Title
Empirical Studies of the State's Treatment of Noncitizens in the United States: A Mixed Method Approach

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Publication Date
2020

Peer reviewed|Thesis/dissertation

Empirical Studies of the State's Treatment of Noncitizens in the United States: A Mixed Method Approach

by

Mary Agnes Hoopes

A dissertation submitted in partial satisfaction of the
requirements for the degree of
Doctor of Philosophy
in
Jurisprudence and Social Policy
in the
Graduate Division
of the
University of California, Berkeley

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Summer 2020

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Abstract

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Doctor of Philosophy in Jurisprudence and Social Policy

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This dissertation provides three studies on the state's treatment of noncitizens in the United States, focusing on two groups in particular: asylum seekers and farmworkers. Together, these three chapters probe decisionmaking in each branch of the government, with particular attention to the interplay between them. The first chapter examines decisionmaking within the federal courts and considers their role in reviewing decisions of the immigration agency, the second explores how support for the detention of asylum seekers evolved within the executive and the legislature, and the third explores how the administrative state engages with a particularly vulnerable population: migrant farmworkers.

Chapter 1 considers appeals of asylum claims from the immigration agency to the United States Courts of Appeals. While there is consensus among attorneys and scholars alike that immigration adjudication is in a state of crisis, very few studies have examined how federal courts are reviewing this agency in crisis, and what role they play (or ought to play) through their review. This chapter focuses on asylum appeals at the federal appellate level, and builds an original database of asylum cases across five circuits over seven years. As it reveals, the Courts of Appeals have created a wide variety of court-fashioned rules that serve to either expand or constrict the scope of their review of asylum appeals. As it demonstrates, the elasticity of the appellate review model permits this wide variation. I argue that the more expansive approach to review is normatively beneficial, as we ought to have an appellate review model that permits courts to be responsive to evidence of an agency in crisis. Since larger changes aimed at addressing the underlying flaws at the agency level are unlikely to be forthcoming soon, federal courts may be the only institutions equipped to meaningfully address problems within asylum adjudication.

Chapter 2, co-authored with Smita Ghosh, traces the institutional history of the mass detention of noncitizens in the United States. Drawing upon an analysis of congressional records and media coverage from 1981 to 1996, it examines the growth of mass immigration detention. It traces an important shift during this period: while detention began as an ad hoc executive initiative that was received with skepticism from the legislature, Congress was ultimately responsible for

entrenching the system over objections from the agency. As Chapter 2 reveals, a critical component of this evolution was a transformation in the legislative perception of asylum seekers: while lawmakers initially decried their detention, they later branded them as dangerous. It illuminates how elements of the new penology, such as the rhetoric of risk, were also critical in transforming the perception of asylum seekers.

Chapter 3 turns to the institutional treatment of another vulnerable group of noncitizens, farmworkers, and considers the failure of the administrative state to protect them. While the administrative state is said to pervade nearly every aspect of modern life, it has largely failed this population. Despite a robust regulatory framework governing the treatment of farmworkers, these laws are rarely enforced. One agency, the Equal Employment Opportunity Commission (EEOC), has emerged as a leader in enforcing the rights available to farmworkers, and won millions of dollars in settlements and verdicts and secured a wide range of injunctive relief. Chapter 3 explores the process by which the EEOC became much more assertive in enforcing its mandate to protect farmworkers. While its progress was slowed by its initial hesitation to view its civil rights mandate as encompassing farmworkers, it eventually changed course, and began to pursue discrimination claims on behalf of farmworkers. This runs contrary to the narrative often told about the agency, and suggests that the EEOC has employed non-bureaucratic, carefully tailored ways of achieving structural reform in the context of farmworkers. While far from perfect, the EEOC's trajectory provides a model for other agencies that are poised to have a much larger impact in enforcing the rights of farmworkers.

ACKNOWLEDGEMENTS

First and foremost, I owe the utmost gratitude to my husband, Brent Nakamura, who made this entire endeavor possible. He is both brilliant and thoughtful, and I'm blessed beyond measure to have him in my life. Our sons, Owen and Robert, provided endless laughter and distraction, and are the greatest sources of joy in my life. AnnaLise Hoopes spent many hours watching our sons in order to allow me to work on the dissertation, and also provided both valuable insights and coaching. She is the best sister and aunt that anyone could have and a source of constant inspiration. I am very grateful to my parents, Margaret Savino and Robert Hoopes, whose own dissertations inspired me to leave the practice of law to pursue graduate school, and whose many hours with their grandchildren also enabled this dissertation to be completed. My parents have been the greatest source of warmth and love imaginable, and I will forever be thankful for the perspectives I have gained from them.

I'm extremely grateful for my committee members, Leti Volpp, Taeku Lee, Kevin Quinn, Jonathan Simon, and Irene Bloemraad, each of whom invested a great deal of their time to mentor me and offer extremely valuable feedback. Hiroshi Motomura was kind enough to mentor me during a visiting year at UCLA and then beyond, and I greatly appreciate his mentorship. I'm also very grateful for the extraordinary mentorship of Judge Jeremy Fogel. I owe much to the EEOC employees and farmworker advocates who volunteered their time for interviews. Samantha Ho provided outstanding research assistance, particularly with Chapter 3, and has a bright future ahead of her. I also owe thanks to many colleagues and friends who provided support and feedback along the way. This includes Brittany Arsiniega, Mina Barahimi Martin, Kathy Bowen, Jason Cantone, Torey Cummings, Parker Douglas, Jim Eaglin, Smita Ghosh, Kathryn Heard, Brenda Hoopes Daily, Jordy Hur, Rachel Julis, Margarita Kofalt, Kelsey Mayo, Joy Milligan, Jeffrey Minear, Anna Prakash, Bina Patel, Michael Shenkman, Matthew Sipe, and Beth Wiggins.

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Introduction

This dissertation examines the state's treatment of noncitizens from an institutional perspective, and focuses upon two groups: asylum seekers and farmworkers. Each chapter examines these groups from a different institutional perspective, and together they employ a range of qualitative and quantitative methods. The first chapter focuses on the federal judicial branch's review of the administrative adjudication of asylum appeals, and reveals that courts have taken widely divergent approaches in reviewing an agency in crisis. The second chapter examines the interaction between the executive and legislative branches in the formative years of mass immigrant detention, and reveals that a shift in how these branches viewed asylum seekers played an instrumental role. The third chapter examines the administrative state's failure to reach farmworkers, focusing upon the trajectory of one agency that has enjoyed some success in order to consider the lessons that other agencies may learn in order to more effectively reach vulnerable populations.

Chapter 1 closely examines asylum appeals in five circuits across seven years. Advocates and scholars alike agree that the system of asylum adjudication is compromised, as the immigration courts and the Board of Immigration Appeals are equipped with far too few resources to adequately handle their exploding caseload. As a result, the quality of decisionmaking within the immigration agency is sorely lacking. For many asylum seekers, review in the federal circuit courts is their last recourse, and it may be the only meaningful review that their cases receive. A prior study of asylum appeals in 2004-2005 revealed that the likelihood of remand differed dramatically across circuits. These differences invite further inquiry, as there exists no understanding of what might be driving them. Moreover, close examination of these appeals provides insight into how federal courts respond to the task of reviewing an agency in crisis.

The First, Seventh, Ninth, Tenth, and Eleventh Circuits were selected, and asylum appeals were coded over a seven year time period, 2007-2013, to create an original dataset. The results reveal wide variation in remand rates over this seven year period, as an asylum applicant is more than four times more likely to have his claim remanded in the Seventh Circuit than in the First or Tenth Circuits, for example. Logistical regression analysis confirms that this variation cannot be explained by a difference in the types of claims heard across the circuit courts. In other words, these disparities do not simply reflect the fact that circuits with lower remand rates are hearing fundamentally different types of cases than those with higher remand rates. Rather, the effect of being in the Seventh or Ninth Circuits positively and significantly predicts remand, even when controlling for a wide range of case characteristics. Chapter 1 turns next to qualitative analysis of the data, which reveals a broader pattern of court-created doctrinal rules across circuits that serve to broaden or narrow the scope of review, and have important implications for the likelihood of remand.

Finally, Chapter 1 turns to the larger implications of these findings for asylum adjudication, and for administrative law more generally. In essence, it asks, what may we learn of this instance in which the federal courts are tasked with reviewing an agency in crisis? This analysis will more broadly inform studies of "the appellate review model," or the system of having a generalist federal

court review an administrative agency's decisionmaking. The data in this project reflect a feature of the appellate review model that is often lauded by scholars: its elasticity, as circuits are employing an identical standard of review in these cases, and yet reaching very different rates of remand. Scholars have long debated the appropriate level of deference a court should accord an agency, and this chapter argues that the traditional rationales for deference are less forceful in the context of asylum review than in other areas of agency review. As it contends, whether one views the more searching review employed by the Seventh and Ninth Circuits as constituting a departure from *Chevron*, or as lying entirely within its bounds, this more expansive approach is arguably normatively beneficial. Because larger changes aimed at addressing the underlying problems at the agency level are unlikely to be forthcoming soon, federal courts may be the only institutions equipped to meaningfully address flaws in the immigration agency's system of adjudication. Thus, federal courts ought to use the elasticity of the appellate review model in order to expand the scope of their review in the asylum context, as at least two circuits have already done.

Chapter 2, co-authored with Smita Ghosh, turns to the institutional history of the mass detention of immigrants in the United States. It focuses upon a period that has often been overlooked in the literature: the fifteen years preceding the large-scale introduction of mass detention of noncitizens. The prior literature largely treats the executive and the legislature as monolithic in their support of immigration detention. As this analysis reveals, this obscures a more complex interplay between the two institutions in the period leading to the mass detention of noncitizens. Drawing upon an analysis of congressional records and media coverage from 1981 to 1996, Chapter 2 traces an important shift during this period: while detention began as an ad hoc executive initiative that was received with skepticism from the legislature, Congress was ultimately responsible for entrenching the system over objections from the agency. As this chapter reveals, this shift was fundamentally enabled by an abrupt transformation in the congressional perception of asylum seekers. While lawmakers initially resisted their detention and vehemently defended the right to seek asylum, they abruptly branded them as dangerous, "Typhoid Marys" in the early 1990s. This shift in Congress's perception of asylum seekers has been largely absent from scholarship on the origins of immigration detention.

Chapter 2 divides this fifteen-year period into three eras in order to more closely examine this institutional shift. In the first era, immigration imprisonment was reborn in 1981, in response to the unexpected migration of more than 150,000 Cubans and Haitians. President Reagan announced that any arriving noncitizen without proper documentation would be detained pending a determination of the noncitizen's status. The Administration trumpeted this new detention policy as necessary to deter future crises and mass influxes of noncitizens, but it was not well-received by the legislature. Legislators protested the indefinite detention as offensive to the nation's historic commitment to asylum, for example, and emphasized that these noncitizens were not criminals. In the second era, the legislature continued to express concern about detaining asylum seekers, but it also rapidly developed a preoccupation with the so-called criminal alien. The Immigration Service's long inability to deport noncitizens with criminal convictions, previously something of an insider's secret, became widely publicized, and the legislature urged the Service to detain and remove them. During these years, as prior scholarship has recognized, unauthorized migration was recast as a crime in the popular and legislative imagination, and the categories of "illegal alien"

and “criminal alien” began to be commonly conflated. In 1993, an “asylum crisis” was born in the media, brought about by the convergence of a range of dynamics: a rise in the level of undocumented immigration generally, the rise of nativist, anti-immigrant forces, the pressures created by a new, ideologically neutral statutory definition of refugee, and the end of the Cold War. It was more immediately spurred by an enormous increase in the number of Central Americans seeking asylum in the United States beginning in the late 1980s, and a series of isolated acts of terrorism in the early 1990s. This crisis quickly told hold of the legislature, and congressional attitudes and discourse with respect to asylum seekers changed abruptly in the third era: the asylum system was now a “sick” system badly in need of reform in order to prevent walking Typhoid Marys from entering the country. Once the association between criminality and asylum had been firmly cemented, legislators were eager to detain broad swaths of people; the Service, in turn, countered that this approach was neither feasible nor effective. This transformation in the legislative perception of asylum seekers cleared the way for the mass detention of immigrants, culminating in two landmark pieces of legislation in 1996 that would formally institutionalize the system.

This analysis reveals that the logic and rhetoric of the new penology figured prominently into the transformation of the asylum seeker. Just as in the case of the move to mass incarceration generally, asylum seekers were branded as dangerous, risky classes whose detention was necessary in order to prevent abuse of the system. It also reveals a distinctive kind of cognitive dissonance that has marked the nation’s reception of immigrants: during the “asylum crisis,” lawmakers wrestled with the dissonance between the nation’s commitment to providing protections to refugees, and the fears provoked by the perceived threat of asylum seekers. As soon as this fragile commitment became tested, both by their “otherness” and the magnitude of the asylum seekers, it gave way to the language of threat and risk.

It also reveals a similar dynamic to what criminal law scholars have observed: as the judiciary has expanded procedural protections in the criminal context, the legislature has reacted by increasing the substantive severity of the statutes and associated penalties. In the immigration context, the courts similarly expanded the procedural rights of noncitizens in the 1980s; they were less likely to invoke the plenary power doctrine, and more willing to invalidate policies and practices of the Immigration Service. Just as legislators reacted in the criminal law context by increasing substantive severity, legislators reacted to this judicial expansion of rights by continually expanding the number of noncitizens who were subject to removal for criminal infractions. Likewise, legislators blamed procedural protections for the abuse of the asylum system, and viewed detention as necessary to deter such abuse.

Finally, Chapter 2 reveals a curious relationship between detention and the expedited removal provisions in the 1996 legislation. This analysis locates the roots of this controversial program in the convergence of two very different legislative concerns: one about reducing detention and another about increasing immigration enforcement. Legislators who were initially concerned about asylum seekers being indefinitely detained were supportive of speedy hearing provisions that would ensure their more efficient release. Later, during the anti-asylum fervor of the early 1990s, these same provisions were attractive to legislators who sought to remove asylum

seekers on an expedited basis in order to deter abuse of the system. As lawmakers crafted the summary exclusion provisions in the 1990s, they borrowed mechanisms that the agency had used in order to placate those who had objected to the detention of asylum seekers. As the credible fear screening process migrated from the detention arena to asylum reform, reformers soon forgot its ties to immediate release. Once a way of ensuring that asylum seekers would be released from detention, the credible fear screening mechanism became the only means of ensuring release for most asylum seekers.

Chapter 3 is motivated by the fact that the administrative state has largely failed one of the most vulnerable immigrant populations, migrant farmworkers. As it explores, one notable exception to this failure has emerged, the Equal Employment Opportunity Commission (EEOC), which began a unique initiative more than two decades ago to bring cases on behalf of farmworkers. While these efforts have escaped the attention of scholars, they have been enormously successful. The EEOC has won millions of dollars on behalf of farmworkers through this initiative, and secured a wide variety of injunctive relief. This narrative runs contrary to the one often told about the EEOC, which depicts the agency as implementing managerialist, bureaucratic responses that are not closely tailored to the circumstances of the case, and do little to either prevent or combat discrimination. As Chapter 3 demonstrates, the EEOC's efforts on behalf of farmworkers evince an innovative, case-specific approach that has allowed the agency to surmount the significant obstacles inherent in bringing these cases.

Chapter 3 constructs a database of the sixty-four cases brought on behalf of farmworkers by the EEOC from the beginning of its initiative in 1999 to the present day. It analyzes how these cases were resolved, where the cases were litigated, and how the types of relief varied across cases. It further engages in a content analysis of the forty-nine publicly available consent decrees in these cases. While many of these consent decrees did contain standard, routine types of relief, they also demonstrate case-specific, contextualized forms of relief that were often quite innovative. For example, several consent decrees secured forms of relief that fell outside the scope of the lawsuit, such as ensuring adequate housing, sanitation, and transportation conditions. Others drew upon the more current research on how to make anti-discrimination trainings most effective and required the defendants to work with outside consultants in developing their trainings to adhere to this research, for example. Still others required very specific post-decretal reporting to the EEOC, including the results of a survey distributed to all employees about any harassment they had experienced subsequent to the resolution of the case. In sum, then, an analysis of these decrees revealed an approach far different from a bureaucratic, managerialist approach, and instead included unique and case-specific forms of relief.

To supplement these data, I conducted semi-structured interviews of both EEOC employees and farmworker advocates, and also engaged in a close review of a wide range of case filings, training materials, EEOC press releases and meeting minutes, and documents from advocacy organizations. This analysis reveals that the prior scholarship has obscured an important aspect of the value of these cases: the signaling function, which ultimately enables the impact of these cases to reach far beyond the parties to an individual case. As this analysis demonstrates, these cases have played a significant role in signaling the agricultural industry that it must take

steps to prevent harassment and discrimination, and properly investigate any complaints. They have also changed the culture among employees at the farms and empowered farmworkers to report future violations, which is critical in a context in which the power imbalance between employer and employee is so extreme.

Several aspects of the EEOC's technique in these cases were critical to achieving success. First and foremost, the agency formed close partnerships with a number of outside advocacy organizations that functioned as its eyes and ears. These partnerships allowed the agency to identify cases it would not have otherwise, as farmworkers remain geographically isolated and language barriers further hinder their reporting to government agencies. In addition, the de-centralized, entrepreneurial approach of the agency allowed the farmworker initiative to diffuse from one office to the next. This was not the more typical, top-down diffusion from a national directive down to the district offices. Rather, the analysis revealed that this initiative began as the result of one Regional Attorney's efforts in one district office, and gradually diffused outward to other district offices, which closely collaborated with one another. Its more de-centralized nature permitted less traditional, and more innovative, strategies to flourish, as the agency recognized that the more typical bureaucratic processes don't function well for farmworkers. As Chapter 3 argues, the EEOC's trajectory is instructive in considering how other agencies could more effectively reach farmworkers and other vulnerable populations.

CHAPTER 1: FEDERAL COURT REVIEW OF ASYLUM APPEALS: TOWARD A RESPONSIVE DOCTRINE OF DEFERENCE

INTRODUCTION

Thousands of asylum seekers who enter this country each year depend entirely upon the system of immigration adjudication. Unfortunately, this system falls short in many ways, as several scholars have illuminated; it is a system plagued by inadequate resources, far too little time for judges to adjudicate each case, and a lack of independence in decisionmaking. For asylum applicants, their last recourse lies with the federal courts. However, as one groundbreaking study, *Refugee Roulette*, demonstrated, there are large disparities between an asylum applicant's likelihood of succeeding across every level of asylum adjudication, including the Courts of Appeals (Ramji-Nogales et. al 2009). This invites further inquiry into which factors might driving these differences across the appellate courts, and how we may situate the role of the federal courts in reviewing this agency in crisis. Given that the immigration agency is widely perceived to be severely compromised and larger changes are unlikely to be forthcoming soon, federal courts may be the only meaningful level of review for the few asylum seekers who reach them.

Taking data over seven years in five different Courts of Appeals, this Chapter explores these questions. Using logistic regression analysis, it finds that this variation between remand rates cannot be explained by a difference in the types of claims heard across the circuit courts; in other words, it does not simply reflect the fact that circuits with very low remand rates are hearing fundamentally different types of cases than circuits with higher remand rates. Rather, these disparities reflect very different approaches across circuits in reviewing the immigration agency. While the standard of review imposed by Congress appears to be very constraining, a qualitative analysis of this data reveals that circuits have fashioned rules that have the effect of either narrowing or broadening the scope of the court's review of the immigration agency.

The Chapter proceeds in five parts. First, it provides the relevant context, and sets forth the process by which an asylum case reaches the federal circuit courts and the relevant standards of review. Next, it presents the data and methods. As the third section demonstrates, the disparities in remand rates cannot be explained by a difference in the composition of cases. Rather, even when controlling for a wide variety of characteristics across a range of logistic regression models, having one's case heard in the Seventh or Ninth Circuits was associated with a significantly higher likelihood of remand than those in the First, Tenth, or Eleventh. This analysis also reveals the need for a closer qualitative analysis of the doctrinal differences between courts, such as differences in how courts treat a prior adverse credibility finding by the agency. Accordingly, the fourth section digs deeper into the data, exploring qualitatively the ways in which the courts differ in their application of the standard of review. It reveals that the circuits have adopted differing approaches with respect to how searching or circumscribed the scope of their review is in reviewing asylum appeals, and that these approaches affect the likelihood of remand.

Finally, the last section turns to the implications, and begins by analyzing how the federal

courts' role in asylum adjudication comports with existing theories of judicial review. In part, these data reflect the elasticity of the appellate review model: even as courts purport to apply an identical and constraining standard of review, they are reaching starkly different results. Recent work by Jonah Gelbach and David Marcus (2018) demonstrates that courts can play a critical function when reviewing agencies with high volumes of adjudication, which they term "problem-oriented oversight." This type of oversight arguably allows judges to identify agencies in crisis, as in this context: it permits them to recognize persistent problems that go unaddressed by the agency. The notion of problem-oriented oversight also has critical implications for the theoretical underpinnings of the deference doctrine in asylum law. As scholars such as Adam Cox (2008) have recognized and the data in this project reinforce, some courts are arguably not according the immigration agency the deference envisioned by the *Chevron* doctrine. While Cox argues that the *Chevron* doctrine doesn't contemplate courts adjudicating the competence of an agency on a case by case basis, the notion of problem-oriented oversight suggests that courts could appropriately play this role.

This result would be normatively desirable, as it would result in a deference doctrine that permits courts to be more responsive to agencies in crisis. The alternative affords the courts very little latitude to adjust their level of deference to major crises in the quality of adjudication, other than through the adoption of the court-fashioned rules examined here. As I explore, these rules often result in strained interpretations, as courts try to demonstrate that their more searching deference comports with the narrow standard of review. The notion of what I term a "responsive doctrine of deference" is particularly compelling in the asylum context, where the need for judicial review to legitimize the actions of the agency is at its most compelling. As I outline below, there is virtually no evidence that the immigration agency is politically responsive to its litigants, which renders the typical political accountability justification much less forceful. Similarly, as Michael Kagan has argued, there are compelling reasons to doubt the expertise rationale in this context. Accordingly, I argue that we ought to develop a doctrine of deference that permits courts to respond to evidence of an agency in crisis.

1.1 BACKGROUND AND CONTEXT

1.1.1 The Asylum Process in the United States

As many scholars have recognized, asylum law is distinctive as one of the most thoroughly international areas of U.S. law (Farbenblum 2011: 1059). Indeed, Congress passed the Refugee Act of 1980 with the explicit intent to bring the U.S. into conformity with its obligations under the international Protocol Relating to the Status of Refugees. To establish eligibility for asylum, an applicant must demonstrate that he or she is a "refugee," or a "person who is . . . unable or unwilling to return to . . . [her home] country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (INA § 101(a)(42)(A))."

For the few asylum seekers who reach the federal courts, their claim first proceeds through up to three levels of review. If one applies for asylum affirmatively with the U.S. Citizenship and Immigration Services (USCIS), the applicant first receives an interview with an asylum officer, who may directly grant the application, or refer the case to an immigration judge, before whom

the applicant may renew his application *de novo* (8 C.F.R § 208.4(b)(3)(2012)). Asylum officers refer approximately 65 percent of affirmative applications to the immigration courts (Ramji-Nogales et al. 2009: 31). Alternatively, if the Department of Homeland Security has initiated removal proceedings, one may apply for asylum defensively and receive a merits hearing in the immigration court. Immigration courts are housed within the Executive Office of Immigration Review (EOIR), a branch of the Department of Justice (DOJ) (EOIR 2016) Following the immigration judge's decision in either an affirmative or a defensive case, either the government or the applicant may appeal to the Board. The percentage of cases appealed from the immigration courts to the Board tends to fluctuate, ranging from 35-58 percent of all cases since 1990 (Miller et. al 2015: 43). From the Board's decision, only the asylum applicant may appeal to the federal circuit courts (Law 2011: 664). While the applicants may then appeal from the circuit courts to the Supreme Court, the Courts of Appeals function as the court of last resort for the vast majority of asylum applicants, as the Supreme Court rarely hears asylum claims. As one Ninth Circuit Judge explained, "That's why we are important. The U.S. Courts of Appeals is the end of the line" (*Id.*)

While asylum applicants have the right to counsel that they obtain, they do not have any right to government-provided counsel. Chief Judge Katzmann of the Second Circuit has argued that the lack of representation for noncitizens in removal proceedings constitutes a "substantial threat to the fair and effective administration of justice" (Dolnick 2011: A24). Ingrid Eagly and Steven Shafer found that immigrants with representation were five-and-a-half times more likely to obtain relief from removal in immigration court (Eagly and Shafer 2015). David Hausman's work shows that the appeals process is almost exclusively used by immigrants who have representation (2016: 1194). Hausman further demonstrates that the appeals process for the immigration courts does not promote uniformity among immigration court decisions, as the removal orders of harsher immigration judges are no more likely to be reversed on appeal by the Board or Courts of Appeals. As he explains, this is because they are reviewing an unrepresentative sample of cases, as immigration judges with lower grant rates more often order immigrants deported early in their proceedings, before they have found a lawyer or filed an application for relief. Thus, the Board rarely reviews a meritorious claim of someone who lacked representation initially and was assigned an immigration judge with a very low grant rate (*Id.* at1195).

1.1.2 The History of Asylum Adjudication

The corps of immigration judges has expanded rapidly in recent years. There are now approximately 350 immigration judges located in 60 immigration courts across the nation, and they collectively hear roughly 300,000 cases per year (Dolnick 2011: A2). The Board is also a component of EOIR, and currently has sixteen members who hear roughly 35,000 cases per year (EOIR Website). The Board is authorized twenty-one members, and currently has a total of sixteen permanent members and four temporary members (EOIR 2016). Asylum adjudication takes place within a larger context of a crushing backlog in the immigration courts. From 1998 to 2018, the number of deportation cases increased eight-fold, while the number of immigration judges increased by merely a third (TRAC Pending Cases 2020). At their current completion rate, it would take the immigration courts 3.6 years to clear their backlog if they were to take no new cases ("TRAC Backlog 2018"). Many immigrants wait more than 1,000 days for their cases to be resolved (AIC Asylum Fact Sheet 2020). Several judges in the Courts of Appeals have testified that this vast under-resourcing inevitably affects immigration judges' ability to decide cases with

the requisite care and thoroughness (Stmt. of J. John Walker 2006). As Judge Bea emphasized in testimony before Congress, many immigration judges' decisions reflect the fact that they do not have adequate time to review the entire record before rendering a decision (TRAC Improving the Immigration Courts 2008). It appears little has changed since Judge Bea's testimony in 2007; in 2017, immigration judges reported to the GAO that they do not have sufficient time to conduct essential tasks such as "case-related legal research or staying updated on changes to immigration law" (Immigration Courts GAO Report 2017: 31). Immigration judges sorely lack adequate support staff and average approximately one law clerk for every four judges (Legomsky 2010: 1652-53). As Andrew Kim argues, such shortages are acutely felt in a court in which many asylum seekers lack representation and do not speak English, and the immigration judges have a duty to establish and develop the factual record (2013: 611).

A variety of changes to the decisionmaking within the Board have rendered its review much less meaningful. Prior to 2002, the majority of appeals from immigration judges were decided by a three member panel (Caplow 2012: 4-5). This changed when then Attorney General John Ashcroft instituted a variety of significant changes in the way the Board decides immigration cases in 2002. Chief among these changes was a new policy permitting most appeals to be decided by a single-member panel of the Board in an "affirmance without an opinion" (AWO). Between 2006 and 2015, more than 90 percent of appeals were reviewed by a single Board member (Immigration Courts GAO Report 2017: 32). These decisions often contained a single line that had no reasoning or analysis (Caplow 2012: 5). A report by the Government and Accountability Office (GAO) found that three-member panels ruled in favor of noncitizens in 52 percent of cases, while the single-member opinions did so in only 7 percent (Immigration Courts 2017: 10). These "streamlining" changes resulted in a dramatic increase in the number of immigration cases appealed to the federal courts (Kagan 2012: 102). In the peak of the resulting "surge" in 2004, immigration cases accounted for 88.2 percent of all administrative appeals and 17.2 percent of all federal appeals (Caplow 2012: 2-3; U.S. Court Statistics 2004; Table B-3). While these have leveled off to some degree, federal courts now receive a steady rate of immigration appeals, often hovering at around 10-14% of all federal appeals (Gelbach and Marcus 2018: 1100).

This system has been long criticized for its failure to separate the enforcement and adjudicative functions, and several overt efforts to politicize the process. In the most dramatic politicization of immigration adjudication, John Ashcroft reduced the size of the Board from twenty-three members to eleven in 2002, and a study by former congressional counsel Peter Levinson demonstrated that the Board members who were "re-assigned" were those with decision rates most favorable to non-citizens (Levinson 2004: 1155-56). Following these changes, the authors of *Refugee Roulette* found that the success rate of asylum applicants before the Board dropped from 37 percent in 2001, to less than 10 percent in 2005 (Ramji-Nogales et. al 2009: 68). These changes were felt acutely at the federal appellate level, as well; the Ninth and Second Circuits (which together hear approximately 70% of all asylum appeals) saw an "astounding 1,400% increase in appeals," and the Second Circuit's docket became so overburdened that it eliminated oral arguments for asylum appeals in September 2005, and began a process of staff attorney review instead (MacLean 2005: S1). In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docket and 34 percent of the Ninth Circuit docket (Legomsky 2010: 1647). Based upon interviews with fifteen former immigration judges and supervisory officials, Amit Jain (2019: 261) argues that immigration courts exhibit core features of a tightly

hierarchical bureaucracy rather than adversarial courts.

Scholars have proposed a number of means of improving the problems at the immigration agency. Stephen Legomsky (1989), for example, proposes giving more decisional independence to immigration judges by moving them from the Department of Justice into a new executive branch tribunal that would be independent from the Attorney General's oversight. He further recommends eliminating the Board entirely, and replacing the appellate phase with a single round of review by a new Article III immigration court, comprised of district and circuit judges serving two-year assignments (*Id.*) Lindsay Vaala (2017: 1036) provides a number of ways of training immigration judges in order to decrease the likelihood of bias, and increase the quality of decisionmaking.

1.1.3 The Standard of Judicial Review

The circuit courts review the opinion of the immigration judge ("IJ") where the Board has not conducted its own review, such as when it issues an affirmance without an opinion. When the Board has conducted its own review, the courts limit their review to the Board's decision, except to the extent it has expressly adopted part or all of the IJ's opinion (*Seck v. U.S. Attorney General*, 11th Cir. 2011: 1364). Thus, the courts are sometimes reviewing only the immigration judge's opinion, sometimes only the Board's opinion, and sometimes a combination of both. Several of the traditional standards applied to the review of agency actions also apply in the immigration context. The courts review questions of law *de novo*, deferring to the agency's reasonable interpretations of the statutes and regulations it administers (*Baraket v. Holder*, 2nd Cir. 2011: 58). Constitutional challenges are also reviewed *de novo* (*Vicente-Elias v. Mukasey*, 10th Cir. 2008: 1094). For issues reliant upon the discretionary judgment of the agency, such as a motion to reopen, an appellate court reviews for an abuse of discretion (*Singh v. Holder*, 9th Cir. 2011: 885). The courts employ the substantial evidence standard in reviewing the factual findings of the agency, which includes the determination of whether the applicant is credible (*See, e.g., Ismaiel v. Mukasey*, 10th Cir. 2008: 1204; *Khup v. Ashcroft*, 9th Cir. 2004: 904). The courts in the dataset all describe this standard in nearly identical language, explaining that the substantial evidence standard means that the agency's factual findings are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary, and that they must be supported by reasonable, substantial, and probative evidence on the record as a whole. Under the Immigration and Nationality Act, "the administrative findings of facts are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary" (8 U.S.C. § 1252(b)(4)(B)). This requirement derives its origin from the Supreme Court's 1992 decision in *INS v. Elias-Zacarias* (481, n.1). As the Ninth Circuit has recently pointed out, the substantial evidence standard is at least in one sense stricter than the review of district courts (*Dai v. Sessions*, 9th Cir. 2018: 869*)*. When appellate courts review a decision of a district court, they may "affirm on any ground supported by the record even if the district court did not consider the issue" (*Perfect 10, Inc. v. Visa Int'l. Serv. Ass'n*, 9th Cir. 2007: 794). When the courts review an administrative decision, however, they "cannot deny a petition for review on a ground [on which] the BIA itself did not base its decision" (*Hernandez-Cruz v. Holder*, 9th Cir. 2011: 1110).

Several scholars have proposed changing the standard of review. Michael Kagan suggests that the standard of review, based upon the presumption that judges ought to leave in place a decision with which they disagree, overturning only if any reasonable adjudicator would be so

compelled, is long overdue for reconsideration, and based upon largely discredited assumptions. He proposes a shift in the standard of review to a balancing test instead, akin to the one articulated in *Mathews v. Eldridge* (Kagan 2012: 106). Andrew Kim (2013: 610-11) argues that the question of whether a noncitizen meets the statutory definition of refugee is truly a mixed question of law and fact, rather than purely one of fact. Accordingly, it is not appropriate to assess it under the deferential substantial evidence standard, and courts should instead accord less deference to these determinations in asylum cases (*Id.* at 610-11).

In addition, federal appellate review of agency decisions has long been guided by the Supreme Court's decision in *Chevron* (*Chevron U.S.A v. Natural Resources Defense Council Inc.*, 1984). *Chevron* expanded the sphere of courts' mandatory deference to agencies "through one simple shift in doctrine: it posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering" (Merrill and Hickman 2001: 833). In dictum, the Supreme Court stated that the BIA should receive *Chevron* deference in interpreting the asylum and withholding of removal provisions of the Immigration and Nationality Act (*INS v. Cardoza-Fonseca*, 1987: 446). Thus, in asylum cases, *Chevron* deference is given to precedential opinions of the Board that interpret governing legal standards, or non-precedential decisions of the Board that rely on applicable Board precedent (*Escobar v. Holder*, 7th Cir. 2011: 542).

As in the case of the substantial evidence standard, several scholars have questioned whether *Chevron* deference is appropriate in the asylum context, as discussed *infra*. Michael Kagan questions whether *Chevron* is appropriate in asylum law, as it doesn't involve technical expertise that would make an agency better suited to address these cases, and the politicization of immigration adjudication is at odds with the stability that Congress meant to formalize with the passage of the Refugee Act. Maureen Sweeney similarly argues that there should be no *Chevron* deference in interpreting the Refugee Act of 1980, as the institutional location of asylum adjudication within an enforcement branch makes it critical for the courts to serve as a check on agency power.

1.1.4 Studies of Immigration Adjudication

For a long while, empirical work on immigration adjudication remained curiously absent from both the administrative law scholarship and the courts literature within political science scholarship. Writing in 2007, Margaret Taylor lamented that immigration law was one of the only areas of administrative decisionmaking that had been left largely unexplored. A burgeoning literature has answered this call, and painted a much richer and more nuanced portrait of how immigration cases are decided. Schoenholtz, Schrag, and Ramji-Nogales provide the most comprehensive treatment of decisionmaking at the asylum officer level in a separate book, analyzing more than 300,000 cases (2014: 3). They find that where an applicant first seeks asylum has an enormous effect on her chances of success, as rates vary dramatically depending upon the location of the asylum officer and several factors specific to the officer, such as her educational background. They propose a number of reforms to mitigate these effects, such as requiring officers to have law degrees and increasing the level of engagement between individual officers and regional offices (*Id.* at 230).

Much of the empirical work on asylum has focused on decisionmaking at the immigration judge level. A vast body of work in international relations has examined the competing roles of human rights and geopolitical and material interests (*see, e.g.*, Loescher and Scanlan 1998). More recent work has shown that immigration judges are responsive to the humanitarian needs of applicants, but that they are often also influenced by national interests, including national security and economic concerns (Rosenblum and Salehyan 2004; Holmes and Keith 2010). Analyzing a novel database of more than 400,000 immigration court cases, David Hausman (2016) finds that disparities across immigration judges are large and statistically significant, as the average standard deviation of judge relief rates within the nineteen largest immigration courts between 1998 and 2004 was approximately nine percentage points (*Id.* at 1187). Most importantly, Hausman finds that the decisions of the harshest immigration judges are not more likely to be overturned through the appellate process, as these judges are more likely to refuse to grant a motion for continuance in order to allow litigants to find counsel. Banks Miller, Linda Camp Keith, and Jennifer Holmes (2016) published the most comprehensive book analyzing asylum decisions by immigration judges, examining more than half a million cases over two decades. They argue that the decisions of IJ are sensitive to their ideological beliefs and the local and demographic conditions where the courts are located. Similarly, Daniel Chand and colleagues (2016) find that immigration judges in communities where citizens more often vote Republican grant asylum less often, whereas those in states with Democratic governors and state legislative majorities grant asylum more often. Most recently, work by Amy Semet and Catherine Kim (2018) demonstrates that immigration judges have been more likely to deny asylum claims during the Trump administration. Taking a cross-national perspective, Rebecca Hamlin (2014) contrasts the process of refugee status determination in the U.S., Canada, and Australia in rich detail, and finds that the level of insulation the agency enjoys from political interference and judicial review is a critical factor in explaining differences in outcomes across systems.

Refugee Roulette was the seminal work that spurred much of the preceding literature, as it analyzed disparities in every level of asylum adjudication in the years 2004 and 2005 (Ramji-Nogales et. al 2009: 31). In the most comprehensive study of asylum adjudication to date, they documented that asylum grant rates varied dramatically from one asylum officer to the next, and demonstrated that political changes the composition of the Board had resulted in decreased remand rates (*Id.* at 56). Most relevant to this study, the authors of *Refugee Roulette* were also the first to establish the wide disparities between remand rates in asylum appeals before the Courts of Appeals, even when one only considered appeals from the fifteen countries from which the most asylum seekers originate (*Id.* at 365). With a few notable exceptions, there has been very little empirical work on asylum decisionmaking within the federal appellate courts. David Law (2005) demonstrates that judges are more likely to vote according to their ideological preferences in published decisions, and less likely to do so in unpublished opinions. In several articles, Scott Rempell has examined aspects of the appellate court review of asylum decisions, including the variation in their interpretation of the legal definition of both credibility (2008) and persecution (2014).

Given the paucity of scholarship on decisionmaking in asylum appeals before the circuit courts, *Refugee Roulette* invites further inquiry into which factors may be driving these differences, as this was outside the scope of their already broad work. Accordingly, this Chapter answers this

call, examining the opinions in five circuits across seven years in order to better understand the disparities between them.

1.2 DATA AND METHODS

To better understand the role played by judicial review in the asylum context, this project selected a range of circuit courts to examine. The First, Seventh, Ninth, Tenth, and Eleventh Circuits were selected in order to maximize variation in size, remand rate, and the number of asylum appeals typically heard each year. In part, this choice was also a function of the nature of the opinions in the circuits, as some circuits' opinions in asylum appeals tend to be so brief that many of the variables of interest could not be identified. Asylum appeals were coded over a seven year time period, 2007-2013, which was chosen with the aim of excluding several significant events that had happened on either side of this period. The inquiry begins in 2007, once the large surge in appeals that followed the streamlining measures had settled, and the Courts of Appeals had adapted to these cases becoming a steady part of the their dockets (Caplow 2012: 4). The concluding year of this study, 2013, was prior to when many of the asylum cases from the surge of unaccompanied children would have reached the Courts of Appeals, which also brought important changes to the adjudication environment that might have complicated this analysis (Hong 2018: 553).

In every circuit but the Ninth, every opinion that constituted a merits opinion on an asylum claim was included in the dataset. In the Ninth, which hears far more asylum appeals than any other circuit in the country, a sample of 100 opinions per year was randomly chosen. Cases that may have mentioned the term "asylum," but were not in fact asylum cases decided on the merits, were then eliminated from the dataset. This might include, for example, a mention that an immigrant had previously sought asylum but was now appealing a criminal conviction. Similarly, motions to reopen and motions for reconsideration were also excluded, in order to compare the most similar claims. This process yielded approximately 2,111 cases, or observations.

The data were coded for twenty-nine variables. These focused on factors related to attributes of the applicant, such as the gender of the applicant, whether the applicant had dependents, and whether they had legal representation. Factors relating to the case were also coded, such as the basis of the claim (political opinion, membership in a social group, nationality, religion, or race), whether there was an adverse credibility finding below at either level, whether the court reviewed the IJ's and/or the Board's opinion, and whether the case was published. Attributes relating to the court were also coded, including the identity of the judges deciding the case, their gender, and the party of each judge's nominating President. All of these factors were included in order to control for as many characteristics about the asylum seekers and panels as possible, and to generate a rich descriptive account of which asylum cases reach the Courts of Appeals. These data also permit an analysis of whether the disparities across circuits persist once these case and judicial characteristics are taken into account.

1.3 RESULTS

1.3.1 Summary Statistics and Regression Analysis

The figure below provides summary statistics in order to give a sense of the full range of the types of cases appealed across the courts. It first provides the percentage of claims brought under each of the five possible bases for asylum, and also provides the percentage of applicants who were represented before the Court of Appeals, the percentage of women who filed (alone) for asylum claims, and the percentage of cases that mentioned that the applicant had one or more children. An applicant may assert several bases for an asylum claim (membership in a social group, political opinion, nationality, religion, and/or race), so these claims total more than one hundred percent in each court. In addition, in some opinions (particularly in the Ninth Circuit), the basis for the asylum claim was not explicitly stated, and could not be coded.

Figure 1: Summary of Case Statistics

Case Attribute	First Circuit	Seventh Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit	Overall Average
Membership in a Social Group	23.9%	26.2%	12.8%	19.3%	25.1%	21.2%
Political Opinion	51.4%	41.2%	21.4%	40.7%	60.3%	44.9%
Nationality	0.8%	3.6%	0.2%	0.0%	1.3%	1.1%
Religion	30.5%	22.6%	17.7%	40.0%	15.8%	20.3%
Ethnicity	11.9%	10.0%	7.8%	18.6%	8.0%	9.3%
Representation	100.0%	92.3%	84.2%	88.6%	87.9%	88.7%
Female Applicants	28.8%	22.2%	22.3%	15.0%	29.5%	25.6%
Applicants with Children	43.0%	35.3%	10.0%	37.4%	29.8%	27.8%

Figure 1 provides summary statistics on the applicants. Applicants may claim more than one basis for asylum, meaning that the claim bases may total more than 100%. On the other hand, some cases did not provide the basis for the claim and the variable could not be coded; accordingly, in the Ninth Circuit, the bases do not total 100%. Source: Data include all asylum claims on Lexis Nexis from 2007 to 2013 in the First, Seventh, Tenth, and Eleventh Circuits, and a random sample of one hundred cases from the Ninth Circuit each year.

As Figure 1 reveals, most of the asylum seekers before the Courts of Appeals had representation. This is part due to the fact that only represented asylum seekers tend to avail

themselves of the appeals process, and also reflects the efforts of some judges to initiate programs in their circuits to provide such representation (*see,* e.g., Dolnick 2011: A24; Hausman 2016: 1194). It reveals that certain types of asylum claims are made more and less frequently across circuits: for example, claims based upon one's nationality were quite rare in all courts. Claims based upon one's ethnicity were similarly less frequent, though they were more common in the Tenth Circuit. Unsurprisingly, claims based upon one's political opinion were the most common in all circuits, which likely reflects the origins of asylum law. Indeed, prior to the 1980s, the prototypical refugee was an Eastern European or Vietnamese refugee fleeing a Communist regime, and scholarship has probed the relative advantage of these types of claims. Jonathan Simon (1998: 582) notes that such refugees "presented an opportunity to create powerful propaganda about the relative virtues" of Democratic governments. It also reflects that men bring asylum appeals more often than women.

In addition, the figure below divides applicants by country of origin using two different measures. The first shows the composition of applicants from each region of the world within each circuit: Africa, Europe, Asia, Latin America, Central America and the Caribbean, and Oceania. The second measure, labeled "Asylum Producing Countries," uses a method employed by the authors of *Refugee Roulette,* and considers what percentage of appeals within each court are from one of fifteen countries from which at least five hundred claims came before asylum offices or immigration courts, and from which at least 30% of claims were granted (Ramji-Nogales et. al 2009: 18). This is one way of narrowing the cases in order to examine a roughly comparable set of claims across circuits.

Figure 2: Summary Case Country of Origin Statistics

Region	First Circuit	Seventh Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit	Overall Average
Europe	11.5%	16.3%	2.5%	1.4%	10.7%	8.4%
Africa	9.1%	15.8%	4.8%	11.4%	4.1%	6.6%
Asia	38.3%	33.0%	38.0%	61.4%	21.9%	32.2%
Oceania	5.3%	8.1%	1.3%	0.0%	0.1%	1.9%
Latin America	9.9%	3.2%	1.8%	7.1%	28.1%	14.5%
Central America & Caribbean	21.8%	5.9%	19.1%	15.7%	14.9%	16%
Asylum-Producing Country	34.6%	46.6%	27.4%	27.9%	51.4%	40.5%

Figure 2 provides summary statistics on the applicant's country of origin. Source: Data include all asylum claims on Lexis Nexis from 2007 to 2013 in the First, Seventh, Tenth, and Eleventh Circuits, and a random sample of one hundred cases from the Ninth Circuit each year.

As Figure 2 reveals, there are important differences in the regions from which asylum seekers originate across circuits. Asylum seekers may only file appeals in the circuit in which the immigration judge decided the underlying immigration case (Ramji-Nogales et. al 2009: 50). Thus, the origin of many asylum seekers in each circuit tends to track already well-established migration patterns. The Eleventh Circuit, for example, receives a significant number of asylum seekers from Central and South America, for example, whereas the Ninth Circuit receives a majority of asylum seekers from Asia. These geographic differences might lead one to wonder if any difference in remand rates might reflect (at least in part) differences in the composition of cases. Accordingly, I control for these geographic differences in the regression analysis that follows, using two alternative measures: the region of the applicant's country of origin and whether the applicant was from an asylum-producing country (described *supra*).

Figure 3 presents a summary of the characteristics of the judicial panels represented in the data. Two of the 2,111 cases were decided en banc, and two were decided by two judge panels. The remaining 2,107 cases were decided by a three judge panel, and the judges' race, ethnicity, and political ideology were coded. The party of the appointing President was used as a proxy for

each judge's political ideology, though this has been shown to be an imperfect measure, at best. As Figure 3 demonstrates, nearly half of the panels had at least one female judge on panel, and about one third of panels had at least one judge of color. More cases in the data were heard by a Republican majority panel (57.6%) than by a Democratic majority.

Figure 3: Panel Characteristics

Panel Characteristics	**Overall Average**
At least one female judge on panel	46.1%
At least two female judges on panel	15.4%
At least one judge of color on panel	33.4%
Two or more Republican appointed judges on panel	57.6%

Figure 3 presents characteristics of the three-judge panels in the data. Source: Data include all asylum claims on Lexis Nexis from 2007 to 2013 in the First, Seventh, Tenth, and Eleventh Circuits, and a random sample of one hundred cases from the Ninth Circuit each year.

As reflected in Figure 4, the data also show large differences in the remand rates across circuits, a finding consistent with *Refugee Roulette.* The authors of *Refugee Roulette* found even more dramatic differences in 2004-2005, and this difference could reflect a number of factors. First, the courts were dealing with the effect of a "surge" of appeals following changes to the composition of the Board, discussed *infra,* in 2004-2005. In addition, the authors did not exclude motions to reopen (*Id.* at 77-80). The current project excluded these and motions for reconsideration in order to limit comparison to cases reviewing the most similar types of cases. These results show that the remand rates vary from as low as 5.7% in the Tenth Circuit, to as high as 26.7% in the Seventh Circuit from 2007-2013.

Figure 4: Average Remand Rate by Circuit Court

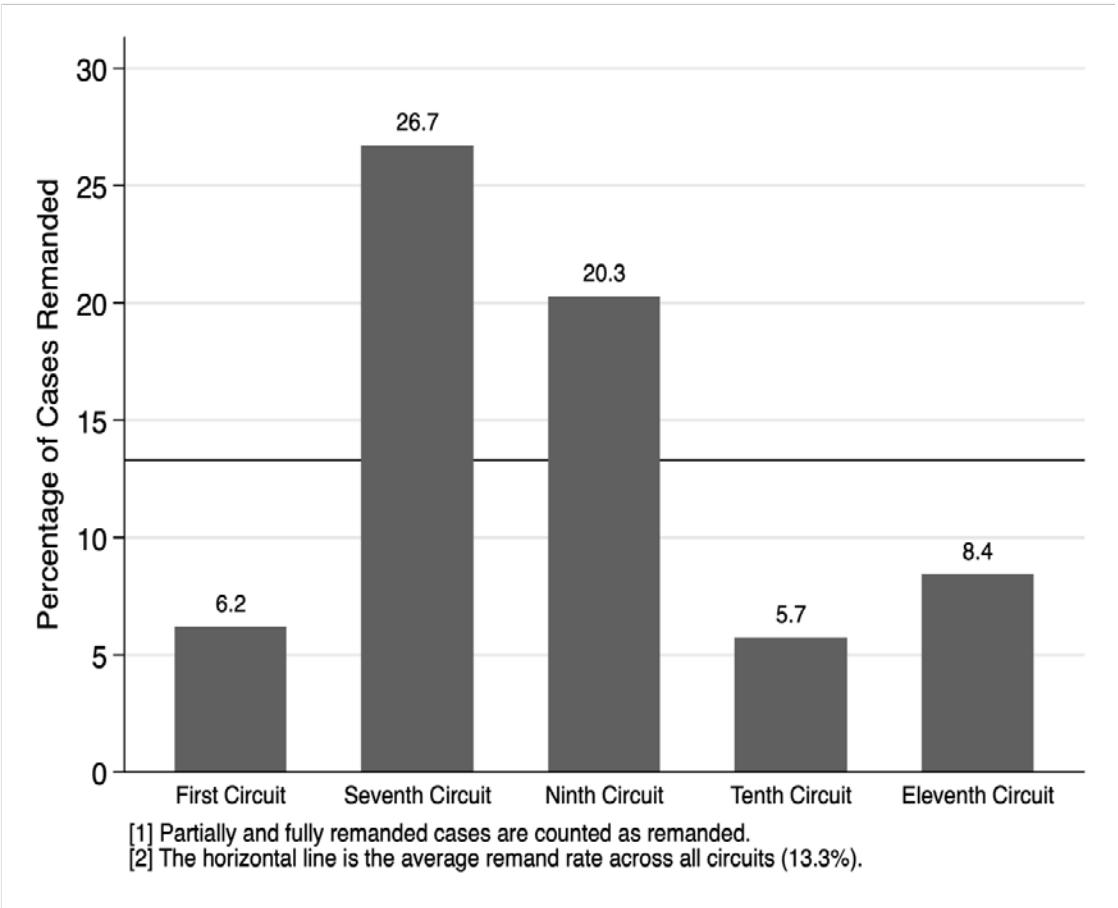

Figure 4 reflects the average remand rate across circuits. Source: Data include all asylum claims on Lexis Nexis from 2007 to 2013 in the First, Seventh, Tenth, and Eleventh Circuits, and a random sample of one hundred cases from the Ninth Circuit each year.

Lastly, logistic regression analysis was performed in order to understand whether the difference in remand rates persists even when controlling for case characteristics, and the results are reported below. These regressions were run using robust standard errors (reported as p-values in parentheses). While unobserved differences across circuits preclude a causal claim here, the analysis is useful in ruling out the possibility that the disparities reflect large differences in the cases across circuits. In order to determine which case characteristics were significant in predicting whether a remand would occur, logistic regressions were estimated with remand (either partial or total) as the dependent variable.

Figure 5: Logistic Regression Results

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9
Any adverse credibilty		-0.036	-0.077	0.108	-0.160		-0.051	-0.060	-0.183
determination below		(0.796)	(0.613)	(0.506)	(0.301)		(0.715)	(0.696)	(0.239)
Circuit-level variables									
First Circuit	-0.332	-0.336	-0.468	-0.254	-0.381	-0.327	-0.333	-0.521	-0.422
	(0.256)	(0.253)	(0.128)	(0.426)	(0.243)	(0.282)	(0.275)	(0.103)	(0.206)
Seventh Circuit	1.379 **	1.378 **	1.429 **	1.580 **	1.321 **	1.465 **	1.463 **	1.466 **	1.355 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Ninth Circuit	1.020 **	1.018 **	1.118 **	1.388 **	1.265 **	1.016 **	1.013 **	1.077 **	1.232 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Tenth Circuit	-0.414	-0.417	-0.318	-0.258	-0.229	-0.301	-0.306	-0.288	-0.165
	(0.280)	(0.278)	(0.425)	(0.532)	(0.566)	(0.443)	(0.437)	(0.488)	(0.686)
Individual effects									
Female applicant			0.309	0.417	0.333			0.310	0.325
			(0.289)	(0.254)	(0.264)			(0.288)	(0.276)
Male applicant			0.211	0.283	0.240			0.197	0.219
			(0.435)	(0.415)	(0.386)			(0.467)	(0.428)
Child			0.024	0.0646	-0.016			0.040	-0.009
			(0.888)	(0.717)	(0.927)			(0.811)	(0.956)
Basis of claim									
Membership in a			-0.225	-0.0181	-0.080			-0.283	-0.099
social group			(0.217)	(0.924)	(0.664)			(0.126)	(0.595)
Political opinion			0.191	0.301	0.185			0.212	0.189
			(0.234)	(0.076)	(0.271)			(0.190)	(0.261)
Nationality			-0.0984	-0.0908	-0.309			-0.114	-0.287
			(0.876)	(0.894)	(0.635)			(0.858)	(0.666)
Ethnicity			-0.101	-0.0336	-0.195			-0.188	-0.220
			(0.688)	(0.900)	(0.448)			(0.472)	(0.392)
Religion			0.216	0.309	0.148			0.230	0.154
			(0.239)	(0.102)	(0.430)			(0.210)	(0.409)
Representation by counsel			0.353	0.227	0.235			0.351	0.226
			(0.141)	(0.311)	(0.333)			(0.143)	(0.351)
Country-level characteristics									
Asylum-producing				-0.219				-0.219	
country				(0.155)				(0.158)	
Europe					0.089				0.057
					(0.745)				(0.836)
Africa					0.238				0.245
					(0.402)				(0.387)
Asia					-0.346				-0.345
					(0.104)				(0.106)
Oceania					-0.471				-0.464
					(0.345)				(0.350)
Latin America					-0.361				-0.408
					(0.175)				(0.129)
Central America					-1.400 **				-1.394 **
& Carribbean					(0.000)				(0.000)
Judge & panel-level variables									
Majority republican-						-0.363 *	-0.363 *	-0.270 †	-0.278 †
appointed						(0.012)	(0.012)	(0.077)	(0.071)
One or more female						0.0921	0.0942	0.079	0.052
judges						(0.526)	(0.517)	(0.604)	(0.736)
One or more minority						-0.0291	-0.0297	-0.074	-0.066
judges						(0.841)	(0.838)	(0.632)	(0.669)
Constant	-2.389 **	-2.375 **	-3.002 **	-2.925 **	-2.602 **	-2.265 **	-2.246 **	-2.775 **	-2.420 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Observations	2,111	2,111	1,947	1,947	1,947	2,109	2,109	1,945	1,945

Robust p-value in parentheses; † p<0.10, * p<0.05, ** p<0.01

Figure 5 presents logistic regression models predicting likelihood of remand. Source: Data include all asylum claims on Lexis Nexis from 2007 to 2013 in the First, Seventh, Tenth, and Eleventh Circuits, and a random sample of one hundred cases from the Ninth Circuit each year.

One key finding of the regression analysis is that one factor remained significant, even when controlling for a wide range of case-specific variables: whether a case came from the Seventh or Ninth Circuit. This remained significant across all of the estimated models, and positively predicted remand. In other words, even when controlling for a wide variety of relevant variables, the sample shows that an asylum case was more likely to be totally or partially remanded if it was heard by the Seventh or Ninth Circuits. Thus, it appears that their much larger remand rates cannot be explained by the fact that they are hearing different types of claims than the other courts in the study. These effects were strong and stable across different logistic regression models that took into account whether an adverse credibility determination was made below. In Models 3-5, they remained significant when controlling for case-specific characteristics, such as the basis for the asylum petition, the applicant's gender, whether the applicant had representation, and two different means of controlling for the applicant's country of origin. Model 6 introduced judge and panel-level characteristics, such as whether the panel had a majority of judges appointed by a Republican president, whether the panel had one or more female judges, and whether the panel had one or more minority judges.[1] The circuit effects were robust to these characteristics as well, and remained significant in all models, including Model 9, which controlled for the widest variety of case and judicial characteristics.

Whether a case was heard by the Seventh or Ninth Circuits was not the lone significant factor, however. Rather, other characteristics also appeared to be significantly associated with remand. Having one's case heard by a majority of Republican-appointed judges was significant when only considering the circuit and judicial characteristics, though this became less important ($p=.10$) when controlling for other case characteristics. At the conventional statistical significance threshold ($p=0.05$), the models also showed that an applicant from the Central American or Caribbean regions was significantly less likely to receive remand (Model 5). This result warrants further investigation in future research to determine whether any country-specific effects are strongly influencing the results. For example, further analysis should parse the effects of high volume countries, such as El Salvador. Prior work has explored the effect of country of origin on asylum grant rates, finding that applicants from Spanish and Arabic countries are significantly less likely to be successful at the IJ level (Rottman et. al 2009). Other work has explored some country-specific effects, concluding that applicants from less democratic countries were not significantly more likely to be granted remand (Williams and Law 2012: 107).

While representation was not significant in any of the models, this likely reflects the fact that the vast majority of applicants in the data had representation before the Courts of Appeals. The *quality* of representation is not measured here, and future work should explore this factor as well. Previous scholarship has found that representation is extremely significant in immigration court. In addition, the authors of *Refugee Roulette* note that applicants represented by Georgetown's Clinic, for example, are nearly twice as likely to be granted asylum as applicants represented by other counsel in immigration court (Ramji-Nogales et. al 2009: 45). No scholarship has yet explored the effect of the quality of representation in asylum appeals in the federal courts. Exploring the barriers that asylum seekers face in securing quality representation, Sabrineh Ardalan (2016) develops a model for holistic representation.

[1] The purpose of this limited inquiry was to test whether the circuit effects were robust to judicial characteristics. Future work could fruitfully explore the relationship between likelihood of remand and panel characteristics in much more detail.

Figure 6: Remand with Adverse Credibility Determination Below

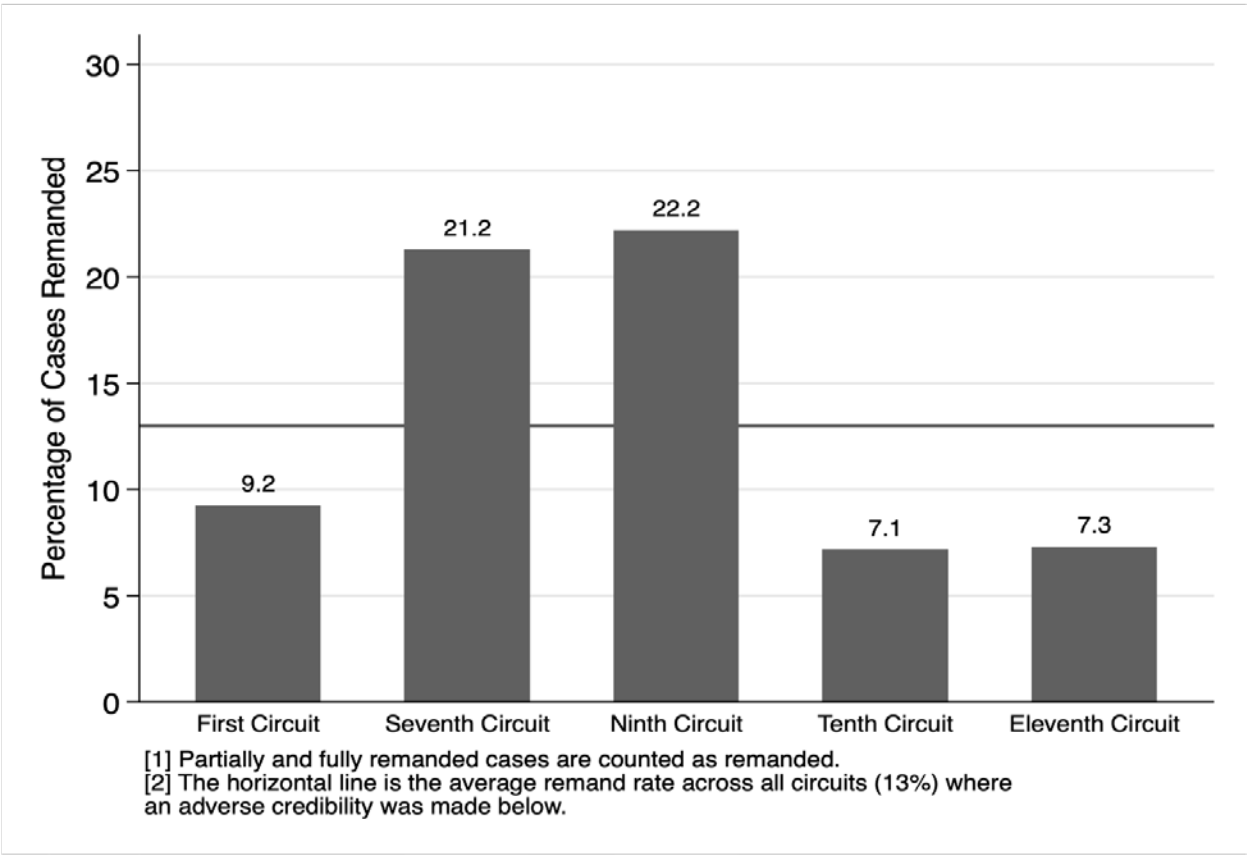

Figure 6 reflects the difference across circuits in the likelihood of remand where there was an adverse credibility determination about the asylum applicant below. Source: Data include all asylum claims on Lexis Nexis from 2007 to 2013 in the First, Seventh, Tenth, and Eleventh Circuits, and a random sample of one hundred cases from the Ninth Circuit each year.

As Figure 6 demonstrates, there was wide variation in the proportion of cases remanded where there had been a prior adverse credibility finding, or a finding that the applicant was not credible. While this factor was not significant in the regression analysis, this is likely because many factors are driving differences across circuits. The Seventh and Ninth Circuits were nearly three times more likely to remand than the First, Tenth, or Eleventh Circuits. This deserves further exploration, and indicates that a qualitative analysis of the doctrinal differences between the courts is warranted in order to better understand the differences in how these courts treat asylum appeals.

1.4 DIVERGENCE IN THE CASE LAW ACROSS CIRCUITS

As this section will discuss, a qualitative analysis of the opinions reveals that the circuits have developed a variety of court-fashioned rules that affect the likelihood of remand, even though all of these circuits are using the same legislatively imposed standard of review. These rules serve to either constrict or expand the scope of review. In the Seventh and Ninth Circuits, these rules permit courts to engage in a more searching review of the agency's decisionmaking. In the First, Tenth, and Eleventh Circuits, the courts have interpreted the standard in a way that restricts the

scope of review, making remand much less likely.

1.4.1 Credibility Determinations

An asylum seeker's credibility has been aptly described as "the most crucial aspect of any asylum case and the single biggest substantive hurdle facing asylum applicants" (Rempell 2008: 186-87). As Judge Easterbrook has explained, these determinations are so challenging, in part, because "[m]ost claims of persecution can be neither confirmed nor refuted by documentary evidence" (*Mitondo v. Mukasey*, 7th Cir. 2008: 788). Accordingly, much of the case hinges upon whether an immigration judge finds the asylum seeker to be credible, through a combination of factors such as his testimony, his demeanor, any corroborating evidence, and the consistency of his claims. If a credibility determination is appealed to the Board, the Board reviews the immigration judge's reasons, and determines whether the factual finding is clearly erroneous (8 C.F.R. § 1002.1(d)). As discussed above, the circuit courts then review the finding for substantial evidence. The courts generally review the Board's analysis, except where the Board adopts the IJ's opinion, and courts accordingly review the IJ's analysis (*Musollari v. Mukasey*, 7th Cir. 2008: 508).

A review of the cases suggests significant differences in the level of deference circuits accord to the agency's credibility determinations. In order to understand the courts' treatment of these determinations, the REAL ID Act, affecting applications for asylum made on or after May 11, 2005, serves as an important context. In addition to a number of provisions that increased the burden of proof for asylum seekers and decreased judicial review of immigration decisions, the REAL ID Act also gave specific guidance on how courts must treat the agency's assessment of an applicant's credibility. The Act instituted a requirement that there be a clear nexus between the applicant's alleged persecution and the protected ground (such as race or religion), and also placed a burden on applicants to provide evidence to corroborate otherwise credible testimony, unless "the applicant does not have the evidence and cannot reasonably obtain the evidence" (8 U.S.C. § 1158(b)(1)(B)(i)-(iii)). The Act also restricted habeas corpus review under 28 U.S.C. § 2241 of final orders of removal, deportation, and exclusion. Most critically, the Act prescribed that credibility determinations must be made on the "totality of the circumstances, and all relevant factors[,]" and that the IJ may look beyond factors such as demeanor, responsiveness, and inconsistency, to "any relevant factor" in assessing credibility (U.S.C. § 1158(b)(1)(B)(iii)). The Act was based upon the notion an "immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth" (*Shrestha v. Holder*, 9th Cir. 2010: 1041). For the most part, courts have agreed with the sentiment that the immigration judge possesses a unique advantage, noting that "[w]eight is given to the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records" (*Mendoza Manimbao v. Ashcroft*, 9th Cir. 2003: 662). The REAL ID Act implemented one important substantive change related to inconsistencies. Following its implementation, inconsistencies no longer need to "go to the heart" of the petitioner's claim in order to form the basis of an adverse credibility determination (8 U.S.C. § 1158(b)(1)(B)(iii); *Malkandi v. Mukasey*, 9th Cir. 2009). As described below, some circuits have interpreted the Act as narrowly circumscribing their review,

and vesting the agency with much more discretion in these determinations, while other courts have maintained a more searching level of review.

All of the courts purport to require the agency to provide specific reasons for an adverse determination, and all of them impose a reasonableness requirement on the determination. As the Ninth Circuit explains, "[w]e have consistently required that the IJ state explicitly the factors supporting his or her adverse credibility determination" (*Shrestha v. Holder*, 9th Cir. 2010: 1042). The Seventh Circuit cautions that an "IJ cannot selectively examine evidence in determining credibility, but must present a reasoned analysis of the evidence as a whole" (*Hanaj v. Gonzales*, 7th Cir. 2006: 700). The First Circuit has cautioned that credibility determinations under the REAL ID Act must be "reasonable" and must "take into consideration the individual circumstances of the applicant" (*Lin v. Mukasey*, 1st Cir. 2008: 28 n. 3). The Tenth Circuit states that "[w]e do not question credibility findings that are substantially reasonable." (*Ismaiel v. Mukasey*, 10th Cir. 2008: 1206). Nonetheless, "the IJ must give specific, cogent reasons for disbelieving" an applicant's testimony (*Id.*)

However, as described below, the circuits have developed varying approaches in assessing the agency's credibility determination. Some circuits, such as the Ninth and Seventh in this sample, have taken pains to make the limitations of the Act explicit, and have developed tools of interpretation that limit the types of inconsistencies that could serve as a basis for an adverse determination. As the Ninth Circuit declares, "The REAL ID Act did not strip us of our ability to rely on the institutional tools that we have developed, such as the requirement that an agency provide specific and cogent reasons supporting an adverse credibility determination, to aid our review" (*Shrestha v. Holder*, 9th Cir. 2010: 1042). It further explains, "Despite our recognition that agency credibility determinations deserve substantial deference, the REAL ID Act does not give a blank check to the IJ enabling him or her to insulate an adverse credibility determination from our review of the reasonableness of that determination" (*Id.*) In other words, the Ninth Circuit has imported "a rule of reason" into the assessment of the standard governing a credibility determination (*Id.* at 1041). As it emphasizes, the REAL ID Act does not permit the IJ to "rely on nothing more than a vague reference to the 'totality of the circumstances' or recitation of naked conclusions that a petitioner's testimony was inconsistent or implausible, that the petitioner was unresponsive, or that the petitioner's demeanor undermined the petitioner's credibility" (*Id.* at 1042). Rather, the agency must enumerate the factors underlying the credibility determination, and the agency must explicitly make an adverse credibility in order for the Ninth Circuit to discredit the petitioner's claims. As one opinion explains, where the agency identifies an applicant's failure to disclose a fact and indicates that the agency did not believe the applicant's explanation for omitting it, this constitutes the sort of "passing statement" that "does not constitute an adverse credibility finding" (*Kaur v. Holder*, 9th Cir. 2009: 962-63). In addition, even a "statement that a petitioner is 'not entirely credible' is not enough" to be deemed an adverse credibility finding (*Aguilera-Cota v. I.N.S.*, 9th Cir. 1990: 1383). Rather, the finding must be explicit, and in the absence of such a finding, the Ninth Circuit will treat the petitioner's testimony as credible (*Kalubi v. Ashcroft*, 9th Cir. 2004: 1137).

These courts have also read additional requirements into the language of the REAL ID Act. The Ninth Circuit also imposes an affirmative duty upon the agency to address any plausible explanation that an applicant has offered for an inconsistency. Thus, in cases in which the record

revealed that the applicant had proffered an explanation for the inconsistency, and it was not explicitly considered in the agency's decision, the Ninth Circuit has remanded. For example, in *Solo-Olarte v. Holder,* the Ninth Circuit explained that the "lack of consideration given to [the applicant's] proffered explanation was error and prevents the underlying inconsistency from serving as substantial evidence to support the IJ's adverse credibility finding" (9th Cir. 2009: 1091). As it reasons, to "ignore a petitioner's explanation for a perceived inconsistency and relevant record evidence would be to make a credibility determination on less than the total circumstances in contravention of the REAL ID Act's text" (*Shrestha v. Holder*, 9th Cir. 2010: 1044). The Ninth Circuit has also concluded that credibility determinations may not be based upon trivial inconsistencies, and has further held that the IJ must weigh any relevant evidence that may contravene a conclusion that a given factor undermines credibility (*Id.*) Similarly, the Seventh Circuit imposes a similar requirement that the determination may not be based upon trivial details or easily explained discrepancies; it emphasizes that while the IJ may consider inaccuracies that don't go to the heart of the applicant's claim, "he can do so only as part of his consideration of the totality of the circumstances, and all relevant factors" (*Kadia v. Gonzales*, 7th Cir. 2007: 822).

In contrast, the three other circuits in this sample have interpreted the REAL ID Act to narrowly circumscribe their review of credibility determinations. In particular, the First Circuit treats the Act's language "as a revival of the doctrine of *falso in uno, falso in omnibus*[,]*"* meaning that if a petitioner is inconsistent with respect to one thing, he may be inconsistent (or untruthful) with respect to the entirety of his claim (*Id.* at 821, explaining that the Seventh Circuit is "dubious" of this interpretation). Similarly, the Tenth Circuit has interpreted this rule to mean that inconsistency with respect to matters that may be incidental to the applicant's claim may still serve as a basis for an adverse determination. Explicitly recognizing the contrary approach taken by the Seventh and Ninth Circuits in addressing the agency's treatment of inconsistencies, the Tenth Circuit reasons: "Experienced litigators do not limit their challenges to adverse testimony to matters at the heart of the case. Cross-examination often seeks to undermine the witness's credibility by probing into inconsistencies and improbabilities regarding 'incidental' matters" (*Ismaiel v. Mukasey*, 10th Cir. 2008: 1205). Thus, in the Tenth Circuit's view, an inconsistency about an incidental matter may well serve as the basis for an adverse credibility determination. In contrast, circuits like the Ninth apply the rule that an applicant must be deemed unbelievable as to more than just trivial inconsistencies in order to be disbelieved more generally (*Dyuessemaliyev v. Holder*, 9th Cir. 2011: 999).

Each of the five circuits distinguish between determinations based upon the applicant's testimony from those that are based upon the applicant's demeanor, in part because of the fact-finder's unique ability to assess the applicant's demeanor. As they explain, "credibility determinations that are based on the IJ's analysis of testimony, as opposed to demeanor, are granted less deference" (*Gao v. BIA*, 2nd Cir. 2007: 127; *Arulampalam v. Ashcroft*, 9th Cir. 2003: 685-86). These courts reason that the fact-finder does not enjoy the distinct advantage in analyzing testimony, since the appellate court is similarly capable of analyzing testimony. By contrast, the fact-finder is in a unique position to assess demeanor, and the appellate courts are accordingly more deferential to these findings. In the years reviewed here, the First, Tenth, and Eleventh Circuits were much less likely to reverse an adverse credibility determination based upon either ground. However, this difference was most stark in cases in which the agency had made a demeanor-based credibility finding. As described below, despite the purported heightened

deference that such a finding would receive, the Ninth and Seventh Circuits did remand in many of these cases, where the First, Tenth, and Eleventh Circuits were extremely deferential to demeanor-based credibility findings over the seven year period, and very rarely remanded in such a situation.

While affording heightened deference to demeanor-based findings, the Ninth Circuit still scrutinizes the fact-finder's underlying reasons for an adverse, demeanor-based finding. It will reverse such findings where they appear to be "boilerplate," and it requires the IJ to "specifically point out the noncredible aspects of the petitioner's demeanor" (*Shrestha v. Holder*, 9th Cir. 2010: 1042). For example, where an IJ determines that the person was not credible because he was unresponsive, the Ninth Circuit requires the IJ to support this finding with "particular instances in the record where the petitioner refused to answer questions asked of him" (*Id.*) The Seventh Circuit has more boldly expressed concerns about the immigration judges' ability to assess demeanor, which is reflected in its higher remand rates in these cases. It has explicitly questioned the competence of immigration judges to adequately assess demeanor, stating: "Immigration judges' insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American is a disturbing feature of many immigration cases, and immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor" (*Kadia v. Gonzales*, 7th Cir. 2007: 819). As Judge Easterbrook colorfully stated, "if you want to find a liar you should close your eyes and pay attention to what is said, not how it is said or what the witness looks like while saying it. And even then the error rate is high" (*Mitondo v. Mukasey*, 7th Cir. 2008: 788). He went on to summarize empirical research to conclude that the "major clue" in giving a liar away is the amount of detail, as truth-tellers have normal amounts of memory failure, while "liars" seem to "develop super-powered memories and often recall the smallest of details" (*Id.*) In the Tenth Circuit, the data revealed very few cases in which the court found that a demeanor-based determination was not supported by substantial evidence. In other words, the Tenth Circuit appeared to be extremely deferential to the immigration judge's assessment of the applicant's demeanor, and the Eleventh Circuit displayed a similar pattern. While it emphasized that credibility determinations must "rest on substantial evidence, rather than conjecture or speculation," it also stated that "[c]redibility determinations, so far as they involve demeanor, have thus been characterized as largely unreviewable" (*Todorovic v. U.S. Att'y Gen.*, 11th Cir. 2010: 1325). In a context in which an assessment of demeanor is one of the largest substantive components of an applicant's case, this approach can have significant implications. Thus, in the few cases in which these circuits remanded a demeanor-based finding, the immigration judges' behavior was particularly egregious (*Id.* at 1324; *Lin Lin Tang v. U.S. Att'y Gen.*, 11th Cir. 2009). For example, both the Tenth and Eleventh Circuits made this finding when a judge had blatantly introduced his own prejudices, basing his credibility determination on his conclusion that the applicant did not appear "effeminate" in his dress or appearance, and could not therefore have been persecuted on account of his sexuality (*Todorovic v. U.S. Att'y Gen.*, 11th Cir. 2010: 1325; *see also Razkane v. Holder*, 10th Cir. 2009).

The Ninth Circuit is the only circuit to go so far as directing the agency to consider the applicant credible on remand in certain cases. In cases in which it finds an adverse credibility decision is not supported by substantial evidence, the Ninth Circuit sometimes applies the "deemed credible" rule, where it directs the agency on remand to consider the petitioner credible (*Solo-Olarte v. Holder*, 9th Cir. 2009: 1095). As the court has explained, this rule is fact dependent, and

there are cases in which it is appropriate to allow the Board to reexamine the credibility upon remand (*Id.*) While many of its opinions characterize its jurisprudence as lying well within the limits of the REAL ID Act's statutory language, it is worth noting that not every judge in the Ninth Circuit agrees with its approach, and some judges believe that the Ninth Circuit has exceeded the bounds of its authority. In a strongly worded dissent, Judge Trott recently complained that "[o]ver the years, our Circuit has manufactured a plethora of misguided rules regarding the credibility of political asylum seekers" (*Dai v. Sessions*, 9th Cir. 2018: 877). As he explained, "These result-oriented ad hoc hurdles for the government stem from humanitarian intentions" (*Id.*) He argues, furthermore, that the Ninth Circuit "has pursued these intentions with untenable methods that violate the institutional differences between a reviewing appellate court, on one hand, and a trial court on the other, usurping the role of the Department of Homeland Security ('DHS') and the BIA in the process" (*Id.*) A previous Ninth Circuit panel similarly characterized its jurisprudence as engaging in "sly subordination" by promulgating rules "that tend to obscure" the "clear standard" that applies when reviewing an immigration judge's adverse credibility finding, which has "flummox[ed] immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents" (*Jibril v. Gonzales*, 9th Cir. 2005: 1138).

Taken as a whole, these rules of interpretation provide further explanation for the quantitative result described above, in which the Ninth and Seventh Circuits are up to three times more likely to remand in a case in which there was an adverse credibility finding than circuits like the First, Tenth, and Eleventh. A close reading of these cases suggests that the circuits have adopted differing approaches to the level of deference that is appropriate in assessing the agency's credibility finding. In addition, as described below, these cases reveal several other differing rules of interpretation that also affect the likelihood of remand across circuits.

1.4.2 Review of the Record Below

A review of the cases reveals another important difference in the relevant facts and sources that a court is likely to rely upon in assessing the reasonableness of the agency's decision. Under the substantial evidence standard, a court assesses reasonableness by considering the agency's inferences against the record as a whole, rather than the particular facts cited by the agency. However, in the sample, courts differed in the extent to which they were inclined to view evidence that wasn't cited by the agency as warranting remand. In circuits like the Ninth and Seventh, the courts routinely reviewed evidence that the agency did not cite in support of its decision, and sometimes determined that this evidence undermined the reasonableness of the agency's inferences. In *Chen v. Holder*, for example, the Seventh Circuit faulted the Board for its failure to explicitly address a document that the petitioner had presented from a Chinese government website on sterilization (*Chen v. Holder*, 7th Cir. 2013: 212). Of course, these courts also routinely reject the argument that the Board failed to consider all of the relevant evidence (*Singh v. Holder*, 9th Cir. 2011). On the whole, however, they were more likely to closely scrutinize evidence not cited by the agency than the Tenth and Eleventh Circuits over the seven-year period. In cases in which the agency's opinion did not mention a piece of evidence that the court viewed as outcome-determinative, these circuits also remanded, concluding that the record was too ambiguous to permit adequate review (*See, e.g.*, *Escobar v. Holder*, 7th Cir. 2011). The Seventh Circuit has gone so far as to say that "ignoring even inconclusive corroborating evidence can undermine the decisions of an immigration court" (*Terezov v. Gonzales*, 7th Cir. 2007: 565). Significantly, it

treats the question of whether the agency failed to consider evidence put forth by a petitioner as an allegation of legal error, and thus subject to the more stringent standard of *de novo* review (*See, e.g., Cruz-Movaho v. Holder*, 7th Cir. 2012: 997). The Seventh and Ninth Circuits were also more likely to scrutinize the evidence relied upon by the agency in order to determine whether it supported the agency's conclusion. For example, the Ninth Circuit was unconvinced by cases in which an IJ merely cited State Department Reports for the proposition that the harm alleged by the petitioner was uncommon; as it emphasized, the question was not whether this harm was uncommon, but rather, whether the petitioner's "individual experiences are consistent with the country report" (*Nosa v. Mukasey*, 9th Cir. 2008: 593, citing *Singh v. Gonzales*, 9th Cir. 2006: 1110-11). In these types of decisions, the court cited parts of the State Department Report that the agency had not relied upon in its decision, and explained that these other statements "provide the context for evaluating [the petitioner's] credibility," and were "relevant to [her] specific and individualized experiences" (*Id.*) Similarly, the court remanded in situations in which the Board or IJ relied upon "broad statements" from the State Department, rather than conducting the requisite individualized analysis of the petitioner's claims (*Dawwod v. Mukasey*, 9th Cir. 2008: 549). The Eleventh Circuit also sometimes scrutinized evidence not cited in the agency's decision, and remanded for the agency's failure to consider it (*See, e.g., Bao Chai Lin v. U.S. Att'y Gen*, 11th Cir. 2007; *Seck v. U.S. Att'y Gen*, 11th Cir. 2011). While the Eleventh Circuit rarely issued a remand, this was one of the more common bases for remand in this circuit. However, in opinions in which it declined to issue a remand (which constitute the vast majority), it emphasized that "[w]here the BIA has given reasoned consideration to the petition, we will not require that it address specifically each claim the petitioner made or each piece of evidence the petitioner presented" (*Seck v. U.S. Att'y Gen*, 11th Cir. 2011: 1364). In the First and the Tenth Circuits, on the other hand, the courts very rarely remanded because of evidence that was in the record that the agency had not explicitly addressed.

Relatedly, there were also important differences in the extent to which the courts would scrutinize the agency's decisionmaking as to record formation. The Seventh and Ninth Circuits were also more inclined to criticize how the agency treated the question of whether proffered documents could form part of the record. These circuits emphasized that the standards should be more lax than the Federal Rules of Evidence, and they appeared to expect the agency to err on the side of including documents. In one case, for example, the Seventh Circuit criticized the Board's dismissal of documents as improperly authenticated, saying that the "Board has a pinched conception of 'authentication[,]'" and noting that "documents may be authenticated in immigration proceedings through any recognized procedure" (*Qui Yan Chen v. Holder*, 7th Cir. 2013) (internal citations omitted). Similarly, the Ninth Circuit emphasized that the IJ "may consider evidence if it is probative and its admission is fundamentally fair" (*Singh v. Mukasey*, 9th Cir. 2008: 793) (internal citations omitted). Notably, this doctrine applies to evidence introduced by the government or the petitioner. Thus, these differences in how likely the courts were to treat evidence that was not cited by the agency as warranting remand accounted for some of the differences in remand across circuits.

1.4.3 The Meaning of Persecution

A close reading of the cases also reveals differences in the ways that circuits interpret whether the petitioner's alleged harm rises to the level of the persecution, and the requirement that

the persecutor target the petitioner "on account of" a protected ground. From a review of the data, it is fair to say that all of the courts privilege a definition of persecution that involves physical harm (for a broader discussion of this issue, see Rempell 2013). For example, in *Sheng En Liu v. Holder,* the court held that "[p]ersecution requires the application of 'significant physical force against a person's body, . . . the infliction of comparable physical harm without direct application of force,' or the infliction of "nonphysical harm of equal gravity" (7th Cir 2014: 565) (internal citations omitted). However, in practice, the courts differ in the extent to which they appear to nearly *require* a credible allegation of physical harm in order to find that the evidence compelled a finding of persecution, and in the severity of the harm necessary in order to compel such a finding. For instance, the Tenth Circuit has emphasized that threats or harassment, without further incident, are very rarely sufficient to compel such a finding (*Soewarsono v. Holder*, 10th Cir. 2009: 145-46). As one judge in the Tenth Circuit explained, "[o]ur cases do seem to require very violent, pervasive harassment and even injury" (*Nalwamba v. Holder*, 10th Cir. 2010: 865). In *Sidabutar v. Gonzalez,* the Tenth Circuit concluded that an Indonesian Christian man who had suffered repeated "beatings and robberies at the hands of Muslims" had not established past persecution (10th Cir. 2007: 1118, 1124). In another case, *Jian Hui Li. v. Kesler,* the Tenth Circuit affirmed an immigration judge's ruling that, even if true, the deprivation of petitioner's right to education for three months and the broken arm he received during his fight with population control employees "constituted at most harassment and discrimination, but not past persecution within the meaning of the asylum statute" (10th Cir. 2007: 854). A review of the Eleventh Circuit reveals a very similar pattern. In the Ninth Circuit, however, while "[i]t is well established that physical violence is persecution[,]" the court emphasized that "evidence of physical harm is not required to establish persecution," and was generally more likely to find that a petitioner demonstrated persecution in the absence of physical harm (*Li v. Holder*, 9th Cir. 2009: 1107; *Nguyen v. Holder*, 9th Cir. 2009: 774). Of course, as Scott Rempell (2014: 176) demonstrates, persecution assessments can be widely divergent even within the same circuit.

In addition, there were differences in the ways in which courts analyzed the question of whether the petitioner can satisfy the question of nexus, or whether the alleged persecutor targeted the petitioner *because of* a protected ground. In the sample reviewed, the Tenth and Eleventh Circuits appeared to interpret this standard very stringently, in a way that strains credulity. For example, the Eleventh Circuit held that "[e]ven if the evidence compels the conclusion that the petitioner refused to cooperate with the guerillas because of his political opinion, the petitioner still has to establish that the record also compels the conclusion that he has a well-founded fear that the guerillas will persecute him *because of* that political opinion, rather than because of his refusal to cooperate with them" (*Rivera v. U.S. Att'y Gen.*, 11th Cir. 2007: 822). Similarly, in a case in the Tenth Circuit, *Tello v. Holder* (10th Cir. 2010), the petitioner argued that he feared persecution from a Communist terrorist group, the Shining Path, based on his past extensive involvement with an opposing Peruvian political party. He testified that after receiving death threats by phone, he was assaulted by men claiming to be Shining Path members. After he was forced out of his car and beaten until he was unconscious, the alleged persecutors left Shining Path pamphlets and shouted "notorious statements" of the Shining Path to observers. Here, the Tenth Circuit affirmed the Board's holding that "even if [his] attackers yelled platitudes about the Shining Path, that did not establish that they targeted *him* on account of *his* political activity" (*Id.* at 264). The Ninth Circuit, on the other hand, often interpreted the "because of" requirement much less stringently, holding that "persecutors' motivation should not be questioned when persecutors

specifically articulate their reason for attacking a victim." (*Li v. Holder*, 9th Cir. 2009). Thus, this analysis also revealed differences in the level of harm sufficient to meet the definition of persecution, as well as variation in interpreting the nexus requirement.

1.4.4 Questions of Law and Fact

Finally, the Ninth Circuit has expanded the scope of its review by interpreting the REAL ID Act as permitting review of the question of whether an applicant can demonstrate changed circumstances to provide an exception to a one-year filing limit, where the facts are undisputed (*See, e.g., Vahora v. Holder,* 9th Cir. 2011; *Ramadan v. Gonzales*, 9th Cir. 2007: 648; *Chacon-Botero v. U.S. Att'y Gen*, 11th Cir. 2005). As it reasons, the REAL ID Act did not address whether courts have jurisdiction over mixed questions of law and fact, or "those situations in which the historical facts and applicable legal standard are undisputed but the agency's application of those facts to law are at issue" (*Ramadan,* 9th Cir. 2007: 653). Examining the legislative history, the Ninth Circuit concluded that Congress intended to allow for such review in order to fit within the constitutional bounds of the Supreme Court's decision in *INS v. St-Cyr* (2001). Other circuits, by contrast, have interpreted this issue as precluded, either concluding that it entails an unreviewable exercise of agency discretion, or that the statute's term, "questions of law," does not include mixed questions of law and fact (*Al Ramahi v. Holder,* 9th Cir. 2013: 1140 n. 2). This, of course, permitted the Ninth Circuit to review more cases than in the other circuits in these data, where this question was not reviewable. However, since it was an issue that infrequently arose and the "changed circumstances" standard remains a difficult one to meet, the Ninth Circuit rarely remanded on this basis in the seven years reviewed, and it did not account for a significant portion of the differences between circuits.

1.5 IMPLICATIONS

1.5.1 The Value of Judicial Review in Asylum Law

As Justice Breyer (2011: 2190-92) has argued, the technical nature of modern society has brought laws that delegate enormous decisionmaking power and responsibility to administrators who are not themselves elected. This, in turn, imposes a challenge to ensure that related administrative decisions are fair and reasonable. In other words, "who will regulate the regulators?" (*Id.*) Judicial review is one critical way of addressing this concern, and has been described as conferring "an imprimatur of legitimacy for administrative action" (Fallon 1988: 942). As I argue below, legitimacy is one of the most critical functions that judicial review plays in this context because asylum seekers are politically powerless. This vulnerability renders the legitimizing function of judicial review all the more important.

Of course, legitimacy is just one of several justifications for judicial review. There is a well-developed line of scholarship analyzing the purposes served by judicial review of agency action. Writing in 1978, Jerry Mashaw and his colleagues set forth the most comprehensive account of judicial review. In addition to the legitimizing function, they developed four additional, core functions. First, they argued, appellate courts provide a "corrective" function in reviewing agency action, as they are able to serve as a check by correcting erroneous agency decisions. Second, they perform a related, "critical" function by offering a steady stream of feedback to the

agency. Third, they perform a "regulative" function by inducing the agency to decide cases more accurately out of either a fear of being reversed, or the mandate to follow judicial precedent. Finally, they perform an "information" function by drawing the agency's internal operations into the public eye (Mashaw et. al 1978: 136-37).

Mashaw and his colleagues were skeptical that courts were well-suited to perform these functions in both the disability benefits adjudication context that they studied, and more broadly. They concluded that the costs outweighed any benefits of judicial review, and that internal agency quality measures were better suited to achieve these aims (*Id*). In the asylum context, such a debate is of less pragmatic value, as such internal measures are nearly non-existent within the immigration agency. Recent work has examined the history of the EOIR's efforts to ensure quality adjudication, and concluded that the agency has displayed a "near-total disregard for quality assurance initiatives" (Ames et. al 2019: 41). Thus, given the constraints of this institutional history, judicial review is one of the only checks on agency action in the asylum context.

Mashaw and his colleagues also emphasized the "baseline" problem, or the fact that the appellate courts review a small fraction of cases adjudicated by the agency, and therefore have a skewed perspective that doesn't reflect the wide range of cases (1978: 139). This may make it difficult to assess whether an asylum seeker's testimony was coached, for example, if one is not accustomed to hearing such cases routinely. However, David Hausman's analysis implies that the difference in their baselines may run in the opposite direction; as he demonstrates, the BIA and the Courts of Appeals are less likely to review the decisions of harsher immigration judges, and therefore review a skewed sample of more lenient immigration judges (Hausman 2016:1207).

The foregoing analysis of the variety of court-fashioned rules suggests that courts can play important corrective and critical functions in the asylum context. Indeed, the cases provide many examples of clear errors in the agency's decisionmaking that were remedied by the courts. In addition, these courts appear to be serving the information function, as the strong language in the opinions has attracted the attention of the media quite regularly (*See, e.g.*, Marek 2008). However, this analysis has also revealed that the appellate courts are performing these functions very unevenly in the asylum context, and that the varying rules of interpretation adopted by the different circuits have affected how often they may correct an error by the agency, for example.

In recent work, Jonah Gelbach and David Marcus (2018: 1100) argue that courts perform a previously unappreciated function when they review high volume agency adjudication, which they term "problem-oriented oversight." They consider "high volume" agencies, or those whose caseloads and resources mean that they can devote a minimal amount of time to each case. As they argue, there is no doubt that these cases play an important role in federal courts; in 2013, immigration appeals increased the federal appellate docket by nearly 13% (*Id.;* U.S. Court Statistics 2013; Table B-3). However, since the federal courts review a very small percentage of agency decisions, it is not as obvious that the federal courts are as important to immigration judges with crushing caseloads. As Gelbach and Marcus explain, "Whatever legitimacy the Article III courts promise must seem like a distant mirage for the vast majority of immigrants, claimants, and others as they litigate in obscure hearing rooms, far away from the grandeur of the federal courts" (2018: 1100).

Gelbach and Marcus argue that problem-oriented oversight is a core judicial function that courts perform in reviewing agencies with a very high volume of fact-intensive adjudication. Adding to the list developed by Mashaw and his colleagues, they contend that courts are able to recognize and address problems that go unaddressed by the agency. When an immigration judge persistently demonstrates bias, they argue, a federal court may address this when the agency fails to correct it (*Id.* at 1101). Of course, as Hausman's work demonstrates, judicial review is only effective when cases routinely reach the courts. As he demonstrates, immigration judges exercise some control over this through hasty denials of a motion for a continuance, for example, which terminates an immigrant's case before it ever reaches a federal court (Hausman 2016:1198-1200). As Gelbach and Marcus argue, judges occasionally break from the more day-to-day opinions to offer commentary on patterns or trends that they have observed (2018: 1101). They argue that this commentary constitutes judicial attempts to "influence agency decisionmaking through means beyond the correction of discrete errors in individual cases or the issuance of binding precedent" (*Id.*) They view this as the judicial equivalent of legislators publicly criticizing an agency based upon information that they have assembled (*Id.* at 1129-30). In performing this form of oversight, courts are able to identify problems that involve patterns of flaws, rather than cases that may reflect a more isolated error (*Id.* at 1141). This concept has not been without its critics, who have questioned whether appellate judges are well-suited to a managerial function that requires them to aggregate and assess data (Nou 2019: 1197).

In the asylum context, the above analysis provides evidence that the Seventh and Ninth Circuits are engaging in the type of oversight that Gelbach and Marcus envision. While they may not be systematically gathering data in any technical way, courts do sometimes explicitly mention that the problem they're addressing is a recurring one. They have often noted that an IJ's behavior forms part of a pattern, for example, or noted the recurring problems created by an adjudicators who have far too little time to decide a case (*Shrestha v. Holder*, 9th Cir. 2010: 1044; *Terezov v. Gonzales*, 7th Cir. 2007: 565). To be sure, Gelbach and Marcus acknowledge that this is a highly stylized example, and that no courts are yet engaging in the precise, more technical method that they set forth (2018: 1144-46). While these forms of oversight may not be as effective as direct changes within the agency, Gelbach and Marcus point to several tools that courts have at their disposal: they may threaten sanctions, for example, or their opinions may result in the DOJ pressuring the EOIR to correct a problem so as not to face reputational consequences in court (*Id.* at 1146). As this analysis has revealed, some courts have also used the doctrinal tools at their disposal in order to spur agency action. This may be seen, for example, in the variety of additional rules of interpretation that the Ninth and Seventh Circuits have developed in assessing credibility determinations, as discussed *supra.*

While courts may already be engaging in this type of oversight as a descriptive matter, the notion of problem-oriented oversight also has critical implications for the theoretical underpinnings of the deference doctrine in asylum law. As I explore below, scholars like Adam Cox have observed the decreased deference that some courts appear to accord the immigration agency (2007: 1671). Cox has argued that one problem with this approach is that it departs from the *Chevron* doctrine in an important way, as courts seem to be assessing the competence of the immigration agency. As he contends, there is no doctrinal basis for this sort of assessment. Cox questions whether judges are in the best position to make such judgments, though he notes that these courts now review more than ten thousand immigration court decisions each year (*Id.* at

1683). Gelbach and Marcus offer evidence that courts are capable of making these assessments in reviewing high volume agency adjudication, and that this is in fact one of the primary *benefits* of judicial review in this context. In other words, not only are courts capable of this type of assessment, but this type of oversight provides a basis for justifying resource-intensive judicial review. One way of viewing the phenomenon that Cox observes is that courts are engaged in precisely the sort of problem-oriented oversight that Gelbach and Marcus envision. Just as with the other core functions of judicial review, the above analysis has revealed that courts are engaging in this form of oversight very unevenly across circuits. As I argue below, the case for this oversight is most critical in the context of asylum adjudication, as the need for judicial review to "legitimize" the actions of the agency is at its most compelling.

1.5.2 Deference and Immigration Exceptionalism

Immigration law has long been considered a "maverick" or an "aberration" within American public law. As Peter Schuck writes convincingly, "no other area of American law has been so radically insulated and divergent from those fundamental norms of a constitutional right, administrative procedure, and judicial role that animate the rest of our legal system" (Schuck 1984: 1). Hiroshi Motomura refers to immigration law as "an aberrational form of the relationship between statutory interpretation and constitutional law" (1990: 549). One of its defining features, as Adam Cox has recognized, is that its jurisprudence reflects an obsession with judicial deference (Cox 2007: 1671). The doctrine that established the relationship between the three branches in immigration, the "plenary power" doctrine, first allowed Congress to exclude nearly all Chinese immigrants in a decision in which the Court essentially declined to review the actions of the political branches (*The Chinese Exclusion Case* 1889: 600). In *Ekiu,* the Supreme Court expanded this doctrine in 1892, when it declared that "as to [aliens], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law" (*Ekiu v. United States* 1892: 660). There, an arriving citizen of Japan had been excluded on the basis that she was likely to become a public charge, and was not given the opportunity to demonstrate otherwise.

Courts continue to invoke this doctrine to the present day in decisions of admission and exclusion, and it has arguably influenced every aspect of the level of scrutiny accorded to the immigration agency. As this analysis reflects, deference to the agency remains an important component of asylum law, and the circuits appear to engage in very different levels of scrutiny when reviewing asylum adjudication. Following the streamlining measures and the subsequent surge of federal appeals, Judge Posner emerged as a particularly vocal critic of the agency's decisionmaking, and this captured the attention of legal scholars and the media alike (Cox 2007: 1671; Marek 2008). In examining the jurisprudence of Judge Posner, Adam Cox has argued that he may have afforded less deference to the agency because he judged it to be incompetent. As Adam Cox explains and I explore in more detail *infra, Chevron* deference has been defended upon the principle that administrative agencies have greater expertise and more political accountability than courts. However, as he points out, "administrative law jurisprudence has generally made these judgments of institutional competence wholesale rather than retail" (Cox 2007: 1682). In other words, the *Chevron* doctrine arguably did not envision a world in which courts decide whether deference is warranted by directly evaluating the competence of an individual agency's decisionmaking. However, Cox suggests, this appears to be precisely what is happening in

immigration cases. The term "immigration exceptionalism" has been used to refer to the notion that immigration law is "littered with special immigration doctrines that depart from mainstream constitutional norms" (Rubenstein and Gulasekaram 2017: 584). Looking solely at Judge Posner's opinions in the Seventh Circuit, Cox considers the possibility that courts have created an area of immigration exceptionalism within the deference doctrine (2007: 1684). Judge Posner most famously stated:

> In recent years an avalanche of asylum claims has placed unbearable pressures on the grossly understaffed Immigration Court, and we and other courts have frequently reversed the credibility determinations made by immigration judges and affirmed by the also sorely overworked Board of Immigration Appeals. Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate" (*Kadia v. Gonzales*, 7th Cir. 2007: 820-21).

As Cox argues, Judge Posner has "decided that deference is not due because the immigration agencies are failing to discharge this duty [to implement a statute over which it has primary responsibility] when they decide immigration cases" (2007: 1679). This skepticism extends to the agency's handling of both factual and legal questions, and Judge Posner has variously referred to its adjudication as "arbitrary, unreasoned, irrational, inconsistent, uninformed," and falling "below the minimum standards of justice" (*Id.* at 1679-80). While Cox's analysis is limited only to Judge Posner, he notes that "a number of federal appellate judges have suggested that the immigration courts are fundamentally incompetent, biased, or both[,]" and that this "chorus has grown louder in recent years" (*Id.* at 1682).

Both the data considered here and subsequent work by Anna Law indicate that this may be more widespread than Judge Posner's jurisprudence, as it encompasses the Seventh Circuit more broadly, as well as the Ninth. The higher remand rate of the Second Circuit (*see* Ramji-Nogales et. al 2009: 78) would suggest that it may also be among these courts, though the present study does not include this court. In Law's interviews with Ninth Circuit judges, one judge stated anonymously that he or she would have no problem with according deference to the immigration agency, "if the IJs were well trained" and "not erratic" (2011: 130). The foregoing analysis also reveals that this is not merely limited to the application of *Chevron* deference. As this project has demonstrated, a view of the institutional incompetence of the agency has arguably seeped into every aspect of how certain circuits interpret the standards in asylum law, and not merely those governed by *Chevron.* These courts' mistrust of the agency has led them to read additional requirements into every component of the substantial evidence standard. In at least the Seventh and Ninth Circuits, this distrust of the agency's competence has resulted in a much closer scrutiny of the agency's adjudication.

Thomas Merrill has pointed to the elasticity of the current model of judicial review as one reason for its endurance. In an article exploring the origins of the appellate review model, Merrill explains that it was much less intentional than one might expect (Merrill 2011). Rather, it was an

improvised response by the Supreme Court to a political crisis brought on by very searching judicial review of decisions of the Interstate Commerce Commission. As Merrill argues, this "jerry-built" system became entrenched by the 1920s and eventually spread to all of administrative law, even though the Court has never grappled with the Article III problems created by the use of administrative agencies to adjudicate cases. However, one reason that it has remained in place, he argues, is because of its elasticity, or its flexibility at both the micro and macro levels (Merill 2011: 997). At the micro, or individual case level, he argues, a court can usually find a way to overturn an agency decision on an issue within the agency's competence that "suggests it is exercising its own competence" (*Id.* at 998). Merrill also argues that the model has proven flexible at the macro levels, citing the creation of "hard look review" by the courts in response to concerns of agency capture (*Id.*) Studies that have attempted to examine whether the standard of review makes a meaningful difference in the likelihood of remand, for example, have largely concluded that it does not, a point which further supports Merrill's argument that the review model is quite elastic (*See, e.g.* Pierce 2011; Verkuil 2002). For example, it may overturn a fact-based decision by framing the decision as "contrary to law."

The data here illustrate the appellate review model's elasticity very starkly: in an area in which courts are applying the identical standard of review to decisions issued by the Board, some courts are consistently four times more likely to remand than others. While *Refugee Roulette* laments this level of inconsistency, at least some prominent scholars have taken the contrary view, arguing that consistency is not necessarily a virtue, as it comes at the cost of judicial independence (Legomsky 2007). As the data here have demonstrated, this elasticity permits a wide range of approaches to reviewing the agency's adjudication of asylum cases.

The variation in these approaches begs the question: which approach is normatively most beneficial here, when federal courts are faced with the task of reviewing an agency in a state of crisis? Turning from the descriptive to the normative, I argue that the more expansive review employed by the Seventh and Ninth Circuits is the most sensible in this context. In addition to the core functions of judicial review discussed *supra*, I suggest, judicial review should also enable courts to be responsive to an agency in crisis. This is particularly true in the asylum context, when there is good reason to depart from the traditional deference that courts afford administrative decisionmaking.

1.5.3 Justifications for Judicial Deference

As I argue below, the conventional justifications for deference to agency action are much less forceful in the asylum context. Two primary theories are commonly invoked to justify judicial deference to agency action: political accountability and expertise. As Anne Joseph O'Connell explains, neither theory is sufficient on its own because agency decisionmaking can be based on both political and internal factors relying upon the agency's expertise (2008: 980). Courts have traditionally employed both theories in justifying deference, and this project provides an opportunity to assess the strength of each in justifying judicial deference to asylum adjudication. It builds upon the important work of Michael Kagan and Maureen Sweeney, both of whom have suggested that *Chevron* deference is not appropriate when reviewing asylum cases. It also relies upon O'Connell's suggestion that courts ought to take factors such as the political responsiveness and the track record of the agency into account in deciding the appropriate level of deference (*Id.*

at 981). As I detail below, this approach to deference law would permit federal courts to adjust their scrutiny to be sensitive to signals of crisis within the quality of agency adjudication, which is normatively desirable.

1.5.3.1 Political Accountability

Under the political accountability theory of judicial review, courts defer to agency action because agencies are more accountable to the polity than are courts (*see Chevron* 1984: 865-66; O'Connell 2008: 979). Several prominent immigration scholars, including Stephen Legomsky, have emphasized that asylum applicants are politically powerless, and particularly dependent upon the federal courts for the protection of their rights (Legomsky 1989: 1208). The system of asylum adjudication arguably reflects their vulnerability, as it is one that has been marred by a history of politicization and attempts to politically insulate its decisionmaking from judicial review, and the agency has consistently under-funded immigration adjudication and given immigration judges an enormous caseload (*Id.*; Legomsky 2010: 1676). Recent work has examined the history of the EOIR's measures to ensure quality adjudication, and concluded that the agency has displayed a "near-total disregard for quality assurance initiatives" (Ames et. al 2019: 41). While EOIR had one early evaluation program effort that involved peer evaluation, this ended in 2008 (*Id.*) Since then, EOIR has focused on case completion goals as the primary metric by which immigration judges are assessed, and places no emphasis on decisional accuracy. As David Ames and his colleagues argue, this may reflect the political weakness of the litigants before the agency. Thus far, theories of judicial review and deference have not adequately considered the political powerlessness of immigrants. This vulnerability makes the "legitimizing" function developed by Mashaw all the more critical. Indeed, there is no evidence that the agency is in any way responsive to the asylum seekers over whom it exercises power.

This lack of political power arguably renders the agency's decisionmaking even more vulnerable to political pressures. The politicization of the agency has received much more attention within the literature. In fact, recent scholarship has pointed to the structural design of the agency in order to call for less deference in asylum cases. In a trenchant analysis, Maureen Sweeney (2019) argues that the institutional location of asylum decisionmaking within the Department of Justice, a law enforcement agency deeply invested in enforcing border patrol, warrants a reconsideration of *Chevron* deference in asylum cases. As she observes, the Supreme Court has never (outside of dictum in *Cardoza-Fonseca*) engaged in any robust analysis to justify the application of the *Chevron* doctrine in interpreting the Refugee Act. Moreover, she contends that the Court's doctrine has arguably evolved in the three decades since this decision, and displayed increasing willingness to scrutinize whether Congress intended for courts to exercise deference (*Id.* at 150).

There is a long line of scholarship emphasizing the lack of decisional independence within immigration judges and the related politicization of adjudication, and these structural features are likely a result, in part, of the lack of political power of immigrants. There have been egregious accounts, such as Legomsky's recounting of a government prosecutor contacting the chief immigration judge ex parte to protest a ruling of an immigration judge, causing the chief judge to instruct the immigration judge to reverse his ruling (2010: 1668). After Ashcroft reduced the size of the Board in 2002, Levinson demonstrated that the Board members who were "re-assigned" were those with decision rates most favorable to non-citizens (2004: 1155-56). Legomsky (2010:

1668) has also shown a positive correlation between the decisions of immigration judges and Board members and their job security (*see also* Kim 2013: 619; Levinson 2004: 1156-60). In 2008, testifying under a grant of immunity before the U.S. House Judiciary Committee, a former Justice Department official testified that between 2004 and 2006, the White House and the Justice Department had bypassed the usual application procedures to appoint immigration judges based on their Republican Party affiliations or their conservative ideological views (DOJ Investigation 2008). Many of these immigration judges remain on the bench today, and the official's testimony revealed that more than half of them had no prior immigration experience (*Id.*) In 2016, former Board Chair and immigration judge Paul Schmidt described the politicized environment of the agency, explaining, "You exist to implement the power of the Attorney General, you aren't 'real' independent Federal Judges" (*The Asylumist* September 28, 2016). Recent work by Catherine Kim and Amy Semet supports this, as they show that immigration judges are more likely to order removal under the Trump Administration than in prior ones, regardless of which President appointed them (Kim and Semet 2018). In addition, Daniel Chand and William Schreckhise (2018) find that immigration judges five significantly greater deference to the positions of the public, their agency and President, and Congress in responding to a survey. In short, as Shruti Rana (2012: 325) argues, the "problems at the immigration agency read like a laundry list of all of the reasons a court should not defer to an agency." Courts of Appeals have called the independence of agency adjudicators into question in many decisions, finding that the immigration judge showed "bias" and "prejudgment" against the noncitizen (*Lopez-Umanzor v. Gonzales*, 9th Cir. 2005: 1054). Thus, when an agency is particularly vulnerable to political manipulation and its litigants are politically powerless, a more searching level of review is arguably warranted.

1.5.3.2 Expertise

The second primary basis for judicial deference is the expertise theory, or the notion that courts ought to defer to agency interpretations because they have more expertise in their areas than do courts. Several scholars have suggested that the traditional reasons for deferring to agency fact-finding do not apply as forcefully in this context, and that less deference is due as a result (*See, e.g.,* Legomsky 2010). No scholar has more extensively developed the critique of the expertise rationale than Michael Kagan. In recent work, Kagan relies upon the limitations of the expertise rationale to argue that *Chevron* deference is inappropriate in the context of asylum law. As he argues, immigration cases rarely raise issues requiring scientific expertise, and instead raise "classic problems of fact and law, which would seem to dilute any claims that an executive body has a relative advantage compared to courts" (2019: 30). In his prior work, he has also shown that immigration judges enjoy very little advantage in assessing the credibility of asylum seekers, a factor on which many cases hinge. Deference to the fact-finder is traditionally justified on the basis of the relative advantage in making an accurate evaluation of the evidence, as the trial court has a unique opportunity to judge a witness's credibility. As Kagan demonstrates, social science research has soundly undermined the notion that truthfulness can be assessed from one's demeanor, and this criticism is particularly forceful in the asylum context (*Id.* at 127). At least one court has recognized this. The Seventh Circuit has voiced concern about immigration judges' insensitivity to the difficulty of judging a witness's demeanor when the witness is from a country that may have different cultural norms concerning things like eye contact, and may be testifying about very sensitive events (*Kadia v. Gonzales*, 7th Cir. 2007). For example, in *Kadia,* the court noted that "immigration judges often lack the 'cultural competence' to base credibility

determinations on an immigrant's demeanor" (*Id.* at 819). A second rationale, efficiency, is often used to justify deference to the fact-finder, as it would be inefficient to have the reviewer reach these same findings anew. As Kagan (2012: 117) argues, efficiency, alone, is a difficult rationale when it comes at the expense of the correct substantive outcome, particularly when the stakes are as high as in an asylum claim. While there can be no doubt that the immigration judge is still in a relatively better position to assess things like a witness's demeanor than an appellate court, there is at least reason to be skeptical of whether it justifies the extreme deference to the immigration judge in asylum adjudication.

An issue closely related to expertise concerns the conditions under which agencies adjudicate cases. Immigration judges operate in a climate in which any relative expertise is nearly moot, as judges don't even have time to do basic research on the relevant case law. In 2017, immigration judges reported to the GAO that they do not have sufficient time to conduct essential tasks such as "case-related legal research or staying updated on changes to immigration law" (Immigration Courts GAO Report 2017: 10). As Stephen Legomsky has demonstrated, the agency suffers from severe underfunding that has affected its reputation and the courts' perception of its decisionmaking (Legomsky 2010). In 2012, for example, the average immigration judge was required to complete 4.3 removal cases per day; this left each judge with approximately seventy three minutes to consider each case, which would include hearing testimony, reviewing evidence, and rendering a decision (TRAC Immigration 2009; *see also* Kim 2013: 610-11). As the Seventh Circuit noted, in 2007, one Board member decided more than 50 cases a day, requiring a decision nearly every ten minutes if he were assumed to work a nine-hour day without a break (*Kadia v. Gonzales*, 7th Cir. 2007: 820). The GAO's 2017 analysis showed that the EOIR's case backlog, or the cases pending from previous years that remain open at the start of a new fiscal year, more than doubled from 2006 through 2015 (Immigration Courts GAO Report 2017). As its analysis demonstrated, the median pending time for a case went from 198 days in 2006 to 404 days in 2015 (*Id.* at 22). Many immigrants routinely wait more than 1000 days currently, and it would take the immigration courts 3.6 years to clear their backlog if they were given no new cases (TRAC Immigration 2009).

Given that immigration judges operate with inadequate resources and with a crushing caseload, erroneous decisions are simply inevitable. Moreover, as Gelbach and Marcus point out, federal judges have the ability to spend much more time on each case (2017: 1111). They also confer the advantage of a generalist, which plays a particularly important role in this context. As Stephen Legomsky has argued, asylum officers and immigration judges are bombarded every day with tales of unimaginable human tragedy, and may begin to think in relative terms (1989: 1210). One advantage of generalist federal appellate courts is that they may be less likely to develop a level of institutional callousness, or undue sympathy for agency employees (*Id.*) With adequate scrutiny of the agency's decisionmaking, the appellate process permits some of the most egregious errors to be fixed.

The doctrines that the Seventh and Ninth Circuit have developed are most appropriately tailored to the limitations of the expertise rationale in the asylum context. These courts are closely scrutinizing the agency's factual findings to be certain that they are well-supported by the entire factual record, and to ensure that the agency has provided specific and reasonable support for any adverse determinations. While this inquiry has grown increasingly searching as the reputation of

the agency has been called into question and the quality of its decision making has arguably been poorer, one could argue that this approach more fully permits courts to fulfill the aims of judicial review. In fact, the Ninth Circuit has argued that its searching review is entirely consistent with the legislative history of the REAL ID Act (*Shrestha v. Holder*, 9th Cir. 2010: 1043). However, even if this scrutiny may lie outside the bounds contemplated by *Chevron*, this more searching inquiry is arguably normative beneficial, and justified by the current state of immigration adjudication.

1.5.3.3 Asylum as a Private Right

Mila Sohoni (2013: 1623) provides one final basis on which courts should accord less deference to agency decisionmaking in asylum cases. She argues that some appellate courts perceive asylum as more akin to a private right than a public one. Drawing upon Thomas Merrill's argument that the Supreme Court has never truly grappled with the Article III implications of the appellate review model, discussed *supra*, Sohoni argues that Article III in fact demands that the doctrine of deference be calibrated to the nature of the right involved. Traditionally, Article III review has been viewed as necessary in cases involving private rights, or rights stemming from an individual's status as a person, such as his common law rights in property and bodily integrity (Woolhandler 2006: 1020). The parceling of public rights, which includes interests that originate from the state rather than the individual, such as one's right to a governmental benefit, has not typically been viewed as requiring Article III review. As Sohoni explains, the standards of review for agency action do not turn on whether the right at issue is public or private (Sohoni 2013: 1573 n. 16). However, she argues, the standards ought to make exactly this distinction; in cases involving private rights, she contends, more deference is warranted. In other words, courts ought to be guided by Article III jurisprudence when determining the extent of their deference in reviewing agency adjudication. In the asylum context, she claims, this phenomenon is already occurring, and it is likely due to a judicial perception that asylum is something like a quasi-private right. James Pfander and Theresa Wardon provide support for this, as they demonstrate that immigration did not historically fall squarely within the "public rights" category (Pfander and Wardon 2010: 433-40). Bolstered by their historical findings, Sohoni argues that the refusal of the courts to accord the expected level of deference in asylum cases simply reflects their recognition of this quasi-private right, and they are thus "performing the robust review that Article III demands" (Sohoni 2013: 1573).

1.5.4 Judicial Deference as Responsive to Agency Crisis

A consideration of all of these factors warrants a reexamination of the deference doctrine in asylum law. Anne Joseph O'Connell has suggested that judicial doctrine could be better attuned to the reality of agency decisionmaking. O'Connell (2008: 981) suggests that courts could assess several factors when deciding how much to defer to an agency's decisionmaking, such as the level of presidential and congressional control over the agency, the agency's track record, and the type of agency. She suggests, for example, that if an agency receives substantial oversight from Congress and the White House, then perhaps courts should simply defer to their reasonable decisions. Immigration cases are different from every other type of agency action, however, as they are virtually non-responsive to the people upon whom they act. Thus, immigration cases might dictate precisely the opposite result: the more oversight the agency receives from Congress

and the White House, the more closely courts should scrutinize their actions. As Maureen Sweeney (2019: 191) argues, majoritarian political accountability is a "distinct *dis*advantage in any attempt to protect the fundamental rights of politically vulnerable minorities."

To be sure, this theory of deference would require a revision to the one encapsulated by *Chevron.* Indeed, part of the point of *Chevron,* as Cox explains, was to create a "general, trans-substantive doctrine of administrative deference" to approach the prior, more "ad hoc" approach (2007: 1682). Accordingly, *Chevron* surely does not authorize courts to calibrate the level of deference to their assessment of an individual agency's competence (*Id.*) It begs the broader question, of course, of how well suited courts are to assess agency competence (*Id.* at 1683). However, the recent work of Gelbach and Marcus has suggested that courts can serve this role, at least in areas of the law in which they receive large numbers of appeals. As they point out, the federal courts now feed on a sizeable diet of immigration cases, and accordingly are well-situated to observe trends within the agency's decisionmaking. In a crisis as severe as the immigration agency's, with performance measured by the number of cases completed and nearly no time to decide each case, such shortcomings are nearly impossible to ignore. Facing this reality, some courts have arguably adjusted their scrutiny of the agency accordingly, and this is normatively beneficial.

Put a different way, it would not be desirable to have a theory of judicial review that is simply invariant to major crises within an agency. Certain circuits, such as the First, Tenth, and Eleventh in these data, have simply employed the same approach to reviewing the agency's decisionmaking, even as the agency increasingly employed measures that incontrovertibly reduced the quality of its adjudication. Others, such as the Seventh and Ninth here, have engaged in closer scrutiny in response to repeated signals that the quality of adjudication was compromised. This latter approach better fulfills the legitimizing function of judicial review, and this is particularly true in the context of an agency that is not politically responsive to its litigants. In this context, judicial review becomes all the more important, and an approach to deference that is calibrated to the quality of decisionmaking is both normatively justifiable and desirable. This is all the more compelling in a substantive area of law in which the stakes could not be higher and the right at stake is arguably more akin to a private one that demands robust review by Article III judges. As Michael Kagan (2019: 2) argues, "*Chevron* deference seems to be at the height of its powers in refugee and asylum cases, with the highest possible human consequences."

CONCLUSION

The most promising potential to change asylum adjudication surely lies in proposals directed at improving the quality of decisionmaking within the agency. Thus, proposals to separate the enforcement and adjudicative arms of the agency, for example, are critically important, as are proposals to provide more resources and independence to immigration judges and the Board (*See, e.g.,* Vaala 2017: 1036; Legomsky 1989: 1210). However, while many of these proposals could bring substantial improvement to the quality of asylum adjudication and ultimately affect far more asylum seekers, they are unlikely to be forthcoming soon. Rather, recent changes will move the agency in the opposite direction. The imposition of quotas will likely further compromise the immigration judges' independence and the quality of their decisionmaking, by having their job performance evaluated on how quickly they close cases (EOIR Performance Plan 2018). In order

to achieve "satisfactory performance," each judge must complete 700 cases per year (more than two per working day) and must achieve a remand rate of less than 15% total from both the Board and Courts of Appeals (*Id.*) As a result, federal courts may be the only institutions equipped to meaningfully address flaws in the immigration agency's system of adjudication.

A close review of five circuit courts has demonstrated important differences in how courts approach judicial review of asylum adjudication. Circuits like the First, Tenth, and Eleventh engage in very little scrutiny of asylum cases, instead adhering to an approach grounded in extreme deference to the agency. Others, like the Seventh and Ninth, have calibrated their approach to signals that the quality of agency adjudication is extremely compromised in asylum cases. Accordingly, they have used the elasticity of the appellate review model, and the accompanying flexibility in the substantial evidence standard, to develop rules of interpretation that expand the seemingly narrow standard of review in asylum cases.

As I have outlined here, this more expansive approach is normatively desirable. Federal courts ought to use the elasticity of the appellate review model in order to expand the scope of their review in the asylum context, as some circuits have already done. While not necessarily the approach envisioned by *Chevron*, a theory of deference that permits courts to respond to signs of crisis within an agency more closely fulfills the purpose of judicial review. This is particularly true in the asylum context. In stark contrast to other agencies, the immigration agency is not responsive to the people over whom it exercises power. Rather, it is structured in a way that permits adjudication to be directly influenced by the political whims of the executive, even though asylum arguably implicates a more quasi-private right (Sohoni 2013: 1573). Moreover, as a long line of scholarship has recognized, there are reasons to doubt the purported expertise advantage of the agency in this context. The more expansive standard adopted by at least two circuits is sensible, and more courts should follow suit.

CHAPTER 2: LEARNING TO DETAIN ASYLUM SEEKERS AND THE GROWTH OF MASS IMMIGRATION DETENTION IN THE UNITED STATES

INTRODUCTION[2]

In the past four decades, the number of noncitizens detained by the United States has grown at a staggering rate. In 1985, the government detained an average of 3,380 noncitizens on a given day (INS Oversight Hearing 1986: 111); in June 2019, this number exceeded 52,000 (Jefferis 2019). Immigration imprisonment was "reborn" in 1981 (Simon 1998: 579), in response to the unexpected miigration of more than 150,000 Cubans and Haitians. However, detention of noncitizens was otherwise relatively rare during this period. In stark contrast to today, the agency did not routinely detain noncitizens after a final deportation order was entered, even when the reason for deportation was a criminal conviction (Taylor 2005: 3). For those it did detain, a bond hearing was available and administrative precedent established a presumption of release (*Id.*)

While modern-day immigration detention began with Reagan's 1981 policy, it was the legislature that ultimately entrenched the system of mass confinement. It began with a series of laws that targeted noncitizens with criminal convictions. In the Anti-Drug Abuse Act of 1986, Congress authorized immigration officials to seek a detainer for anyone arrested for a controlled substance offense. Two years later, Congress required that the Immigration and Naturalization Service ("the Service") take custody of any noncitizen convicted of an "aggravated felony," creating an entirely new population of detainees (García Hernández 2014: 1337, 1370). In 1996, Congress changed immigrant detention even more drastically, passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In addition to mandating detention of a wide variety of noncitizens, the 1996 legislation contained the most stringent provisions ever adopted for noncitizens with criminal convictions (Schuck and Williams 1999: 450). The number of noncitizens in detention rose "steadily and dramatically" (Ryo and Peacock 2018: 2).

How did the Service's targeted, crisis-specific detention efforts of the early 1980s develop into a broad, legislatively mandated detention scheme? Scholars have not yet undertaken a comprehensive historical examination of the period between 1981, when President Reagan announced his policy of detaining Haitians, and 1996, when Congress passed its far-reaching detention mandate. In particular, they have not yet explored how Congress evolved from initially criticizing the executive's detention practice to instituting a broad scheme of mandatory detention over the Service's objections.

Our analysis reveals that a critical component of this evolution was a transformation in the perception of asylum seekers. Until the early 1990s, legislators focused their detention efforts on noncitizens with criminal convictions and continued to express concern that these policies could infringe upon the rights of asylum seekers. As we demonstrate below, this changed in the early

[2] This chapter was co-authored with Smita Ghosh.

1990s, as a variety of dynamics converged and an asylum crisis was born. These included, for example, a general rise in undocumented immigration, the recasting of unauthorized migration as a crime, the end of the Cold War, the creation of an asylum crisis in the media, and a concurrent asylum crisis in Europe (Hedges 1993: A6; Hamlin 2015: 332; Loescher and Scanlan 1986: 69). Congressional discourse about asylum changed dramatically. Lawmakers began depicting asylum seekers as either potential criminals or agents of infectious diseases. This new discourse came to justify the systemic detention of asylum seekers and cleared the way for the mass detention of immigrants more broadly. Just as policymakers became more comfortable detaining in the criminal context, they also learned to detain and exclude potential refugees. Indeed, the growth of immigration confinement was "fueled by a sharp increase in detention of asylum seekers" (Acer and Byrne 2017: 373). Once the label of criminality had been extended to asylum seekers, lawmakers were motivated to enact reforms that would limit asylum-processing and increase their incarceration, guaranteeing that arriving asylum seekers were more likely to see the inside of a prison than the inside of a courtroom.

This shift in Congress's perception of asylum seekers has been largely absent from scholarship on the origins of immigration detention. Most critically, while scholars have described the legislative preoccupation with noncitizens convicted of criminal offenses, and have considered the implications of this preoccupation for the growth in immigrant incarceration, they have not connected the "political climate" (García Hernández 2014: 1359) of the 1980s and 1990s with the changing politics of asylum.

In addition to demonstrating a critical shift in the treatment of asylum seekers, our analysis also contributes to the scholarship on the growth of immigration detention in two ways. First, with some significant exceptions (Martin 1995; Schuck and Williams 1999; Taylor 2003, 2005), many scholars treat the executive and Congress as monolithic in their support of immigration detention. As our analysis reveals, the two branches in fact changed positions on the issue in the fifteen years preceding the 1996 legislation. Treating the executive and Congress as though they were uniformly pursuing the same goal of detention obscures a more complex interplay between the two institutions in the period leading to the mass detention of immigrants. Second, most accounts of detention begin with the passage of AEDPA and IIRIRA in 1996. As we argue, the preceding fifteen years are essential to understanding how immigration detention became normalized and institutionalized within the U.S.

We present a number of implications that follow from this study. First, a comprehensive analysis of more than five thousand pages of legislative history and government records from 1981-1996, supplemented by more than one hundred newspaper and magazine articles, reveals how Congress extended the label of criminality to asylum seekers, who became a subtype of another legislative preoccupation, the so-called "criminal alien."[3] As this discursive shift occurred, lawmakers increasingly turned to mandatory detention policies that precluded individualized determinations of risk. We illuminate how many of the same processes that drove the mass incarceration movement—particularly the notion of "rhetorics of risk"—were at work within the immigration detention movement as well (Feeley and Simon 1992). While we focus on

[3] While we recognize that the term "criminal alien" has a dehumanizing effect, we use it within this chapter because a central component of our analysis is the rhetoric used to describe noncitizens over this period.

congressional change, our analysis also draws on internal agency records to show that even the Service's attempts at detention reform eventually succumbed to the new penology framework.

Our analysis also reveals a distinctive form of cognitive dissonance at work within the transformation of asylum seekers. In exploring how asylum seekers came to be branded as dangerous classes, we draw upon the work of Allegra McLeod (2012: 159-61). McLeod identifies two forms of "cognitive dissonance" prevalent in immigration discourse: a racial dissonance, in which a norm of colorblindness stands in tension with the racial anxiety surrounding immigration, and an economic one, in which the public's reliance on immigrant labor conflicts with its unwillingness to extend associated economic privileges to immigrant workers (*Id.* at 159). As she argues, the category of the criminal alien relieves some of the dissonance by providing a discrete and identifiable group to be held responsible for the ills posed by immigration (*Id.* at 166). Our work reveals another form of dissonance at work within the transformation of asylum seekers. In the early 1990s, lawmakers and the public wrestled with the dissonance between the humanitarian commitment to protecting refugees, on the one hand, and the fears provoked by the realities of this commitment, on the other. In studies of the post-9/11 period, scholars have emphasized that asylum seekers were marked by their "otherness" and became implicitly associated with the dangerousness of the regimes they fled (Welch and Schuster 2005: 344; Malloch and Stanley 2005: 43). Our analysis reveals that lawmakers perceived asylum seekers as dangerous and risky much earlier. In the early 1990s, legislators and the public branded asylum seekers as criminals (or "Typhoid Marys"), avoiding the dissonance between proposed reforms and their humanitarian commitment to refugees.

As we demonstrate, a long-described relationship between procedural interventions and substantive severity within criminal law also contributed to the detention of asylum seekers. In the criminal law context, William Stuntz (1997: 5) argues that legislators reacted to expansions of procedural protections from the courts by expanding the scope of liability, increasing punishments, and underfunding criminal defense. As we describe below, lawmakers similarly responded to expanded procedural protections for asylum seekers by expanding their detention and justifying it as necessary to prevent abuse of the system.

Finally, lawmakers also reacted by streamlining the asylum process through the institution of expedited removal. Scholars have long decried expedited removal, both because it dramatically restricts individual rights and because it fails to "protect society against potentially dangerous accretions of government power" (Kanstroom 2018: 1326). We find the roots of this controversial program in the convergence of two very different legislative concerns, one about reducing detention and another about increasing immigration enforcement. As we show below, screening mechanisms that were once implemented in order to release asylum seekers from detention were later incorporated into the expedited removal system and divorced from their decarceral roots.

2.1 Existing Literature on the Growth of Immigration Detention

In this chapter, we build upon a growing literature that examines the convergence of mass incarceration and immigration detention (McLeod 2012; Chacón 2012; Stumpf 2014). As we detail below, scholars have rooted the rise of immigrant detention in many of the same dynamics that

spurred the development of mass incarceration. Jonathon Simon was the first to place the executive's practice of detaining arriving Haitian and Cuban migrants within the larger history of the mass incarceration movement (1998). Since his writing, an interdisciplinary literature has connected mass incarceration and immigration detention, demonstrating that immigration detention was a direct result of the incarceration movement. Legal scholars Emma Kaufman and Mary Bosworth (2011: 431) argue that noncitizens became "the next and newest 'enemy' in an American war on crime." Political scientist Marie Gottshalk shows that immigrants became "important new drivers of the carceral state" (2014: 215-17). Sociologist Patrisia Macías-Rojas (2018:2) emphasizes that Democrats as well as Republicans recast unauthorized migration as a crime, showing that the crime politics of both parties in the early 1990s played an undeniable and understudied role in shaping IIRIRA's criminal provisions.

Many scholars have emphasized the significant role of profit-seeking by private detention companies in the staggering growth of immigrant detention. As Ackerman et al. (2014: 4) observe, immigration detention followed the neo-liberal movement to privatize state services. Phillip Torrey details the powerful incentives created by the private prison industry to expand immigration detention (2015: 904). Drawing on the notion of institutional path dependence, Cesar Cuauhtémoc García Hernández argues that once immigration officials embraced the political rhetoric of migrant criminality, they became locked in a pattern of expanding imprisonment (2015: 1498).

Scholars have also connected the rise of immigration detention to the theories of racial subordination and social control that characterized crime policy during the same period. Several scholars have observed that the government disproportionately incarcerates noncitizens of color. Michael Welch argues that detention has emerged as a mechanism of social control over them (1996: 178). García Hernández takes a longer view in his most recent work (2019: 11), exploring how immigration imprisonment emerged amid racially coded debates over drug policy in the mid-1980s.

Much of this scholarship on immigration detention begins its inquiry with the broad detention mandates enacted in 1996, providing only a cursory description of the preceding years. As we argue, the fifteen years preceding the 1996 legislation are equally important to the growth of immigration detention and, in particular, to understanding how detaining asylum seekers became routine. There are several notable exceptions to this tendency. Peter Schuck and John Williams (1999: 422-450) demonstrate that state and local governments, increasingly frustrated by the costs associated with incarcerating noncitizens, convinced Congress to enact mandatory detention provisions. David Martin, writing as a legal academic and the former General Counsel of the INS, describes how the Service opposed the expedited removal provisions in IIRIRA (1999: 167). Margaret Taylor has explained that Congress went from neglecting the Service's inability to remove noncitizens with criminal convictions in the 1980s, to hastily writing broad detention mandates into the 1996 legislation, over the objections of the agency (Taylor 2005: 2-9). We draw upon this work in a careful review of how immigration detention became formalized between 1981 and 1996. This permits us to examine how immigration detention evolved from an ad hoc executive initiative into a far-reaching system of confinement mandated by the legislature. As we reveal, the legislative preoccupation with immigrants with criminal convictions gave way to an association between criminality and the asylum seeker, grounded in a rhetoric of risk in which asylum seekers were presumptively dangerous.

The use of deterrence as a justification has figured prominently into studies of detention and asylum policy. Several scholars have analyzed the frequency with which lawmakers and officials invoke the notion of deterrence in justifying the detention of both asylum seekers and immigrants more generally (Loyd and Mountz 2018; Hamlin 2012: 46). However, as Emily Ryo (2019) explores, despite the persistent rhetoric of deterrence, there is no empirical evidence that detention has a deterrent effect. Scholars of asylum policy describe "a regime of deterrence" that fully took hold after the 1994 congressional election (Hamlin 2012: 47). In a detailed account of legislative efforts to enact asylum reforms in the early 1990s, Philip Schrag demonstrates that the expedited removal provisions of IIRIRA followed an "asylum crisis" that was animated by at least three factors: acts of terrorism attributed to asylum seekers in 1993, growing concern about an asylum backlog, and extensive press accounts of alleged abuse of the asylum system (Schrag 2000: 5, 94). In this chapter, we build upon the work of Hamlin and Schrag by tracing the evolution of congressional attitudes towards the detention of asylum seekers between 1981 and 1996. Most notably, we understand the changing perception of asylum seekers in the broader context of the legislative preoccupation with the criminal alien, exploring a relationship that most scholars have ignored.

In 1992, criminologists Malcolm Feeley and Jonathan Simon introduced the pivotal concept of the "new penology," which has since generated extensive work on the ways in which prison administration in the U.S. moved from system focused on rehabilitation to an actuarial project seeking to control "dangerous" classes of people (see, e.g., Reiter 2016). Simon (1998: 594) argues that the Haitian refugees were perceived as a "dangerous class" and incorporated into prevailing conceptions of race in the U.S. Teresa Miller (2003: 646) has built upon Simon's work to argue that criminal aliens were similarly understood as dangerous and managed by an actuarial model of justice. Welch (1996: 181; 2002: 152) invokes the new penology to argue that the Service abandoned any pretense that detention was anything but punitive, and actively resisted and opposed the reintegration of undocumented immigrants into the community. As we demonstrate below, elements of this new penology were similarly important in explaining the transformation of asylum seekers during this period. As lawmakers extended the label of criminality to asylum seekers, they soon became branded as dangerous, risky classes who harbored disease or sought to commit crimes.

2.2 DATA AND METHODS

This chapter conducts a careful historical analysis of the fifteen-year period that culminated in legislation that would formalize the mass detention of immigrants. It draws on multiple sources of data, including congressional hearings, case law, federal archives, and print media.

In order to more fully assess congressional treatment of immigration detention, we compiled data from Proquest Congressional, focusing on all congressional hearings from 1981 through 1996. Using a search framework that identified any variation of the word "detain" in proximity to variations of the words "asylum", "alien," or "migrant," we reviewed more than 5,000 pages of legislative history, which included over eighty congressional hearings, after excluding search results unrelated to immigration policy. This included, for example, committee reports, hearing transcripts, and congressional communications with the executive. The logic of this

inquiry was inductive and exploratory, as we sought to allow findings to develop through the frequent and dominant themes that emerged (Webley 2010: 942). As we reviewed them, we collected any relevant quotations related to the detention of noncitizens, and made summary notes about the themes in the dialogue in each hearing. This permitted us to examine how legislative perceptions of issues evolved, and we analyzed these records with the goal of identifying changes in congressional reactions to immigrant detention. For example, we paid careful attention to questions from legislators to agency officials concerning funding of detention centers, allegations from constituents concerning detention, and lawmakers' discussion of the propriety of detention generally.

These sources offer a window into the public politics of immigrant detention and reveal how lawmakers understood the Service's use of detention. While the membership of Congress changed during the study period, we noticed trends even in individual lawmakers' approach to detention. For example, we compared Romano Mazzoli (D-KY)'s 1982 statement that he "opposed long-term detention for aliens" (Detention of Aliens 1982: 249) and his 1994 statement of concern about noncitizens with convictions being "paroled to the streets" rather than remaining in custody (Criminal Aliens 1994: 190), in addition to assessing statements of various members and committees across the period.

We supplemented this analysis of congressional records with 1) a review of print media sources for their treatment of detention, refugees, and asylum seekers, 2) a review of archival materials concerning the Asylum Pre-Screening Officer ("APSO") program, and 3) records from the Reagan and Clinton libraries. We created a database of media coverage of immigration detention across a large range of sources from 1981-1996. We conducted a detailed review of this coverage and, following Hamlin (2012: 39), were able to identify points of tension and critical moments during this history. In addition to tracking critical moments, we focused on editorials, because official editorials are likely to reflect the institutional preferences of the newspapers and may help track general attitudes (Chomsky 1999). A close reading of the more than one hundred articles in this database helped us to construct a timeline of the major events in detention and enabled us to locate crucial changes in the discourse around asylum seekers.

2.3 ANALYSIS

The evolution of mass detention between 1981 and 1996 can be roughly divided into three "eras" that each reflect a different dynamic between the executive and the legislature. These boundaries are approximate, of course, as they reflect a complex and dynamic interplay between the branches, but they help demonstrate the evolution of attitudes toward detention. The first era begins in 1981, when Congress resisted the executive's detention policy, expressing particular concern about asylum seekers. A shift began to take place in the second era, beginning in the late-1980s, as the legislative preoccupation with the so-called "criminal alien" began. While members of Congress increasingly expressed support for the detention of noncitizens with criminal convictions, they largely resisted the detention of asylum seekers. Finally, in the third era, a number of domestic and foreign policy considerations converged to create an "asylum crisis" in 1993, which was marked by an abrupt shift in legislative discourse. Legislators began to describe asylum seekers as "Typhoid Marys" and criminals who sought to abuse the system, and viewed detention as necessary to deter this abuse. Once lawmakers were comfortable with detaining

asylum seekers, the system of mass detention quickly followed. Legislators engaged in a frenzied effort to reform immigration law, and hastily enacted IIRIRA's broad mandatory detention policies over the objection of immigration officials.

2.3.1 The First Era: The Executive's Push for the Power to Detain

Following the arrival of over 150,000 Cubans and Haitians to Florida between 1980 and 1981, the Reagan Administration reinvented immigration imprisonment after a hiatus of nearly twenty-seven years (Simon 1998: 579). This detention was not entirely new, as Haitians in Florida facing deportation in the 1970s had been subjected to imprisonment "on a sporadic basis" (Loescher and Scanlan 1986: 193). The Carter Administration also began detaining Cubans entering in 1980 in what formed the precursor to Reagan's more formal policy (New York Times May 25, 1980). Under Reagan's policy, anyone arriving without proper travel documents would be detained pending a determination of their status (Welch 1996: 170). Because the Service had not used detention systematically in the past, relying instead on an official policy of releasing migrants on parole except in exceptional circumstances, it lacked the infrastructure to do so, and began detaining them in overcrowded prisons and jails (Macías-Rojas 2018: 4).

The Reagan Administration defended the 1981 detention policy to Congress by trumpeting it as a deterrent to future immigration crises. As Alan Nelson, Reagan's INS Commissioner, told Congress in 1982, "the detention policy … puts pressure on people not to come unless they have a legal right to be here" (Immigration Reform and Control Act of 1982: 408). Similarly, the Attorney General told Congress that the country had "lost control of [its] borders" and would, without detention, "crumble under the burden of overwhelming numbers" (Administration's Proposals on Immigration 1981: 6, 75). Detention was a crucial component of the executive's immigration policy agenda. The Administration included in its proposed immigration reform bill a provision that would "make clear" the Attorney General's authority to detain migrants—even indefinitely—"so there can be no doubt regarding the power of the United States to protect the public by detaining … all of the arriving aliens during an emergency, as circumstances warrant" (Immigration Emergency Powers 1982: 26). The administration felt that its "broad authority to detain" was clear, explaining that the "language of this bill [wa]s merely intended … to preclude the judiciary from second guessing the Executive Branch's decisions" (*Id.* at 27). Senators from Florida introduced the President's proposal in the Senate in 1982 and 1983, but their bills never passed (Schmults 1984: 1).

In addition to disapproving of the emergency powers bill, members of Congress voiced their opposition to the executive's use of detention. On May 21, 1982, fifty-five representatives wrote a letter to the Attorney General protesting the "indefinite imprisonment" of Haitians as "costly[,] inefficient," and offensive to "our historic commitment [to] political asylum" (Detention of Aliens 1982: 255). In June 1982, Alan Simpson (R-WY) and Romano Mazzoli (D-KY), the chairmen of the immigration subcommittees in the Senate and House, respectively, visited the Krome Avenue detention camp in Miami. "Having visited these Haitians in their detention facilities," they wrote in a joint press release, "we know they are not criminals and that our policy should not be to detain them in such facilities" (*Id.* at 248). At oversight hearings in 1982, Representatives Hamilton Fish (R-NY) and Mazzoli pressed the Immigration Service Commissioner about whether long-term detention should really "be the mission of the Immigration

Service" (Oversight Hearing 1982: 86, 94).

Members of Congress drew on news articles and court opinions to express specific disapproval of the long-term detention of Cubans and Haitians. In 1982, the House Committee on the Judiciary reported that it was "deeply troubled by the long-term detention of Haitian nationals undergoing asylum hearings," particularly because these detainees were "not criminals" (H. Rep. 97-890 1982: 52). In letters to the Attorney General, members of the House referenced Judge Spellman's decision in *Louis v. Nelson*, which had temporarily enjoined the detention policy because it violated the Administrative Procedure Act's notice and comment provisions (Detention of Aliens 1982: 255). As discussed in the next section, Cubans and Haitians had been treated very differently prior to 1980; nearly all Cubans were granted asylum, while the applications of nearly all Haitians had been denied (Loescher and Scanlan 1986: 69). However, support for Cubans had changed dramatically with the arrival of the Mariel Cubans, who were quickly stigmatized as criminals and deviants (*Id.* at 217).

Because the detention of Caribbean migrants was primarily in Florida and felt very acutely by the community, lawmakers from Florida were some of the fiercest critics of long-term detention—or, at least, long term detention in Florida. As Rep. Dante Fascell (D-FL) explained when reflecting upon his efforts in the early 1980s, "I did everything I could to keep [Krome detention center in Miami] from being opened up. I thought if you are going to detain, you ought to detain in an area that is not that close to where your problem is" (Central American Asylum Seekers 1989: 25). State officials also entered federal discourse. The Governor of Florida testified several times in the early 1980s, sued the Attorney General about the conditions at Krome, and advocated Florida lawmakers behind the scenes.

During this era, the legislature was relatively sympathetic to asylum seekers, and introduced a number of measures to influence the executive's asylum procedure and policy. In the early 1980s, each house approved its own version of legislation that would have provided more education to immigration officers about human rights abuses and more training in interviewing asylum applicants (Loescher and Scanlan 1986: 196). These measures were not ultimately passed because of the failure to reach agreement on immigration reform legislation. In 1983, both houses attached a nonbinding resolution to a Foreign Aid appropriations bill urging President Reagan to grant asylum seekers from El Salvador extended voluntary departure status (*Id.*) The Administration ultimately ignored this, however, and was similarly unmoved by a large "sanctuary movement" by church leaders that hid Salvadorans and Guatemalans in churches and parishioner homes (*Id.*)

Lawmakers also expressed their dissatisfaction with detention in discussions about appropriations. In 1981, Congress removed $45 million from the Immigration Service's budget, $35 million of which had been intended for constructing an additional detention center (H. Rep. 97-352 1981: 28). Most members of Congress explained the decision as a cost-effective way to reduce government spending. To them, constructing a new detention facility was especially unwarranted. In a hearing on the Appropriations Subcommittee, Rep. Smith (D-IA) asked if a "permanent facility" was "necessary," given the government's use of temporary detention spaces and the President's new interdiction policy (Departments of Commerce 1981: 91-92). Chairman Mazzoli asked if the money could go to other INS efforts instead (Immigration Reform 1981: 834).

When the DOJ again asked for the funding in supplemental appropriations, Congress, once again, pushed back. Writing to the House Subcommittee on Courts, Rep. Robert Kastenmeier (D-WI), urged members to "carefully examine" the DOJ's request (Detention of Aliens 1981: 228). Detention was inappropriate, he argued, because it interfered with migrants' right to counsel, prevented family reunification, and already cost the taxpayers approximately $37 million annually. Members of the House Immigration Subcommittee were similarly cautious. Chairman Mazzoli stated that he "oppose[d] long-term detention for aliens waiting a decision on their immigration status" and that the detention of Haitians "reflected adversely on our traditional history of humane treatment of aliens and refugees" (*Id.* at 249). Several months later, and after Kastenmeier's committee held a lengthy hearing on the detention policy, Congress granted the Department of Justice only $17 million for the construction of an immigration detention facility.

Congress continued to express concern about the Service's use of detention through the mid-1980s. In an oversight hearing in 1986 on the performance of the Service, lawmakers expressed a number of concerns about the executive's detention practices (INS Oversight Hearing 1986: 20). Their comments focused in particular on the construction of a new detention center in Oakdale, Louisiana, which was designed to house long-term immigration detainees and free bed space for more short-term detention at the border. Chairman Mazzoli pressed Assistant Commissioner Hugh Brien about whether detention was the best use of the Service's limited assets and whether it should be in the business of detaining people at all (*Id.* at 79).

Mazzoli was in fact so opposed to the idea of long-term immigration detention that he sought legislation limiting its use. In July of 1986, the House Immigration Subcommittee considered an amendment, introduced by Chairman Mazzoli, that would have required the Attorney General to release detained migrants on bond unless they posed a danger to the community or were likely to abscond (Administration of the Immigration and Nationality Laws 1986: 42). The provision, entitled "a clarification of the temporary nature of detention," would have returned the executive's detention practices to those of the pre-1981 era, in which the Service did not routinely detain arriving noncitizens.

The success of this bill in the House exemplifies Congress's concern about the long-term detention of asylum seekers in the first era. The Immigration Subcommittee, Judiciary Committee, and the House all passed Mazzoli's provision. As the Judiciary Committee explained in an accompanying report, this provision was rooted in a concern about the detention of asylum seekers:

> the Committee has noted with growing concern the increased incidence of detention on the whole and the increased use of long-term detention of aliens who have exercised their right to a proceeding on their claim to entry, particularly asylum. The Committee strongly disagrees with any attempted use [of] detention as a method of deterring the exercise of rights granted under the immigration law (H. Rep. 99-907 1986: 33).

A new version of the bill, which retained the detention provisions, passed the House in October of 1987 (Efficiency Amendments 1987: 22). Chairman Mazzoli introduced the same amendment the following year, seeking to provide "a clear statement of congressional intent" that noncitizens awaiting removal hearings should not be detained without good reason, and that "release subject

to reasonable conditions is preferable to detention" (*Id.* at 94). While the Senate did not act on the House's immigration amendments that year, the success of the detention amendment in the House reflects the strength of congressional opposition to the detention policy at the time.

Later in the first era, lawmakers expressed concerns about immigration detention by inquiring into the prolonged detention of Mariel Cubans. In 1987, over 3,500 Cubans from the Mariel boatlift remained in federal custody (Gibson 1988). Their detention came to the public eye when they staged a series of three prison riots in November of that year, successfully drawing attention to their incarceration (Kemple 1989: 1749). While media portrayals of the Cubans often reflected their "deviance" or social undesirability immediately following the Mariel boatlift (Hufker et al. 1990: 333), by the mid-1980s the press was also very critical of the lengthy detention they faced (Mariel Cuban Detainees Serial No. 97 1988). As the New York Times reported, a "clamor" was rising over the detention of Mariel Cubans (Volsky 1987). Even before the riots, the editorial boards of several newspapers argued against their "cruel and unusual" treatment (New York Times April 14, 1987; Washington Post April 2, 1987).

At congressional hearings about the riots, lawmakers expressed grave concern about the possibility of indefinite detention (Welch 2002: 97). Rep. John Lewis (D-GA) testified after visiting the Atlanta Penitentiary that the conditions were "truly appalling" and these detainees had been indefinitely detained with no chance of judicial review or due process (Mariel Cuban Detainees Serial No. 97 1988: 5). In July of 1988, the House Immigration Subcommittee considered several provisions that would have limited the detention of excludable aliens and provided counsel for those detainees who were financially unable to obtain adequate representation (Mariel Cuban Detainees Serial No. 81 1988). Rep. Kastenmeier noted that these provisions had bipartisan support, emphasizing: "That we as Americans could have permitted the indefinite and often inhumane incarceration of fellow human beings for so long is nothing short of a tragedy" (*Id.* at 13).

At the end of the First Era, legislators were still more likely to question the executive about the overuse of immigration detention than to demand its increase. Newspapers had the same tendency, reporting on accusations of bias in the detention process (Johnson 1982), sharing sympathetic portrayals of asylum seekers in detention (Morrison, 1987), and criticizing what one paper called the "department of detention" (New York Times 1982). However, this was a time of transition. Even Chairman Mazzoli, who sponsored the bill that would limit long-term immigration detention, expressed mixed feelings. He voiced concern that if noncitizens were not detained, they could rapidly establish roots in the community by marrying, having children, and buying property. In his view, these were the very factors noncitizens might use to "throw themselves on the mercy of the immigration court and say: it is going to be a terrible hardship for me to leave" (Administration of the Immigration and Nationality Laws 1986: 249). As detailed below, these concerns would prevail in the coming years.

2.3.2 The Second Era: The Rise of the "Criminal Alien"

While the legislature continued to express concern about the detention of asylum seekers during the second era, it rapidly developed a preoccupation with what it called the criminal alien. Crime had been a central issue in U.S. politics for nearly two decades, and the War on Drugs was

in full force during this era (Simon 2007: 262), but this concern had not yet moved into the immigration arena (Macías-Rojas 2018: 2). In the mid-1980s, however, what Margaret Taylor has characterized as a "something of an insider's secret" had begun to capture the legislature's attention: that the INS lacked the necessary infrastructure to remove many noncitizens with criminal convictions, so that "[d]eportable criminals slipped through the cracks at every point in the removal process" (2005: 4). In May 1986, the Senate Committee on Appropriations ordered the Attorney General to provide the Committee with a detailed strategy for investigating and deporting noncitizens with criminal convictions (*Id.*) Hearings began to reveal the extent of the Service's inaction. Lawmakers castigated the service for detaining so few criminal aliens (Emerging Criminal Groups 1986: 268, 294). In October, Congress passed the Anti-Drug Abuse Act of 1986, which established pilot cooperation programs between the Service and local law enforcement and required immigration authorities to respond to local requests regarding the immigration status of people arrested on drug charges (Shuck and Williams 1999: 429; 8 U.S.C. §1357(d)(1994)).

As awareness of the Service's inability to remove noncitizens grew, lawmakers began to consider mandatory detention as a solution for those with criminal convictions. In March 1987, a Senate Subcommittee held a public hearing on the Service's inability to effectively deport so-called criminal aliens (Illegal Alien Felons 1987). Both state and local officials testified in support of a no-bond policy for convicted felons. In 1988, Senator Lawton Chiles (D-FL) introduced unsuccessful amendments to the INA that laid the groundwork for subsequent mandatory detention legislation (Implementation of Immigration Reform 1988). At this point, lawmakers still drew a sharp line between asylum seekers and criminal aliens, seeking only to detain the latter. Indeed, as Senator Chiles explained, his proposed bill drew a distinction between an illegal alien who may be entitled to certain rights (such as the asylum seeker), and "an illegal alien felon," whom he described as "another creature entirely" (*Id.* at 22). While Chiles' bill was ultimately unsuccessful, very similar language found its way into the Anti-Drug Abuse Act of 1988, which mandated detention without the possibility of bond for noncitizens convicted of aggravated felonies. Critically, Congress passed these provisions despite the Service's very limited detention capacity, which rendered it incapable of fulfilling the statute's mandates. Less than a year later, in the Immigration Act of 1990, Congress expanded the aggravated felony definition, increasing the number of noncitizens subject to mandatory detention.

Meanwhile, the problem of the criminal alien continued to gain traction within Congress and the media. Following widespread reporting on the inability of INS to remove aliens with criminal convictions, the House Immigration Subcommittee convened another hearing on the issue in November of 1989 (Criminal Aliens 1989). As Chairman Mazzoli framed the issue in his opening remarks, the "deportation capacity and performance" of the Service was "woefully inadequate" (*Id.* at 2). In several studies, the GAO had concluded that criminal aliens who should have been deported had instead remained and then committed additional crimes (*Id.* at 1). Both lawmakers and the press depicted noncitizens as "prone" to drug-related offenses and "violent kinds of crime" (*Id.* at 36). The Subcommittee considered H.R. 3333, which would have expanded the Service's ability to make arrests. At this hearing the Assistant Commissioner for Investigations indicated that the lack of detention space directly affected its ability to effectively remove criminal aliens (*Id.* at 22-23). He urged Congress to provide the INS with more resources for detention (*Id.*)

As the legislative preoccupation with the so-called criminal alien deepened, a number of changes were occurring that weakened support for asylum during this period. The 1980s were marked by two distinctive challenges in immigration: a dramatic increase in undocumented immigration generally, and the arrival of unprecedented numbers of "first asylum" refugees after the passage of the Refugee Act of 1980 (Tichenor 1994: 333). Attitudes towards asylum seekers had also soured in Europe; by the 1980s, European countries were "overwhelmed" by asylum applications, and headlines soon referred to "an asylum crisis" (Boswell 2007: 541). Prior to the 1980s, refugee claims had been politicized, and asylum was largely restricted to asylum applicants from communist countries and the Middle East (Loescher and Scanlan 1986; Yarnold 1990: 528). The Refugee Act of 1980 was intended to usher in an entirely new era of asylum law in which the definition of refugee was depoliticized and there was no longer a bias in in favor of "hostile-state" applicants (Yarnold 1990: 529). However, in the years after its passage, the Immigration Service continued to deny asylum to large numbers of Central Americans from El Salvador and Guatemala. Meanwhile, Nicaraguans fleeing a leftist force that had ousted a regime supported by the United States received asylum at much higher rates (Bibler Coutin 2011: 575).

Prior scholarship has long recognized that the reception of asylum seekers was sharply divided along racial lines. This was apparent in the treatment of asylum seekers fleeing Communist regimes, as Southeast Asians were not met with the welcome reception experienced by those from the Soviet Union (Loescher and Scanlan 1986: 113). Loescher and Scanlan (1986: 69) also write of a "double standard" in asylum law that began as early as the 1960s, in which Cubans entered the U.S. with few restrictions, while Haitian "boat people" were rarely granted asylum. Despite the rapid deterioration of human rights within the Haitian government and the fact that many Haitians were fleeing the regime, Haitians were treated exclusively as economic migrants who were not entitled to asylum (*Id.* at 178). As Loescher and Scanlan argue, Haitians did not have the benefit of the strong political power of the Cuban enclaves in the U.S., and were further marginalized by the "perception that they were poor, black, and difficult to resettle" (*Id.*) In a 1979 class action lawsuit challenging the denial of more than 4000 Haitian asylum applications, the judge noted that the plaintiffs constituted the "first substantial flight of black refugees from a repressive regime to this country" (*Haitian Refugee Center v. Civiletti* 1980: 451). Haitians were further stigmatized as being HIV-positive, though this was the case in fewer than one percent of cases (Villiers 1994: 928, n. 290). Noting that most Cubans seeking political asylum prior to the Mariel boatlift were successful, and none of the more than 4,000 Haitian applicants had been granted, the judge in *Civiletti* concluded that "no greater disparity can be imagined" (1980: 451). The Congressional Black Caucus, along with a number of interest and humanitarian groups, complained that the asylum process was being used to prevent the entrance of Haitians while being treated as a mere formality when applied to Cubans (Loescher and Scanlan 1986: 179). Of course, the reception of Cuban immigrants changed dramatically with the arrival of the Mariel Cubans. They were increasingly labeled as "criminals, sociopaths, homosexuals, and troublemakers" (*id.* at 217), in part due to the perception that Castro was exploiting the situation to expel Cubans who had been previously institutionalized in Cuba, or the "dregs of society" (*id.* at 183).

In 1988, another event would place pressure on the asylum system, as the number of Central Americans fleeing conflict to the U.S. rapidly increased. That year, immigration officials in South Texas went from receiving 407 asylum applications in a year to receiving more than 30,000 in six months from Central America (Central American Asylum Seekers 1989: 16). In

March of 1989, the House Immigration Subcommittee held a hearing on the detention of Central American asylum seekers and their impact on local communities (*Id.*) Lawmakers were uncertain about the future of detention, particularly of asylum seekers. Legislators from Texas emphasized the need for the federal government to develop a uniform way of responding to immigration crises and relieving the burden on local communities, but did not specify the need for detention (*Id.* at 31). While he emphasized the "very serious impact" of asylum seekers on the state of Florida, Congressman Dante Fascell (D-FL) argued that detention was not a good use of the Service's resources, placed an "unfair burden" on the agency, and could not be "reasonably maintain[ed] as a policy" (*Id.*) INS Commissioner Nelson responded that detention and summary asylum procedures served as successful deterrents, pointing to the decrease in apprehensions of asylum seekers on the Texas border (INS Budget 1989: 49-50).

Within the congressional discourse, this marked a turning point when sympathy for asylum seekers began to erode. Prior to this point, legislators may have been particularly inclined to defend the right to asylum in public hearings because it was politically expedient: most asylum seekers before the late 1980s were fleeing Communist countries, and they offered lawmakers an opportunity to defend the superiority of democratic values. Refugees were seen as a "powerful ideological symbol of the superiority of Western societies" (Boswell 2007: 540). As they no longer offered this same opportunity and their racial makeup also changed, the congressional discourse changed as well. In the 1988 hearings on Central Americans, there was a marked change in lawmakers' willingness to invoke the sanctity of the right to asylum. However, lawmakers were not yet advocating the detention of asylum seekers, and were instead focused on detaining those with criminal convictions.

The Service's inability to deal with the "criminal alien problem" was once again at issue in legislative hearings in 1992, when Congress met to discuss the Service's budget and its general operations. The detention policy was a particular point of contention (Immigration and Naturalization Service's General Operations 1992). Legislators urged the agency to "deploy" its detention resources (*Id.* at 100) and "get criminal illegal aliens out of our communities" (*Id.* at 68). In addition to asking for more appropriations for detention, the Service asked for resources to improve collaboration with federal and state prisons to identify noncitizens with criminal convictions (*Id.* at 3). Legislators pushed back, protesting that previous budget increases had not necessarily resulted in the agency providing better services. As Shuck and Williams (1999: 436-42) demonstrate, the Service suffered from a poor relationship with the Department of Justice during this period, which had issued scathing audits of several INS programs (*Id.* at 440-42). As they argue, Congress was not yet willing to invest the resources necessary to detain and remove so-called criminal aliens.

2.3.3. The Third Era: Detention of Asylum Seekers, Clearing the Way for Mass Detention of Immigrants

Over the next three years, unauthorized migration was recast as a crime in the popular imagination. In the face of a major recession beginning in 1990, immigration became a "hot-button" political issue, and nativist forces gained strength (Chavez 2001: 134-138; Skelton 1993). During this period, the categories of the "illegal alien" and "criminal alien" began to be conflated, a blurring that continues to the present day (McLeod 2012: 165). Anti-immigrant sentiment

reached a post-World War II pinnacle in the mid-1990s, and political scientists point to economic insecurity, a large and sustained immigrant flow (including an increase in undocumented immigration), and social and ethnic differences between the new arrivals and native majority in explaining this peak (Muller 1997: 105). The early 1990s saw a rise of nativist forces like the prominent FAIR and resulted in, for example, California's passage of Proposition 187, which sought to deny most public services and education to undocumented immigrants and their children, and the proliferation of "English only" laws (Diamond 1996: 156). There were also a number of pressures abroad, as the dissolution of the former Yugoslavia resulted in more than two million refugees being displaced and needing resettlement in the early 1990s (Fletcher et al. 1994: 361).

Macías-Rojas (2018: 6) emphasizes that both political parties were instrumental in recasting unauthorized migration as a crime in the early 1990s. In June of 1993, Senator Dianne Feinstein published an op-ed pledging to take a tougher stance on unauthorized immigration and urging President Clinton to do the same. Rather than "having our taxpayers underwrite the prison costs" for noncitizens convicted of crimes, she alleged, the federal government should deport them to their home countries for imprisonment (Feinstein 1993). At the same time, other Democrats began to propose bills addressing noncitizens with criminal convictions (Macías-Rojas 2018: 6). For example, Rep. Chuck Schumer (D-NY) introduced a bill authorizing the use of closed military bases for detaining noncitizens with convictions. Macías-Rojas concludes that these bills were not ultimately enacted in part because immigration was not yet sufficiently entangled with crime in the public imagination (*Id.* at 7). As we argue below, the accompanying shift in the perception of asylum seekers was essential to this transformation.

The end of the Cold War and the collapse of the Soviet Union also redefined asylum law, and this likely contributed to changing attitudes towards the detention of asylum seekers, even if it did not enter explicitly into congressional discourse. Asylum applications greatly increased in the 1990s around the world due to the resulting political instability. With the end of the Cold War, asylum applicants were no longer viewed as sympathetically by those who wished to use asylum as an opportunity to defend democracy. As Hamlin (2015: 333) writes, "in the absence of the Cold War frame, asylum policy was no long insulated from the domestic politics of cost-saving and border control." Rather, the costs of asylum were thrown into sharp relief. At the same time, legal advocates were also enjoying some success in challenging the Immigration Service's failure to enact the depoliticized ideals of the Refugee Act. A large settlement was reached in a class action lawsuit, *American Baptist Churches v. Thornburgh*, on behalf of Central American asylum applicants that entitled applicants who had arrived before 1990 to new asylum hearings (ABC Settlement). In the eyes of lawmakers, this victory may have further exposed the costs of providing procedural protections to asylum seekers.

In 1993, an "asylum crisis" was born in the media and quickly took hold of the legislature, becoming a critical turning point in this history. In addition to the dynamics mentioned previously, including the enormous increase in Central American asylum seekers on the Southwest border, the end of the Cold War changing the political expediency of defending asylum for lawmakers, and the recasting of unauthorized migration as crime, a series of acts of terrorism spurred the extension of the "criminal alien" label to asylum seekers. In February 1993, just one month after a Pakistani asylum seeker killed two people in the parking lot of a CIA building in Virginia, a car bomb exploded in the parking garage of the World Trade Center, killing six people (Schrag 2000: 39).

One of those responsible for the World Trade Center Bombings, Ramzi Yousef, had claimed asylum after entering the country with a fake passport (*Id.*) Those supporting more restrictive immigration policies quickly seized upon this to characterize asylum as an easy way for criminals to enter the country. In a segment of 60 Minutes that was later introduced in Congress, a representative from the Federation for Immigration Reform (FAIR), the leading anti-immigration lobbying group (*Id.* at 41), explained that "if you get to the US, you say 'political asylum,' and that's it. That's your ticket in. You get a free ride. And you can stay indefinitely" (Asylum and Inspections Reform 1993: 51). While newspapers reported critiques of this approach (New York Times 1993a; Leiden 1993), they also portrayed asylum as a "worldwide Siren's call to foreigners" (Clines 1993), and a "loophole" (Lin et al. 1993) that could be exploited by noncitizens seeking to "remain in the country indefinitely" (Ostrow 1994).

Congress moved quickly to respond to the public pressure created by the media frenzy. As Schrag (2000: 68) summarizes, "hearings proliferated on what was suddenly being portrayed as an asylum crisis." Lawmakers convened a hearing to focus upon asylum seekers who arrived by plane to New York and were released because of the Service's lack of detention space. The hearing records reveal a dramatic shift in lawmakers' portrayal of asylum seekers (Asylum and Inspections Reform 1993). Chairman Mazzoli opened the hearing with the following statement:

> The asylum system is sick. The asylum system needs attention in the very worst way. … Thousands upon thousands of persons are entering the United States illegally, without papers, or in some cases, with fraudulent papers. Some enter for the benign purpose of finding a better life, and doing something with their talents. Some enter with nefarious schemes on their minds and terrorist impulses, some of which are given vent. Some of these people are walking Typhoid Marys-but in this case, it is not typhoid, but HIV, or it is infectious tuberculosis.

Mazzoli concluded that the asylum system was being manipulated with ease (*Id.* at 1). A scan of the newspaper articles introduced at this hearing underscored Mazzoli's point: "A Dreadful Mess at the INS" and "Think the Rio Grande is a porous border? Try New York's JFK, where anyone can enter through the magic of political asylum." (*Id.*) Referencing the noncitizens implicated in the World Trade Center bombing and the 1993 murders, Mazzoli concluded that the one thing they had in common was an ability to manipulate a deeply flawed asylum system (*Id.* at 2) that afforded "laboriously extensive due process" (*Id.* at 121). Accordingly, lawmakers considered the "Asylum Reform Act," which included amendments that would require the Service to detain anyone, even an asylum seeker, who was not clearly and beyond a doubt entitled to enter (*Id.* at 21).

By now, the tables had clearly turned: legislators were eager to detain broad swaths of people, while the Service countered that this approach was neither feasible nor effective. Representative Xavier Becerra (D-CA), for example, argued that detention had deterred unauthorized migration in Los Angeles and complained that he did "not hear enough from the INS saying that detention and increasing the detention facility capacity is a priority" (*Id.* at 131). While the Service had repeatedly asked for more detention space, it made clear that some of Congress's detention proposals went too far. Gene McNary, who led the Service in the Bush Administration, testified that detaining everyone who entered with fraudulent papers would be a "budget buster"

and cost over a billion dollars (*Id.* at 140). In addition, mandatory detention would result in the confinement of "many persons who have committed minor crimes, and have come to the United States in search of a better life." Instead, he argued, summary exclusion was a better alternative. The next month, the Senate Immigration Subcommittee met to address the same issue. While Chairman Senator Ted Kennedy (D-MA) took a more measured tone than Chairman Mazzoli, he and other Senators emphasized that the asylum system was being abused, and that it was necessary to develop means of preventing it (Terrorism, Asylum, and Immigration 1993).

Alleged abuse of the asylum system continued to occupy the eyes of the public and the executive during this period. In the summer of 1993, several large boats from China were detected containing hundreds of asylum seekers, and one, the *Golden Venture*, ran aground off Long Island (New York Times 1993). This much-publicized case was an early test of the practice of detaining asylum seekers. Indeed, the Administration was committed to detaining most of the passengers while they resolved their asylum cases, some of which lasted almost four years (Dugger 1997; Lake, et. al. 1996: 2). At the same time, President Clinton continued Bush's controversial system of interdicting and detaining Haitian asylum seekers, apparently afraid that the Administration's early months would be marked by stories of Haitians arriving *en masse* in Florida (Martin 1999: 163). That summer, over 60% of Americans said that they favored decreased immigration, even from asylum seekers (Christian Science Monitor June 28, 1993). Concerned by what it called the "highly publicized problem of asylum abuse" and the fact that "many in Congress would prefer to dispense with … asylum completely" if it did not offer a reasonably harsh alternative, the administration proposed a set of reforms that would allow for "summary processing" of asylum claims (Coven 1993: 1). The Clinton Administration's proposal, which Sen. Kennedy introduced as S. 1333 in July 1993, would have enacted a broad form of expedited exclusion (Schrag 2000: 50). The political prominence of the asylum crisis is apparent from the fact that the Administration announced its proposed legislation in a press conference with the President, Vice President, and Attorney General (Martin 1995: 740).

After the congressional election of 1994, which gave the Republican Party a majority in both houses of Congress, the changed perception of asylum seekers was further entrenched in Congress (Schrag 2000: 56). As the Senate Immigration Subcommittee once again took up immigration reform—this time to consider an omnibus bill proposed by Senator Simpson—a truck bomb destroyed the federal office building in Oklahoma City, killing 168 people (*Id.* at 62). While the perpetrator was born in America, his actions prompted anti-immigrant activists and politicians to call for further immigration reform (*Id.*) Pro-asylum advocates were overwhelmed by defending against the restrictive proposals in Simpson's bill, which included reducing the statutory refugee cap, shortening the filing period for asylum applications, and enacting summary exclusion provisions to reduce judicial review of certain asylum claims (*Id.* at 67).

Much like the media exposure of Service's inability to remove the criminal alien created a rush in Congress to act, the problems of the asylum system also spurred pressure to quickly introduce reform measures (Martin 1995: 738; Schrag 2000: 68). A GAO report (Immigration Control 1992) had concluded that detention was too costly and that expanding INS detention capabilities would not solve the problem (*Id.* at 4). As Margaret Taylor argues, "the political gain to be had from cracking down on criminal aliens enticed Congress to ignore this reality" (2005: 7). In the rush to act, legislators once again paid little attention to the reality: as David Martin has

explained, lawmakers rushed to introduce summary removal procedures for asylum seekers arriving at the borders, despite the fact that only ten percent of asylum cases originated in this way (Martin 1995: 739). Nonetheless, as Martin notes, the 60 Minutes episode focused on asylum seekers at the border, so reform efforts began there (*Id.*; Schrag 2000: 44).

Asylum seekers were now associated with criminality implicitly, by virtue of being undocumented, and explicitly, as a result of the terrorist events. Once the association between asylum and criminality had been established, Congress continued to build the system of mass immigration incarceration. In a Senate Immigration Subcommittee hearing on terrorism and asylum, Senator Simpson noted how many of his colleagues had reversed course on detention. As he observed, "those who are recommending increased detention years ago were saying detention was a terrible thing, and that we should be very sparing" in the use of detention (Terrorism, Asylum, and Immigration 1993: 25). Now, both parties rushed to appear tough on crime, introducing a dizzying array of proposed amendments. As Margaret Taylor (2005: 5) describes, "several decades of near-total neglect were followed by frenzied overreaction" by Congress. In November 1993, the Senate Permanent Subcommittee on Investigations convened to review an investigation of the Alien Criminal Apprehensions Program, initiated by ranking minority member Bill Roth (R-DE) (Criminal Aliens in the United States 1993). Lawmakers lambasted the Service as toothless, pointing to an internal INS investigation that revealed "thousands of deportation orders gathering dust in boxes" (*Id.* at 3). Now, lawmakers saw detention as necessary to solve the agency's inability to deport noncitizens with criminal convictions. At this hearing, lawmakers considered whether to eliminate immigration officials' discretionary authority to release some noncitizens. Assistant Attorney General Sheila Anthony opposed the proposal, arguing that the "INS does not have sufficient resources to detain each and every criminal alien until removal can be effected" (*Id.* at 100). She defended the Service's policy of balancing flight risk and danger to the community and explained that the Department of Justice would not support eliminating the Service's discretion to release some aggravated felons from detention (*Id.*)

The House Immigration Subcommittee again convened in 1994 to consider a number of bills addressing the "problem of criminal aliens." Several of these bills focused once again on the Service's inability to apprehend and remove criminal aliens, and its lack of detention capacity (Criminal Aliens 1994). Chairman Mazzoli explained that the Service's detention facilities had not been able to keep up with the growing numbers of deportable alien criminals, and there were "simply more felons than there are beds in the INS detention facilities" (*Id.* at 1). Rep. Schumer argued that the inadequate capacity of the detention facilities resulted in noncitizens being released into the public to commit another crime after serving their sentences (Immigration and Naturalization Service General Operations 1994). Indeed, the GAO estimated before Congress that the INS apprehended hundreds of thousands of aliens and could only detain "very few of them" (Immigration Control GAO Report 1992). The GAO further found that the INS did not treat them consistently; some were detained for just a few days, while others remained for extended periods (*Id.* at 25-26).

State and local governments continued to play a prominent role in advocating for increased detention, referencing the burden they bore in detaining so-called criminal aliens (Schuck and Williams 1999: 424). They advocated for increased deportation of criminal noncitizens in their communities, specifically emphasizing the need for detention. Several states began to seek redress

from the federal government for the costs associated with detaining noncitizens with criminal convictions (*Id.* at 445). Lawton Chiles, who had become Governor of Florida in 1991, announced plans to sue the government for failing to prevent illegal aliens from entering the state (Schuck and Williams 1999: 446). Representatives reported that the Service was unresponsive to their requests for the deportation of undocumented immigrants who were "pick[ed] up" (Removal of Criminal and Illegal Aliens 1996: 37) by local police or "rounded up [in] drug sweeps" (*Id.* at 65). All of these complaints focused on swift deportation and detention capability. Referencing the growth of noncitizen detainees in Santa Barbara jails, Representative Stephen Horn (R-CA), Chairman of the House Subcommittee on Government Management, told his colleagues that "there must be a commitment, a streamlined, timely, and efficient INS enforcement program to … deport illegal immigrants who have been arrested, detained and incarcerated in our local facilities" (What Resources Should be Used 1995: 114).

By 1995, the legislature's answer to the problem of criminal aliens was clear: detention was necessary for the agency to effectuate their removal. Senators proposed a measure that would have allowed the Attorney General to take into custody any undocumented criminal alien upon the request of a state or county official and another that would accelerate the deportation process by holding a deportation hearing during the period of incarceration. As Rep. Susan Molinari (NY) put it: "the most important thing we can do when we rewrite our immigration laws is to focus on improving, number one, detention, and second, deportation" (Forum on Immigration 1995: 39). In a March 1995 hearing, Rep. Lamar Smith (R-TX), stated that the "most effective way" to deport a noncitizen was to detain them until removal (Removal of Criminal and Illegal Aliens 1995: 2). Smith, who was then Chairman of the Immigration Subcommittee, said that detention would "send a message that we are serious about enforcing immigration policy" (*Id.* at 48). Rep. Xavier Becerra agreed, noting that the "whole issue of detention" was essential "to send that real strong message to someone who thinks that they can come in here, make a claim for asylum[and] escape our purview" (Terrorism, Asylum, and Immigration Issues 1993: 36). For both Becerra and Smith, detention would not only remove noncitizens with criminal convictions but, as Margaret Taylor has argued, would "restore credibility in the immigration enforcement system" more generally (1997b: 158). Senators echoed these concerns in hearings later that year. Sen. Feinstein pressed INS Commissioner Doris Meissner to look for detention spaces in the San Francisco Bay Area (INS Oversight Hearing 1996: 37). Chairman Smith said that without confinement, deportable noncitizens might "never to be heard from again."

The sustained media attention to the Service's inability to remove noncitizens with criminal convictions, combined with pressure from legislators and local officials, pushed Congress to enact AEDPA and IIRIRA in 1996. As scholars have made clear, AEDPA and IIRIRA together marked a "seismic change" in the landscape of immigration detention (Taylor 1997a: 209). The laws greatly increased the situations in which immigration officials were required to confine noncitizens and also authorized state and local law enforcement officials to apprehend and detain immigrants on the government's behalf (García Hernández 2014: 1370). Furthermore, the law created "expedited removal" provisions for recent entrants, allowing for fast-track deportation of unauthorized migrants at the border unless they demonstrated a "credible fear" of persecution (Macias-Rojas 2018: 12). Both bills were controversial. Indeed, IIRIRA barely passed, and was revived by a last-minute agreement to incorporate amendments to the immigration statute in order to avoid government shutdown (Taylor 2005: 8-9; Martin 1999: 167).

The Service was "caught off guard" by these dramatic changes in the law (Schmitt B9; Taylor 2005: 8). Our archival research confirms that the 1996 legislation was enacted over the objections of the Service and with little regard to the institutional reality, particularly the agency's capacity to detain. Administration archives make clear that it "strongly opposed" the mandatory detention provisions of IIRIRA (Fernandes 1998). According to members of the White House Domestic Policy Council, mandatory detention was "bad policy" and ignored the agency's institutional capacities (*Id.*) As the Service had explained in Congressional testimony, mandating detention was not a good use of enforcement resources or detention space (Criminal Aliens in the United States 1993: 100). In what Taylor (2005: 9) calls "a small concession to practical reality," Congress permitted the Service to delay implementation of mandatory detention for two years due to insufficient space.

The Administration also opposed the provision of the law allowing for summary exclusion—or "expedited removal"—of recent arrivals. While the Clinton Administration's 1993 asylum reform bill included a broad form of expedited exclusion, it had reversed course in 1994, instead favoring a proposal that would have only applied only in extraordinary immigration situations, such as a mass influx (Martin 1999: 164-67; Markus 1995: 7). Martin agrees that the summary exclusion components of IIRIRA were "poorly conceived and poorly drafted[,]" and remembers agonizing over how to implement them because they broadly applied to all entrants without inspection, rather than just new arrivals (1999: 164).

2.4 IMPLICATIONS

2.4.1 The New Penology in the Transformation of Asylum Seekers

The logic and rhetoric of the new penology figured prominently into the transformation of the asylum seeker. Prior to the 1980s, the prototypical refugee was one fleeing a Communist regime, and granting asylum "presented an opportunity to create powerful propaganda about the relative virtues" of democratic governments (Simon 1998: 582). However, this changed as the Refugee Act depoliticized the definition of a refugee, and the reception of asylum seekers was closely intertwined with prevailing conceptions of race (*Id.* at 594). Both Haitians and Cubans were perceived as nonwhite, but the Cubans fared much better. Early on, they were welcomed without restriction (Loescher and Scanlan 1986: 69), and they benefited from the strong political support of existing Cuban enclaves (*Id.*; Simon 1998: 594). The Haitians were integrated into the prevailing views of race in the U.S. in the public's view, and accordingly perceived as a particularly "dangerous class." (Simon 1998: 594). Soon after the arrival of the Mariel Cubans, they too were stigmatized by the public as criminals and deviants (*Id.* at 590-91). The cover of *U.S. News and World Report* (1989) drew attention to the disparities between their reception and the Cold War acceptance of refugees, featuring a full-page photograph of a white woman, holding a young girl in her arms, and the title "The New Refugees: Should America take them in?" It pointed to the hypocrisy of an asylum policy that accepted large numbers of white eastern Europeans fleeing Communism, while excluding Haitians and Central Americans as ineligible because they were, in the eyes of administration officials, fleeing poverty rather than persecution (Chavez 2001: 134).

However, this fear of dangerous asylum seekers did not enter congressional discourse until the asylum crisis of 1993. During the prior decade, many lawmakers expressed grave concerns about the detention of Haitians and Cubans (see, e.g., Mariel Cuban Detainees Serial No. 81 1988: 13; Cuban and Haitian Immigration 1991:1) Later, however, after a perceived "asylum crisis," the rhetoric surrounding asylum seekers changed dramatically. Legislators began to understand incoming asylum seekers as dangerous classes, referring openly to asylum seekers as "Typhoid Marys" who might pass communicable diseases such as HIV onto citizens (Asylum and Inspections 1993). Alternatively, they were depicted as criminals seeking to abuse the asylum system (*Id.*) Media portrayed the asylum system as a "loophole" for undeserving economic migrants or those with terrorist impulses. This rhetoric was laden with the presumption of dangerousness that affected other "dangerous" noncitizens in this era, including the criminal alien. Because asylum seekers were inherently risky, mandating their detention was paramount, even without an opportunity for individualized review of their incarceration. Congress's changed attitude towards asylum seekers was also influenced by the sheer magnitude of its commitment. While the U.S. had received about 5,000 asylum applications in 1980, this number had grown to more than 100,000 by 1993 (Asylum and Inspections Reform 1993: 305). A long line of scholars have analyzed how asylum law posed a threat of opening "floodgates," and have termed the resulting tendency to close the gates a "compassion fatigue" (Chavez 2001: 133).

McLeod's notion of "cognitive dissonance" (2012: 160-61) is instructive in understanding how the "rhetoric of risk" (Reiter 2016: 512) came to apply to asylum seekers. In fact, our analysis reveals a distinctive form of dissonance at work in the asylum context. During the "asylum crisis," lawmakers wrestled with the "dissonance" between the nation's commitment to providing protections to refugees, and the fears provoked by the perceived threat of asylum seekers. On the one hand, asylum has often occupied a special place within immigration law because of its unique humanitarian aim, and has enjoyed support even among those inclined to support more restrictive immigration policies (Martin 1995: 738). And yet, as this history reveals, this commitment is quite fragile; as soon as the magnitude of people seeking refuge begins to test it, or as their race, culture, or socioeconomic status may make citizens more likely to perceive them as "the other," legislators soon began describing them in dramatically different ways. Then Associate Attorney General Rudolph Giuliani (1992: 811) admitted as much in defending the imprisonment of Haitians and Cubans: as he argued, the American political tolerance for immigration, and its "absorptive capacity," is "affected by a wide range of economic, cultural, and political considerations." As legislators and the public began to feel threatened, branding asylum seekers as criminals (or "Typhoid Marys") provided a simple way to avoid the tension between proposed reforms and adherence to the humanitarian commitment to refugees. From this point on, the U.S. adopted what Hamlin (2015:334) has persuasively called a "regime of deterrence" in asylum law.

While immigration officials resisted mandatory detention in the mid-1990s, they also employed the logic of the new penology in their approach to detention reform. In the early 1990s, advocates argued for the individualized approach to the Service's use of detention, but the Service ended up rejecting that framework after only half-heartedly attempting reform. Throughout the period, advocates criticized the Service for detaining indiscriminately, without any regard for individualized equities. As they explained, the Service's practice involved two extremes: either incarcerating people indiscriminately, with no regard to their risk, or releasing them with absolutely no supervision or monitoring (INS Budget Hearings 1993: 121). In April 1992, in

response to the "continued demand" of these advocates, the agency created a corps of Asylum Pre-Screening Officers and piloted what it called the "APSO" program (General Counsel 1996: 1-3; Pistone 1999: 201-02; McNary 1992). In participating districts, APSO officers interviewed detained asylum seekers and recommended the release of those who were likely to succeed in their claims (General Counsel 1996: 3). This program, however, was weakly implemented, demonstrating the Service's lack of commitment to individualized determination. An internal evaluation in 1996 showed that it operated inconsistently and "relatively informally" (General Counsel 1996: 5). In some districts, virtually all defensive asylum applicants were detained until their cases were adjudicated (Pistone 1999: 202), and "the program was viewed as unnecessary" (General Counsel 1996: 5). Margaret Taylor (1997a: 1701) surmises that many officials were hostile to its goals and believed "that paroling detained asylum seekers undermined enforcement efforts." Whatever the reason, the fate of the APSO program showcases the agency's lack of commitment to making detention decisions on an individualized basis and the totalizing pull of the actuarial approach that had migrated from criminal to immigration law.

2.4.2 The Relationship between Detention and Procedural Protections

The 1980s were a period of dramatic change in which courts were less likely to invoke the plenary power doctrine and more willing to review immigration policy (Shuck 1992: 85). During this period, courts invalidated key INS policies and practices and expanded the procedural rights of noncitizens. Shuck and Williams argue that while Congress might have begrudgingly accepted more expansive procedural rulings with respect to "immigrants in general, it resisted applying them to criminal aliens" (1999: 435). As our analysis reveals, this reaction was very similar to what prior research has observed in the criminal law context. Scholars of criminal law have long described a relationship between procedural interventions and substantive severity. William Stuntz (1997: 5) demonstrates that procedural protections sometimes create an incentive for legislators to pass "bad law." In the 1970s and '80s, he argues, legislators reacted to judicial expansions of procedural protections by expanding the scope of liability, increasing punishments, and underfunding criminal justice efforts. Our analysis reveals a similar dynamic in the immigration context. Just as legislators expanded the scope of liability in Stuntz's analysis, Congress continually expanded the scope of the aggravated felony definition, vastly increasing the number of noncitizens subject to removal for criminal infractions. Additionally, in what was perhaps the most dramatic pushback to the judicial expansion of procedural rights, Congress eliminated sentencing judges' ability to issue Judicial Recommendations Against Deportation (JRAD), which permitted judges to consider mitigating circumstances in deciding whether to recommend deportation (Shuck and Williams 1999: 438).

While our analysis revealed the same resistance that Shuck and Williams described in the criminal alien context, we also found that the legislature was just as uneasy with the application of more expansive procedural protections to asylum seekers. Consistent with Stuntz's observations in the criminal law context, Congress responded to these procedural protections by proposing detention as a solution. During the "asylum crisis" of the 1990s, legislators blamed procedural protections for abuse of the system. Chairman Mazzoli described a "sick" asylum system, plagued by rampant abuse enabled by "laboriously extensive due process" (Asylum and Inspections 1993: 121). The settlement in *American Baptist Churches* likely further brought this issue to the fore, as it entitled Central American applicants who had entered before 1990 to entirely new asylum

hearings (ABC Settlement). Legislators reasoned that detention was necessary to deter abuse of the asylum system, and this argument ultimately prevailed. In the wake of complaints that the Service was releasing asylum seekers arriving at New York airports, for example, Congress funded detention centers near the alleged abuse (Schrag 2000: 69). In addition, just as it had in the criminal alien context, Congress responded by streamlining asylum procedures and limiting access to judicial review, a subject to which we now turn.

2.4.3 Detention and the Roots of Expedited Removal

Our study also reveals a curious relationship between detention and the expedited removal provisions in the 1996 legislation. Scholars have long decried "expedited removal" for restricting individual rights and failing to protect society against more expansive government power (Kanstroom 2018: 1326). Our analysis locates the roots of this controversial program in the convergence of two very different legislative concerns, one about reducing detention and another about increasing immigration enforcement. During the asylum crisis of the 1990s, resistance to expedited removal was reduced because of an earlier presumption that "speedy processing" would result in less detention.

In the early 1980s, both the executive and Congress embraced the idea that procedural reform could lead to a substantive reduction in detention. The Reagan Administration defended its use of long-term detention by blaming procedural delays in asylum processing. In a 1982 hearing, officials described the asylum process as "torturously slow," and stated that "as a result, INS detention facilities [were] filled to overflowing" (Mass Asylum 1982: 14). When they criticized detention, members of Congress adopted a similar presumption that speedy processing would reduce confinement. In 1982, for example the House Judiciary Committee introduced "speedy hearing" provisions to the Immigration Reform and Control Act of 1982, seeking to "obviate the possibility that aliens awaiting asylum determinations might be subject to lengthy detention" (H. Rep. 98-890 1982: 57). Even the Editorial Board of the *New York Times* adopted this framework, recommending a "streamlined" hearing procedure in an editorial decrying the detention of Haitians (New York Times, January 5, 1982).

However, the same speedy hearing provisions also attracted legislators who were concerned with so-called asylum abuse. During the anti-asylum fervor of the early 1990s, the Senate proposed asylum reform bills that would subject asylum seekers at the border to "summary exclusion" proceedings (Martin 1999: 162). The summary exclusion proposals, which had originated in the Reagan administration's immigration reform agenda, delegated certain asylum claims to INS officers, limited judicial review, and provided the basis for today's expedited removal regime (Schrag 2000: 44). These provisions may have been palatable to members of Congress who retained the association between shortened asylum procedures and reduced detention. In a 1995 hearing, for example, Sen. Kennedy sought a cost-comparison between detention and a "blanket summary exclusion system" at airports, wondering if summary exclusion would be a cheaper way to address "asylum abuse" (INS Oversight Hearing 1996: 83).

Expedited removal was connected to detention in another way, as well. As lawmakers crafted the summary exclusion provisions in the 1990s, they borrowed mechanisms that the agency had used to ensure that people with legitimate asylum claims would be released from detention.

The APSO program, which the Service had developed to limit the detention of "bona fide" asylum seekers, used a "credible fear" standard to determine which asylum seekers were likely to succeed in their claims (General Counsel 1996: 3; Coven 1993: 1; Schrag 2000: 34). When legislators considered asylum reforms in the 1990s, they used the "credible fear" standard from the detention release program. Indeed, in 1992 Rep. Bill McCollum (R-FL) urged the adoption of this standard because INS was "comfortable with it" and it had "worked in the detention area" (Asylum and Inspections 1993: 124).

As the credible fear screening process migrated from the "detention area" to asylum reform, reformers soon forgot its ties to immediate release. While the standard was, in the words of INS Commissioner Chris Sale, originally used to ensure that someone who "appear[ed] to have a really good case, and does not need to be further hurt by the world by being in jail for a long time," it eventually became a tool to ensure quick processing of asylum claims, without limiting detention. Indeed, when Congress wrote summary exclusion provisions into IIRIRA, it provided that noncitizens subject to expedited removal "shall be detained for further consideration of the application for asylum," even after establishing a credible fear of persecution (8 U.S.C. § 1225(b)(1)(B)(ii) (1996)). While the government had periodically released asylum seekers on bond after credible fear proceedings, in 2019, the Attorney General re-interpreted this provision to mandate that asylum seekers who exhibited a credible fear of removal during expedited removal proceedings were ineligible for bond hearings (*Matter of M-S-* 2019).

CONCLUSION

While 1981-1996 were formative years in the making of mass immigration detention in the U.S., this time period has often been overlooked in the literature. Drawing upon both media coverage and a wealth of administrative and legislative records from this period, our analysis reveals a dynamic interplay between Congress and the executive during the formative years of immigration detention. Rather than being uniform, each branch's support for increasing immigration detention varied in important ways over time. A well-developed body of literature has demonstrated that the move to criminalize the noncitizen must be understood within a broader context of crime politics and mass incarceration more generally. As we demonstrate, the change in the perception of asylum seekers similarly cannot be understood without examining it alongside the legislative preoccupation with the criminal alien. Indeed, similar dynamics spurred each frenzied period within Congress. Margaret Taylor has shown that the public revelation of the Service's inability to remove criminal aliens, previously "something of an insider's secret," spurred lawmakers to act quickly. In the same way, the asylum crisis in 1993 and the resulting media preoccupation with abuse of the asylum system caused Congress to act swiftly, and to quickly change how it depicted asylum seekers. As we demonstrate, careful analysis of these formative years is paramount to understanding how the United States developed and formalized the mass detention of immigrants. Similarly, an understanding of the institutional dynamics between Congress and the executive, and the ease with which the label of criminality was extended to asylum seekers, is essential to reimagining a different reality.

CHAPTER 3: DESIGNING ADMINISTRATIVE AGENCIES TO PROTECT VULNERABLE POPULATIONS: LESSONS FROM THE EEOC'S ENGAGEMENT WITH MIGRANT FARMWORKERS

INTRODUCTION

The administrative state is thought to pervade nearly every aspect of modern life. And yet, if one were to venture into one of the fields in which millions of farmworkers work every year in the United States, it would seem that this vast regulatory state is nowhere to be found. While a relatively broad regulatory framework exists to protect farmworkers, the sparse empirical evidence suggests that these laws go largely unenforced. The extreme imbalance of power between employers and farmworkers encourages employers to violate their rights with impunity, and they are likely emboldened by a long history in which farmworkers were excluded from many of the central protections afforded other laborers. As one farmworker explains, the laws simply weren't designed for them. In other words, "No one sees the people in the field. We're ignored" (Ramirez and Bauer 2010: 4). The following example illustrates one instance of how employers routinely suppress their ability to report a violation of their rights:

> Five hundred farmworkers arrive in North Carolina from Mexico to work for harvest season. Each has a "know your rights" booklet from a legal services organization that explains the laws that protect them. When a representative of their employer greets them, they are ordered to dispose of these booklets, and another one is distributed in their place. This one warns that legal services have a "hidden motive" to "destroy the program which brings you to North Carolina legally" (Human Rights Watch 2000: 218-25). It further advises the new employees that "history … shows that the workers who have talked with [legal services] have harmed themselves" (*Id.*) Workers report fearing that being seen with one of the legal service's booklets could cause them to be fired or have problems with their employers (*Id.* at 220).

While the administrative state has largely failed this vulnerable population, one notable exception has emerged over the past two decades: the Equal Employment Opportunity Commission (EEOC), which has been successful in securing a wide range of injunctive relief to prevent harassment and discrimination, and winning millions of dollars on behalf of farmworkers. This was in spite of the agency's initial resistance to address the needs of farmworkers, even in the face of robust advocacy by the United Farm Workers. This resistance stemmed from an initial interpretation of the agency's civil rights mandate as encompassing only a black-white paradigm. Responding to leadership within the agency in district offices, the agency changed course rather dramatically, and became a leader among agencies in protecting the rights of farmworkers. Despite the fact that the EEOC was weak by congressional design, and was initially vested with very limited enforcement capacity, it has emerged as one of the most effective agencies in enforcing farmworkers' legal rights.

The Chapter proceeds in five parts. Part One sets forth the data and methods, as this study relies upon the creation of a database of the EEOC's litigation on behalf of farmworkers, a content analysis of all publicly available consent decrees and verdicts, interviews with EEOC employees and farmworker advocates, and a review of a wide range of government and organizational materials. Part Two explores the history of the EEOC and the relevant scholarship on its ability to achieve meaningful structural reform. Drawing upon the insights of a rich sociological literature, legal scholars have argued that, like many private employers, the agency has encouraged bureaucratic responses to discrimination that mirror managerial, business responses that do little to achieve meaningful structural reform (Edelman 2016: 138-140). As they argue, the agency's employment discrimination litigation has proven to be drastically different from what public legal scholars originally envisioned, such as remedies specifically tailored to individual circumstances, and injunctive relief with significant judicial involvement.

Next, Part Three turns to the agency's engagement with farmworkers, exploring its initial reluctance to respond to the needs of farmworkers because it viewed its civil rights framework as encompassing only a black-white paradigm. The EEOC changed course rather dramatically in the mid-1990s, and began aggressively pursuing anti-discrimination claims on behalf of farmworkers. It provides an overview of the challenges that farmworkers face and contextualizes the problem of agency failure, exploring the ways in which the modern regulatory state has largely failed farmworkers.

Drawing upon an analysis of court records and interviews with EEOC employees and farmworker advocates, Part Four carefully explores the EEOC's litigation record over the past two decades. It argues that much of the scholarly criticism of the EEOC has missed its rather extraordinary innovation in the context of farmworkers. Rather than adopting a managerialist approach, the EEOC's efforts on behalf of farmworkers evince a more tailored, innovative approach. An analysis of forty-nine publicly available consent decrees revealed that the agency was often able to craft case-specific forms of relief that ensured compliance and helped to prevent future violations.

Part Five identifies which factors enabled the agency's success in this context in order to consider what lessons may be learned for other agencies seeking to more effectively reach vulnerable populations like farmworkers. Critical to the agency's success were the unique and sustained partnerships with advocacy organizations who served as the "eyes and ears" of the agency (Tamayo 2009: 264). These partnerships have enabled the agency to develop cases that it may not have otherwise even identified because of the geographic and language factors that make farmworkers so isolated. As I explore below, these relationships were mutually beneficial: they influenced the way that the agency operates, but advocates also reported that collaboration with the EEOC had also influenced their own organizations' efforts on behalf of farmworkers as well.

In addition, the de-centralized, entrepreneurial approach of the agency critically enabled the farmworker initiative to diffuse from one office to the next. Administrative law scholars have long criticized the traditional regulatory model for having an excessive centralization that creates "a one-size-fits-all approach" that may not be effective in diverse contexts. The EEOC's unique entrepreneurial approach, which vests a great degree of authority in Regional Attorneys and encourages close collaboration between offices as new strategies and cases emerge, permitted this

initiative to diffuse outward from one office to another. As it reveals, the initiative on behalf of farmworkers was not the result of a top-down mandate that flowed from the national headquarters down to district offices. Rather, it began from the bottom up, diffusing from one district office outward, as offices coordinated closely with one another and offered valuable lessons from prior successes. In one interviewee's words, the agency recognized that "for farmworkers, the typical bureaucratic processes don't work well."[4] Its more de-centralized nature permitted less traditional, and more innovative, strategies to flourish. One of the primary obstacles is the seasonal nature of agriculture, which can mean that by the time an investigator is ready to investigate a claim, the witnesses are long gone and the job site looks completely different. Indeed, this may be a primary reason that the Department of Justice has prosecuted nearly none of the very serious allegations of sexual abuse in these cases. In order to overcome this problem, the EEOC regional offices have reached an agreement with community-based organizations that when they learn of a case of sexual harassment on a farm, for example, they can reach out directly to either the District Director or the Education and Outreach Coordinator, who will act immediately.[5] As they explained, "by working in a non-bureaucratic way, we're able to address some of the shortcomings of the system."[6]

This study suggests that the prior work on the EEOC has missed a crucial element of what makes these cases meaningful, particularly in the agricultural industry: the signaling function of these cases. High-value settlements have signaled the industry that it must take steps to prevent harassment and discrimination, and to properly investigate any complaints. Participation in these cases has also empowered farmworkers to come forward in cases of future abuses, and helped to change the culture among employees, which is critical in this context, where the imbalance of power between employees and their employers is so extreme. These cases have also inspired widespread media coverage, which has in turn attracted the attention of state legislators in one case, and led to more robust legislation protecting farmworkers.

Of course, this study also revealed important limitations of the EEOC's work, and pointed to ways that it might improve its work on behalf of farmworkers. A close review of the consent decrees revealed that the agency engaged in very little post-decretal monitoring, which may be driven by a lack of resources. It also demonstrated that some offices were more likely to secure the appointment of a third party monitor, or to obtain innovative forms of relief that were outside the scope of the suit, such as the sanitation, transportation, and living conditions of the workers. It appeared that the agency might benefit from closer collaboration on forms of relief, in particular, among offices. In addition, it appeared from interviews that the quality of EEOC investigators varied between offices, and may have related to how well the enforcement and legal branches interacted, and the degree of control that the Regional Attorney (from the legal branch) exercised over the investigation process (in the enforcement branch). In addition, EEOC employees expressed frustration with the difficult of cross-agency collaboration, which is critical to ensuring prosecution of the underlying crimes in many of these cases.

To date, the existing scholarship has not probed the process by which the EEOC evolved from having a reputation as "irrelevant" and "ill-prepared" to being one of the central players in protecting and expanding the rights of farmworkers. This project explores the process by which

[4] Interview with EEOC Employee (June 1b, 2020).
[5] *Id.*
[6] *Id.*

the agency came to see farmworkers as a central part of its enforcement mandate. In turn, this analysis provides insight into the lessons that this trajectory may have for other agencies. For example, one of the other central agencies charged with protecting farmworkers, the Occupational and Safety Health Administration ("OSHA"), has lagged far behind. Decades ago, one court described OSHA's fourteen years of "resistance" as "intractable" and a "disgraceful chapter of legal neglect" (*Farmworker Justice Fund v. Brock*, D.C. Cir. 1987: 614). By all accounts, little has changed, as OSHA continues to receive scrutiny for its failure to prevent deaths from exposure to pesticides (Cunningham-Parmeter 2004: 451-53), for example, and excluding farmworkers from recent safety standards. The final fall-protection regulation, issued in 2016, excluded workers on farms, ranches, and dairies (29 CFR § 1910 2016). By exploring the lessons learned from the EEOC's history with farmworkers, other agencies may draw upon this history to similarly adapt to be more effective in meeting the needs of farmworkers. In addition to this context, these insights may be generally valuable in considering questions of institutional design, and how to optimally design the administrative state to reach the legal needs of vulnerable communities, whose rights often remain unenforced. In part, this article echoes the call to place a renewed emphasis upon the enforcement apparatus of the federal government (Waterstone 2007). In vindicating the rights of more vulnerable communities, the "private attorney general" model, or the model of private litigants bringing lawsuits in order to eliminate discriminatory behavior, has largely proven ineffective. In the farmworker context, the EEOC's trajectory provides at least a starting point for developing a more robust vision of public enforcement of these rights.

3.1 DATA AND METHODS

In order to understand the EEOC's engagement with farmworkers, the project employs a multi-method approach. It combines semi-structured interviews with EEOC employees and advocates with content analysis of media accounts, court records, organizational materials, and archival analysis. In order to take a broad view of the EEOC's efforts on behalf of farmworkers over time, I created a database of litigation brought by the EEOC on behalf of farmworkers. This litigation spans approximately twenty one years, from its first case in 1999 to the present day, and includes sixty-four cases. These cases were identified by searching EEOC press releases and additional media searches, and through an EEOC website highlighting its cases on behalf of farmworkers through 2015 (EEOC Selected List). In order to analyze the ultimate relief obtained in these cases, I also analyzed the outcomes of each case, which included the verdicts in the five cases that reached a jury or bench trial. Using a combination of public repositories of consent decrees and searches in PACER, the federal court database, I obtained consent decrees in forty-nine cases. As discussed *infra*, a careful review of these decrees permitted me to understand the types of relief won in each case, and to trace variation in this relief across cases and EEOC district offices.

I supplemented this analysis with fourteen in-depth, semi-structured interviews of two groups of respondents: EEOC employees and farmworker advocates. The semi-structured format allowed me to both investigate both a predetermined set of questions asked of each interviewee, and to explore unique perspectives that emerged during the interview. To better understand the evolution of the EEOC's efforts and its strategy in these cases, I interviewed senior leadership within the majority of the EEOC district offices that have brought cases on behalf of farmworkers. This included a range of District Directors, Regional Attorneys, Senior Trial Attorneys, and

Outreach and Education Coordinators. I supplemented these with interviews with noted farmworker advocates across the country, all of whom had worked closely with the EEOC in litigation or advocacy efforts.[7] This included attorneys in both rural and urban locations, from states such as California, Florida, Texas, and Washington. Together, these interviews helped to illuminate the process by the EEOC came to emerge as a leader in the area of farmworker litigation during the preceding two decades. It further provided insight into the litigation process and the agency's reasoning in pursuing various strategies. These interviews typically lasted between one hour and seventy five minutes. Each subject was recruited by email. I initially identified EEOC employees from their signatures on case filings in many of the high profile cases, and farmworker advocates through either participation as interveners, or through their status as noted advocates who were frequently mentioned in media reports. From there, I employed a snowball sampling method in order to identify "information-rich key informants," asking interviewees if there were others who might have valuable information (Patton 2001). I added interviews until I had reached a "saturation point," or the point at which it seemed that further interviews would not yield new information (Teddlie and Tashakkori 2008). Following each interview, I also engaged in a self de-briefing process of immediately writing my reflections on each interview, and comparing these to those from prior interviews. Each interview was recorded with the consent of the interviewee[8] and was subsequently transcribed. Each interviewee was promised anonymity. Accordingly, interviewees are simply identified as either an "EEOC Employee" or a "Farmworker Advocate" when I draw upon these interviews in my analysis, and I use plural pronouns (they, them) to further ensure anonymity.

Finally, to better understand the EEOC's efforts in this arena, I reviewed a broad array of organizational documents. Some of these were provided to me by EEOC employees or advocates subsequent to interviews. Others were retrieved from the EEOC's website, such as internally produced articles on its history, training materials it provided to organizations on sexual harassment cases, and Meeting Minutes. Other documents were retrieved through archives and through advocacy organization websites. This analysis also included a review of the press releases associated with each case and testimony by many of the EEOC Regional Attorneys that discussed the agency's efforts on behalf of farmworkers.

3.2 THE EEOC'S EVOLUTION

3.2.1 The EEOC's Beginnings as a "Toothless Tiger"

Nicholas Pedriana and Robin Stryker provide the most comprehensive account of the EEOC's unlikely trajectory. As they detail, the EEOC began as a relatively weak agency, hampered by very few enforcement powers and a meager budget (Pedriana and Stryker 2004: 710). While Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-4) created the EEOC and charged it with eradicating employment discrimination, it was a law mired in contradiction. On the one hand, it seemingly bestowed a variety of robust legal protections against discrimination,

[7] This research was approved by the University of California Berkeley Committee for Protection of Human Subjects under CPHS protocol number 2018-07-11222.

[8] Due to technical difficulties, two interviews were not able to be recorded. During these interviews, I typed notes as the interviewee spoke instead, noting where I was able to transcribe their words verbatim.

created a new administrative agency to enforce the law, and granted access to federal courts to protect this new right (Pedriana and Stryker 2004: 710). As they explain, "Never had Congress made so bold a statement about the economic rights of black Americans and other disadvantaged groups" (*Id.*)

However, despite these seemingly significant advances, Congress gave the newly created EEOC no teeth. The EEOC had no independent enforcement authority when Title VII was first passed in 1964 (Kim 2015: 1137). Rather, it was authorized to receive and investigate charges of discrimination, and to seek voluntary resolution through conciliation (*Occidental Life Ins. Co. of Cal. v. EEOC* 1977: 358-59). When this failed, enforcement was available only through a private lawsuit or referral to the Attorney General. As Pedriana and Stryker describe, the EEOC suffered from a "revolving door-personnel problem," (Gannon 1967: 1) in the late 1960s, and went through a rapid turnover of staff in the 1970s (Pedriana and Stryker 2004: 713). If an employer didn't wish to follow the law, there was little the EEOC could do to remedy it. In 1967, then-EEOC Chairman Stephen N. Shulman told the Wall Street Journal that "We're out to kill an elephant with a fly gun" (Jameel and Yeradi 2019). The EEOC's own anniversary publication, which reviewed its first thirty-five years, explains that most civil rights groups viewed the agency as a "toothless tiger" for its first six years of existence (Story of the EEOC 2000: 5).

At the time of its creation, many members of Congress were opposed to the institution of federal protections against workplace discrimination. Many legislators were opposed to broad workplace discrimination regulation, and more than 200 fair employment measures had failed in the two decades before the Civil Rights Act was passed (Jameel and Yerardi 2019). Ultimately, an opponent of the Act, Representative Howard Smith (D-VA) inserted a sex discrimination clause days before the Act was passed in order to protect white women. As Democrat George Andrews of Alabama reasoned, without legislation prohibiting discrimination, every employer would hire an African American woman, and white women would suffer discrimination (*Id.*)

The EEOC was finally vested with prosecutorial power in 1972. The 1972 Amendments to Title VII expanded the enforcement role, authorizing the EEOC to bring suit against private employers, and "shifted power to pursue pattern of practice cases from the Attorney General to the EEOC" (Kim 2015: 1137). As the EEOC's anniversary report explains, "The 'Toothless Tiger' Gets Its Teeth" in a new era of enforcement (Story of the EEOC 2000: 15). The agency began to target more systemic forms of discrimination, and Commission Chair Eleanor Holmes Norton created a new program focused on systemic cases in 1977 (EEOC Systemic Task Force Report 2006: 57-58). The EEOC's earliest work was focused upon overt forms of discrimination, where it received the least resistance, such as dismantling segregated workplaces and unions (Pedriana and Stryker 2004: 726). It was slower to confront practices that appeared neutral on their face, and yet were discriminatory in impact. In 1970, it expanded its guidelines to include national origin discrimination, and later broadened this in the 1980s to enforce the rights of employees to use their native tongues at the workplace and prevent "English only" rules (Castro 2001: 155).

Pedriana and Stryker ultimately credit civil rights groups as responsible for the EEOC's strength as an institution. In its first fiscal year, the EEOC had received more than 8,800 complaints, despite being created with a budget to handle a mere 2,000 cases (Pedriana and Stryker 2004: 725, quoting NAACP Papers 1965). Groups "such as the NAACP and the LDF hit the EEOC

with complaints in an unrelenting drive to demonstrate that the agency lacked the resources to aggressively enforce Title VII. By mounting a campaign to expose the EEOC's inadequacy, the civil rights organizations hoped to incentivize Congress to increase EEOC's budget, personnel, and enforcement power" (Pedriana and Stryker 2004: 725). This effort was successful, and the EEOC similarly bolstered the efficacy of civil rights organizations' litigation by filing amicus briefs in Title VII lawsuits (*Id.* at 731). Gradually, Pedriana and Stryker argue, these civil rights organizations and the Commission began to present a united front in advocating for broadened interpretations of the law in novel contexts, such as the seniority systems (*Id.*)

The EEOC accomplishes the "overwhelming majority" of its work through voluntary resolutions, mediation, settlement, and conciliation. Litigation, on the other hand, is described as "truly a last resort" (Comm. on Health 2015: 5, Testimony of Jenny R. Yang, Chair, EEOC Commissioner). Within each office, the functions are split into the "enforcement" branch, which handles the initial investigation and conciliation, and the "legal" branch, led by a Regional Attorney, which handles litigation if conciliation fails. The EEOC's charging process permits either an individual or an EEOC commissioner to file a claim, and it need not be from the aggrieved individual. Rather, a third-party organization with knowledge of the facts can file the claim, which permits the Commission to investigate when advocates file a claim (Title VII, 706(b), 42 U.S.C. 2000e-5(b) (1988 and Supp. V 1993)). If the EEOC finds reasonable cause to believe that a charge is true, it first attempts to eliminate the unlawful practice by conciliation (Title VII 706(b), 42 U.S.C. 2000e-5(b) (1988)). Where the Commission is unable to secure a conciliation agreement, it may sue the employer in federal court, and at this point the case moves from the enforcement branch to the legal branch (*Id.*) The charging party can intervene in the suit and also bring any related state or federal claims, which can sometimes far exceed the caps on federal employment damages caps (Tamayo 2015: 12). A court may award the same remedies as it might to a private plaintiff when the EEOC proves that the employer wrongfully discriminated. A court may also enjoin the respondent from discriminating, or award any other equitable relief it deems appropriate (Title VII 706(g), 42 U.S.C. 20000e-5(g)). While the EEOC describes litigation as a last resort, when it does litigate, its successful resolution rate is nearly 90% (Selmi 1996: 18).

3.2.2 Prior Scholarship on the EEOC

Pedriana and Stryker argue that the EEOC ultimately surmounted its weak institutional design and soon proved to be a formidable force, possessing capacity beyond what political scientists would have predicted (2004: 710). It aggressively enforced Title VII and broadened employment discrimination laws in ways that "significantly expanded legal rights and resources available to minority groups" (*Id.*) Maurice Munroe makes a compelling case that the EEOC is uniquely situated to eradicate discriminatory employment practices. As he argues, private lawsuits tend to focus on isolated incidents of discrimination, even though employment discrimination more commonly occurs in systemic patterns. Unlike private litigants, the EEOC has the resources to monitor employment practices more broadly, and focus on more systemic practices (Monroe 1995: 220). In addition, in *Walmart v. Dukes* (2011), the Supreme Court made it far more difficult for private plaintiffs to certify a class of employees in a discrimination claim. Accordingly, scholars have argued that this holding has made the role of the EEOC in systemic discrimination all the more critical.

However, much of the scholarship has argued that the EEOC has fallen far short in combatting systemic discrimination. Many have emphasized that the agency itself doesn't bear the blame for much of this, as Congress has never given the EEOC the resources it would need to adequately investigate cases and prevent a large backlog of cases (Moss et. al 2001: 4). While criticizing the agency for struggling to "be a meaningful force in eradicating employment discrimination since its inception," scholars like Modesitt have also recognized that the primary reason is the extent to which the EEOC has been hampered by its many structural impediments (2010: 1252). It has been forced to spend much of its time on the intake and processing of claims, rather than investigation or conciliation, and struggled with poor management and excessive turnover in its most senior positions (*Id.*) Congress has routinely under-funded the agency, which has led to long delays and a backlog of cases, though this was improved under the Clinton-Gore administration (Igasaki 2001a). The result, Modesitt argues, is that the EEOC has suffered a "significant credibility crisis" (2010: 1238). Many have long issued calls for Congress to relieve the EEOC of its duty to process individual charges" (Monroe 1995: 219; Modesitt 2010: 1256). Pauline Kim argues that reducing its emphasis on charge processing would better allow it to shift priorities and focus greater attention on systemic discrimination (2015: 1145).

There has been a longstanding tension between the agency's duty to respond to individual complaints and its ability to investigate and bring larger class actions. Republican legislators have long criticized the agency for pursuing high-profile, systemic cases rather than pursuing the backlog of 75,000 claims that it has received. In response, agency leaders such as former General Counsel Lopez counter that many of the systemic cases involve plaintiffs who cannot come forward themselves. As he explained in response to criticism from legislators, this permits the agency to target abuse that it wouldn't uncover by relying upon worker-initiated claims alone (Comm. on Health 2015: 21, testimony of P. David Lopez, General Council, EEOC). As he explained, a paradigm shift to focus on individual claims would render plaintiffs like those in the *Hill County Farms* case, who were intellectually disabled, essentially without recourse (*Id.* at 29). At Vice President Gore's initiation, the agency made a number of changes that allowed the agency to focus more on systemic litigation (Igasaki 2001b: 264). This included the elimination of a performance review system that was based solely upon the number of charges resolved, rather than the impact of the charges, in order to afford offices greater discretion to close charges that lacked potential (*Id.*)

Even with these changes to allow for a greater focus on systemic discrimination, however, many scholars have argued that the EEOC has not been successful in achieving meaningful reform in the field of employment discrimination. Lauren Edelman, for example, argues that the EEOC has never surmounted its weak administrative structure, which has allowed employers to construct the meaning of compliance with anti-discrimination laws in ways that symbolically met their requirements, rather than substantively (1992: 1531). As one telling sign of its weak influence, Michael Selmi argues that the EEOC has rarely been a party to Supreme Court litigation advancing and developing antidiscrimination laws (1996: 24). While he finds that the EEOC does have a higher success rate than private litigation, he also finds that it more often resulted in smaller awards for the litigants (*Id.* at 14-15). He concludes that the EEOC serves two primary functions: to screen a large number of non-meritorious claims, and to pursue claims that were otherwise too low in dollar value to be pursued by the private bar (*Id.* at 3). Selmi argues that private attorneys could better fulfill these functions, and that an agency is unnecessary.

Perhaps because of the EEOC's poor reputation, the scholarship on structural reform in the courts has largely ignored the role of the agency. Writing in 2014, Margo Schlanger and Pauline Kim argued that the structural reform literature had largely ignored the role of the EEOC, with the notable exception of Lauren Edelman's work (Schlanger and Kim 2014: 1521). As they also argue, scholars of structural reform have also relied upon a handful of "mega," high-profile cases that are not necessarily representative of the broader class of cases (*Id.*) In order to remedy these gaps, Schlanger and Kim systematically analyzed a ten-year period of EEOC's litigation activities to understand how the agency's strategies fit within the competing "gladiator" and "collaboration" theories of structural reform litigation. In the gladiator theory, structural reform litigation is dramatic, "replete with confrontations and threats," (*Id.* at 1528) and protracted, with extensive judicial oversight. A newer model of reform litigation, the collaboration theory, gained traction in the past fifteen years, which argues that litigation efforts have shifted away from the "command-and-control injunctive regulation toward experimentalist intervention" (*Id.* at 1530). As Schlanger and Kim explain, some employment law scholars have extended this model to employment discrimination, arguing that it better responds to the changing nature of discriminatory bias in the workplace. These might include the fact that many companies have moved to forms of assessment that diffuse responsibility for decisionmaking and make it difficult to assign responsibility for discrimination, or from more subtle forms of discrimination.

Schlanger and Kim find that the EEOC's pattern comports with neither the gladiator nor the collaboration theories of structural reform litigation. In the gladiator theory, structural reform litigation is characterized by drawn-out, high stakes litigation with injunctive relief that involves a high level of judicial involvement (*see, e.g.*, Fiss 1979: 6). Contrary to what the gladiator theory might predict, Schlanger and Kim found that most of the cases involved remedial periods lasting a few years rather than decades, and showed little sign of struggle after the judges had entered decrees (2014: 1525). Rather than dramatic legal struggles, they found that most cases ended in a settlement that involved very little judicial intervention, and required only modest (rather than wholesale) changes to company practices (*Id.*) However, neither was there any sign of flexible, contextualized, and de-centralized decisionmaking like that envisioned by the collaboration theory (*Id.* at 1531; Sabel and Simon 2004: 1019). Rather, the decrees obtained by the EEOC often involved nearly identical form language that was not specific to individual employers (Schlanger and Kim 2014: 1526). Several phrases were repeated across decrees, and very few encouraged ongoing dialogue, gave employees any meaningful voice in articulating anti-discrimination norms, or implemented means of holding employers accountable (*Id.*)

In analyzing these systemic cases, Schlanger and Kim conclude that the EEOC's litigation efforts more closely resemble the managerialist model developed by sociologists, most prominently Lauren Edelman and Frank Dobbin. As they concluded, the EEOC's efforts might best be described as the "routinized application of managerialist, bureaucratic responses to the legal prohibitions against discrimination" (*Id.*) By "managerialist," Edelman explains that this approach is marked by the gradual infusion of managerial or business ideals into understandings of law (Nakamura and Edelman 2019: 2641). As she and Brent Nakamura argue, this can often lead corporations to visible "symbolic metrics of diversity," such as antidiscrimination policies, diversity mission statements and training programs, and formalized organizational structures (*Id.* at 2638). Building upon Edelman's work, Schlanger and Kim conclude that the EEOC's litigation

strategy forms part of this larger phenomenon of adopting "routinized bureaucratic responses" to anti-discrimination laws (2014: 1582). Notably, Schlanger and Kim don't necessarily see the turn to managerialism as entirely detrimental; rather, they argue that some managerialist responses are indeed useful. They point to the fact that several of them may in fact reduce discrimination, and that it ultimately allows the EEOC to bring and resolve more lawsuits than the more resource-intensive gladiator or collaboration theories would permit (*Id.* at 1587). As I argue below, a close analysis of the EEOC's efforts in the farmworker context reveals a different approach, as the agency has developed innovative approaches to overcome many of the bureaucratic impediments to achieving relief in farmworker cases.

3.3 HISTORY OF THE EEOC'S INVOLVEMENT WITH FARMWORKERS

3.3.1 Unique Vulnerabilities that Farmworkers Face

Despite a sizeable literature focused the impact of the EEOC, very little of the existing scholarship has examined its efforts on behalf of farmworkers. There is a well-developed line of scholarship on the precarious nature of undocumented workers' existence. More than thirty years ago, Linda Bosniak identified the "dual identity" of the undocumented immigrant worker. As she explained, they are "members" of the national community and have limited employment rights, and yet these rights are sharply curtailed because of their legal status as "outsiders" (1988: 966). In a large body of work, Shannon Gleeson has probed the process by which immigrant workers engage in claims-making (2016). Most relevant to this project, Gleeson finds that the presence of an EEOC office made immigrant workers more likely to engage in claims-making behavior (2015).

As I explore below, the majority of farmworkers face an array of unique challenges that make it particularly difficult for agencies to reach them. Most live in abject poverty. They are not eligible for most governmental benefits, such as housing assistance, welfare, food stamps, or disability. While the data are known to be incomplete, farmworkers earn very little and are typically not employed year-round. The most recent National Agricultural Workers Survey (NAWS) showed an average individual income is between $15,000 and $17,499, and between $20,000 and $24,999 for a family (Hernandez and Gabbard 2018). More than one-half of farmworkers are also parents. There are a significant number of children working in agriculture; it is estimated to be between 300,000 and 800,000 children aged 18 years and under who work in the fields, and child labor laws are seldom enforced.

A number of other factors make farmworkers uniquely vulnerable, including their geographic isolation and the transient nature of their work, which can make accessing social or legal services particularly difficult. Nearly half of farmworkers have completed six or fewer years of school (*Id.*) In addition, language difficulties are prevalent. Between one and two thirds of farmworkers in one study could not speak any English, and the majority could not read any English (*Id.*) Many farmworkers don't speak a common second language like Spanish; Miztecan languages are more common, and agency employees reported in interviews that there are very few court translators available throughout the country.[9]

[9] Interview with EEOC Employee (May 8, 2020).

All of these vulnerabilities are exacerbated by the fact that many farmworkers are immigrants. It is estimated that more than half of all farmworkers are undocumented, which renders them far less likely to report any abuse. As explored below, this poses unique challenges for agencies enforcing the rights available to them. Beyond the undocumented, a sizeable percentage are workers who come in through the H-2A guest worker program. These laborers are uniquely vulnerable because their legal status tied to a single employer, and renders them unable to leave an abusive employer to work for another (Holley 2001: 596). This creates a situation that is ripe for abuse by the grower, and there is evidence that such abuse is frequent (*Id.*) Their legal status can have a substantial impact on their likelihood of ensuring their safety on the job. As one study by UCLA demonstrated, "[Many of the interviewees] felt they could not ask for protective equipment, training, or other health and safety-related items, because they might be turned into the Immigration and Naturalization Service (INS or "la migra") or fired" (Brown et. al 2002).

While agencies such as the EEOC have largely been successful in making one's legal status irrelevant to their ability to enforce anti-discrimination labor laws, some agricultural defendants have found new ways to convince judges to introduce evidence of the plaintiff's legal status at trial.[10] In one case, discussed *infra*, the defendant argued that the plaintiff had fabricated a rape charge in order to qualify for a visa that the EEOC was concurrently supporting, for example, and the judge ruled that her status was accordingly admissible (*EEOC v. Favorite Farms* Order on Limine Motions 2018: 5). One EEOC employee explained that legal status was often an impediment to bringing these cases because it was not necessarily just the plaintiffs "working for these employers, their whole family is. Their spouses, their parents, their uncles, aunts, cousins. So they [defendants] will use that as leverage to threaten them to back off."[11] As this official explained, the opposing lawyers in these cases sometimes intimidated the families and threatened deportation.

Farmworkers have historically been excluded from central protections afforded most other employees in what some have referred to as the doctrine of "agricultural exceptionalism" (Schell 2002: 141; Fox 2012). Farmworkers did not benefit from the extraordinary transformation of the workplace during the New Deal period. As Greg Schell writes, "Virtually every labor protective standard passed on both a federal and state level prior to 1960 excluded agricultural workers" (Schell 2002: 141). Within Congress, influential senators from the rural south were swayed by industry interests, and this was particularly true because most farmworkers were African American at the time (*Id.* at 142). Several scholars have argued that many of the agricultural exemptions were rooted in racism (Linder 1987: 1360). Juan Perea has argued that this exclusion is explicitly rooted in racism, arguing that during the New Deal era, the statutory exclusion of agricultural and domestic employees was well-understood as a race-neutral proxy for omitting African Americans from the benefits and protections available to whites (2011). As Bernice Yeung as argued, agricultural laborers were excluded in order to avoid protecting black workers, and domestic laborers were further excluded because they were mostly African American women (2018: 70-73).

The result of this agricultural exceptionalism is that farmworkers are not included in many of the central protections afforded to most employees. The National Labor Relations Act (NLRA) explicitly excludes agricultural workers, meaning that farmworkers are not protected from

[10] Interview with EEOC Employee (May 13, 2020).
[11] Interview with EEOC Employee (May 11, 2020).

retaliation for joining a labor union (Schell 2002: 142; Guild and Figueroa 2018: 169). They are exempt from the overtime provisions of the Fair Labor Standards Act (FLSA), and included in its minimum wage provision at a lower rate than other workers (Inventory of Farmworker Issues 2011: iii). States with progressive labor laws like New York, California, New Jersey, and Michigan have passed modest reforms to limit "the most obvious abuses of farmworkers, such as transportation in unsafe and overcrowded vehicles and housing workers in units lacking electricity or running water" (Schell 2002: 141-42). In most other states, the political power of the agricultural industries prevented any such legislation (*Id.* at 142). In proposed legislation on employer sanctions, employers have been very frank in their testimony that they rely upon undocumented labor and that sanctions would impose severe financial obstacles (Fix and Hill 1991; Wishnie 2007: 201). This reliance upon undocumented labor makes sense in some ways, as farm work involves such difficult labor. In the 1986 amnesty for seasonal workers, which allowed approximately 1.1 million undocumented farmworkers to become permanent residents (Martin 1997: 81), farmworkers tended to switch to safer and steadier work upon gaining legal status (NAID Center 2000: 8).

On the heels of "Harvest of Shame," a documentary that depicted the unsafe living and working conditions of farmworkers, Congress held lengthy hearings to learn about the need for federal protection (Schell 2002: 154). In the end, it passed a modest bill called the Farm Labor Contractor Registration Act (FLCRA), which was the first law to regulate the living and working conditions of farmworkers (*Id.*) Later this was replaced by the Migrant and Seasonal Agricultural Worker Protection Act (MPSA) in 1983 (see Pub. L. No. 97-470, 96 Stat. 2583 (1983)). MPSA created federal jurisdiction over farmworkers' claims, and gave them the ability to establish proper venue in any court where personal jurisdiction exists over the defendant, and contains an anti-retaliation provision (29 U.S.C. 1854(a)). AWPA allows any person aggrieved under the statute to file in any district court having jurisdiction over the parties, without regard to citizenship of the parties. Many have written about the limitations of MPSA. One major obstacle is that farmworkers were not included under union laws, unlike in Canada, for example. Scholars have found that union employees are safer than non-union employees in the workplace, as unions are often far more effective at engaging with management to reduce risks, (Baltz et. al 2002: 44) and more likely to file OSHA complaints (Rathod 2009: 517).

Farmworkers face another unique vulnerability from the structure of the relationships in the agricultural industry. Farm Labor Contractors (FLCs) work as intermediaries between growers and laborers and are licensed by the U.S. Department of Labor and regulated by AWPA (Ontiveros 2002: 162). The use of FLCs varies by states, and some states have additional licensing requirements. In some states like California, it is estimated that FLCs supply 50 to 75 percent of the farmworkers (Martin 2001). The growers will typically contract with an FLC to complete a particular job, such as harvesting a certain number of acres (Inventory of Farmworker Issues 2011: 4). This allows some growers to distance themselves from the working conditions of farmworkers, and to not be involved in the terms under which the farmworkers are contracted to work on their land. (*Id.*) As one advocate attorney testified before the Commission: "Unfortunately, the multiple layers of contracted labor make it difficult to impute criminal liability to the grower who benefits from cheap labor. Sadly, many growers will turn a blind-eye to immigration status and the working conditions in their lands in order to obtain a workforce that is cheap to employ and with little risk of being reported for violations of labor and employment rights" (Vallejo 2011).

Even when farmworkers have rights, they have little recourse when an employer violates them. While MPSA regulates housing and transportation for the minority of employees that provide these to farmworkers (Inventory of Farmworker Issues 2011: iv), legal advocates report unsafe transportation and substandard housing as common (*Id.*) The Southern Poverty Law Center reports that minimum wage rules are routinely violated by growers and labor contractors paying "piece" rates instead of hourly wages, which allows them to avoid paying the minimum wage (Ramirez and Bauer 2010: 25). Farmworkers also routinely report not being paid at all, and having no recourse (*Id.* at 23). Farmworkers experience the highest rates of toxic chemical injuries and skin disorders of any workers in the country, according to the Department of Labor (Nat'l Agricultural Workers Survey 2005). Language barriers can contribute to the likelihood of injury, as one study reported that participants "could not read warning labels on containers holding toxic chemicals" (*Id.* at 25). Thus, there is ample evidence that much of the statutory and regulatory framework has not been successful in protecting farmworkers from unsafe working conditions.

As scholars such as Maria Ontiveros (2002: 158) have recognized, farmworkers suffer from the fact that the law is very fragmented, which often means that many of their most pressing problems are analyzed independently instead of holistically. Critically, Ontiveros argues, farmworkers and their advocates have a history of crafting responses to these problems themselves through their own organizing (*Id.*) Thus, while this Chapter focuses on the importance of a robust public enforcement scheme to ensure that farmworkers can avail themselves of the legal protections to which they're entitled, this important history of advocacy by farmworkers cannot be overlooked. Farmworker women, in particular, have an important history of grassroots advocacy that has most recently included recognition within the #MeToo movement. While the #MeToo movement has revealed the prevalent nature of sexual harassment in the workplace, it was criticized for its initial failure to include the voices of the more vulnerable, and less visible women, like low-wage immigrant workers. In the past few years, though, this has begun to change as a result of grassroots advocacy by farmworker women. In 2017, TIME Magazine published a letter from the Alianza Nacional De Campesinas in which 700,000 farmworker women expressed their support for the actors who had revealed their experiences with sexual assault in the wake of the Harvey Weinstein scandal. As the letter explained, farmworker women work "in the shadows of society in isolated fields and packinghouses that are out of sight and out of mind for most people in this country," in sharp contrast to the "bright stage lights or the big screen" of the more affluent women of Hollywood (TIME 2017). Nonetheless, they explained, they suffered from a similar imbalance of power, where revealing abuse puts too much at risk, "including the ability to feed our families and preserve our reputations." Now, in the midst of the COVID-19 pandemic, the importance of farmworkers has grown even more salient in the public eye, as they labor daily to keep the food system operating in the face of a great deal of risk, armed with very few protections.

3.3.2 The Evolution of the Agency's Efforts

William ("Bill") Tamayo has written that the EEOC was initially slow to reach immigrant communities, as the Commission was "understandably driven by a 'black v. white' framework, much like the rest of the civil rights community in analyzing and addressing issues of racial minorities" (2000: 1078). Tamayo is currently the Director of the San Francisco District Office, and formerly served as Regional Attorney for that office from 1995-2015. As discussed *infra*,

Tamayo plays an instrumental role in the EEOC's work on behalf of farmworkers. Traditionally, the Commission had focused on the discrimination issues of African Americans in urban areas. Thus, while agribusiness is one of the largest industries, there were very few EEOC cases in agriculture prior to the late 1990s. As Tamayo concedes, "the EEOC did not significantly respond to the changing phenomena in the workplace" initially, created by globalization, industry expansion, and international and domestic instability (*Id.* at 1079). In addition, as he explains, the Commission was hampered by advocates' perception of the agency. "By the 1990s the EEOC was sometimes viewed by civil rights advocates as irrelevant, poorly trained, ill-prepared to address the discrimination issues of the decade, and indifferent to the civil rights concerns of new Americans and emerging communities" (*Id.*)

This finally changed in 1995, when Tamayo left civil rights advocacy work and joined the EEOC as the Regional Attorney. That year, he arranged for EEOC staff from the San Francisco District Office to meet with farmworkers and advocates in Fresno, California, where they learned how pervasive the problem of sexual harassment was in the fields. This prompted the San Francisco District Office to develop an education and outreach campaign as part of its Local Enforcement Plan, discussed *infra*, that included innovative partnerships with a number of advocates and public interest organizations. This effort was also supported by a National Enforcement Plan (NEP), adopted under Chairman Gilbert Casellas, that stressed the importance of heightened outreach to underserved communities, especially with respect to national origin bias, harassment toward immigrant workers, wage discrimination and retaliation (Castro 2001: 156). Critically, the NEP changed the authorization procedure for regional offices to bring litigation, which had previously required the full Commission's authorization (*Id.*) It delegated litigation decisions to the EEOC's General Counsel, who in turn redelegated this authority to Regional Attorneys (*Id.*) Under this more entrepreneurial approach, then, the Regional Attorney of each District Office now had wide latitude to determine its litigation priorities.

As the San Francisco District Office grew its partnerships with outside organizations, the California Rural Legal Foundation (CRLA) soon presented the perfect test case with strong factual allegations. In *EEOC v. Tanimura & Antle*, the lead plaintiff, a farmworker, testified that she had been forced to have sex with the hiring official (*EEOC v. Tanimura and Antle* Consent Decree 1999; "EEOC and Tanimura & Antle Settle Sexual Harassment Case" 1999). In 1999, the EEOC San Francisco District Office reached a $1.855 million dollar settlement against the largest lettuce grower in the world. It was the largest sexual harassment settlement in the agricultural industry that the Commission had ever handled. *Tanimura* captured the attention of the national office, as Chairwoman Ida Castro attended the press conference announcing the *Tanimura* settlement.[12] Chairwoman Castro's approach was very aligned with this effort, and the changes that she had initiated at the national level were supportive of these types of cases. Shortly after taking office in 1998, she determined that a new comprehensive enforcement approach was needed to move past the plateau in employment civil rights enforcement (US Comm's'n on Civil Rights 2000). As she believed, the EEOC needed to increase its presence in underserved communities, including immigrant and limited English proficient communities (Castro 2001: 157). That same year, the Commission made the representation of low-wage workers a national priority through its "Low Wage Task Force," and this included immigrant workers (Tamayo 2009: 261). Title VII does not expressly protect immigrants on the basis of citizenship status; rather, the agency has often

[12] Interview with EEOC Employee (May 8, 2020).

protected the rights of immigrant workers on the statutory basis of national origins discrimination.

Once the *Tanimura* settlement made headlines, the effort on behalf of immigrant workers in the agricultural industry began to spread nationally within the Commission. As discussed *infra,* interviews with advocates and EEOC employees indicated that much of this diffusion outward was driven by Tamayo's efforts, who cared deeply about these cases. Two years later, the Milwaukee office announced a 1.525 million dollar settlement on behalf of a class of Mexican female employees in a poultry and egg processing plant (*EEOC v. Austin J Decoster d/b/a Decoster Farms of Iowa, and Iowa AG L.L.C.* Consent Decree 2002). Four years later, the Los Angeles District Office would announce a similarly large settlement of 1.05 million in a sexual harassment class of Latino farmworkers (*EEOC v. Rivera Vineyards, Inc. d/b/a Blas Rivera Vineyards, et al.* Consent Decree 2005).

The agency stepped in to fill a significant gap in representation in this context, as federal restrictions prevent rural legal services programs from participating in class actions, representing undocumented workers, or obtaining attorneys' fees (Tamayo 2000: 1084). As several Regional Attorneys and advocates confirmed in interviews, very few in the private bar (outside of legal service corporations) have taken these cases. As others have also written, both business considerations and the gatekeeping function of the plaintiffs' bar make it much less likely that these cases will be taken (see, e.g., Jacob 1986; Kritzer 1997; Kritzer 2004: 45-95). As interviewees explained, private lawyers experience difficulty in identifying these claims due to geographic isolation and language barriers, and the plaintiffs are unlikely to be able to cover costs as the litigation proceeds. Prior to the EEOC taking this initiative, the result was that farmworkers had nearly no legal recourse when they suffered harassment.

3.4 Analysis of EEOC's Litigation Efforts on Behalf of Farmworkers

Next, I turn to a comprehensive analysis of the EEOC's litigation efforts on behalf of farmworkers, which have spanned more than two decades. Of course, litigation represents only a small fraction of the charges filed with the agency. One study found, for example, that 1,106 sexual harassment complaints had been filed with the Commission against agricultural industries as of 2015 (Yeung and Rubenstein 2013). While there are no reliable data on how many the Commission investigates, the publicly available data indicate that it declines to investigate approximately 50 percent of sexual harassment complaints across all industries, for example (*Id.*) The remainder are either settled in the conciliation process, internal to the agency, and a small fraction of those (that are not successfully resolved) result in a lawsuit.

There is no centralized source which would allow one to identify all of the cases that the EEOC has initiated on behalf of farmworkers. In addition, most of these cases settle out of court, meaning that the typical searches of case law yield very little. Drawing from the EEOC records, case law drawn on Lexis Nexis, public repositories of consent decrees, searches using PACER, and media searches discussing the Commission and farmworkers, I provide a first look at the agency's engagement with farmworkers and employment discrimination.

In deciding how to define a "farmworker" case, I took the broad view of the EEOC's anti-

discrimination efforts in the agricultural industry, including what one advocate referred to as "agricultural-adjacent low-wage worker cases."[13] Accordingly, I included cases that did not technically occur on a farm, such as meatpacking or egg processing plants. It also bears mentioning that these cases include a broad range of plaintiffs. Some are plaintiffs who have legal status as guest workers or permanent residents, some lack legal status, and others are citizens. While many of the cases involve Spanish-speaking or Mixtec-speaking Central or Latin American farmworkers, many other cases involved guest workers from countries such as Thailand or Haiti. As described below, several district offices have also brought cases on behalf of African American citizens who were farmworkers, alleging that they were being discriminated against in favor of foreign farmworkers. Also, while it lies outside the scope of this work, many of the same dynamics affect other low-wage immigrant industries, such as the janitorial industry, in which the EEOC has also been involved (Yeung 2018: 70-73).

Research revealed sixty-four cases over the past twenty five years, between the Commission's first suit on behalf of farmworkers in 1995 and the present day. The vast majority of these cases (fifty) contained a claim of discrimination based upon sex. Notably, at least two of the cases involving sex-based discrimination were brought on behalf of male plaintiffs. A sizeable portion of them also contained allegations of racial discrimination national origin (eighteen). There were a smaller number of race-based claims (eight) and an even smaller number of disability (three). These are not mutually exclusive, as race and national origin were often brought in tandem, for example.

Of the fifty-nine cases that were settled by consent decrees, these decrees were publicly available in all but ten cases. In those cases in which they were not available, the Commission's press releases, the docket sheets for each case, and media sources provided basic information about the action. As Figure 7 demonstrates, nearly every one of the cases settled through the form of a court-monitored consent decree, which is a settlement agreement that the court approves and over which it retains jurisdiction for the period specified in the decree.

[13] Interview with Farmworker Advocate (May 24, 2020).

Figure 7: Type of Resolution

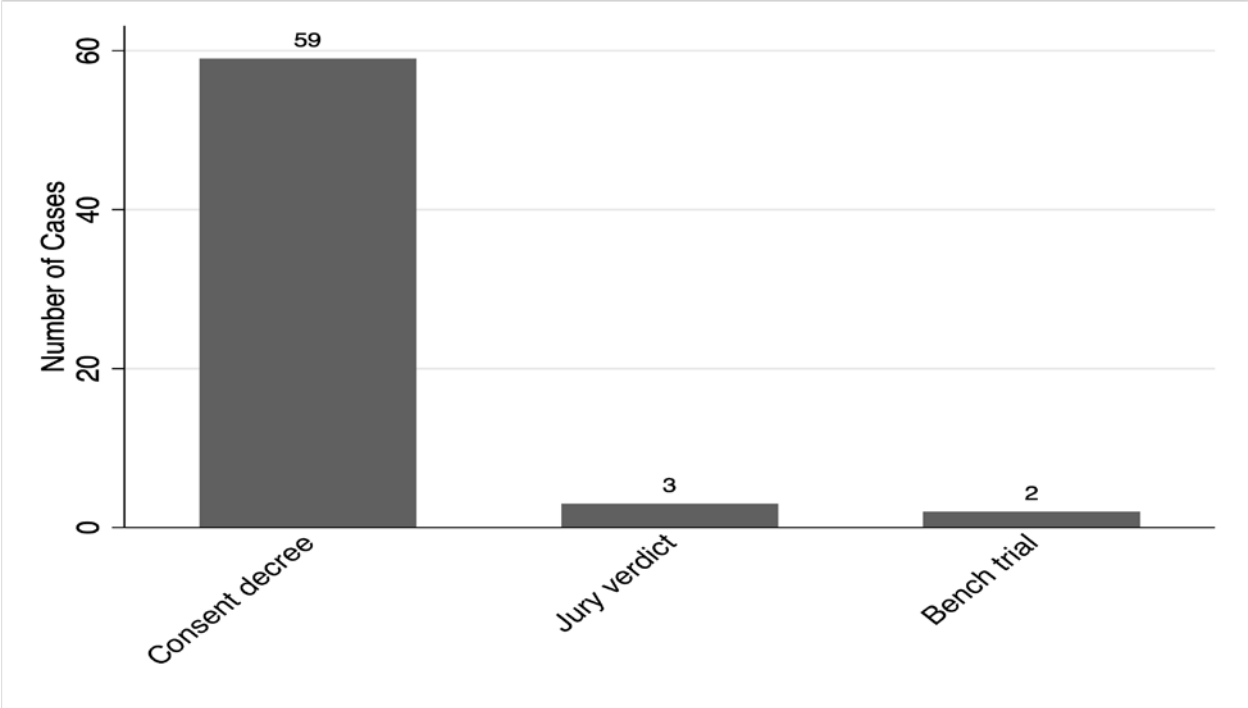

Figure 7 reflects whether a case was resolved by consent decree, jury verdict, or bench trial in cases brought by the EEOC on behalf of farmworkers between 1999 and July 2020. Source: Data were gathered from the Cornell Digital Commons Consent Decree Database, PACER, and EEOC Press Releases.

This is likely the result of at least two factors. First, as interviews with EEOC employees stressed, these cases often don't involve corroborating evidence and inevitably depend upon the fact-finder believing the farmworker to be more credible than the defendant.[14] Several EEOC employees expressed concern about this, explaining, for example, that it was very difficult to get an all-white jury in a rural location to step into the shoes of a farmworker in just a matter of days.[15] After an unsuccessful trial in one case, a white jury member explained that he hadn't believed the farmworker because she hadn't reported the assault to the police, and he believed that his daughter would have done so (*Id.*) In addition, as discussed *infra*, at least one EEOC employee expressed concern about bringing a number of undocumented witnesses to a courtroom to testify. As this person explained, in one case, every one of the witnesses "was undocumented and we wound up resolving the case in part, probably for less than we otherwise might have gotten because we didn't want to subject all these people who weren't even party to the case to being deposed."[16] While the agency "fights very hard and is for the most part successful that immigration status can't be discovered, it creates a chilling effect" (*Id.*) A consent decree avoids the need to gather testimony and ensures continuing judicial oversight without the need to file subsequent litigation, and guarantees badly needed relief for the plaintiffs. From the employer's perspective, it often contains a provision denying any wrongdoing, and so it permits the employer to avoid admitting any fault or establishing any precedent.

[14] Interview with EEOC Employee (May 8, 2020).
[15] Interview with EEOC Employee (May 13, 2020).
[16] *Id.*

Interviewees were reluctant to provide much explanation for why many cases didn't settle in the internal conciliation process within the agency instead of settling much later in litigation, as much of this process is confidential. However, at least one EEOC employee explained that the defendants frequently don't offer enough at this stage, which forces the case to proceed to litigation. This interviewee explained that while only 12-14% of cases nationwide to the EEOC involve sexual harassment, 25% to 30% of the EEOC's litigation is sexual harassment.[17] "It's all about reputations," the interviewee explained, as many more defendants are willing to go to trial to destroy the plaintiff's credibility because it affects their reputation (*Id.*) In this interviewee's perception, defendants took allegations of sexual harassment much more personally, and were accordingly more likely to litigate in a protracted way, and to attempt to malign the character of the plaintiffs.

Figure 8 presents the number of cases per year, and also includes whether each case was brought on behalf of an individual claimant or multiple. When asked whether the Commission favors systemic or individual litigation, most interviewees responded that a mix of these cases was viewed as important. One EEOC employee offered the perspective that systemic cases were preferable in this context because these cases so frequently involved attacks on the plaintiff's credibility. In an individual case, "there's always going to be a flaw, since there's never a perfect claimant."[18] In a class of plaintiffs, "then it becomes more of the employer's actions as opposed to singling out the individual."[19] This same official explained that the Commission was in a favorable position because it didn't have to do class certifications, so it was "very aggressive about trying to find other victims. It's very important for us" (*Id.*)

[17] Interview with EEOC Employee (May 8, 2020).
[18] Interview with EEOC Employee (May 11, 2020).
[19] *Id.*

Figure 8: Case Type: Individual or Multiple Claimants by Year of Resolution

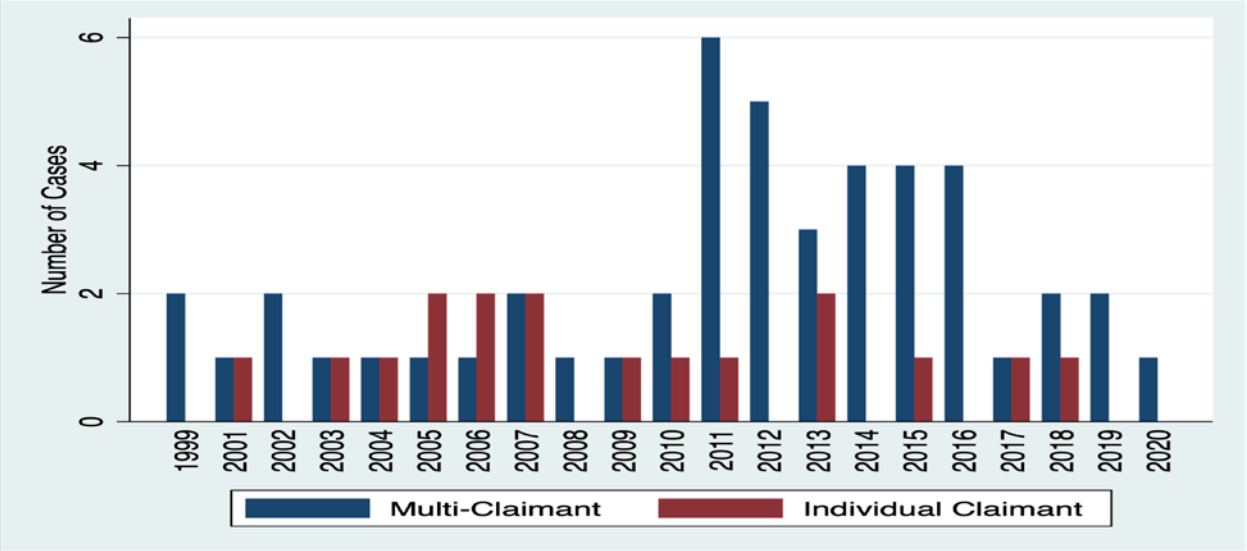

Figure 8 reflects the number of cases brought by the EEOC on behalf of farmworkers between 1999 and July 2020, and whether it was brought on behalf of individual or multiple claimants. Source: Data were gathered from the Cornell Digital Commons Consent Decree Database, PACER, and EEOC Press Releases.

As the above figure reflects, the EEOC litigated the most cases on behalf of farmworkers between 2011 and 2016, during the Obama Administration. This may reflect the influence of the national leadership at the EEOC to some extent, though every EEOC employee interviewed stressed that they had not observed a large difference in their freedom to pursue farmworker cases across administrations. One interviewee noted, for example, that Cari Dominguez, Chair of the EEOC during the Bush Administration, was very supportive of these cases.[20] Three EEOC employees explained that the recent decrease in cases did not reflect national control over regional litigation; rather, they offered that in the prevalent anti-immigrant climate created under the Trump administration, claimants were so afraid of retaliation that they were not bringing claims as often to community organizations, who would in turn bring them to the EEOC.[21] Interviews with farmworker advocates confirmed that they had seen a reticence to report claims due to fears of retaliation. However, several EEOC employees surmised that recent leadership changes within the EEOC could affect the priorities for low-wage workers if Trump were to serve a second term.[22] In their view, it sometimes took time for these changes to filter down to regional offices, and they saw them as more likely occurring during a second term.

[20] Interview with EEOC Employee (May 8, 2020).
[21] Interviews with EEOC Employees (May 8, 11, 13, 2020).
[22] Interviews with EEOC Employees (May 13, June 4, 2020).

Figure 9: Originating District Office

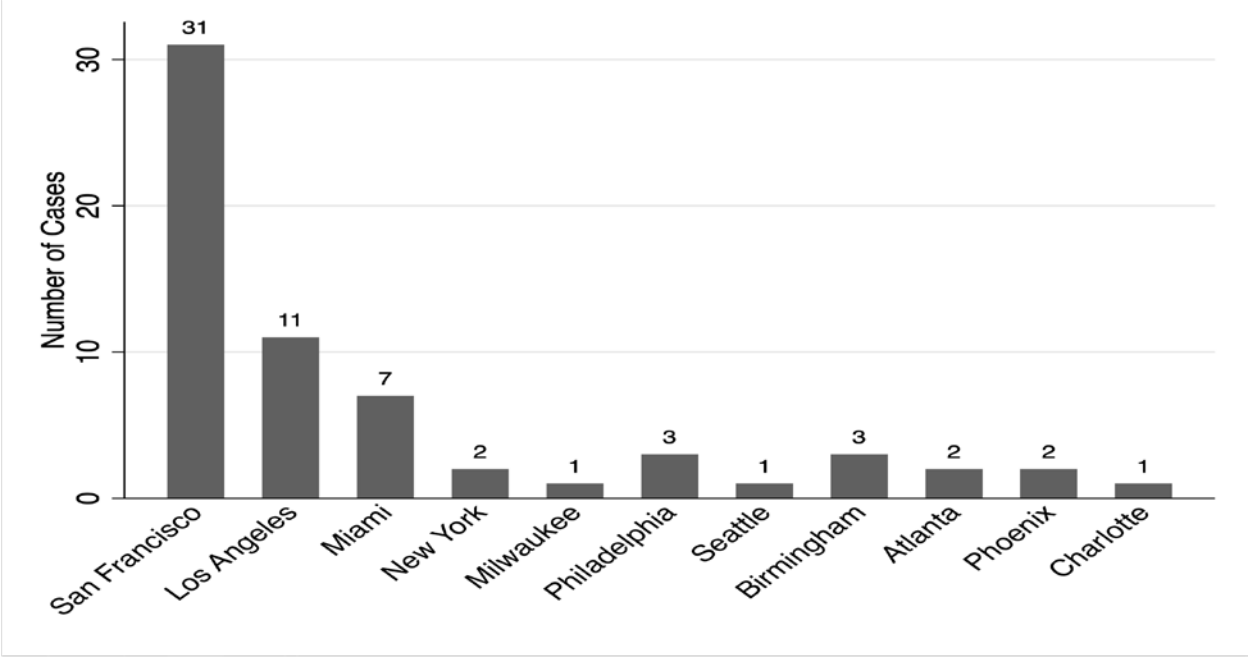

Figure 9 reflects the originating office of each EEOC District Office in each case brought by the EEOC on behalf of farmworkers between 1999 and July 2020. Source: Data were gathered from the Cornell Digital Commons Consent Decree Database, PACER, and EEOC Press Releases.

As Figure 9 illustrates, farmworker cases have been initiated by at least eleven EEOC district offices, with the vast majority of them being brought in California.[23] To some extent, this aligns with where much of the agricultural industry is within the United States, as the states with the highest farmworker populations are in the Pacific (states such as California, Washington, and Oregon) and South Atlantic (states like Florida, Georgia and North Carolina) regions (USDA Farm Labor Statistics 2018). To some extent, this also likely reflects regional variation in the priority afforded to farmworker cases.

The figure below reflects the overall distribution of the recovery obtained (either by consent decree or a verdict), adjusted for inflation.[24] While most of the very large victories have come out of the San Francisco and Los Angeles District Offices, several other offices have achieved notable victories. This includes, for example, the 1.5 million dollar *Decoster* settlement in Milwaukee, a 3.75 million dollar settlement in *Koch Foods* out of the Birmingham District Office, and several cases out of the Miami District Office, including a 17.425 million dollar jury verdict in *Moreno Farms*.

[23] Figure 9 shows the originating district offices, which is how the EEOC typically records these cases. Each district office encompasses a number of regional offices, and often the litigation includes regional offices within a district that also bring the cases as co-counsel. This includes offices in Denver, Albuquerque, Fresno, Baltimore, San Jose, San Diego, San Antonio, and Raleigh that have also been involved in farmworker litigation.

[24] This means, for example, that $1 recovered in 1999 is worth $1.55 in 2020. This was adjusted using the Consumer Price Index, Urban, which may be located at https://www.bls.gov/cpi/questions-and-answers.htm.

Figure 10: Amount of Claim

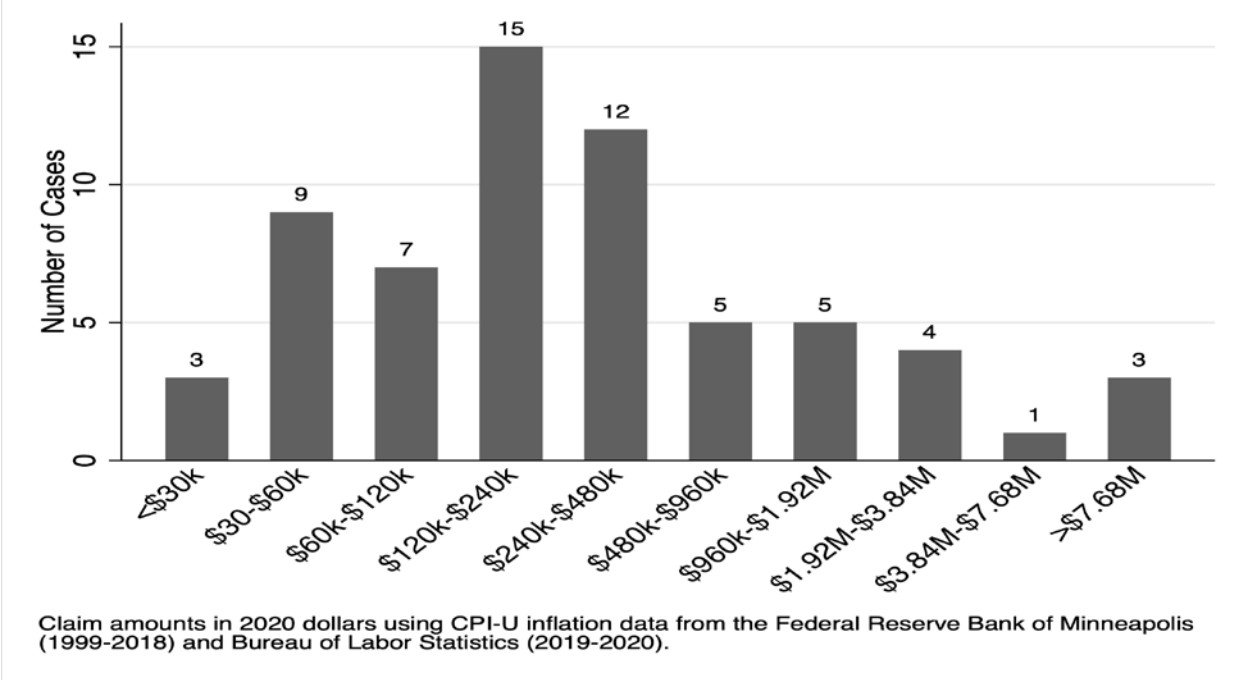

Figure 10 reflects the amount of the relief obtained in all resolved farmworker litigation brought by the EEOC between 1999 and July 2020. Source: Data were gathered from the Cornell Digital Commons Consent Decree Database, PACER, and EEOC Press Releases.

3.4.1 Consent Decrees in Farmworker Litigation

Next, I carefully analyzed the forty-nine publicly available consent decrees that that the EEOC obtained in farmworker litigation. Studying the EEOC's litigation efforts more broadly, Schlanger and Kim find that the consent decrees primarily implement managerialist remedies, or the policies and structures considered "best practices" within industries (2014: 1586). While noting that many scholars have been critical of these tendencies, Schlanger and Kim argue that some manageralist responses are useful, and that more empirical evidence of their effectiveness is needed (*Id.* at 1587). My review of the agency's litigation on behalf of farmworkers revealed that, one the one hand, there were standard types of relief in nearly every consent decree. On the other hand, they also evinced a more narrowly tailored and innovative approach. In interviews, EEOC employees consistently agreed that there were types of relief that they tended to prioritize in nearly all farmworker cases. Outside of California, which has mandated sexual harassment training for any company with at least five employees (Senate Bill 1343 2018), EEOC employees explained that the majority of agricultural defendants had no policies or complaint procedures in place at all.[25] As this interviewee explained, "these companies are basically ignorant about their duties under the law. They put people in positions of power, like a foreman or a manager, and they don't look back" (*Id.*) As another EEOC employee explained, there was a general resistance on the part of the agricultural industry to be required to train all employees because their work is so seasonal in nature.[26] As this EEOC employee explained, "we really try to ensure that injunctive relief is

[25] Interview with EEOC Employee (June 5, 2020).
[26] Interview with EEOC Employee (June 1a, 2020).

actually accessible to the workforce in these cases."[27] This has meant, for example, not just providing employees with a flyer that contains the EEOC policies and having them sign it, since very few employees in any industry are likely to read it, and many farmworkers are not literate. Instead, they have been successful in negotiating for defendants to produce a live video and "blast it when the season begins," so that all of the incoming workers can see it. This also includes producing it in the relevant languages so that the workers can understand it. Finally, this employee explained, a persistent problem in the agricultural industry is that supervisors see abuse but don't report it. As a result, the EEOC has focused heavily on consent decrees that make the supervisors' performance contingent upon following agreed upon reporting procedures in order to ensure the proper internal investigation of all claims.[28]

All forty-nine of the available consent decrees required the defendant to implement anti-discrimination and anti-harassment training, for example. Most of these contained common provisions: upper level management was required to make a personal appearance to introduce the training, the training was required to be provided in at least Spanish and English, and the EEOC retained the right to approve the training. Most consent decrees also contained a provision requiring distribution or posting of the harassment policy at regular intervals. Most also required twice-annual reporting to the EEOC on any harassment complaints that the company had received and how it had dealt with them.

Several of the consent decrees contained very specific goals and metrics by which to judge the defendant's compliance. Many of the decrees specifically set up complaint procedures for companies that did not previously have one. Many also contained specific injunctive relief, which varied across cases: some required that certain employees be fired, for example, or that the company establish a specific hotline in multiple languages that could be reached at any time. *Hamilton Growers*, brought by the Atlanta District Office, involved African American seasonal workers who were subjected to discrimination based upon their national origin and/or race. As advocates explained in interviews, the requirement that an H2A guest worker stay with an employer in order to have legal status creates a situation ripe for abuse, and many in the agricultural industry have begun to favor these workers because of the ability to exploit them.[29] Suits like *Hamilton Growers,* while focused on African American plaintiffs, create an opportunity to improve the working conditions for all farmworkers by reducing the employer's ability to exploit guest workers. In this case, the defendant had fired all U.S. citizen workers and retained only Mexican workers from 2009-2011, and the plaintiffs alleged that the firings were coupled with race-based comments by management, fewer job opportunities, and less pay. In this consent decree, in a section entitled "Goals for African American Workers and workers of American National Origin," the consent decree specified that the company would retain at least 65% of the non-H2A workers. It also specified that the company would allocate 50% of supervisory or leadership positions to "American and/or African American workers" (*EEOC v. Hamilton Growers* Consent Decree 2012: 19). It also required the defendant to hire a compliance official whose duty it would be monitor policies and practices to ensure no impact for U.S. citizen and/or African American workers, and created a Task Force with the goal of retaining non-H2A workers. It further created a termination appeals process for any non-H2A worker that would be overseen

[27] *Id.*
[28] *Id.*
[29] Interview with Farmworker Advocate (May 28b, 2020).

by a third party. It created a presumption of re-employment for the plaintiffs, and an agreement to make reasonable efforts to extend rehire offers to previously terminated employees.

Most surprisingly, some consent decrees also included provisions that would fall outside of the EEOC's enforcement mandate. In *Hamilton Growers,* the consent decree required the defendant to provide sanitation units that were accessible, to provide coolers with cool drinking water and disposable cups, and to prohibit weapons and firearms. In *Global Horizons,* a 1.2 million dollar settlement on behalf of Thai farmworkers who had been trafficked to a nut farm in Hawaii, the consent decree appointed a third party monitor who would monitor farmworkers' housing, living, and transportation conditions (*EEOC v. Global Horizons* Consent Decree 2014: 11). As one EEOC employee explained, the agency "needs out of the box thinking, understanding that their trafficking victims need more than just money. They need social services. I think that is the beauty of the ability of the Commission, when allowed to do its work and be creative."[30]

The EEOC was also sometimes able to find a solution for the common difficulty in holding the intermediary, farm labor contractors (FLCs) liable. In some consent decrees, like *Global Horizons,* the defendant assumed responsibility for holding FLCs accountable for Title VII compliance (*Id.*) It required the defendant (the grower) to conduct audits of any housing provided by the FLCs, provide orientations on anti-harassment, and create a hotline for employees to contact for any concerns related to their working or housing conditions (*Id.*)

A number of the decrees relied on third party monitors, and some included very specific ways of ensuring compliance. *Smokin' Spuds* (*EEOC v. Smokin' Spuds, Inc*. Consent Decree 2015: 20), for example, required the third party monitor to distribute an anonymous written survey probing whether employees had experienced any harassment in both English and Spanish to all employees, and to provide a copy of the results to the EEOC (*Id.*) While all EEOC employees reported spending a lot of time negotiating the terms, they differed on the extent to which the agency monitored subsequent compliance with the consent decree. One EEOC employee explained that such monitoring was an important part of what their office did, and explained that they frequently used third party monitors.[31] Other EEOC employees said that their offices really didn't have the resources to monitor cases, other than the reports that the companies were required to file with the agency, and through bringing a second case if they received another complaint. As one EEOC employee explained, this second offense would lay the foundation for punitive damages, which provided an incentive for companies not to re-offend.[32] While certain offices preferred to use a third party monitor more generally,[33] others explained that their offices tended to use these only in systemic cases.[34] For offices that did appoint a third party monitor, the monitor was often responsible for overseeing the revision and implementation of anti-discrimination and anti-retaliation policies and the complaint and investigation process (See, e.g. *EEOC v. Zoria* Consent Decree 2015: 8-9).

Of course, there were important limitations to the relief obtained in these cases. As Nancy

[30] Interview with EEOC Employee (May 11, 2020).
[31] *Id.*
[32] Interview with EEOC Employee (May 8, 2020).
[33] Interview with EEOC Employee (May 11, 2020).
[34] Interview with EEOC Employee (June 1a, 2020).

Levit has argued, a key hallmark of institutional reform litigation that restructured conditions in schools, prisons, and voting booths was extensive judicial oversight (2008: 414-15). She also notes that in employment discrimination cases, "the courts that have taken more aggressive oversight responsibilities have had better outcomes" (*Id.*; see also Selmi 2003: 1285-88). In reviewing the dockets of these cases, seldom was there any post-decretal involvement by the court, which is consistent with what Schlanger and Kim found of the EEOC's litigation more generally. EEOC employees confirmed this in interviews, often citing the agency's lack of resources as limiting their ability to engage in post-decretal monitoring.[35] As another employee explained, while many consent decrees allow for the possibility of the EEOC to conduct audits at the worksite, this interviewee was not aware of the agency ever having done that.[36] Going forward, this would be a fruitful area of focus for the EEOC in order to strengthen the impact of its litigation.

In addition, it appeared that the agency might benefit from closer collaboration across district offices, as certain types of relief were more likely in some areas than others. While this may reflect geographic differences in how much growers are likely to concede during negotiation, or other case specific factors, it also likely reflects differences in individual attorney strategies across offices. The Los Angeles office, for example, was particularly likely to secure a third party monitor to ensure compliance with the consent decree, and the Atlanta office had particular success in securing terms that reached beyond the terms of the lawsuit, and implicated the broader conditions on the farms. While interviews described a relatively high degree of collaboration across district offices, more emphasis could be placed upon sharing the successful negotiation of these types of provisions.

3.5 LESSONS FROM THE EEOC'S TRAJECTORY

Interviews with EEOC employees and farmworker advocates helped to illuminate the process by which the EEOC came to prioritize farmworker litigation. In the section that follows, I first argue that the prior scholarship has missed an important element of what makes these cases meaningful, particularly in the agricultural industry: the signaling function of these cases. Next, I focus on two factors that facilitated the EEOC's success on behalf of farmworkers, as they offer important lessons in considering how an agency may reach vulnerable populations: first, its close partnership with outside organizations, and second, its decentralized structure that allowed diffusion from San Francisco outward to other district offices. Finally, I consider the challenges and limitations of the EEOC's farmworker litigation, focusing on two challenges described by interviewees: the difficulties in bringing cases in which the plaintiffs may lack legal status and the difficulty of inter-agency coordination.

3.5.1 The Signaling Function of Litigation

Employment law scholars point to the routinized language in the EEOC's consent decrees as evidence that the agency isn't achieving meaningful reform. However, as I argue below, this criticism obscures an important element of what is at work here, and the fact that the litigation can have an effect on behavior outside of the mere language of the settlement. In interviews, EEOC

[35] Interview with EEOC Employee (May 8, 2020).
[36] Interview with EEOC Employee (June 1a, 2020).

employees offered evidence that they had seen subsequent cases settled at a much earlier point in the conciliation process after the defendants had observed the public nature of the large settlements with other agricultural defendants. As they explained, these same types of cases had never settled prior to many of the landmark agricultural cases. As they reasoned, because the industry was now on notice that the EEOC was willing to prioritize and invest in these cases, it took them much more seriously. As one EEOC employee explained, the fear of future litigation is "really what motivates them. They don't want to be litigating with the government because unlike private plaintiffs, we're motivated differently. We'll take it to trial just on principle because we're committed to the case."[37] In other words, "being visible is another source of incentives" (*Id.*) As another EEOC employee put it, these cases have a prophylactic effect. They explicitly tell the defendants, "Look, you don't want to be in the news. It hurts."[38] Another EEOC attorney explained that their approach was to be very upfront with opposing counsel that the EEOC operates differently because it serves the public, and that this meant that there would be a public press release and that any future violations would be publicized.[39] As this interviewee explained, they worked to create a cooperative relationship in which the defendant would come to want to comply and to put in place provisions that would prevent future abuses, in order to avoid bad publicity in the future.

One EEOC employee explained that the agency had received criticism for focusing on obtaining high-value settlements, when critics argued that the agency should prioritize the revision of anti-harassment policies and training. However, as they explained, this critique was missing the effect of high monetary settlements on deterring bad behavior on the parts of defendants in the future. They continued, "If they thought that they would be subject to these multi-million-dollar lawsuits, they wouldn't be cavalier." As they explained, the high dollar amounts of these settlements served as "a way to communicate with businesses."[40]

Interviews with advocates who work very closely with farmworkers confirmed this. In one interview, an advocate said that there was no question that the Commission's cases have made a difference in the way that employers respond to subsequent allegations. As they explained, growers slowly began to change their practices as the Commission began bringing these cases, and began to take complaints of sexual harassment much more seriously. Prior to these cases, the advocate explained, it was "virtually unheard of for growers to hire investigators in response to sexual harassment complaints, and now they routinely do."[41] Now, these prior cases have "made a difference in my cases today, in the way employers respond to allegations of sexual harassment. They take them more seriously right away."[42] Other advocates stressed that the "specter" of having the federal government pursue a grower significantly changed their behavior.[43] As another advocate explained, they had witnessed growers behave very differently when the EEOC was on the other side instead of a private law firm.[44] In cases involving the federal government, they explained, growers were willing to invest more resources to settle the cases quickly, and were more motivated to comply.

[37] Interview with EEOC Employee (May 11, 2020).
[38] Interview with EEOC Employee (May 8, 2020).
[39] Interview with EEOC Employee (June 4, 2020).
[40] Interview with EEOC Employee (May 13, 2020).
[41] Interview with Farmworker Advocate (May 20, 2020).
[42] *Id.*
[43] Interview with Farmworker Advocate (May 28b, 2020).
[44] Interview with Farmworker Advocate (May 28a, 2020).

In addition to changing the agricultural industry's behavior, these cases also empower the farmworkers to come forward in response to violations of their rights. Both EEOC employees and advocates stressed this, explaining that they had witnessed this firsthand in some cases. In one case, for example, an EEOC employee explained that a consent decree had required visible posting of contact information for the EEOC, and that workers at these farms had subsequently been contacting them much more frequently.[45] These subsequent complaints, in turn, permitted the EEOC to establish the foundation for punitive damages in a second action against the employer.

On the other hand, there was evidence that the ability of these cases to change working conditions varied depending on the circumstances of the workers. For example, one advocate mentioned that the EEOC had settled a case involving Haitian women.[46] This interviewee said that the conditions in this farm are now either just as bad or worse, as the women employees know that the number of jobs is shrinking, and they're getting older and less employable. As a result, they are very unlikely to report future abuses. This suggests that in deciding where to invest resources in post-decretal monitoring, the EEOC might consider factors such as the unique vulnerability of plaintiffs, including their ability to find other work. In cases such as these, the agency might do well to invest more post-decretal monitoring, knowing that the employees may be less likely to report future abuses.

Finally, these cases can also serve important signaling functions in the political and legislative arenas. Pointing to the EEOC's litigation against Evans Fruit, one EEOC employee explained that this settlement had resulted in a documentary, *Rape in the Fields,* which had greatly raised awareness about the issue. The documentary, in turn, led to legislation mandating training and increasing liability for the middlemen, or farm labor contractors, for sexual harassment in California (Senate Bill 1087 2014) because it had caught the attention of a California legislator.[47] Following this case, the EEOC was invited for the first time to speak at the state grower association meetings, and one EEOC employee discussed having observed the larger effect of this case on the agricultural industry in Washington (EEOC Evans Press Release 2016).

In sum, much of the scholarly criticism of the EEOC has arguably missed the fact that the effects of litigation reach far beyond the language contained in the settlement decrees. Both defendants' interaction with the litigation process and the publication of the cases (through word of mouth within the industry or among farmworkers, or within more formal outlets such as the media) have the potential to change behavior. From the perspective of the industry, it may lead companies to be more proactive in responding to complaints, and to take investigation by the EEOC much more seriously. It may also lead them to settle in the initial conciliation process to avoid litigation. Finally, the explicit admonition by EEOC attorneys that these businesses did not want to be in the news likely deterred future abuses. From the perspective of the farmworkers, these cases can make them far more likely to report subsequent abuse as they learn not to fear the legal process, and become aware of someone within an agency or organization they feel comfortable contacting.

[45] Interview with EEOC Employee (May 26, 2020).
[46] Interview with EEOC Employee (May 28b, 2020).
[47] Interview with EEOC Employee (June 1a, 2020).

3.5.2 Centralization and the Agency's Entrepreneurial Approach

Administrative law scholars have long criticized the traditional regulatory model for having an excessive centralization that creates "a one-size-fits-all approach" that may not be effective in diverse contexts (Modesitt 2010: 1257; Stewart 1986: 96-100). Rather than the more typical, top-down approach that describes many federal agencies, the EEOC's efforts on behalf of farmworkers reveals a very different trajectory. As one EEOC employee explained, the initiative began in San Francisco, spearheaded by William Tamayo, and gradually diffused to other district offices.[48] The EEOC has a unique "entrepreneurial approach" to litigation in the district offices, delegating much of the litigation authority to Regional Attorneys in the district offices. The Commission still has to approve major expenditures, address developing areas of law, or raise issues of public controversy (Castro 2001).

In the words of one EEOC Employee, "things just started exploding" after the *Tanimura* case out of the San Francisco district office, under Bill Tamayo's leadership.[49] As another EEOC employee explained, the EEOC was reorganized in 2006, and the San Francisco district office included new offices, like Seattle. As this interviewee explained, Tamayo had come to the EEOC with the goal of making farmworker cases a priority to the agency, and had engaged in outreach to outside organizations to see whether they would be willing to partner with the agency. Prior to that, the interviewee explained, they hadn't collaborated with outside organizations or focused on farmworker cases in the Seattle office, and this quickly changed.[50] The Commission began taking cases in other parts of California, and this effort gradually spread across the country. This involved EEOC attorneys going from California to the EEOC District Office in Birmingham, Alabama, for example, to train them on how to assess credibility.[51] Interviewees described offices collaborating in partnerships with the Southern Poverty Law Center, for example, and one EEOC employee described efforts to "teach" other offices that these cases were possible. As this person explained, this evolution reflects in part, "the way EEOC is structured, it happens district by district."[52] Some of the initial resistance by other offices, according to this interviewee, was the hesitation to file unless they were certain they would win, and this interviewee described convincing other offices that it was worth taking a risk of loss initially.[53] As they put it, in a civil rights case, "if you don't take a risk, you've lost already."[54]

Advocates recalled Bill Tamayo approaching their organizations directly to act as partners, and they explained that the approach was mutually advantageous. These organizations had more experience with farmworkers, and the EEOC had more experience litigating discrimination cases that their organizations were "only on the cusp of developing."[55] This same advocate recalled that Tamayo had a large presence outside of the local outreach efforts within northern California. In their view, Tamayo was ultimately able to influence national priorities as well, which influenced

[48] Interview with EEOC Employee (June 1a, 2020).
[49] Interview with EEOC Employee (May 8, 2020).
[50] Interview with EEOC Employee (June 4, 2020).
[51] Interview with EEOC Employee (May 8, 2020).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Interview with EEOC Employee (June 6, 2020).

where the agency invested its investigative resources.[56]

Thus, the EEOC's farmworker work was largely made possible by the leadership of a few Regional Attorneys who prioritized these types of cases, beginning with Bill Tamayo in San Francisco. As interviewees explained, these leaders gradually convinced other district offices to do the same. The interviewees consistently described a high degree of collaboration across district offices on these cases. Both EEOC employees and advocates stressed that certain Regional Attorneys had acquired a reputation for having expertise in certain types of cases, including those involving farmworkers, and the overlapping categories of trafficking and guest worker abuse. As they explained, when those types of charges were brought before an office that may not have had as much experience with these types of cases, these Regional Attorneys would be pulled in to cases outside of their districts in order to lend their expertise.[57]

As former Vice Chair Paul Igasaki has written, many of the changes during the Clinton-Gore Administration effectively swung the pendulum "from national micro-management to local control" (2001a: 31). EEOC employees stressed the relatively high degree of autonomy within each office. As one EEOC employee explained, "the district leadership is the one that is on the ground. They're the ones who have to figure out how to really make national policies or how to execute national policies or make them a reality."[58] Farmworker advocates also emphasized that they perceived the Regional Attorneys as having a large degree of autonomy in setting the office's agenda.[59] However, despite the relatively high degree of autonomy within each office, the national leadership in the years preceding (and during) the initial farmworker litigation no doubt played an important role. Chairwoman Castro began increasing efforts to outreach to immigrant communities immediately upon joining the Commission, and the first large farmworker settlement coincided with low-wage immigrant workers being included in the national priorities (Castro 2001: 156).

One drawback to the de-centralized structure is that interviewees reported that the district office's priorities were very dependent on the leadership within a given district. Indeed, former Vice Chair Igasaki (2001a: 31) noted that this move to local control had negative effects as well as positive, as those offices that had weak programs continued to produce limited results. Similarly, this leaves offices vulnerable to changes in local leadership. At least one advocate mentioned that a change in the Regional Attorney within a district office had affected the organization's ability to work with the Commission. As this advocate explained, there was a "significant difference" in the extent to which the new Regional Attorney prioritized farmworker cases, even though the national enforcement plan still prioritized low-wage immigrant workers, and it was within the context of an Administration that would have been favorable to these cases. As they explained, it had made advocates less likely to approach the Commission with a potential case.[60] Other advocates stressed these differences as well, noting that in their view, the Regional Attorneys have the ability to significantly set the "tone" of an individual office, and the extent to which they prioritize these types of cases.[61]

[56] Interview with EEOC Employee (June 6, 2020).
[57] Interview with Farmworker Advocate (May 20, 2020); Interview with EEOC Employee (May 8, 2020).
[58] Interview with EEOC Employee (May 8, 2020).
[59] Interview with Farmworker Advocate (May 20, 2020).
[60] *Id.*
[61] Interview with Farmworker Advocate (May 24, 2020).

3.5.3 Partnerships with Advocacy Organizations and Attorney Hiring

In analyzing these cases and conducting interviews with the Commission employees and advocates, one of the most striking aspects of the Commission's strategy was its close partnership with other organizations. Much of the existing literature has missed how truly innovative this agency has been in establishing close partnerships with outside organizations, with the notable exception of Ming Chen's work (Chen 2012). In the farmworker context, these relationships have been particularly critical, as they have enabled the agency to develop cases that may not have otherwise even been identified by the agency.

In the Commission's case, advocates have been closely intertwined with the agency's success since its very inception. As Pedriana and Stryker explain, civil rights groups were arguably responsible for the EEOC's strength as an institution, as their strategy of overwhelming the agency with far more many complaints than it had the capacity to initially handle incentivized Congress to increase its budget, personnel, and enforcement power (2004: 725). Pedriana and Stryker demonstrate that the Commission and these civil rights organizations gradually evolved to present a united front in advocating for broadened interpretations of the law in novel contexts (*Id.* at 731).

Beginning in the 1990s, the EEOC "developed critical and indispensable partnerships with the Esperanza Project of the Southern Poverty Law Center, California Rural Legal Assistance, National Sexual Violence Resource Center, ACLU Women's Project, Oregon Law Center, Northwest Justice Project, Organizacion en California de Lideres Campesinas, and many other similar organizations" (Tamayo 2009: 264). Tamayo describes these organizations as functioning as "the eyes and ears of the EEOC" (*Id.*) In fact, the agency's farmworker initiative began in 1995 through Commission attorneys meeting with advocates, and learning of the pervasive sexual abuse in the fields. As one EEOC employee explained, this collaboration was particularly useful because the EEOC's jurisdiction is so widespread, and the outside organizations have a good sense of the local politics and the individual businesses.[62] Another EEOC Employee explained in referring to intervener organizations that had served as co-counsel on a farmworker case, "these organizations have an ear to the community that the government doesn't have. They can communicate what their rights are, who the EEOC is, and how to contact them."[63]

The Houston EEOC Office, for example, formed a coalition known as the "Justice and Equality in the Workplace Partnership" (JEWP) that includes other labor enforcement agencies, the local labor council, advocate organizations, and the Latin American consulates (Gleeson 2013). The goal was to increase outreach in order to show people how to file complaints and to be aware of their rights. As Shannon Gleeson has argued, JEWP created an important form of communication between federal labor standards enforcement agencies and workers, and plays a significant role in allowing Latino immigrant workers to make claims (*Id.* at 216, 220).

The agency's partnerships were aided by the fact that there is a particularly well-developed and robust set of non-profit law firms and low-wage workers rights centers around the country. These grew out of the congressional decision in the 1980s to restrict legal aid organizations' ability

[62] Interview with EEOC Employee (June 4, 2020).
[63] Interview with EEOC Employee (May 26, 2020).

to represent undocumented immigrants and to bring class action suits (Guild and Figueroa 2018: 161). As one advocate explained, many of the legal aid organizations had previously maintained very vibrant farmworker practices.[64] When this legislation rendered them unable to do so, many of them left to establish private legal services organizations.

The relationship between the Commission and the outside organizations operated in both directions, as each was influenced by the other. One advocate explained that the San Francisco district office, led by Tamayo, had created a wide network of advocates engaged in farmworker advocacy. They explained that Tamayo had launched broad outreach efforts even outside of California, convening meetings of broad groups of advocates and organizations so that they could learn from one another on the best ways of identifying these cases.[65] Advocates stressed that having a government agency on the "conference circuit" at all, interacting with advocates, representatives from the industry, and academics, was a rarity.[66] Rather than just telling participants what the EEOC did, they stressed, EEOC attorneys would speak at the conferences with the aim of asking, "What can we do differently?"[67] As they stressed, the EEOC representatives were "very open to different ways of thinking about this work in particular."[68] Part of this included reaching out to researchers who were involved in work on how to prevent harassment. As an advocate explained, "rather than just putting the onus on employees for reporting, [the Commission] wants to look at prevention and mitigation" from the employers' perspective.[69] Tamayo had served as a "matchmaker of sorts" in the subsequent decades, they explained, frequently putting this advocate in touch with a broad range of stakeholders who might benefit from their work.

While the Commission learned a great deal from the tactics of organizations, one interviewee stressed that their own organization had changed the way they did outreach because of the Commission's influence. These organizations "began to do the community outreach in a different way" as a result of these meetings. As one example: "Many legal service programs operate in a 'white culture.' Things happen from 9-5, they have to be done a particular way, etc."[70] As this interviewee explained, collaborating with the Commission had made the organization's staff more receptive to the fact that when workers are in the fields, they can't be expected to seek legal or social services, and effective outreach might involve hours outside of the 9-5 workday, for example. Advocates also explained that attorneys from the Commission served on various state coalitions working on farmworker issues, and had helped advocates to produce a video that employers had requested by reviewing the legal content of the video.[71]

These close partnerships also changed the way the Commission operated. As one EEOC employee explained, "It did require us to retool within the EEOC."[72] One advocate explained that the agency's approach was distinctive from other government agencies with whom they had

[64] Interview with Farmworker Advocate (May 24, 2020).
[65] Interview with Farmworker Advocate (May 20, 2020).
[66] Interview with Farmworker Advocate (July 1, 2020).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Interview with Farmworker Advocate (May 20, 2020).
[71] Interview with Farmworker Advocate (July 1, 2020).
[72] Interview with EEOC Employee (May 8, 2020).

interacted, as the agency was very receptive to the work of the advocates informing the agency's approach. Attorneys from the Commission frequently came back to the advocates and asked questions such as: "So if you're learning this, does that change [the Commission's] approach? Should we update materials or engage employers in more meaningful ways?"[73] Like many government agencies, some staff members were not initially trained in how to do credibility assessments, and the Regional Attorney for that office brought in domestic violence experts to teach EEOC staff how to assess credibility with traumatized victims. The employee continued, "It really was a retooling because it was revolutionary for a lot of the offices. For my office and for many of the offices, they had never done credibility assessments like this."[74] By training EEOC employees to more carefully investigate the reasons for the termination, many more cases could be identified. Another EEOC Employee explained that their office regularly receives training on working with trauma victims and what they called the "neurobiological effects" of difficulty in reporting abuse, as well as training on cultural competencies.[75]

Interviewees emphasized two structural aspects of the EEOC hiring that further enabled the farmworker initiative. First, several of the EEOC employees referenced their work in either plaintiff-side work within the private bar, or work in public interest legal organizations prior to coming to the EEOC as playing an important role in the agency's farmworker initiative. As one EEOC employee explained, this allowed them to immediately begin working with these organizations when they began working at the EEOC. In bringing one of the first farmworker cases, this EEOC employee consulted with several organizations and told them, '"we can't do anything unless we do outreach with you.' Then eventually the key case comes in, so we develop all these materials, we're starting presentations all over."[76] As one interviewee explained, it was helpful to have Regional Attorneys who had experience in either the private plaintiff bar or public interest legal organizations so that they were "from the outside, not bound by tradition."[77] Citing "inertia in the government," this interviewee explained that other offices initially responded that they simply weren't aware that this was a problem since "none of these cases ever came to our office." As this official explained, they had to educate other offices that they couldn't expect farmworkers to just walk into a government office and make a complaint (*Id.*) As this employee argued, it was important to depart from the more common tradition of promoting within the agency, and to instead bring in a fresh perspective from outside the government.

In addition, several EEOC employees emphasized that hiring attorneys who were bilingual or from underrepresented communities played a critical role in enabling the agency to establish trust with the plaintiffs. One EEOC employee explained that a significant number of attorneys in the District Office were bilingual.[78] One EEOC employee described hiring a new EEOC attorney who brought very little litigation experience, but "gave us instant credibility in the fields and who had worked with farmworkers."[79] As this EEOC employee explained, this attorney was critically able to travel to a farmworker's home and spend time with her family, which enabled her to establish trust and convince her to take a considerable risk to herself and her family by going

[73] Interview with Farmworker Advocate (July 1, 2020).
[74] Interview with EEOC Employee (May 8, 2020).
[75] Interview with EEOC Employee (June 1a, 2020).
[76] Interview with EEOC Employee (May 8, 2020).
[77] *Id.*
[78] Interview with EEOC Employee (May 13, 2020).
[79] Interview with EEOC Employee (May 8, 2020).

forward with the case.

Without its close partnerships with advocates, there may be little chance of the Commission ever learning of many of these cases. Cases on behalf of farmworkers present several unique obstacles to the agency. First, there is the difficulty of identifying the claim at all. In part, this reflects geographic isolation, as most farmworkers are necessarily located in more rural areas, far from the offices of most federal agencies. In addition, it requires extensive outreach in order to gain the trust of farmworkers to report abuse. While the Commission has made efforts to hire attorneys who may be more likely to be able to do this, it doesn't have the resources to make outreach its primary function. With the assistance of organizations which do have this as their focus, the agency has been able to reach many more plaintiffs. Second, there is the inherent difficulty of factual development in cases in which the power imbalance is so extreme between the parties. This is particularly true in sexual harassment cases, which are made all the more difficult because of both cultural and language barriers. As one EEOC employee explained, "in none of our farmworker cases did any of these women come in complaining of sexual harassment. They complained that they were fired and then we have to ask, 'Well, why were you fired?'"[80] As they explained, only with the right training is it possible to bring out their stories of harassment, and this is part of why the close partnerships with other organizations had played such a critical role.

These relationships are facilitated by an Outreach and Education Coordinator in each district who focuses on reaching out to groups within the community, and farmworkers were one of these in several district offices.[81] Because farmworkers are more likely to go to community organizations to report an abuse, the Outreach and Education Coordinators play a critical role in allowing these cases to be identified by first forming critical relationships with community-based organizations. As this interviewee explained, "breaking bread" with these organizations and "asking them what they need," rather than imposing the standard bureaucratic scripts on them, was critical.[82] This employee emphasized that the EEOC stood apart from many other agencies because its Outreach and Education Coordinators are given substantial latitude to develop their own initiatives and programs. As they explained, many of their counterparts in other agencies simply receive a "script" that they have to follow, whereas they are, in their words, "given the latitude to really engage."[83]

They offered two examples of this broad latitude. One was that at least one Outreach and Education Coordinator works very closely with the state Monitor Advocate. These Advocates were formed by the Department of Labor in response to a court order, and are appointed in each state to monitor conditions for farmworkers and other migrant workers (DOL Monitor Advocate System 2020). Together, the Monitor Advocate and the EEOC Outreach and Education Coordinator had realized that the training modules for employers were outdated and not very effective, and they worked together to produce a new one.[84] In another example, an Outreach and Education Coordinator in one office had developed a relationship with a farmworker advocacy group that specialized in education, which they noted was outside the scope of their mandate. At the same

[80] *Id.*
[81] Interview with EEOC Employee (May 26, 2020).
[82] Interview with EEOC Employee (June 1b, 2020).
[83] *Id.*
[84] Interview with EEOC Employee (June 1b, 2020).

time, this manager saw a unique opportunity to travel with them to talk to the parents of the migrant children, which was the population the EEOC needed to reach.[85] By using these unconventional methods, this manager had found a way of reaching a population that was challenging for the agency to reach.

EEOC employees explained that one of the major difficulties they face is that the efficacy of their Outreach and Education Managers depends so heavily upon the "establishment and support of community-based organizations across geographic areas."[86] As they explained, their district office was permanently at a disadvantage compared to places like California, where an extensive network of such organizations existed. As this EEOC employee emphasized, the government will likely never be the primary source to which farmworkers report abuse, and the lack of such organizations means that even in states with many farmworkers (and the accompanying harassment), those EEOC district offices will see fewer charges and ultimately be able to bring less litigation.[87] This conclusion is consistent with Shannon Gleeson's work, who found that the size of the civil society, measured by the number of non-profit organizations, was associated with more claims filed before the EEOC. As she concludes, "civil society may function as an important liaison between the existence and experience of these protections" (Gleeson 2009).

In addition to the outreach the EEOC engages in in the context of finding plaintiffs, it also does extensive outreach in the form of educating the public. These efforts take the form of Technical Assistance Program (TAP) seminars with employers to educate them on their obligations and the rights of their employees (O'Hara 2000). In collaborating with community groups, ethnic organizations, unions, and social service and legal service agencies, it includes appearances in Spanish language television and radio talk shows, and production of pamphlets, fliers, and hand-outs in a variety of languages (*Id.*)

EEOC employees also reported innovative ways of tackling the unique challenges inherent in farmworker cases by collaborating with community-based organizations. One of the primary obstacles is the seasonal nature of agriculture, which can mean that by the time an investigator is ready to investigate a claim, the witnesses are long gone and the job site looks completely different. This, in fact, is one of the reasons agricultural defendants were able to act with impunity for so long. As this EEOC employee put it, "With farmworkers, the typical bureaucratic processes don't work well."[88] Instead, they have reached an agreement with the community-based organizations that if they see a case of sexual harassment on a farm, for example, they can reach out directly to either the District Director or the Education and Outreach Coordinator, who will act immediately.[89] As they explained, "by working in a non-bureaucratic way, we're able to address some of the shortcomings of the system."[90]

One additional obstacle that several EEOC employees emphasized was the farmworkers' fear of retaliation. One EEOC employee explained that retaliation claims have spiked in the past

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

5 years overall, as now approximately 54% of EEOC cases involve threats to retaliate.[91] As a result, they have heard from advocacy organizations that fewer women are reaching out to complain at all out of fear, particularly in the more recent "anti-immigrant" atmosphere.[92] Interviews with advocates confirmed that they had seen a similar trend of fewer women seeking legal services recently.[93] Without the close relationships with advocates, many of these cases would have never reached the agency. As one EEOC employee explained in reference to threats from defendants to use plaintiff's legal status against them and their entire families, "Allowing people the strength to look beyond that and stay with us is difficult, and earning the trust. It takes a lot of time, energy, compassion."[94] EEOC employees described putting substantial resources into these outreach efforts and in investing resources in less conventional efforts. As the EEOC employee explained, they engaged in efforts such as "going into those fields at three in the morning and giving them phones so we can communicate with them."[95]

Finally, EEOC employees addressed the challenges inherent in maintaining meaningful relationships with community-based organizations in the face of changing national priorities across different Commissioners. In order to address this difficulty, each district also establishes its group of "Significant Partners," which form a core group of organizations that the district commits to work with regardless of changing national priorities. In several districts, farmworkers were one of these groups. One EEOC employee described these organizations as being selected through a combination of significant input from that district's Outreach and Education Coordinator, in addition to the District Director consulting with the National Outreach Coordinator.[96]

3.5.4 The Commission and the Legal Status of Plaintiffs

One delicate line that the Commission treads in these cases is the legal status of many of the claimants and witnesses, as many of them are undocumented. The EEOC was part of early efforts to make legal status irrelevant to litigation, which is crucial to allowing farmworkers (and other immigrant workers) to come forward. Nonetheless, as they described, it remains relevant both because growers have found novel ways of circumventing the rules, and because it can affect juror's perceptions of the plaintiffs.

The EEOC has adopted a status-blind approach, meaning that it does not inquire into an employee's legal status on its own initiative, and it does not consider this status when weighing the substantive merits of a claim (Chen 2012: 282). The Commission was instrumental in resisting employers' efforts to silence farmworkers by using a lawsuit to obtain information on the workers' legal status. As part of its standard practice, the Commission seeks a protective order to bar defendant's inquiry into immigration status, and later files limine motions to similarly prohibit this inquiry (Tamayo 2013a: 5). In one of the first cases, *Rivera v. NIBCO, Inc.* (E.D. Cal. 2001), involving Latino and Asian workers who alleged disparate impact based upon their national origin, counsel for the employers sought the legal status of the plaintiffs in deposition (Tamayo 2009:

[91] Interview with EEOC Employee (May 8, 2020).
[92] *Id.*
[93] Interview with Farmworker Advocate (May 21, 2020).
[94] Interview with EEOC Employee (May 11, 2020).
[95] *Id.*
[96] Interview with EEOC Employee (June 1b, 2020).

267). The EEOC resisted this attempt, and was successful in obtaining a protective order from the district court that barred those questions (*Id.*; *Rivera v. NIBCO, Inc.*, E.D. Cal. 2001: 649). However, while the judge barred all discovery related to the plaintiffs' immigration status, it did not bar the employer's independent investigation into the matter. Counsel for the EEOC argued that because each plaintiff had already been verified for employment at the time of hiring, and further questioning related to their immigration status was not relevant to their claims, it would have a chilling effect on the pursuit of their workplace rights (*Rivera v. NIBCO, Inc.*, 9th Cir. 2004: 1061). In upholding that order, the Ninth Circuit noted that "employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain" (*Id.* at 1069). The court declined to reach the question of whether *Hoffman* applied, but expressed "serious doubts" that it would, given the significance of Title VII's statutory purpose. Relying upon the *Nibco* case, the EEOC was successful in obtaining similar protective orders in cases in New York (*EEOC v. First Wireless*, E.D. N.Y. 2004) and Chicago (*EEOC v. City of Joliet*, N.D. Ill. 2006). The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) construed the employer sanctions provision of IRCA to prohibit the awarding of backpay to undocumented workers who were subjected to unlawful retaliation for reporting workplace abuses. Ming Hsu Chen has written about the pattern of regulatory resistance to rulings that restrict immigrant rights, like *Hoffman*. She examines the ways in which three agencies- the National Labor Relations Board (NLRB), the U.S. Department of Labor, and the EEOC- have resisted such rulings out of a professional ethos of protecting workers and a commitment to enforcing labor laws independently of the policy preferences (Chen 2012).

The EEOC also pioneered a way of obtaining legal status for plaintiffs bringing sexual harassment cases by supporting their applications for U- and T-visas, and worked with other agencies to develop similar procedures (*Id.* at 286). As Chen has written, "attorneys involved recalled 'making it up as we went along' when confronted with the forms to accompany the U-visa petition" (*Id.*)

While the plaintiff's legal status was another area in which the agency had been innovative, interviews revealed that this was a persistent problem as growers found novel ways to undermine the agency's efforts. In a recent case, for example, growers successfully introduced plaintiffs' legal status by arguing that they fabricated the underlying allegations in order to qualify for these visas. In one recent case, *Favorite Farms,* the judge agreed, holding that the EEOC's assistance to the plaintiff in adjusting her status was relevant and admissible (*EEOC v. Favorite Farms, Inc.* Order on Limine Motions 2018: 5). In response to this adverse ruling, the EEOC attorneys argued that this plaintiff had everything to lose by calling the police as an undocumented person, and yet she had taken the risk of reporting the rape to the police. In the end, they prevailed, and the jury awarded $850,000 to her. The EEOC also won injunctive relief, including sexual harassment and retaliation training in multiple languages, and mandatory reporting to the EEOC on any complaints received by the company (*EEOC v. Favorite Farms, Inc.* Amended Judgment 2020: 2-3). In another case, one EEOC Employee explained that the judge ruled that if the plaintiffs were to plead the Fifth Amendment with regard to their legal status, then they would not be able to seek emotional distress damages.[97] Thus, the agency was forced to weigh the damage of revealing one's legal status against the inability of seeking distress damages, and they ultimately chose to protect the plaintiffs' legal status.

[97] Interview with EEOC Employee (June 4, 2020).

Other EEOC employees recounted instances in which they suffered bias from the jury because of the plaintiff's legal status. In one case, the employee explained that there was a straightforward, "slam dunk" harassment case, and the jury found against the plaintiff. As the interviewee explained, "What it was was that they were guest workers. They didn't see them as people. So it didn't really matter that we had direct evidence, the guy admitting to it. The company did nothing with it. I think it just shows there is a lot of work to be done."[98] In a different case, another EEOC employee recounted asking the all-white jury afterward why they didn't believe the plaintiff, and one juror cited the fact that she didn't report the rape to the police, and his daughter would have gone to the police. As this employee explained, this was the most difficult aspect of these cases: "how do you get white jurors in a matter of days to put themselves in the shoes of a farmworker, when they don't interact with them at all?"[99]

3.5.5 The Challenges of Inter-agency Coordination

Critics of the traditional regulatory state have pointed to a structural flaw that makes cross-agency cooperation very difficult even in "an era of multiple potential regulators" (Modesitt 2010: 1257; Cunningham-Parmeter 2004: 451-53). In a compelling study of day laborers, Jayesh Rathod has argued that "the regulatory silos in employment law could better coordinate to detect unlawful working conditions" (Rathod 2016: 879). Stephen Lee and Kati Griffith have both written about the importance of maintaining a firewall between immigration enforcement and labor standards enforcement agencies such as the EEOC (Griffith 2011; Lee 2011). The interviews also emphasized the ways in which a lack of inter-agency coordination sometimes hindered the EEOC's work on behalf of farmworkers.

One EEOC employee explained that there were important differences in the "prisms" through which various agencies view these cases.[100] While the EEOC viewed them as "civil rights cases at their heart," other agencies viewed them primarily from a law enforcement perspective. As this EEOC employee argued, this made inter-agency coordination particularly difficult. As they explained, the EEOC is "an anomaly" as an independent agency that also brings its own litigation, and this made it difficult for other agencies to understand what the Commission does.[101] This official described some success, particularly in the trafficking realm, in the ability to collaborate with other agencies, and cited the Chair of the Commission's subsequent invitation to speak with cabinet members about trafficking (*Id.*) On the other hand, the employee explained that convening the typical cross-agency task forces was insufficient to achieve meaningful collaboration. Rather, this interviewee argued, the directive needed to come from the top-down, with an instruction to actually work with one another. Otherwise, it was too easy for "turf issues" to impede such collaboration. As this employee explained, when multiple agencies could be involved in a case, each agency might have a different sense of who should take the lead or what the best approach to the case was, among other issues. This, they explained, "was where the rubber hits the road." In the end, the person explained, "those have all been done on an individualized basis," without a

[98] Interview with EEOC Employee (May 11, 2020).
[99] Interview with EEOC Employee (May 8, 2020).
[100] Interview with EEOC Employee (May 11, 2020).
[101] Interview with EEOC Employee (May 8, 2020).

clear directive, and were ultimately impeded by problems over each agency's authority.[102] This is particularly glaring when one considers that the Department of Justice has prosecuted nearly none of the egregious sexual assault cases brought by the EEOC in farmworker litigation (Tamayo 2013b).

The lack of inter-agency coordination also has a concrete effect on the agency's ability to litigate cases on behalf of farmworkers. One EEOC employee expressed concern that Immigration and Customs Enforcement (ICE) may enter the courtroom and arrest witnesses, and explained that the agency took precautions as a result, which included bringing in only one witness at a time into the courthouse.[103] As the EEOC employee explained, their practice was to have only one witness in the witness prep room in order to prevent this. Most strikingly, this employee explained that this office would sometimes settle a case rather than take the risk of bringing it to trial because the witnesses might all lack legal status and they didn't want to expose them to that risk. While "some MOU [memorandum of understanding] may exist somewhere in Washington, you can't count on a line official from ICE to know that" (*Id.*)

3.5.6 Limitations to the EEOC's Efficacy

On the whole, advocates expressed a positive view of the Commission's work on behalf of farmworkers. One advocate explained that their advocacy organization spends a lot of its time thinking about how to do the most with limited resources.[104] Part of that calculus, they explained, was the fact that this work largely involved "agencies that are pretty ineffectual" (*Id.*) The EEOC, in contrast, had the rare combination of not having had all "its resources stripped," and enough people "who care enough to do the job right." They were careful to note that this did not describe the entire Commission, but at least "a strand of people within it" (*Id.*)

However, one area of criticism from advocates concerned the EEOC investigators. The same advocate confirmed that the plaintiff's bar often views the Commission as merely "an obstacle you have to get through to file your suit" (*Id.*) However, if pressed, this interviewee argued, most of these lawyers are likely speaking more about the investigation side of the Commission. In this advocate's experience, many of the investigators are not very competent, lack a good understanding of the law, and have been very business or employer-oriented, and eager to toss a charge. This interviewee was in some ways sympathetic to the difficulty of the investigators' position, as they emphasized that they have far too many cases and far too little resources.

In this interviewee's opinion, this was one area in which the Regional Attorneys could intervene and make a large difference, and they were aware of at least one who had done so. They emphasized that the attorneys and investigators have their own, separate hierarchies, and the Regional Attorneys are not meant to supervise the investigators. On the other hand, they emphasized, some Regional Attorneys had taken a particular initiative to interface directly with farmworker attorneys on a regular basis, explicitly instructing them to reach out directly if a charge has been pending with no action from the investigator. The advocate mentioned that some of these same Regional Attorneys did the same on the employer side, and tried to maintain collegial

[102] Interview with EEOC Employee (May 11, 2020).
[103] Interview with EEOC Employee (May 13, 2020).
[104] Interview with Farmworker Advocate (May 24, 2020).

relationships with defense attorneys.[105] In interviews with EEOC employees, one mentioned that offices had varying reputations for how closely the legal and enforcement sides collaborated.[106] In this individual's office, the office enjoyed a very good reputation for working together, and they believed that the investigators in this district office were particularly good as a result. Thus, the interviews suggested that, from a national level, the Commission should ensure closer collaboration between the legal and enforcement branches, as this may ultimately improve the quality of the investigations.

Several advocates criticized the fact that the EEOC process moved much more slowly than they wished to proceed, though they noted that this was often a given in a government agency.[107] In some cases, this advocate explained, the investigation stage might take so long that a private organization may end up litigating it alone instead. As they explained, by the time the investigation had concluded, the private organization may be so far ahead in litigating that the EEOC attorneys may decide not to litigate. In one case that was likely to have a systemic impact, they explained, they had the sense that the Regional Attorney was regretful that they had not moved faster.[108]

Advocates also mentioned that some of these farms go out of business, and there can be difficulty collecting the settlement money at all.[109] And, of course, several interviewees stressed that seeking redress after the fact is no substitute for policies that would prevent this harm from occurring at all. This is where other agencies, like the Department of Labor, could play a larger role.

Nonetheless, there is mounting evidence that these policies have had a very tangible effect for farmworkers. Shannon Gleeson shows that there is more claims-making by immigrant workers in areas where an EEOC agency is present (2015: 483). As discussed *supra*, both EEOC employees and farmworkers explained that they had seen large differences in both the plaintiffs' likelihood of reporting abuse, and in the seriousness with which growers treated claims of harassment or discrimination.

CONCLUSION

The EEOC has emerged as a leader in agency efforts on behalf of some of the most vulnerable workers, farmworkers. As this project has illuminated, its efforts depart from much of the prior scholarship's criticism of the agency as adopting a managerialist response to the violation of civil rights. Rather, in the farmworker context, the agency has achieved remedies that are sensitive to the needs of claimants, and often tailored to the specific situation at hand. The prior scholarship has also arguably missed the signaling function of the EEOC's work. In the case of farmworkers, the very public nature of the EEOC's work has changed the way that the agricultural industry has treated discrimination and harassment claims in ways that reach far beyond the specific terms of an individual consent decree, and has also empowered farmworkers to report future abuses.

[105] *Id*.
[106] Interview with EEOC Employee (June 4, 2020).
[107] Interview with Farmworker Advocate (June 5, 2020).
[108] Interview with Farmworker Advocate (May 24, 2020).
[109] Interview with Farmworker Advocate (May 28b, 2020).

More than a decade ago, Michael Selmi questioned why employment discrimination claims should be subject to an agency procedure, and argued that private attorneys could better fulfill the functions of the EEOC (1996: 2). As he argued, the EEOC served two primary functions: to screen a large number of non-meritorious claims, and to pursue claims that were otherwise too low in dollar value to be pursued by the private bar (*Id.* at 3). An analysis of the agency's work in the farmworker context complicates this analysis, as the agency has been able to accomplish much more than these limited functions. Moreover, because organizations that receive federal funding from the Legal Services Corporation (LSC) are prohibited from representing undocumented immigrants and from bringing class actions (Lyon 2005: 278), the role of public agencies emerges as all the more critical in the farmworker context. This limitation, combined with the fact that many farmworker plaintiffs lack the resources to cover the cost of litigation as it proceeds, has meant that very few private attorneys have pursued harassment and discrimination claims on behalf of farmworkers. Simply put, the private attorney general model has not been successful in the farmworker context. As this project has revealed, the farmworker context is one in which the need for a robust public enforcement model is at its most compelling (Waterstone 2007: 436).

A few factors emerge as critical to the EEOC's success on behalf of farmworkers. The first is the agency's de-centralized design, and its entrepreneurial approach to litigation that vests a high level of control in each regional office and fosters close collaboration between offices. In the case of farmworkers, this permitted efforts to develop from the bottom up, as one Regional Attorney initially led efforts that diffused outward to other offices. In addition, the agency afforded its Outreach and Education Coordinators a wide degree of latitude in choosing how to build and maintain relationships with farmworker advocates. As they described, they were not forced to follow a bureaucratic script like their counterparts in other agencies, and were free to engage in more innovative techniques.

Perhaps most importantly, it was made possible by the critical partnerships that the agency formed with outside organizations. These relationships were mutually beneficial, as they allowed the agency to identify cases in the community that would have never been brought to its attention otherwise, and it permitted the organizations to intervene in class action claims that could achieve more systemic change. In addition to the extensive work by the Outreach and Education Coordinators, attorneys engaged in sustained, close relationships with advocates. As the interviews revealed, these relationships were mutually beneficial: advocates reported changing some of their practices to better meet the needs of farmworkers as a result of having learned from the agency, and EEOC employees reported adjusting their tactics in response to these collaborations.

In her study of the collaboration between the Houston EEOC office and outside organizations, Gleeson suggests that future work is needed to understand whether these partnerships ultimately facilitate or hinder the development of a robust labor standards enforcement agency in the long term (Gleeson 2013: 225). This project suggests that in the context of the EEOC's work with farmworkers, these partnerships have ultimately strengthened the agency's ability to enforce their rights. Further, in their absence, it appears nearly impossible for any agency to engage as closely with the community as the outside organizations have been successful in doing, and the EEOC has benefited directly from this collaboration.

In many respects, the EEOC adopted innovative approaches that departed from the more traditional complacency in government agencies and overcame the resistance to following anything but the agency's standard practices. As advocates stressed, the agency regularly displayed a receptiveness to change that they had seldom observed in a government agency. EEOC attorneys asked advocates how the Commission might learn from their work, whether these new insights might change the way that the agency interacted with employers, and whether there were opportunities for more meaningful engagement with employers as a result.[110]

The EEOC's trajectory may inspire lessons for other agencies that play a central role in monitoring the conditions of farmworkers, such as the Department of Labor (DOL) and its Occupational Safety and Health Administration (OSHA). Several EEOC employees and advocates stressed that the mere involvement of the federal government in these cases had an impact on defendants that reached far beyond the terms of an individual case. As one advocate explained, when an agency gets involved and issues a public press release, the agricultural industry views this as a sign that they may be at risk of public exposure in the future, and are much more likely to comply. If, on the other hand, "agencies turn a blind eye, they interpret this as a get out of jail free card" that may worsen employment conditions for farmworkers.[111]

Observers have assailed OSHA "for its ossified agency structure and its inability to adapt to changing workplaces in the United States, including the growing presence of foreign-born workers" (Rathod 2016: 818). The "protracted pace of OSHA's regulatory efforts" has been an area of concern (Rathod 2009: 522). While a large part of its mandate is to issue standards, it takes an average of ten years to develop and promulgate an OSHA standard (OSHA Standards Development Process 2000). As Jayesh Rathod has written about extensively, the existing standards suffer from some serious gaps, and the agency's interpretations have weakened its existing standards (2009: 523-26). Rathod explains that the agency has not yet issued standards to address workplace violence, even though workers in the retail industry have a larger homicide rate than law enforcement workers. In addition, its interpretations have often weakened existing standards, in areas such as the number of immigrant worker fatalities that result from falls in building erection and roofing work. It has "faced criticism for its limited civil penalties, its frequent reductions of penalty amounts, and its rare prosecutions" (*Id.* at 534). As a congressional report on occupation safety in 1988 put it, "a company official who willfully and recklessly violates federal OSHA laws stands a greater chance of winning a state lottery than being criminally charged" (Barstow 2003). As Rathod argues, rather than adding a list of policy proposals, what is needed is a "new normative vision for regulating safety in the workplace given the changing demographics of the workforce" (2009: 534). As the foregoing analysis has demonstrated, the example of the EEOC is instructive in developing this new normative vision.

To be sure, there are important differences between OSHA and EEOC, including their structures and levels of independence. Critically, though, OSHA and EEOC share an important structural feature: they were both built to be weak by design and to rely upon worker-initiated complaints. Their success critically depends upon full participation by employees, which is a significant impediment in a context in which workers may be extremely reluctant to claims-making behavior. In the case of farmworkers, numerous obstacles inhibit them from directly

[110] Interview with Farmworker Advocate (July 1, 2020).
[111] Interview with Farmworker Advocate (June 5, 2020).

approaching a federal government agency. Through its close partnerships with advocates and the other strategies discussed *infra*, the EEOC has surmounted this structural weakness in the context of farmworkers.

If, for example, OSHA were to form closer partnerships with outside organizations in the way that the EEOC has, these relationships could do a great deal to overcome this structural weakness in the agency's design. This is particularly true because very few farmworkers are unionized, and the unions generally play a large role in bringing complaints to the attention of OSHA, and are also able to mitigate the problem of OSHA under-enforcement. Rathod notes that OSHA has made some effort to offer trainings in Spanish (2009: 532, citing Occupational Safety & Health Admin., U.S. Dep't of Labor, OSHA Fact Sheet: Hispanic Outreach 2007), and has also "developed some outreach materials and public service announcements in Spanish, which are targeted towards the Latino immigrant community" (*Id.* at 541). As he concludes, his work "highlights the need for sustained partnerships and a closer examination of how worker centers can mediate safety-related concerns" (Rathod 2016: 879). By drawing upon the model embraced by the EEOC, other agencies might more effectively reach vulnerable populations like farmworkers.

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