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THE PROBLEM OF FOREIGN CONVICTIONS IN U.S. IMMIGRATION LAW

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Introduction
(The Uncertain Implications of a Blushing Kangaroo)

Foreign convictions can carry serious consequences for noncitizens seeking to enter or remain in the United States. Under various provisions of the Immigration and Nationality Act (INA),[1] certain types of criminal convictions render a noncitizen inadmissible,[2] deportable,[3] or ineligible for asylum.[4] A noncitizen must disclose all prior convictions when seeking to enter the country or adjust immigration status,[5] and under some circumstances a postadmission conviction may suffice to render even a lawful permanent resi-

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1 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).

2 *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2018) (specifying that noncitizens convicted of "a crime involving moral turpitude" are inadmissible, except for in the case of "a purely political offense"); *id.* § 1182(a)(2)(A)(i)(II) (same result for controlled substance-related offenses); *id.* § 1182(a)(2)(B) (same result for any combination of two or more offenses carrying an aggregate sentence of five or more years, again excepting "purely political offenses"). On the "purely political offense" exceptions in these provisions, see *infra* notes 81–84 and accompanying text.

3 *See* 8 U.S.C. § 1227(a)(1)(A) (making any inadmissibility criterion listed in 8 U.S.C. § 1182 a basis for removal); *id.* § 1227(a)(2) (listing other crimes that may serve as a basis for removal).

4 *Id.* § 1158(b)(2)(A)(ii) (authorizing the Attorney General to deny asylum to an applicant who has been convicted of a "particularly serious crime" and "constitutes a danger to the community of the United States"). While this Note focuses on consequences for a noncitizen's ability to enter and remain in the United States, the legal effects of foreign convictions reach further. A foreign conviction may also result in an array of "collateral sanctions," including "disenfranchisement, the denial of welfare benefits and public housing, sex offender registration, . . . bars on employment, the denial of the right to serve on a jury, and the revocation of a driver's license." Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing, and Collateral Sanctions*, 26 Immigr. & Nat'y L. Rev. 599, 599 (2005).

5 *See, e.g.*, Form I-485 (Application to Register Permanent Residence or Adjust Status), pt. 8, §§ 27–28 (requiring applicant to indicate any guilty pleas, convictions, or judge-ordered punishment received in her lifetime).

dent removable.[6] Given the severity of these consequences, it matters what qualifies as a conviction under the statute.

On the surface, the answer to this question may appear simple. At a first glance, the definition of "conviction" in the INA would appear to encompass just about any "formal judgment of guilt of the [noncitizen] entered by a court,"[7] and immigration courts generally do not look at the judicial process underlying the conviction.[8] Nothing in the INA limits the consequences of a criminal conviction to judgments entered by a domestic court, and it is well established by precedent that a noncitizen may face immigration hurdles for convictions obtained in her country of origin.[9] Yet it would seem perverse for the United States to credit a conviction by a foreign tribunal that fails to provide even minimal safeguards for procedural fairness (e.g., a "show trial" with a predetermined outcome or a conviction *in absentia* with no meaningful right to a defense). Are U.S. courts and administrative agencies bound to enforce immigration consequences on the basis of a foreign conviction resulting from a process that may amount to, in the words of Judge Posner, "a kangaroo court to make kangaroos blush"?[10]

Those who recoil at this prospect will find some comfort in the scant judicial opinions to pose this question directly. As Judge Posner's marsupial metaphor suggests, the Seventh Circuit has held that U.S. immigration courts cannot base removal solely on a foreign conviction in a proceeding so fundamentally unfair as to constitute "a travesty—a parody—of justice."[11] The Board of Immigration Appeals (BIA) has similarly endorsed the view that foreign convictions "can be discounted" in cases where "the foreign jurisdiction's legal system is shown to be fundamentally inconsistent with an American understanding of fairness."[12] Yet judging by published opinions, it is rare for U.S. authorities to find a foreign proceeding so procedurally defec-

6 *See* 8 U.S.C. § 1227(a)(2) (making a noncitizen deportable for committing listed offenses, including aggravated felonies, specified firearms offenses, and a crime involving moral turpitude within five years of admission if the sentence is at least one year).

7 8 U.S.C. § 1101(a)(48)(A); *see also infra* note 15 and accompanying text.

8 *See* M–, 9 I. & N. Dec. 132, 134 (B.I.A. 1960) ("[W]hen a record of conviction is introduced as evidence in an immigration proceeding the nature of the crime is conclusively established by that record.").

9 *See, e.g.*, Vasquez-Muniz, 23 I. & N. Dec. 207, 221 (B.I.A. 2002) (Rosenberg, concurring in part and dissenting in part) (discussing the history behind a provision of the current INA "making clear that a state or foreign conviction would also constitute an aggravated felony conviction"); B–, 3 I. & N. Dec. 1, 3–4 (B.I.A. 1947) (upholding exclusion on the basis of a Canadian conviction under an early version of the statutory exclusion for criminal convictions); *see also* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (expressly referring to foreign drug-related convictions as a basis for inadmissibility).

10 Doe v. Gonzales, 484 F.3d 445, 451 (7th Cir. 2007).

11 *Id.*

12 Preclik, 2010 WL 1747384, at *3 (B.I.A. Apr. 19, 2010); *see also* Esposito v. INS, 936 F.2d 911, 914 (7th Cir. 1991) ("[A] petitioner may present evidence that calls into question the fundamental fairness of the proceedings which generated an *in absentia* conviction, and if that evidence is sufficiently compelling, the Board would be precluded from giving it any weight at all.").

tive as to be effectively void.[13] More fundamentally, it is not immediately obvious under what legal authority an immigration court could find most types of procedurally defective foreign convictions invalid for immigration purposes or what criteria ought to be used in making such a determination.[14] Despite the commonsense appeal of such a rule, there is simply no express provision of the INA that requires a foreign conviction to attain a minimum of fairness in order to serve as a predicate for immigration consequences.

This Note attempts to fill this gap by surveying how U.S. courts and the BIA have addressed the fairness of foreign proceedings in related contexts. Part I argues that the definition of "conviction" in the INA implicitly leaves room for courts to inquire into the procedural fairness underlying a foreign conviction. Part II surveys the traditional standards for evaluating the sufficiency of foreign convictions in the contexts of extradition and international comity, two areas where U.S. courts have had to decide when to honor foreign judgments for centuries. These longstanding criteria formed the background against which the INA definition was adopted and may provide guidance on how to apply this definition. Accordingly, Part III derives from this analysis suggestions for how the Department of State might better address these concerns in its visa issuance decisions, as well as for how the immigration courts in the Department of Justice might treat foreign convictions differently. Lastly, Part IV considers the practical questions of implementation raised by these suggestions.

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13 *See infra* notes 15–19 and accompanying text. Additionally, although it did not involve one of the criminal conviction provisions of the INA, but rather the prohibition on Nazi war criminals, the well-known case of Estonian national Karl Linnas is a striking illustration of the BIA's reluctance to look behind a formal foreign judgement. Linnas, 19 I. & N. Dec. 302 (B.I.A. 1985); *see also* 8 U.S.C. § 1182(a)(3)(E)(i) (making inadmissible any noncitizen who "[p]articipat[ed] in Nazi persecutions"). Linnas presented evidence in his removal proceedings that the Soviet trial that had convicted him of war crimes *in absentia* was a sham, arguing that deportation to the Soviet Union, where he faced execution on these charges, violated the U.S. Constitution. *Linnas*, 19 I. & N. Dec. at 310. The Board rejected this argument, reasoning that

> [a]lthough the respondent has been sentenced to death in the Soviet Union in what appears to have been a sham trial, the Constitution does not extend beyond our borders to guarantee the respondent fairness in judicial proceedings in the Soviet Union. Moreover, under our immigration laws there is no requirement that a foreign conviction must conform to our constitutional guarantees.

Id. This order was affirmed by the Second Circuit, which cited "overwhelming and largely uncontroverted" evidence against Linnas, including eyewitness testimony and documentary evidence. Linnas v. INS, 790 F.2d 1024, 1026–27 (2d Cir. 1986). On the circumstances and politics of these hearings, see generally Theresa M. Beiner, Comment, *Due Process for All? Due Process, the Eighth Amendment and Nazi War Criminals*, 80 J. CRIM. L. & CRIMINOLOGY 293 (1989); Jerome S. Legge, Jr., *The Karl Linnas Deportation Case, the Office of Special Investigations, and American Ethnic Politics*, 24 HOLOCAUST & GENOCIDE STUD. 26 (2010).

14 For the exceptions already recognized under current law, see *infra* notes 78–86 and accompanying text.

I. IS A FOREIGN CONVICTION ALWAYS A "CONVICTION"?

As its language controls admission and removal decisions, the INA is the necessary starting point for understanding how immigration courts and consular posts ought to treat foreign convictions. The currently controlling definition of "conviction" entered the Act in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). It reads in full:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[15]

The Foreign Affairs Manual (FAM), issued by the Department of State, cites the same INA definition for the purposes of judging a noncitizen's admissibility when deciding on a visa petition.[16] Under this definition, the verdict of a foreign "kangaroo court" would ostensibly be binding as long as it rendered its judgment with sufficient formality and ordered some type of punishment, and in most cases neither immigration authorities nor reviewing courts will look beyond the fact of a conviction.[17] Nevertheless, this definition does not speak to the treatment of foreign convictions per se, and there are several reasons for thinking that the judgment of a foreign tribunal might be treated differently from a domestic conviction.

The first is the legislative history of IIRIRA. Congress expressly introduced a statutory definition of "conviction" in IIRIRA as a response to the definition offered by the BIA in the 1988 decision *Ozkok*.[18] The IIRIRA definition of "conviction" quoted above adopts the precise language of the *Ozkok* definition but excises the following key caveat: "[A] judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availa-

15 Pub. L. No. 104-208, § 322(a)(1)(A)(i)–(ii), 110 Stat. 3009-546, 3009-628 (codified at 8 U.S.C. § 1101(a)(48)(A)).

16 U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 302.3-2(B)(3)(a) (2020) [hereinafter FAM].

17 *See id.* § 302.3-2(B)(3)(c) ("Official police and/or court records generally establish the existence of a conviction."); Chiaramonte v. INS, 626 F.2d 1093, 1098 (2d Cir. 1980) ("Petitioner accepts as axiomatic that neither the INS nor the courts may entertain a challenge to the legitimacy of a criminal conviction duly obtained under the laws of a foreign country."); Soetarto v. INS, 516 F.2d 778, 780 (7th Cir. 1975) ("Our function is not to try the foreign crimes *de novo*.").

18 Ozkok, 19 I. & N. Dec. 546, 551–52 (B.I.A. 1988); *see also* H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) ("This section deliberately broadens the scope of the definition of 'conviction' beyond that adopted by the Board of Immigration Appeals in [*Ozkok*]."); Daniela Mondragón, Comment, *Finality of a Conviction: A Noncitizen's Right to Procedural Due Process*, 49 ST. MARY'S L.J. 519, 527–30 (2018).

bility of further proceedings regarding the person's guilt or innocence of the original charge."[19] In other words, the *Ozkok* definition contained an exception for certain types of court orders and probation agreements that deferred any decision on the merits of the case. A final adjudication in this category would only trigger the "conviction" provisions of the INA if the noncitizen also failed to comply with probation or a court order.[20] Congress changed this language in IIRIRA in order to address the resulting problem that certain noncitizens "who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' have escaped the immigration consequences normally attendant upon a conviction."[21] In so doing, Congress was responding to the practice of certain states, where "adjudication may be 'deferred' upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence."[22] In other words, Congress intended to broaden the scope of "conviction" to include noncitizens *who have clearly been guilty of criminal behavior* but might evade deportation due to *domestic* procedures that deferred final adjudication. There is no indication in the legislative history that Congress meant to tie courts' or officials' hands in interrogating *foreign* convictions—especially in the case of proceedings so fundamentally unfair that the fact of conviction cannot reliably establish guilt of criminal behavior.

Second, there is precedent for treating foreign convictions differently from U.S. domestic convictions for the purposes of statutory interpretation. In *Small v. United States*, the Supreme Court considered whether foreign convictions could trigger 18 U.S.C. § 922(g)(1), which makes it "unlawful for any person . . . who has been *convicted in any court* of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm."[23] The Court considered "whether the statutory reference 'convicted in any court' includes a conviction entered in a foreign court,"[24] and held "that the phrase 'convicted in any court' refers only to domestic courts, not to foreign courts."[25] In reaching this conclusion, it relied, in part, on "the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[26] Moreover, the Court observed that "foreign convictions differ from domestic convictions in important

19 *Ozkok*, 19 I. & N. Dec. at 552.

20 Mondragón, *supra* note 18, at 524–26.

21 H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.).

22 *Id.*

23 544 U.S. 385, 387 (2005) (alteration in original) (quoting 18 U.S.C. § 922(g)(1) (2015)).

24 *Id.* at 388 (emphasis omitted) (quoting 18 U.S.C. § 922(g)(1) (2015)).

25 *Id.* at 394.

26 *Id.* at 385, 388–89; *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) ("Congress is primarily concerned with domestic conditions.").

ways."[27] Most relevantly, the Court reasoned that the class of all foreign convictions "would include a conviction from a legal system that is inconsistent with an American understanding of fairness."[28] This consideration bolstered the Court's "ordinary assumption about the reach of domestically oriented statutes" in cases "where Congress likely did not consider the matter and where other indicia of intent are in approximate balance."[29] Of course, there is no similar basis for arguing that Congress did not intend to include foreign convictions within the scope of the INA—after all, the admissibility restrictions are intended to apply to all noncitizens, including those who have never set foot in the United States.[30] Nevertheless, the reasoning of *Small* supports the conclusion that Congress wrote the conviction requirements of 8 U.S.C. § 1101(a)(48)(A) with domestic concerns in mind, without considering the specific problems that may arise from a foreign conviction (including the possibility of a conviction from "a legal system that is inconsistent with an American understanding of fairness").[31]

Lastly, courts and the BIA have been willing to read other implicit exceptions into the conviction definition in other circumstances that cast doubt on whether the noncitizen engaged in criminal conduct. For instance, even though IIRIRA removed all reference to the "availability of further proceedings" from *Ozkok*'s definition of "conviction," federal circuit courts split over whether an implied finality requirement had survived in the circumstance where a noncitizen's conviction is under direct appeal.[32] The BIA recently responded to this split by ruling that a final judgment under direct appeal does not qualify as a "conviction" for removal purposes.[33] In so holding, the Board cited "proper regard for fundamental fairness" as a reason "to expect that Congress would be clear if its intent was to eliminate the long-standing finality requirement regarding the right to appeal a conviction."[34] The

27 *Small*, 544 U.S. at 389.

28 *Id.*

29 *Id.* at 390. After examining the statutory language and legislative history, the Court "found no convincing indication" of contrary intent. *Id.* at 391–93.

30 *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2018) (specifically covering any "violation of (or a conspiracy or attempt to violate) any law or regulation of . . . a foreign country relating to a controlled substance").

31 *Small*, 544 U.S. at 389.

32 *See* Mondragón, *supra* note 18, at 530. *Compare* Orabi v. Att'y Gen., 738 F.3d 535, 543 (3d Cir. 2014) (holding that the *Ozkok* finality requirement "is alive and well"), *with* Planes v. Holder, 652 F.3d 991, 995 (9th Cir. 2011) ("[T]his statutory definition of 'conviction' [in 8 U.S.C. § 1101(a)(48)(A)] . . . supplants our prior judicially-created standards.").

33 J.M. Acosta, 27 I. & N. Dec. 420, 428 (B.I.A. 2018); *see also* Conde, 27 I. & N. Dec. 251, 255 (B.I.A. 2018) ("[W]e consider convictions that have been vacated based on procedural and substantive defects in the underlying criminal proceeding as no longer valid for immigration purposes."). *But see* FAM, *supra* note 16, § 302.3-2(B)(3)(j) (specifying that in the context of "adjudicating a visa application," "[i]t does not matter whether the applicant has filed a direct appeal of the conviction to a higher court").

34 *Acosta*, 27 I. & N. Dec. at 427 (citing Alim v. Gonzales, 446 F.3d 1239, 1249 (11th Cir. 2006)) (observing that a rule treating as final for immigration purposes a conviction "vacated on appeal (with a judgment of acquittal entered) due to insufficient evidence"

notion that no conviction is final for immigration purposes while it remains under direct appeal is a "well-established principle" that cannot be abandoned unless Congress has spoken expressly to this issue.[35] By analogy, congressional silence should not be taken to mean that the passage of IIRIRA removed any requirement that some baseline level of fairness attend the judicial proceedings underlying a conviction. The condemnation of a foreign "kangaroo court" is at least as defective from the standpoint of "fundamental fairness" as a domestic conviction under appeal.

In short, even though the INA's definition of conviction does not include any express reference to fairness, this omission should not wholly disqualify a court from inquiring into the procedures underlying a conviction in certain extreme cases. There is no indication that Congress intended to preclude such an inquiry in every case, nor any presumption that it did so, and the concerns of "fundamental fairness" weigh on the side of allowing U.S. courts to avoid enforcing immigration consequences on the basis of sham proceedings in another country.[36]

II. Domestic Concern for Fairness Among Foreign Tribunals

Such an inquiry into the fairness of foreign convictions also advances significant, long-acknowledged domestic policy interests. To understand these interests better, we may look to other areas of law where U.S. courts must routinely decide whether to give effect to foreign judgments. One such area is litigation over whether a U.S. court should give effect to foreign civil judgments, as these cases present a long tradition of evaluating the domestic interests implicated in affirming a foreign judgment.[37] Another such area is extradition law, perhaps the only sphere that implicates U.S. courts' treatment of foreign convictions more regularly than immigration. Taken together, international comity and extradition form a substantial common-law background against which to evaluate the implications of honoring a foreign conviction for immigration purposes.

A. International Comity

While U.S. courts typically uphold civil judgments rendered by foreign courts with competent jurisdiction to hear the case, the common-law princi-

would be "so foreign, so antithetical, to the long-standing principles underlying our criminal justice system and our notions of due process that we would expect Congress to have spoken very clearly if it intended to effect such results").

35 *Id.*

36 *Cf.* INS v. St. Cyr, 533 U.S. 289, 320 (2001) (relying, in part, on "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987))); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[W]e will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

37 *See generally* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015).

ple of international comity allows U.S. courts to weigh competing interests in deciding whether to enforce a foreign judgment.[38] The interests to be balanced come from various sources of legal authority:

> Comity is not a rule expressly derived from international law, the Constitution, federal statutes, or equity, but it draws upon various doctrines and principles that, in turn, draw upon all of those sources. It thus shares certain considerations with international principles of sovereignty and territoriality; constitutional doctrines . . . ; principles enacted into positive law . . .; and judicial doctrines such as forum non conveniens and prudential exhaustion.[39]

The decision of whether to enforce a foreign judgment involves weighing considerations of "international duty and convenience" against "the rights of [a nation's] own citizens, or of *other persons who are under the protection of its laws*."[40] If courts have not always been clear about how this balancing is to be conducted, the principle that the decision of whether to honor a foreign judgment implicates domestic policy concerns has a long pedigree in American jurisprudence.[41]

More specifically, U.S. courts have long recognized in the comity context a domestic interest in upholding certain fundamental standards of fairness. As early as 1839, the U.S. Supreme Court observed that "[c]ourts of justice have always expounded and executed [contracts made in a foreign country] according to the laws of the place in which they were made; *provided that law was not repugnant to the laws or policy of their own country*."[42] Half a century later the Court elaborated that the merits of a foreign adjudication "should not . . . be tried afresh" *as long as* "there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect."[43] Justice Story espouses a similar view in his

38 *See, e.g.*, Wilson v. Marchington, 127 F.3d 805, 809–10 (9th Cir. 1997) ("At its core, comity involves a balancing of interests."); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) ("Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.").

39 Mujica v. AirScan Inc., 771 F.3d 580, 598 (9th Cir. 2014) (emphasis omitted).

40 Hilton v. Guyot, 159 U.S. 113, 164 (1895) (emphasis added). While the phrase "under the protection of its laws" may not apply to noncitizens excluded at the U.S. border, noncitizens who have entered the territorial United States are afforded varying degrees of constitutional protection, depending on circumstance. *See* Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 850–64 (2013) (reviewing Supreme Court jurisprudence to the effect that the U.S. government has nearly unlimited authority to exclude at the border but must abide by a range of due process restraints when dealing with noncitizens who are physically present in the United States).

41 *See* Dodge, *supra* note 37, at 2087–92 (describing the evolution of comity doctrines, particularly during the nineteenth century).

42 Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839) (emphasis added).

43 *Guyot*, 159 U.S. at 202–03; *see also* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) (affirming same standard); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (citing as a requirement of enforcement that a foreign judgment is not "repugnant to

treatise on the conflict of laws, observing that the principle of international comity does not obligate a nation "to enforce doctrines, which, in a moral or political view, are incompatible with its own . . . conscientious regard to justice and duty."[44] Arbitrary or fraudulent convictions implicate such basic concerns, as the right not to be subject to an arbitrary exercise of government power is deeply entrenched in this country's notion of justice.[45] Indeed, the uniform acts that control most states' treatment of foreign judgments include a mandatory exception preventing states from honoring foreign judgments "rendered under a judicial system that does not provide . . . procedures compatible with . . . due process."[46]

Of course, the policy interests at stake in immigration proceedings are not the same as those implicated by international comity in civil proceedings. The right to define criteria for excluding noncitizens is often discussed as a necessary feature of a sovereign's power to extend—and, therefore, to limit—the privilege of entering its borders,[47] whereas comity is fundamentally concerned with "deference to foreign government actors."[48] Nevertheless, the important point here is that courts have routinely recognized upholding a standard of fundamental fairness in legal proceedings as a domestic policy interest in itself.[49] This interest ought to weigh into courts' decisions on whether to credit a foreign conviction. Even if U.S. constitutional protections cannot reach foreign adjudications,[50] familiar constitutional concerns like "due process" may nevertheless provide guidance in assessing whether honoring the judgment entered in a foreign proceeding

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fundamental notions of what is decent and just in the State where enforcement is sought" (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (AM. L. INST. 1971))); *cf.* Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) (observing that a state court can withhold enforcement of an out-of-state judgment when "the cause of action in its nature offends our sense of justice or menaces the public welfare").

44 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 25, at 26 (Boston, Hilliard, Gray & Co. 1834).

45 *See, e.g.*, Hurtado v. California, 110 U.S. 516, 535 (1884) ("It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power.").

46 Dodge, *supra* note 37, at 2129 (omissions in original) (quoting UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § (4)(b)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2005)); *see also* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § (4)(a)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1962) (identical provision).

47 *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (describing the "[a]dmission of aliens" as "a privilege granted by the sovereign United States Government" and "exclusion" as "a fundamental act of sovereignty").

48 Dodge, *supra* note 37, at 2078 (emphasis omitted).

49 *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 n.71 (D.C. Cir. 1984) ("The specific reason for refusing recognition on public policy grounds may vary. In foreign judgment cases, enforcement is denied because the judgment is predicated on laws repugnant to the domestic forum's conception of decency and justice.").

50 *See, e.g.*, Brice v. Pickett, 515 F.2d 153, 154 (9th Cir. 1975) (finding "no requirement that a foreign court's proceedings or conviction must conform to United States constitutional standards" (citing M-, 9 I. & N. Dec. 132 (1960))).

might implicate a domestic policy interest in upholding basic notions of justice. Thus, for instance, the Ninth Circuit has observed:

> It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process . . . . "A court in the United States may not recognize a judgment of a court of a foreign state if: (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law. . . ."[51]

While crediting a foreign conviction for immigration purposes is not the same as enforcing the convicting court's judgment, it is nevertheless a means by which U.S. courts and authorities attach stigma to a noncitizen on the basis of alleged criminal conduct.[52] Moreover, their civil nature notwithstanding, immigration consequences have long been recognized as effectively a form of punishment.[53] In this sense, the decision to predicate immigration decisions on a foreign conviction effectively enforces punitive consequences based on that judgment. With such substantial stakes for the noncitizen, U.S. authorities enforcing these consequences cannot responsibly avoid considering whether reaffirming the underlying conviction would be "repugnant to the laws or policy of" the United States.[54]

B. Extradition Law

Related concerns have been raised in the context of extradition, especially in cases where a foreign court has convicted a noncitizen *in absentia*.[55] While some courts will find an *in absentia* conviction sufficient to establish the probable cause necessary for extradition,[56] many courts treat such convic-

51 Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 (9th Cir. 1995) (second ellipsis in original) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a) (AM. L. INST. 1987)).

52 *See* David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1309–23 (arguing that the stigma pertaining to criminal convictions is not only significant but also has more severe effects than generally registered in the law). In this respect, it is significant that the INA uses the stigmatic label "crime[s] involving moral turpitude" to name a range of crimes carrying inadmissibility as a consequence. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2018).

53 *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." (citation omitted)); Fong Yue Ting v. United States, 149 U.S. 698, 739–40 (1893) (Brewer, J., dissenting) (characterizing deportation as a "punishment" and a "penalty").

54 Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839).

55 *See generally* Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 39 SETON HALL L. REV. 843 (2009).

56 *See* Esposito v. INS, 936 F.2d 911, 914 (7th Cir. 1991) ("[A]t the very least, *in absentia* convictions properly constitute probable cause to believe that the petitioner is guilty of the crimes in question."); *In re Extradition of* Blasko, No. 1:17-mc-00067, 2018 WL 6044921, at *9 (E.D. Cal. Nov. 19, 2018) ("[T]he Court finds no merit to the argument that the [*in absentia*] judgment itself is insufficient to establish probable cause [where the treaty doesn't specifically call for such treatment].").

tions as mere charges and require some additional showing of guilt to establish probable cause.[57] This "independent proof" may sometimes be supplied by the record of the foreign trial itself.[58] Yet, courts have occasionally found the record furnished by a foreign tribunal to be insufficient to support a finding of probable cause.[59] The practice of treating a foreign *in absentia* conviction as a mere "indictment" has been recognized as characteristic of "United States practice generally."[60] Indeed, this practice has a long pedigree. One of the earliest twentieth-century cases to apply this rule cites as authority only a popular treatise on extradition law.[61] This treatise, in turn, explains how nineteenth-century British and American jurists developed the practice of treating *in absentia* convictions as charges in order to reconcile the French practice of rendering judgments *par contumace* (*in absentia*) with a common-law tradition that did not recognize this category.[62] Thus, a concern about the propriety of honoring *in absentia* convictions has long been part of the American tradition in extradition proceedings, and courts have repeatedly decided that the appropriate response was *not* to accord such adjudications full weight as final convictions.

As was the case with international comity, the policy reasons for refusing extradition under certain circumstances differ from those underlying immi-

57 *See* Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960); Argento v. Horn, 241 F.2d 258, 259 n.1 (6th Cir. 1957) ("Since the Italian conviction was *in absentia*, the Commissioner correctly treated the case as though the appellant had been charged with and not convicted of a crime in Italy."); Germany v. United States, No. 06 CV 01201, 2007 WL 2581894, at *7 (E.D.N.Y. Sept. 5, 2007); Arambasic v. Ashcroft, 403 F. Supp. 2d 951, 962 (D.S.D. 2005) (regarding *in absentia* conviction "merely as a charge, requiring independent proof of probable cause"); *In re* Mylonas, 187 F. Supp. 716, 721 (N.D. Ala. 1960); *In re Extradition of* D'Amico, 177 F. Supp. 648, 651 n.3 (S.D.N.Y. 1959); *Ex parte* Fudera, 162 F. 591, 592 (S.D.N.Y. 1908) ("One who has been convicted [by default judgment] . . . in foreign countries is to be regarded not as convicted of, but only charged with, the offense.").

58 *See Arambasic*, 403 F. Supp. 2d at 960–62 (finding relator extraditable on the basis of the Croatian court's 124-page decision).

59 *See In re Extradition of* Ernst, No. 97 CRIM.MISC.1 PG.22, 1998 WL 395267, at *10 (S.D.N.Y. July 14, 1998) (finding that a decision of the Zurich Supreme Court was insufficient to establish probable cause where it included cites to documentary evidence but no supporting documentation); *see also In re* Ribaudo, No. 00 CRIM.MISC.1PG., 2004 WL 213021, at *6–7 (S.D.N.Y. Feb. 3, 2004).

60 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 cmt. h (AM. L. INST. 1987).

61 *Fudera*, 162 F. at 592 (citing 1 JOHN MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 131–34 (Fred B. Rothman & Co. 1996) (1891)).

62 MOORE, *supra* note 61, at 131–34. To understand this history, it is important to note that a defendant convicted *par contumace* had the right to stand trial anew after turning himself over to French authorities. *Id.* at 132. In other words, an extradition for a conviction *par contumace* would have been functionally the same as an extradition for a mere charge. Nevertheless, under current law, extraditability on account of an *in absentia* conviction does *not* imply that a "federal court may, as a condition for discharging the writ, require retrial in the foreign country." *Gallina*, 278 F.2d at 78–79.

gration enforcement.[63] Most obviously, extradition obligations are typically defined by treaty, and in many cases the relevant treaty specifies that *in absentia* convictions will be regarded as mere charges.[64] Yet the policy reasoning for treating *in absentia* convictions differently for purposes of extradition applies with equal force in the contexts of admissibility and removal: when an *in absentia* proceeding deprives the defendant of an opportunity to properly contest a charge, the resultant conviction is no longer a reliable indication of underlying guilty conduct. The FAM recognizes this principle for the purposes of admissibility determinations: "A conviction in absentia does not constitute a conviction, unless the accused had a meaningful opportunity to participate in the judicial proceedings."[65] To apply a lesser standard in removal proceedings would result in a disjunction between the administrative guidance for admissions and the reasoning of removal decisions. Moreover, it would create a bizarre situation where a noncitizen might be ineligible for extradition (because the underlying *in absentia* conviction, supported by no other evidence, was deemed unreliable) but still be deported for the same conviction on which extradition was originally sought (because *in absentia* convictions are presumed reliable in the removal context). Such an incoherent policy could allow federal agencies to perform an end run around the extradition process by simply seeking removal for foreign convictions that would be considered insufficient to support extradition.[66]

Together, the traditions of international comity and extradition law suggest two fundamental considerations that should inform the decision of whether to honor a foreign judgment. The first concern relates to the United States' interest in upholding certain basic notions of fairness and justice that should extend across every court system. Even if Due Process protections do not extend to the procedures of foreign tribunals, one can

63 *Cf.* O'Cealleagh, 23 I. & N. Dec. 976, 980 (B.I.A. 2006) (noting "the very different purposes served by extradition and removal or exclusion proceedings").

64 *See, e.g.*, Haxhiaj v. Hackman, 528 F.3d 282, 288 (4th Cir. 2008) ("We first look to the language of the Extradition Treaty to determine whether it mandates that an extradition request based on an *in absentia* conviction be supported by 'actual evidence'. . . .").

65 22 C.F.R. § 40.21(a)(4) (2006) ("A conviction in absentia of a crime involving moral turpitude does not constitute a conviction within the meaning of [the INA provision making noncitizens convicted of such a crime inadmissible]."); FAM, *supra* note 16, § 302.3-2(B)(3)(g)(2). *But see* Hope, 2018 WL 4611469, at *2 (B.I.A. Aug. 13, 2018) (rejecting noncitizen's claim that an Italian conviction for a drug-related offense should be disregarded due to *in absentia* conviction on the basis that "[t]o consider this foreign conviction as potentially rendering the respondent removable . . . we need only determine that the conduct reached by the foreign statute is criminal in nature under the laws of the United States" (citing Eslamizar, 23 I. & N. Dec. 684, 688 n.6 (B.I.A. 2004))).

66 While this Note was pending publication, the Attorney General referred to himself a previously unpublished 2006 BIA decision involving an *in absentia* conviction. A–M–R–C–, 28 I. & N. Dec. 7 (A.G. 2020). The opinion in this case is likely to change how the BIA handles *in absentia* convictions going forward, as the Attorney General requested briefing on whether "the Board appl[ied] the correct legal standard in concluding that the respondent's in absentia trial suffered from due process problems even though the Department of State had found that the trial had satisfied due process." *Id.* at 7.

nonetheless argue that the United States has a public policy interest in refusing to honor judgments repugnant to some minimum standard of fairness. After all, American jurisprudence on comity has long endorsed the view that a nation cannot be compelled "to enforce doctrines . . . incompatible with its own . . . conscientious regard to justice and duty."[67] It would seem perverse to apply the standards of the immigration code in a manner that fails to embody such a conscientious regard to justice and duty. The second concern derives from the public policy underlying the INA definition of conviction: the imposition of immigration consequences on certain noncitizens "who have clearly been guilty of criminal behavior."[68] This end is only served if the underlying criminal conviction is a reliable indication that the noncitizen did, in fact, engage in criminal behavior. As the treatment of *in absentia* convictions in extradition law illustrates, however, certain trial procedures are sufficiently flawed as to render a conviction unreliable as an indicator of guilt. In such a situation, the domestic adjudicator has every reason to demand some additional evidence of guilt beyond the mere fact of a conviction.

III. Distinguishing Between Justice and Its Parodies

If we accept that immigration officers and adjudicators have the authority to look beyond the mere fact of a foreign conviction, and that the fairness and reliability of the foreign tribunal are relevant concerns, it is not yet obvious what criteria courts should use to evaluate another nation's criminal procedures. Certainly, there is "no requirement that a foreign court's proceedings or conviction must conform to United States constitutional standards."[69] Rather, courts have reserved the right to question a conviction only where the foreign proceedings fall below the "standards accepted by any civilized system,"[70] are "fundamentally inconsistent with an American understanding of fairness,"[71] or amount to "a travesty—a parody—of justice."[72] While this language suggests a particularly egregious form of misconduct, it is difficult to say where exactly the bounds of "any civilized system" ought to be drawn. Of course, the bodies of caselaw in international comity and extradition identified above can provide some guidance for this inquiry. It may also be helpful at this point to sketch out some of the concrete ways in which foreign proceedings may fall below this standard.

The defects observed in *Doe v. Gonzales* serve as a good illustration of a foreign proceeding that falls outside this boundary. Doe was convicted by a

67 Story, *supra* note 44, § 25, at 26.

68 H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.).

69 Brice v. Pickett, 515 F.2d 153, 154 (9th Cir. 1975) (citing M-, 9 I. & N. Dec. 132 (B.I.A. 1960)); *see also* Gutierrez, 14 I. & N. Dec. 457, 458 (B.I.A. 1973) ("[T]here is no requirement that a foreign conviction must conform to constitutional guarantees in the United States.").

70 Lui-Dix v. Holder, 528 F. App'x 595, 598 (7th Cir. 2013).

71 Preclik, 2010 WL 1747384, at *3 (B.I.A. Apr. 19, 2010).

72 Doe v. Gonzales, 484 F.3d 445, 451 (7th Cir. 2007).

Salvadoran court on charges arising from his involvement in the country's civil war, specifically his alleged participation in the murder of eight unarmed civilians.[73] Criticizing Doe's Salvadoran trial, Judge Posner first points to deficiencies in the behavior of the defendant's attorney:

> Doe's lawyer was on the payroll of the high command and focused his efforts not on defending his client but on asserting the innocence of the high command, though no members of that body were on trial. The lawyer presented no evidence on Doe's behalf and conducted no cross-examination of the prosecutor's witnesses.[74]

Next, he cites the conduct of the judge, who failed even to "instruct the jury on the law."[75] These irregularities are apparently confirmed by the inconsistent results of the trial, which saw other defendants "acquitted even though some of them—the actual triggermen—had confessed" and Doe himself "amnestied while his appeal was pending."[76] (This amnesty was issued after the original proceeding came under heavy criticism from a United Nations "Truth Commission," with which Doe cooperated in defiance of orders.)[77] Finally, Posner points to the confirmation of "[i]ndependent observers," who "called the trial a 'simulated trial,' 'rigged from beginning to end;' 'the whole thing was a cover-up[,]' and Doe's conviction 'totally incomprehensible factually and legally.'"[78]

If *Doe* does not provide an explicit test for determining the validity of a foreign conviction, Posner's summary of the sham trial does suggest a list of possible indicators: (1) extreme inadequacy of defense counsel; (2) judicial conduct suggesting indifference to rule of law; (3) inconsistencies in a court's verdicts and sentencing so pronounced as to suggest that the defendant was singled out for punishment; and (4) the informed opinion of credible outside observers. One could certainly extend this list—perhaps to include a strong indication that key evidence was fabricated, an extreme and unexplained break from the foreign system's normal procedures, or any number of other procedural defects. The point is not to establish procedural prescriptions for foreign courts. Rather, the presence of such procedural defects may serve as a red flag to indicate that a proceeding deserves further scrutiny to determine whether it falls below minimum standards of fairness and reliability. They may be used as a threshold showing to prompt the agency or reviewing court to ask whether the foreign judgment was sufficiently fair and reliable for immigration consequences to attach. This thresh-

73 *Id.* at 446–47. The Seventh Circuit followed the Immigration Judge in crediting Doe's testimony that his involvement was minimal: he"did not give orders, fire his gun, seize anyone, or block anyone's attempted escape," but merely accompanied the soldiers who committed the offense and "assisted in destroying log books identifying the soldiers who had participated in the raid." *Id.* at 447.

74 *Id.* at 451.

75 *Id.*

76 *Id.*

77 *Id.* at 447.

78 *Id.* at 451.

old might be set high, such that only a very small number of foreign adjudications would fail the test—the crucial thing is to require and set standards for some form of inquiry.

To this end, the Department of State should update the FAM to include more substantive guidance on the circumstances under which a foreign conviction is to be considered sufficient for a decision to deny admission. A model for such guidance is already present in the FAM's language on foreign *in absentia* convictions:

> A conviction in absentia does not constitute a conviction, unless the accused had a meaningful opportunity to participate in the judicial proceedings. Any participation in judicial proceedings by the accused may mean that the conviction was not one made in absentia. For example, in certain cases where a conviction in absentia has been appealed by the person convicted a person will have legally "appeared" for the purpose of appealing. In such cases if the conviction is reaffirmed, then it is no longer considered a conviction in absentia. Similarly, representation by an attorney of the accused in a trial proceeding may preclude a finding that the trial was conducted in absentia.[79]

The logic of this exception could be extended. The criminal proceedings for a *present* defendant may fall short of "meaningful participation" as well—after all, the spectacle of a show trial requires the presence of the accused.[80] Yet, the participation allowed in a show trial falls short of being "meaningful," as the accused does not have any real opportunity to mount a defense. Conviction in such a trial cannot rationally be deemed a more reliable indication of guilt than an *in absentia* conviction. Thus, it is anomalous to extend the criterion of a "meaningful opportunity to participate" only to *in absentia* proceedings.

Similar guidance could be provided for the other *Doe* indicators of a fundamentally compromised foreign proceeding. For instance, a consular official might be required to take a closer look at a conviction where the noncitizen's counsel offered no substantive defense of his own client but rather attempted to exonerate a codefendant or the accused in a separate criminal proceeding. A similar rule might apply to judicial conduct suggesting indifference to the rule of law (such as failure to instruct the jury, as in Doe's case) and unexplained inconsistencies in verdicts and/or trial procedures that suggest a singling out of the defendant for prosecution. Perhaps easiest to administer would be a rule authorizing scrutiny when a credible international observer has published a report calling the foreign proceeding into question. Once any such major procedural red flag has been shown, it would be up to the consular officer to decide whether the

79 FAM, *supra* note 16, § 302.3-2(B)(3)(g)(2).

80 *See* Julie A. Cassiday, *Marble Columns and Jupiter Lights: Theatrical and Cinematic Modeling of Soviet Show Trials in the 1920s*, 42 SLAVIC & E. EUR. J. 640, 650 (1998) (describing how the accused engineers in the famous Soviet show trial known as the "Shakhty Affair" were positioned on a raised stage for greater theatrical and cinematic effect).

underlying adjudication was so fundamentally compromised as not to merit recognition.

Beyond the factors at issue in *Doe*, officials confronting foreign judgments should be prepared to address cases of fabricated or falsified evidence. Just as the proposed requirement of a defendant's meaningful participation found a basis in the existing treatment of *in absentia* convictions,[81] the exclusion of convictions based on fabricated evidence may be rooted in the existing exception for "purely political offenses," which do not qualify as "crimes involving moral turpitude" under the INA.[82] While this category most obviously includes overtly political offenses such as "the crimes of espionage, treason and sedition,"[83] it may also encompass other types of offenses when the circumstances establish that the prosecution was political in nature.[84] As defined by regulation, "[t]he term 'purely political offense' . . . includes offenses that resulted in convictions obviously based on fabricated charges."[85] By its express terms, this exception only applies narrowly to those offenses that would otherwise be "crimes involving moral turpitude" but for the political nature of the conviction. Yet common sense dictates that "convictions obviously based on fabricated charges" should *never* be used as a predicate for immigration consequences, as such convictions are neither reliable nor consistent with fundamental notions of civilized justice.[86] Of course, it is a high bar to show that charges were *obviously* fabricated—expanding the application of this exception would not authorize U.S. offi-

81 *See supra* notes 78–79 and accompanying text.

82 *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2018) (excluding "a purely political offense" from the definition of a "crime [of] moral turpitude"); *id.* § 1182(a)(2)(B) (providing the same exception for the "[m]ultiple criminal convictions" bar to entry); 22 C.F.R. § 40.21(a)(6) (2006) (providing the regulatory definition of "purely political offense"); FAM, *supra* note 16, § 302.3-2(B)(9) (describing the treatment of "purely political offenses" for purposes of consular processing). A similar exception for political offenses dates back to the earliest form of the conviction bar on entry. *See* Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

83 FAM, *supra* note 16, § 302.3-2(B)(9)(c). The manual describes these types of convictions as "generally . . . eligible for the political offense exemption." *Id.*

84 *See* O'Cealleagh, 23 I. & N. Dec. 976, 980 (B.I.A. 2006) ("The third kind of 'political' crime . . . is one in which a common offense such as murder, assault, or theft is so connected with a political act that the offense is regarded as 'political.'"). Note that the BIA has construed this exception narrowly, declining to adopt the related balancing test used in the asylum context to determine whether an offense constitutes a "serious nonpolitical crime" under 8 U.S.C. § 1158(b)(2)(A)(iii). *Compare O'Cealleagh*, 23 I & N. Dec. at 981 (expressly rejecting such a balancing test in the context of judging a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I)), *with* McMullen, 19 I. & N. Dec. 90, 97–98 (B.I.A. 1984) (establishing, in the asylum context, a test whereby the Board asks whether "the political aspect of the offense outweigh its common-law character"), *and* INS v. Aguirre-Aguirre, 526 U.S. 415, 430 (1999) (endorsing the balancing test set forth in *McMullen*).

85 22 C.F.R. § 40.21(a)(6) (2006).

86 *Cf.* Hilton v. Guyot, 159 U.S. 113, 202 (1895) (listing "fraud in procuring the judgment" among the situations where the Court is not required to extend comity to a foreign judgment); *see also supra* notes 37–54 and accompanying text.

cials to second-guess the factual determinations of a foreign tribunal in most cases, but only to reject convictions based on especially egregious violations.

Although the procedures for submitting and evaluating evidence of procedural defects would be different in the context of an immigration court, the relevant considerations would be the same. In fact, immigration courts would be especially well-suited to this type of inquiry, as they routinely engage in findings of fact and often address complex issues of law.[87] The function of an immigration judge in this case would be to consider evidence proffered by the noncitizen regarding the basic unfairness of the foreign conviction, balanced against any countervailing evidence proffered by the Department of Homeland Security, and to determine whether honoring the foreign conviction as a predicate for removal is consistent with domestic policy interests.

The overall principle behind these recommendations is that a foreign conviction obtained in a fundamentally unfair proceeding should be void for immigration purposes, regardless of whether it fits into the already existing carve-outs for *in absentia* convictions and purely political offenses. As discussed above, taking these considerations into account is wholly consistent with the definition of conviction under the INA.[88] Moreover, there is no rational reason why U.S. authorities should base immigration consequences on such fundamentally unfair proceedings. As detailed in the following Part, there is also no serious cause for concern that articulating procedures for recognizing challenges to especially egregious foreign convictions would greatly expand the burden on consular official or immigration courts in handling foreign convictions.

IV. Considerations for Implementation

Upon reading this Note's suggestions, one may worry that an inquiry into the procedures underlying a foreign conviction would place an undue burden on consular resources and the immigration courts. Though reasonable, this concern soon dissipates upon considering the limited nature of the proposed fairness inquiry, as well as its commonality with existing immigration procedures.

To adopt this Note's recommendations would not require consular officials or immigration judges to consider the merits of the vast majority of foreign convictions. Rather, the initial burden could be placed on the noncitizen to provide some evidence that the judicial process underlying the foreign conviction was defective. Most noncitizens with foreign convictions would not be able to make the required showing of fundamentally unfair procedures. For instance, the Seventh Circuit held, while affirming its decision in *Doe* six years earlier, that "[i]t would be inappropriate for us to open

87 *Cf.* 8 C.F.R. § 1003.1(d)(3) (2020) (describing varying standards of review for factual determinations and legal conclusions made by the immigration judge).

88 *See supra* notes 15–36 and accompanying text.

the door to attacks on run-of-the-mill foreign convictions."[89] The point is not to prescribe judicial procedures for foreign states, but rather to prevent the United States from rubberstamping the results obtained through especially egregious miscarriages of justice. For this same reason, the proposed inquiry into the circumstances of some foreign convictions would have limited impact on the enforcement of immigration laws.

Further, these suggestions would not require much procedural innovation, as the mechanism for challenging the legitimacy of a foreign conviction could mimic the existing procedures governing the inquiry into whether a conviction has been properly expunged or pardoned.[90] In the consular context, this would require allowing the noncitizen an opportunity to submit additional evidence along with a visa application questioning the legitimacy of the foreign judgment.[91] Elaborating standards for treating such evidence in the FAM would alleviate the decision-making burden on consular officers and render the process consistent and practicable. In the context of immigration courts, both the noncitizen and the Department of Homeland Security would be afforded the opportunity to present evidence on the fairness and reliability of the foreign conviction.[92] The immigration judge would then consider this evidence to determine whether the foreign judgment qualifies as a "conviction" under the INA.[93]

Under current procedures, immigration courts must routinely examine the circumstances underlying a conviction in order to determine whether a noncitizen is removable. To take a frequently encountered example, immigration judges must often make complex determinations to figure out whether an underlying offense qualifies as an "aggravated felony" under the INA, even examining a limited range of documents in the case of a statute containing alternative elements.[94] In other cases, the immigration judge may be required to consult charging documents to determine the amount of

89 Lui-Dix v. Holder, 528 F. App'x 595, 598 (7th Cir. 2013).

90 *See* FAM, *supra* note 16, § 302.3-2(B)(3)(c) (describing required documentation to prove that a conviction has been properly expunged, including evidence of a foreign pardon); EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 3.3(f), at 52 (2016) (providing for the submission of documents relating to criminal convictions) [hereinafter PRACTICE MANUAL]; *id.* § 5.7(k), at 97 (providing for the submission of evidence accompanying a motion to reopen based on the claim "that a criminal conviction has been overturned, vacated, modified, or disturbed in some way").

91 *Cf.* FAM, *supra* note 16, § 302.3-2(B)(3)(c) (describing consular requirements for a noncitizen to bring documentation pertaining to a foreign conviction).

92 *See* PRACTICE MANUAL, *supra* note 90, § 4.16(d), at 80 (indicating that parties in an individual hearing may expect to "present witnesses and evidence on all issues").

93 *See* 8 U.S.C. § 1101(a)(48)(A) (2018).

94 *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (describing the "modified categorical approach," whereby the court looks to documents including "the indictment, jury instructions, or plea agreement and colloquy"). Although *Mathis* deals with a mandatory minimum sentence under the Armed Career Criminal Act, the Court has specified the same approach must be followed for applying the INA to criminal offenses. *See id.* at 2251 n.2.

money at issue in a fraud conviction.[95] Immigration courts must examine the reasons underlying a vacated conviction to determine its impact for immigration purposes.[96] In fact, a recent Attorney General decision widens the scope of immigration courts' review of judicial orders further by directing immigration judges to consult the administrative record of state court proceedings to determine the immigration effects of a court order to modify or clarify a criminal sentence.[97] There is also nothing unusual about the fact that questioning a foreign conviction requires an immigration court to consider the practices of another country. These courts routinely examine country conditions reports and other documentary evidence in order to evaluate whether it would be safe to return a noncitizen to that person's country of origin.[98] This examination often involves analysis of political conditions within the country in order to establish, for instance, whether the local government is unwilling or unable to protect the applicant from persecution.[99] Thus, review of a foreign judicial record, perhaps supplemented with documentation of corrupt practices in the issuing country, fits comfortably alongside the type of review routinely practiced by immigration courts already.

Finally, it is worth emphasizing once again the importance of putting some type of procedure in place. Foreign convictions by unjust tribunals implicate both a broad U.S. policy interest in upholding international standards of fairness and an immigration-specific interest in applying the relevant

95 *See* Nijhawan v. Holder, 557 U.S. 29, 32 (2009) (authorizing immigration courts to look beyond the statute of conviction to determine whether a noncitizen's offense of fraud or deceit resulted in loss to victims in excess of $10,000, as required to constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i)).

96 *See* Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, 465 F.3d 263, 269 (6th Cir. 2006) (observing "a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships" and limiting the efficacy of vacated sentences for immigration purposes to the former category).

97 Thomas, 27 I. & N. Dec. 674, 685 (A.G. 2019). This analysis is necessary to give effect to the Attorney General's determination that "such state-court orders will be given effect for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding." *Id.* at 690.

98 *See* Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOB. LEGAL STUD. 197, 197 (2000) ("Documentation related to a country's political situation and human rights record is relevant, and often crucial, evidence regarding the objective reasonableness of an asylum seeker's subjective fear of persecution."); *see also id.* at 198 n.9 (noting relevance of such documentation to claims for withholding of removal and under the Convention Against Torture).

99 *See* 8 U.S.C. § 1101(a)(42) (defining a refugee, in relevant part, as one "unable or unwilling to avail himself or herself of the protection of [that individual's country of nationality]"); 8 U.S.C. § 1158(b)(1)(A) (making asylum procedures available to a noncitizen who qualifies as a refugee under § 1101(a)(42)(A)). Evaluating the threat posed by public actors is also central to adjudicating a claim under the Convention Against Torture. *See* 8 C.F.R. § 208.18(a)(1) (2020) (requiring that "a public official or other person acting in an official capacity" instigate, consent to, or acquiesce to the acts comprising "torture" for the purposes of the Convention).

sanctions of the INA only to noncitizens who have actually committed criminal offenses.[100] These interests outweigh the modest increase in administrative burden that would accompany review of certain foreign convictions not already covered by existing procedures.

CONCLUSION

Despite the broad language of IIRIRA's definition of conviction, there is good reason to presume that Congress did not intend to prevent courts from looking at the judicial process underlying a foreign conviction when there is reason to believe those proceedings may have been severely compromised and manifestly unjust.[101] The principle that the United States has a policy interest in upholding some fundamental baseline of fair and just adjudication has long been recognized in the common law of international comity.[102] Meanwhile, in extradition proceedings courts have long recognized that certain foreign convictions result from trials so procedurally defective that they cannot reasonably be viewed as reliable indicators of guilt.[103] When an administrative agency or court bases its decision to exclude or remove a noncitizen on the verdict of a "kangaroo court," it does nothing to promote domestic public safety (since such a "conviction" does not reliably indicate the prior bad conduct that would raise public safety concerns), and such a decision runs counter to a long-recognized domestic interest in upholding some minimal standards of fairness and justice in foreign judicial proceedings. Therefore, sound public policy strongly weighs in favor of imposing a baseline of fairness and reliability on foreign proceedings before basing immigration consequences on the judgments resulting from these proceedings.

As intuitive as this conclusion may sound, it is likely to have little force absent some explicit standards for determining that a foreign conviction is defective. Accordingly, this Note has outlined some generalized standards for making such a determination—based, in part, on the implicit standards that appear to animate judicial review of immigration decisions, and, in part, on the exceptions for *in absentia* convictions and "purely political offenses" already active in immigration law.[104] The adoption of such standards would require no drastic departure from existing policies and procedures, as such an inquiry into the fairness and reliability of foreign convictions may be grafted with relative ease onto existed consular and immigration court procedures.[105] This inquiry would be triggered by a showing of an especially egregious defect in the foreign proceedings, such as the total absence of a right to mount a meaningful defense or prosecution on obviously fraudulent

100 *See supra* notes 37–67 and accompanying text.
101 *See supra* notes 15–36 and accompanying text.
102 *See supra* notes 37–54 and accompanying text.
103 *See supra* notes 55–67 and accompanying text.
104 *See supra* notes 68–87 and accompanying text.
105 *See supra* notes 88–99 and accompanying text.

charges.[106] Once such a showing is made, the consular officer or immigration court would evaluate the evidence consistently with existing procedures for determining the finality of a conviction.[107]

While this Note has attempted to outline the considerations that should go into evaluating foreign adjudications for basic fairness, the specific procedures and standards would need to be developed by the Department of State and immigration courts. At this stage, the most important point is simply that more comprehensive standards and procedures ought to be elaborated. Moreover, it bears emphasis that such an elaboration would be consistent with the INA in its current form. Of course, the effectiveness of such a reform would depend on the specific policies implemented, but the very effort to articulate clearer standards for handling fundamentally unfair foreign convictions would be valuable as a signal of the priorities underlying U.S. immigration law. It would send a clear message that U.S. officials and courts are not bound by paper convictions issued by a foreign court unaccountable to the rule of law.

106 *See supra* notes 68–87 and accompanying text.
107 *See supra* notes 88–99 and accompanying text.