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What Matter of Soram Got Wrong: "Child Abuse" Crimes that May Trigger Deportation Are Constantly Evolving and Even Target Good Parents

by Molly Coleman | Oct 15, 2019 | Amicus, Courts & Judicial Interpretation, Education & Youth, Executive Branch, Guest Author, Immigration, Poverty and Economic Justice, Racial Justice |

This is a guest post by Kari Hong* and Philip L. Torrey.**

Many are surprised to learn that crime-based deportations[1] do not necessarily make intuitive sense. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[2], a misdemeanor drug offense for which probation was imposed 20 years ago can be an "aggravated felony," a category reserved for the presumably most serious offenses that result in detention, deportation, and denial of most forms of immigration relief. But a felony conviction for kidnaping may have no consequences at all.

The crime of "child abuse, child neglect, or child abandonment" removal ground created by IIRIRA similarly leads to illogical results.[3] This deportability ground, first created in 1996 by IIRIRA, is causing federal circuit courts (and arguably the Board of Immigration Appeals itself) to split over whether this deportability ground is narrow or broad. We contend that the narrow interpretation, best defended by the Tenth Circuit, is the proper one. Not only does the legislative history support a narrow reading, but the ground's broad interpretation adopted by the Second Circuit improperly includes civil actions (not just crimes) and does not even require acts that cause injury to a child. As a result, the broad interpretation sweeps too far. It includes parents with civil violations for leaving their child unattended, either out of circumstances arising from the lack of child care for the working poor or from deliberate parenting choices known as "free-range" parenting in which children are encouraged to function independently and with limited parental supervision. The deportability ground should be interpreted narrowly—as intended by Congress— to trigger deportation only for those who are harming and preying on children.

We contend that Congress meant to attach immigration consequences to the narrow definition and limit its reach to crimes involving harm to a child when enacting IIRIRA. It may at first seem counterintuitive to defend those who have committed crimes from deportation. After all, isn't the threat of immigration, at least as explained by President Trump, the fact that "rapists" and "murderers" are crossing the border to harm U.S. citizens?[4] But just as the fear of rape was wrongfully used to justify slavery and segregation, so too is the fear of rape being used to wrongfully defend the deportation of immigrants, even those who have committed crimes.[5] This is true, as we will explain, even for those accused of child abuse crimes.

We have to look critically at how categories of deportable crimes are defined because Congress made a deliberate policy choice in 1996 to deport in broad strokes—based on categories of crimes alone—rather than through individual assessments on a case-by-case basis. When Congress opted for this route, it ended its earlier policy of letting an individual judge decide if a second chance or deportation was appropriate by weighing aggravating circumstances concerning a criminal act—the seriousness of the offense (What did the person do? How long ago?), the character of the offender (Is there rehabilitation or reform? Is a there a risk of reoffending?)—against mitigating factors—family ties in the United States, lengthy residence, a track record of community service.[6] Congress ended these individualized hearings based on a desire to more quickly deport as many people as possible with any criminal conviction.[7] As a result, all offenses that fall within certain categories—aggravated felonies, crimes involving moral turpitude, controlled substance offenses, etc.—will render an individual deportable, regardless of the individual characteristics of the offender and the seriousness of the offense as determined by the prosecutor and state court adjudicating guilt and imposing punishment.

Arising from both overly broad categories of deportable offenses and the foreclosure of an individualized analysis, existing immigration policy then assigns the same dire, lasting

consequences to both serious offenses and dangerous offenders as to minor crimes and rehabilitated individuals. Because of the potential real-world impact of overinclusive error, the Supreme Court presumes that a non-citizen has committed the "least of the acts" necessary for a conviction.[8] But this presumption does not, by itself, correct for all overinclusive error that results in crime-based removals.

While overinclusive errors that arise for drug offenses or petty theft invoke quick sympathy, the public seems to presume that anyone convicted of the crimes of child abuse or child neglect deserves as harsh a penalty as possible. But a more complete understanding of the "crime of child abuse" legal definition challenges that presumption. The laws in several states have evolved over the past two decades to pursue the protection of children with increasing—at times excessive—rigor. Today, states often have expansive definitions of what constitutes child abuse and, in particular, child neglect. In the civil context, neglect can trigger child protective services investigations and remedial parenting interventions, rather than jail time. It then is particularly perverse that civil adjudications that have the express goal of family preservation are used—in the broad interpretation of what constitutes child abuse crime—to cause deportation, an act that permanently separates parents from their children.

Additionally, criminal definitions of neglect have expanded well-beyond prior iterations. In contemporary civil and criminal statutes, terms like "child neglect" often are overinclusive in three distinct ways that result in punishment of not only demonstrably poor parenting but also target women who are themselves victims of domestic violence, the working poor, or responsible parenting decisions that fall under the "free-range" child-rearing philosophy.

First, contemporary child abuse laws sweep in conduct that often arises from a parent's own abuse or poverty, and not predation. In 1999, Minnesota enacted legislation requiring a child's exposure and proximity to domestic violence to be "a statutorily specified form of reportable child abuse and neglect."[9] The result, however, was "a dramatic increase in the number of referrals, emanating mainly from law enforcement officials who responded to reports of domestic violence and, as mandated, reported the family to child protective services."[10] "Parents, primarily mothers, who themselves were victims of domestic violence thus became the subjects of neglect reports based on their alleged failure to protect their children from exposure to the violence."[11] Although Minnesota repealed its law when it realized the unintended consequences, similar offenses under now-existing laws remain.[12] The new rule established by the Board of Immigration Appeals (BIA) in *Matter of Soram*, 25 I. & N. Dec. 378 (2010), requires the "crimes of child abuse" removal ground to be interpreted without regard to injury, which will, in some states, sweep in mothers of children who are the *victims* of domestic violence alongside a child predator.

Second, as noted in a formidable dissent by Judge Wardlaw of the Ninth Circuit, some child neglect and endangerment statutes reach "conduct driven by poverty, such as leaving a

child at home alone while a parent leaves for a brief errand or unintentionally failing to secure a babysitter for a child while the parent is at work."[13]

Third, parents who have adopted the "free-range" parenting philosophy and therefore may permit their child to walk outside alone or play without supervision have been investigated by child services for, and criminally charged with, child neglect and endangerment. In Maryland, for instance, a family engaged in "free-range parenting" was twice investigated for civil neglect when they permitted their ten- and six-year-old to walk home from a park.[14] In Montana, a mother who dropped off her children at the mall was criminally charged with child endangerment.[15] In Florida, a woman who permitted her seven-year-old to walk half a mile home from a park was arrested and charged with felony neglect.[16]

Broadly defined child abuse and neglect state statutes are subsequently swept into a broadly defined crime of child abuse deportability ground thereby exacerbating the problem of rendering minor offenses and responsible parenting decisions deportable offenses. Both the BIA and federal appeals courts are now struggling to determine what crimes should fall into the category of "child abuse, child neglect, and child abandonment" deportability ground.[17] In 2008, the BIA first defined the "child abuse" deportability ground in *Matter of Velazquez-Herrera* to be narrow, requiring intentional mistreatment toward a child.[18] Shortly thereafter, the BIA switched course and opted for a broad definition in *Matter of Soram*, finding that the crime of child abuse deportability ground "denotes a unitary concept" and defined that concept by reference to *civil* laws extant in 2009.[19] In so doing, the BIA first held that the deportability ground did not require actual injury to a child.[20] The Eleventh Circuit deferred to the BIA's expansive interpretation as reasonable.[21] But, in 2013, the Tenth Circuit, in *Ibarra v. Holder*, disagreed, contending that the generic definition of a "crime of child abuse" involves only crimes requiring injury to a child—not civil offenses—of child abuse, neglect, and abandonment.[22]

In July 2018, in a 2-1 decision, the Ninth Circuit weighed in with *Martinez-Cedillo v. Sessions*, agreeing with *Soram*'s broad interpretation of the crime of child abuse deportability ground to include offenses that do not require injury to a child.[23] But an impassioned dissent by Judge Kim McLane Wardlaw argued that "*Soram* is overbroad and an unreasonable interpretation of congressional intent."[24] This dissent convinced enough judges to vacate *Martinez-Cedillo*, but before the en banc hearing arose, the client tragically died, temporarily preventing the Ninth Circuit judges from deciding which definition was the correct one.[25] In June 2019, in *Matthews v Barr,* the Second Circuit reaffirmed its prior position that *Chevron* deference is owed to *Soram*.[26] There is now a potential en banc review of *Matthews v. Barr*, which could add to the current split amongst circuits about the proper interpretation and scope of the crime of child abuse deportability ground.

This article weighs into the debate by siding with *Ibarra v. Holder*'s more limited interpretation of what offenses should be considered crimes of child abuse and thus result in immigration consequences. The most reasonable interpretation of the crime of child

abuse deportability ground is a narrow one, which requires a criminal conviction that involves injury to a child.

Specifically, the text of the amendment that resulted in the crime of child abuse deportability ground, as well as remarks by the amendment's co-authors, establish that the deportability ground was intended to target individuals whose criminal acts necessarily resulted in injury to a child's physical, mental, or emotional wellbeing. What *Soram* got wrong was its presumption that child abuse, neglect, and abandonment are static terms, instead of definitions that shift quickly to reflect changing parenting trends and, at times, cultural norms that reflect animus towards certain groups instead of concern for children. Consequently, contemporary definitions of child abuse and endangerment was unforeseeable to Congress when it enacted the crime of child abuse deportability ground. As a result of *Soram*, there are now a number of less serious offenses—civil and criminal—that may result in removal yet require no injury to a child, no intent to harm, and no persistent neglect of a child's basic needs. Those "endangerment" and neglect offenses should not be confused with the crimes of child abuse, child neglect, and child abandonment that Congress intended to punish with removability.

I. A NARROW DEFINITION OF A "CRIME OF CHILD ABUSE" AVOIDS SWEEPING IN CONTEMPORARY NEGLECT AND ENDANGERMENT OFFENSES THAT ARE NOT LIMITED TO SERIOUS AND CRIMINAL MISCONDUCT.

Unlike criminal sentences, which are imposed based on the seriousness of a crime and depravity of an offender, civil collateral consequences for prior criminal offenses are not tailored to the criminal justice goals of retribution or rehabilitation. The sanction of deportation (and its updated technical term "removal"), which often results in the loss of family, community, and country for long-term residents—is frequently disproportionately harsh for past criminal offenses that the prosecutors and sentencing courts did not deem serious or even deserving of prison terms.

The breadth of contemporary neglect and endangerment statues—civil and criminal—do not reach just bad parenting decisions. They reach arguably either good parenting decisions, advocated by "free-range" parents who encourage children to engage in self-reliant conduct of playing and walking home unsupervised, or working parents who are prosecuted for leaving their child unattended while working or running errands. If the crime of child abuse deportability ground is not limited to crimes that result in injury, then individuals could be deported for those types of prosecutions targeting the working poor or free-range parenting. A review of contemporary civil and criminal statues supports a narrow definition of the crime of child abuse deportability ground such that it includes only criminal offenses that necessarily involve injury to a child.

A. Collateral Consequences, Including Removal, Are Not Related To The Goals Of Criminal Justice.

Criminal statutes target a bad act for sanction and, by design, capture a range of conduct from predatory serious injuries to near-misses arising from understandable mistakes. The criminal codes use the various mental states—intentional, knowing, reckless, and negligence—to grade certain offenses. The prosecutors are empowered with discretion to charge and offer appropriate pleas. The judges are tasked with imposing appropriate sentences, usually ranging from probation to multi-year prison terms. The criminal justice system then is supposed to tailor the appropriate charge and sentence to fit the offense and offender,[27] which is meant to result in lengthy sanctions for predators and second chances to those who show potential for rehabilitation.

A dysfunction within immigration law—and all other forms of civil law that attach collateral consequences to criminal convictions—arises because civil law was never meant to protect the public. It cannot, it does not, and it need not. The criminal justice system, in theory, is designed to incapacitate individuals it deems truly dangerous, either through incarceration or rigorous post-release supervision. Collateral consequences, which are imposed by federal, state, and city governments rather than courts, prevent people from getting housing, employment, student loans for education, and public assistance for disabilities or medical care for criminal convictions, including the loss of housing, employment. Those types of consequences are not designed to protect the public from truly dangerous individuals.[28]

By definition, collateral consequences attach a more serious sanction than the level of punishment that the criminal court deemed appropriate. When this occurs, collateral consequences become overinclusive and often arbitrary. For instance, in 2016, when sentencing a woman for a felony drug offense, a federal district court judge rejected the advisory sentence of 33 to 41 months in prison.[29] He instead granted probation to avoid what he called a "civil death," arising from the 50,000 collateral consequences collectively imposed by state and federal law on those who committed a felony.[30] These collateral consequences—imposed by federal, state, and city governments rather than courts—prevent people from getting housing, employment, student loans for education, and public assistance for disabilities or medical care.

IIRIRA has exacerbated the overinclusive reach of crime-based deportations by choosing to assign consequences based on the categorical approach instead of individualized hearings. IIRIRA's policy choice—as many judges have noted—runs counter to the nuanced and careful work of the criminal law.[31] For clarification, the problem is not the categorical approach, which simply requires determining whether the language of a violated criminal statute matches a deportability ground. Instead, criticisms should be directed both toward impermissibly expansive deportability ground interpretations that result in over inclusivity and toward a Congress that refuses to permit individualized hearings in which individuals facing removal may present mitigating evidence such as proof of rehabilitation. In fact, President Trump recently explained that he does not want to hire more immigration judges because giving an immigrant a hearing provides an

opportunity for them to prevail in their cases, an opportunity he wants denied categorically.[32] IIRIRA is predicated on the same faulty logic: individualized hearings will allow people with past convictions to remain in the United States. But to be clear, if the presentation of mitigating evidence in an individualized hearing results in granting a second chance, perhaps that in fact is the proper result.

As cited in *Immigration and Naturalization Service v. St. Cyr*,[33] under the legal regime repealed by IIRIRA, around half of all people with real "aggravated felonies"—more serious offenses like drug trafficking, murder, and firearms trafficking for which a court had to impose punishment—were granted the now-repealed INA § 212(c) relief, which allowed for an individualized review of mitigating circumstances such as rehabilitation. Giving people who have been convicted of crimes a second chance is even more politically palatable today than ever before. As more people realize that the "Tough on Crime" era resulted in racial-bias, overzealous prosecution, and wasted resources that only promoted recidivism, relying on a conviction alone as a marker of bad character or future dangerousness is in doubt.[34]

What's clear is that after 20-years of implementation, the IIRIRA approach is a failed experiment. By eliminating individualized hearings in which an individual's mitigating circumstances may be considered, IIRIRA's fatal flaw becomes its presumption that any relief afforded to those with criminal convictions is somehow misguided. To the contrary, IIRIRA's decision to end hearings and no longer consider mitigating evidence had resulted in disproportionate outcomes and overinclusive error.

As a result, when construing the reach of categories of crimes that trigger deportation—in this instance, the meaning of a "crime of child abuse" deportability ground—one must remember that there are no longer individual hearings to determine whether removal is appropriate in a specific case. Therefore, the interpretation must be grounded on the recognition that a number of non-serious offenses and non-dangerous offenders will be swept up if the "crime of child abuse" deportability ground is interpreted broadly.

B. Civil And Criminal Schemes That Respond To Child Abuse, Neglect, And Endangerment Have Evolved And Expanded Over Time.

Contemporary definitions of "child abuse," "child neglect," and "child endangerment," have expanded over time. In part, that expansion can be explained by shifting norms and a greater understanding of crimes involving children. But, many current laws are less about the protection of children and more about inflicting humiliation on groups deemed undesirable by the larger society.

For example, it took many years and cultural shifts to convince the public that "the vast majority of child sex abusers are either members of the child's family or family friends and acquaintances," rather than strangers.[35] For instance, in the 1980s, the public was captivated by milk cartons advertising the fear of violent kidnappings and disappearances

by strangers, even though—then as now—a child is at greater risk of harm by an adult known to them, a family member or adult in her inner circle of trust.

Child neglect has a darker history of targeting perceived inferior groups instead of protecting children. In the 1970s, "approximately 25 to 35% of all Native American children were removed from their families, and 85% of those children were placed in homes with white parents."[36] The state agencies removed the Native American children after diagnosing the parents as being neglectful or abusive. But according to a 1978 House of Representatives Report, 1% of the removals were in response to child abuse and the remaining 99% of the removals were on the grounds of "neglect" or "social deprivation," which were the charges social workers made in response to the perceived emotional damage that a child was receiving by being "subjected to [] living with their [Native] parents."[37]

Child neglect statutes also have mirrored shifts in parenting trends. For example, the rise and influence of "helicopter-parenting," a parenting style now criticized for being over-protective, ushered in a number of state statutes that defined "abuse," "neglect," "abandonment," and "endangerment" without regard to injury or intent.[38] Conversely, the increasing use of parenting styles that encourage child independence, such as those styles discussed below, have been unfairly swept into outdated state definitions of neglect that may ultimately trigger deportation. That type of harsh consequence underscores *Soram*'s expansive and overinclusive interpretation of the crime of child abuse deportability ground. In its decision, the BIA fails to appreciate how contemporary civil and criminal laws evolved from earlier iterations in effect in 1996.

C. Expansive Contemporary Definitions Of Child Abuse, Neglect, and Endangerment Reach Both Unintended Consequences And "Free-Range" Parenting Decisions.

Contemporary state statutes aimed at preventing child abuse and neglect—many of which are being swept into the child abuse deportability ground—are not limited to punishing serious misconduct. Many states, for example, have mandatory reporting statutes designed to alert (often civil) authorities to both outright abuse and more general, dangerous situations within a home.[39] Accordingly, many states now have "more expansive definitions of the conduct that legally constitutes child abuse and neglect for purposes of mandatory reporting."[40]

There are downsides to the expanded definitions. For example, in 1999, Minnesota enacted legislation to require that a child's exposure and proximity to domestic violence become "a statutorily specified form of reportable child abuse and neglect."[41] The result, however, was "a dramatic increase in the number of referrals, emanating mainly from law enforcement officials who responded to reports of domestic violence and, as mandated, reported the family to child protective services."[42] "Parents, primarily mothers, who themselves were victims of domestic violence thus became the subjects of neglect reports

based on their alleged failure to protect their children from exposure to the violence."[43] Because that was not the intent of the law, Minnesota repealed that provision.[44]

But similar convictions under current laws remain. The *Soram* rule—interpreting "crimes of child abuse" without regard to injury, and looking to definitions like Minnesota's above—may result in mothers who are the *victims* of domestic violence being deported alongside an irredeemable predator of children. For instance, both Texas and Oklahoma prosecuted battered women for child neglect when they are present when their abusers also harm their children.[45]

Classifying one of these contemporary, domestic-violence based endangerment or neglect statutes as a removable "crime of child abuse," as *Soram* would do, is of great concern. Not only does it trigger removal, but it will make some victims of domestic violence ineligible for relief—such as the special-rule of cancellation of removal—that is designed to protect certain battered spouses.[46] It may also have a chilling effect on the reporting of domestic violence.

In addition to punishing domestic violence survivors, expansive criminal neglect laws can encompass parenting decisions designed to promote self-reliance and independence in a child. For example, in 2015, a white, middle-class Maryland couple that made the conscious choice to teach their children self-reliance by letting them play in a park and walk home without supervision were twice investigated for violating Maryland's civil child neglect law.[47] The public outcry led to the state agency issuing a clarification memo that their existing child neglect law should be interpreted more narrowly than the language suggests.[48] But that clarification was not codified in official regulation or law. Had one or both parents been a non-citizen and convicted of child neglect—even though the children were not harmed at all—they may have been deported based on the BIA's interpretation of the crime of child abuse deportability ground in *Soram*.

Maryland is not alone. Other states criminally prosecute parents who make similar parenting decisions. In Montana, in 2009, a mother was criminally charged with endangerment after dropping off her children "for a few hours at the local mall."[49] The youngest child was three, but the child was under the supervision of two twelve-year old children who had taken certified babysitting classes.[50] In Florida, in 2014, a mother was arrested and charged with felony neglect for letting her seven-year-old walk home from a park, which was half-a-mile away.[51] Because Florida has no minimum age for a child to be left alone, in 2015, two parents were charged for felony neglect when their 11-year-old was locked outside the house for 90 minutes before the parents returned home.[52] Indeed, only one state—Utah—has decriminalized "free-range parenting," by changing their definition of child neglect to exclude decisions by parents to "let[] their child walk outside alone, play without supervision or allow[] them to wait in the car without an adult."[53]

The working poor who engage in "free range" parenting out of necessity are also subjected to civil and criminal consequences based on statutes that lack an injury or mens rea element. As recognized by Judge Wardlaw, crimes that do not require an injury will impact the working poor, and working mothers in particular.[54] Some child neglect and endangerment statutes reach "conduct driven by poverty, such as leaving a child at home alone while a parent leaves for a brief errand or unintentionally failing to secure a babysitter for a child while the parent is at work".[55] A prominent example of this is *Ibarra*, in which the non-citizen was a mother who was prosecuted for abuse when she went to work and left her children in the care of an adult, who unbeknownst to the mother, left the children unattended.[56] Outside of the immigration context, in 2014, a mother in South Carolina was charged under a felony statute sounding in abandonment and endangerment when she let her nine-year-old daughter play in a nearby park while she worked her shift at McDonald's.[57] In 2015, an Arizona homeless mother was prosecuted for child abuse and sentenced to 18 years of probation for leaving her children in the car while she interviewed for a job.[58] In each of these examples *Soram* would render the prosecuted individuals removable despite the fact that none of the charged crimes required any type of physical, emotional, or psychological harm to a child.

D. It Is Particularly Perverse To Use Civil Adjudications, Which Promote Family Unification, As A Basis for Deportation, Which Results In Family Separation.

It is significant that Congress opted to define the crime of child abuse deportability ground as involving "crimes," rather than all forms of child abuse and neglect that are also adjudicated in civil forums. The focus on criminal sanctions with respect to child abuse is an important one. As explained in *Ibarra*, civil adjudications involving child neglect and child endangerment also exist and "the purpose of civil definitions is to determine when social services may intervene. The purpose of criminal definitions is to determine when an abuser is criminally culpable."[59]

That distinction is not academic. A person who preys on children is a child abuser, subject to criminal law's severe sanctions of incarceration, incapacitation, and a lengthy, if not life-long sanction to civil commitment and sex offender registrations requirements.[60] But a person who is adjudged guilty of various child endangerment or child neglect offenses in the civil and family context becomes part of a system in which a parent is encouraged, efforts are made, and reforms are attempted with the goal of having the parent *stay united* with their child who was the subject of the civil action. In this context, "an essential goal of social services is family preservation," which is why many state courts follow policies to provide services first to a family in crisis.[61]

For example, in a recent New York action, before determining whether the court should terminate parental rights, the state court first reviewed whether the social services agency met "its initial burden of establishing by clear and convincing evidence that it exercised diligent efforts to strengthen the parental relationship between the mother and the child by, among other things, developing an appropriate service plan, scheduling regular

parental access between the mother and the child, and referring the mother to programs for substance-abuse treatment."[62] State child protection services that are witness to the dynamics, causes, and cures for child abuse opt for policies "that respect[] the family unit as an essential social building block and commits substantial resources to supporting it through crisis. . . ."[63]

Civil adjudications of child endangerment and neglect actions then are predicated on family unification efforts. Child abuse criminal statues, by contrast, seek the separation of the abuser from the child. It is particularly perverse then for a crime-based deportation ground—one that exiles a parent from a child—to sweep in the civil adjudications that are predicated on the goal of family unification and preservation. In the poignant words of Judge Wardlaw who argued against the (then) majority's decision that affirmed deportation, "It should not be lost on us that, while we fault [the non-citizen] for endangering his son, we simultaneously condone the separation of a family, exiling a father of two children who has resided in the United States lawfully for more than twenty-five years."[64] Although Judge Wardlaw was speaking to deportation based on a criminal offense for child endangerment, those words summarize why civil adjudications for child abuse should not be included in the definition of what constitutes a crime of child abuse in immigration law.

These modern civil and criminal definitions of child abuse and neglect sweep in domestic violence survivors as well as parents making good child-raising decisions that are unrecognizable to what Congress understood as child abuse more than two decades ago when it created the crime of child abuse deportability ground. The broad reach of many contemporary state definitions of abuse, neglect, and endangerment support rejecting *Matter of Soram's* expansive definition of a "crime of child abuse" that does not require injury. Congress clearly did not intend to sweep those types of expansive statutes—most of which did not exist in 1996—into the crime of child abuse deportability ground.

II. The Crime of Child Abuse Deportability Ground was Not Intended to Include Offenses that Do Not Require Injury to a Child.

Despite its broad interpretation by some courts, the crime of child abuse deportability ground was designed to narrowly target individuals who prey on children and cause them harm. The deportability ground's legislative history demonstrates that Congress intended it to apply to individuals who viciously assaulted children and caused them physical, psychological, or emotional harm. But courts have become increasingly divided about whether the deportability ground encompasses crimes that involve no injury to a child. Any interpretation that does not require injury is a significant departure from the legislative purpose of the deportability ground.

In 1996, Congress introduced the crime of child abuse deportability ground designed to trigger the deportation of anyone "convicted of . . . a crime of child abuse, child neglect, or child abandonment."[65] The provision ("Coverdell-Dole amendment") was authored by

Senators Paul Coverdell (R-Ga) and Robert Dole (R-Kan) in an amendment to the House bill that would later become the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996.[66] Section 218 of the Coverdell-Dole amendment, which included the relevant removal provision, was entitled "Exclusion Grounds for Offenses of Domestic Violence, Stalking, Crimes *Against* Children, and Crimes of Sexual Violence."[67] By using the term "against," Congress clearly meant the deportability ground to target criminal acts in opposition to or in hostility toward children.[68] Criminal conduct that doesn't require injury to a child, such as child endangerment, cannot reasonably be considered to be "against" a child.

Although Congress did not define the term "crime of child abuse" in the statute, comments from the removal provision's authors further suggest that it was designed to target individuals convicted of crimes that necessarily entailed acts of violence against children. In his remarks on the Senate floor, then-Senate Majority Leader Robert Dole elaborated on the goal of the crime of child abuse removal provision:

[O]ur society will not tolerate crimes against women and children. The criminal law should be a reflection of the best of our values, and it is important that we not only send a message that we will protect our citizens against these assaults, but that we back it up as well. . . . When someone is an alien and has already shown a predisposition toward violence against women and children, we should get rid of them the first time.[69]

After the amendment passed, Dole praised his colleagues for adopting legislation that he considered critical to "stop[ping] the *vicious acts* of stalking, child abuse, and sexual abuse."[70]

Senator Coverdell echoed his colleague's remarks and noted that the provision was needed to "protect . . . children."[71] He went on to explain that "[i]nvestigations by State child protective service agencies in 48 States determined that 1.12 million children were victims of child abuse and negligence in 1994."[72] The figure represented a 27 percent increase since 1990 in the number of children "found to be victims of maltreatment" according to Coverdell.[73] He further noted that "[a]mong the children . . . for whom maltreatment was substantiated or indicated in 1994, 53 percent suffered negligence, 26 percent physical abuse, 14 percent sexual abuse, 5 percent emotional abuse, and 3 percent medical negligence."[74] Clearly the purpose of Coverdell's amendment was to target individuals convicted of offenses that necessarily require a child to be physically, emotionally, or psychologically harmed. It was not meant to target individuals convicted of endangerment-type offenses that, although they may result in injury to a child, do not require any such injury. After its enactment, the crime of child abuse deportability ground went undefined by courts or the BIA for years. In 2008, the BIA issued its first precedential decision interpreting the deportability ground.[75] In that case, the BIA reasoned that by enacting the deportability ground, "Congress clearly intended to single out those who have been convicted of maltreating or preying upon children."[76] Its decision suggested that a conviction must necessarily involve some type of harm against a child for it to trigger the

deportability ground. The following year, the Ninth Circuit relied on the BIA's new definition when it likewise interpreted the crime of child abuse deportability ground to require some type of harm to a child.[77]

But in 2010's *Soram* decision, the BIA changed directions and held that as long as there was a "reasonable probability" that a child may be injured in the course of committing an offense, the crime of child abuse deportability ground was satisfied.[78] The BIA's tortured analysis relied heavily on a recent survey finding a majority of states had civil child abuse and neglect statues that did not require injury to a child.[79] The BIA inexplicably relied on that 2009 survey of *civil* statutes to determine what Congress meant when it first premised removal on *crimes* of child abuse in 1996. The BIA's interpretation thus went well beyond the deportability ground's intent and the plain meaning of its text. Nonetheless, as discussed above, some courts have deferred to the BIA's expanded interpretation as reasonable.[80]

Conversely, other courts have recognized that the BIA's definition is impermissibly expansive. For example, the Tenth Circuit recently criticized the BIA's broad interpretation of the crime of child abuse deportability ground noting that, in light of the Board's expansive definition, the deportability ground was quickly becoming unconstitutionally vague.[81] The court further chastised the BIA for relying on a survey of civil offenses to interpret a crime-based deportability ground.[82] Most recently, judges in the Ninth Circuit have echoed the Tenth Circuit's concerns, setting up a pending petition for review en banc and potentially adding to the current split amongst circuits about the proper interpretation of the crime of child abuse deportability ground.

CONCLUSION

Ultimately, the Supreme Court may weigh in on the meaning of the crime of child abuse deportability ground. If the Second Circuit reviews its decision in *Matthews v. Barr* and subsequently declines to accord *Matter of Soram* deference, then the division amongst circuit courts about the proper interpretation of the child abuse deportability ground will deepen.

The Supreme Court may resolve that split and ultimately decide what conduct Congress intended the crime of child abuse deportability ground to cover. In so doing, the Court must recognize that *Matter of Soram* fails to account for modern statutes that criminalize behavior which would never have been considered child abuse at the time the "crime of child abuse" deportability ground was enacted. Accepted parenting styles that teach children independence and self-reliance do not reflect the type of conduct that Congress intended to label child abuse, neglect, or abandonment.

Violent crimes that necessarily results in a child's injury should be condemned, but conduct that does not cause harm to a child must not result in removal. The deportation of

a parent, guardian, or caretaker for the crime of child abuse deportability ground breaks up families; ironically, it then becomes the source of serious and lasting harm to children.

The Supreme Court and lower federal courts have an opportunity to return the reach of the crime of child abuse to the deportability ground's original purpose. Once the flaws of *Matter of Soram* are rejected, that realignment is possible.

—

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[1] Before 1996, a non-citizen whose status was in jeopardy was placed in "exclusion proceedings" or "deportation proceedings," depending on a number of factors such as whether they had legal status or not and were they inspected at the border or not. As a general matter, "deportation proceedings" had more protections and remedies, mostly because people with status, such as green cards, were subject to this venue. In 1996, Congress changed the law so that there was only one "removal proceeding" and individuals were charged with "inadmissibility grounds" or "deportability grounds," which roughly tracked the prior exclusion and deportation proceedings. Post-1996, the technical term for ordering someone out of the country is "removal." Because most people still refer to the process as deportation, the authors will use that term only in its colloquial sense.

[2] Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-640 (Sept. 30, 1996).

[3] If a noncitizen is convicted of a criminal offense that qualifies as a crime of "child abuse, child neglect, or child abandonment" then that individual may be deported from the United States. *See* 8 U.S.C. 1227(a)(2)(E)(1).

[4] Michelle Mark, Trump Just Referred to One Of His Most Infamous Campaign Comments: Calling Mexicans 'Rapists," Business Insider (Apr. 5, 2018), https://www.businessinsider.com/trump-mexicans-rapists-remark-reference-2018-4; Dara Lind, Trump Has A Long History of Fearmongering About Immigrant Murder, Vox, (Feb. 5, 2019), https://www.vox.com/2019/2/5/18213077/state-of-the-union-2019-trump-david-killed-immigrant-family

[5] It is ironic that President Trump himself has been accused of raping a woman and presides over an administration that enacts policies that make prosecuting rape more difficult. See Jessica Bennett, Megan Twohey, Alexandra Alter, *Why E. Jean Carroll, "The Anti-Victim" Spoke Up About Trump,* N.Y. Times (June 27, 2019),

https://www.nytimes.com/2019/06/27/us/politics/jean-carroll-trump-sexual-assault.html, Gloria Yuen and Osub Ahmed, *4 Ways Secretary DeVos' Porposed Title IX Rule Will Fail Survivors of Campus Sexual Assault,* Center for American Progress (Nov. 16, 2018), https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/.

[6] *See generally* Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14-02 Immigr. Briefings 1 (2014) (discussing the expansive use of waivers and other forms of discretionary immigration relief for individuals with criminal convictions prior to their repeal with the passage IIRIRA).

[7] *See* Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 Immigr. & Nat'l L. Rev. 3, 17 n.56 (2016).

[8] Moncrieffe v. Holder, 569 U.S. 184, 190–91, 205, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013) ("[W]e err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the [Immigration and Nationality Act] must be construed in the noncitizen's favor.").

[9] Anne C. Peterson, Joshua Joseph, and Monica Feit, eds, *New Directions in Child Abuse and Neglect Research,* Institute of Medicine and National Research Council of the National the Academies 34 (2014) (hereinafter "National Research Council Report"), https://www.nap.edu/read/18331/chapter/1.

[10] Id.

[11] Id.

[12] *See* Jacqueline Mabatah, *Blaming the Victim? The Intersections of Race, Domestic Violence, and Child Neglect Laws*, 8 Geo. J.L. & Mod. Critical Race Persp. 355, 355–56, 361–64 (2016) (discussing Texas' prosecution of battered women for child neglect); Adam Banner, "*Failure to Protect" Laws Punish Victims of Domestic Violence,* Huff Post (Feb 3, 2015) (discussing Oklahoma's policy to prosecute battered women for child neglect), https://www.huffingtonpost.com/adam-banner/do-failure-to-protect-law_b_6237346.html.

[13] Martinez-Cedillo v. Sessions, 896 F.3d 979, 1002 (9th Cir. 2018) (Wardlaw, J., dissenting), vacated by en banc vote in Martinez-Cedillo v. Barr, 918 F.3d 601 (9th Cir. 2019) *("Martinez-Cedillo II").*

[14] *See* Donna St. George, "*Free Range" Parents Cleared In Second Neglect Case After Kids Walked Alone*, Wash Post (Jun 22, 2015).

[15] Nicole Vota, *Keeping the Free-Range Parent Immune From Child Neglect: You Cannot Tell Me How to Raise My Children,* 55 Fam. Ct. Rev. 152, 155 n.76 (2017).

[16] *See* Caitlin Schmidt, *Florida Mom Arrested After Letting 7-Year-Old Walk To The Park Alone,* CNN (Aug 1, 2014).

[17] This article uses the phrase "crime of child abuse" to refer to the "crime of child abuse, child neglect, or child abandonment" deportability ground codified at 8 U.S.C. § 1227(a)(2)(E)(i).

[18] 24 I & N Dec. 503, 512–14 (2008).

[19] 25 I. & N. Dec. 378, 381 (BIA 2010). Although the immigration statute requires a criminal conviction to trigger the "crime of child abuse" deportability ground, the BIA in *Matter of Soram* relied on a survey of states' civil definition of child abuse to determine that endangerment offenses that do not necessarily result in harm nonetheless may qualify as child abuse. *See id.* at 382.

[20] *See id.* at 383.

[21] *See* Florez v. Holder, 779 F.3d 207, 209 (2d Cir. 2015); Pierre v. U.S. Att'y Gen., 879 F.3d 1241, 1250 (11th Cir. 2018).

[22] 736 F.3d 903, 910–11 (10th Cir. 2013).

[23] 896 F.3d 979 (9th Cir. 2018).

[24] *Id.* at 996 (Wardlaw, J., dissenting).

[25] Martinez-Cedillo v. Barr, 918 F.3d 601 (9th Cir. 2019) ("Martinez-Cedillo II")

[26] Matthews v. Barr, 927 F.3d 606, 616 (2d Cir. 2019) ("We conclude that *Florez* [*v. Holder*, 779 F.3d 207 (2d Cir. 2015)] remains binding, and for this reason, we continue to defer to the BIA's definition of crime of child abuse, neglect, or abandonment as including child endangerment offenses that pose a sufficiently high level of risk of harm to a child.")

[27] Despite this ideal, there is growing consensus that the enforcement of crimes, despite being written in a "color-blind and class-blind manner," are enforced unequally. *See* The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S Criminal Justice System,* Apr. 19, 2018, https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ ("United Nations Report"). In a 2018 report submitted to the United Nations, the Sentencing Project noted that "the racial disparity that pervades the U.S. criminal justice system, and for African Americans in particular. African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely." *Id*. More pointedly, "[t]he United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color." *Id.*

[28] *See* Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. Davis L. Rev. 2067, 2139–45 (2017) (criticizing IIRIRA's repeal of remedies that had permitted an individual immigration judge to assess the seriousness of the crime and dangerousness of an offender for IIRIRA's directive to instead apply crime-based deportation grounds in a categorical manner); Eisha Jain, *Prosecuting Collateral Consequences*, 104 Geo. L.J. 1197, 1209–10 (2016) (discussing how collateral consequences may be arbitrary when "[t]he underlying criminal record is used as a proxy, even though it may not correlate in a meaningful way to risk assessment or to the relevant regulatory priority.").

[29] *See* United States v. Nesbeth, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016) (Block, J.).

[30] *Id.*

[31] *See* United States v. Valdivia-Flores, 876 F.3d 1201, 1210 (9th Cir. 2017) (O'Scannlain, J., concurring) (lamenting that whereas the Armed Career Criminal Act can adjust for the actual seriousness of an offender in sentencing, the immigration context does not allow for such correction); United States v. Carthorne, 726 F.3d 503, 523 (4th Cir. 2013) (Davis, J., dissenting) (discussing frustration with overinclusive nature of categorical approach that results in holding an assault conviction a crime of violence when the underlying conduct arose from "a 26–year–old drug-addicted confessed drug dealer, abandoned by his family at a very young age and in and out of juvenile court starting at age 12, has more than fourteen years added to the top of his advisory sentencing guidelines range . . . because, as a misguided and foolish teenager, he spit on a police officer."); *but see* Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigr. L.J. 257, 263 (2012) ("[A] robust version of the categorical approach not only promotes administrative efficiency, but also has the potential to serve as a proxy for the incorporation of otherwise-absent substantive and procedural protections in the immigration law framework governing noncitizens with criminal convictions.").

[32] Salvador Rizzo, *President Trump's Misconceptions About Immigration Courts And Law,* Wash. Post (June 26, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/26/president-trumps-misconceptions-about-immigration-courts-and-law/?utm_term=.55e796b4d506.

[33] 533 U.S. 289, 296 n.5 (2001).

[34] Indeed, on April 22, 2019, Senior Judge Jack Weinstein retroactively applied the First Step Act of 2018, the transformative federal criminal justice reform law, to order the immediate release of a man sentenced to a 12-year prison term. In doing so, he noted that "[e]vidence has mounted that the country's sprawling system of punishment was counterproductive, resulting in high recidivism rates. ***Studies showed that even brief stays in jail disrupts people's lives and [often] make them more likely to commit crime.***" United States v. Simons, 375 F. Supp. 3d 379, 385 (E.D.N.Y. 2019) (quoting Shaila Dewan & Alan

Binder, *Just How Much of an Overhaul Is This Overhaul of the Nation's Criminal Justice System?* N.Y. Times, Nov. 16, 2018, https://www.nytimes.com/2018/11/16/us/prison-reform-bill.html) (emphasis added).

[35] Steven Grossman, *Hot Crimes: A Study in Excess*, 45 Creighton L. Rev. 33, 40 & n.48 (2011).

[36] Kari E. Hong, *Parens Patri(Archy): Adoption, Eugenics, and Same-Sex Couples*, 40 Cal. W. L. Rev. 1, 31–33 (2003).

[37] *Id.* (quoting Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 489 (2003) (quoting findings from House report)).

[38] *See* Deena Prichep, *To Raise Confident, Independent Kids, Some Parents Are Trying To "Let Grow,"* NPR (Sep. 3, 2018).

[39] *See* Mical Raz, *Unintended Consequences of Mandatory Reporting Laws,* Pediatrics Perspectives 1–2 (2017).

[40] Anne C. Peterson, Joshua Joseph, and Monica Feit, eds, *New Directions in Child Abuse and Neglect Research,* Institute of Medicine and National Research Council of the National the Academies 32–33 (2014) (hereinafter "National Research Council Report").

[41] *Id.* at 33.

[42] *Id*.

[43] *Id*.

[44] National Research Council Report, at 33.

[45] *See* Jacqueline Mabatah, *Blaming the Victim? The Intersections of Race, Domestic Violence, and Child Neglect Laws*, 8 Geo. J.L. & Mod. Critical Race Persp. 355, 355–56, 361–64 (2016) (discussing Texas' prosecution of battered women for child neglect); Adam Banner, "*Failure to Protect" Laws Punish Victims of Domestic Violence,* Huff Post (Feb 3, 2015) (discussing Oklahoma's policy to prosecute battered women for child neglect).

[46] *See generally Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1064 (9th Cir. 2015) (upholding agency rule that finds otherwise eligible battered spouses ineligible for relief based on certain criminal convictions) (citing 8 U.S.C. § 1229b(b)(2)).

[47] *See* Donna St. George, "*Free Range" Parents Cleared In Second Neglect Case After Kids Walked Alone*, Wash Post (Jun 22, 2015).

[48] *See id.*

[49] Nicole Vota, *Keeping the Free-Range Parent Immune From Child Neglect: You Cannot Tell Me How to Raise My Children,* 55 Fam. Ct. Rev. 152, 155 n.76 (2017).

[50] *Id.*; *see also* Emily Cohen, M*om Charged with Child Endangerment For Letting Kids Go To Mall Alone,* ABC News (July 20, 2009).

[51] *See* Caitlin Schmidt, *Florida Mom Arrested After Letting 7-Year-Old Walk To The Park Alone,* CNN (Aug 1, 2014).

[52] *See Parents Charged With "Neglect" After 11-Year-Old Plays In Yard For 90 Minutes*, Fox News (July 14, 2015).

[53] Nicole Pelletiera, *Utah's 'Free-Range Parenting' Law Is Now Official,* ABC News (May 8, 2018.

[54] *Martinez-Cedillo I*, 896 F.3d at 1002 (Wardlaw, J., dissenting)

[55] Id.

[56] 736 F.3d at 905 n.3.

[57] *See S.C. Mom's Arrest Over Leaving Daughter Alone In Park Sparks Debate*, CBS News (July 28, 2014).

[58] Sarah Jarvis, *Mom Who Left Kids In Car Sentenced To 18 Years Probation,* USA Today (May 15, 2015).

[59] *Ibarra*, 736 F.3d at 911.

[60] *See generally* Kansas v. Hendricks, 521 U.S. 346, 357 (1997) (upholding Kansas' lengthy civil commitment of a man convicted of "indecent liberties" with a child after his prison term was complete, rejecting challenges that the post-conviction civil commitment was a punishment); United States v. Kebodeaux, 570 U.S. 387, 389 (2013) (upholding retroactive application of registration requirements of the Sex Offender Registration and Notification Act ("SORNA") to a man whose sex offense had a three month prison term).

[61] Julie Odegard, *The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents*, 11 Law & Ineq. 533, 558 (1993) (discussing efforts and proposing new policies to support disabled parents who seek to raise their own children with accommodations);

[62] *See* Matter of Deanna E.R., 93 N.Y.S.3d 375, 377 (N.Y. App. Div. 2019) (discussing that, before determining termination of parental rights,

[63] Note, *Unified Family Courts and the Child Protection Dilemma*, 116 Harv. L. Rev. 2099, 2102 (2003) (discussing how a 1997 federal law that seeks to adopt children who have been neglected or abused conflicts with state policies that seek family preservation first before terminating the parent-child relationship).

[64] *Martinez-Cedillo I*, 896 F.3d at 1002 (Wardlaw, J., dissenting)

[65] Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-640 (Sept. 30, 1996).

[66] 104 H.R. 2202 Engrossed Amendment Senate, § 218 (May 2, 1996) (enacted).

[67] *Id.* (emphasis added).

[68] Merriam-Webster defines the term "against" to mean "in opposition or hostility to." *Merriam-Webster*, merriam-webster.com, https://www.merriam-webster.com/dictionary/against (last visited Nov. 26, 2018).

[69] 104 Cong. Rec. S4059 (daily ed. Apr. 24, 1996) (statement of Sen. Dole).

[70] 142 Cong. Rec. 10,067 (daily ed. May, 2, 1996) (statement of Sen. Dole) (emphasis added).

[71] 104 Cong. Rec. S4059 (daily ed. Apr. 24, 1996) (statement of Sen. Coverdell).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 509 (BIA 2008) (holding that fourth-degree assault in Washington is not a "crime of child abuse").

[76] *Id.*

[77] Fregozo v. Holder, 576 F.3d 1030, 1036–38 (9th 2009) (noting that Congress enacted the provision to "facilitate[e] the removal of child abusers").

[78] *See* Matter of Soram, 25 I. & N. Dec. 378, 381 (BIA 2010).

[79] *See id.* at 382.

[80] *See e.g.*, Florez v. Holder, 779 F.3d 207, 209 (2d Cir. 2015); Pierre v. U.S. Att'y Gen., 879 F.3d 1241, 1250 (11th Cir. 2018).

[81] *See* Ibarra v. Holder, 736 F.3d 903, 910 (10th Cir. 2013) (holding that the BIA's interpretation of the crime of child abuse deportability ground to include "criminally negligent non-injurious conduct" is unreasonable).

[82] *See id.* at 911, 917.

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Still hoping that courts will revive a general liberty or expression right to student dress freedom as @djuna22 and I advocated in @HarvardCRCL. In the meantime, Equal Protection, Free Exercise, and compelled speech doing a decent job policing the boundaries of gov't overreach.
https://twitter.com/galenleigh/status/1199442702582059008

> **galen sherwin** @galenleigh
> Another thing to be thankful for this week: declaratory judgment finding that the provision of Charter Day School dress code requiring girls to wear skirts violates Equal Protection, & order permanently enjoining the school from establishing or enforcing the provision. Justice!

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As someone who used to assist accused students in Title IX proceedings, I think I'm in a good position to say that DeVos's "due process" regs are unnecessary and dangerous. When they were proposed, I wrote about it for @HarvardCRCL's blog:

http://harvardcrcl.org/why-betsy-devo...
https://twitter.com/azbrodsky/status/1192104171664822274

> **Alexandra Brodsky** @azbrodsky
>
> We are expecting @BetsyDeVosED's final regulations on Title IX and sexual harassment within the month. Based on the previously published proposed rules, we have good reason to think they will be bad.

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In light of today's finding against the Trump foundation, I've written a post for the @HarvardCRCL Amicus blog on the importance of transparency in ideological nonprofits.
https://harvardcrcl.org/nonprofits-dafs-and-campaigns-a-call...
https://twitter.com/Fahrenthold/status/1192535254919237632

> **David Fahrenthold** @Fahrenthold
>
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>
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