a crime. *See, e.g.*, WASH. REV. CODE § 9.94A.753 (2003) (discussing restitution).

175. *See* State v. Henderson, 717 P.2d 933, 934-35 (Ariz. Ct. App.1986) (holding that, in order to secure a more favorable plea agreement in a state RICO action, defendant could consent to forfeiture of some property not the fruit of the illegal activity).

176. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-89 (D.C. Cir. 1973).

177. *See, e.g.*, IDAHO CODE ANN. § 48-608 (2008) (providing for actions to recover damages); TEX. BUS. & COM. CODE ANN. § 17.50 (2005) (providing relief for consumers); WASH. REV. CODE § 19.86.090 (2009) (providing civil action for damages).

178. *See supra* note 136 and accompanying text (noting the three types of UPIL situations).

179. UNFAIR AND DECEPTIVE ACTS AND PRACTICES, *supra* note 139, § 13.3.

180. *See* Panag v. Farmers Ins. Co. of Wash., 204 P.3d 885, 899 (Wash. 2009) (holding that plaintiff's time away from his business was sufficient injury, as was an adverse effect on credit rating resulting in a loss of business profits).

181. *See id.* at 902 (explaining that measurement of legal fees must carefully distinguish among (1) resolution of the underlying immigration matter; (2) untangling of the mess created by the notario; and (3) fees incurred to bring the UDAP case).

182. *See id.* at 900-03 (discussing losses and expenses that may be recoverable).

183. In Idaho, for example, the enhancement is the greater of $15,000 or treble the actual damages, upon proof of certain losses enumerated in the statute, including "loss of assets essential to the health or welfare of the elderly or disabled person." IDAHO CODE ANN. § 48-608(2).

184. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (providing express allowance for mental anguish damages); Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741, 751 (E.D. Va. 2006) ("Compensatory damages are those allowed as a recompense for loss or injury actually received and include loss occurring to property, necessary expenses, insult, pain, mental suffering, injury to the reputation, and the like.") (citations and internal quotation marks omitted).

erty injury, as opposed to general injury.[185] In those states, recovery for pure emotional harm may not be allowed. However, proof of minimal, temporary or intangible economic injury will sometimes provide a sufficient platform to support recovery for emotional distress.[186]

If proof of actual damage is lacking, plaintiffs should check their respective state's UDAP statutes: about half of the states allow private litigants to recover minimum statutory damages in amounts ranging from $25 to $10,000.[187] These are neither punitive damages nor penalties paid to the state. Rather, designed to overcome proof issues and to encourage private litigation, these damages are a substitute[188] for actual damages that do not meet the minimum amount, even in cases with no showing of actual injury.[189] They may be aggregated for multiple violations or tripled as a punitive measure.

Attorneys' fees for the costs of bringing the UDAP claim are normally recoverable to make prosecution of the claims economically feasible[190] and to encourage private enforcement.[191] Punitive damages are possible in most states, often in the form of treble damages upon proof of intent, bad faith, or simply as a matter of the court's discretion.[192] While punitive damages are intended primarily to punish, deter, and prevent future bad acts, the fact that these damages are paid to plaintiffs suggests that there is a compensatory aspect to them as well.

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185. *See, e.g.*, WASH. REV. CODE § 19.86.090 (requiring there must be injury to "business or property," not solely personal injuries); *Panag*, 204 P.3d at 899 ("Personal injuries, as opposed to injuries to 'business or property' are not compensable and do not satisfy the injury requirement.").

186. *See Panag*, 204 P.3d at 899-902 (allowing recovery of pecuniary loss occasioned by inconvenience, id at 899, as well as money for postage, parking, and consulting an attorney). Note that the *Panag* court distinguished damages from injury and stated that unquantifiable damages would suffice. *Id.* at 900. In the case of a notario's victim, the lower status of being without long-term, secure documentation may result in lower wages and a smaller range of possible jobs.

187. UNFAIR AND DECEPTIVE ACTS AND PRACTICES, *supra* note 139, §§ 13.4.1 *et seq.*

188. *See, e.g.*, Tri-West Constr. Co. v. Hernandez, 607 P.2d 1375, 1382 (Or. Ct. App. 1979) (permitting actual damages for one UDAP violation and statutory minimum damages for another).

189. *See, e.g.*, IDAHO CODE ANN. § 48-608(1) (allowing a consumer to recover actual damages or a minimum of $1000); White v. Mock, 104 P.3d 356, 364 (Idaho 2004) (discussing recovery under IDAHO CODE ANN. § 48-608(1)). Note that in Washington a consumer may recover actual damages only. WASH. REV. CODE § 19.86.090.

190. *See, e.g.*, Miller v. United Automax, 166 S.W.3d 692, 679 (Tenn. 2005) ("The potential award of attorneys' fees under the Tennessee Consumer Protection Act is intended to make prosecution of such claims economically viable to plaintiff.") (internal quotation marks omitted).

191. *See, e.g.*, Wilkins v. Peninsula Motor Cars, Inc., 587 S.E.2d 581, 584 (Va. 2003) ("The fee shifting provisions of the VCPA are designed to encourage private enforcement of the provisions of the statute.").

192. *See* IDAHO CODE ANN. § 48-608 (authorizing treble the actual damages for an elderly or disabled person bringing suit); TEX. BUS. & COM. CODE ANN. §17.50(h) (authorizing up to treble the actual damages); WASH. REV. CODE § 19.86.090 (authorizing treble of actual damages up to $25,000).

All of these rules should be applied liberally, with an eye to avoidance of deceptive practices and restoration of the victim to his or her rightful position. The law in this area is quite helpful for consumers and may serve as a starting place for victim's advocates.[193]

b. State Common Law

Victims can bring common law causes of action against notarios for fraud, fraudulent concealment, conversion, deceit, forgery, breach of fiduciary duty, and even simple breach of contract.[194] It is usually more difficult to prevail on a common law fraud claim than a statutory UDAP claim, as a plaintiff has more to prove.[195] Further, the fraud defendant may push back by citing the victim's negligence, unreasonable reliance, or lack of due diligence. On the other hand, "where the person making the statement has inhibited plaintiff's inquires by . . . creating a false sense of security," the failure to inquire into facts that could be made available to the plaintiff is not fatal.[196] In the notario context, the *modus operandi* is to create a false sense of security. The notario presents himself as the one with knowledge of the American language, culture, and legal system. Therefore, the reasonableness of plaintiff's conduct should be a question of fact for the jury.

Some notarios may also be liable for attorney or notary malpractice.[197] The negligence per se doctrine might help establish breach of tort duty when the notario has violated a statute that, for example, prohibits unauthorized practice of law. Standard recovery would include out-of-pocket expenses, consequential damages, and likely punitive damages. This remedy applies to all of the notario scenarios but is particularly useful against the strayer.

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193. State and federal civil RICO should also be considered as a means of recovery against both fraudsters and the business notario. *See, e.g.*, Complaint, Vargas v. Casa Latina, *supra* note 135, at 10-13 (outlining alleged state and federal RICO violations by defendants). Discussion of these actions, however, is beyond the scope of this article.

194. These are generally state claims and should be brought in state court. *See* De Pacheco v. Martinez, 515 F. Supp. 2d 773, 783 (S.D. Tex. 2007) (denying federal question jurisdiction to several of these types of tortious claims).

195. The court in *Miller v. William Chevrolet/Geo, Inc.*, 762 N.E.2d 1, 11-12 (Ill. App. Ct. 2001), engages in an interesting discussion of common law fraud and statutory UDAP. The reliance element of fraud is largely eliminated in UDAP, and the plaintiff's diligence is not required. *Id.* at 12-13. Also, the intent to deceive required in fraud becomes merely the intent that statements be relied upon in UDAP. *Id.* at 12.

196. Carter v. Mueller, 457 N.E.2d 1335, 1340 (Ill. App. Ct. 1983).

197. Other states take the opposite tack, holding that a non-attorney may not be liable for legal malpractice. *See* UNFAIR AND DECEPTIVE ACTS AND PRACTICES, *supra* note 139, §10.4.2.5; Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 97 (2007) ("A majority [of jurisdictions] hold that when an unauthorized law practice is conducted by a layman, he is held, at a minimum, to the standards of competency of a lawyer. Failure to conform to that standard constitutes actionable negligence.").

c. Small Claims Court

For those who are damaged in an amount less than the statutory maximum for the jurisdictional court system, small claims court may be an excellent option because the rules of evidence are relaxed and no attorneys are required.[198] In a recent case from Wisconsin, a notario's advice led to the deportation of the plaintiff's wife.[199] The plaintiff sued in small claims court for unjust enrichment, breach of contract, breach of an implied duty of good faith, negligent and intentional misrepresentation, UDAP violations, notary misconduct, and negligent provision of services.[200] The small claims judge granted summary judgment for the defendant on the grounds that the plaintiff had no standing and that his wife "was here illegally by her own choice," thereby making the contract in question "unenforceable."[201]

The appellate court reversed, explaining that the plaintiff did have standing because he had a personal stake in the outcome and had incurred legal and travel expenses.[202] The Wisconsin court did not expressly refute the assertion that the contract was unenforceable, but other courts have not viewed such arguments as dispositive.[203] Although this Wisconsin plaintiff was represented by a lawyer who was willing to take the case through appeal, perhaps some victims could begin to use the small claims courts *pro se* if these actions could gain some traction.

198. EVELYN CRUZ & KATHY BRADY, IMMIGRANT LEGAL RES. CTR., HOW TO SUE AN IMMIGRATION CONSULTANT IN SMALL CLAIMS COURT 6-7 (2001).

199. Enciso-Lopez v. Monteagudo, 801 N.W.2d 349 (Wis. Ct. App. 2011) *review denied*, 806 N.W.2d 639 (Wis. 2011).

200. *Id.*

201. *Id.*

202. *Id.* at 1 (internal quotation marks omitted). The court hinted at the plaintiff's likely emotional harm and expressly noted his expenditures to keep his family together, including both legal fees and travel expenses to take his children to be with his wife in Mexico. *Id.* at 2. Defendants appealed, decrying the opening of the floodgates of litigation; their appeal was summarily denied. *Enciso-Lopez*, 806 N.W.2d at 639; *see also* Georgia Pabst, *"Notarios" Ask for Supreme Court Review*, MILWAUKEE JOURNAL-SENTINEL ONLINE (July 11, 2011), http://www.jsonline.com/blogs/news/125382578.html (discussing the case).

203. *See, e.g.*, Gamboa v. Alvarado, 941 N.E.2d 1012, 1016-17 (Ill. App. Ct. 2011) (characterizing a scheme for fake immigration papers as increasingly criminal). When plaintiffs realized that they had been scammed, they sued in state court for common law fraud, unjust enrichment, civil conspiracy, intentional infliction of emotional distress, and violation of the Illinois UDAP act. *Id.* at 1015. Defendants argued that the plaintiffs had entered into an illegal contract, violated the law and public policy, and that the parties were *in pari delicto*. *Id.* at 1017-18. Dismissal on those grounds was reversed, because (1) the plaintiffs were seeking to get back money for being misled and (2) the plaintiffs were not *in pari*—equally—bad as defendants: "plaintiffs spoke little English, did not know defendants were lying/unable to deliver on their promise and would not necessarily know the agreement was illegal." *Id.*

d. Traditional Restitution

UPIL committed by the established business notario[204] is ripe for another civil approach, the oft-forgotten theory of restitution for unjust enrichment.[205] Restitution operates on the simple concept that "a person is not permitted to profit by his own wrong."[206] The acts and deceptions of notarios are wrong. Fraud is "one of the principal grounds for restitution and one of the principal sources of unjust enrichment."[207] A victim of fraud is entitled to disgorge the perpetrator of the proceeds of the fraud; that is, the money paid over by the victim. Accordingly, the "restitutionary" remedy is congruent with the standard common law remedy of "out of pocket loss," but providing proof may be easier, especially in a suit against an established business that keeps records. If a victim or a group of victims has insufficient paperwork to prove how much the notario's UPIL has cost them but can prove the amount gained by the notario, that amount should be returned to the victims.[208]

Restitution shines in measures like the constructive trust. In such cases, the victim may be able to recover more than he lost and get some preferences in bankruptcy. When notarios are well established in the community, with traceable personal and business assets,[209] plaintiffs should be able to make good use of this remedy. Consider this illustration from the Restatement commentary:

> Victim loses $100,000 to Embezzler. After discovering the fraud, Victim is able to establish that embezzler used Victim's money to purchase Blackacre. Because Blackacre qualifies as Embezzler's homestead, it would be exempt from execution on a judgment for damages. Restitution gives Victim ownership of Blackacre, rather than a judgment to be satisfied from a property of Embezzler. Relief will usually take the form of a decree that Embezzler holds Blackacre in constructive trust for Victim.[210]

The tracing component of restitutionary recovery is not easy[211] but may be significant. For example, if the business notario's UPIL profits provided the money for the notario

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204. *See supra* note 136 and accompanying text (highlighting the typology of notario scenarios).

205. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) [hereinafter RESTATEMENT].

206. *Id.* § 3.

207. *Id.* § 13 cmt. a.

208. *See, e.g.*, Avila v. State, 252 S.W.3d 632, 645-47 (Tex. Ct. App. 2008) (discussing calculation of damages).

209. This remedy works especially well for the business notario. *See supra* note 115 (describing the "business" notario).

210. RESTATEMENT, *supra* note 205, § 13 cmt. h, illus. 25.

211. Examples abound of funds commingled among victims and innocent dealings of the defendant, direct and indirect transactions, sequential withdrawals and contributions, and so forth. *See, e.g.*, RESTATEMENT, *supra* note 205, § 59 cmts. c, d.

to buy real property or assets,[212] UPIL victims may be able to disgorge from the notarios the value of the property or even obtain actual ownership of the property. This approach may be lucrative if the property has increased in value since its initial purchase. Victims may benefit from the simplicity of receiving title to the property rather than having to prove its value.[213] The victims' interest may be paramount to other unsecured creditors.[214] Multiple claimants may aggregate their claims and then divide the funds to receive shares in proportion to contributions.[215]

Fraud is just one of the relevant wrongs enumerated in the Restatement. Notarios may also be charged with conversion,[216] breach of fiduciary relation,[217] and occasionally "undue influence."[218] The advantages of restitution are significant and, at times, startling.[219] It should be in every litigator's toolkit.

3. Practicalities

Before the lucre of private civil recovery shines too bright, reality must cast its shadow. A prerequisite to these legal mechanisms is the victim's willingness to come forward. Fear of law enforcement and lack of familiarity with our nation's legal system commonly deter reporting such conduct. In addition, those who do venture forward may be discouraged by slow processes and the fluidity of the notario's *modus operandi*. For instance, a notario may have folded up shop and moved on by the time fraud is discovered, especially in larger states with fluid immigrant populations. Nonetheless, the possibility of monetary

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212. Similarly, if the money were traced to the purchase of stock or any other asset that might appreciate, the same theories would hold.

213. RESTATEMENT, *supra* note 205, § 51 cmt. b, illus. 2.

214. *Id.* § 51 cmt. b, illus. 3; *see also id.* § 55 cmt. c (describing the policies behind the balancing of interests between the victims and other creditors).

215. *Id.* § 59 cmt. f. Also consider this illustration: "Acting wrongfully, X obtains $1000 from A on January 1, $2000 from B on February 1, and $3000 from C on March 1, depositing these funds (and no others) in a single account. The account is closed on April 1, leaving a balance of $2000. . . . A, B, and C share pro rate to their losses (i) any traceable product of the April withdrawal and (ii) the $2000 closing balance." *Id.* § 59, illus. 17.

216. *Id.* § 40.

217. *Id.* § 43.

218. *Id.* § 15. Victims may also be able to cite § 44(c), which provides that "when the object of a legal prohibition of general application is to protect persons in the position of the claimant, the circumstances of an intentional and profitable violation will sometimes permit the conclusion that the wrongdoer has been unjustly enriched at the claimant's expense." The illustrations to this comment are not on point, but the wording may permit inclusion of the unauthorized practice of law and unpermitted provision of immigration services.

219. In addition to the benefits listed in the text, the statutes of limitations may be more generous than for some other causes of action. Given the confusion over restitutionary claims and the unfolding of the history of restitution, "the question of limitations may be especially challenging" in this context. *See id.* § 70 cmt. a. (discussing the question of limitations). The equitable doctrine of laches may also come into play. *Id.*

redress might incentivize victims to report fraud and provide evidence,[220] though they should be made aware of the difficulties of proof and collecting the damages.

The various roads to monetary recovery outlined above may be combined, with a few obvious limitations. As always, when thinking about remedies, the key is to pause, reflect, and use common sense.[221] Parallel criminal or civil governmental proceedings do not preclude private actions for damages or restitution. Although victims may not recover duplicative remedies, strong complaints will set forth a variety of causes of action.[222] One complaint, for example, may allege multiple counts under UDAP, Racketeer Influenced and Corrupt Organizations Acts ("RICO"), fraud, restitution, and breach of contract.[223] A plaintiff "is . . . entitled to one award of compensatory damages, one award of exemplary damages, and one award of attorney's fees."[224]

All lawyers know that a judgment, even a monetary judgment, is just a piece of paper. The judgment must be collected, and there must be assets from which to wring the cash.[225] The business notario, well established in the community for years, has traceable assets. This bespeaks some stability and some sense of being within the system.[226] Fraudster notarios, on the other hand, are essentially criminals. It is not uncommon for a notario to get wind of an exposure or legal crackdown[227] and go into hiding, relocate, and set up a new shop shortly thereafter. If the notario is jailed pursuant to a concomitant criminal action, the

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220. A further lure to reporting may be injunctions available with lawsuits. *See* discussion *infra* Part III.A.

221. Statutory damages, punitive damages, and attorneys' fees are all conceptually different, and all may be collected in the same lawsuit. On the other hand, treble damages and punitive damages are usually duplicative. Statutory damage amounts are substitutes for actual, proven damages, so they should not be collected together for the same harm, but it is possible to recover statutory damages for one violation and actual damages for another. Plaintiffs may collect punitive damages on a fraud claim and treble damages on a UDAP claim. Common law fraud does not usually give rise to an award of attorneys' fees but statutory claims do. *See, e.g.*, Miller v. United Automax, 166 S.W.3d 692, 697-98 (Tenn. 2005) (finding the award of punitive damages duplicative of treble damages but not of attorney fees).

222. Texas gives a statutory nod to multi-pronged approaches. *See* TEX. BUS. & COM. CODE ANN. § 17.43 (1995) (covering cumulative remedies).

223. *See* Wildstein v. Tru Motors, Inc., 547 A.2d 340 (N.J. Super. Ct. Law Div. 1988) (providing that statutory claims do not abrogate the common law).

224. Wilkins v. Peninsula Motor Cars, Inc., 587 S.E.2d 581, 583 (Va. 2003). Issuance of an injunction is independent of penalties. *See* People v. Fremont Life Ins. Co., 128 Cal. Rptr. 2d 463, 480-81 (Cal. Ct. App. 2002) (discussing the purpose and imposition of injunctive relief).

225. Lawyers from both the Federal Trade Commission and the Idaho State Attorney General's Office have commented on the difficulty, in many cases, of being able to collect the full amount of consumer injury from a fraudster notario. Telephone Interview with Brad Winter, Attorney, Federal Trade Commission (June 15, 2011). If a legitimate immigration consultant strays or errs in California, collection may be easier still because that state requires posting of a bond. CAL. BUS. & PROF. CODE ANN. § 22443.1 (2013).

226. For example, in the small claims action mentioned previously, the plaintiff collected some money (undisclosed pursuant to agreement) and, more importantly for the public good, defendants changed their signs and business cards to make clear that they could not provide legal services. Telephone Interview with Mike J. Gonring, Attorney, Quarles & Brady (June 25, 2012).

227. The authors have been careful to avoid disclosures about pending or potential moves against notarios.

notario is not making money. Most notarios significant enough to be prosecuted by the government are fraudsters used to flying over legal lines and savvy about concealing assets.[228]

With this in mind, the FTC usually moves quickly to file for an ex parte temporary restraining order (TRO). The showing to get the order ex parte requires providing information about the defendant's tendency to hide assets and destroy documents, as well as the FTC's track record with fraudsters. The TRO often includes an order to stop deceptive practices, appoint a receiver, freeze assets,[229] grant immediate access to business premises, and, if necessary, secure mailboxes and safety deposit boxes. The receiver, protected by local or federal law enforcement, promptly invites the FTC into the notario's place of business to examine all potential evidence. The evidence is immediately copied to prevent spoliation and to obviate lengthy discovery processes.[230]

A state attorney general may be prevented, to some degree, from taking as aggressive an approach as the FTC. By statute, many state attorneys general must attempt to obtain "voluntary compliance" before filing the complaint, unless doing so will "substantially and materially impair" the provision's purposes by causing a delay in instituting legal proceedings.[231] The provision's purposes may be impaired, for example, if the target has advanced warning and can hide assets or even evade jurisdiction. To mitigate the possibility of such consequences, these statutes usually have exceptions for situations where the attorney general finds that the purposes of the law will be substantially and materially impaired by delay in instituting legal proceedings. Some state attorneys general have it within their power to move to freeze assets, order preliminary placement into escrow of all amounts received from consumers, or appoint a receiver to administer a violator's assets.[232]

Two recent victories by the FTC provide insight into the comprehensive and full frontal attack required to remedy notario fraud.[233] These cases involve the fraudster-type

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228. Telephone Interview with Brad Winter, *supra* note 225. Winter quoted his boss as saying, "We go after people who step across the line, and we go after people who live across the line." *Id.* The aim is to prevent fraud.

229. The asset freeze is common in RICO litigation as well.

230. Telephone Interview with Brad Winter, *supra* note 225.

231. *See, e.g.*, IDAHO CODE ANN. § 48-606(3) (2001) (using quoted language); TEX. BUS. & COM. CODE ANN. § 17.58(b) ("The acceptance of an assurance of voluntary compliance may be conditioned [on restoring] any money or property, real or personal, which may have been acquired by means of [violative] acts or practices.")

232. *See, e.g.*, FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1111-13 (9th Cir. 1982) (discussing the power to freeze assets); David Jason West & Pydia, Inc. v. State, 212 S.W.3d 513, 519 (Tex. Ct. App. 2006) (discussing the power to freeze assets); *but see* State v. Gartenberg, 488 N.W.2d 496, 499 (Minn. Ct. App. 1992) (disallowing requirement of loan brokers to escrow prejudgment monies); Avila v. State, 252 S.W.3d 632, 647-48 (Tex. Ct. App. 2008) (finding injunction to be overly broad).

233. *See* Gamboa v. Alvarado, 941 N.E.2d 1012, 1017-19 (Ill. App. Ct. 2011) (holding for plaintiffs and against purveyor of criminal schemes to obtain immigration status).

notario, with the least traceable assets of the various notario types.[234] Nonetheless, the thorough approach of the FTC is ideal for all types of notario scenarios because it preserves evidence, documents, and assets, insofar as possible.

For over ten years, Manuel and Lola Alban allegedly engaged in UPIL, represented that Manuel was a lawyer, took money for services they did not perform, and made mistakes when they did perform.[235] According to the complaint, the couple filed at least 600 immigration applications, over half of which were denied or rejected for failure to include proper documentation or pay the required processing fee.[236] To make matters worse, the Albans purportedly destroyed files so that consumers with pending appeals were unable to obtain copies of their applications.[237]

On June 1, 2011, the FTC obtained an ex parte TRO against the Albans and their business.[238] The judge issued the TRO ex parte out of fear that the Albans would otherwise hide assets and destroy documents and evidence.[239] The TRO prevented further UPIL by prohibiting the Albans from providing immigration services; facilitated prosecution of the Albans by granting federal agents immediate access to their business premises, and; facilitated economic recovery by freezing their assets.[240] Federal agents, under the supervision of a monitor,[241] entered the Albans' workplace, seized electronic devices and copied their business and client records, and preserved original documents for return to the clients.

The FTC obtained a similar TRO to shut down a multi-state fraudulent enterprise.[242] The complaint alleged that while this enterprise did not use the term "notario," it played on

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234. *See supra* note 115 and accompanying text (giving the three notario situations).

235. Complaint for Permanent Injunction or Other Equitable Relief at 4, FTC v. Loma Int'l Bus. Grp., No.1:11-cv-01483-MJG (N.D. Md. June 1, 2011) [hereinafter Complaint Against Loma Int'l].

236. *Id.* at 6.

237. *Id.*

238. Ex Parte Temporary Restraining Order With Asset Freeze, Appointment of a Temporary Monitor, Immediate Access to Business Premises, and Limited Expedited Discovery, and an Order to Show Cause Why a Preliminary Injunction Should Not Issue at 9, FTC v. Loma Int'l Bus. Grp., No. MJG 11-CV-1483 (N.D. Md. June 2, 2011) [hereinafter Temporary Restraining Order].

239. The FTC made a Rule 65 showing of the tendency of similarly situated defendants to destroy evidence and established that these defendants already made suspiciously large withdrawals from bank accounts. *See* Memorandum Supporting FTC's Ex Parte Motion for a Temporary Restraining Order Appointing Temporary Receiver, Freezing Assets, and Granting Other Equitable Relief at 2, 28, FTC v. Immigration Servs., No. 311-cv-00055 (D. Nev. Jan. 26, 2011) [hereinafter FTC Memo]. This is more crucial in immigration cases because immigration service providers often have in their possession the only original copies of crucial documents. *See supra* note 36 and accompanying text.

240. This includes prohibition on opening safe deposit boxes, commercial mailboxes, storage facilities, or even mail addressed to them. FTC Memo, *supra* note 239, at 9.

241. The monitor was appointed in the TRO, essentially as a logistical supervisor.

242. *See Immigration Scam Shut Down by FTC*, FED. TRADE COMM'N (Jan. 31, 2011), http://www.ftc.gov/opa/2011/01/immigration.shtm (discussing FTC's efforts).

the same immigrant desires to obtain legal status.[243] Seven individuals doing business under various names and in corporations, organized under the laws of various states, ran operations in three different states primarily using the internet, and held themselves out as authorized and qualified to provide immigration services.[244] In reality, however, none of them were attorneys or accredited representatives.[245] They filed papers without allowing the clients to see the papers, resulting in errors in form selection and factual accuracy.[246] The individuals affixed seals and graphics depicting the American bald eagle, the flag of the United States, or the Statue of Liberty on their materials to trick people into believing that they were affiliated with the federal government.[247] The URL names for their websites were confusing, including addresses with the phrases "uscic-ins.us" or "usgovernmenthelpline."[248] Phones were answered "immigration center," and consumers were transferred to a live person identifying him or herself as "agent," "immigration officer," or "caseworker."[249] The individuals charged fees ranging from $200 to $2500.[250] Many customers believed that their fees were being paid to the United States government to process documents.[251] Moreover, the individuals used standard slick business tactics, such as failing to be clear about actual costs, double charging, and refusing to give refunds.[252]

The Colorado and Missouri Attorneys General took criminal action against these individuals, but they simply moved on to Nevada.[253] On January 26, 2011, after talking to many victims of these scams, the FTC stepped in.[254] The individuals' businesses were shut down,[255] and the State of Nevada simultaneously filed criminal charges.[256] Eventually the

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243. *See* Complaint Against Immigration Ctr., *supra* note 143, at 6-12 (describing defendants' business practices). Final judgment was stipulated and a permanent injunction and other equitable relief was entered on Dec. 27, 2011. *See* Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants Immigration Center, Charles Doucette, and Deborah Stilson at 2, FTC v. Immigration Ctr., No. 3:11-CV-00055-LRH (D. Nev. Dec. 27, 2011) [hereinafter Stipulated Final Judgment].

244. Complaint Against Immigration Ctr., *supra* note 143, at 3-7 (listing defendants and describing their business practices).

245. *Id.* at 3-6 (providing descriptions of each defendant).

246. *See id.* at 10 (explaining that defendants often filed papers before consumers could review them).

247. *Id.* at 9.

248. *Id.*

249. *Id.*

250. *Id.* at 10.

251. *Id.* at 11 (explaining that defendants charged the same amount for their purported services as the U.S. government actually charges to process a given form).

252. FTC Memo, *supra* note 239, at 12.

253. *Id.* at 2.

254. *See Ex Parte* Temporary Restraining Order With Asset Freeze, Appointment of a Temporary Receiver, Immediate Access to Business Premises, Limited Expedited Discovery, and an Order to Show Cause a Preliminary Injunction Should Not Issue at 1, FTC v. Immigration Ctr., No. 3:11-CV-00055-LRH (D. Nev. Jan. 26, 2011) [hereinafter *Ex Parte* Temporary Restraining Order] (detailing the FTC's response).

255. *Id.* at 5-6.

256. *FTC Combats Immigration Services Scams*, FED. TRADE COMM'N (June 9, 2011), http://www.ftc.gov/news-events/press-releases/2011/06/ftc-combats-immigration-services-scams.

federal matter was settled,[257] resulting in the return of clients' original documents and a judgment in the millions, suspended upon the surrender of certain assets and compliance with the settlement order.[258]

These prosecutions were part of a concerted and collaborative effort among several federal and state agencies and attorneys general as well as the Better Business Bureau to combat immigration services scams. Legitimate immigration service providers also joined in on their efforts. For example, it was Catholic Charities[259] who tipped off the FTC about the Albans.[260] This effort outlines the three pillars of fighting notario fraud: enforcement, education, and collaboration.[261]

III. Stopping Specific Notarios From Engaging in Improper Practices

The first part of this article addressed how to help restore victims of UPIL to their rightful legal and financial positions. But, these restoration attempts are nearly always inadequate. It would be better if the victims had not been victims in the first place, and there were no harms to remedy. The next three parts of this article discuss prevention of UPIL. We begin narrowly in Part IV by cataloguing attempts to prevent known notarios from repeating their behavior. Parts V and VI will discuss broader, systemic approaches.

A discussion of prevention should begin with vocabulary. Prevention, deterrence, and punishment are closely related, but not identical, terms. To prevent something is to keep it from happening.[262] Whereas "prevention" is a general term, "deterrence" bespeaks a more psychological approach to prevention. The Latin root is *terrere*, or "to frighten." Deterrence means discouraging and preventing behavior through fear of consequences or unpleasantness.[263] Punishment relates to deterrence. The linguistic root of punishment is the same as

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257. *See FTC Action Bans Defendants from Providing Immigration Services*, Fed. Trade Comm'n (Jan. 24, 2012), http://www.ftc.gov/opa/2012/01/immigration.shtm (describing the settlement).

258. *See* Stipulated Final Judgment, *supra* note 243, at 5-6 (setting forth monetary judgments).

259. Catholic Charities was also instrumental in getting legal representation for Enciso-Lopez in his small claims case against notarios Monteagudo. *See supra* notes 199-202 and accompanying text. Defendants went so far as to write the pope in an effort to get Catholic Charities to back off of the case. Telephone Interview with Mike J. Gonring, *supra* note 226.

260. *See FTC Combats Immigration Services Scams*, *supra* note 256 (discussing the FTC's actions against the Albans).

261. *National Initiative to Combat Immigration Services Scams*, U.S. Citizenship & Immigr. Servs., U.S. Dep't of Homeland Sec. (June 9, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3a983ffa91570310VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD.

262. The etymology of word speaks to this: *prae venire* means acting before something comes. Webster's New International Dictionary of the English Language 1960 (2d ed. 1950).

263. *Id.* at 711.

for the words "penalty" and "pain."[264] To punish is to correct and discipline by afflicting with pain, loss, and suffering.[265] It is the opposite of rewarding. Black's Law Dictionary distinguishes among "deterrent punishment," with the purpose of deterring like-minded others from committing crimes by making an example of the offender; "preventative punishment," which "prevents a repetition of wrongdoing by disabling the offender," and; "retributive punishment," which is intended "to satisfy the community's retaliatory sense of indignation that is provoked by injustice."[266] All of these concepts play a role in preventing notarios, or would-be notarios, from plying their trade.

While acknowledging the deterrent effect of the monetary awards discussed in Part III, we now look at more direct preventive measures, civil and criminal, taken against identified, specific notarios. Some of these measures are punitive. Others are exemplary, intended to deter others besides the defendant. And, still others are preventive, without necessarily being punitive.

A. Injunctions

An injunction is the most obvious preventive legal action, designed to avert reoccurrence of misconduct by people who have been identified as notarios. Federal and state courts routinely issue orders against provision of unauthorized, illegal, or fraudulent services, thereby protecting not only the private litigant[267] or the named complainant in government actions, but also the general public and all future victims. The beauty of injunctions is that they can both be tailored exactly to the improper practices used by the given notario and include general prohibitions. This section details the purposes served by injunctions, sets out some basic best practices for drafting an injunction, and surveys the law of contempt.

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264. *Id.* at 2013.

265. *Id.* at 743. The first definition of the verb "discipline" is "to teach." *Id.* The second and third definitions involve chastisement or suffering, and the fourth invokes control and strict governance. *Id.*

266. BLACK'S LAW DICTIONARY 1247-48 (7th ed. 1999).

267. A few state UDAP statutes preclude private injunctive relief. *See, e.g.*, WYO. STAT. ANN. § 40-12-114 (2000); *see also* Baptist Health v. Murphy, 373 S.W.3d 269, 288-89 (Ark. 2010) (interpreting ARK. CODE ANN. § 4–88–113(f)); Family Res. Grp. v. La. Parent Magazine, 818 So. 2d 28, 32-33 (La. Ct. App. 2001) (interpreting LA. REV. STAT. ANN. § 51:1407 (2006)). In other states, some procedural wrinkles may arise. *See, e.g.*, WASH. REV. CODE § 19.86.095 (requiring that plaintiffs requesting a UDAP injunction must serve the state attorney general with a copy of the initial pleading). The circuit courts are currently split on whether private RICO plaintiffs can obtain injunctive relive. *Compare* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1082-89 (9th Cir. 1986) (finding no injunctive relief for private parties under civil RICO), *with* Bennett v. Berg, 710 F.2d 1361, 1365 (8th Cir. 1983) (McMillan, C.J., concurring in part, dissenting in part) (arguing that the majority should have decided the question of whether equitable relief is available to private parties). Government and private parties using federal or state RICO may seek equitable remedies. *See, e.g.*, 18 U.S.C. § 1964(b) (2013) (discussing civil remedies); AGS Capital Corp., Inc. v. Product Action Int'l, LLC, 884 N.E.2d 294, 310-11 (Ind. Ct. App. 2008) (discussing claims based on violations of RICO).

Injunctions may be issued as remedies for most all of the causes of action identified in this article.[268] Unless otherwise noted, the explanations that follow apply to all of the claims described.[269] Similarly, the ensuing discussion applies to both preliminary injunctions sought before trial[270] and permanent injunctions sought as a remedy after liability has been established.

Injunctions are used primarily to prevent future harms.[271] They may do so by issuing direct orders to parties or other actors to cease and desist from illegal or unlawful practices. But, they can and should go one step further, and educate the defendant by detailing and explaining what practices are illegal and, by omission, what practices are legal.[272] The well-drafted injunction precludes the defendant from future assertions that he "did not know" he was doing anything wrong.[273]

Preliminary injunctions can assist in building the case against, and collecting a judgment from, the defendant by ordering an accounting of profits, production of documents, freezing of funds, keeping of records, and similar measures.[274] Preliminary injunctions can give a tactical advantage to plaintiffs or prosecutors because, for the injunction to issue, a court must determine that the party seeking the injunction is likely to succeed on the merits. The judge's very decision to issue the order is a harbinger of disaster for the defendant, which may lead to a quicker settlement. Additionally, the preliminary order often cuts off a significant income stream to the defendants, which may pressure them to proceed with settlement.

The efficacy of injunctions lies in their flexibility and ability to address exactly what is needed in the specific case before the court. The trial court has broad discretion to do "com-

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268. Injunctions may be teamed with the other preventive and compensatory measures outlined in this article.

269. The phrase "cease and desist order" is commonly used when the government is seeking to enjoin acts prohibited by statute.

270. Preliminary injunctions remain in force only until final judgment. The terms of these orders may be revisited at the discretion of the trial court.

271. Some injunctions are also reparative, used to help restore plaintiffs to their rightful positions. Injunctions need not be onerous. The National Consumer Law Center writes, "In theory, judges should enjoin future conduct even if they are unwilling to order a company to pay for past conduct that was not clearly deceptive." UNFAIR AND DECEPTIVE ACTS AND PRACTICES, *supra* note 139, §13.6.1. Case law highlights that injunctions should not be punitive, but rather should be aimed at prevention of reoccurrence of the bad action. *See, e.g.*, Agronic Corp. of Am. v. deBough, 585 P.2d 821, 824 (Wash. Ct. App. 1978) ("The purpose of an injunction is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts.").

272. *See, e.g.*, The Fla. Bar v. Fuentes, 190 So. 2d 748 (Fla. 1966) (granting an injunction against a notario long before any anti-notario laws were on the books); State *ex rel.* Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433, 448 (Ind. 2005) (granting an injunction against a notario).

273. The injunction demonstrates to the defendant that this court is watching him and has power over him. Even a scoff-law will squirm and think again before risking disobedience.

274. *See generally* Stipulated Final Judgment, *supra* note 243 (serving as an excellent example of a detailed injunction).

plete" justice by the injunction, and the court's equitable powers are especially broad when the public interest is involved.[275]

The main limits on the courts' discretion in issuing injunctions come from centuries of equitable precedent.[276] The injunction should address only relevant matters, with relevance limited by the scope of the underlying crimes, torts, or other legal violations that, along with the facts at hand, make the injunction ripe.[277] Also, the injunction must not inflict "undue hardship" on a defendant. Certainly it will inflict some hardship, or what feels like hardship, to the defendant deprived of a moneymaking scheme. The question is, what hardship is "undue"? Generally, it is improper to prohibit people from running a legitimate business. The good injunction carves away the illegitimate practice while leaving intact the defendant's ability to utilize his training and experience.[278] If, for example, a notario ran a true notary service, a translation service, and a legitimate travel business, the injunction should not touch those legal endeavors.

The recent injunction in *Avila v. State* went too far in restraining two Texan notarios. The injunction restrained the Avilas from destroying written materials related to their business; removing funds or property from the jurisdiction; giving advice about immigration; selecting or preparing immigration forms; soliciting or accepting compensation for providing immigration or legal services; and holding themselves out as legitimate providers of immigration services.[279] However, the appellate court deleted from the trial court's order a prohibition on spending or transferring any money, securities, or property.[280] The court explained, "Rendering the Avilas unable to pay their bills does not further [the purpose of the UDAP act]. Additionally, some of their money has been earned through legitimate business activi-

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275. State v. Shattuck, 747 A.2d 174, 180-81 (Me. 2000).

276. The argument that the injunction should not issue because an adequate remedy at law exists is usually not successful in the fraud and deceptive practices context. *See, e.g.*, State *ex rel.* Attorney Gen. v. NOS Commc'ns, Inc., 84 P.3d 1052, 1054 (Nev. 2004) (holding that the district court erred in declining to issue an injunction); Avila v. State, 252 S.W.3d 632, 643 (Tex. Ct. App. 2008) ("When it is determined that a statute is being violated, it is within the province of the district court to restrain it."); State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 553 P.2d 423,434 (Wash. 1976) ("The decision to grant or deny equitable relief is within the discretion of the trial court.").

277. Mootness is seldom an issue in fraud or UDAP cases because of the obvious ability of the defendant to set up shop in a new place. *See Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 510 P.2d at 238 ("Mootness exists in the issuance of injunctions only where events make it absolutely clear the behavior could not reasonably be expected to recur."). Voluntary cessation of activities is weak, at best, as an argument against issuance of an injunction, especially when the cessation occurs after the commencement of litigation. *See id.* ("Voluntary cessation of allegedly illegal conduct does not moot a case because there is still a likelihood of the illegal conduct recurring.").

278. *See* State *ex rel.* Stovall v. Martinez, 996 P.2d 371, 375-76 (Kan. Ct. App. 2000) (holding the injunction narrowly tailored to prevent future KCPA violations and the unauthorized practice of law but not so narrow as to disallow the defendant from continuing to use his training and experience).

279. *Avila*, 252 S.W.3d at 648.

280. *Id.* at 648 (modifying the overly broad injunction).

ties. The Avilas should have access to money made in a manner that does no harm to the public."[281]

On the other hand, if an entire business is deceptive, fraudulent, or otherwise illegal, the courts may prohibit them from operating.[282] An alternative tack is to suspend a business from operating until it complies with the law.[283] Under Washington's anti-notario law, for example, an immigration service must comply with the code by not falling into any number of the prohibited practices it sets forth that pertain to offering assistance in immigration matters.[284] Yet another approach would require defendants to deliver a copy of the injunction to any people with whom they enter into business with for the next five years.[285]

Most injunctions begin with an umbrella prohibition, a general order to cease and desist from violation of the statute. More specific provisions are then added because, to be enforceable, the injunction must be sufficiently specific that the defendant knows what is allowed and what is not.[286] Then, additional provisions can require affirmative acts on the defendant's part.[287] For example, at least one court has required a seller to include warning labels on hazardous goods to correct a public perception that the product was safe.[288] By analogy, if a notario creates a public perception that he provides legitimate services when he actually does not, he may be ordered to disabuse the public of that understanding. If he fraudulently creates his reputation, he can be required to dismantle it.

In a case outside but similar to the immigration context, a California man listed his services in the phone book as "legal aid" and suggested that people consult with him if they could not afford an attorney.[289] He targeted poor people being evicted from their mobile homes as potential clients.[290] He did not claim to be a lawyer but did say he had an attorney

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281. *Id.*

282. *See* State v. Shattuck, 747 A.2d 174, 180-81 (Me. 2000) (belligerent and deceptive motel owner); Kugler v. Haitian Tours, Inc., 293 A.2d 706, 708-09 (N.J. Sup. Ct. Ch. Div. 1972) ("legal-tourism" to Haiti claimed to include divorces which were in fact null and void in New Jersey); Lefkowitz v. Therapeutic Hyponosis Inc., 374 N.Y.S.2d 576, 577 (N.Y. Sup. Ct. 1975) (fraudulent hypnosis business). For a broad preliminary injunction, see *Commonwealth* ex rel. *Corbett v. Snyder*, 977 A.2d 28, 40-50 (Pa. Cmmw. Ct. 2009) (fraudulent mortgage scheme).

283. People v. iMergent, Inc., 87 Cal. Rptr. 3d 844, 852 (Cal. Ct. App. 2009) (discussing a preliminary injunction in the context of the sale of an assisted marketing plan).

284. *See* WASH. REV. CODE §19.154.060 (listing prohibited practices in offering assistance in immigration matters).

285. *See* Stipulated Final Judgment, *supra* note 243, at 10 (ordering defendants to provide a copy of the injunction to a number of individuals for the following five years).

286. Injunctions must not be "vague and indefinite," although they may be "broad and general." *See* People v. Custom Craft Carpets, Inc., 206 Cal. Rptr. 12, 15 (Cal. Ct. App. 1984) (describing the level of specificity required in an injunction); Kitsap Cnty. v. Kev, Inc., 720 P.2d 818, 823 (Wash. 1986) (discussing the same).

287. *See, e.g.*, Stipulated Final Judgment, *supra* note 243, at 11-12 (ordering defendants to keep their names, business names, and contact information on file with the FTC for twenty years). .

288. Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy, 6 Cal. Rptr. 2d 193, 198 (Cal. Ct. App. 1992).

289. Brockey v. Moore, 131 Cal. Rptr. 2d 746, 749 (Cal. Ct. App. 2003).

290. *Id.*

on staff, even though he did not.[291] A court found he practiced law without a license, violated consumer protection statutes, and acted with fraud, oppression or malice.[292] The court issued an injunction, which was upheld on appeal, that prohibited the use of "Legal Services," "Legal Aid Services," "legal," and symbols of the scales of justice on his advertising.[293] He was ordered to provide copies of the injunction to any employees of his businesses and make compliance reports to plaintiffs' counsel.[294] The court further ordered him to advertise the injunction in various newspapers in the communities where he operated, shoulder the cost of those quarter-page advertisements, and report to plaintiff's counsel the names of all persons who responded to the advertisements.[295]

Contempt is the remedy for the remedy; that is, it is the reparative and punitive mechanism used when injunctions have been violated.[296] Consumer protection statutes may set their own penalties for violations of injunctions issued in accord with the statute.[297] Violations of injunctions may also result in forfeiture of a corporate franchise, which would deter the business notario and strayer in particular.[298] When a court finds a defendant in contempt of a court order, it enforces not only the law but also its own power to make orders. Courts do not make light of flagrant contumacy. Even the scoff-law fraudster notario may still be sobered by the power of contempt.

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291. *Id.* at 751-52.

292. *Id.* at 749.

293. *Id.* at 754.

294. *Id.* at 759.

295. *Id.* at 760. This final provision was added because a former employee testified that the company received 60-200 calls per day, and the trial court found it possible that "thousands" of victims might be located by the advertisements. *Id.* Defendant had destroyed business records, so there was no other practical way to determine his victims' identities. *Id.*

296. *See, e.g.*, IDAHO CODE ANN. § 7-610 (2013) (discussing contempt); WASH. REV. CODE § 7.21.030 (discussing remedial sanctions for contempt of court). There are three types of contempt. The first is compensatory, essentially a determination of what civil damages were caused by the contempt. These damages are paid to the original plaintiff in a civil action, the victim who sought the injunction. Second, civil coercive contempt is used to force a defendant to comply with the court orders. This usually takes the form of fines paid to the state and could potentially include jail time. Finally, criminal contempt is possible as well, resulting in fines paid to the state, or incarceration. *See, e.g.*, *In re* Ryan, 823 A.2d 509, 511-12 (D.C. 2003) (finding in criminal contempt a disbarred lawyer who continued to hold herself out as a lawyer).

297. *See, e.g.*, IDAHO CODE ANN. § 48-615 (providing for a fine of up to $10,000 per violation and possible civil penalties); TEX. BUS. & COM. CODE ANN. § 17.47(e) (providing for a penalty of not more than $10,00 per violation, not to exceed $50,000); WASH. REV. CODE § 19.86.140 (authorizing a penalty of up to $25,000).

298. *See, e.g.*, IDAHO CODE ANN. § 48-616 (governing forfeiture of corporate franchises).

B. *Civil Penalties Paid to the Government for Violation of Federal FTC Act and State UDAP Statutes*

Knowing violations of the federal FTC Act give rise to "civil penalties" paid to the government.[299] The government must prove that defendant had "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that his or her acts were unfair or deceptive.[300] The FTC may collect $10,000 per violation.[301] Most state UDAP statutes have similar provisions,[302] many of which make the penalty collectable even without proof of willfulness, knowledge of, or actual harm to a consumer.[303] In some states, the penalties are expressly designated to fund the attorney general's consumer protection efforts.[304]

These civil penalties are justifiable because restitution and compensation may not reflect the gravity of the defendant's bad conduct.[305] The rationales behind imposing these penalties include recovery for damage to the public,[306] disgorgement, disincentivizing the behavior, and punishment.[307] The judge determines the amount assessed, with the maximum set by statute. Factors taken into account include the number of violations, the number of people damaged, the nature and extent of the public injury, and the detrimental effect of particular violations.[308] The wealth of the defendant is also relevant.[309]

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299. *See* 15 U.S.C. § 45(1) (2006) (covering unlawful unfair methods of trade competition). This provision also authorizes civil penalties for violations of cease and desist orders. *See* discussion *supra* Part III.A.

300. 15 U.S.C. § 45(m)(1)(A).

301. *Id.*

302. *See, e.g.*, IDAHO CODE ANN. § 48-606 (authorizing civil penalties of "up to five thousand dollars ($5,000) per violation"); TEX. BUS. & COM. CODE ANN. § 17.47(c) (allowing for penalties of up to $2,000 per violation and not to exceed $10,000); WASH. REV. CODE § 19.86.140 (providing for civil penalties up to $100,000 for a person or $500,000 for a corporation); State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 553 P.2d 423, 436-47 (Wash. 1976) (giving that penalties in Washington are assessed by each violation, not each customer harmed). These civil penalties paid to the state are distinct from treble damages that are paid to consumers in consumer actions. *See* discussion *supra* Part II.B (discussing monetary relief); *supra* note 192 and accompanying text (discussing punitive damages).

303. Statutes vary across the nation. *See, e.g.*, People *ex rel.* Lockyer v. Fremont Life Ins. Co., 128 Cal. Rptr. 2d 463, 468-481 (Cal. Ct. App. 2002) (discussing California law); State *ex rel.* Woodard v. May Dep't Stores Co., 849 P.2d 802, 808-811 (Colo. App. 1992) (interpreting the Colorado statute); McKinney v. State, 693 N.E.2d 65, 69 (Ind. 1998) (explaining the Indiana statute).

304. *See, e.g.*, IDAHO CODE ANN. § 48-606(f)(5) ("All penalties, costs and fees recovered by the attorney general shall be remitted to the consumer protection fund which is hereby created in the state treasury.").

305. State v. WWJ Corp., 980 P.2d 1257, 1261 (Wash. 1999) ("[T]he gravity of [defendant's] violations is not limited just to the actual damages inflicted.").

306. There is a compensatory aspect to these penalties, but they are discussed as "prevention" rather than compensation because they are paid to the state, not the victims. Punishment is certainly the primary goal. *May Dep't Stores Co.*, 849 P.2d at 809 ("[T]he civil penalty award goes to [Colorado]'s general fund, and thus, its purpose is not to make an injured party whole, but rather it is solely intended to punish the wrongdoer for its illegal acts.").

307. *See, e.g.*, Avila v. State, 252 S.W.3d 632, 637-38 (Tex. Ct. App. 2008) (describing factors to consider when assessing a penalty).

308. *See Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d at 475-482 (describing factors to consider when assessing a penalty).

309. *Id.* at 480.

Penalties may be assessed against each individual perpetrator, as well as against the corporation for which the perpetrator works.[310] Penalties may be assessed for each violation, even if practiced upon the same customer.[311] States may seek one penalty per misleading ad.[312] These civil penalties can be thousands of dollars;[313] a leading case from California involving the unauthorized practice of law, among other things, assessed $2,543,000 in civil penalties.[314] Large as these amounts may be, they are defined as civil, and the standard of proof is a preponderance of the evidence.[315]

C. Federal and State Crimes

1. Federal Crimes

The federal FTC Act is not a criminal statute,[316] nor are most state UDAP laws.[317] Some federal crimes may be implicated in the activities of notarios, including prohibitions against inappropriate interstate wire transfers, use of the federal postal service, use of government seals,[318] and conspiracy.

When fraudster notarios resort to crimes like forgery, they wade into even deeper water. For example, a Floridian notario couple that ran a business called "Welcome to

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310. *See* State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 553 P.2d 423, 439 (Wash. 1976) ("If a corporate officer participates in the conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties.").

311. *Id.* at 436.

312. *Id.* at 436 n.12.

313. *See, e.g.*, IDAHO CODE ANN. § 48-606(e) (allowing up to $5000 for a civil penalty); WASH. REV. CODE § 19.86.140 (allowing up to $100,000 for a civil penalty).

314. People *ex rel.* Lockyer v. Fremont Life Ins. Co., 128 Cal. Rptr. 2d 463, 468 (Cal. Ct. App. 2002).

315. *See, e.g.*, State *ex rel.* Redden v. Disc. Fabrics, Inc., 615 P.2d 1034, 1039 (Or. 1980) (providing that the standard of proof required for a proceeding under UTPA is "preponderance of the evidence"). Civil penalties are constitutional, and usually survive double jeopardy arguments, Eighth Amendment excessive fines prohibitions, and Fourteenth Amendment due process challenges. *See* Hudson v. United States, 522 U.S. 93, 98-102 (1997) (discussing double jeopardy); State v. WWJ Corp., 980 P.2d 1257, 1261-63 (Wash. 1999) (discussing Eighth and Fourteenth Amendment prohibitions). At some point the amounts might become disproportional and excessive. People v. Beaumont Inv., Ltd., 3 Cal. Rptr. 3d 429, 449-51 (Cal. Ct. App. 2003) (discussing the amount of damages); *State v. WWJ Corp.*, 980 P.2d at 1264-65 (Alexander, J., dissenting).

316. This is in contrast to RICO, which contemplates expressly criminal penalties including fines and incarceration.

317. *But see, e.g.*, ALA. CODE § 8-19-8(c) (1981) (providing that continuous and willful violations are a misdemeanor).

318. *See* 18 U.S.C. § 1028 (providing a punishment of up to 15 years in jail for falsifying a government identification or other authentication feature). In the Immigration Services case discussed above, one count was brought for misuse of the United States seal. *See supra* Part II; *Two Plead Guilty in Scheme to Defraud Consumers Seeking Immigration Services*, U.S. DEP'T OF JUSTICE (Aug. 23, 2012), http://www.justice.gov/opa/pr/2012/August/12-civ-1041.html (describing fraud involving immigration forms).

America, Inc." aggregated $4.5 million in fees charged for UPIL.[319] They were ultimately found to have defrauded not only their clients but also the state government, which had issued drivers' licenses based on the estimated 3,200 false immigration documents the couple had forged.[320] In 2011, the Department of Justice investigated and prosecuted dozens of cases, obtaining "sentences up to eight years in prison and restitution of over $1.8 million."[321]

2. State Crimes

Classic state criminal law is available as well, assuming the notario has the requisite *mens rea*. Criminal liability has the practical advantage of possibly triggering the victims' restitution statutes previously described. It also is a powerful deterrent and social declaration that a practice is socially and morally unacceptable.

Most obvious are the crimes of theft and larceny,[322] which can be a misdemeanor or a felony depending on the amount of money stolen.[323] In particular, notaries are often guilty of theft on the theory of fraud committed by false pretenses or trick. In most states, the penalty for felony theft is incarceration for a period ranging between one and twenty years.[324]

Notarios commit the crimes of fraud or false pretenses if they intentionally hold themselves out as something they are not.[325] Some statutes use the phrase "designedly" instead of "knowingly"—did the wrongdoer *designedly* use false pretenses to obtain property from another.[326] That adverb catches the crime of the notario—by *design* he or she creates and capitalizes on the confusion and insecurity of immigrants, so that immigrants think they are taking responsible, correct, legal steps while actually falling into a premeditated trap.

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319. Jane Musgrave, *Lake Clarke Shores Couple Sentenced for Defrauding Immigrants*, PALM BEACH POST (Mar. 29, 2012), http://www.palmbeachpost.com/news/news/crime-law/lake-clarke-shores-acouple-sentenced-for-defrauding/nLh4z/; Paula McMahon, *Couple Face Sentencing for Immigration Fraud*, SUN SENTINEL (Mar. 28, 2012), http://articles.sun-sentinel.com/2012-03-28/news/fl-immigration-fraud-couple-20120328_1_legal-status-undocumented-immigrants-federal-prosecutors.

320. Musgrave, *supra* note 319.

321. *National Initiative to Combat Immigration Services Scams*, *supra* note 261.

322. Larceny is committed when one person takes another's property without his consent. WAYNE R. LAFAVE, CRIMINAL LAW § 19(a) (5th ed. 2010), False pretenses and larceny by trick are committed when the wrongdoer obtains the property from the owner by telling him lies. *Id.* The Model Penal Code "provides for an ambitious plan of consolidation of [these and other] smaller separate crimes into one larger crime called 'theft.'" *Id.* § 19.8(d).

323. *See id.* § 19.4(b) (giving that the dollar amounts needed to escalate the crime into a felony is from $50 to $2000); KATHERINE BRADY, IMMIGR. LEGAL RES. CTR., IMMIGRATION CONSULTANT FRAUD: LAWS & RESOURCES 14-15 (2000) (noting that crimes against multiple victims may need to be aggregated to bring the value of the property take into felony range); Langford, *supra* note 6, at 116, 130 (discussing these criminal issues in the notario context).

324. *See, e.g.*, IDAHO CODE ANN. § 18-2408 (2002) (providing punishments for varying grades of theft); TEX. PENAL CODE § 12.35 (2011) (providing the state jail felony punishment); WASH. REV. CODE § 9A.56.030 (2013) (covering theft in the first degree).

325. LAFAVE, *supra* note 322, § 19.7.

326. *Id.* §19.7(f)(1).

Other notario practices may lead to the commission of separate crimes like forgery, submission of false papers, extortion and assault.[327] In many states, unauthorized practice of law is a misdemeanor and in some even a felony.[328] In various states, making false or misleading statements when preparing immigration matters is a crime in and of itself.[329] Many notario offices involve more than one person, opening the door for charges of conspiracy and aiding and abetting.

IV. Federal and State Regulation of Immigration Practice

In addition to remedial and deterrent measures, strong regulation of immigration practice—laws that define its scope, identify who is authorized to provide representation, and establish enforceable sanctions against violators—can play an important role in the battle against UPIL. The INA, the federal statute governing immigration, and its implementing regulations include rules that specifically govern immigration practice nationwide. Every state has its own statutes, which generally prohibit and punish the unauthorized practice of law and regulate notaries. Several states also have statutes that specifically prohibit UPIL. Because the federal government occupies the field of immigration law, state statutes regarding UPIL may be preempted;[330] however, state rules which complement rather than conflict with federal rules potentially provide additional safeguards against UPIL. Conversely, state laws that are inconsistent with federal regulation create confusion and may foster UPIL rather than curtail it.

A. Federal Law

1. What Does Immigration Practice Mean?

The federal regulation scheme is conceptually simple in its precise definition of both the categories of individuals who may practice immigration law as well as the scope, nature, and circumstances under which non-attorneys may lawfully provide immigration services. The problem with the federal framework is that it comprises more than a dozen provisions scattered throughout the INA and its regulations, which must be read together to understand

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327. *See* discussion *supra* Part I (considering harms caused by the unauthorized practice of immigration law).

328. *See, e.g.*, Idaho Code Ann. § 3-420 (stating the penalties for unauthorized practice of law); Tex Gov. Code § 406.017 (defining the offense of unauthorized practice of law); Tex. Penal Code § 38.122 (governing the crime of falsely holding oneself out as a lawyer).

329. *See, e.g.*, Ariz. Rev. Stat. Ann § 12-2703 (2012) (making such conduct a felony); Cal. Penal Code § 653.55 (2012) (making such conduct a misdemeanor); Wash. Rev. Code § 19.154.060 (discussing prohibited conduct).

330. *See, e.g.*, Moore, *supra* note 2, at 14-15 (discussing preemption); Shannon, *supra* note 173, at 453 (discussing issues regarding preemption).

it properly. Of course, most immigration consumers do not know how to locate the relevant provisions and are not trained in statutory and regulatory construction. In other words, federal law on UPIL is relatively clear for those who know how to find and interpret it, but confusing for those who do not.

Federal regulation defines "immigration practice" broadly as "the act or acts of any person appearing in any case, *either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person* or client before or with DHS, or any immigration judge, or the Board."[331] Unless the context dictates otherwise, "case" is defined as

> *any proceeding arising under any immigration or naturalization law, Executive Order, or Presidential proclamation, or preparation for or incidental to such proceeding, including preliminary steps by any private person or corporation preliminary to the filing of the application or petition* which any proceeding under the jurisdiction of [federal immigration agencies] is initiated.[332]

The INA permits "service consisting *solely of assistance in the completion of blank spaces on [government immigration] forms" if provided for free or at nominal cost and if the service provider "does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.*"[333] The term "representation" includes practice and preparation as described above.[334]

These rules are useful in combating UPIL for at least two reasons. First, the definition of immigration practice is relatively precise and theoretically puts the public, including potential immigration practitioners and consumers, on notice as to what is permitted and what is not. Second, the definition is broad in that it encompasses not only acts performed in person at the Executive Office for Immigration Review (EOIR) or DHS, but also work undertaken in preparing immigration applications and related documents, in filing them, or in conducting post-filing tasks. This definition prohibits the kind of activities in which notarios frequently engage, such as preparing documents which require formal training in immigration law and providing legal consultation or advice. Essentially, a licensed attorney or other federally authorized provider of immigration services must perform all work related to matters arising under immigration law.

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331. 8 C.F.R. §1001.1(i) (emphasis added); *see also id.* § 1.2 (defining "practice").

332. *Id.* §1001.1(g) (emphasis added); *see also id.* § 1.2. Similarly, the term "preparation, constituting practice, means the study of the facts of a case and the applicable laws, combined with the giving of advice and auxiliary activities, including the incidental preparation of [immigration-related] papers . . . ." *Id.* § 1001.1(k); *see also id.* § 1.2 (defining "preparation").

333. *Id.* § 1001.1(k) (emphasis added); *see also id.* §1.2 (explaining what type of service is permitted).

334. *Id.* § 1001.1(m); *see also id.* § 1.2 (defining "representation").

2. Who May Lawfully Practice Immigration Law?

Federal law limits immigration representation to six categories of individuals: (1) attorneys in good standing of the bar of the highest court of any state;[335] (2) specially accredited representatives acting as employees of "recognized agencies" authorized by the federal government to provide immigration assistance;[336] (3) supervised, unpaid students enrolled in a law school clinic, with the consent of both the client and the adjudicator;[337] (4) unpaid, supervised law graduates, again with the permission of the client and the adjudicator;[338] (5) unpaid "reputable" non-attorneys of "good moral character" who have a pre-existing relationship with and the consent of the individual entitled to representation, and the adjudicator's approval;[339] and (6) unpaid, "reputable" individuals of "good moral character" who have no pre-existing relationship with person entitled to representation, if the adjudicator determines that adequate representation would not otherwise be available.[340] Representatives must file a signed notice of appearance in every immigration matter and demonstrate that they fall within one of the prescribed categories.[341]

a. Recognized Agency[342]

To become a "recognized agency" authorized by the government to represent individuals in immigration matters, a non-profit organization must file an application with the BIA which demonstrates that the agency is established in the United States, will not charge more than a nominal fee for immigration services, and "has at its disposal adequate knowledge, information, and experience" in immigration law.[343] The BIA has held that "nominal," although not defined as a specific dollar amount, typically means "a very small quantity" and is determined on a case-by-case basis.[344] The knowledge, information, and experience requirement is typically met if the organization proves that it is associated with an attorney competent in immigration law who can provide legal assistance and support to agency em-

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335. *Id.* § 1292.1(a)(1); *see also id.* §1001.1(f) (defining "attorney").

336. *Id.* § 1292.1(a)(4).

337. *Id.* § 1292.1(a)(2).

338. *Id.*

339. *Id.* § 1292.1(a)(3) (providing a non-exhaustive list of such individuals, including a relative, neighbor, clergyman, business associate or personal friend).

340. *Id.* Categories 5 and 6 are particularly susceptible to abuse because they provide virtually no concrete guidance as to how an adjudicator should evaluate the identity of such individuals, whether they are qualified to provide competent—or even helpful—assistance, or how to evaluate with any degree of uniformity, the circumstances under which adjudicators should allow such representation.

341. *Id.* § 1292.1(f).

342. For an overview of recognition and accreditation requirements, see *Recognition & Accreditation (R &A) Program*, U.S. DEP'T OF JUSTICE, www.justice.gov/eoir/statspub/raroster.htm (last visited Oct. 25, 2013).

343. 8 C.F.R. §1292.2(a).

344. Matter of American Paralegal Academy, Inc., 19 I. & N. Dec. 386, 387 (BIA 1986).

ployees, and has access to relevant legal materials, training, and practice updates.[345] The BIA may order the withdrawal of an agency's recognition for failing to maintain these qualifications.[346]

b. Federally Accredited Representatives Employed by a Recognized Agency

A recognized agency may apply to the BIA for one or more non-attorney employees to become an "accredited representative," permitted to practice before USCIS alone (partial accreditation) or before USCIS, immigration court, and the BIA (full accreditation).[347] The accreditation application must describe the nature and extent of the work to be performed by proposed representatives, designate the category of accreditation sought, document their experience and knowledge of immigration law, and include letters of recommendation regarding their skills, ability, and good moral character.[348]

Applications for accreditation must also show that the proposed representative is in regular contact with an expert immigration lawyer.[349] Accredited representatives cannot receive personal remuneration and only retain accreditation while working for the same BIA-recognized non-profit organization under whose auspices they originally obtained the accreditation.[350] In other words, accredited representatives cannot practice immigration law as private individuals, and their accreditation is not portable.

The BIA investigates and assesses whether the proposed representative meets the qualifications for the requested designation and issues a decision. Accreditation is valid for three years.[351] An application for renewed accreditation must be affirmatively and timely filed, but accreditation remains valid until the Board makes a renewal decision.[352] Applications for renewal must meet standards similar to those for initial accreditation.[353]

3. Oversight and Discipline of Immigration Practitioners

The Board of Immigration Appeals bears primary responsibility for overseeing conduct by attorneys and non-attorneys authorized by regulation to provide legal assistance

345. *See, e.g.*, Matter of EAC, 24 I. & N. Dec. 556, 558-59 (BIA 2008) (describing how to satisfy requirements for recognition).
346. 8 C.F.R. §1292.2(d).
347. *Id.*
348. *See, e.g., Matter of EAC, supra* note 322, at 561-562 (analyzing application for accreditation).
349. *See id.* at 558-59 (describing the requirement of adequate knowledge and expertise).
350. 8 C.F.R. §1292.1(a).
351. *Id.* §1292.2(d).
352. *Id.*
353. *Id.*

in immigration matters.[354] Although the Board may discipline immigration practitioners who assist unauthorized practice of law, it has no jurisdiction to discipline individuals, such as notarios, who are not covered by 8 C.F.R. §§ 1001.1(f) or 1292.[355] Accordingly, discipline and sanction of those not authorized to practice immigration law are left to miscellaneous state and federal agencies such as the FTC, consumer fraud offices, bar associations, and notary boards, and to the civil and criminal courts, if an appropriate cause of action is filed by a government agency or an aggrieved individual.[356]

The BIA publishes an online roster of recognized organizations and individual accredited representatives that is updated on a weekly basis.[357] Additionally, the BIA publishes a list of currently and previously sanctioned immigration practitioners.[358] Attorneys, accredited representatives, and others authorized to appear in immigration matters under 8 C.F.R. § 1292 may be sanctioned for misconduct.[359] Disciplinary sanctions include disbarment, suspension, and censure.[360] Numerous grounds for sanction exist,[361] including assisting in the unauthorized practice of law,[362] and, in the case of accredited representatives, law clinic students or law graduates, for receiving remuneration from a client.[363]

4. Brief Critique of Federal Provisions

Prescribed requirements for recognition and accreditation standards provide some degree of quality control among non-attorney immigration practitioners. Compliance with these requirements potentially yields increased access to competent representation in immigration matters, and theoretically decreases reliance on notarios and others engaged in UPIL. Accredited representatives and recognized agencies, however, are arguably subject to

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354. *Id.* §§ 1003.1(d)(5) (describing power of the BIA to discipline attorneys and representatives), 1003.101-106 (providing the same), 1292.3 (providing the same); *see also* Matter of Gadda, 23 I. & N. Dec. 645, 649-50 (BIA 2003) (describing the BIA's authority to impose sanctions). Rules governing BIA complaints against are found at 8 C.F.R. §§ 1003.101; 1003.102(h), (k); 1003.103(c); 1003.104(a)(1), (b); 1003.105; 1003.106; 1003.107; 1292.3.

355. *See* 8 C.F.R. §1003.102(m) (providing that a person may be sanctioned for unauthorized practice of law).

356. *See* discussion *supra* Parts II, III (regarding remedies that individuals may pursue and regulation of notarios).

357. *See Recognized Organizations and Accredited Representatives by City and State*, EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/ra/raroster_ orgs_reps_state_city.htm (last visited Oct. 25, 2013) (providing a list of recognized organizations and accredited representatives).

358. *List of Currently Disciplined Practitioners*, EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/discipline.htm (last visited Oct. 25, 2013). In a welcome development, some immigration courts (New York City's, for example) post current lists of disciplined practitioners on bulletin boards outside courtrooms.

359. 8 C.F.R. §1003.101(b).

360. *Id.* § 1003.101(a).

361. *Id.* §1003.102.

362. *Id.* §1003.102(m).

363. *Id.* §§ 1003.102(a)(2), (3).

less scrutiny than attorneys who face regular review and possible discipline by both the BIA and state bar associations.

Applicants for initial accreditation and renewal of accreditation must satisfy broad criteria, such as demonstrated knowledge of and experience in immigration law as well as ongoing access to or supervision by a licensed attorney.[364] Applicants for renewal must demonstrate that during the period since their previous BIA approval, they have kept abreast of developments in immigration law and practice and have been engaged in ongoing immigration training.[365] Critics argue, however, that the requirements are vague and lack uniformity, as written and as applied, and are not always strictly enforced.[366] To improve the system, Professor Careen Shannon and Emily Unger recommend amendments to federal regulation of accredited representatives. Both propose that the BIA develop and administer a competency exam, based on a standardized curriculum, to test applicants' knowledge of immigration law and professional ethics,[367] and require completion of specified additional training for reaccreditation.[368] Unger also suggests that the BIA "post each applicant's name, license number, accreditation status, sanction history, and photo on its website," and "require accredited representatives to conspicuously display their name, license number, and the BIA web address in their office and . . . include this information on all contracts and receipts."[369] She points out these additional requirements "would allow consumers to check the status of a representative, prevent consultants from falsely claiming representation, and give consumers an easier mechanism to report abuses."[370] The virtue of these proposals is that they would provide uniformity in evaluating accreditation applications, enhance sound immigration law training of accredited representatives, offer consumers a relatively simple way to verify whether an individual is properly accredited, and facilitate the reporting of alleged abuses. Implementation of such proposals would also be cost-effective, requiring little or no additional cost to accreditation applicants or to the U.S. government, and has the potential to reduce the systemic costs involved in poor or fraudulent representation.

In sum, current federal regulation of immigration law practice must be fortified and should include measures such as those suggested above. As proposals for capacity-building initiatives become a reality, federal regulation of immigration practice will require amendments carefully tailored to balance the need for a larger pool of representatives with

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364. *See id.* § 1292.2(d) (describing requirements for recognition).

365. *See, e.g.*, Matter of EAC, Inc., 24 I. & N. Dec. 563, 564 (BIA 2008) (discussing requirements for accreditation).

366. Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQU. 425, 445-48 (2011) (discussing how to strengthen and better implement requirements for accreditation).

367. *Id.* at 446 (suggesting changes to improve oversight of immigration practitioners); *To License or Not to License*, *supra* note 173, at 485 (discussing what can be done at the federal level to oversee the competency of immigration practitioners).

368. *To License or Not to License*, *supra* note 173, at 485.

369. Unger, *supra* note 366, at 447.

370. *Id.* at 448. Unger also suggests a campaign to educate immigrant communities about accreditation. *Id.*

the risk that expanded categories of individuals and organizations permitted to practice immigration law will create new opportunities for fraud.

B. State Regulation of Immigration Practitioners

Each state has its own rules for regulating the practice of law. States' approaches to UPIL vary significantly from one another—and often from federal law—and typically do not apply outside the borders of each state.

In the context of UPIL, state rules fall into four general categories: (1) statutes that forbid the unauthorized practice of law generally, do not specifically address UPIL, and *do* conflict with federal regulations; (2) statutes that forbid the unauthorized practice of law generally, do not specifically regulate UPIL, and *do not* conflict with federal rules; (3) statutes that specifically regulate immigration law practice and *do not* conflict with federal regulations; and (4) statutes that specifically regulate immigration law practice and *do* conflict with federal regulation.

1. Examples of State Regulation

a. Idaho

Idaho's broad unauthorized practice of law statute forbids non-attorneys from providing any kind of legal assistance, thereby implicitly prohibiting the unauthorized practice of immigration law.[371] Idaho's blanket proscription has the virtue of simplicity: only licensed attorneys can practice law, including immigration law. Idaho courts have clarified that "the practice of law" includes not only the performance of legal services in matters pending in court but also "legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not [pending] in a court."[372]

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371. *See* IDAHO CODE ANN. §3-420 (forbidding individuals who have not been admitted or licensed to practice law in Idaho, or whose right or license to practice has been terminated, from practicing, acting, or holding themselves out as lawyers). A conviction for unlawful practice of law may result in a $500.00 fine, imprisonment not to exceed six months, or both, as well as a finding of being in contempt of court. *Id.* §§ 3-420, 3-104. Persons who have been admitted to practice law shall also be subject to suspension. *Id.* § 3-420; *see also* IDAHO BAR COMM'N RULE 804 (1998) (authorizing the Idaho State Bar Counsel to investigate complaints of unauthorized practice of law, issue cease and desist letters, and maintain permanent records related to unauthorized practice of law).

372. *See* Idaho State Bar v. Villegas, 879 P.2d 1124 (Idaho 1994) (holding that a self-proclaimed "public adjuster" who helped evaluate, investigate and settle civil claims had engaged in the unlawful practice of law); Idaho State Bar v. Meservy, 335 P.2d 62, 64 (Idaho 1959) (holding that an individual who provided legal advice and drafted pleadings and a proposed order for filing in court had engaged in unlawful practice of law); State v. Wees, 58 P.3d 103, 106-07 (Idaho Ct. App. 2002) (finding Wees guilty of unauthorized practice of law because he interviewed and advised customers on legal issues, and helped them draft documents to file in state court).

Accordingly, Idaho *precedent* interprets "unauthorized practice of law" in a manner largely consistent with federal immigration law.[373]

The Idaho *statute*, however, is inconsistent with federal rules that govern immigration law practice. Federal law affirmatively permits non-attorney representatives, accredited by the BIA and employed by BIA-recognized agencies, as well as attorneys in good standing in the bar of any state in the United States to represent individuals in immigration matters.[374] Despite the state statute's facial inconsistency with federal provisions, Idaho has generally respected federal rules governing immigration representation. Still, for the sake of clarity, the state should consider amending its unauthorized practice of law statute to include an explicit provision incorporating or referencing the federal rules on immigration practice.

b. Washington

Prompted by years of experience litigating against Washington state notarios, the Washington Attorney General's Office, working with community-based organizations such as the Northwest Immigrant Rights Project, proposed a bill to eliminate statutory loopholes facilitating notario fraud and to strengthen penalties against offenders.[375] The bill, eventually enacted as the Immigration Services Fraud Prevention Act of 2011,[376] states, in relevant part, that "persons, other than those licensed to practice law in this state *or otherwise permitted to practice law or represent others under federal law in an immigration matter*, are prohibited from engaging in [immigration practice]. . . ."[377] The virtue of this language is its consistency with federal immigration law. The language could also serve as a model for an amendment to Idaho's unauthorized practice of law statute to bring it into line with federal rules regarding immigration practitioners. The Washington amendments also eliminate the term "immigration assistant" from the previously existing legislation and provide harsher penalties for violators.[378]

2. State Regulation of Notaries Public

State notary boards govern notaries. Some notarios are true renegades, who are not licensed notaries, rendering notary boards virtually helpless to punish them directly. Other

373. *See supra* Part IV.A (discussing federal law).
374. 8 C.F.R. § 1292.
375. Molly Rosbach, *Washington Notarios Bill Combats Immigration Fraud*, THE SEATTLE TIMES (Feb. 5, 2011), http://seattletimes.com/html/localnews/2014139113_apwaxgrnotarios1stldwritethru.html; *Federal and State Officials Expose Immigration Service Scams, Unveil New Prevention and Enforcement Initiatives*, WASH. STATE OFFICE OF THE ATTORNEY GEN., (June 9, 2011), http://www.atg.wa.gov/pressrelease.aspx?id=28224#.UqkyvfSryDs%20.
376. WASH. REV. CODE ANN. §§ 19.154.010 (2011) (describing the state legislature's findings).
377. *Id.* § 19.154.060.
378. *Id.*; *see also id.* § 19.154.090(2) (describing penalties that may be imposed).

notarios are actual state notaries who overstep their power and commit UPIL. Licensing sanctions against them can be fairly effective. As Abrams and Fulghum observe, "[B]ecause the notary commission is often the 'seal' of legitimacy that notarios use as a pretense to present to practice law, taking away that symbol of authority is an effective way to shut them down."[379] Some notary laws specifically address notario deception in the immigration context,[380] including whether or not notaries may use Spanish translations of the phrase "notary public."[381] Violations of such provisions sometimes carry criminal penalties[382] and serve as the basis for injunctions. Those states that forbid the use of the word "notario" by notaries advertising their services have effectively decided that its use is per se deceptive. A flat ban on using the term allows little room for interpretive ambiguities, so violations are more readibly provable. The proscription has the added benefit of preventing harm committed by notarios not directly in front of the court.

V. THE IMPORTANCE OF PUBLIC EDUCATION AND EFFECTIVE REPORTING MECHANISMS

Immigration consumers who are educated about the dangers of UPIL are more likely to avoid it. Ideally, an education campaign not only underscores the potentially adverse consequences of hiring a notario, it also teaches how to identify and report suspected UPIL for investigation and possible legal action; whether affordable and competent representation

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379. Jason Abrams & Thomas E. Fulgham, *Battling Against Notarios: Waging War Against the Unlicensed, Unqualified, and Incompetent*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 123, 127 (2009-2010).

380. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-367(A) (2000) (providing that any notary public who advertises in a language other than English shall post a notice in that language "I am not an attorney and cannot give legal advice about immigration or other legal matters"); IND. CODE ANN. § 33-42-2-2 (prohibiting notaries from taking acknowledgement of persons that do not understand English). Violation is a class six felony and results in permanent revocation of the notary's commission. ARIZ. REV. STAT. ANN. § 41-367(B). This law demonstrates the difficulty of the problem—a true scoundrel, not even a notary, would not be covered.

381. *See, e.g.*, ARK. CODE ANN. § 4-109-102 (2005) (making it unlawful for a person to advertise services using the terms "notario," "notario publico" or other similar terms unless they meet the definition provided for by law); CAL. GOV. CODE § 8219.5 (1976) (giving requirements for advertising in languages other than English and the posting of notices related to legal advice and fees); COLO. REV. STAT. ANN. § 12-55-110.3 (2004) (describing advertisement of services, the unauthorized practice of law and prohibited conduct); 815 ILL. COMP. STAT. ANN. 505/2AA (2005) (prohibiting the phrase "poder notarial"); IND. CODE § 33-42-2-10; (2007) (covering fraudulent advertising and misrepresentation); KAN. STAT. ANN. § 53-121 (2006) (giving requirements for notaries advertising in foreign languages); ME. REV. STAT. ANN. tit. 4 § 960 (2006) (discussing advertisement of services); MICH. COMP. LAWS § 55.291 (2006) (setting forth requirements for the advertisement of services); NEB. REV. STAT. ANN. § 64.105.03 (2004) (discussing notaries public, unauthorized practice of law and prohibited behavior); NEV. REV. STAT. § 240.085 (2005) (covering advertisements in a language other than English if the notary public is not an attorney); N.M. STAT. ANN. § 14-12A-15 (2003) (covering the unauthorized practice of law); OKLA. STAT. ANN. tit. 49 § 6 (2003) (discussing the provision of legal advice); TEX. GOV. CODE § 406.017 (2001) (covering representation as an attorney); WIS. STAT. ANN. § 137.01 (2013) (covering notaries).

382. *See, e.g.*, IND. CODE. ANN. § 35-43-5-3.7 (2013) (providing that the notario publico designation is a Class A misdemeanor in Indiana).

by lawyers or federally accredited representatives is locally available, and; about potential immigration, civil and criminal remedies.

A. Non-governmental and Community-Based Organizations

Until relatively recently, efforts to educate immigrant communities about notario fraud were mainly localized and relied on non-governmental community based groups. During the last half-dozen years, however, non-governmental organizations with a national reach, such as the Immigrant Legal Resource Center (ILRC) and the Catholic Legal Immigration Network (CLINIC), have created resources to combat UPIL through broader, more coordinated public education initiatives and to assist community-based groups that work with immigrants.[383] Education materials prepared by ILRC and CLINIC teach immigrants about adverse consequences of notario fraud and how to identify, avoid, and report UPIL. They include posters, cartoon booklets, talking points and PowerPoint presentations, and suggestions for skits and role-playing—particularly popular and effective in communities where immigrants may not be literate.[384] The organizations' resources are free, simple to understand, accurate, and easy to adapt to the needs of specific audiences. Materials are available in multiple languages, including English, Spanish, Haitian Creole, Chinese, Korean, Arabic, Serbian, Croatian, Tagalog, Farsi, and Urdu.[385]

B. Professional Organizations

Professional organizations such as the American Bar Association (ABA) and the American Immigration Lawyers Association (AILA) have become involved in educating their members as well as immigration consumers about how to identify, report, and take action against UPIL.[386] In just the last year, AILA has undertaken an ambitious program of

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383. *See Anti-Fraud Campaign*, IMMIGR. LEGAL RES. CTR., http://www.ilrc.org/policy-advocacy/anti-fraud-campaign (last visited Oct. 26, 2013) (describing the organization's anti-fraud advocacy efforts).

384. *See For Immigrants/Para Inmigrantes*, IMMIGR. LEGAL RES. CTR., http://www.ilrc.org/for-immigrants-para-inmigrantes (last visited Oct. 26, 2013) (providing education materials for immigrants); *Notario and Immigration Consultant Fraud Resources*, CATH. LEGAL IMMIGR. NETWORK, INC., http://cliniclegal.org/resources/notario-and-immigration-consultant-fraud-resources (last visited Feb. 16, 2013) (providing educational resources to address notario fraud).

385. *Anti-Fraud Flyers*, IMMIGR. LEGAL RES. CTR., http://www.ilrc.org/for-immigrants-para-inmigrantes/anti-fraud-flyers (last visited Oct. 26, 2013); *Anti-Fraud Comics*, IMMIGR. LEGAL RES. CTR., http://www.ilrc.org/for-immigrants-para-inmigrantes/anti-fraud-comic-books (last visited Oct. 26, 2013).

386. *See* AM. IMMIGR. LAWYERS ASS'N, GUIDELINES FOR CONSUMERS: HOW AND WHERE TO FILE COMPLAINTS AGAINST NOTARIOS AND IMMIGRATION CONSULTANTS 18 (2013) (providing a state-by-state list of resources to fight notario fraud); *Fight Notario Fraud*, AM. BAR ASS'N, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html (last visited Oct. 26, 2013) (describing the ABA's Fight Notario Fraud project); *Stop Notario Fraud*, AM. IMMIGR. LAWYERS ASS'N, http://www.stopnotariofraud.org (last visited Oct. 26, 2013) (describing AILA's efforts to stop notario fraud).

anti-notario education, which includes the development and nationwide dissemination of multi-media public service announcements (PSAs) at no charge for use in immigrant communities.[387] AILA also assists groups with press contacts and instructions for how to place PSAs.[388]

State and local bar associations have also stepped up to the plate. The New York State Bar Association and the New York City Bar Association, in particular, have undertaken comprehensive education of its members and the broader public. Prompted by the Second Circuit Court of Appeals Judge Robert Katzmann's Study Group on Immigrant Representation[389] and drawing on the expertise of the New York City Legal Aid Society, New York State Legal Services Corporation, and numerous other organizations, both bar associations have conducted and published studies, presented results in public venues, and made specific recommendations for action.[390]

C. *Federal Government Agencies*

Since 2009, three federal agencies—the FTC, USCIS, and the Department of Justice (DOJ)—have implemented education and capacity-building initiatives.[391] Based in part on information obtained during such collaborative efforts, the FTC and DOJ, along with state Attorney General offices, have filed legal complaints against notarios, sometimes rooted in evidence provided by USCIS and the Department of Homeland Security's HSI. USCIS, the FTC, and DOJ have launched aggressive campaigns highlighting the problem of UPIL and suggesting ways to report it, including informational websites, flyers, and tweets.[392]

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387. *See PSA on Comprehensive Immigration Reform and Notarios (Updated 4/29/13)*, Am. Immigr. Law. Ass'n (Apr. 29, 2013), http://www.aila.org/content/default.aspx?docid=44060 (providing flyers for distribution and education of immigrant groups).

388. *See id.* (indicating AILA is willing to help with press contacts).

389. *See* Symposium, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings New York Immigrant Representation Study Report*, 33 CARDOZO L. REV. 357 (2011) [hereinafter *Accessing Justice*] (discussing issues related to access to justice and counsel in removal proceedings); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008) (discussing the need for counsel and problems caused by notarios).

390. *See generally Accessing Justice*, *supra* note 389 (discussing these issues); N.Y. IMMIGRANT REPRESENTATION STUDY STEERING COMM., ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS (2012) (discussing the same).

391. *See, e.g.*, *National Initiative to Combat Immigration Services Scams DHS, DOJ and FTC Collaborate with State and Local Partners in Unprecedented Effort*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC. (June 9, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=01083ffa91570310VgnVCM100000082ca60aRCRD (discussing this collaborative effort).

392. *See, e.g.*, *Avoid Scams*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., http://www.uscis.gov/avoidscams (last visited Oct. 26, 2013) (providing tools to avoid scams); U.S. Citizenship & Immigr. Servs., *Message*, TWITTER (May 16, 2013 at 8:11 AM), https://twitter.com/USCIS/status/331426014683078656 (providing a link to the USCIS website on avoiding scams).

Governments of other countries have also begun to educate their citizens living in the United States about UPIL. Consular officials in some states have forged relationships with United States and state government agencies, community-based organizations (CBOs) and attorneys on anti-notario efforts aimed at identifying local notarios, teaching how to report fraud, and providing information on legitimate service providers.[393] For instance, Mexico's Secretary of Exterior Relations (SRE) and the Center of Information about the Realities of Migration (CIAM) recently issued a Spanish language flyer warning immigrants to be wary of notarios who try to persuade consumers that the U.S. Congress has already enacted comprehensive immigration reform and who promise to secure green cards for a price.[394] The flyer includes the web address of a USCIS Spanish language website with immigration law updates and information about how to denounce immigration fraud.[395] Additionally, the flyer includes a CIAM phone number that Mexican nationals can call with inquiries about immigration law and notario abuse in the United States.[396]

D. State Governments

State governments are increasingly active in educating immigration consumers about notario fraud.[397] Some State Attorney General (AG) offices, typically through their consumer fraud divisions, have not only developed educational resources about UPIL for immigrants, they have additionally begun to serve as conduits for accepting notario fraud complaints and funneling them to the appropriate state or federal agency for follow-up action.

E. Collaboration Between the Private and Public Sectors

Collaboration among federal and state governmental agencies, national and local non-governmental groups, and professional organizations are particularly welcome developments. Coordinated approaches not only raise community awareness of UPIL, they maxi-

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393. In Boise, Idaho, for example, the Mexican consulate has collaborated with federal and state authorities, CBOs, and private attorneys in anti-UPIL initiatives. *See infra* notes 401-06 and accompanying text.

394. *See* SECRETARIA DE RELACIONES EXTERIORES DE MEXICO & CENTRO DE INFORMACIÓN SOBRE ACTUALIDAD MIGRATORIO, ACTUALIDAD MIGRATORIA: LO QUE LOS MEXICANOS DEBEN SABER 2 (2013) (providing a warning and information for assistance).

395. *Id.*

396. *Id.*

397. *See Report Immigration Scams*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., http://www.uscis.gov/portal/site/uscis/menuitem.e8b24a3cec33ca34c48bfc10526e0aa0/?vgnextoid=E309d4aaee6ab210VgnVCM100000b92ca60aRCRD&vgnextchannel=6358d4aaee6ab210VgnVCM100000b92ca60aRCRD (last visited Oct. 26, 2013) (providing links to state agencies with whom notario fraud victims can file complaints). Some state websites also have easy-to-find reporting resources. *See, e.g., Immigration Services*, WASH. STATE OFFICE OF THE ATTORNEY GEN., http://www.atg.wa.gov/immigrationservices.aspx#.USBzvEI1ZSU (last visited Feb. 16, 2013).

mize the potential for increased reporting, enforcement activity, successful court action, and capacity-building.[398] In Washington state, for example, public and private cooperation not only resulted in successful civil prosecution but also the development of legislation that more effectively addresses notario fraud than its predecessor statutes.[399]

Some public-private partnerships are geared toward attorneys, while others reach out to community groups that work with immigrants. "Reaching Victims of Notario Fraud," produced and presented by several national and local non-government actors—the Immigration Advocates Network (IAN), ILRC, the ABA, the law office of Abrams and Abrams, and the FTC is an excellent example of a collaboration aimed at both audiences.[400]

Other initiatives are designed to communicate information directly to immigrant consumers. For instance, in Idaho, Catholic Charities of Idaho, USCIS, pro bono attorneys, the Idaho Legal Action Network, and local radio stations work together on programs that explain how to identify common signs of UPIL, the dangers of relying on notario, and how to report suspected abuse.

In 2012, in Boise, Idaho, the U.S. Attorney's Office and USCIS hosted several meetings that brought together diverse public and private actors engaged in anti-notario work.[401] In addition to the U.S. Attorney and USCIS, participants included representatives of federal and state agencies—the FTC, HSI, and the Office of the Idaho Attorney General—and non-state actors—the University of Idaho Immigration Law Clinic, representatives of the Idaho Bar Association's Office of Ethics and Professional Responsibility and Volunteer Lawyers Program, Idaho refugee resettlement agencies, community-based and religious organizations with immigrant constituencies, and members of the private bar.[402] Representatives of the Mexican Consulate in Boise also attended.[403]

The meetings had three purposes: (1) to better understand the scope of each participant's work in combating notario fraud; (2) to share concerns and observations about specific instances of suspected UPIL, and; (3) to provide a foundation for future exchange of information and reporting about suspected UPIL, collaboration in pursuing legal actions

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398. *See, e.g.*, COHEN, *supra* note 34, at 56 (discussing the successes of these efforts).

399. *See* Molly Rosbach, *Lawmakers Introduce Bill to Combat Legal Fraud*, THE WENATCHEE WORLD (Feb. 12, 2011), http://www.wenatcheeworld.com/news/2011/feb/12/lawmakers-introduce-bill-to-combat-legal-fraud/ (describing the success of collaborative efforts).

400. *See* ABA Comm'n on Immigration & Immigration Advocates Network, *Webinar: Reaching Victims of Notario Fraud* (May 22, 2012).

401. Meeting Agenda, Office of the U.S. Attorney for Idaho (Jan. 25, 2012) (on file with authors); Letter of Invitation to Participate in UPIL Outreach Meetings from Robert Mather, USCIS Denver District Director to author (Aug. 16, 2012) (on file with authors).

402. *Id.*

403. *Id.*

against alleged notarios, and development of coordinated education and capacity-building initiatives.[404] The meetings prompted subsequent presentations by USCIS, the U.S. Attorney for Idaho, the Idaho Deputy Attorney General for Consumer Fraud, HSI, and non-governmental experts at a variety of venues in immigrant communities.[405] A primary objective of these presentations was to familiarize immigration consumers not only with the dangers of UPIL but also to build constructive relationships among consumers, advocates, and representatives of government agencies that are critical to successful anti-notario efforts. In the last two years, successful governmental and non-governmental face-to-face initiatives have occurred with greater frequency throughout the United States.[406]

F. The Need to Strengthen Links Between Anti-Notario Education and Effective Procedures to Report and Follow-Up Suspected Fraud

Although collaborative government and non-government initiatives to educate immigration consumers and advocates about the dangers of UPIL have made great strides, more attention must be paid to the attendant need to develop simple and effective guidance about procedures for reporting, monitoring, and assisting victims with potential legal recourse.

Currently, no uniform method exists to file, process or track individual notario complaints or to share information among government and non-governmental actors. In a welcome development, however, the FTC's Consumer Sentinel Network, which accepts consumer complaints, including allegations of notario fraud, recently expanded its roster of registered agencies and the ability of those agencies to search reports more easily across a greater number of databases.[407] Member agencies are restricted to government entities including many international, foreign, federal, state, and local government agencies.[408] Current members include ICE, the EOIR's immigration courts, the U.S. Postal Service, consumer fraud and law enforcement offices in numerous states and localities, several foreign law enforcement agencies, and other entities active in addressing notario fraud.[409] Although the Sentinel Network neither resolves nor necessarily tracks individual cases, it can now rely on

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404. *Id.* Since these meetings, anecdotal evidence suggests a rise in reporting of notario activity to government agencies by immigrants and their attorneys and by CBOs.

405. Meeting Notes, UPIL Outreach Meetings (Aug. 16, 2012) (on file with authors).

406. *See* COHEN, *supra* note 34, at 63-64.

407. *See Consumer Sentinel Network*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/consumer-sentinel-network (last visited Jan. 24, 2014) (describing the FTC's Consumer Sentinel Network); FED. TRADE COMM'N, THE FTC'S CONSUMER SENTINEL NETWORK (2013), *available at* http://www.ftc.gov/sites/default/files/attachments/consumer-sentinel-network/factsheet.pdf (describing the same).

408. *See Organization Registration*, CONSUMER SENTINEL NETWORK, FED. TRADE COMM'N, https://register.consumersentinel.gov/Agency/AgencyLookup.aspx (last visited Jan. 24, 2014) (providing a list of Sentinel members); *Consumer Sentinel Network Contributors*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/consumer-sentinel-network/data-contributors (last visited Jan. 24, 2014) (listing contributors).

409. *Organization Registration*, *supra* note 408.

government agencies to detect patterns of UPIL reports, thus facilitating investigation and prosecution.

The Sentinel Network appears to have no mechanism to provide follow-up and assistance directly to most individuals or any publicly available protocols for monitoring particular notarios, even those who have been found liable for fraud.

Reporting mechanisms are now increasingly available to individual immigration consumers through multiple federal and state agencies, and information about how and where to file complaints has been integrated into most public education campaigns. For example, in additional to the FTC, USCIS, the EOIR, states attorney general, the ABA, and state and local bar associations and nongovernmental networks have developed websites with instructions about how to report allegations of notario fraud. Some government and non-government agencies have also started to cross-reference offices that accept UPIL complaints. Cross-linking among public and private sectors is useful because it can facilitate information sharing among different entities active in anti-notario work and expands the possibility that a victim will actually receive assistance.

The recently published *Notario Fraud Manual* provides excellent practical guidance for reporting. The *Manual* includes model templates for gathering information from alleged victims and examples of well-drafted UPIL complaints. Importantly, the *Manual* also discusses how to generally assist victims, to understand the positive aspects of filing a complaint as well as its shortcomings, and, specifically, to help individual immigration consumers assess the potential pros and cons of reporting.[410]

Recent efforts notwithstanding, the bottom line is that mechanisms for reporting, tracking, and resolving cases of suspected notario fraud are piecemeal and thus are not as useful as they could be. The absence of regularized follow up and resolution also minimizes the incentives for reporting fraud. As a practical matter, education about UPIL will be primarily preventive in nature until more regularized, coordinated, and transparent procedures for reporting and tracking complaints and providing direct assistance to victims are developed.

410. *See* NOTARIO FRAUD REMEDIES, *supra* note 78, at 13-25, 75-90, App. I.A, III (discussing information gathering, complaints and referrals.

VI. CAPACITY BUILDING

Chief among the reasons for the persistence of UPIL is the scarcity of affordable and competent legal representation in immigration matters.[411] The INA provides a right to immigration counsel but only at no cost to the federal government. Accordingly, efforts to increase the availability of quality counsel focus on building capacity in the private sector. Non-governmental organizations play a central role in capacity building, and, increasingly, federal and state agencies provide training for pro bono attorneys and accredited representatives to facilitate free immigration representation. Capacity-building initiatives typically fall into one or more of the following categories: formation of volunteer attorney networks at local, state, and federal levels; development of pro bono programs by the federal courts and the BIA to expand appellate representation of immigrants; creation of law school clinics; and building and strengthening federally recognized non-profit organizations and increasing the number and quality of their accredited representatives. The ABA, AILA, and private attorneys have also recently established pro bono training and opportunities for attorneys interested in helping immigration consumers defrauded by UPIL.[412]

A. Volunteer Attorney Networks Organized by Non-Profit and Professional Groups

Since at least the 1980s, non-profit and professional organizations such as the ABA, AILA, and state and local bar associations have become increasingly active in establishing or supporting programs that focus on training and coordinating pro bono and low-cost attorneys to represent financially-eligible immigrants in various kinds of cases. Some of the earliest initiatives emphasized representation of individuals in deportation proceedings who were seeking asylum because of political repression and civil war in their home countries. Recent efforts also include representation of undocumented survivors of domestic violence and other statutorily enumerated crimes, unaccompanied minors, and detainees.

Pro bono immigration work can be beneficial for private attorneys and firms for several reasons. First, immigration cases often provide lawyers with the opportunity to develop important lawyering skills. They typically require client interviews and preparation, working with expert witnesses in diverse fields, motion and brief writing practice, and significant courtroom experience. In addition, as more states move toward mandatory or aspirational pro bono requirements, attorneys have a greater incentive to take on volunteer representation of immigrants. Asylum applicants and victims of domestic violence, crime, and traffick-

411. *See* CATHOLIC LEGAL IMMIGR. NETWORK, INC., STARTING A LEGAL IMMIGRATION PROGRAM: THE NEED FOR CHARITABLE LEGAL IMMIGRATION SERVICES 1 (2010) [hereinafter STARTING A LEGAL IMMIGRATION PROGRAM] (describing need for immigration legal services).

412. *See, e.g.*, ABA Comm'n on Immigration & Bryan Cave LLP, *Fighting Notario Fraud: Consumer Protection Theories*, VA. STATE BAR (June 20, 2012), http://www.vsb.org/site/news/item/fighting-notario-fraud-ABA-2012-07.

ing who may qualify for legal status under the INA as well as individuals whose removal would result in family separation are typically seen as the most sympathetic clients. Particularly in an anti-immigrant political environment, private attorneys and firms that might otherwise be hesitant to handle immigration cases may be more willing to provide representation to individuals likely eligible for these forms of relief. Many lawyers also find that providing legal assistance to some of the most vulnerable individuals who would not otherwise have representation is uniquely rewarding. Further, attorneys interested in other cultures, languages, and parts of the world often enjoy pro bono representation of immigrants.

Models for pro bono immigration networks vary but typically have the following features: (1) a strategy for recruiting volunteer lawyers; (2) intake and screening of potential pro bono clients according to case type, level of difficulty, and income conducted by experienced attorneys or accredited representatives; (3) a foundational training program and regular follow-up trainings in particular skills or substantive areas of law; (4) matching of attorneys with no previous practice in immigration law with more experienced mentor attorneys who can help oversee the progress of the case, provide assistance with preparation tasks, and sometimes, serve as second-chair.

Volunteer attorney networks operate in most states, although some groups are very small. Most are limited with respect to both the kinds of cases they accept and their geographic reach. In Idaho, for example, a group of attorneys, students, faculty, community-based and religious organizations, Idaho Legal Aid Services, the Boise Mexican consulate and the Idaho State Bar Volunteer Lawyer Program (IVLP), concerned with the dearth of competent, affordable representation in removal proceedings came together in 2009 to develop a pro bono program that held its first training and accepted its first cases in January 2010.[413] Because Idaho is largely rural and its capital, Boise, has the largest concentration of attorneys as well as the state's only immigration court, representation is largely limited to immigrants residing in the greater Boise area.[414] The Idaho network typically accepts cases involving removal proceedings in which individuals have relatively straightforward claims for relief based on cancellation of removal, asylum, family-based adjustment of status, and the Violence Against Women Act.[415]

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413. *See* Mikela French & Kristina Wilson, *Idaho Immigration Law Pro Bono Network: Answering the Call*, *in* 52 THE IDAHO STATE BAR ADVOCATE 33-34 (Oct. 2009) (discussing the pro bono program in Idaho).

414. One of the authors helped establish a pro bono program in New York City during the late 1980s and Idaho's volunteer network, and can state with confidence that the hurdles for creating organized pro bono representation in a rural region with little public transportation or major highways are more daunting in every respect. Lawyers' offices are far-flung, attorneys often have to drive long distances to attend trainings and immigration court hearings, and clients frequently live in isolated areas without access to transportation. Attorneys in rural areas are typically solo practitioners or belong to very small law offices. Rural lawyers also often have little financial cushion or the time required to take on deportation cases, which are usually time-consuming.

415. *See* French, *supra* note 413, at 33-34.

While the Idaho effort is relatively recent, volunteer attorney initiatives to represent immigrants have been in existence in other areas, especially urban areas, for much longer. In New York and San Francisco, for example, such pro bono networks date back to the early1980s. New York recently announced ambitious new programs, to be implemented through public and private partnerships, which will provide additional representation to immigrants in removal proceedings, especially to detainees and those living outside of metropolitan areas.[416]

1. Pro Bono Programs Created by the Federal Courts of Appeal: The Ninth Circuit Example

A number of federal courts have created pro bono programs designed to increase appellate representation for low-income or indigent individuals in a variety of matters, including immigration. The Court of Appeals for the Ninth Circuit has one of the most ambitious pro bono programs. It was established in 1993 to provide "pro bono counsel to pro se parties with meritorious or complex appeals, to provide a valuable learning experience to young attorneys and law students, and to assist the court in processing pro se civil appeals more equitably and efficiently."[417] During the last decade, immigration matters have become an increasingly large part of the pro bono docket.

Cases are pre-screened by court staff attorneys.[418] Those selected for the program typically "present[ ] issues of first impression or some complexity or otherwise warranting further briefing and oral argument."[419] The court's pro bono staff works with members of the bar association and law school clinics to recruit qualified volunteers to handle the cases chosen for the program.[420] Attorneys who participate in the program gain valuable appellate experience, including a guaranteed oral argument.[421]

The Ninth Circuit pro bono program has created a win-win situation: it helps expand quality representation for indigent individuals, provides attorneys and law clinic students with an unparalleled opportunity to hone their appellate skills, and helps manage the court's burgeoning pro se caseload. The need for the program is particularly evident in immigration matters. As of 2005, immigration cases comprised approximately 48% of the Ninth Circuit's

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416. Kirk Semple, *Plan Would Provide Help to Contest Deportation Cases*, N.Y. TIMES (Nov. 27, 2012), http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html.

417. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PRO BONO PROGRAM HANDBOOK 1 (2012).

418. *Id.*

419. *Id.*

420. *Id.* at 5-6.

421. *Id.*

docket, which, evidence suggests, has remained roughly consistent since then.[422] Recognizing the complexity of most immigration appeals, the Ninth Circuit facilitates more effective pro bono representation by publishing a comprehensive outline, which synthesizes precedent decisions in procedural and substantive areas of immigration law, and has developed an arrangement with staff attorneys at the ILRC to mentor pro bono attorneys representing immigrant petitioners for review.

2. The BIA

Established in 2001, the BIA Pro Bono Project initially focused on increasing pro bono representation for pro se detainees who sought BIA review of immigration judge decisions or wanted to respond to an ICE appeal.[423] The project's scope was later expanded to increase pro bono representation for non-detainees.[424] The project matches selected unrepresented appellants with volunteer lawyers, with the goal that attorney involvement in writing an appeal brief will provide higher quality appeals and, thus, facilitate "a smoother and more effective case review by the Board."[425] It relies on a BIA Pro Bono Program Coordinator "who spends about 10% of his work year on the project," and an office paralegal who "devotes approximately 30% of her time to the project," thus avoiding interference with their assigned responsibilities.[426] Volunteer and contract attorneys from the private bar, including lawyers with CLINIC, AILA, and National Immigration Project of the National Lawyers Guild, help screen and review cases for placement with pro bono attorneys.[427] Although a positive contribution to capacity-building efforts, the BIA program can assist just a small fraction of those who need help with appeals to the BIA.[428]

B. Federally Recognized Programs and Accredited Representatives

Creating federally recognized programs with trained and accredited non-attorney representatives is an important piece of increasing competent free or low cost representation in immigration cases. CLINIC has been a major player in facilitating the growth of recognition and accreditation initiatives nationwide. In addition to providing immigration law train-

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422. Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES (May 2, 2005), http://articles.latimes.com/2005/may/02/local/me-backlog2.

423. BD. OF IMMIGR. APPEALS, U.S. DEP'T OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL 1-2 (2004) [hereinafter THE BIA PRO BONO PROJECT IS SUCCESSFUL].

424. *See id.* at 4 (listing non-detained cases as one category the project now covers).

425. *Id.* at 2.

426. *Id.* at 3.

427. *Id.* at 3.

428. For example, from June 2003 through May 2004, the project screened 421 cases of which ninety-nine were selected to match with pro bono counsel. *Id.* at 22. Ninety lawyers indicated a desire to represent the pro se appellant and only forty-seven filed notices to appear as counsel of record. *Id.*

ing and support for recognition and accreditation in Catholic Charities offices across the country, CLINIC provides assistance to other community-based organizations seeking federal recognition and accreditation of qualified employees. Among other capacity building resources, CLINIC created an online "Toolkit for BIA Recognition and Accreditation," which provides a step-by-step guide for successfully applying for recognition and accreditation, self-directed e-learning courses, trainings, and webinars on the fundamentals of immigration law, and links to additional resources.[429] CLINIC also publishes a comprehensive online manual entitled "Managing an Immigration Program: Steps for Creating and Increasing Legal Capacity."[430] ILRC also offers excellent training resources, including 40-hour on-site courses for individuals seeking accreditation.[431] Private and not-for-profit attorneys, the ABA, AILA, and state and local bar associations also offer trainings for individuals employed by recognized agencies who seek accreditation and provide supervision for already accredited representatives.

The Executive Office for Immigration Review publishes practical suggestions about the recognition and accreditation processes, including its "Frequently Asked Questions (FAQs) about the Recognition and Accreditation (R&A) Program" and publicly available power-point presentations.[432] Finally, USCIS offers useful information about recognition and accreditation.[433]

C. Law School Clinics

Most U.S. law schools run legal clinics which provide students the opportunity to represent clients in actual cases or other legal matters for indigent or low-income individuals and communities under the supervision of law professors who are licensed attorneys. Law clinics allow students to learn how to be attorneys through structured and intensive hands-on experience in applying theory and doctrine to facts that involve real clients, while also increasing access to justice for those most in need. Clinics aim to instill in students an appreciation of the importance of pro bono service. Approximately 115 of the country's law schools

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429. *Toolkit for BIA Recognition and Accreditation*, CATHOLIC LEGAL IMMIGR. NETWORK, INC., https://cliniclegal.org/resources/toolkit-bia-recogition-accreditation (last visited on Oct. 26, 2013).

430. STARTING A LEGAL IMMIGRATION PROGRAM, *supra* note 411.

431. *BIA Accreditation*, IMMIGR. LEGAL RES. CTR., http://www.ilrc.org/info-on-immigration-law/bia-accreditation (last visited Oct. 26, 2013).

432. *See Recognition & Accreditation (R&A) Program*, EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/ra.html (last visited Oct. 26, 2013) (providing links to those documents).

433. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., APPENDIX 12-2: WORKSHEET FOR REQUESTS FOR RECOGNITION AND ACCREDITATION PROCESSING AND PROCEDURES, *available at* http://www.uscis.gov/ilink/docView/AFM/DATAOBJECTS/Appx.12_2.pdf (providing relevant information).

now offer immigration clinics.[434] Most of these are live client clinics in which students represent immigrants in venues that include USCIS, immigration courts, the BIA, and the federal courts. Although these clinics meet only a tiny fraction of the need for representation in immigration matters, they have a multiplier effect because participants often go on to practice immigration law full- or part-time, take on pro bono immigration cases, clerk for judges who hear immigration-related matters, find employment in government agencies that require knowledge of immigration law, or become involved in capacity-building initiatives in other ways.[435]

CONCLUSION

The notario problem has been likened to the arcade game "Whac-a Mole," in which "each time an adversary is 'whacked' it pops up again somewhere else."[436] In the UPIL context, subduing the mole requires sustained, collaborative action, strategic teamwork, and a variety of tools.

The approach we have outlined includes remedial, compensatory, preventive, and deterrent legal methods as well as broader advocacy techniques. We call for a more coherent process for reporting allegations of notario fraud, expanding and rationalizing opportunities for victims to obtain legal redress, and improving the regulation of immigration law practice. Equally important to an effective anti-notario strategy are targeted community education initiatives coupled with practical guidance for immigration consumers who seek not only to avoid scams but also to find remedies for harm already inflicted. Finally, an effective campaign against UPIL must include further development of capacity-building programs to meet the demand for competent immigration representation.

These measures are increasingly urgent in light of current immigration reform proposals, which are likely to contain opportunities for several million immigrants to apply for lawful immigration status—and therefore, an unparalleled opportunity for fraudsters to take advantage of immigration consumers. Through its explanation of existing strategies to combat UPIL, identification of their strengths and weaknesses, and recommendations for improvement, we hope that this article contributes to the fortification of anti-notario initiatives.

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434. *See* Immigration Prof, *List of Law School Immigration Law Clinics - Updated*, IMMIGRATIONPROFBLOG (Oct. 15, 2012), http://lawprofessors.typepad.com/immigration/2012/10/list-of-immigration-law-clinics-updated.html (providing a link to download the list of schools with immigration clinics).

435. The Idaho Immigration Law Pro Bono Network, for example, got off the ground with the help of former University of Idaho Immigration Law Clinic interns. *See* French, *supra* note 413.

436. *See* Whac-a-Mole, WIKIPEDIA, http://en.wikipedia.org/wiki/Whac-A-Mole (last visited Oct. 26, 2013) (describing the "Whac-a-Mole" game).

NOTE

DISPARATE TREATMENT: A COMPARISON OF UNITED STATES IMMIGRATION POLICIES TOWARD ASYLUM-SEEKERS AND REFUGEES FROM COLOMBIA AND MEXICO

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I. INTRODUCTION

Each year, thousands of Mexican asylum applications are denied. While it is not clear how many of these applications are based on drug-related violence, given the increase in asylum applications in recent years coupled with an increase in drug-related violence in Mexico, a connection seems quite likely. The drug-related violence in Mexico is not unique in Latin America; indeed, Colombia has suffered from an internal conflict tied to drug trafficking for decades. Colombian refugees and asylum-seekers have had comparatively high rates of success in their claims, while Mexicans have had very low rates of success.

This note begins with background on U.S. immigration law concerning refugees and asylum-seekers. Next, the note surveys the recent violent conflicts in Mexico and Colombia and establishes a variety of similarities between the two. Then, the note examines U.S. immigration policy regarding Mexican refugees and asylum-seekers compared to U.S. immigration policy regarding Colombian refugees and asylum-seekers and suggests that the stark discrepancy between the treatment of Mexican and Colombian refugees and asylum-seekers is based on the United States' broader policy concerns regarding its relationship with Mexico. Finally, the note concludes that the differing treatment of these refugees and asylum-seekers is unjustified under the facts and the governing federal law.

II. BACKGROUND ON U.S. IMMIGRATION LAW AND RECENT ADMISSIONS STATISTICS OF REFUGEES AND ASYLUM-SEEKERS

The Immigration and Nationality Act (INA) forms the basis of U.S. immigration law.[1] First promulgated in 1952, the INA has been amended many times,[2] producing a very complex and confusing statute. This note focuses specifically on the law surrounding asylum-seekers and refugees.

Before 1980, refugees were admitted to the United States under a hodge-podge of provisions, none of which were truly tailored to address the broad range of refugees inside and outside the United States.[3] Specifically, these procedures included withholding of deportation, conditional entry status, and parole.[4] Under withholding of deportation, if a noncitizen[5] in the United States faced a "clear probability" of persecution in his or her country of

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1. Immigration and Nationality Act (INA) §§ 101-507, 8 U.S.C. §§ 1101-1537 (2012).
2. *Id.*
3. Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 243-49 (1984).
4. *Id.* at 243-46.
5. For the purposes of this note, the term "noncitizen" refers to a person who is not a U.S. citizen or national.

origin, the U.S. government would decline to deport him or her.[6] Conditional entry status conferred legal status on refugees outside of the United States who fled Communism or conflicts in the Middle East.[7] The third type of procedure, parole, was more nuanced. Under the parole power, the Attorney General had the power to "parole," or give temporary permission to be in the United States, to noncitizens already in the United States as well as those abroad in emergency situations or for reasons of public interest.[8] Under this system, the parole power mainly benefited individuals fleeing Communism.[9] While parole still exists today, it generally cannot be used to admit refugees.[10]

Immigration law regarding refugees changed in 1980 with the promulgation of the Refugee Act of 1980, which represented the first comprehensive effort to provide for refugees and asylum-seekers in U.S. immigration law.[11] As previously noted, before 1980, the procedural mechanisms in place to assist refugees focused mainly on individuals fleeing Communism.[12] The 1980 Act defined "refugee" under U.S. law for the first time and set up standardized legal mechanisms to protect a broad range of refugees and asylum-seekers.[13] Despite the 1980 Act's goal of neutralizing refugee determinations through the standardization of the law, the more favorable treatment accorded to those escaping Communism continued in the years following 1980,[14] in part because the refugee definition emphasized political persecution.

This definition of "refugee" codified in the 1980 Act remains in place today:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[15]

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6. Helton, *supra* note 3, at 244.
7. *Id.* at 245.
8. *Id.* at 245-46.
9. *Id.* at 246.
10. INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B).
11. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *see* Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 142-43 (1981) (describing the goals of the Refugee Act of 1980).
12. *See* Helton, *supra* note 3, at 245-46, 248 (comparing the use of the parole power for those fleeing Communist versus non-Communist regimes).
13. *Id.* at 250-51.
14. *Id.* at 250-51, 253, 261-62.
15. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *see also* Helton, *supra* note 3, at 250-51 (citing the definition of "refugee" provided under the Refugee Act of 1980).

The definition is purposefully based on the definition of "refugee" in the 1951 Convention relating to the Status of Refugees, as updated by the 1967 Protocol relating to the Status of Refugees.[16]

U.S. immigration law distinguishes refugees from asylum-seekers. To put it simply, a refugee is a person claiming to meet the definition of "refugee" and is outside the United States,[17] whereas an asylum-seeker is a person claiming to meet the definition of "refugee" and is already in the United States.[18] To qualify for either refugee resettlement or asylum status in the United States, a noncitizen must meet the definition of "refugee" as defined by the INA, making this definition significant in both refugee and asylum determinations.[19]

Despite this similarity, the processes to obtain refugee status and asylum status differ greatly. The refugee process is mentioned in the INA, but the INA expressly gives the power to the executive branch to determine the nuts and bolts of the process on a yearly basis.[20]

The asylum process, on the other hand, is thoroughly described in the INA, beginning at section 208(a)(1):

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum . . . .[21]

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16. Helton, *supra* note 3, at 251; 1967 Protocol Relating to the Status of Refugees art. 1(2), Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; 1951 Convention Relating to the Status of Refugees art. 1(A)(2), Apr. 22, 1954, 189 U.N.T.S. 150.

17. *See* INA § 207(d)(1), 8 U.S.C. § 1157(d)(1) (discussing the process for determining how many refugees are in need of resettlement in the United States, implying that such refugees are not presently in the United States).

18. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

19. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); INA § 207(c)(4), 8 U.S.C. § 1157(c)(4) (referencing INA § 101(a)(42)); INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (referencing INA § 101(a)(42)(A)).

20. *See* INA § 207(a), 8 U.S.C. § 1157(a) (detailing the annual admission of refugees). The President, in consultation with Congress, determines the number of refugees that the United States will admit during a particular fiscal year before that fiscal year begins. INA § 207(a)(2), 8 U.S.C. § 1157(a)(2). Those spots are then assigned to people who fit the refugee definition and who fall into one of three priority groups. *See* U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2013: REPORT TO THE CONGRESS 6-7, 14-15 (2012), *available at* http://www.state.gov/documents/organization/198157.pdf (describing refugee admissions procedures, the adjudication process, and eligibility criteria). Per the priority group requirements, the U.N. High Commissioner for Refugees (UNHCR), designated nongovernmental organizations, a U.S. embassy, or the U.S. Refugee Admissions Program (USRAP) identifies individuals for refugee resettlement, including individuals who are family members of already-identified refugees. *Id.* at 7–8, 11, 13. After identification, a Refugee Corps official from the U.S. Citizenship and Immigration Services (USCIS) determines if the individual fits the statutory definition of "refugee" and is otherwise admissible to the United States. *Id.* at 14.

21. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

Once a noncitizen is in the United States, there are two ways to apply for asylum: affirmatively, by filing an application with U.S. Citizenship and Immigration Services (USCIS), or defensively, by asking for asylum in the context of an adversarial removal hearing before an immigration judge.[22] If an asylum applicant's affirmative application is denied, the case is "referred" to an immigration judge, meaning the noncitizen is put into removal proceedings during which he or she can renew the claim of asylum as a defense to removal.[23]

To receive asylum, a noncitizen must meet the statutory definition of a "refugee"[24] and other various requirements,[25] and he must then obtain a favorable grant of discretion from an asylum officer (if applying affirmatively) or immigration judge (if applying defensively).[26] The discretionary nature of asylum means that while noncitizens have the *right* to apply for asylum, no one is *entitled* to asylum protection.[27]

Before reviewing the situation of Colombian and Mexican refugees and asylum-seekers, it is worth noting how many refugees and asylum-seekers the United States processes and admits. In terms of numbers, in recent years, the United States has admitted many more refugees than asylum-seekers:

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22. *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last visited Dec. 30, 2013) (outlining the affirmative and defensive asylum processes).

23. *Id.*

24. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

25. *See* INA §§ 208(a)(2)(A)-(D), (b)(1), (b)(2)(A)-(B), 8 U.S.C. §§ 1158(a)(2)(A)-(D), (b)(1), (b)(2)(A)-(B) (detailing various requirements of and restrictions for asylum status, such as the requirement that a noncitizen must apply for asylum within one year of arrival and cannot previously have been denied asylum).

26. *See* INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum . . . .") (emphasis added).

27. *See* INA §§ 208(a)(1), (b)(1)(A), 8 U.S.C. §§ 1158(a)(1), (b)(1)(A) (stating that any noncitizen in the United States may apply for asylum but that asylum is granted at the discretion of Secretary of Homeland Security or the Attorney General).

Table One: Refugee and Asylee Admissions to the United States, 2007–2012

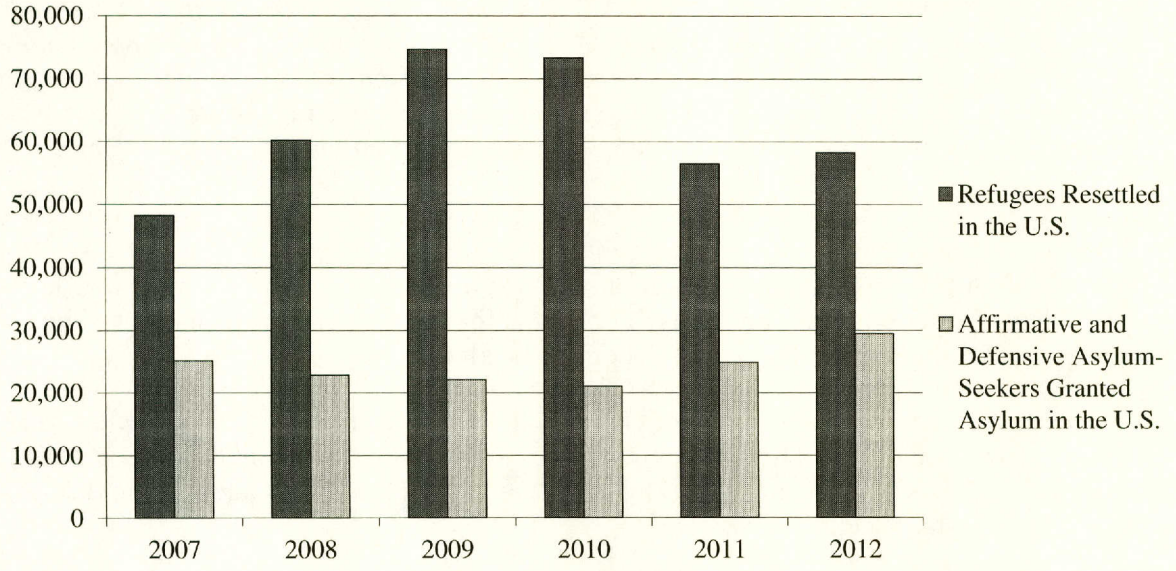


Table Two: Refugee and Asylee Admissions to the United States, 2007–2012

Fiscal Year	*Refugees Resettled in the United States*	*Affirmative and Defensive Asylum-Seekers Granted Asylum in the United States*
2007	48,282[28]	25,167[29]
2008	60,192[30]	22,824[31]
2009	74,654[32]	22,111[33]
2010	73,311[34]	21,047[35]
2011	56,424[36]	24,897[37]
2012	58,238[38]	29,484[39]

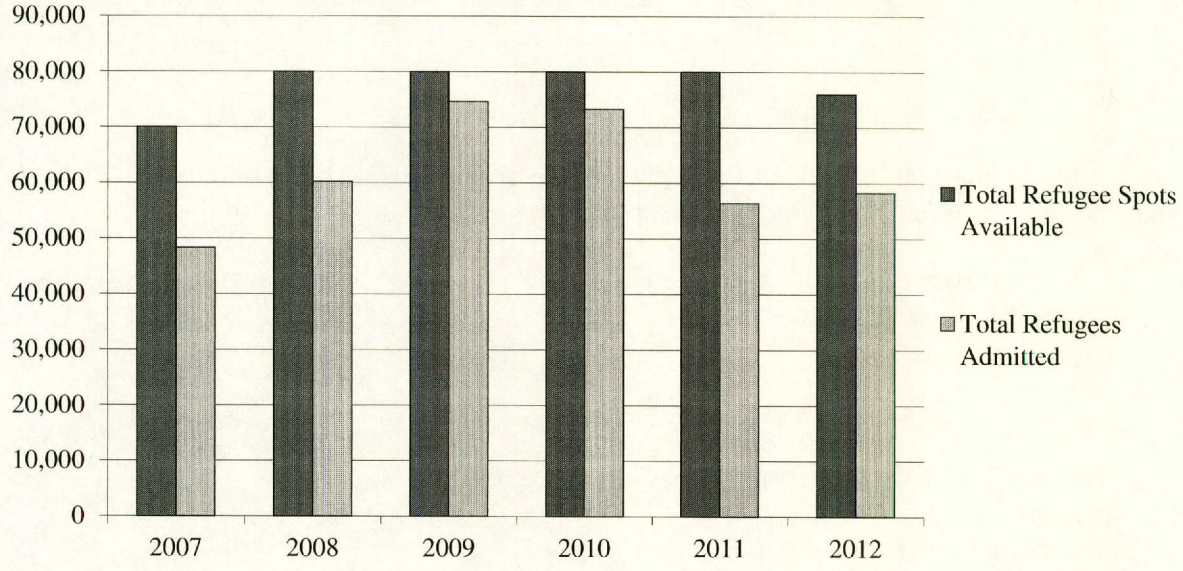
28. *Summary of Refugee Admissions: Fiscal Year 2007*, BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE, http://www.state.gov/documents/organization/181376.pdf (last visited Jan. 22, 2014).

29. *Immigration Courts: Fiscal Year 2007 Asylum Statistics*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. Dep't of Justice (Apr. 2008), http://www.justice.gov/eoir/efoia/FY07AsyStats.pdf; *Yearbook of Immigration Statistics: 2012*, U.S. DEP'T OF HOMELAND SEC., Table 16, http://www.dhs.gov/yearbook-immigration-statistics-2012-refugees-and-asylees (last visited Dec. 30, 2013). The Department of Justice data and the Department of Homeland Security data differ regarding defensive asylum grants. This note uses the Department of Justice data for defensive asylum grant rate figures and the Department of Homeland Security data for affirmative asylum grant rate figures.

30. *Summary of Refugee Admissions: Fiscal Year 2008*, BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE, http://www.state.gov/documents/organization/181375.pdf (last visited Jan. 22, 2014).

As for refugees, the United States consistently fails to admit as many refugees as have been authorized:

Table Three: Refugee Admissions to the United States, 2007–2012



31. *Immigration Courts: Fiscal Year 2008 Asylum Statistics*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE (Mar. 2009), http://www.justice.gov/eoir/efoia/FY08AsyStats.pdf; *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.

32. *Summary of Refugee Admissions: Fiscal Year 2009*, BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE, http://www.state.gov/documents/organization/181373.pdf (last visited Jan. 22, 2014).

33. *Immigration Courts: Fiscal Year 2009 Asylum Statistics*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE (Mar. 2010), http://www.justice.gov/eoir/efoia/FY09AsyStats.pdf; *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.

34. *FY10 Refugee Admissions Statistics*, BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE (Nov. 29, 2010), http://www.state.gov/j/prm/releases/statistics/181160.htm.

35. *Immigration Courts: Fiscal Year 2010 Asylum Statistics*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE (Jan. 2011), http://www.justice.gov/eoir/efoia/FY10AsyStats.pdf; *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.

36. *FY11 Refugee Admissions Statistics*, BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE (Jan. 31, 2012), http://www.state.gov/j/prm/releases/statistics/184843.htm.

37. *Immigration Courts: Fiscal Year 2011 Asylum Statistics*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE (Feb. 2013), http://www.justice.gov/eoir/efoia/FY11AsyStats-Current.pdf; *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.

38. *FY12 Refugee Admissions Statistics*, BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE (Feb. 28, 2013), http://www.state.gov/j/prm/releases/statistics/206319.htm.

39. *Immigration Courts: Fiscal Year 2012 Asylum Statistics*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE (Feb. 2013), http://www.justice.gov/eoir/efoia/FY12AsyStats-Current.pdf; *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.

Table Four: Refugee Admissions to the United States, 2007–2012

Fiscal Year	*Total Refugee Spots Available*	*Total Refugees Admitted*
2007	70,000[40]	48,282[41]
2008	80,000[42]	60,192[43]
2009	80,000[44]	74,654[45]
2010	80,000[46]	73,311[47]
2011	80,000[48]	56,424[49]
2012	76,000[50]	58,238[51]

In fiscal year 2013 (October 2012 to September 2013), the United States almost reached the maximum by resettling 69,926 refugees out of a proposed total of 70,000.[52]

With respect to asylum-seekers, only a small portion of the defensive and affirmative applications filed are granted:

40. *Summary of Refugee Admissions: Fiscal Year 2007*, *supra* note 28, at 3.
41. *Id.*
42. *Summary of Refugee Admissions: Fiscal Year 2008*, *supra* note 30, at 3.
43. *Id.*
44. *Summary of Refugee Admissions: Fiscal Year 2009*, *supra* note 32, at 2.
45. *Id.*
46. *FY10 Refugee Admissions Statistics*, *supra* note 34.
47. *Id.*
48. *FY11 Refugee Admissions Statistics*, *supra* note 36.
49. *Id.*
50. *FY12 Refugee Admissions Statistics*, *supra* note 38.
51. *Id.*
52. *Admissions and Arrivals Reports*, REFUGEE PROCESSING CENTER, http://www.wrapsnet.org/Reports/AdmissionsArrivals/tabid/211/Default.aspx (last visited Jan. 22, 2014) (follow link to download "Refugee Admissions Report as of Dec. 31, 2013"); PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2013: REPORT TO THE CONGRESS, *supra* note 20, at 5.

Table Five: Defensive Asylum Applications, 2007–2012

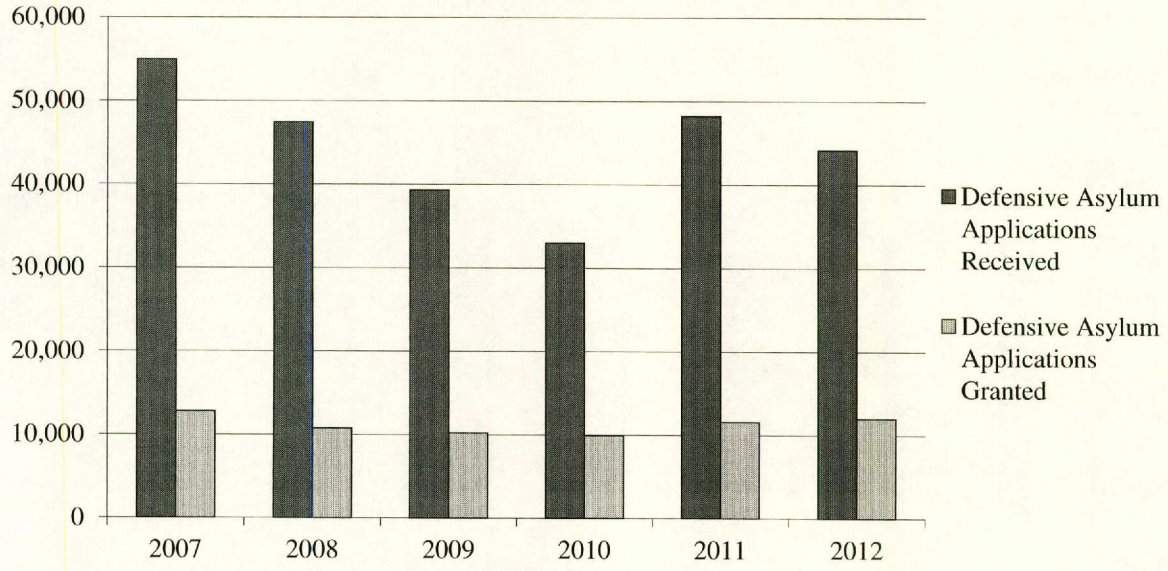


Table Six: Defensive Asylum Applications, 2007–2012

Fiscal Year	*Defensive Asylum Applications Received*	*Defensive Asylum Applications Granted*
2007	54,957[53]	12,807[54]
2008	47,459[55]	10,743[56]
2009	39,279[57]	10,186[58]
2010	32,961[59]	9,869[60]
2011	48,226[61]	11,528[62]
2012	44,170[63]	11,978[64]

53. *Immigration Courts: Fiscal Year 2007 Asylum Statistics*, *supra* note 29.
54. *Id.*
55. *Immigration Courts: Fiscal Year 2008 Asylum Statistics*, *supra* note 31.
56. *Id.*
57. *Immigration Courts: Fiscal Year 2009 Asylum Statistics*, *supra* note 33.
58. *Id.*
59. *Immigration Courts: Fiscal Year 2010 Asylum Statistics*, *supra* note 35.
60. *Id.*
61. *Immigration Courts: Fiscal Year 2011 Asylum Statistics*, *supra* note 37.
62. *Id.*
63. *Immigration Courts: Fiscal Year 2012 Asylum Statistics*, *supra* note 39.
64. *Id.*

Table Seven: Affirmative Asylum Applications, 2007–2012

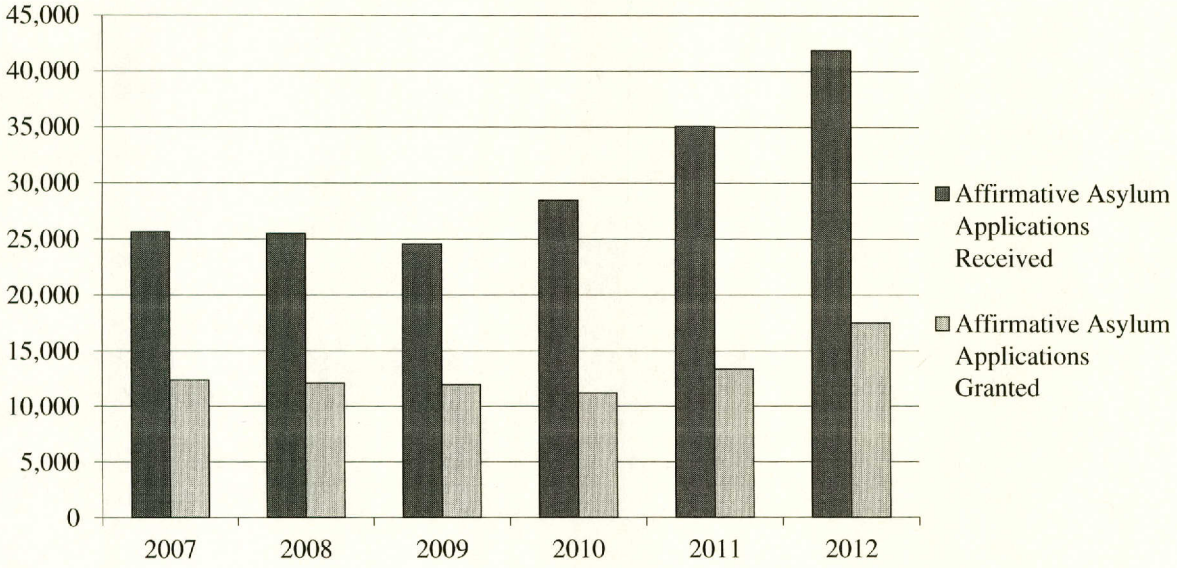


Table Eight: Affirmative Asylum Applications, 2007–2012

Fiscal Year	*Affirmative Asylum Applications Received*	*Affirmative Asylum Applications Granted*
2007	25,647[65]	12,360[66]
2008	25,497[67]	12,081[68]
2009	24,551[69]	11,925[70]
2010	28,444[71]	11,178[72]
2011	35,067[73]	13,369[74]
2012	41,883[75]	17,506[76]

65. ASYLUM DIVISION, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., ASYLUM APPLICATIONS (NEW) FILED BY ASYLUM OFFICE FY 2007 – FY 2012 (2012) (on file with author).
66. *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.
67. ASYLUM APPLICATIONS (NEW) FILED BY ASYLUM OFFICE FY 2007 – FY 2012, *supra* note 65.
68. *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.
69. ASYLUM APPLICATIONS (NEW) FILED BY ASYLUM OFFICE FY 2007 – FY 2012, *supra* note 65.
70. *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.
71. ASYLUM APPLICATIONS (NEW) FILED BY ASYLUM OFFICE FY 2007 – FY 2012, *supra* note 65.
72. *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.
73. ASYLUM APPLICATIONS (NEW) FILED BY ASYLUM OFFICE FY 2007 – FY 2012, *supra* note 65.
74. *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.
75. ASYLUM APPLICATIONS (NEW) FILED BY ASYLUM OFFICE FY 2007 – FY 2012, *supra* note 65.
76. *Yearbook of Immigration Statistics: 2012*, *supra* note 29, Table 16.

As previously mentioned, the violent conflicts in Colombia and Mexico have noticeable similarities. This note will begin by briefly analyzing the conflicts in Colombia and in Mexico and then compare the two.

III. The Conflict in Colombia

Colombia is located in the northwest corner of South America, bordered by Panama, Ecuador, Peru, Brazil, and Venezuela. Geographically, Colombia is almost two times the size of Texas.[77]

The violent conflict in Colombia is resoundingly complex. For purposes of this note, the analysis of the conflict focuses on human rights abuses committed in Colombia and does not discuss the United States' involvement in the conflict beyond admission of refugees and asylum-seekers.[78] Although the conflict has roots in a civil war that occurred during the 1940s and 1950s, this note's analysis of the conflict starts in the 1960s, when two of the major players in today's conflict were established.[79]

In 1964, Communist peasants formed the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) as a rural insurgency force.[80] The second main insurgency group, the National Liberation Army (*Ejército de Liberación Nacional*, or ELN), was formed in 1965 and also has a Communist agenda.[81] As a response to the violence associated with FARC and ELN's political insurgency efforts, wealthy farmers and landowners developed paramilitary groups during the 1980s.[82] These groups were affiliated with the Colombian military, which provided organization and arms to the paramilitary groups.[83] In 1997, some of the paramilitary groups joined forces to form the right-wing United Self-Defense Forces of Colombia (*Autodefensas Unidas de Colombia*, or AUC).[84]

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77. *The World Factbook: Colombia*, Cent. Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/co.html (last visited Dec. 30, 2013).

78. For a discussion on U.S. involvement through Plan Colombia, see June S. Beittel, Cong. Research Serv., RL32250, Colombia: Background, U.S. Relations, and Congressional Interest 31-37 (2012) [hereinafter Beittel, Colombia].

79. *See* Martin Gottwald, *Protecting Colombian Refugees in the Andean Region: the Fight Against Invisibility* 2 (UNHCR, Working Paper No. 81, 2003) (describing a violent civil war in the 1940s and 1950s between the country's main political groups: the Liberals and the Communists); Beittel, Colombia, *supra* note 78, at 13 (discussing the roots of Colombia's internal conflict).

80. Gottwald, *supra* note 79, at 2; Beittel, Colombia, *supra* note 78, at 14.

81. Gottwald, *supra* note 79, at 2; Beittel, Colombia, *supra* note 78, at 18.

82. Beittel, Colombia, *supra* note 78, at 19.

83. Gottwald, *supra* note 79, at 3.

84. Richard L. Millett, Strategic Studies Inst., Colombia's Conflicts: The Spillover Effects of a Wider War 4 (2002); Beittel, Colombia, *supra* note 78, at 19.

What started as a political and ideological conflict developed into a battle over territory and the drug trade in the 1990s.[85] During this time, FARC increased its territorial control through a system of extortion and "taxes" in exchange for FARC's protection of coca farmers and drug traffickers.[86] These efforts eventually led to a permanent occupation of territory in Colombia,[87] and FARC operates in about one-third of Colombia.[88] Deeply involved in all steps of the drug trade,[89] FARC is an incredibly violent group and "conducts bombings, murders, mortar attacks, kidnappings, extortion, and hijackings mainly against Colombian targets."[90]

Like FARC, ELN raises funds through criminal activities, including extortion, taxation, and kidnapping for ransom, including high-level officials, and today generates extensive revenue from drug trafficking.[91] ELN is also responsible for large-scale atrocities, including widespread abuse of rural populations and bombings.[92] Moreover, both FARC and ELN target journalists, human rights activists, and political officials.[93] As such, in 1997, the U.S. government labeled FARC and ELN as "foreign terrorist organizations."[94]

For their part, the paramilitary groups began to target the civilian population during the 1990s through mass executions, enforced disappearances, mass displacement, and torture.[95] Additionally, the conglomerate of paramilitary groups, AUC, is involved in drug trafficking[96] and has committed numerous human rights abuses, including sexual violence against women, restrictions on freedom of movement, and recruitment of child soldiers.[97] In 2001, the U.S. government labeled AUC as a "foreign terrorist organization."[98]

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85. MILLETT, *supra* note 84, at 3 ("The line between political violence and criminality has . . . long been blurred in the Colombian context."); Gottwald, *supra* note 79, at 2-3 (describing the evolution of Colombia's conflict).

86. Gottwald, *supra* note 79, at 2.

87. *Id.*

88. Stephanie Hanson, *FARC, ELN: Colombia's Left-Wing Guerrillas*, COUNCIL ON FOREIGN RELATIONS (Aug. 19, 2009), http://www.cfr.org/colombia/farc-eln-colombias-left-wing-guerrillas/p9272.

89. *See* BEITTEL, COLOMBIA, *supra* note 78, at 14 ("The FARC is fully engaged in the drug trade, including cultivation, taxation of drug crops, and distribution, from which it reaps significant profits.").

90. *Id.*

91. Hanson, *supra* note 88.

92. BEITTEL, COLOMBIA, *supra* note 78, at 18.

93. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: COLOMBIA (2010), *available at* http://www.state.gov/j/drl/rls/hrrpt/2009/wha/136106.htm.

94. *Foreign Terrorist Organizations*, BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE (Sept. 28, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm.

95. Gottwald, *supra* note 79, at 4.

96. Sylvia M. Longmire & John P. Longmire, *Redefining Terrorism: Why Mexican Drug Trafficking is More Than Just Organized Crime*, 1 J. STRATEGIC SECURITY 35, 47 (2008).

97. 2009 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 93.

98. *Foreign Terrorist Organizations*, *supra* note 94.

By the 2000s, Colombia was consumed by the conflict, and there were virtually no risk-free areas within the country, leading thousands of Colombians to seek refuge outside of the country.[99] To complicate matters more, the Colombian military has been involved in widespread extrajudicial killings of civilians,[100] including instances of "false positives," in which military members murder civilians and then report the deceased to be "combatants killed in action."[101] Similarly, the military has "[paid] illegal groups to forcibly recruit young men, transport them to another town, and turn them over to local brigades who then killed them and presented them as guerillas killed in combat."[102] The Colombian government and military, both high-level officials and subordinates, have also admitted to colluding with the paramilitaries and their illicit drug activities.[103]

This fifty-year-long conflict continues today. There are more than 63,000 registered cases of forced disappearances.[104] While no official total exists, estimates of the conflict's death toll range from 240,000[105] to 600,000.[106] Currently, according to the Office of the U.N. High Commissioner for Refugees (UNHCR), there are over four million internally displaced Colombians, about 400,000 Colombian refugees, and approximately 19,000 Colombian asylum-seekers worldwide.[107]

Many Colombians flee to border nations, with tens of thousands of refugees fleeing to Ecuador alone in 2012.[108] In response to the growing violence in Colombia and the ensuing flow of refugees, the five countries that frame Colombia militarized their borders and, with the exception of Ecuador, initiated hostile policies toward Colombian refugees.[109] Only a small fraction of the Colombian refugees present in Panama, Venezuela, and Peru were

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99. Gottwald, *supra* note 79, at 4-5.

100. BEITTEL, COLOMBIA, *supra* note 78, at 24; 2009 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 93.

101. *World Report 2012: Colombia*, HUMAN RIGHTS WATCH, http://www.hrw.org/world-report-2012/colombia (last visited Dec. 30, 2013).

102. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: COLOMBIA (2009), *available at* http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119153.htm.

103. BEITTEL, COLOMBIA, *supra* note 78, at 21-22; BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2011 HUMAN RIGHTS REPORT: COLOMBIA (2012), *available at* http://www.refworld.org/docid/4fc75aac50.html.

104. 2011 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 103.

105. Vivian Sequera, *No Easy Road to Peace in Colombia*, BLOOMBERG BUSINESSWEEK (July 26, 2012), http://www.businessweek.com/ap/2012-07-26/no-easy-road-to-peace-in-colombia.

106. *Colombia's FARC admits role in civilian deaths*, UNITED PRESS INT'L (Aug. 21, 2013), http://www.upi.com/Top_News/Special/2013/08/21/Colombias-FARC-admits-role-in-civilian-deaths/UPI-84371377112147/.

107. *2013 UNHCR Country Operations Profile – Colombia*, UNHCR, http://www.unhcr.org/pages/49e492ad6.html (last visited Dec. 30, 2013). Note that the figure for the number of refugees includes those who have been officially designated as refugees and those who are living in refugee-like situations but whose status has not yet been verified.

108. Babar Baloch, *Violence in Colombia Displacing More People into Ecuador*, UNHCR (Apr. 12, 2012), http://www.unhcr.org/4f86ecfc9.html ("Significant numbers of people have been crossing into [Ecuador] to seek shelter for years, with government figures putting the number at 1,200 to 1,500 people a month . . . .").

109. *See* Gottwald, *supra* note 79, at 7-9 (describing the responses of Panama, Venezuela, Ecuador, Brazil, and Peru to the movement of Colombian refugees).

able to access the refugee protection procedures in those nations.[110] Furthermore, refugees have been subject to deportation and other adverse policies that limit access to asylum.[111]

While some refugees stay under the radar due to fear that they will be deported back to Colombia if they report to foreign government officials, others stay hidden for fear of backlash from the insurgency groups, FARC and ELN, operating in the border areas.[112] The insurgency groups established a strong presence along Colombia's border with Venezuela, Ecuador, and Panama during the 1990s, and today, these groups are present along virtually the entire border.[113] The insurgency groups pressure some refugees to not seek international refugee assistance in efforts to keep the presence of the insurgency groups along the border and within neighboring countries relatively quiet.[114] For its part, UNHCR has struggled to access refugee populations in the face of the lack of cooperation from the border countries.[115]

IV. THE CONFLICT IN MEXICO

Mexico is located in North America, bordered to the north by the United States and to the south by Guatemala, and it is slightly less than three times the size of Texas.[116]

The current violent conflict in Mexico bears striking similarities to the conflict in Colombia. Although the Mexican conflict is younger than the Colombian conflict, and as of now, the casualties and the scope of the conflict have not reached the same heights as seen in Colombia, the two situations have much in common: multiple actors, drug trafficking, collusion between criminals and the government, and the use of terrorist tactics. In fact, the conflict in Mexico has its roots in Colombia.[117]

The drug trade based in Colombia fostered a transportation network in Mexico to facilitate shipment of drugs to the United States.[118] During the late 1980s and 1990s, Mexican

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110. *See id.* at 10 ("Official statistics reflect the reality that only a minor percentage of the overall refugee caseload has managed to access eligibility procedures: between 1 January 2000 and 1 October 2002 officially Panama received a mere 284 asylum-seekers from Colombia, Venezuela 972 and Peru 131. By contrast, Ecuador's liberal asylum policy has meant that in the same period some 9000 applications were filed by Colombian asylum-seekers.").

111. *Id.* at 10-11.

112. *Id.* at 6, 12.

113. *Id.* at 4, 6.

114. *Id.* at 6.

115. Gottwald, *supra* note 79, at 17.

116. *The World Factbook: Mexico*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html (last visited Dec. 30, 2013).

117. Tomas Kellner & Francesco Pipitone, *Inside Mexico's Drug War*, 27 WORLD POL'Y J. 29, 30 (2010).

118. *Id.*

drug cartels rose in prominence: first, they were paid by the Colombians in cocaine, which increased the involvement of Mexican drug cartels in the drug market,[119] and second, after the demise of some major Colombian drug cartels,[120] the Mexican drug cartels took over more of the drug trade.[121]

While there are many drug cartels in Mexico, the five main cartels include the Sinaloa cartel, the Gulf cartel, the Juárez cartel, the Familia Michoacana cartel, and the Tijuana cartel.[122] The Sinaloa cartel operates on the Pacific Coast of Mexico, along the United States-Mexico border from east of Tijuana to west of Ciudad Juárez, and in southern Mexico, including the Yucatán Peninsula.[123] The Gulf cartel operates along the United States-Mexico border in the Nuevo Laredo area and in the Yucatán Peninsula.[124] The infamous Los Zetas make up the core of the Gulf cartel today, but Los Zetas were originally a group of ex-Mexican military members hired as security for the Gulf cartel.[125] The other three main cartels have smaller areas of operation: the Juárez cartel operates in the Ciudad Juárez area, the Familia Michoacana cartel operates in central Mexico in the state of Michoacán, and the Tijuana cartel operates in the Tijuana area.[126] Together, these five cartels have a presence in the entire country, much like FARC, ELN, and AUC do in Colombia.[127]

Starting in the 2000s, the drug cartels, especially the Sinaloa cartel and the Gulf cartel,[128] went to war over control of territory.[129] When former Mexican President Felipe Calderón took office in December of 2006, he began a military assault against the drug cartels by ordering the militarization of various areas in Mexico, including the state of Michoacán and the northern border,[130] and by increasing the national security budget.[131] These actions led to

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119. *Id.*; Robert C. Bonner, *The Cartel Crackdown: Winning the Drug War and Rebuilding Mexico in the Process*, 91 FOREIGN AFF. 12, 12 (2012).

120. Longmire, *supra* note 96, at 40.

121. Aimee Rawlins, *Mexico's Drug War*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2013), http://www.cfr.org/mexico/mexicos-drug-war/p13689.

122. Bonner, *supra* note 119, at 12.

123. *See* Farhana Hossain & Xaquín G.V., *The Reach of Mexico's Drug Cartels*, N.Y. TIMES (Sept. 11, 2011), http://www.nytimes.com/interactive/2009/03/22/us/BORDER.html (providing a map of Mexico that demonstrates the areas of cartel influence and dispute).

124. *Id.*

125. Kellner, *supra* note 117, at 32.

126. Hossain, *supra* note 123.

127. *Id.*

128. Kellner, *supra* note 117, at 32.

129. CORY MOLZAHN ET AL., TRANS-BORDER INST., DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2012 27-28 (2013), *available at* http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf.

130. Kellner, *supra* note 117, at 32.

131. *See* MOLZAHN ET AL., *supra* note 129, at 32 (noting that the budgets for the Mexican Army and Navy reached all-time highs in 2012).

an immediate increase in violence:[132] 2,275 drug-related murders in 2007,[133] 5,207 in 2008,[134] and 6,587 in 2009.[135]

The clash between the cartels is not limited to cartel members—innocent civilians are also targeted.[136] The violence is often public and grotesque, including "beheadings, public hanging of corpses, killing of innocent bystanders, car bombs, torture, and assassination of numerous journalists and government officials."[137] According to Mexican government figures, from December 2006 to September 2011, an estimated 47,515 people were killed from drug-related violence,[138] including approximately 1,000 children.[139] Other estimates put the total over 50,000.[140] During the first nine months in 2011 alone, there were 12,903 drug-related murders.[141]

As previously discussed, the drug cartels operate throughout the entire country of Mexico. By 2006, the cartels controlled municipalities and even entire states.[142] In addition to this loss of state control, albeit disputed as to its extent, the Mexican government's ability to stop the drug cartel violence and crime is severely frustrated by Mexican government officials' collusion with the cartels.[143] Moreover, the Mexican military has also been involved in many human rights abuses, including torture, illegal detention, and extrajudicial killings.[144]

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132. Kellner, *supra* note 117, at 32.

133. *Id.* at 33.

134. *Id.* at 32.

135. *Id.*

136. *Id.* at 34.

137. JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE RISING VIOLENCE 1 (2013) [hereinafter BEITTEL, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS].

138. Damien Cave, *Mexico Updates Death Toll in Drug War to 47,515, but Critics Dispute the Data*, N.Y. TIMES (Jan. 11, 2012), http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html.

139. *See* Anne-Marie O'Connor & William Booth, *Mexican Drug Cartels Targeting and Killing Children*, WASH. POST (Apr. 9, 2011), http://www.washingtonpost.com/world/mexican-drug-cartels-targeting-and-killing-children/2011/04/07/AFwkFb9C_story.html ("The [Child Rights Network] estimates that 994 people younger than 18 were killed in drug-related violence between late 2006 and late 2010, based on media accounts, which are incomplete because newspapers are often too intimidated to report drug-related crimes.").

140. BEITTEL, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS, *supra* note 137, Summary.

141. *Travel Warning: Mexico*, OVERSEAS SEC. ADVISORY COUNCIL, BUREAU OF DIPLOMATIC SEC., U.S. DEP'T OF STATE (Feb. 8, 2012), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=11961.

142. Bonner, *supra* note 119, at 12.

143. *Id.* at 13; BEITTEL, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS, *supra* note 137, at 5-6.

144. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: MEXICO (2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154512.htm; Melissa W. Wright, *Necropolitics, Narcopolitics, and Femicide: Gendered Violence on the Mexico-U.S. Border*, 36 SIGNS 707, 708 (2011).

As of 2011, there were about 115,000 internally displaced persons in Mexico, and many Mexicans have fled to the United States.[145] Since 2008, the United States has received a total of roughly 30,000 defensive asylum applications from Mexicans, with the numbers rising each year.[146] Like the border countries surrounding Colombia, the United States has reacted negatively to the influx of asylum-seekers by bolstering border security[147] and sending many Mexicans back across the border soon after crossing through a process called expedited removal[148] or through an informal "return."[149]

V. DISPARATE TREATMENT IN U.S. IMMIGRATION POLICIES REGARDING MEXICAN AND COLOMBIAN REFUGEES AND ASYLUM-SEEKERS

The conflicts in Mexico and Colombia are centered on the drug trade and a battle for territorial control against internal actors and the government. The violent tactics used by Mexican drug cartels are virtually the same as what is seen in Colombia[150] but on a smaller scale in terms of overall death-count and displacement of people, which is due, at least in part, to the fact that the conflict in Mexico is more recent.[151] The Mexican drug cartels and the insurgency groups and paramilitary groups in Colombia all engage in similar activities, including widespread killings, bombings, and kidnapping and murder of high-level officials, government employees, and journalists;[152] all have integral roles in the illicit drug trade.[153] In

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145. *See* Ingrid Sandnæs, *Severe Displacement Situation in Mexico*, NORWEGIAN REFUGEE COUNCIL (Feb. 23, 2011), http://www.nrc.no/?did=9547824 (stating that approximately 115,000 Mexicans have been displaced from their homes and fled to the United States, while another 115,000 are internally displaced in Mexico).

146. *See infra* Tables 10, 11, 13, 14.

147. *See* Mike Bostock et al., *Increased Border Enforcement, With Varying Results*, N.Y. TIMES (Mar. 2, 2013), http://www.nytimes.com/interactive/2013/03/01/world/americas/border-graphic.html?_r=0 (showing that there are now more border patrol agents stationed along the United States-Mexico border than ever before).

148. U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT ON IMMIGRATION ENFORCEMENT ACTIONS: 2011 5 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf ("[Undocumented immigrants] from Mexico accounted for 83 percent of expedited removals in 2011."); U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT ON IMMIGRATION ENFORCEMENT ACTIONS: 2010 4, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf ("[Undocumented immigrants] from Mexico accounted for nearly 77 percent of expedited removals in 2010.").

149. ANNUAL REPORT ON IMMIGRATION ENFORCEMENT ACTIONS: 2011, *supra* note 148, at 6 ("Seventy-two percent of returns in 2011 involved Mexican or Canadian [undocumented immigrants] . . . ."); ANNUAL REPORT ON IMMIGRATION ENFORCEMENT ACTIONS: 2010, *supra* note 148, at 4 ("Eighty-one percent of returns in 2010 involved Mexican or Canadian [undocumented immigrants] . . . .").

150. BEITTEL, COLOMBIA, *supra* note 78, at 14, 18 (discussing how FARC and ELN target civilian populations); Hanson, *supra* note 88 (stating that ELN kidnaps Colombian government officials); BEITTEL, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS, *supra* note 137, at 40 (providing that the lethal violence in Mexico is not limited to the drug cartels but rather extends to civil society at large).

151. Kellner, *supra* note 117, at 32 (stating that violence skyrocketed in Mexico beginning in 2006, when President Calderón began a military assault on the drug cartels).

152. *Travel Warning: Mexico*, *supra* note 141 (stating that from December 2006 to September 2011, there were an estimated 47,515 drug-related murders in Mexico); BEITTEL, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS, *supra*

both situations, the government and military have generally been unable to control the violence and the drug trafficking and sometimes are directly involved in such activities.[154]

Given the many similarities between the two conflicts and the extreme levels of violence, the asylum grant rates and refugee resettlement rates for Colombians and Mexicans should theoretically be relatively comparable. Since many Mexicans come directly to the United States to seek asylum, the most salient comparison will be between Mexican asylum-seekers and Colombian asylum-seekers. Defensive asylum applications for Mexicans are generally denied, whereas defensive asylum applications for Colombians benefit from much higher rates of approval:

Table Nine: Grant Rates for Defensive Asylum Applications, 2008–2012

Fiscal Year	*Percentage of Defensive Asylum Grants Compared to Amount of Defensive Applications Received (Colombia)*	*Percentage of Defensive Asylum Grants Compared to Amount of Defensive Applications Received (Mexico)*
2008	43.9%[155]	2.0%[156]
2009	34.6%[157]	1.7%[158]
2010	31.5%[159]	0.96%[160]
2011	33.6%[161]	1.4%[162]
2012	29.0%[163]	1.4%[164]

note 137, at 1 (commenting that violence in Mexico includes car bombings and the assassination of journalists and government officials); 2009 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 93 (stating that both FARC and ELN target government officials and journalists); Sequera, *supra* note 105 (noting that one estimate of the death toll in the Colombian conflict is about 240,000); Gottwald, *supra* note 79, at 4 (discussing that Colombian paramilitary groups commit mass executions); BEITTEL, COLOMBIA, *supra* note 78, at 18 (stating that ELN commits bombings).

153. Longmire, *supra* note 96 (stating that AUC is involved in the drug trade); Hanson, *supra* note 88 (noting that ELN raises its funds through drug trafficking); BEITTEL, COLOMBIA, *supra* note 78, at 14 (discussing FARC's involvement in all steps of the drug trade).

154. 2011 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 103 (discussing the involvement of Colombian government officials and military in the illicit drug trade); 2009 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 93 (noting that the Colombian military has committed widespread extrajudicial killings of civilians); Hossain, *supra* note 123 (demonstrating the extent of the various Mexican drug cartels' territorial control); Bonner, *supra* note 119, at 13 (discussing Mexican government officials' collusion with drug cartels); 2010 HUMAN RIGHTS REPORT: MEXICO, *supra* note 144 (noting the Mexican military's commission of human rights abuses).

155. *Immigration Courts: Fiscal Year 2008 Asylum Statistics*, *supra* note 31.

156. *Id.*

157. *Immigration Courts: Fiscal Year 2009 Asylum Statistics*, *supra* note 33.

158. *Id.*

159. *Immigration Courts: Fiscal Year 2010 Asylum Statistics*, *supra* note 35.

160. *Id.*

161. *Immigration Courts: Fiscal Year 2011 Asylum Statistics*, *supra* note 37.

162. *Id.*

163. *Immigration Courts: Fiscal Year 2012 Asylum Statistics*, *supra* note 39.

164. *Id.*

Table Ten: Defensive Asylum Applications Received and Granted, 2008–2012

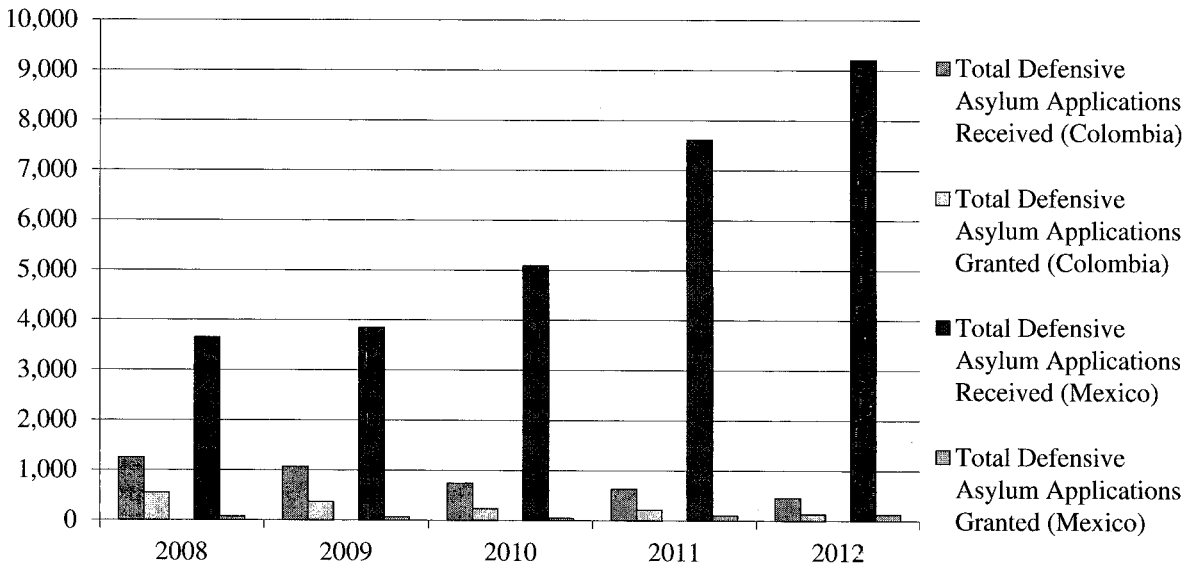

Table Eleven: Defensive Asylum Applications Received and Granted, 2008–2012

Fiscal Year	*Total Defensive Asylum Applications Received (Mexico)*	*Total Defensive Asylum Applications Granted (Mexico)*		*Total Defensive Asylum Applications Received (Mexico)*	*Total Defensive Asylum Applications Granted (Mexico)*
2008	1,246[165]	548[166]		3,650[167]	73[168]
2009	1,063[169]	368[170]		3,855[171]	65[172]
2010	743[173]	234[174]		5,098[175]	49[176]
2011	633[177]	213[178]		7,616[179]	107[180]
2012	451[181]	131[182]		9,206[183]	126[184]

165. *Immigration Courts: Fiscal Year 2008 Asylum Statistics*, *supra* note 31.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Immigration Courts: Fiscal Year 2009 Asylum Statistics*, *supra* note 33.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Immigration Courts: Fiscal Year 2010 Asylum Statistics*, *supra* note 35.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Immigration Courts: Fiscal Year 2011 Asylum Statistics*, *supra* note 37.
178. *Id.*

In terms of the affirmative asylum grant rates, Colombia also has higher overall grant rates compared to Mexico:

Table Twelve: Grant Rates for Affirmative Asylum Applications, 2007–2011

Fiscal Year	*Percentage of Affirmative Asylum Grants Compared to Number of Affirmative Applications Received (Colombia)*[185]	Percentage of Affirmative Asylum Grants Compared to Number of Affirmative Applications Received (Mexico)
2007	140.4%[186]	5.0%[187]
2008	184.3%[188]	8.2%[189]
2009	171.2%[190]	13.7%[191]
2010	93.2%[192]	6.0%[193]
2011	101.2%[194]	4.7%[195]

179. *Id.*

180. *Id.*

181. *Immigration Courts: Fiscal Year 2012 Asylum Statistics*, *supra* note 39.

182. *Id.*

183. *Id.*

184. *Id.*

185. *See* discussion *infra* p. 135 (explaining why the grant rates for Colombian applications exceed one hundred percent some years).

186. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2011 44-45 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf (providing the number of affirmative asylum applications granted); ASYLUM DIVISION, USCIS, NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY 2, 4 (2013), *available at* http://www.uscis.gov/USCIS/About%20Us/Electronic%20Reading%20Room/Asylee%20and%20Refugee%20Information%20-%20Static%20Files/COW2013000178%20-%20Affirmative%20and%20Defensive%20Asylum%20Applications%20FY2002-2011.pdf (giving the number of affirmative asylum applications received by USCIS). This information compiled by the USCIS Asylum Division recently became available on April 5, 2013, via a FOIA request. *Id.* at 1. It includes data from 2002 to 2011. *Id.* at 2.

187. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 44-45; NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 2, 4.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

Table Thirteen: Affirmative Asylum Applications Received and Granted, 2007–2011

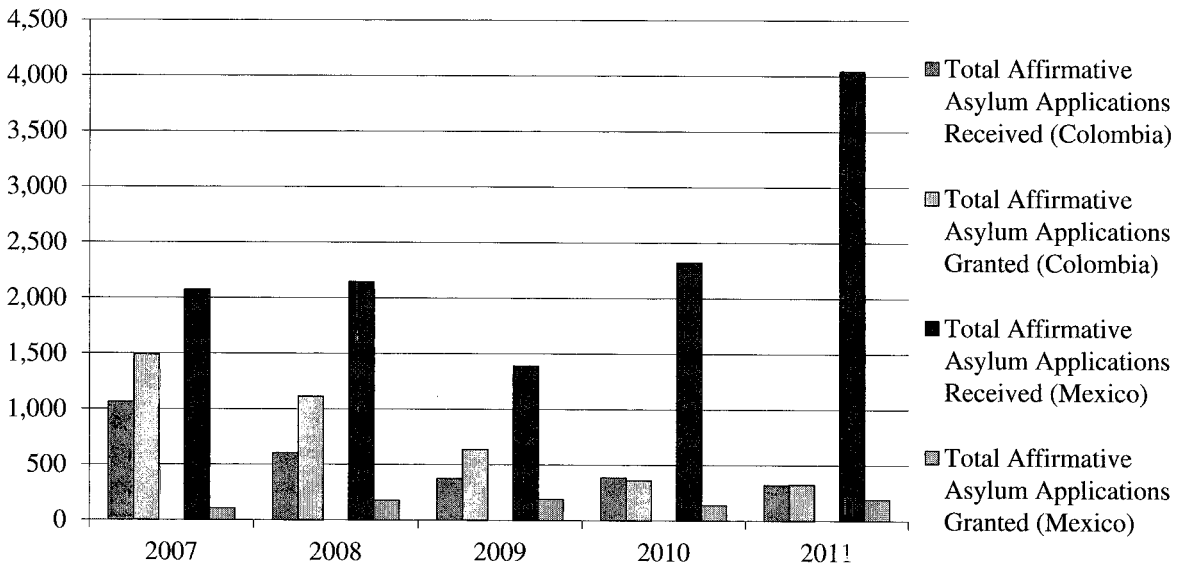

Table Fourteen: Affirmative Asylum Applications Received and Granted, 2007–2011

Fiscal Year	*Total Affirmative Asylum Applications Received (Colombia)*	*Total Affirmative Asylum Applications Granted (Colombia)*	*Total Affirmative Asylum Applications Received (Mexico)*	*Total Affirmative Asylum Applications Granted (Mexico)*
2007	1,061[196]	1,490[197]	2,073[198]	103[199]
2008	604[200]	1,113[201]	2,144[202]	176[203]
2009	372[204]	637[205]	1,393[206]	191[207]
2010	384[208]	358[209]	2,320[210]	140[211]
2011	321[212]	325[213]	4,042[214]	190[215]

196. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 2.
197. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 44.
198. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 4.
199. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 45.
200. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 2.
201. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 44.
202. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 4.
203. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 45.
204. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 2.
205. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 44.
206. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 4.
207. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 45.
208. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 2.
209. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 44.

It is important to note that the number of applications filed in a particular fiscal year can be lower than the number of applications granted in a particular fiscal year because some applications are pending for over a year. Nevertheless, the data is relevant to show a large discrepancy in grant rates for affirmative asylum applications. Furthermore, as previously discussed, the affirmative asylum applications that are denied are "referred" to the Executive Office for Immigration Review (EOIR), and those individuals are placed in removal proceedings. Thus, the defensive asylum application statistics include, to some extent, those affirmative asylum applications initially denied and then subsequently renewed in immigration court as defensive asylum applications.

While the actual number of grants may seem small, Colombia is consistently one of the countries with the highest overall numbers of defensive and affirmative asylum grants. For example, in 2007, Colombians received the second highest number of grants of defensive asylum applications, second only to China.[216] Despite the high number of Mexican applications, Mexico did not make the list of the top twenty-five countries with the highest asylum grant rates.[217] In 2008, Colombians again received the second highest number of asylum grants, second only to China,[218] while Mexico again did not make the top twenty-five.[219] In 2009, Colombians received the fourth highest number of asylum grants,[220] and Mexico once again did not make the top twenty-five.[221] In 2010, Colombians again received the fourth highest number of asylum grants.[222] Mexico again did not make the top twenty-five.[223] In 2011, Colombians received the eighth highest number of asylum grants.[224] That year, Mexicans received the twenty-third highest number of asylum grants, finally making the top-twenty-five list.[225]

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210. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 4.

211. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 45.

212. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 2.

213. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 44.

214. NEW AFFIRMATIVE ASYLUM CASES BY NATIONALITY, *supra* note 186, at 4.

215. YEARBOOK OF IMMIGRATION STATISTICS: 2011, *supra* note 186, at 45.

216. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK J2 (2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

In terms of refugee resettlement, the United States, perhaps not surprisingly,[226] does not designate Mexicans for refugee resettlement but does resettle some Colombian refugees:

Table Fifteen: Mexican and Colombian Refugees Resettled in the United States, 2007–2012

Fiscal Year	*Mexican Refugees Resettled in the United States*	*Colombian Refugees Resettled in the United States*
2007	0[227]	54[228]
2008	0[229]	94[230]
2009	0[231]	57[232]
2010	0[233]	123[234]
2011	0[235]	46[236]
2012	0[237]	126[238]

VI. WHY IS THERE SUCH A DISPARITY?

If the conflicts affecting Mexicans and Colombians are similar in terms of the type of violence and the type of actors, why are the rates of approval so different? The U.S. govern-

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226. It is unlikely that Mexicans would ever be designated for refugee resettlement in the United States, even if the U.S. government viewed Mexican refugee claims as meritorious. Since a person cannot be designated for refugee resettlement in the United States unless he is outside his country of origin and not in the United States, and Mexicans, almost without exception, flee Mexico to the north and not the south, it is not surprising that there are no Mexican refugees as such individuals travel directly to the United States when fleeing violence in Mexico. *See* INA § 207(d)(1), 8 U.S.C. § 1157(d)(1) (discussing the process for determining refugees for resettlement in the United States, implying that such refugees are not presently in the United States); JEFFREY PASSEL & D'VERA COHN, PEW RESEARCH CTR., MEXICAN IMMIGRANTS: HOW MANY COME? HOW MANY LEAVE? i (2009), *available at* http://www.pewhispanic.org/files/reports/112.pdf ("The U.S. is the destination for nearly all people who leave Mexico . . . .").

227. *See Summary of Refugee Admissions: Fiscal Year 2007*, *supra* note 28, at 3 (indicating by way of exclusion that there were no admissions of Mexican refugees in 2007).

228. *Id.*

229. *Summary of Refugee Admissions: Fiscal Year 2008*, *supra* note 30, at 3.

230. *Id.*

231. *Summary of Refugee Admissions: Fiscal Year 2009*, *supra* note 32, at 1-2.

232. *Id.* at 1.

233. *FY10 Refugee Admissions Statistics*, *supra* note 34.

234. *Id.*

235. *FY11 Refugee Admissions Statistics*, *supra* note 36.

236. *Id.*

237. *FY12 Refugee Admissions Statistics*, *supra* note 38.

238. *Id.*

ment, through the Department of State and the EOIR, which encompasses immigration judges, seems resistant to grant asylum to Mexicans for many reasons.

First, the overall sentiment in the United States is that Mexicans come to the United States for economic reasons[239] and that the vast majority arrives "illegally."[240] This view is bolstered by the fact that overall immigration rates from Mexico to the United States have gone down since the recession[241] but ignores another fact: asylum applications from Mexicans have been on the rise for years.[242] These changes indicate that the United States is seeing more Mexican asylum-seekers each year. The long-standing perception of Mexicans as economic migrants and "illegals" inevitably frustrates the ability of these Mexican asylum-seekers to prove eligibility for asylum.

Second, as previously discussed, Mexico borders the United States directly to the south, while Colombia is thousands of miles away. U.S. immigration policy does not account for the fact that it is easy for Mexicans to travel to the United States, and the United States is inevitably the country of first refuge for those fleeing violence in Mexico.[243] The very low grant rates for defensive asylum applications from Mexico indicate the U.S. government's concern that if it gives asylum to Mexicans, there may be a flood of asylum-seekers coming to the United States from Mexico,[244] and this concern is likely internalized by immigration judges.[245]

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239. *See* Haya El Nasser, *More Mexicans Returning Home, Fewer Immigrating to U.S.*, USA TODAY (Apr. 24, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-04-23/mexican-immigration-united-states/54487564/1 (suggesting that the level of immigration from Mexico to the United States is linked to the U.S. economy and that the immigration of Mexicans may increase with the availability of jobs); Steven A. Camarota, *Public Opinion in Mexico on U.S. Immigration: Zogby Poll Examines Attitudes*, CTR. FOR IMMIGRATION STUDIES (Oct. 2009), http://www.cis.org/ZogbyPoll-EffectsOfAmnesty ("Both the bad economy and increased immigration enforcement were cited as reasons fewer people were going to America as [undocumented] immigrants and more were coming back to Mexico."); PASSEL, *supra* note 226, at i-ii (noting that "[t]he current recession has had a harsh impact on employment of Latino immigrants" and that there has been a decline in Mexican immigration to the United States since the recession).

240. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 423 (2011) (explaining that the term "illegal" is understood to refer exclusively to Mexicans).

241. PASSEL, *supra* note 226, at ii (noting the inflow of Mexican immigrants to the United States started to diminish in 2004 and took a sharp decline in the years following the current recession).

242. *See supra* Tables 10, 11, 13, 14.

243. PASSEL, *supra* note 226, at i (providing that "nearly all" people who leave Mexico go to the United States).

244. Todd Bensman, *Mexico Drug War: Mexican Asylum Seekers Increasingly Turned Away by US Immigration Courts*, HUFFINGTON POST (Aug. 15, 2009), http://www.huffingtonpost.com/2009/07/15/mexico-drug-war-asylum-se_n_234022.html ("The immigration attorneys say homeland security lawyers in some jurisdictions are aggressively opposing Mexican claims for reasons less than humanitarian. Homeland Security officials and appointed judges, they say, want to avoid triggering a system-clogging flood of asylum petitions . . . .").

245. *See* Marouf, *supra* note 240, at 425, 428–40 (discussing extensively the factors that contribute to bias within the immigration courts, including limited appellate review, complexity of cases, especially asylum cases, and a lack of independence from the Department of Justice).

Third, the U.S. government presumably does not want to offend the Mexican government by granting asylum applications for Mexicans.[246] While the U.S. government is very willing to assist the Mexican government in fighting the drug cartels within Mexico,[247] once the United States grants asylum to Mexican citizens, the message shifts from "The United States wants to help Mexico do its job" to "Mexico cannot do its job."[248]

Finally, the United States has purposefully declined to identify any of the Mexican drug cartels as "foreign terrorist organizations," despite the fact that the violent tactics of the Mexican drug cartels are essentially indistinguishable from those used by the Colombian insurgency groups and paramilitary groups. As previously discussed, both employ violence against civilians, intimidate the population as a whole, seek to control territory, and force cooperation from the government.[249] While the Colombian conflict started as ideological, today it involves organized crime, human rights abuses, territorial control, and drug trafficking—the same type of conflict seen in Mexico. Yet, in U.S. government rhetoric, the Mexican drug conflict is described as "crime"[250] and "narcotics-related violence,"[251] while the Colombian conflict is described as "terrorist and criminal activities."[252] Mexican drug cartels are described as "transnational criminal organizations,"[253] whereas FARC and ELN are described as "terrorist guerrilla groups."[254] The language used to describe the Colombian conflict is much stronger and has obvious political undertones, especially given the overall aversion to "terrorism" in any form in the United States.[255] Because FARC and ELN began as Communist groups, the United States is still clinging to its conventional animosity toward Communism by taking a strong stance against the Colombian insurgency groups compared to its stance on the Mexican drug cartels, even though they are analogous in terms of their human rights abuses.

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246. Bensman, *supra* note 244 (noting that immigration attorneys suspect that homeland security attorneys oppose and immigration judges reject Mexican asylum applications so as to not "offend[ ] the Mexican government by ruling [that] it can't protect its own citizens").

247. *See U.S. Relations with Mexico*, BUREAU OF W. HEMISPHERE AFFAIRS, U.S. DEP'T OF STATE (Sept. 5, 2013), http://www.state.gov/r/pa/ei/bgn/35749.htm (discussing the Merida Initiative, a joint effort by Mexico and the United States to fight organized crime).

248. Bensman, *supra* note 244.

249. *See supra* pp. 123-29.

250. *U.S. Relations with Mexico*, *supra* note 247.

251. *Travel Warning: Mexico*, *supra* note 141.

252. *Colombia Travel Warning*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE (Oct. 11, 2013), http://travel.state.gov/content/passports/english/alertswarnings/colombia-travel-warning.html.

253. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2011 HUMAN RIGHTS REPORT: MEXICO (2012), *available at* http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186528.

254. 2011 HUMAN RIGHTS REPORT: COLOMBIA, *supra* note 103.

255. *See* Zbigniew Brzezinski, *Terrorized by 'War on Terror'*, WASH. POST (Mar. 25, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301613.html ("Constant reference to a 'war on terror' did accomplish one major objective: It stimulated the emergence of a culture of fear.").

The language used to describe the situation in Mexico is in flux though, and some government officials are willing to acknowledge that the problem in Mexico goes far beyond organized crime. In 2009, Barry R. McCaffrey, former director of the U.S. Office of National Drug Control Policy, reported to Congress that "[i]t is not inconceivable that the violent, warring collection of criminal drug cartels could overwhelm the institutions of the state and establish de facto control over broad regions of Mexico . . . . [The Mexican government] is not confronting dangerous criminality—it is fighting for survival against narco-terrorism."[256] While Mexican officials have been reluctant to recognize the lack of control over some areas of the country, even former Mexican President Felipe Calderón acknowledged the drug cartels' actions as "an attempt to replace the state."[257] In 2010, then Secretary of State Hillary Clinton stated that the drug cartel violence was morphing into an "insurgency."[258] Although the use of the term "insurgency" was later rejected by the Obama administration, the U.S. government has acknowledged the insurgent-like attacks and terrorist-like tactics employed by the Mexican drug cartels.[259]

This shift in rhetoric more accurately describes the conflict in Mexico and could be incredibly important for the adjudication of asylum claims. By aligning the language used to describe the conflict in Mexico with the language used to describe the conflict in Colombia, Mexican asylum applicants could potentially avoid the perception that they are merely fleeing crime or poverty.[260]

VII. CONCLUSION

The conflict in Mexico mirrors the conflict in Colombia to such an extent that the vast disparity in asylum application grants for Mexicans and Colombians is unjustified. Admittedly, the scope of the conflict in Colombia is greater because the conflict has been going

256. Kellner, *supra* note 117, at 30, 37 (internal quotation marks omitted).

257. BEITTEL, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS, *supra* note 137, at 5 (internal quotation marks omitted).

258. *Id.*

259. *Id.*; *see also* Rafael Romo, *Mexican Drug Cartels Considered Terrorists?*, CNN (Apr. 15, 2011), http://www.cnn.com/2011/WORLD/americas/04/15/cartels.terror/index.html (providing that a Republican member of the House of Representatives has proposed adding Mexico's dominant drug cartels to the list of foreign terrorist organizations maintained by the Department of State).

260. Bensman, *supra* note 244; *see also* Mark Potter, *Despite Safer Border Cities, Undocumented Immigrants Flow Through Rural Areas*, NBC NEWS (May 2, 2013), http://dailynightly.nbcnews.com/_news/2013/05/02/17708115-despite-safer-border-cities-undocumented-immigrants-flow-through-rural-areas?lite (acknowledging the violence in Mexico and Central America but still citing poverty as one of the main reasons immigrants leave those areas for the United States); *How Will Immigration Reform Impact Border Crossings*, KRISTV (Apr. 13, 2013), http://www.kristv.com/news/how-will-immigration-reform-impact-border-crossings/# (noting the increased violence in Central America but also citing poverty as one of two main reasons that people flee the area).

on since the 1960s, but this fact does not in turn mean that viable Mexican asylum claims must be denied. The U.S. government's unspoken policy against Mexican asylum-seekers ignores our unique role as Mexico's neighbor and the fact that the United States is the destination for nearly every person who leaves Mexico.[261] The U.S. government should recognize the conflict in Mexico for what it is—far-reaching violence between drug cartels that employ terrorist tactics to gain control over territory and the Mexican population. Additionally, the U.S. government should acknowledge the role of the Mexican government in the conflict as an active participant in the violence, through collusion with drug cartels and human rights abuses committed by the military.

While the U.S. government has reason to maintain a relationship with the Mexican government and a right to choose who can enter the United States, foreign policy should not dictate asylum adjudications. Congress intended to neutralize immigration law through the Refugee Act of 1980, but political concerns and rhetoric still play a role in immigration policy and in the adjudication processes in immigration courts. As a result, those fleeing Mexico to escape horrific conditions of violence do not receive the same protection under U.S. law as those fleeing Colombia, thwarting congressional intent and balking on the goal of standardized refugee and asylum determinations.

261. PASSEL, *supra* note 226, at i.