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## The Challenge of Seeing Justice Done in Removal Proceedings

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## The Challenge of Seeing Justice Done in Removal Proceedings

Jason A. Cade\*

*Prosecutorial discretion is a critical part of the administration of immigration law. This Article considers the work and responsibilities of the Immigration and Customs Enforcement (ICE) trial attorneys, who thus far have not attracted significant scholarly attention, despite playing a large role in the ground-level implementation of immigration law and policy. The Article makes three main contributions. First, I consider whether ICE attorneys have a duty to help ensure that the removal system achieves justice, rather than indiscriminately seek removal in every case and by any means necessary. As I demonstrate, trial attorneys have concrete obligations derived from statutory provisions, case law, and administrative guidance to seek legitimate objectives, take steps to ensure procedural justice, and exercise equitable discretion in appropriate cases. Second, I argue that the removal system lacks serious structural features to ensure these obligations are met, and as a result, prosecutorial discretion and prosecutorial conduct vary significantly across and within jurisdictions. Little prevents ICE attorneys from indiscriminately pursuing enforcement objectives at the expense of seeing justice done. This matters today, more than ever, because of the categorical and categorically unforgiving nature of the modern statutory removal scheme and the risk of erroneous detentions and removals. Third, the Article develops important parallels between ICE attorneys and criminal prosecutors, suggesting that the immigration system might borrow some of the administrative features*

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*employed in criminal systems to encourage earlier prosecutorial screening of cases for positive discretion and equalize some of the power asymmetries that can result in unjust outcomes. I sketch the contours of four such reforms that could be readily implemented without the need for congressional action.*

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## I. INTRODUCTION

The Executive Branch enjoys an unmatched degree of discretion in its enforcement of immigration laws against deportable noncitizens. This is so in part for doctrinal reasons: while courts are reluctant to scrutinize enforcement decisions in all regulatory arenas,<sup>1</sup> the United

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1. Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (articulating the judicial presumption against reviewing agency's decisions not to undertake enforcement action).

States Supreme Court's extreme deference to legislative and executive policy decisions in the immigration context renders selective prosecution challenges nearly nonjusticiable.<sup>2</sup> There is also a systemic basis for the great discretion. While congressional funding levels permit the removal of approximately 400,000 noncitizens per year, the current unauthorized population in the United States is estimated at 11 million.<sup>3</sup> There are also millions more lawfully present noncitizens who are potentially removable on the basis of criminal history and immigration violations.<sup>4</sup> When the pool of potential targets for enforcement dwarfs the government's resources, discretion inevitably comes into play, whether at the macro level of setting policy or the micro level of implementation in individual cases. Indeed, the Court observed recently that enforcement discretion is a "principal feature" of the immigration system.<sup>5</sup>

While every presidential administration since the enactment of the first exclusion and deportation laws has developed its own priorities for the deployment of enforcement resources,<sup>6</sup> a number of developments have thrust the role of immigration prosecutorial discretion into the spotlight. These include the rise of state and local participation in the removal system,<sup>7</sup> the Department of Homeland Security's (DHS) high-profile establishment of tiered priorities for

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2. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999) (rejecting the challenge to selective enforcement of immigration laws based on constitutionally protected associational activities); *Carranza v. Immigration & Naturalization Serv.*, 277 F.3d 65, 72 (1st Cir. 2002) ("[T]he Court has made it plain that no general constitutional right exists for an alien . . . to review prosecutorial deliberations in order to forfend removal."); see Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 628-30 (2006).

3. See Memorandum from John Morton, Dir., ICE, to All ICE Employees, ICE (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (stating that the immigration system can process only about 400,000 of the estimated 11 million undocumented persons in the United States per year); Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RES. CENTER 9 tbl.2 (Feb. 1, 2011), <http://www.pewhispanic.org/files/reports/133.pdf> (showing the estimates of the unauthorized population fluctuated between 10 and 12 million between the years 2004 and 2010).

4. See discussion *infra* Part II.A.

5. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

6. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511-21 (2009) (explaining that executive immigration enforcement priorities have shifted over time, as illustrated through various administrations' policies targeting criminal justice systems, workplaces, or private homes).

7. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008).

immigration enforcement,<sup>8</sup> and the Obama Administration's decision in 2012 to categorically afford temporary reprieves from deportation to undocumented youth who meet certain criteria.<sup>9</sup>

Such events have sparked a burgeoning literature on the role of prosecutorial discretion in the immigration removal system. Most scholarship in this area focuses on the propriety of the Obama Administration's categorical enforcement priorities.<sup>10</sup> Others have explored the influence that nonfederal actors have on the implementation of those priorities, for example, through state and local immigration arrests<sup>11</sup> or through the choices prosecutors make in the criminal justice system.<sup>12</sup> This Article contributes to this literature by

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8. See, e.g., Memorandum from John Morton, Assistant Sec'y, ICE, to All ICE Employees, ICE (June 30, 2010), <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf> (setting forth the agency's priorities for removal in light of limited resources).

9. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Oct. 27, 2014).

10. See, e.g., Cox & Rodríguez, *supra* note 6, at 511-21 (explaining that Congress, through legislation that vastly expands the population of deportable noncitizens in the United States, has conferred de facto discretionary authority to the Executive Branch to determine which deportable noncitizens to pursue); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (arguing that categorically extending deferred action to qualifying undocumented youth violates the President's duty to execute the laws faithfully); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (analyzing historical antecedents of deferred action policies and exploring parallels between prosecutorial discretion in criminal and immigration law); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, YALE L.J.F. 167 (Dec. 20, 2012), <http://www.yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade> (arguing that Executive Branch determinations about immigration enforcement priorities, including categorical deferred action programs, are supported by statutory authority and policy grounds); Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, TEX. L. REV. SEE ALSO 64-66 (2013), <http://www.texaslrev.com/wp-content/uploads/Wadhia.pdf> (arguing that the DACA prosecutorial discretion program is legally justified).

11. Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1433-37 (2011); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1848-58 (2011) (explaining how developments in immigration enforcement allow state and local decision makers to "act as gatekeepers, filling the enforcement pipeline with cases of their choice"); Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, COLUM. L. REV. SIDEBAR 182-83 (Nov. 2013), <http://columbialawreview.org/wp-content/uploads/2013/11/Cade-113-Colum.-L.-Rev.-Sidebar-180.pdf> (summarizing how cooperative relationships, data-sharing technology, and state legislation have given state and local officers a significant role in selecting immigrants referred for removal hearings).

12. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1 (2012); Jason A. Cade, *The Plea-Bargain Crisis*

turning attention to important but undertheorized players in immigration enforcement discretion: the Immigration and Customs Enforcement (ICE) attorneys who represent the government in immigration court.<sup>13</sup>

ICE's trial attorneys are charged with "protecting the homeland" by diligently litigating removal cases against "undesirable" noncitizens, especially those who pose security risks, attempt to obtain immigration benefits through fraud, or have a criminal history.<sup>14</sup> To do this work, they must establish grounds for removal, test the credibility of claims for asylum or other discretionary relief, and represent the government's position on the necessity of a noncitizen's detention. In light of their enforcement-oriented responsibilities within an adversarial removal system, trial attorneys have sometimes been characterized as the government's "gladiators" or the nation's "gatekeepers."<sup>15</sup>

Discretion permeates the work of attorneys, who are variably referred to as trial attorneys, ICE prosecutors, or assistant chief counsel. They decide whether to pursue removal, which charges to levy, what trial tactics to employ, and whether to appeal adverse decisions in the hundreds of thousands of cases that make their way through our nation's immigration courts every year. These discretionary decisions matter for several reasons. First, the categorical and categorically unforgiving nature of the current immigration code makes vast numbers of noncitizens removable on

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*for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553 (2013).

13. A few recent or forthcoming articles touch on various aspects of the role of ICE's trial attorneys in immigration enforcement. See, e.g., Cade, *supra* note 11, at 185, 201-03 (analyzing ICE prosecutors' gate-keeping role in the immigration enforcement system where there have been upstream violations of constitutional rights); Erin B. Corcoran, *Seek Justice, Not Just Deportation: How To Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. (forthcoming 2014) (arguing that ICE attorneys have ethical duties to seek justice); Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014) (analyzing discovery asymmetries between ICE and noncitizen respondents); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195 (2014) (arguing that DHS's focus on criminal enforcement has frustrated the implementation of prosecutorial discretion priorities throughout the agency).

14. See discussion *infra* Part II.C.1.

15. See, e.g., Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 612 (2000) ("The role of the INS is that of a gatekeeper, not a disinterested party concerned with assessing the needs of children."); Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 655 (2012) (describing ICE prosecutors as the government's "gladiator-attorneys").

the basis of immigration infractions or low-level criminal activity, while preventing immigration judges from even considering equitable relief.<sup>16</sup> Enforcement discretion thus injects flexibility into an otherwise rigid system, so that the complexity of an individual's situation may be taken into account when necessary to avoid an overly harsh application of statutory law. Second, ICE prosecutors are frontline gatekeepers of a system characterized by the pervasive use of detention, extreme backlogs, and weak process rights relative to the stakes. These features elevate both the potential for erroneous results and the costs to taxpayers, noncitizens, and their families.

In light of the vast space for discretion in the removal system and the high stakes, do ICE attorneys have a duty to “seek justice”? Some scholars and courts have suggested that, like other government attorneys, they do, but the contours of this duty in immigration proceedings have never been clearly or comprehensively defined. One contribution of this Article, then, is to show that ICE prosecutors do have certain concrete responsibilities—expressed in statutory provisions, case law, and agency guidance—to seek legitimate objectives, take steps to ensure procedural justice, and exercise equitable discretion in appropriate cases. Together these obligations comprise at least the minimal components of a prosecutorial duty to help the removal system achieve justice, rather than to pursue removal orders in every case and by any means necessary.<sup>17</sup>

While their dual obligations to effective enforcement and individualized justice will sometimes clearly align, the available evidence suggests that in many cases ICE attorneys are ineffectively identifying cases in which zealous enforcement should be tempered by discretion and the pursuit of justice. Indeed, significant disparities in government attorneys' approach to the exercise of discretion and litigation tactics mark the immigration system. To begin with, the application of agency guidelines for equitable discretion in appropriate cases varies greatly from jurisdiction to jurisdiction, as indicated by data showing that just five immigration hearing locations account for more than half of all discretionary case closures nationwide in recent years.<sup>18</sup> Other findings indicate that low priority or humanitarian cases are closed inconsistently, especially in cases involving pro se or detained noncitizens.<sup>19</sup>

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16. See discussion *infra* Part II.A.

17. See discussion *infra* Part II.C.2.

18. See discussion *infra* Part III.A.

19. See discussion *infra* Part III.A.

ICE's failure to adequately screen the merits of the cases it pursues is also evidenced by recent data on immigration court outcomes showing that despite statutory rigidity, immigration judges ultimately reject ICE's request for removal orders at an astonishingly high rate: almost 50% of the time.<sup>20</sup> Finally, court observers, advocates, and federal judges have noted the fervent manner in which some ICE attorneys prosecute removal cases, for example by pursuing inaccurate or inflated grounds for removal; declining to negotiate, stipulate, or even communicate with noncitizens or their representatives before hearings; failing to turn over evidence bearing on removability; and sometimes opposing discretionary relief no matter how clear the merits or how strong the equities.<sup>21</sup> These observations tend to be anecdotal, but they are pervasive enough to warrant further scrutiny of the role of ICE in immigration court.

Two forces in particular appear to motivate some trial attorneys to prioritize an aggressive one-size-fits-all approach over nuanced discretion and attention to individual justice. First, ICE's law-enforcement, national-security mission—long a feature of the immigration agency's culture, but one that became especially prominent following the terrorist attacks of September 11, 2001 (9/11)—may have overridden its agents' concomitant obligation to ensure the system does not deport those who have the right to stay or upon whom the law falls too harshly.<sup>22</sup> This hypothesis has intuitive appeal and is supported by literature that posits the general tendency of "prosecutor bias" to subvert other agency objectives.<sup>23</sup> Second, the vast population of potentially deportable noncitizens relative to current prosecutorial and adjudicative resources, in combination with a steady pipeline of immigration arrests by both federal agents and nonfederal "force multipliers,"<sup>24</sup> has created overwhelming caseloads in many immigration courts.<sup>25</sup> Excessive workloads lead to prosecutorial inattention.<sup>26</sup> The agency itself has acknowledged that its attorneys

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20. See discussion *infra* Parts III.B, V.E.

21. See discussion *infra* Parts III.B-D.

22. See *Developments in the Law—Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1656 (2013); Rabin, *supra* note 13, at 209-35; discussion *infra* Parts II.C.1, IV.A.

23. See discussion *infra* Part IV.A.

24. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005).

25. See discussion *infra* Part IV.B.

26. Cf. Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (making this observation about overworked criminal prosecutors).



have “extremely limited” time for preparation, sometimes averaging as little as twenty minutes per case.<sup>27</sup>

The upshot is that while the Executive Branch plainly expects its attorneys to help facilitate justice in removal proceedings, it has failed to provide them with structural mechanisms and incentives sufficient to consistently overcome institutionalized enforcement biases and intense workloads. As a result, little constrains ICE attorneys from privileging their protector role over their minister-of-justice role, even at the expense of consistency, accuracy, fairness, and adherence to agency directives intended to avoid undue harshness and make the most of limited resources. ICE’s enforcement culture and workload burdens are unlikely to change, at least in the near future. So the question facing the Executive Branch is whether and how it can adopt realistic measures inducing its agents to exercise discretion more consistently and to litigate more fairly.

I argue that the government should look to the nation’s criminal systems, where comparable enforcement biases and workload pressures complicate prosecutors’ navigation of similar obligations to enforcement and justice. As criminal law scholars have observed, the challenges presented by these competing responsibilities are very real, even for the most seasoned and conscientious prosecutors.<sup>28</sup> Although they are not homogenous, the nation’s federal and state criminal systems make use of various pretrial procedural rules and design features that significantly increase the likelihood that cases will be screened in a meaningful way and that power asymmetries between the government and the defendant will be ameliorated. In particular, this Article focuses on four features of criminal systems: (1) disclosure obligations, (2) vertical prosecution, (3) responsibility and authority to screen and decline removal cases, and (4) prehearing conferences. These mechanisms, which are rooted primarily in statutory or administrative policy, rather than in constitutional commands, impose manageable costs relative to likely gains and could be implemented

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27. Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All Office of the Principal Legal Advisor Chief Counsel, AM. U. WASH. C.L. 1 (Oct. 24, 2005), <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092975-ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05.pdf>.

28. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 15-18 (2007); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors’ Offices Learn from Their Lawyers’ Mistakes?*, 31 CARDOZO L. REV. 2161 (2010).

through agency policy changes or rulemaking, without the need for congressional legislation.

The Article proceeds as follows. Part II provides background on the current removal system, ICE prosecutors' role within it, and the sources of their obligations as both protectors and ministers of justice. Part III shows that discretion is exercised inconsistently under the current system and that many trial attorneys litigate removal cases in ways that impede, rather than advance, the cause of justice. Part IV outlines the most plausible explanations for this state of affairs: a culture of enforcement stringency and the reality of a heavy workload, neither of which is likely to change. Accordingly, I argue in Part IV.C that DHS should look to the criminal system, where similar forces that work against prosecutorial justice-seeking duties are counteracted by measures that improve prosecutorial accountability and reduce power imbalances. Part V focuses on four mechanisms in particular that would work to increase ICE prosecutors' attentiveness to all their duties. The net result should be earlier screening, improved prehearing communication and information flow, and greater exercise of discretion in favor of noncitizens, thus nudging ICE attorneys to fulfill their obligation to help the immigration system achieve justice. I address implementation concerns in Part V.E.

## II. ICE TRIAL ATTORNEYS' ROLE IN IMMIGRATION ENFORCEMENT

### A. *The Current Statutory Removal Scheme*

The Immigration and Nationality Act (INA) makes noncitizens subject to detention and deportation on the basis of a wide range of immigration violations and minor crimes, providing for only narrow grounds of relief. Many commentators, including myself, have written on the expansive and unforgiving nature of modern statutory grounds for removal.<sup>29</sup> I briefly revisit the subject here only to provide context for unfamiliar readers and to underscore the importance of

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29. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1479-80, 1483 (2010) (discussing Congress's elimination of section 212(c)'s other forms of discretionary relief for persons with criminal convictions); Cade, *supra* note 12, at 1752-63, 1775-90; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651-52 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482-86 (2007); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-41 (2000).

prosecutorial discretion in (1) reducing the likelihood of erroneous detentions or deportations and (2) identifying cases where strict enforcement would lead to unjust results.

For much of the twentieth century, statutory deportation grounds were generally subject to limitations that prevented lawful-resident noncitizens from being deported on the basis of conduct that occurred long ago or after they had been lawfully admitted for a significant period of time.<sup>30</sup> Additionally, those who were subject to deportation were usually afforded the opportunity to argue that their positive equities and connections in the United States outweighed the gravity of their infractions, even where convicted of serious criminal activity.<sup>31</sup>

In the 1990s, the United States Congress widely expanded the categories of deportable offenses while sharply constricting opportunities for discretionary relief from removal at both the federal and state levels.<sup>32</sup> Many minor offenses now fall within the statute's capacious list of "aggravated felonies," which trigger mandatory detention, deportation, and a permanent bar on lawful return to the United States.<sup>33</sup> For example, simple marijuana possession with a one-year sentence and misdemeanor battery with a year of probation can qualify as aggravated felonies, as can convictions for selling ten dollars' worth of marijuana, shoplifting fifteen dollars' worth of baby clothes, or forging a check for less than twenty dollars.<sup>34</sup> Noncitizens deportable on the aggravated felony ground are ineligible for most forms of adjudicative discretionary relief, regardless of the strength of their ties in the United States, the passage of time since their offense, or whether their offense was classified as an aggravated felony at the time of conviction.<sup>35</sup>

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30. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 671-73 (7th ed. 2012); Neuman, *supra* note 2, at 621-24.

31. See Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, -597.

32. See IIRIRA, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 22, 28, and 42 U.S.C.); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 and 29 U.S.C.).

33. 8 U.S.C. § 1101(a)(43)(A)-(U) (2012); see also *id.* § 1182(a)(9)(A)(i) ("Any alien . . . who again seeks admission . . . at any time in the case of an alien convicted of an aggravated felony[] is inadmissible.").

34. See Cade, *supra* note 12, at 1759.

35. Before 1996, immigration judges were authorized by section 212(c) of the INA to determine whether deportation was warranted in individual cases based on factors like the nature of the offense, the length of the noncitizen's residence, the hardship to family members

Crimes involving moral turpitude (CIMT), another deportation category, also can include relatively minor offenses, even if the criminal punishment levied consists only of a fine or community service.<sup>36</sup> For example, CIMTs include petty shoplifting,<sup>37</sup> theft of service offenses like turnstile jumping,<sup>38</sup> misdemeanor indecent exposure,<sup>39</sup> and passing bad checks.<sup>40</sup> Although not explicitly prohibited from seeking discretionary relief from an immigration judge, permanent residents deportable under this provision are foreclosed from establishing the seven-year residency requirement to qualify for cancellation of removal due to a stop-time rule.<sup>41</sup>

Any controlled substance offense makes a lawfully present noncitizen deportable and subject to mandatory detention, with the narrow exception of a single conviction for simple possession of thirty grams or less of marijuana.<sup>42</sup> Convictions classified as domestic violence crimes trigger another ground for deportation.<sup>43</sup> Many states punish misdemeanor drug offenses only with small fines,<sup>44</sup> but the leniency of punishment is not a relevant factor in triggering the controlled substance or domestic violence grounds of removal, even if it means the state was not constitutionally required to afford the defendant a right to counsel or trial by jury.<sup>45</sup> Indeed, even where

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that would be caused by the noncitizen's deportation, evidence of rehabilitation, and so forth. INA § 212(c) (codified as amended at 8 U.S.C. § 1182).

36. 8 U.S.C. § 1227(a)(2)(A)(i) (CIMT within five years of admission). Two CIMTs make a noncitizen deportable regardless of whether either was committed within five years of admission. *Id.* § 1227(a)(2)(A)(ii).

37. *Da Rosa Silva v. Immigration & Naturalization Serv.*, 263 F. Supp. 2d 1005, 1011 (E.D. Pa. 2003) (holding that shoplifting is a crime constituting moral turpitude).

38. *See Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

39. *See In re Cortes Medina*, 26 I. & N. Dec. 79 (B.I.A. 2013) (holding that a violation of section 314(1) of the California Penal Code, which includes misdemeanor-level indecent exposure, is a CIMT).

40. *See, e.g.*, N.J. STAT. § 2C:21-2.4 (2014) (classifying the offense of passing bad checks as a "disorderly persons offense"); *Baer v. Norene*, 79 F.2d 340, 341 (9th Cir. 1935) (describing check forgery as an offense that involves moral turpitude); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 312-13 (1997) (explaining that passing bad checks is a crime that may involve moral turpitude under deportation law).

41. *Morawetz*, *supra* note 29, at 1941 (observing that the commission of a crime stops the accumulation of seven years' residence for purposes of qualifying for cancellation of removal).

42. 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

43. *Id.* § 1227(a)(2)(E)(i).

44. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11357(b) (West 2007); MINN. STAT. § 152.027(4) (2013); NEV. REV. STAT. § 453.336 (2013); N.J. STAT. § 2C:35-10(a)(4) (2014); N.Y. PENAL LAW §§ 221.05, .10 (McKinney 2008).

45. *In re Cuellar-Gomez*, 25 I. & N. Dec. 850, 851-55 (B.I.A. 2012) (holding that a municipal marijuana violation where the defendant was not afforded a right to counsel or

noncitizens charged with drug, domestic violence, or other offenses enter a diversionary program, in which criminal adjudication and sentencing is deferred and dismissed upon successful completion of the program's requirements, federal law treats the result as a conviction for immigration purposes if the noncitizen had to plead guilty to qualify for the program.<sup>46</sup> An emerging but robust body of work suggests that misdemeanor convictions are often unreliable indicators of guilt, due to the exploding number of misdemeanor prosecutions and weak process rights in many lower-level courts throughout the United States, despite the significant collateral consequences that can follow such convictions.<sup>47</sup> Yet most convictions leading to immigration consequences are in fact misdemeanors.<sup>48</sup>

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advised of potential immigration consequences counts as a conviction for immigration purposes); Cade, *supra* note 12, at 1778 (discussing states that do not provide counsel to misdemeanor defendants where incarceration is not at issue).

46. See Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 380-81, 394-96 (2012) (discussing the tension between the operation of federal immigration law and states' goals in diversionary or deferred adjudication programs); *The Immigration Consequences of Deferred Adjudication Programs in New York City*, N.Y.C. BAR 1-4 (June 2007), <http://www.nycbar.org/pdf/report/Immigration.pdf>. Many states require a plea of guilty before a defendant can enter a diversionary program. See, e.g., MICH. COMP. LAWS § 600.1068 (2014) (declaring that the drug treatment diversionary program requires a guilty plea); *id.* § 769.4a (declaring that the domestic violence diversionary program requires a person be found guilty or plead guilty); N.Y. CRIM. PROC. LAW § 216.05 (McKinney 2007) (declaring that a drug treatment diversionary program requires a guilty plea); OKLA. STAT. tit. 43A, § 3-452 (2013) (same).

47. John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors in the United States*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 20 (Erik Luna & Marianne L. Wade eds., 2012); Cade, *supra* note 12, at 1753-56; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); see also Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N CRIM. DEF. LAW. 11 (Apr. 2009), <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> (explaining that the large volume of misdemeanor cases has led to innocent defendants being forced to plead guilty); *No Day in Court: Marijuana Possession Cases and the Failure of the Bronx Criminal Courts*, BRONX DEFENDERS (May 2013), <http://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf> (explaining how insufficient procedural safeguards in the Bronx misdemeanor courts have left many defendants unable to effectively contest the charges leveled against them); The Spangenberg Grp., *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, N.Y. CTS. 143 (June 16, 2006), <http://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf> (arguing that a lack of funding has left New York's indigent defense system unable to provide effective representation).

48. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

As for noncitizens who are not lawful permanent residents, the statute prescribes removal for those who entered without inspection,<sup>49</sup> as well as for a wide variety of immigration violations committed after lawful admission.<sup>50</sup> There is no statutory exception for noncitizens who entered the United States as young children and never left. Eligibility for consideration of discretionary relief from removal is very tightly constrained: the noncitizen must show ten years of continuous physical presence in the United States, ten years of “good moral character,” and that removal would result in “exceptional and extremely unusual hardship” to their spouse, parent, or child—as long as the qualifying family member is a citizen or lawful permanent resident.<sup>51</sup> Commission of a removable offense, or service of the removal proceedings charging document, stops the accrual of time for purposes of establishing continuous residence.<sup>52</sup> Additionally, only 4,000 persons, whether lawful permanent residents or not, may be granted cancellation of removal per year.<sup>53</sup>

In sum, immigration violations and minor convictions may trigger removal for noncitizens despite their lawful presence and without respect to their equities. Outside of the strict criteria described above, the statute does not limit removal based on consideration of the length of residence, contributions to society, or the number and strength of relationships with U.S. citizen family members. This sweeping, categorical, and unforgiving approach thus elevates the role of enforcement discretion, which must compensate for the statute’s lack of nuance.

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49. See 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (“[A noncitizen is inadmissible if] present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General . . .”).

50. See, e.g., *id.* § 1227(a)(1)(A) (stating that a noncitizen is deportable if they were inadmissible for any reason when they entered the United States); *id.* § 1227(a)(1)(B) (stating that a noncitizen is deportable for overstaying an authorized period of admission); *id.* § 1227(a)(1)(C)(i) (stating that a noncitizen is deportable for violating the conditions of admission); *id.* § 1227(a)(3) (stating that a noncitizen is deportable for failing to register or provide notice of a change of address); *id.* § 1182(a)(9)(B) (stating that noncitizens in the United States who previously accrued at least six months of unlawful presence and then departed the United States are inadmissible for various statutory periods and are therefore removable).

51. See *id.* § 1229b(b). The exceptional and extremely unusual hardship threshold is applied rigorously. See *In re Recinas*, 23 I. & N. Dec. 467 (B.I.A. 2002).

52. See 8 U.S.C. § 1229b(d)(1).

53. See *id.* § 1229b(e).

### B. Overview of Removal Proceedings

Removal proceedings are administrative adjudication hearings intended to determine a noncitizen's eligibility to remain in the United States. Immigration judges adjudicate removal proceedings and related matters under the auspices of the Executive Office for Immigration Review (EOIR), a subagency within the Department of Justice (DOJ).<sup>54</sup> Immigration judges are "career attorneys" employed for indefinite terms.<sup>55</sup> Immigration court is adversarial: trial attorneys prosecute on behalf of the government while the noncitizen appears pro se unless they can retain an attorney. There is no right to appointed counsel in immigration court, and just under half of all noncitizens proceed without representation.<sup>56</sup>

Removal proceedings are commenced through a charging document called a Notice To Appear (NTA).<sup>57</sup> The NTA must specify "[t]he charges against the alien and the statutory provisions alleged to have been violated."<sup>58</sup> The immigration judge acquires jurisdiction once an NTA has been issued to a respondent and filed in the immigration court.<sup>59</sup> Although the trial attorneys have exclusive authority to conduct removal prosecutions, a variety of ICE officers, as well as officers from other agencies within DHS, are also authorized to initiate such proceedings.<sup>60</sup> In fact, the trial attorneys themselves often

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54. *EOIR at a Glance*, DOJ (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

55. 8 U.S.C. § 1101(b)(4); Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, ADMIN. CONF. U.S. 7 (June 7, 2012), <http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>; *Judicial Oversight v. Judicial Independence*, TRAC (2008), [http://www.trac.syr.edu/immigration/reports/194/include/side\\_4.html](http://www.trac.syr.edu/immigration/reports/194/include/side_4.html).

56. *FY 2013 Statistics Yearbook*, DOJ F1 (Apr. 2014), <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (reporting that in FY2012, 50% of respondents were represented in removal proceedings). Noncitizens do enjoy the "privilege of being represented, at no expense to the Government, by counsel of the [noncitizen's] choosing who is authorized to practice in such proceedings." 8 U.S.C. § 1229a(b)(4). Such representation frequently does not involve a lawyer, as permitted "counsel" in immigration matters includes law students, EOIR-accredited nonlawyer representatives, and, in certain circumstances, other "reputable individuals." 8 C.F.R. §§ 1292.1-2 (2014).

57. ARNOLD & PORTER LLP, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1-5, 1-10 to -11 (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf). The NTA is Form I-862. *Id.* at 1-18 n.98.

58. 8 U.S.C. § 1229(a)(1)(D). NTAs must also contain various notices to the respondent. *See id.* § 1229(a).

59. 8 C.F.R. § 1003.14.

60. *See id.* § 239.1 (listing officers authorized to issue NTAs).

do not make the decision to file a charging document with the immigration court and instead are typically assigned to cases only later in the process.<sup>61</sup>

At a “master calendar” hearing (similar to a criminal arraignment), a group of respondents appears before an immigration judge.<sup>62</sup> Each case is called individually before the judge, who must determine whether the noncitizen understands the charges in the NTA and notify the noncitizen of the right to seek representation at no expense to the government.<sup>63</sup> Immigration judges also use master calendar hearings to take noncitizens’ pleas in response to the allegations of removability set forth in the NTA.<sup>64</sup> Often noncitizens simply admit to the government’s charges, and the judge makes a finding of removability.<sup>65</sup>

If the noncitizen contests removability by denying some or all of the allegations in the NTA, the government has the burden of establishing by clear and convincing evidence that he or she is in fact not a citizen,<sup>66</sup> which shifts the burden to the respondent to prove by clear and convincing evidence that he or she is nevertheless lawfully present in the United States.<sup>67</sup> If the noncitizen can establish lawful presence, the burden shifts back to ICE to prove removability, again by clear and convincing evidence. To meet their burden, trial attorneys generally rely on documents concerning the noncitizen that are maintained in the government’s “A-file.”<sup>68</sup> In cases involving lawful

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61. ARNOLD & PORTER LLP, *supra* note 57, at 1-11 to -13 (providing statistics for FY2004 to FY2009 on agencies and units initiating removal proceedings); *see* discussion *infra* Part V.B.

62. *See Immigration Judge Benchbook: Introduction to the Master Calendar*, DOJ, [http://www.justice.gov/eoir/vll/benchbook/tools/Purpose\\_and\\_History\\_of\\_MC.pdf](http://www.justice.gov/eoir/vll/benchbook/tools/Purpose_and_History_of_MC.pdf) (last updated Aug. 2014).

63. 8 C.F.R. § 1240.10(a); *Immigration Judge Benchbook: Introduction to the Master Calendar*, *supra* note 62.

64. 8 C.F.R. § 1240.10(c). Trial attorneys can lodge additional grounds of removability at later stages of proceedings. *Id.* § 1240.10(e).

65. *EOIR at a Glance*, *supra* note 54 (“In most removal proceedings, individuals admit that they are removable, but then apply for one or more forms of relief.”).

66. *In re Corona-Palomera v. Immigration & Naturalization Serv.*, 661 F.2d 814, 817 (9th Cir. 1981). Often this burden is met through the noncitizen’s statements at the time of apprehension, or other alienage information contained in the Form I-213 that ICE submits at the master calendar hearing. *See In re Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (B.I.A. 1999) (holding that Form I-213 is “inherently trustworthy” to establish alienage unless there is evidence that it contains incorrect information or “was obtained by coercion or duress”).

67. 8 U.S.C. § 1229a(c)(2)(B) (2012); *id.* § 1361.

68. *See* Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755, 1757 (Jan. 16, 2007) (“The hardcopy paper A-File (which, prior to 1940, was called Citizenship File (C-File)) contains all the individual’s official record material such as: naturalization certificates; various forms and attachments (*e.g.*, photographs); applications and petitions for benefits under the immigration and nationality



permanent residents who have been convicted of a crime, for example, the prosecutor might introduce a record of conviction from criminal court and argue that it falls within one of the INA's criminal grounds for removal.<sup>69</sup> The noncitizen (or their representative) has the opportunity to contest the government's evidence, although discovery is quite limited in practice.<sup>70</sup> Proceedings establishing removability can take place across one or more master calendar or individual hearings, depending on the complexity of the issues.

After removability is established through the noncitizen's admissions or the government's satisfaction of its evidentiary burden, the immigration judge either enters an order of deportation, or, if the noncitizen appears eligible for some form of discretionary relief, schedules the matter for a merits hearing.<sup>71</sup> At the merits hearing, ICE attorneys can challenge the noncitizen's asserted grounds for a right to remain, which typically involve asylum,<sup>72</sup> cancellation of removal,<sup>73</sup> or adjustment of status.<sup>74</sup>

At each stage of the removal proceeding, the trial attorney wields discretion. Foremost, the attorney has discretion with respect to *whether* even to pursue removal against a particular noncitizen.<sup>75</sup> In regional offices where trial attorneys have the opportunity to screen NTAs before they are filed, such discretion comes into play before

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laws; reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom DHS has created a record under the Immigration and Nationality Act.”)

69. Alternatively, if the case involves a noncitizen alleged to have overstayed a visa, the prosecutor would submit government-maintained documents showing issuance of a visa to the noncitizen with an expiration date that has now passed. Or, if the matter involves a noncitizen alleged to have entered the country without being lawfully admitted, the prosecutor might establish removability by submitting a foreign birth certificate with details matching those of the noncitizen.

70. See discussion *infra* Part III.C.

71. 8 C.F.R. § 1240.10(c) (2014); see Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641-42 (2010).

72. 8 U.S.C. § 1158 (making asylum available to persons who can establish that they face persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion, and who meet other statutory requirements).

73. *Id.* § 1229b(a) (establishing discretionary cancellation of removal for lawful permanent residents who have lawfully resided in the United States for at least seven years); *id.* § 1229b(b)(1) (establishing that discretionary cancellation of removal for persons who are not lawful permanent residents requires that they have ten years of physical presence and that they make a showing of “exceptional and extremely unusual hardship” to qualifying family members).

74. See *id.* § 1255(a) (indicating that, subject to exceptions, a noncitizen can adjust their status to that of a lawful permanent resident without processing abroad through the consulate if they have an immigrant visa immediately available at the time the application is filed).

75. See Cade, *supra* note 11.

proceedings begin.<sup>76</sup> They have the authority to cancel NTAs for legal insufficiency or to decline to file the charging document with court, in the exercise of discretion.<sup>77</sup> When other immigration officers from ICE or the United States Customs and Border Protection (CBP) issue NTAs to noncitizens and initiate proceedings without trial attorney review, as is common in many jurisdictions, trial attorneys can still move to close or terminate proceedings administratively.<sup>78</sup> They can also consent to relief or decline to appeal an immigration judge's decision in favor of the noncitizen.<sup>79</sup> Additionally, ICE prosecutors have discretion over *how* to pursue the removal of a noncitizen. For example, they decide what evidence and tactics to use in establishing removability or contesting eligibility for relief. The authority for immigration prosecutorial discretion is both explicitly recognized in top-level DHS policy memoranda<sup>80</sup> and inherent in a massive enforcement scheme where resource constraints allow officials to process only a tiny fraction of the total number of persons eligible for sanctions.<sup>81</sup>

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76. See, e.g., Interview with ICE Trial Attorney in Small Midwestern Office (Dec. 20, 2013) (stating that attorneys in her office typically review NTAs before filing them with the court) (on file with author).

77. 8 C.F.R. § 239.2(a) (2014) (providing authority to cancel NTAs for legal insufficiency); see also *In re G-N-C-*, 22 I. & N. Dec. 281, 284 (B.I.A. 1998) (“We recognize that the decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not a decision which the Immigration Judge or the Board may review. Likewise, a Service officer authorized to issue a Notice to Appear has complete power to cancel such notice prior to jurisdiction vesting with the Immigration Judge.” (citations omitted)); Benson & Wheeler, *supra* note 55, at 38 (“ICE officials told us that ICE trial attorneys have the authority to reject insufficient NTAs . . .”); Memorandum from William J. Howard to All Office of the Principal Legal Advisor Chief Counsel, *supra* note 27, at 5 (encouraging ICE prosecutors not to file NTAs until decisions are made on certain visa applications).

78. 8 C.F.R. §§ 239.2(c), 1239.2(c); see also *In re G-N-C-*, 22 I. & N. Dec. at 281 (“Once the charging document is filed with the Immigration Court and jurisdiction is vested in the Immigration Judge, the Service may move to terminate the proceedings, but it may not simply cancel the charging document.”).

79. According to one trial attorney I spoke with, in her office supervisory approval is not needed to decline to appeal an immigration judge's decision. Interview with ICE Trial Attorney in Large Urban Office (Sept. 10, 2013) (on file with author).

80. See discussion *infra* Part II.C.2; Memorandum from John Morton to All ICE Employees, *supra* note 3 (setting forth guidelines for the exercise of prosecutorial discretion in light of the fact that the immigration system can process only about 400,000 of the estimated 11 million undocumented persons in the United States per year).

81. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13-16 (2010) (discussing the inherent discretion in large enforcement bureaucracies); KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 8-13 (2013) (discussing authority for executive prosecutorial discretion in immigration law).

### C. *Competing Objectives and Expectations*

There is little doubt that ICE prosecutors, like all immigration officers, have significant responsibilities. As Mariano-Florentino Cuéllar has observed, “A country’s approach to immigration is a major feature of its national architecture, defining the scope of a national community as well as functional issues of economic consequences and security-related concerns.”<sup>82</sup> Trial attorneys thus administer laws that bear on the nation’s public safety and security. At the same time, trial attorneys are expected to prosecute suspected immigration violators in ways that make the removal adjudication system as just and accurate as possible, especially in light of the categorical nature of the modern statutory scheme. This Subpart describes these often competing objectives and expectations.

#### 1. Enforcers and Protectors

In response to the terrorist attacks of 9/11, Congress in 2003 created DHS, a cabinet-level agency, through the merger of twenty-two agencies and programs with responsibility for various national security functions.<sup>83</sup> As part of this merger, Congress dissolved the Immigration and Naturalization Service (INS) and distributed its enforcement and service functions among three subagencies: United States Citizenship and Immigration Services (USCIS), CBP, and ICE. Whereas the INS was responsible for both deporting immigration violators and implementing immigration laws’ humanitarian and benefits components, under DHS these functions were segregated, with ICE and CBP sharing enforcement responsibilities and USCIS alone administering the benefits scheme.<sup>84</sup> From its inception, then, ICE has viewed its mission as safeguarding the nation’s security

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82. Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 26 (2012); *see also id.* at 33 (“Finally, immigration, at its core, is a means through which we delimit national communities in a world where laws and societies are defined—at least in principle—by the scope of the nation-state.”); Peter H. Schuck, *Importing Diversity: Immigration*, SOC. SCI. RES. NETWORK (Feb. 16, 2002), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=305801](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=305801) (explaining how U.S. immigration laws historically have both encouraged and limited diversity in this country).

83. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

84. Rabin, *supra* note 13, at 216-17; *Difference Between U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE)*, U.S. CUSTOMS & BORDER PROTECTION (Sept. 4, 2014), 10:37 AM, [https://help.cbp.gov/app/answers/detail/a\\_id/1040/~/-difference-between-u.s.-customs-and-border-protection-\(cbp\),-u.s.-citizenship](https://help.cbp.gov/app/answers/detail/a_id/1040/~/-difference-between-u.s.-customs-and-border-protection-(cbp),-u.s.-citizenship).

through the enforcement of immigration laws, and its relationship with noncitizens has been one of opposition.<sup>85</sup>

To be sure, the enforcement objective took center stage within the immigration agency long before 9/11. Indeed, “From its founding in 1891 until the early 1920s, the [Immigration] Service’s functions were few and they were overwhelmingly enforcement-oriented . . . .”<sup>86</sup> In the early years of immigration policy, the INS primarily was responsible for the exclusion of “certain categories of undesirables.”<sup>87</sup> Over time, Congress added more and more grounds for excluding or deporting noncitizens, especially those with criminal histories.<sup>88</sup> Scholars have widely noted how legislation in the mid-1990s galvanized associations between immigrants and criminality by expanding grounds for deportation on the basis of convictions, narrowing opportunities for relief from removal, and mandating detention for most noncitizens with criminal histories.<sup>89</sup>

This historical focus on criminality and exclusion only intensified with the dissolution of the INS and creation of ICE. The agency saw itself as having been forged “from the crucible of the terrorist attacks of September 11, 2001,”<sup>90</sup> and “[e]stablished to combat the criminal and national security threats emergent in a post 9/11 environment.”<sup>91</sup> Its self-described “vision statement” was “[t]o be the nation’s

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85. Rabin, *supra* note 13, at 216-26.

86. Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 INTERPRETER RELEASES 937, 939 (1998).

87. CONG. RESEARCH SERV., 70-106 O, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE I (1980).

88. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 131-246 (2007).

89. See, e.g., Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843-48 (2007) (arguing that the expansion of criminal grounds for removal in 1996, along with increased criminal prosecution for immigration offenses, “have shored up the popular construction of immigrants as criminal threats”); Morawetz, *supra* note 29 (explaining the impact of immigration legislation in 1996 on noncitizens with criminal history); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 419 (2006) (“When noncitizens are classified as criminals, expulsion presents itself as the natural solution. The individual’s stake in the U.S. community, such as family ties, employment, contribution to the community, and whether the noncitizen has spent a majority of his lifetime in the United States, becomes secondary to the perceived need to protect the community.” (footnote omitted)).

90. See, e.g., ICE, *ICE: Fiscal Year 2006 Annual Report*, CHESAPEAKE DIGITAL PRESERVATION GROUP 2, <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901/coll4/id/2168> (last visited Oct. 24, 2014).

91. *U.S. Immigration and Customs Enforcement (ICE) Mission*, U.S. DIPLOMATIC MISSION TO BRAZ., <http://brazil.usembassy.gov/sections-offices/immigration-and-customs-enforcement.html> (last visited Oct. 24, 2014).

preeminent law enforcement agency, dedicated to detecting vulnerabilities and preventing violations that threaten national security.”<sup>92</sup>

Time and again ICE has emphasized its security mission. In press releases, budget reports, and public addresses, the agency has described its role “to protect America and uphold public safety by targeting the people, money and materials that support terrorist and criminal activities.”<sup>93</sup> Explaining the Secure Communities program in 2011, DHS Secretary Janet Napolitano stated that DHS “established, as a top priority, the identification and removal of public safety and national security threats.”<sup>94</sup> ICE’s current website states that its mission is to “promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration.”<sup>95</sup>

ICE trial attorneys are thus tasked with “protect[ing] the homeland by diligently litigating cases.”<sup>96</sup> They work within an agency culture with deeply rooted emphasis on enforcement that intensified following Congress’s bureaucratic restructuring in response to the terrorist attacks of 9/11. It is not surprising, then, to hear one chief counsel in charge of a regional ICE office describe himself as a “child of 9/11” and explain that the terrorist attack was his motivation to become an immigration prosecutor.<sup>97</sup>

## 2. Ministers of Justice

Although their role as guardians of the nation’s safety through diligent enforcement of immigration law presents a crucial duty, ICE

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92. *Id.*; see also *ICE Unveils “Most Wanted” Criminal Aliens List*, ILW.COM (May 14, 2003), <http://www.ilw.com/immigrationdaily/News/2003,0516-alienlist.shtm> (“ICE is committed to ensuring the safety of the American public. Reducing the number of dangerous criminal aliens hiding in this country is a crucial part of that mission.”).

93. See, e.g., ICE, *supra* note 90, at 2; *Immigration Enforcement: The Rhetoric, the Reality*, TRAC (May 28, 2007), <http://trac.syr.edu/immigration/reports/178/> (reporting, for example, former Assistant Secretary of ICE Julie Myers’ address to a conference of immigration lawyers in 2007).

94. *Secretary Napolitano’s Remarks on Smart Effective Border Security and Immigration Enforcement*, DHS (Oct. 5, 2011), <http://www.dhs.gov/news/2011/10/05/secretary-napolitanos-remarks-smart-effective-border-security-and-immigration>.

95. *Overview*, ICE, <http://www.ice.gov/about/overview/> (expand the “What We Do” heading) (last visited Oct. 24, 2014).

96. *Office of the Principal Legal Advisor (OPLA)*, ICE, <http://www.ice.gov/about/offices/leadership/opla/> (last visited Oct. 24, 2014).

97. Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line*, APPLESEED 40 (2012), <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf>.

attorneys have additional responsibilities imposed by Congress, courts, and key agency overseers. Put broadly, trial attorneys are not afforded the convenience of merely seeking to win every removal case that comes before them in immigration court. Instead, they are also “duty-bound to ‘cut square corners’ and seek justice rather than victory.”<sup>98</sup> This obligation is similar to that of prosecutors in the criminal system, who may not single-mindedly seek convictions, but must be “ministers of justice.”<sup>99</sup>

While private practitioners are permitted or even encouraged to advance their private client’s (lawful) objectives through any means short of illegal or ethically proscribed conduct,<sup>100</sup> government attorneys are generally expected to be constrained from no-holds-barred advocacy, given their special obligations as both members of and representatives for the government.<sup>101</sup> Because they represent a “sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,”<sup>102</sup> government attorneys are said to have a professional responsibility to seek justice.<sup>103</sup>

The concept that government attorneys have a duty to seek justice in the context of removal proceedings is not merely an abstract ideal.

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98. *Kang v. Attorney Gen.*, 611 F.3d 157, 167 (3d Cir. 2010); *see also Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) (commending the INS’s attorney for admitting error in light of the principle that “[c]ounsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation”); *In re S-M-J-*, 21 I. & N. Dec. 722, 727 (B.I.A. 1997) (“[I]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done.”).

99. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2013) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); *see Bruce A. Green, Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 612-18 (1999).

100. *See Steven K. Berenson, The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty To Serve the Public Interest*, 42 BRANDEIS L.J. 13, 18 (2003).

101. *See Bruce A. Green, Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 238, 265-67 (2000).

102. *Berger v. United States*, 295 U.S. 78, 88 (1935).

103. *See MANUEL & GARVEY, supra* note 81, at 8-9 (summarizing the judicial sentiment that enforcement discretion is an executive function essential to the “proper administration of justice”); *Berenson, supra* note 100, at 17-31; *Green, supra* note 101, at 237-38, 256-79; *see also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14* (1980) (“A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.”).

Rather, a variety of legal sources—statutory provisions, training materials, agency memoranda, and case law—charge trial attorneys with this responsibility. Moreover, their responsibility to help the system achieve justice is multifaceted, thus confirming its breadth and depth. This Subpart sketches the origins and contours of three minimal components of the minister-of-justice duty: legitimate objectives, procedural fairness, and equitable discretion.

First, trial attorneys may pursue only lawful objectives through immigration enforcement actions. Most obviously, ICE may not seek to remove U.S. citizens, because statutory deportation laws apply only to “aliens.”<sup>104</sup> In the wake of erroneous removals of citizens,<sup>105</sup> ICE officials have emphasized to Congress and the public that its agents are trained on the responsibility to avoid such mistakes.<sup>106</sup> Such guidance includes an agency memorandum instructing ICE to “fully investigate the merits of any claim to citizenship made by an individual who is subject to a Notice to Appear.”<sup>107</sup> Appropriate measures may include searching vital records and interviewing family members.<sup>108</sup>

Even where citizenship is not at issue, trial attorneys have no legitimate interest in “deporting those who are not deportable, or in

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104. 8 U.S.C. § 1101(a)(3) (2012); *see also* *Nguyen v. INS*, 533 U.S. 53 (2001) (considering a derivative citizenship claim that would defeat the government’s attempt to deport a person with a criminal record).

105. *See, e.g.*, Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606 (2011) (discussing the erroneous detention and deportation of U.S. citizens); William Finnegan, *The Deportation Machine*, NEW YORKER (Apr. 29, 2013), <http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine> (same); *Ice Detainers Placed on U.S. Citizens and Legal Permanent Residents*, TRAC (Feb. 20, 2013), <http://www.trac.syr.edu/immigration/reports/311> (showing that data provided by ICE indicated that 834 ICE detainers were issued against U.S. citizens between FY2008 and FY2012); Ted Robbins, *In the Rush To Deport, Expelling U.S. Citizens*, NPR (Oct. 24, 2011, 3:00 PM), <http://www.npr.org/2011/10/24/141500145/in-the-rush-to-deport-expelling-u-s-citizens> (discussing the erroneous detention and deportation of U.S. citizens); *see also* DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 14-15, 99-102 (2012).

106. *See, e.g.*, *Problems with ICE Interrogation, Detention and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law*, 110th Cong. 110-80 (2008) (statement of Gary E. Mead, Deputy Director, Office of Detention & Removal Operations, ICE, DHS).

107. Memorandum from John Morton, Assistant Sec’y, ICE, to Field Office Directors, Special Agents in Charge, Chief Counsels, ICE, ICE 2-3 (Nov. 19, 2009), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/reporting-investigating-us-citizen-claims.pdf>; *see also* SAN ANTONIO OFFICE OF THE CHIEF COUNSEL, ICE, OFFICE MANUAL 119-23 (Jan. 8, 2014) (providing trial attorneys with detailed guidance on the duty to investigate claims to U.S. citizenship) (on file with author).

108. Memorandum from John Morton to Field Office Directors, *supra* note 107.

barring from discretionary relief those who are eligible.”<sup>109</sup> ICE’s policy for facilitating the return of noncitizens who prevail on appeal after being deported reflects the agency’s commitment to seeking only legitimate removals.<sup>110</sup> According to Professor David Martin, former general counsel to both DHS and the INS, trial attorneys are trained to probe a respondent’s claims but are expected to support adjudicatory relief from removal if persuaded of the credibility and legal merit of the noncitizen’s account.<sup>111</sup> Likewise, the Board of Immigration Appeals (BIA) has emphasized trial attorneys’ shared obligation to ensure that the United States in fact offers refuge to persons seeking asylum in immigration court when warranted under applicable law.<sup>112</sup>

Second, ICE prosecutors must promote procedural justice. An ICE attorney is “the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to [his adversary].”<sup>113</sup> Training materials for trial attorneys have long established that respondents should be aided in obtaining any procedural rights or benefits required by the controlling statutes, regulations, and court decisions, or by the requirements of fairness.<sup>114</sup> The immigration statute provides that a noncitizen charged with overcoming potential grounds of inadmissibility “shall have access to the alien’s visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien’s admission or presence in the

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109. Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 191-92 (2010).

110. See John Morton, *11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, ICE (Feb. 24, 2012), [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/11061.1\\_current\\_policy\\_facilitating\\_return.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf).

111. E-mail from David A. Martin, Professor of Law, Univ. of Va. Sch. of Law, to Immigration Law Professors List (Sept. 7, 2013, 1:47 PM) (on file with author) (“As INS General Counsel, I often emphasized in such settings that attorneys were expected to ask serious questions in immigration court to probe a person’s narrative and also to clarify details, but at the end of that process, if persuaded of the account (and its legal merit), the attorney should indicate that the government supports or would have no objection to the grant of relief (asylum, cancellation, etc.).”).

112. *In re S-M-J*, 21 I. & N. Dec. 722, 723, 727 (B.I.A. 1997) (“Because this Board, the Immigration Judges, and the Immigration and Naturalization Service are all bound to uphold this law, we all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant’s claim.”).

113. *Kang v. Attorney Gen.*, 611 F.3d 157, 167 (3d Cir. 2010) (quoting *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1958)).

114. See, e.g., *In re S-M-J*, 21 I. & N. Dec. at 737 (referring to agency training material); SAN ANTONIO OFFICE OF THE CHIEF COUNSEL, ICE, *supra* note 107, at 129-32 (instructing that trial attorneys must turn over evidence in their possession bearing on the noncitizen’s mental incompetence to ensure that the immigration judge can evaluate whether counsel should be appointed as required by the BIA).



United States.”<sup>115</sup> A related provision requires that noncitizens in immigration court be given “a reasonable opportunity to examine the evidence” against them.<sup>116</sup> While the full extent of the government’s disclosure requirements under these provisions is contested, at least one federal court of appeals has held that they create a “mandatory access” rule, generally requiring the government to turn over any helpful records possessed in the noncitizen’s A-file.<sup>117</sup> In the context of asylum adjudications, the BIA has similarly indicated its expectation that government attorneys, who often have significantly greater resources and access to information, will independently introduce evidence bearing on the merits of noncitizens’ claims.<sup>118</sup>

Finally, ICE attorneys’ role as ministers of justice requires them to exercise equitable discretion.<sup>119</sup> As described by William Howard, former ICE Principal Legal Advisor, in a memorandum to agency attorneys:

Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. . . . Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.<sup>120</sup>

In the context of immigration court, prosecutorial discretion most often refers to the agency’s authority to decide not to seek a removal order against someone suspected to be present in violation of immigration laws.<sup>121</sup> Although the agency has worked under internal

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115. 8 U.S.C. § 1229a(c)(2) (2012).

116. *Id.* § 1229a(b)(4)(B).

117. *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2010) (“We construe the ‘shall have access’ statute to provide a rule for removal proceedings . . . . We are unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it.”). As discussed further below, many ICE attorneys have resisted the holding in *Dent*, and other circuits have yet to reach the issue. See discussion *infra* Part III.C.

118. *In re S-M-J-*, 21 I. & N. Dec. 722, 726-27 (B.I.A. 1997); see also *id.* at 737-39 (Rosenberg, Board Member, concurring) (noting frequent information asymmetries between asylum applicants and the government and concluding that “as the majority explains, the Service should present any evidence it has, supporting or contradicting the applicant’s asylum claim”).

119. See MANUEL & GARVEY, *supra* note 81, at 8-9 (summarizing the judicial sentiment that enforcement discretion is an executive function essential to the “proper administration of justice”).

120. Memorandum from William J. Howard to All Office of the Principal Legal Advisor Chief Counsel, *supra* note 27, at 8.

121. See, e.g., Memorandum from Doris Meissner, Comm’r, INS, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, INS, LEGAL

policies with respect to prosecutorial discretion since at least the 1970s,<sup>122</sup> in recent years ICE policy leaders have issued a series of memoranda expanding on earlier guidance and making the exercise of discretion more publically transparent.<sup>123</sup> Of particular relevance here, the agency has emphasized its expectation that trial attorneys consider the exercise of prosecutorial discretion in all immigration removal proceedings,<sup>124</sup> paying special attention to cases not yet filed or appearing on the master calendar.<sup>125</sup>

As expressed in these memoranda, the agency's prosecutorial discretion policies reflect two, often overlapping, goals. One is to conserve scarce agency resources by declining or deferring cases that are low priorities, either because the person is likely to prevail anyway or because his or her criminal history or immigration violations are minor.<sup>126</sup> The other objective is to ensure that ICE attorneys take special account of situations in which noncitizens are technically in violation of civil immigration laws but have strong humanitarian factors militating in favor of discretion.<sup>127</sup>

In prior work, I advanced an additional argument supporting the exercise of discretion in removal proceedings where there have been

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ACTION CENTER 2 (Nov. 17, 2000), <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>.

122. See, e.g., Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976).

123. See, e.g., Memorandum from John Morton, Dir., ICE, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, ICE, ICE (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

124. Memorandum from John Morton to All ICE Employees, *supra* note 3, at 3.

125. Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, to All Chief Counsel, Office of the Principal Legal Advisor, ICE, ICE (Nov. 17, 2011), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>; *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, ICE, <https://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf> (last visited Oct. 31, 2014); see also SAN ANTONIO OFFICE OF THE CHIEF COUNSEL, ICE, *supra* note 107, at 133 (instructing trial attorneys to confirm that individual cases are priorities for enforcement before recalendarizing cases that had been closed before the Supreme Court clarified that its ruling in *Padilla v. Kentucky* was not retroactive).

126. *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, ICE, <http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf> (last visited Oct. 31, 2014); Memorandum from John Morton to All ICE Employees, *supra* note 3.

127. Memorandum from John Morton, Dir., ICE, to All Field Office Directors, Special Agents in Charge, and Chief Counsel, ICE, ICE (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from William J. Howard to All Office of the Principal Legal Advisor Chief Counsel, *supra* note 27.

violations of noncitizens' constitutional rights by arresting officers.<sup>128</sup> Drawing on the work of Lawrence Sager and others,<sup>129</sup> I contend that ICE attorneys have a constitutional responsibility to take remedial actions in light of the judiciary decision to underenforce violations of the Fourth Amendment in removal proceedings.<sup>130</sup> The crux of the argument is that the judiciary's self-imposed institutional limitations on constitutional enforcement do not limit the strength of the constitutional norm itself. Accordingly, "where institutional factors inhibit robust judicial guardianship of the Constitution, the executive branch's obligation to ensure full enforcement is actually elevated."<sup>131</sup> In removal proceedings, this arguably provides another source of the trial attorneys' obligation to see justice done in certain situations.

As in other areas of government-enforced benefits and sanctions, officials charged with administering immigration law are expected "to be at least open to the possibility that a special case is presenting itself."<sup>132</sup> Indeed, many of the same congresspersons who enacted harsh and restrictive amendments to the immigration statute in the 1990s expressed surprise and disappointment when it came to light that the INS was enforcing those laws in cases where removal was "unfair and resulted in unjustifiable hardship."<sup>133</sup> They urged the Attorney General and INS Commissioner to employ prosecutorial discretion more systematically.<sup>134</sup> In *Arizona v. United States*, the

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128. Cade, *supra* note 11.

129. See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 84-92 (2004); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591 (2014); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21 (1978); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 128-30 (1993) (explaining that "constitutional law, as developed by the Supreme Court, reflects in part the Court's views of its own institutional capacities" and accordingly might differ from constitutional interpretation by the Executive Branch).

130. Cade, *supra* note 11, at 187-98.

131. *Id.* at 192; see also SAGER, *supra* note 129, at 88, 91-94, 116 (discussing the underenforcement thesis); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1225 (2006) (stating that when the judiciary is unable to fully enforce a constitutional provision, the executive branch bears the burden of enforcing the provision more fully); Sager, *supra* note 129, at 1226-28 (discussing the obligation of public officials to use "best efforts" to avoid unconstitutional conduct).

132. LIPSKY, *supra* note 81, at xii.

133. ALEINIKOFF ET AL., *supra* note 30, at 780 (quoting Letter from Henry J. Hyde et al., Representatives, U.S. Cong., to Janet Reno, Attorney Gen., Dep't of Justice, & Doris M. Meissner, Comm'r, Immigration and Naturalization Serv. (Nov. 4, 1999)) (internal quotation marks omitted).

134. *Id.*

Supreme Court highlighted the central role that discretion plays in the removal system:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. . . . Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.<sup>135</sup>

Underlying the importance of each component of ICE prosecutors' duty to see justice done is the significant hardship that immigration detention and deportation inflicts on noncitizens and their families and communities, as well as on the public fisc. The logjam in underresourced immigration courts produces adjudicative wait times that nationally average over 500 days, greatly prolonging the disruption and expense of fighting removal proceedings.<sup>136</sup> As alluded to above,<sup>137</sup> laws enacted in the 1990s made civil detention mandatory for a wide variety of immigration offenses, and many other persons are subject to discretionary detention on the basis of the government's immigration charges.<sup>138</sup> In FY2012, 400,000 people were subject to

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135. 132 S. Ct. 2492, 2499 (2012) (citations omitted); *see also* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (“[A]t the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.”).

136. *Immigration Court Processing Time by Outcome*, TRAC (Aug. 2014), [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php) (select “Average Days” under the “What to Tabulate” heading) (showing 506 average days to completion in all immigration court cases in FY2014). For individuals ultimately granted adjudicative relief from removal in FY2014, the average wait time was 867 days. *Id.*

137. *See* discussion *supra* Part II.A.

138. Many asylum seekers, for example, and most persons charged with any criminal grounds of removal are detained in prison-like conditions for part or all of the pendency of proceedings. *See Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, HUM. RTS. FIRST 1-9 (2011), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf> (describing the conditions of immigration detention); *Tortured & Detained: Survivor Stories of U.S. Immigration Detention*, CENTER FOR VICTIMS OF TORTURE 5 (Nov. 2013), [http://www.cvt.org/sites/cvt.org/files/Report\\_TorturedAndDetained\\_Nov2013.pdf](http://www.cvt.org/sites/cvt.org/files/Report_TorturedAndDetained_Nov2013.pdf) (“[F]rom October 2010 to February 2013—the United States detained approximately 6,000 survivors of torture as they were seeking asylum protection.”). The average length of detention for all persons in removal proceedings is 30 days, while the average length of stay for detained asylum seekers is 102.4 days. *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, *supra*, at 13.

civil immigration incarceration, at a cost of \$2 billion.<sup>139</sup> For many, there is no right or privilege more important than remaining in this country, and no sanction worse than deportation.<sup>140</sup> The impact of deportation on those a deportee leaves behind can be severe.<sup>141</sup> By any measure, then, the immigration system administers benefits and sanctions of substantial significance, at great expense to taxpayers. Accordingly, ICE trial attorneys' role as ministers of justice is critically important.

### III. PROBLEMS: DISCRETIONARY DISPARITIES, UNWARRANTED DETENTIONS AND REMOVALS, AND OVERZEALOUS TACTICS

As described in Part II, ICE prosecutors shoulder significant responsibilities. The enforcement of immigration laws to keep the nation safe is a critical agency objective, especially in the wake of the terrorist attacks of 9/11. At the same time, however, trial attorneys must exercise discretion in ways that avoid wrongful removals and procedures, prioritize scarce resources, and take into account "immediate human concerns" when warranted by the equities.<sup>142</sup>

As in all large organizations, especially those with multiple objectives, there is significant variation in how ICE trial attorneys perceive their role and carry out their work. Some are conscientious, principled, and reasonable; others are lazy, opportunistic, or

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139. John F. Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2012*, DHS 1 (Dec. 2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf); *U.S. Department of Homeland Security Annual Performance Report: Fiscal Years 2011-2013*, DHS, <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf> (last visited Oct. 24, 2014). From 1994 to 2011, the number of persons held in civil immigration detention increased an astonishing 430%. See Mary Fan, *The Case for Cimmigration Reform*, 92 N.C. L. REV. 75, 127-28 (2013).

140. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010); *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001); *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); see also Pilcher, *supra* note 40, at 270 (arguing that immigration proceedings primarily impact "the trappings of identity: home, family, community, and self, resulting in 'loss of both property and life; or all that makes life worth living'" (quoting *Ng Fung Ho*, 259 U.S. at 284)).

141. See, e.g., KANSTROOM, *supra* note 105, at 135-45 (describing the hardship wrought by deportation on individuals, families, and communities); KANSTROOM, *supra* note 88, at 10 ("The 1996 laws have been severely criticized for the devastation they have wrought on families, for their rigidity, and for their retroactivity."); *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUM. RTS. WATCH (July 2007), [http://www.hrw.org/sites/default/files/reports/us0707\\_web.pdf](http://www.hrw.org/sites/default/files/reports/us0707_web.pdf); Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, RACE FORWARD (Nov. 2011), [http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC\\_Report\\_Shattered\\_Families\\_FULL\\_REPORT\\_NOV2011Release.pdf](http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_NOV2011Release.pdf).

142. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

overzealous. My aim here is not to define ICE “culture,” much less to suggest that agency attorneys are less principled than lawyers working in other fields. But I do seek to show that, whatever the reason may be, serious problems mark the on-the-ground handling of immigration cases by ICE. Two problems are of dominating importance. First, the exercise of prosecutorial discretion within ICE appears to be highly inconsistent across the country, leading to disparate application of the agency’s priorities for removal. Second, many ICE attorneys fail to implement their obligations fully to ensure procedural fairness and avoid unwarranted detentions or removal proceedings in the handling of individual immigration cases.

#### A. *Inconsistent Use of Prosecutorial Discretion*

As alluded to above, on June 17, 2011, ICE Director John Morton began ramping up an agency-wide initiative to encourage a more systematic use of prosecutorial discretion.<sup>143</sup> Through a series of memoranda setting forth positive and negative factors to be balanced in the exercise of discretion and designating categories of persons warranting special consideration, Morton hoped to reduce the tremendous backlog plaguing the immigration courts, focus the agency’s limited resources on high priority targets, and make the deportation system as humane as possible.<sup>144</sup> Morton emphasized his expectation that, even more so than in the past, trial attorneys would evaluate all individual removal proceedings for the possible exercise of discretion.

The prosecutorial discretion initiative got off to a rocky start. Four months after the issuance of Director Morton’s June 17 memoranda, the American Immigration Lawyers Association (AILA) collected 252 case submissions from immigration practitioners in

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143. Memorandum from John Morton to All ICE Employees, *supra* note 3.

144. *Id.*; *see also* Memorandum from Gary Mead, Exec. Assoc. Dir., Peter S. Vincent, Principal Legal Advisor, and James Dinkins, Exec. Assoc. Dir., ICE, to All Field Office Directors, Chief Counsel, and Special Agents in Charge, ICE, IMMIGR. EQUALITY, <http://www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf> (last visited Oct. 24, 2014) (“As the Prosecutorial Discretion Memorandum makes clear, one of the factors relevant to that assessment is ‘the person’s ties and contributions to the community, including family relationships.’”); Memorandum from John Morton, Dir., ICE, to All Employees, ICE, ICE (June 15, 2012), <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf>; Memorandum from John Morton to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, *supra* note 123, at 1-2.

virtually every jurisdiction.<sup>145</sup> The thrust of the feedback was that trial attorneys had not altered their discretionary practices in any meaningful regard.<sup>146</sup> The report provided detailed examples from each jurisdiction, which were summarized as follows:

While practices have improved in a few ICE offices, in the majority of offices ICE agents, trial attorneys and supervisors admitted that they had not implemented the memoranda and there had been no changes in policy or practice. Many called for additional guidance or instruction from headquarters while others felt that they were already exercising discretion sufficiently. Several said they have no intention of complying and indicated their jobs are to arrest and deport people. A few ICE attorneys expressed concern about changing current practice for fear that it would negatively impact their careers. . . . Equally troublesome, ICE offices are inconsistently interpreting the prosecutorial discretion standards set forth in the June memoranda. Many ICE offices described the criteria in more narrow terms than the memoranda, and some even refused to consider whole categories of cases no matter the equities.<sup>147</sup>

These accounts from practitioners in the field are supported by data later obtained by researchers at Syracuse University, which indicated that throughout the country, ICE prosecutors closed only thirteen cases in the exercise of discretion between June and December of 2011.<sup>148</sup>

On the heels of this inauspicious beginning, ICE issued three additional documents on November 17, 2011, which detailed more comprehensively the agency's motivation for reviewing cases and specifically ordered the review of all nondetained cases in two pilot jurisdictions. In addition, these pronouncements called for scenario-based training programs for all ICE attorneys and offered special guidance regarding cases that warranted especially strong reasons for the exercise of prosecutorial leniency.<sup>149</sup> Over time, the agency's training sessions, guidance documents, and working-group reviews

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145. Am. Immigration Lawyers Ass'n,  *Holding DHS Accountable on Prosecutorial Discretion*, ELMORE & PETERSON (Nov. 2011), <http://elmoreattorneys.com/wp-content/uploads/2011/11/AILA-AIC-Pros-Disc-Report-11.21.11.pdf>.

146. *Id.* at 4.

147. *Id.*

148. *ICE Prosecutorial Discretion Program*, TRAC tbl.1 (July 23, 2012), <http://trac.syr.edu/immigration/reports/287/>.

149. See *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, *supra* note 126; Memorandum from Peter S. Vincent to All Chief Counsel, Office of the Principal Legal Advisor, *supra* note 125; *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, *supra* note 125.

have gradually increased discretionary case closures.<sup>150</sup> In the year following the issuance of the Morton memos, ICE prosecutors closed a total of 5,684 cases nationwide—about 1.9% of the pending cases.<sup>151</sup> As of August 31, 2014, the total number of closed cases based on prosecutorial discretion reached 38,439 (6.8% of all cases closed since October 2012).<sup>152</sup> This number, while considerably lower than many expected, is not negligible. It has been insufficient, however, to reduce the overall workload, as the number of cases pending nationwide in immigration courts reached a new high of 408,073 as of August 2014.<sup>153</sup>

Even more importantly, the national figures do not tell a critical part of the story: case closures based on prosecutorial discretion vary dramatically across jurisdictions. Data secured through Freedom of Information Act (FOIA) requests reveals that, as of August 31, 2014, just five of the nation's sixty courts<sup>154</sup> were responsible for over half of the total number of immigration case closures.<sup>155</sup> Widening the scope slightly shows that discretionary closures by ICE attorneys in ten courts comprise roughly 70% of such closures nationwide.<sup>156</sup> On the other side of the coin, in scores of hearing locations, trial attorneys almost never exercise prosecutorial discretion, with total case closures since Morton's initiative began in the single digits.<sup>157</sup>

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150. *Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases*, TRAC (Apr. 24, 2012), <http://trac.syr.edu/immigration/reports/279>; *ICE Prosecutorial Discretion Program*, *supra* note 148.

151. *ICE Prosecutorial Discretion Program*, *supra* note 148, tbl.1; Meghan McCarthy, 'Prosecutorial Discretion' Barely Dents Immigration Case Backlog, TUCSONSENTINEL.COM (July 15, 2012, 10:26 AM), [http://www.tucsonsentinel.com/local/report/071512\\_immig\\_cases/prosecutorial-discretion-barely-dents-immigration-case-backlog/](http://www.tucsonsentinel.com/local/report/071512_immig_cases/prosecutorial-discretion-barely-dents-immigration-case-backlog/).

152. *Immigration Court Cases Closed Based on Prosecutorial Discretion*, TRAC (Aug. 31, 2014), <http://trac.syr.edu/immigration/prosdiscretion/>.

153. *Immigration Court Backlog Tool*, TRAC (Aug. 2014), [http://trac.syr.edu/php/tools/immigration/court\\_backlog/](http://trac.syr.edu/php/tools/immigration/court_backlog/).

154. *EOIR Immigration Court Listing*, DOJ, <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last updated Sept. 2014).

155. *Immigration Court Cases Closed Based on Prosecutorial Discretion*, *supra* note 152 (showing that as of August 31, 2014, there were 19,177 closures based on prosecutorial discretion in Los Angeles, Charlotte, Seattle, San Francisco, and New York City, out of a total of 38,439 closures nationwide).

156. *Id.* (showing that as of August 31, 2014, there were 26,999 closures based on prosecutorial discretion in Los Angeles, Charlotte, Seattle, San Francisco, New York City, Orlando, Miami, Phoenix, San Diego, Omaha, and Memphis, out of a total of 38,439 closures nationwide).

157. *Id.*



The discretionary closure data suggests significant disparities between many courts with similarly sized dockets.<sup>158</sup> For example, as of August 31, 2014, trial attorneys in Charlotte's and Seattle's small immigration courts have closed more than 2,000 cases each in the exercise of prosecutorial discretion, which was more than 20% of all case resolutions since October 2012 in their respective courts.<sup>159</sup> Their counterparts in comparable Phoenix, Omaha, and Memphis have closed more than 1,000 cases each, while trial attorneys in Las Vegas, Houston, and Hartford have discontinued prosecutions in 171 or fewer cases.<sup>160</sup> The contrast between courts with larger dockets is similarly stark. In San Diego and Orlando, trial attorneys have closed 1,300 or more cases in the exercise of discretion.<sup>161</sup> In Atlanta and Boston the number drops to 982 and 747, respectively, while in Newark and Dallas discretionary closures are at 466 and 376, respectively.<sup>162</sup> There are also significant differences in discretionary closures between the country's largest immigration courts: as of August 31, 2014, ICE prosecutors in Los Angeles exercised discretion to close cases in 11,108 cases, while New York City saw only 1,750 cases closed in the same time period.<sup>163</sup>

In short, the data suggests that while some trial attorneys take seriously the responsibility of equitable prosecutorial discretion, others seem to regard it as optional or nonexistent. It is beyond the scope of this Article to isolate all the potential variables affecting ICE's discretionary closures in immigration court.<sup>164</sup> But the differences are pronounced and numerous enough to conclude that, at the least, the checkerboard implementation of the prosecutorial discretion initiative

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158. For purposes of roughly estimating the size of each court's docket, I am using the number of immigration judges EOIR has assigned to that court.

159. *Immigration Court Cases Closed Based on Prosecutorial Discretion*, *supra* note 152.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Alternative explanations for some of the results are conceivable. For example, trial attorneys working in field offices located in "new-destination" locations—those with large numbers of recently arrived immigrants—might theoretically encounter fewer noncitizens presenting strong family and community ties than trial attorneys whose jurisdiction includes long-established immigrant communities. Or, as suggested by one ICE attorney with whom I spoke, perhaps CBP does a better job in some areas of targeting high priority immigrants for arrest, and for that or other reasons NTAs are not often filed in cases that would warrant discretion. *See* Interview with ICE Trial Attorney in Small Midwestern Office, *supra* note 76. These theories might explain slight differences in discretionary closures, but are not persuasive enough to account for the magnitude of prosecutorial discretion discrepancies across so many similar hearing locations.

reflects unequal treatment of similarly situated individuals who find themselves caught—sometimes improperly—in the workings of the nation’s deportation machinery.

When trial attorneys do employ prosecutorial discretion, the timing and conditions often approximate plea-bargaining in the criminal system. According to numerous anecdotal reports from advocates, ICE prosecutors around the country frequently offer to close those cases in which noncitizens appear to be eligible for some kind of adjudicative relief from deportation, such as cancellation of removal or asylum.<sup>165</sup> Advocates report that prosecutors often present the discretionary closure offer as a “one-bite-at-the-apple” deal, at or just before the hearing, and with a demand for an immediate answer.<sup>166</sup> In addition, the form of prosecutorial discretion offered is almost invariably administrative closure, rather than termination without prejudice or “deferred action.”<sup>167</sup> But noncitizens who receive administrative closure generally cannot apply for work authorization<sup>168</sup> or recover their bond money, which averages almost \$6,000

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165. See Administrative Closure and Advanced Parole E-mail Posts to Immigration Clinical Professor’s List (Apr. 2014) (on file with author) (relating anecdotes from immigration clinicians in New York City, Chicago, and Iowa regarding the prevalence of ICE attorneys offering prosecutorial discretion in meritorious or strong asylum cases); see N.Y. Immigration Coal. & N.Y. Cnty. Lawyer’s Ass’n, *Prosecutorial Indiscretion: How the Prosecutorial Discretion Policy Failed To Keep Its Promise*, N.Y. IMMIGR. COALITION 14 (Jan. 2013), <http://www.thenycic.org/sites/default/files/Prosecutorial%20Indiscretion%201-10-Final.pdf> (“Our data also showed that ICE frequently offered an exercise of discretion to individuals who appeared likely to win their immigration cases and obtain more lasting forms of relief . . .”); *Prosecutorial Discretion: A Statistical Assessment*, IMMIGR. POL’Y CENTER 3 (June 11, 2012), <http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-statistical-analysis> (“DHS sources have said that of the 3,998 immigrants who have declined offers of administrative closure, more than 3,000 may be eligible for ‘cancellation of removal’ . . .”); *Prosecutorial Discretion Implementation: Synthesis of Chapter Reports*, AILA 3-5, <http://www.aila.org/content/default.aspx?docid=38125> (last updated Jan. 31, 2012).

166. *Prosecutorial Discretion Implementation: Synthesis of Chapter Reports*, *supra* note 165, at 2-4 (internal quotation marks omitted); see Administrative Closure and Advanced Parole Posts to Immigration Clinical Professor’s List, *supra* note 165 (including an e-mail from Geoffrey Heeren, Assistant Professor of Law, Valparaiso University School of Law, on April 2, 2014, regarding an incident in which the ICE attorney offered administrative closure to his client just before the asylum hearing began and gave him only ten minutes to decide).

167. *Prosecutorial Discretion Implementation: Synthesis of Chapter Reports*, *supra* note 165, at 6-8.

168. Noncitizens who benefit from a form of enforcement discretion called deferred action are eligible to apply for work authorization, but administrative closure does not require ICE to offer deferred action. See 8 C.F.R. § 274a.12(c)(14) (2014). See generally 6 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (2014) (describing deferred action as a form of administrative discretionary relief from deportation at various stages of immigration proceedings).

nationwide.<sup>169</sup> As a result, they often face the difficult choice of accepting uncertain respite and losing substantial funds or facing ICE in an adversarial proceeding subject to informational disparities.<sup>170</sup> In short, some trial attorneys primarily use discretionary closure not to buffer overly harsh applications of immigration law in low-priority cases, but rather to avoid having to litigate hearings when the noncitizen may be eligible for more far-reaching relief.

### B. *Erroneous Charges*

The government's most egregious errors in the context of removal proceedings involve the detention and deportation of U.S. citizens. It is unclear how many citizens are subjected to immigration proceedings each year, but the number is not insignificant.<sup>171</sup> The Florence Immigration and Refugee Rights Project has estimated that each month, forty or fifty local detainees present facially valid claims to U.S. citizenship.<sup>172</sup> Political scientist Jacqueline Stevens has estimated that approximately 1% of detained persons charged with removability have eventually been found to be U.S. citizens and that another .05% of those already deported from the country have U.S. citizenship.<sup>173</sup> As Professor Daniel Kanstroom has observed, if Stevens is correct, then

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169. *Jailed Without Justice: Immigration Detention in the USA*, AMNESTY INT'L 17-19, <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf> (last visited Oct. 24, 2014) (reporting that the national average for immigration bonds is \$5,941); Peter L. Markowitz et al., *Assessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, CARDOZO L. REV. DE NOVO 13 (Dec. 2011), [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf) (reporting that judges in New York set immigration bonds at an average of \$10,000, despite being authorized to release many individuals on their own recognizance or to set bail as low as \$1,500); *Prosecutorial Discretion Implementation: Synthesis of Chapter Reports*, *supra* note 165, at 8.

170. *See infra* Part III.C (discussing discovery asymmetries in immigration courts); *see also* Administrative Closure and Advanced Parole E-mail Posts to Immigration Clinical Professor's List, *supra* note 165.

171. *See, e.g.*, Andrew Becker & Patrick J. McDonnell, *U.S. Citizens Caught Up in Immigration Sweeps*, L.A. TIMES (Apr. 9, 2009), <http://articles.latimes.com/2009/apr/09/nation/na-citizen9>; Tyche Hendricks, *Suits for Wrongful Deportation by ICE Rise*, S.F. GATE (July 28, 2009, 4:00 AM), <http://www.sfgate.com/news/article/Suits-for-wrongful-deportation-by-ICE-rise-3291314.php> (reporting on hundreds of U.S. citizens subjected to detention and deportation proceedings).

172. *See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 37 (2008) (testimony of Kara Hartzler, Esq., Florence Immigrant & Refugee Rights Project).

173. Stevens, *supra* note 105, at 622, 624; *see* Jacqueline Stevens, *Thin ICE*, NATION (June 5, 2008), <http://www.thenation.com/article/thin-ice>.

ICE may have held as many as 20,000 U.S. citizens in detention since 2003 and actually deported thousands of them.<sup>174</sup>

Noncitizens are also subjected to erroneous removal actions. In some cases, the charging document alleges grounds for removability that are not justified by the noncitizen's conduct. As mentioned, trial attorneys often do not make the decision to file the NTA or the initial determination of which charges to allege. They always have the authority, however, to amend the grounds of removability, and revised charges are often filed. Yet little constrains trial attorneys from proceeding with erroneous or overblown allegations.<sup>175</sup>

*Moncrieffe v. Holder* presents a recent example of government overcharging.<sup>176</sup> In Adrian Moncrieffe's removal proceedings, ICE alleged that a low-level drug offense, criminalizing both social sharing of a small amount of marijuana and distribution for remuneration, should presumptively be considered an aggravated felony, thereby rendering Moncrieffe not only deportable but also ineligible for discretionary relief and subject to mandatory detention. The Supreme Court ultimately rejected the government's position, noting: "This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' Once again we hold that the Government's approach defies 'the commonsense conception' of these terms."<sup>177</sup>

Similarly, in *Leocal v. Ashcroft*, the government alleged that Josue Leocal's DUI conviction was a crime of violence, making him deportable as an aggravated felon.<sup>178</sup> When the case eventually reached the Supreme Court—after Leocal had already been deported to Haiti—Chief Justice William Rehnquist, writing for a unanimous Court, completely rejected the government's position, finding the

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174. KANSTROOM, *supra* note 105, at 100.

175. *To File or Not To File a Notice To Appear: Improving the Government's Use of Prosecutorial Discretion*, PENN ST. L. 51-52 (Oct. 2013), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf> (quoting retired Immigration Judge Bruce Einhorn).

176. 133 S. Ct. 1678 (2013).

177. *Id.* at 1693 (internal quotation marks omitted); *see also* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (rejecting ICE's position that a second simple drug possession offense constitutes an aggravated felony where the second conviction was not based on the fact of a prior conviction); *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (rejecting the government's argument that a drug possession conviction punishable as a misdemeanor under federal law qualifies as an "illicit trafficking" aggravated felony if punishable as a felony under state law).

178. 543 U.S. 1 (2004).

question not even close.<sup>179</sup> Other federal courts have noted the government's tendency to stretch legal arguments when attempting to remove noncitizens it believes are undesirable.<sup>180</sup>

Most of the cases in which ICE loses on the merits of removability never reach the federal courts. But in fact, data recently obtained through the FOIA shows that in recent years, immigration judges ultimately reject ICE's request for a removal order almost 50% of the time<sup>181</sup>—up from an already high rejection of one of every four cases from FY2001 to FY2010.<sup>182</sup> While there may be reasons immigration judges terminate cases that would not signal prosecutorial missteps, the 50% figure suggests that in many cases ICE proceeds on inaccurate charges or should not be pursuing deportation at all. By way of a very rough comparison, only one out of ten federal criminal prosecutions did not end in a conviction in 2009.<sup>183</sup> The contrast is even starker when one considers that the government's burden of proof in civil immigration cases is considerably lower than in criminal prosecutions,<sup>184</sup> and the fact that immigration judges—themselves DOJ lawyers—are frequently the subject of criticism for abuses and enforcement biases.<sup>185</sup> Every year the BIA reverses and remands

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179. *Id.* at 11.

180. *See, e.g.*, *Anderson v. Holder*, 673 F.3d 1089, 1100 (9th Cir. 2012) (“In other words, the government’s position is that the word ‘legitimation’ should be read broadly when a broad reading results in the denial of citizenship, and narrowly when a narrow reading results in the denial of citizenship.”).

181. *ICE Targeting: Odds Noncitizens Ordered Deported by Immigration Judge*, TRAC (Aug. 2014), [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_outcome\\_leave.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_outcome_leave.php).

182. *Id.*; *see also ICE Seeks To Deport the Wrong People*, TRAC fig.1 & accompanying tabular data (Nov. 9, 2010), <http://trac.syr.edu/immigration/reports/243/> (stating that the rejection rate for ICE removal requests increased to 31%).

183. *See* Mark Motivans, *Federal Justice Statistics, 2009*, BUREAU JUST. STAT. 2 (Dec. 2011), <http://www.bjs.gov/content/pub/pdf/fjs09.pdf>. Note, however, the win-loss statistics on formal removal orders do not include the over 100,000 expedited removals that occur outside of formal immigration courts each year. *See* 8 U.S.C. § 1225(b)(1) (2012) (certain arriving aliens seeking admission are subject to expedited removal procedures); Simanski & Sapp, *supra* note 139, at 5 tbl.6.

184. *See* discussion *supra* Part II.B.

185. *See, e.g.*, Legomsky, *supra* note 71, at 1675 (citing opinions by courts of appeals criticizing immigration judges for “incompetence, bias, hostility, intimidation, abuse, and other unprofessional conduct”); Jacqueline Stevens, *Lawless Courts*, NATION (Oct. 20, 2010), <http://www.thenation.com/article/155497/lawless-courts> (describing unprofessional, abusive, and potentially unethical conduct by immigration judges); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (showing significant disparities in the adjudication of asylum for similarly situated individuals across and within immigration courts).

thousands of immigration judges' decisions on the merits that went in favor of DHS.<sup>186</sup>

Although some noncitizens prevail, charging decisions can affect the outcome of removal proceedings. As mentioned, almost all criminal grounds of removal trigger mandatory detention.<sup>187</sup> Some studies have demonstrated that civil detention impedes a noncitizen's chance of success in removal proceedings, as does a lack of legal representation.<sup>188</sup> In New York's immigration courts, for example, 74% of nondetained, represented noncitizens were successful.<sup>189</sup> The success rate dropped to 18% for represented noncitizens held in detention, while only 3% of detained noncitizens without counsel avoided removal.<sup>190</sup> Other data supports the influence of detention on immigration court outcomes.<sup>191</sup>

Detainees have more difficulty winning cases for multiple reasons. To be sure, a larger percentage of detained noncitizens will have criminal history that makes it more difficult to obtain discretionary relief from removal.<sup>192</sup> But it is also relevant that they are routinely transferred thousands of miles from their communities, sometimes multiple times, to public and private prisons.<sup>193</sup> Sometimes noncitizens are transferred to jurisdictions with less favorable case

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186. According to data that I obtained from EOIR through a FOIA request, in FY2011 the BIA remanded (for reasons other than a background check) 2,763 noncitizen appeals of immigration judges' orders. That same year, the BIA terminated proceedings or granted temporary protected status or voluntary departure (without first dismissing the noncitizen's appeal) in 181 cases. In FY2012, the BIA remanded (for reasons other than a background check) 2,605 noncitizen appeals and terminated proceedings or granted temporary protected status or voluntary departure in 192 cases. An additional 232 cases appealed by noncitizens in FY2012 were administratively closed by DHS, while 54 more were administratively closed by the BIA. See Letter from Crystal Souza, Supervisory Gov't Info. Specialist, EOIR, to Thomas Striepe, Faculty Servs. Librarian, Univ. of Ga. Sch. of Law (Aug. 26, 2013) (on file with author). Of course, more often the BIA rules in favor of DHS. *Id.*

187. 8 U.S.C. § 1226(c). Many crimes classified as misdemeanors, for example, domestic offenses and petty shoplifting, have been determined to be "aggravated felonies" for purposes of removal proceedings. See generally Cade, *supra* note 12.

188. See, e.g., Markowitz et al., *supra* note 169.

189. *Id.* at 19.

190. *Id.*

191. See *ICE Seeks To Deport the Wrong People*, *supra* note 182, fig.3 & accompanying tbl. (reporting removal rejection rates for FY2010 in the Houston-Detained court (only 6% rejected) versus the non-detained Houston Immigration Court (40% rejected), although the data does not indicate how many of these persons were represented).

192. See Markowitz et al., *supra* note 169.

193. *A Costly Move*, HUM. RTS. WATCH (June 14, 2011), <http://www.hrw.org/reports/2011/06/14/costly-move>; Markowitz et al., *supra* note 169.

law.<sup>194</sup> The conditions and duration of incarceration can make it difficult to access counsel, evidence, or support networks, and thus wear down resolve.<sup>195</sup> Not surprisingly, noncitizens often give up their right to fight removal or contest inaccurate charges that trigger harsher penalties (like permanent banishment) in order to get out of detention.<sup>196</sup> Thus, ICE's pursuit of inflated or inaccurate grounds of removal may lead to outcome-determinative process costs. This dynamic calls to mind Malcom Feeley's classic study of Connecticut misdemeanor courts, which led him to conclude that defendants were motivated to plead guilty to escape the process of contesting minor offenses—with its repeated delays, pretrial detention, and so on—rather than to escape any possible penal sanction.<sup>197</sup> Given the high number of removal cases involving detained noncitizens—

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194. See, e.g., Reply Brief for the Petitioner at 2-3, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (No. 11-702) (collecting BIA cases involving immigrants convicted of the same New York marijuana crime and demonstrating that those transferred to detention facilities located in the Fifth Circuit were deemed to have committed an aggravated felony, while noncitizens detained in the Second and Third Circuits, prevailed on that issue).

195. See, e.g., Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J. L. & SOC. POL'Y 1, 25-26 (2012); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 548 (2009); HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 41-57 (2009), available at <http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf>; *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, *supra* note 138; see also Markowitz et al., *supra* note 169, at 4, 9-11 (showing dramatic drops in representation rates for noncitizen residents of New York City transferred to immigration court venues outside of New York City). In the New York study, representation made a significant difference in the success rate, even for those detained and transferred out of state. See *id.* at 21 & tbl.6. Further, access to counsel dramatically improved the likelihood of detainee success across all classifications of relief applications, as well as where no relief was requested at all. *Id.* at 20 & tbl.5. This suggests that some nonnegligible portion of detained noncitizens have been erroneously charged—a problem not easily overcome without the assistance of an attorney.

196. See, e.g., Cade, *supra* note 12, at 1801-02 (discussing the example of a detained noncitizen who gave up fighting despite the likelihood of inaccurate removal charges); Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 44 SETON HALL L. REV. (forthcoming 2014) (on file with author) (“[V]ery difficult detention conditions create a strong incentive to agree to any option that will end the detention quickly, and provides a strong disincentive to exercising rights of appeal, which can stretch a period of detention out for months longer.” (footnote omitted)).

197. MALCOM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979); see also Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) (discussing the “innocence problem” in plea bargaining). While in theory the process of fighting removal while subject to lengthy detention in prison conditions might not outweigh the sanction of permanent banishment on the aggravated felony removal ground, it is easy to see how many noncitizens faced with such costs would throw in the towel, regardless of whether their removal charges are warranted or accurate.

approximately 36%—the impact of ICE’s charging decisions may be widespread.<sup>198</sup>

### C. *Exploitation of Discovery Asymmetries*

There is little formal discovery in immigration court, and the procedures that do exist are a patchwork of statutory provisions, court rules, and regulations.<sup>199</sup> Nevertheless, the INA does impose important (if limited) disclosure obligations on the government. First, noncitizens must be provided with “a reasonable opportunity to examine the evidence against [them].”<sup>200</sup> Second, a noncitizen seeking to prove a right to stay in the United States should have access to all “records and documents, not considered by the Attorney General to be confidential, pertaining to the [noncitizen’s] admission or presence in the United States.”<sup>201</sup> Additionally, the BIA has noted the trial attorneys’ responsibility to help develop full records by sharing relevant evidence in their possession, especially in asylum cases.<sup>202</sup> Courts and commentators have noted similar disclosure obligations for government attorneys enforcing civil law in other contexts.<sup>203</sup>

Despite these expectations and obligations, ICE prosecutors regularly decline to provide noncitizens with relevant documents, allowing them to exploit significant informational asymmetries.<sup>204</sup> Trial attorneys preparing to present evidence or cross-examine a noncitizen in a removal proceeding have access to vast amounts of information in the A-file, including all prior applications, entry and exit data, interview notes, statements, medical examinations, tax forms, and criminal records.<sup>205</sup> By ignoring disclosure obligations, they increase their opportunity to prevail through unfair surprise or because of the noncitizen’s inability to obtain documents rebutting the

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198. Office of Planning, Analysis, & Tech., *FY2012 Statistical Year Book*, DOJ OI (Mar. 2013), <http://www.justice.gov/eoir/statspub/fy12syb.pdf>.

199. Heeren, *supra* note 13, at 1581-1600.

200. 8 U.S.C. § 1229a(b)(4)(B) (2012).

201. *Id.* § 1229a(c)(2)(B).

202. *See In re S-M-J-*, 21 I. & N. Dec. 722, 726-27, 738-39 (B.I.A. 1997); discussion *supra* Part II.C.2.

203. *See, e.g.,* Douglas v. Donovan, 704 F.2d 1276, 1279-80 (D.C. Cir. 1983) (citing MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14 (1980)); Berenson, *supra* note 100, at 19 (discussing and citing cases in support of the “civil obligation” to inform the court or the opposing party about facts known to the government lawyer that might affect the outcome of the litigation).

204. Heeren, *supra* note 13, at 1571-1600.

205. *Id.* at 1603-07.



government's charges or supporting claims for discretionary relief from removal.<sup>206</sup>

As a practical matter, trial attorneys generally force noncitizens or their attorneys to use the FOIA to obtain any part of the government's A-file.<sup>207</sup> Properly filing FOIA requests with the correct federal agency or agencies is cumbersome and prone to both bureaucratic and requester errors.<sup>208</sup> Additionally, FOIA requests for immigration files must slowly tread through significant backlogs.<sup>209</sup> Even after responses finally arrive, they are sometimes heavily redacted, and the noncitizen's only recourse for determining whether such redactions are proper is litigation in federal court.<sup>210</sup> Thus, the efficacy of this means of discovery is haphazard at best.

Sometimes ICE prosecutors withhold documents in the government's possession that directly bear on whether a noncitizen should be deported. A recent case concerned a pro se man named Sazar Dent who claimed he was a U.S. citizen through adoption, which would preclude the government from deporting him to Honduras on criminal grounds.<sup>211</sup> With a substantial amount of difficulty, the incarcerated Dent was able to obtain his twenty-year-old adoption records, as well as his school records in the United States.<sup>212</sup> But the trial attorney in the case argued that Dent had not proven that his adoptive mother was a citizen, and when Dent was unable to produce her birth certificate, the immigration judge ordered him removed.<sup>213</sup> In a separate (later-aborted) criminal illegal-entry prosecution conducted while his immigration appeals were pending, Dent's federal defender discovered that since the beginning of the deportation case the government had been aware of documents in the A-file directly related

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206. *Id.* at 1569-70.

207. *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (noting the government's position that noncitizens can only obtain records about themselves held by the government through FOIA requests); Heeren, *supra* note 13, at 1571-99; *Assembly Line Injustice: Blueprint To Reform America's Immigration Courts*, APPLESEED 25 (May 2009), <http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf>.

208. Heeren, *supra* note 13, at 1571-96.

209. As of June 2013, ICE had a backlog of 6,699 unanswered requests for immigration records, half of which had been pending for 116 days or longer. *See Poor ICE FOIA Management Hinders Public Access to Immigration Records*, FOIA PROJECT (July 18, 2013), <http://foiaproject.org/2013/07/18/poor-management-hinders-public-access-to-immigration-records/>.

210. Heeren, *supra* note 13, at 1597-99.

211. *Dent*, 627 F.3d 365.

212. *Id.* at 369.

213. *Id.* at 369-70.

to his claims of citizenship, including the naturalization petition his mother filed on his behalf when he was fourteen.<sup>214</sup> The deportation case eventually found its way to the United States Court of Appeals for the Ninth Circuit, where the government acknowledged that ICE had been aware of the relevant documents but argued that no law required them to be disclosed.<sup>215</sup> The Court disagreed,<sup>216</sup> holding that the INA establishes a “mandatory access” right to the A-file.<sup>217</sup>

*Dent v. Holder* is noteworthy for what it reveals about the way some trial attorneys deal with evidence in the government’s possession that might undermine the legitimacy of a particular deportation proceeding. Even if the statutory disclosure obligation is ambiguous, trial attorneys are trained that principles of fairness should guide their duty to help respondents obtain procedural rights or statutory benefits. Nevertheless, ICE attorneys have argued that *Dent* is applicable only in the Ninth Circuit, and even there, many prosecutors reportedly continue to ignore the A-file disclosure rule or apply it narrowly.<sup>218</sup> Such actions are hard to square with the duty to seek justice, but from the perspective of dogged enforcement it is easy to see why such tactics are deployed. Declining to provide discovery gives trial attorneys a significant informational advantage over noncitizens, facilitating surprise cross-examinations and limiting the noncitizen’s access to documents that might rebut the government’s charges or bear on eligibility for relief.

#### D. Other Hardball Tactics

Withholding relevant documents in the noncitizen’s A-file is not the only prosecutorial tactic that some trial attorneys use to prioritize winning over the development of a full and fair record. For many years, court observation studies, anecdotal reports, and judicial decisions have suggested that ICE prosecutors often litigate in ways

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214. *Id.* at 372.

215. *Id.* at 370-73.

216. *Id.* at 373-75 (finding a violation of due process and transferring the matter to district court to adjudicate whether *Dent* had become a naturalized citizen).

217. *Id.* at 374-75 (“We construe the ‘shall have access’ statute to provide a rule for removal proceedings . . . . We are unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it.”).

218. See Heeren, *supra* note 13, at 1571-72; Am. Immigration Council, *Practice Advisory*, LEGAL ACTION CENTER 4 (June 12, 2012), [http://www.legalactioncenter.org/sites/default/files/dent\\_practice\\_advisory\\_6-8-12.pdf](http://www.legalactioncenter.org/sites/default/files/dent_practice_advisory_6-8-12.pdf).

that capitalize on surprise, mistakes, and the vulnerability of noncitizens. This Subpart briefly surveys some of those accounts.

In the late 1980s, Professor Deborah Anker and other researchers studied the adjudication of 193 hearings involving 149 asylum seekers in one jurisdiction.<sup>219</sup> In all 149 cases, the INS prosecutors “took an oppositional stance.”<sup>220</sup> While a few trial attorneys were observed to conduct professional and respectful cross-examinations, most were “hostile, sarcastic, or disbelieving.”<sup>221</sup> In hearing after hearing, the prosecutors’ cross-examinations attacked the applicants’ moral character, rather than addressing eligibility for asylum, and were “lengthy and aggressive.”<sup>222</sup> Trial attorneys employed tactics “to block the applicant from elaborating or explaining her answer and seemed to have as their purpose portraying the applicant as evasive.”<sup>223</sup>

Prosecutorial tactics that focused on obtaining removal orders through any means necessary, rather than developing and testing the merits of the asylum claim, were commonly observed.<sup>224</sup> In one case, for example, the trial attorney disclosed to a court observer that he was aware the immigration judge had made a substantial error of law that would have otherwise allowed the noncitizen to avoid a deportation order, but felt it was not his responsibility to inform the court or the noncitizen.<sup>225</sup> In another, the judge ordered a noncitizen removed in absentia when his counsel arrived late for the hearing, but stated he would reopen the proceedings if the government consented. The trial attorney refused to consent, and when interviewed by the researchers after the hearing he was frank: “[INS] wants a deport[ation] order. We couldn’t have done better.”<sup>226</sup>

More recent interview- and observation-based reports suggest that little constrains ICE prosecutors from employing the same sort of sharp tactics that Professor Anker observed, if they wish to. One set of

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219. Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 443-45 (1992) (observing asylum adjudication proceedings and interviewing hearing participants and other government officials between February 1987 and November 1988). To protect the anonymity of participants in the study, Professor Anker revealed only that the immigration court studied was in a major urban center. *Id.* at 443 n.31.

220. *Id.* at 492. This included a case where the United States Department of State had issued a visa to allow the noncitizen to flee persecution in Colombia. *Id.* at 492 n.259.

221. *Id.* at 493.

222. *Id.*

223. *Id.* at 490-96.

224. *Id.*

225. *Id.* at 491 & n.256.

226. *Id.* at 491 (internal quotation marks omitted).

findings came from a study conducted in 2009 by the Chicago Appleseed Fund for Justice, in partnership with several major law firms.<sup>227</sup> According to the report, over 100 lawyers and 22 professional staff members from Latham & Watkins LLP, and Akin Gump Strauss Hauer & Feld LLP observed more than 100 hours of immigration court hearings and conducted in excess of 100 interviews of practitioners, government players, nonprofit officials, professional organization leaders, and academics, covering a range of jurisdictions throughout the country.<sup>228</sup>

Many of those interviewed expressed the belief that some ICE prosecutors “invariably seek the worst outcome possible for the immigrant and unnecessarily drag out cases by litigating every issue.”<sup>229</sup> Advocates encountered trial attorneys who rarely return phone calls or other communications, refuse to negotiate in order to narrow issues, fail to drop weak cases, and take extreme positions on removability.<sup>230</sup> In one proceeding cited by the report, ICE contended that a noncitizen provided “material support” to terrorists based solely on the fact that Burundi rebels robbed him of four dollars and his lunch.<sup>231</sup> The report concluded that many ICE prosecutors operate with a “deport-in-all-cases” mindset.<sup>232</sup>

After conducting a follow-up national study in 2011 and 2012,<sup>233</sup> Chicago Appleseed reported other examples of ICE prosecutors indiscriminately seeking deportation, rarely agreeing to discuss issues in advance of hearings, and declining to stipulate to obvious issues.<sup>234</sup> One New York area immigration practitioner stated that “in twelve years of practice in this area, I have one time had a call returned from a [DHS trial attorney] before the hearing. One time.”<sup>235</sup> Notably, even the information gathered from government stakeholders themselves generally supported these observations.<sup>236</sup>

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227. See *Assembly Line Injustice: Blueprint To Reform America’s Immigration Courts*, *supra* note 207.

228. *Id.* at 1-2.

229. *Id.* at 16.

230. *Id.*

231. *Id.*

232. *Id.*

233. Cavendish & Schulman, *supra* note 97, at 39-48. The 2012 report appears to have been based on more extensive participation from government stakeholders than the 2009 report. *Id.* at 12 (describing the report’s methodology).

234. *Id.* at 42-43, 47.

235. *Id.* at 47 (internal quotation marks omitted).

236. See *id.* at 46-47 (discussing the prevalence of chief counsel offices not having any policy or practice on prehearing conferences or other communications with defense counsel).

A 2010 report for the American Bar Association (ABA) reached similar conclusions about the immigration system.<sup>237</sup> It found, “Many believe that . . . DHS attorneys do not exercise prosecutorial discretion to promote efficiency or fairness in removal proceedings.”<sup>238</sup> In one example cited by the report, an ICE attorney privately acknowledged the strength of a noncitizen’s asylum case but contested it anyway and refused to stipulate to any facts.<sup>239</sup> Various federal judges<sup>240</sup> and law professors with extensive experience in immigration courts<sup>241</sup> have also observed the aggressively hard-nosed approach often taken by government attorneys in deportation proceedings. A recent federal lawsuit concerning an immigration case in which the BIA found evidence of “document tampering” by a Seattle ICE prosecutor

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237. ARNOLD & PORTER LLP, *supra* note 57. The report was generated after a year of study by fifty Arnold & Porter LLP lawyers and legal assistants, who participated in the pro bono project “without preconceived notions or conclusions.” *Id.* at v-vi. According to the ABA, the study consisted of interviews with participants from all perspectives in the removal adjudication system, as well as an extensive review of reports, articles, legislative materials, and other documents. *Id.* at vi.

238. *Id.* at 1-28.

239. *Id.* at 1-29.

240. *See, e.g.*, Flores v. USCIS, 718 F.3d 548, 556 (6th Cir. 2013) (“We are disturbed by the Government’s incessant and injudicious opposition in [immigration] cases like this, where the only purpose seems to be a general policy of opposition for the sake of opposition.”); Diric v. INS, 400 F.2d 658, 661 (9th Cir. 1968) (Ely, J. concurring) (“It distresses me that an alien must depart our country with the justified impression that the Government of the United States, through an over-zealous advocate, has been unnecessarily unkind, if not abusive.”).

241. *See, e.g.*, KANSTROOM, *supra* note 105, at 97-98; Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 437, 530 (2013) (“I continue to learn after years of handling cases, observing the agency, and talking with other practitioners, that relying on administrative good faith is a mistake . . .”); Kidane, *supra* note 15, at 655 (“[I]n deportation proceedings . . . the combatants are the government’s ‘gladiator-attorneys’ who are not primarily crusading after the truth, but seeking to win on the one hand, and the unrepresented noncitizen on the other hand.” (footnote omitted) (internal quotation marks omitted)); Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 536 (2013) (“DHS attorneys also operate within a courtroom culture marked by a severe absence of stipulations and discussions with respondents, even those with counsel, to settle on an outcome that reflects an arms’ length negotiation between both parties.”); Philip G. Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 661 n.24 (2010) (“[I]n the vast majority of cases, DHS attorneys challenge applicants’ corroborating evidence, cross-examine applicants to elicit contradictions, argue that applicants do not meet the statutory standards for asylum, and in other ways vigorously oppose a grant of asylum, treating asylum applications in immigration court like other forms of contested civil or criminal litigation, even when applicants are unable to afford or obtain representation.”).

suggests some trial attorneys may be willing to go to even greater lengths to remove noncitizens.<sup>242</sup>

As should be clear, the anecdotal nature of these observations suggests they should be evaluated with caution. We simply do not have competent data from which to form generalizations about ICE's culture. Indeed, my own encounters with the chief counsel's office in New York City over a period of four years were mixed.<sup>243</sup> But these positive accounts do permit a critical observation: ICE attorneys can take a no-holds-barred approach if they so choose. No serious structural constraints impede large numbers of government lawyers from going full throttle in seeking deportations, even when doing so raises serious questions of procedural fairness and substantive justice.

While winning at all costs may be par for the course in much civil litigation brought by private parties, government attorneys with a role as ministers of justice must temper hardball tactics, especially in settings where the targets of their efforts are often poor and unrepresented.<sup>244</sup> Advancing justice requires government attorneys to facilitate the development of full and fair records and to refrain from exploiting power asymmetries that favor the government.<sup>245</sup> And, as we have seen, a variety of legal sources make such obligations concrete

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242. See Complaint for Damages, *Lanuza v. Love*, No. 2:14-cv-01641-MJP (W.D. Wash. Oct. 23, 2014); Liz Jones, *Lawsuit Claims ICE Attorney Manufactured Evidence in Seattle Deportation Case*, KUOW.ORG (Oct. 23, 2014, 3:23 PM), <http://kuow.org/post/lawsuit-claims-ice-attorney-manufactured-evidence-seattle-deportation-case>.

243. While a few assistant chief counsels in New York City's immigration court returned phone calls or e-mails, stipulated to issues, and joined motions in compelling cases, others took a zero-tolerance approach to seemingly every case. In one example of the latter, I represented a sixteen-year-old Haitian girl with a slight developmental disability who was adjusting her status to that of a lawful permanent resident based on adoption by American parents. Although her only negative history was a trespass violation (incurred while changing into clothes forbidden by her adoptive parents behind a neighbor's house on the way to school), the trial attorney conducted an aggressive and lengthy cross-examination, apparently fishing for evidence of my client's involvement with guns, gangs, or drugs. Eventually the interrogation concluded, and the immigration judge granted my client lawful permanent resident status. In another case involving this same attorney, the immigration judge terminated the proceedings due to CBP's violation of my client's due process rights. Although she was a minor child living with lawfully present relatives and had no criminal history, the attorney had arranged for CBP officers to be present outside the hearing to rearrest her should she prevail in the termination hearing.

244. See, e.g., *Equal Emp't Opportunity Comm'n v. New Enter. Stone & Lime Co.*, 74 F.R.D. 628, 632-35 (W.D. Pa. 1977) (noting the government's obligation to seek justice applies in civil enforcement actions, likening the government attorney's overzealous and "vexatious" tactics to "hunting mice with an elephant gun," and awarding attorney's fees to the defending party).

245. See, e.g., *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980); Berenson, *supra* note 100, at 29-30 (citing *City of Los Angeles v. Decker*, 558 P.2d 545 (Cal. 1977)); Green, *supra* note 101, at 265-67.

for ICE prosecutors.<sup>246</sup> As we have also seen, however, trial attorneys can, and sometimes do, proceed with cases that have been inadequately screened for merit, accuracy, or the exercise of equitable discretion.

#### IV. PLAUSIBLE EXPLANATIONS

Having explored many of the potential ways that trial attorneys can depart from their duty to pursue justice, we can now consider possible sources of the problem. Since Max Weber's pioneering work on bureaucracies in the 1920s,<sup>247</sup> many political scientists and legal scholars have expanded upon his insight that an organization's design impacts the behavior of its members.<sup>248</sup> The institutional, financial, and political factors that influence how bureaucracies operate are often variable and difficult to measure.<sup>249</sup> In most settings, however, certain organizational features tend to be particularly salient. These include: (1) the agency's mission, (2) the resources available to the agency's frontline workers, (3) patterns of practice within the agency, and (4) accountability and performance measures.<sup>250</sup> Although it is beyond the scope of this Article to examine comprehensively the extent to which these features shape the behavior of ICE trial attorneys, their connection with the problems discussed in Part III is readily apparent.<sup>251</sup>

In particular, ICE prosecutors' enforcement bias and excessive workloads go a long way toward explaining the inconsistent fulfillment of justice obligations. I consider the role of enforcement bias in Part IV.A and the role of excessive workloads in Part IV.B. The

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246. See discussion *supra* Part II.C.2.

247. MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978).

248. See, e.g., LIPSKY, *supra* note 81; JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983) [hereinafter MASHAW, *BUREAUCRATIC JUSTICE*]; JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) [hereinafter MASHAW, *DUE PROCESS*]; PUBLIC ACCOUNTABILITY: *DESIGNS, DILEMMAS AND EXPERIENCES* (Michael W. Dowdle ed., 2006); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869 (2009); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1 (1997).

249. See, e.g., MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 248, at 13 (summarizing James Q. Wilson's argument that "regulatory activities and the politics that produce regulatory legislation are too varied to be explained satisfactorily by a parsimonious set of hypotheses").

250. LIPSKY, *supra* note 81, at 27-28; see WILSON, *supra* note 248, at 23-28.

251. For an analysis of how James Q. Wilson's theory of bureaucracy maps onto ICE's broader culture, see Rabin, *supra* note 13.

centrality of these forces in immigration enforcement points to an important parallel with the operation of government agencies engaged in criminal prosecution, to which I turn in Part IV.C.

### A. *Enforcement Bias*

Prosecutors prosecute. Their core mission, shared by others with whom they work, focuses on law enforcement. Consequently, as many experts have noted, a “prosecutor bias” can take hold at the expense of other values and objectives.<sup>252</sup> Thus, it is not surprising that prosecutor bias plays a role in shaping the mindset of ICE attorneys. As described in Part II, law enforcement objectives have long been central to the immigration agency’s mission, and only intensified in the bureaucratic restructuring following 9/11. Even before the creation of ICE, commentators within and outside the INS noted the agency’s tendency to focus on enforcement objectives.<sup>253</sup> For example, Grover Rees, the former general counsel of INS, once acknowledged, “For too many INS officials, the answer is easy: we are the Anti-Immigration and Naturalization Service, and we are about keeping people out.”<sup>254</sup>

By defining and continually affirming ICE’s role as centering on the prevention of terrorism or other threats to national security, government leaders promote prosecutor bias and enforcement stringency.<sup>255</sup> Forging a conceptual connection between immigration

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252. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 22-25 (2012); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 306-19 (2013); Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488 (2009); see, e.g., Charles Perrow, *The Disaster after 9/11: The Department of Homeland Security and the Intelligence Reorganization*, 2 HOMELAND SECURITY AFF. 1 (2006) (“It seems plausible that FEMA’s absorption by the Department of Homeland Security, the resulting emphasis on terrorism rather than natural disasters, and the inattention to natural disasters by the Bush Administration, account for much of the [Hurricane] Katrina and Rita failures.”).

253. See, e.g., Scully, *supra* note 86, at 941 (“[T]he Service’s enforcement function has generally overshadowed its adjudications function. . . . [E]very applicant must be seen as suspect.”); Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 119 (1996) (describing the “law enforcement mentality adopted throughout the agency”); see also Rabin, *supra* note 13, at 213 (discussing the agency’s focus on law enforcement).

254. Grover Joseph Rees, III, *Advice for the New INS Commissioner*, 70 INTERPRETER RELEASES 1533, 1534 (1993).

255. See JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY 6, 14-17 (2011); *Developments in the Law—Immigrant Rights & Immigration Enforcement*, *supra* note 22, at 1656; see also Perrow, *supra* note 252, at 15-17 (explaining how bringing disparate agencies under DHS’s umbrella led to the displacement of their prior non-security missions); David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, MIGRATION POL’Y INST. (Apr. 2003), <http://www>.



enforcement and national security, whether justified or not, also serves to entrench public expectations about the agency's mission.<sup>256</sup> This can create a "policy feedback" loop as the government's initial statements and actions create a narrative about what a policy is intended to achieve, which in turn generates expectations that the agency will fulfill that narrative.<sup>257</sup> Indeed, given the pervasive conceptual links between immigration law, crime, and terrorism, the development of "tunnel vision" among ICE attorneys may be even more pronounced than it is among criminal prosecutors,<sup>258</sup> especially those prosecutors who regularly appear in diversion or problem-solving courts.

There is also another force that cultivates prosecutorial bias. To the extent that quantifiable metrics for measuring the achievement of agency objectives are available, both managers and ground-level officials will tend to orient their work towards fulfillment of those measurable goals.<sup>259</sup> Removal numbers—especially with respect to noncitizens with any criminal history—have proven to be critical tokens in the immigration debate as the Obama Administration, like administrations before it, strives to promote its image of effectiveness with lawmakers and the public.<sup>260</sup> Indeed, ICE under President Obama's leadership has removed more noncitizens than any other administration in history.<sup>261</sup>

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migrationpolicy.org/research/immigration-policy-and-homeland-security-act-reorganization-early-agenda-practical (discussing the duties of INS being transferred to DHS under the Homeland Security Act).

256. See, e.g., M. Isabel Medina, *Immigrants and the Government's War on Terrorism*, 6 NEW CENTENNIAL REV. 225, 230 (2006) ("[T]he reorganization's symbolic message to American society and the world at large was that immigration was inextricably intertwined with terrorism.").

257. Cuéllar, *supra* note 82, at 57-58.

258. See SIMON, *supra* note 252, at 22-25 (explaining the prevalence of tunnel vision among prosecutors and other law enforcement officers); Green & Yaroshefsky, *supra* note 252, at 488 (explaining that prosecutors may be prone to view evidence "through the lens of . . . preexisting expectations and conclusions"); see also *Developments in the Law—Immigrant Rights & Immigration Enforcement*, *supra* note 22, at 1655 (suggesting that the segregation of immigration benefits and removal operations in 2003 may have aggravated "the enforcement regime's propensity for overreach by limiting enforcement officers' interaction with professionals whose duties would have led them to understand and learn about immigration enforcement through a humanitarian lens" (footnotes omitted) (citing Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1184 (2012))).

259. WILSON, *supra* note 248, at 159-71.

260. Rabin, *supra* note 13.

261. See Barack Obama, *Deporter-in-Chief*, ECONOMIST (Feb. 8, 2014), <http://www.economist.com/node/21595902/> ("America is expelling illegal immigrants at nine times the rate of 20 years ago; nearly [two million] so far under Barack Obama, easily outpacing any previous president." (citations omitted)). The magnitude of the current rate of deportations is

Further, the composition of an organization's leadership and employees significantly shapes its culture and its approach to balancing competing interests. As Rachel Barkow has observed, "leadership and personnel decisions can . . . help to foster a self-perpetuating culture that will be particularly powerful if it feeds into the political dynamics that support the agency's dominant mission."<sup>262</sup> It is telling, in this regard, that persons with significant law enforcement or military experience hold nearly every top- and mid-level leadership position in ICE.<sup>263</sup> The law enforcement perspective of the agency's leaders thus aligns powerfully with the political economies that initially led Congress to displace the INS in order to create an agency better equipped to protect the country.<sup>264</sup> In such an environment, it may fairly be expected that many rank-and-file ICE prosecutors will view every immigration case they handle through the lens of national security.

If the agency's hawkish culture contributes to ICE attorneys' failure to seek justice in individual cases, should the culture be altered? Perhaps DHS could systematically emphasize ICE's concurrent commitment to the humanitarian and benefits functions of the immigration system through leadership changes, focused training sessions, public statements, and so forth. But this approach is unlikely to gain traction. Rolling back law enforcement rhetoric offers little political gain, while exposing agency leaders to critiques and reprisals. Moreover, effectuating systemic and lasting change in an agency's

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best appreciated by observing that from 1892 to 2007, the U.S. government deported about two million individuals in total—a figure that has been doubled in the past seven years. Elise Foley, *Obama Deportation Toll Could Pass 2 Million at Current Rates*, HUFFINGTON POST (Jan. 31, 2013, 7:01 PM), [http://www.huffingtonpost.com/2013/01/31/obama-deportation\\_n\\_2594012.html](http://www.huffingtonpost.com/2013/01/31/obama-deportation_n_2594012.html). Although the Obama Administration touts increased removals of "criminal aliens," that classification is contestable. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

262. Barkow, *supra* note 252, at 312.

263. According to the biographies posted on ICE's public website, the vast majority of the top- and mid-level leadership positions in recent years have been occupied by persons with significant law enforcement backgrounds. See *ICE Leadership*, ICE, <http://www.ice.gov/leadership> (last visited Oct. 24, 2014); *National Security Investigations Division*, ICE, <http://www.ice.gov/national-security-investigations-division> (last visited Oct. 24, 2014); *Overview*, ICE, <http://www.ice.gov/about> (last visited Oct. 24, 2014).

264. A former trial attorney confided to researchers conducting the first Chicago Appleaseed study of immigration courts his view that after 9/11, the agency's objective that its prosecutors "see that justice is served" was replaced by a "zero-tolerance" mindset. *Assembly Line Injustice: Blueprint To Reform America's Immigration Courts*, *supra* note 207, at 17.

culture is exceedingly difficult.<sup>265</sup> Finally, as the next Subpart suggests, prosecutor bias is likely not the only relevant factor here. The tendency toward an across-the-board mindset for the handling of cases is reinforced by the work burdens that ICE lawyers carry.

### B. *Workload*

There is no doubt that ICE prosecutors face daunting workloads. In 2005, around 579 ICE attorneys were responsible for over 184,000 pending cases.<sup>266</sup> By ICE's own calculations, this caseload left trial attorneys only about twenty minutes to prepare each case.<sup>267</sup> Today, the ratio of prosecutors to workload is even worse, with just 505 onboard trial attorneys handling an average of more than 350 cases each year.<sup>268</sup> The current backlog stands at 396,552 pending removal cases—more than double what it was in 2005.<sup>269</sup> As ICE's Principal Legal Advisor reported in 2009, “the universal feeling” among assistant chief counsels nationwide is that “they are woefully unprepared for immigration hearings due to the extremely large amount of individual cases they are required to cover.”<sup>270</sup>

Limited time to review and prepare cases has predictable consequences. Prosecutors decline to assess carefully whether favorable discretion is warranted in individual cases because they come to handle cases in an assembly-line, if not triage, mode. This same problem has received substantial scrutiny in criminal law scholarship, especially with respect to our nation's swollen

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265. See Barkow, *supra* note 252; Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 52, 61 (Michael W. Dowdle ed., 2006) (“[N]either individual nor institutional behavior can be readily altered by simple government *ukase*.”).

266. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-206, DHS IMMIGRATION ATTORNEYS: WORKLOAD ANALYSIS AND WORKFORCE PLANNING EFFORTS LACK DATA AND DOCUMENTATION 10 (2007) (indicating that as of September 30, 2006, DHS employed 579 ICE attorneys in 51 field offices throughout the United States, headed by a Director with assistance from 26 Chief Counsels); *Immigration Court Backlog Tool*, *supra* note 153 (noting that there were 184,211 cases pending in 2006).

267. *Assembly Line Injustice: Blueprint To Reform America's Immigration Courts*, *supra* note 207, at 16 (“According to the ICE Principal Legal Advisor, in 2005 Trial Attorneys had only about 20 minutes to prepare each case . . . .” (citing Memorandum from William J. Howard to All Office of the Principal Legal Advisor Chief Counsel, *supra* note 27)).

268. Letter from Catrina M. Pavlik-Keenan, FOIA Officer, ICE, to Thomas Striepe, Faculty Servs. Librarian, Univ. of Ga. Sch. of Law (July 11, 2014) (on file with author); Cavendish & Schulman, *supra* note 97, at 39-40.

269. *Immigration Court Backlog Tool*, *supra* note 153.

270. Legomsky, *supra* note 71, at 1654 (quoting E-mail from Peter Vincent, Principal Legal Advisor, ICE, to author (Aug. 19, 2009) (internal quotation marks omitted)).

misdeemeanor system.<sup>271</sup> When prosecutors have insufficient time to carry out what they view as their primary responsibilities, they are less likely to find time to complete tasks they deem secondary.<sup>272</sup> Sorting meritorious cases quickly can be challenging, as the charging documents in immigration court often consist primarily of a series of conclusory allegations of immigration violations and obtaining reliable additional information is costly.<sup>273</sup> One regional ICE supervisor reflected on the fact that in the face of an exploding immigration docket, he often “feels like we are dodging bullets.”<sup>274</sup> In light of ICE’s heavy caseloads, it is easy to see why trial attorneys might not have time to look closely enough at any particular case to feel confident that backing away from all-out prosecution is warranted, except in the small percentage of cases where competent counsel or immigration judges push hard enough on ICE to gain exceptional treatment.<sup>275</sup>

The problem is highlighted by the work of Michael Lipsky on street-level bureaucracies. As he explained, resource constraints pose special difficulties when either of two conditions is present: (1) the number of people processed is only a fraction of the number that could be processed or (2) the agency’s obligations call for a higher quality of work than it is possible to provide in individual cases.<sup>276</sup> The essential problem when one of these conditions exists is straightforward: demand will rise to devour any increase in the agency’s supply of services, whether quantitative or qualitative. Additional expressway lanes bring more drivers to the road. Teachers whose class size is reduced from thirty to twenty-five still must manage disciplinary problems and learning experiences in substantially the same way. Both

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271. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655 (2010); Cade, *supra* note 12, at 1781-85; Gershowitz & Killinger, *supra* note 26; King, *supra* note 47, at 20; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013); see also LIPSKY, *supra* note 81, at 5, 27 (explaining that the work of “street-level bureaucrats” is extremely labor-intensive because they determine eligibility for benefits and sanctions through direct, individual interactions with large numbers of people).

272. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) (“Prosecutors have personal incentives to reduce their workloads so that they can leave work early enough to dine with their families.”); Bowers, *supra* note 197, at 1140-41.

273. Cf. Bowers, *supra* note 271, at 1702 (“Prosecutors can proceed with almost everything, because all cases look good enough; and they cannot determine what to cast aside, because no case looks all that bad.”).

274. Cavendish & Schulman, *supra* note 97, at 40-42 (internal quotation marks omitted).

275. *Id.*

276. LIPSKY, *supra* note 81, at 33, 37-38.

of these resource complications are present for trial attorneys handling immigration cases.

Today it is estimated that around eleven million unauthorized noncitizens reside in the United States.<sup>277</sup> Millions more are lawfully present but potentially deportable on the basis of criminal history or immigration infractions.<sup>278</sup> So while massive funding increases enabled the Obama Administration to remove a record 400,000 persons in the past year, that is but a tiny fraction of the number that could be processed. While a historical challenge in immigration enforcement was identifying and apprehending undocumented immigrants, as well as noncitizens lawfully present but potentially deportable on the basis of criminal convictions,<sup>279</sup> this obstacle is now much diminished. Through a combination of cooperative relationships with local and state law enforcement agencies, data-sharing technology, and well-resourced programs that enable immigration agents to access detention facilities in every jurisdiction, the government now has the ability to screen nearly every noncitizen who comes into contact with the criminal justice system.<sup>280</sup> Additionally, in recent years a number of states have passed legislation authorizing or requiring local authorities to enforce federal immigration law<sup>281</sup>—for example, by verifying the immigration status of every person who is stopped, detained, or arrested.<sup>282</sup> These activities of state and local authorities, in combination with the significant efforts of what is now the federal government's second largest law enforcement agency, pipe

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277. See Passel & Cohn, *supra* note 3.

278. *Id.* at 9; see Morawetz, *supra* note 29.

279. Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 615 (2012) (citing numerous authorities); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999) (describing the historical “failures” of the immigration system at identifying and removing noncitizens convicted of crimes in state and local courts).

280. See MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 13-17 (2012) (describing ICE programs targeting noncitizens who encounter law enforcement); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 91-96 (2013).

281. See, e.g., ALA. CODE § 31-13-6 (2014); ARIZ. REV. STAT. § 11-1051 (2014); GA. CODE § 17-5-100(b) (2014); UTAH CODE § 76-9-1001 to -1009 (2014).

282. See, e.g., ARIZ. REV. STAT. § 11-1051(B); GA. CODE § 17-5-100; IND. CODE § 5-2-18.2-4 (2014); S.C. CODE § 17-13-170 (2013); UTAH CODE § 76-9-1003. Potentially deportable arrestees are marked with an immigration detainer, which generally functions to ensure that such noncitizens are transferred to immigration custody at the point that they otherwise would have been released by law enforcement. See also Cade, *supra* note 12, at 1763-65 (discussing ICE programs to identify noncitizens who have criminal records, making them potentially deportable).

ever growing numbers of potentially deportable noncitizens into immigration court.<sup>283</sup>

From the trial attorney's point of view, the ready supply line of cases from the vast pool of potentially deportable noncitizens means that when one case is dismissed, another will always be there to take its place.<sup>284</sup> Thus, even adding a large number of agency attorneys may not go far in changing ICE's prosecutorial culture. In practical effect, the current supply of potentially deportable noncitizens is inexhaustible; thus an increased capacity would simply result in "reproducing the level of service quality at a higher volume."<sup>285</sup> At best, the active caseload managed by each attorney would remain the same, while the inactive load would decrease slightly.<sup>286</sup>

Heavy, intractable caseloads help to explain why some ICE prosecutors bring aggressive or uncooperative behavior into the handling of cases that go forward. First, until the hearing is underway, the trial attorney may have little idea whether the government's grounds for deportation (or the noncitizen's grounds for relief) are meritorious.<sup>287</sup> Trial attorneys thus may seek to compensate for a lack of knowledge by maintaining resolve and preserving leverage until an approaching hearing date gets the case off the backburner. Further, with insufficient time to prepare for addressing the merits of any particular noncitizen's claim to asylum or other relief, the ICE attorney may instead rely on wide-ranging cross-examinations that often come to center on the magnification of perceived weaknesses in the noncitizen's testimony or challenges to the noncitizen's moral character.<sup>288</sup> Moreover, once courtroom proceedings have begun, the instinct to win may take over—no matter how strong the noncitizen's right to remain may appear.<sup>289</sup>

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283. Cade, *supra* note 12, at 1765; Brian A. Reaves, *Federal Law Enforcement Officers, 2008*, BUREAU OF JUST. STAT. (June 2012), <http://bjs.gov/content/pub/pdf/fle008.pdf>.

284. LIPSKY, *supra* note 81, at 27, 29, 33 (explaining that street-level bureaucracies are chronically under-resourced, as demand for services typically rises with any increases in supply).

285. *Id.* at 38.

286. *Id.* at 36; *see also* Interview with ICE Trial Attorney in Small Midwestern Office, *supra* note 76 (explaining that her regional office of fewer than ten attorneys is responsible for somewhere on the order of 4,500 pending cases, though many are not currently active).

287. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1309 (1990).

288. Heeren, *supra* note 13, at 1626; Martin, *supra* note 287, at 1308.

289. *See, e.g.*, Martin, *supra* note 287, at 1309 ("Moreover, as one attorney told me, even when it appears to be a strong case, his instincts (and perhaps his inevitable role under this structure) lead him to react in a particular way: 'When it's there in the courtroom, I'm

Finally, the unceasing flow of repetitive cases—especially in jurisdictions where immigration fraud is, or is perceived to be, common—may desensitize some ICE prosecutors to “the human dimensions of the job.”<sup>290</sup> One trial attorney with whom I spoke relayed that recurrent work on matters involving claims that “everyone knows [are] a farce” becomes “soul-sucking.”<sup>291</sup> Such experiences inevitably dampen any potential desire to sort out appropriate cases for the exercise of favorable discretion.

### C. *Lessons from Criminal Law*

It bears repeating that the justice-seeking responsibilities of ICE’s prosecutors are embedded in statutes, case law, training materials, and policy memoranda. The pronouncements bespeak a commitment to fairness values that the agency’s actions thus far have failed to make a reality. What is more, enforcement bias and heavy workloads are features of ICE’s culture that are not easily susceptible to change. How then, can the agency improve the quality of its efforts to foster the pursuit of justice by its frontline attorneys?

A potentially fruitful point of comparison may be found in the administration of criminal law. Although criminal systems vary widely, even within states, all employ a number of procedural mechanisms and design features that encourage their prosecutors to seek justice, and not just convictions, despite the fact that they too must contend with tunnel-vision tendencies and sometimes overwhelming caseloads. If the analogy between immigration removal adjudication and the criminal system is apt, some of these features might be implemented within ICE to heighten the trial attorneys’ accountability and incentives to seek justice.

In important respects, the criminal and administrative removal systems, and the function of government prosecutors in each, are similar—and increasingly so. The ostensible mission of each is to determine, through adversarial proceedings, whether significant statutory penalties should be imposed on the basis of past conduct. In both systems, the contest is frequently lopsided, pitting trained govern-

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‘agin’ it.”); *see also* Barkow, *supra* note 252, at 313 (explaining that the “will-to-win can create cognitive biases in even the most well-intentioned prosecutors”); Bibas, *supra* note 272, at 2471-72 (discussing the importance of high conviction rates to prosecutors); Bowers, *supra* note 271, at 1703 & n.224 (discussing the incentives for prosecutors to pursue convictions).

290. LIPSKY, *supra* note 81, at 37.

291. Interview with ICE Trial Attorney in Small Midwestern Office, *supra* note 76.

ment attorneys wielding the vast power of the state against persons who most of the time cannot afford to hire their own lawyers. And the government's initial charging decisions in both immigration and criminal proceedings frequently produce both immediate detention and a frame of possible outcomes that shape the adjudicative process in fundamental ways.<sup>292</sup>

Immigration and criminal law have also increasingly converged, especially since legislation in the 1990s dramatically expanded the grounds of detention and removal on the basis of criminal history.<sup>293</sup> Today, the path to a removal hearing frequently begins with some kind of contact with law enforcement officials, often at the state or local level.<sup>294</sup> The administrative removal system is then employed as an add-on, or even an alternative, to the criminal prosecution, especially for noncitizens arrested for misdemeanors and immigration violations.<sup>295</sup> Moreover, because so many of these matters are handed off to ICE attorneys, they are often the first (and last) government lawyers in a position to evaluate the propriety of the noncitizen's arrest, just like criminal prosecutors who handle criminal prosecutions.<sup>296</sup>

Perhaps most saliently, because each system is built around an elaborate code that puts many more people in violation of the law than either regime can possibly subject to enforcement, both criminal prosecutors and immigration trial attorneys inevitably must make choices about how, and against whom, the law is applied. This prosecutorial discretion goes largely unchecked by courts—though for somewhat different reasons—in each system. Because only about 5% of criminal cases proceed to trial, much of what criminal prosecutors do—investigation, charging, and plea negotiating—is subject to little review by a judge.<sup>297</sup> While criminal judges ultimately must approve plea bargains before ordering a judgment of conviction, they have little

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292. See discussion *supra* Part III.B.

293. See discussion *supra* Parts II.A and IV.A.

294. Cade, *supra* note 11, at 182-83.

295. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1337-59 (2010).

296. Cade, *supra* note 11, at 186-200 (considering ICE prosecutors' responsibilities following unchecked violations of noncitizens' constitutional rights by arresting officers).

297. See RUSSELL L. WEAVER ET AL., *CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES* 831-60 (5th ed. 2013); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) ("Few officials can so affect the lives of others as can prosecutors. Yet few operate in a vacuum so devoid of externally enforceable constraints."). To be sure, criminal judges presiding over preliminary hearings and motions do have a hand in whether cases go forward, so charging decisions are not entirely insulated from review.



incentive not to accept the agreement as long as the plea is knowingly and voluntarily made.<sup>298</sup> Similarly, statutory limitations on judicial review of immigration proceedings, as well as institutionally driven policies of deference to the Executive Branch in this area, all but foreclose judicial checking of discretionary decisions made by ICE and its trial attorneys.<sup>299</sup>

Criminal prosecutors are expected to exercise discretion to avoid subjecting defendants to unwarranted loss of liberty, harassment, anxiety, or stigma. Their use of discretion is seen as integral to achieving justice in the criminal system, and the decision whether to prosecute requires “consideration of the individual facts and circumstances of each case.”<sup>300</sup> Because criminal prosecutors act on behalf of a “sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,” they have a responsibility not to simply obtain convictions, but also to do what is right.<sup>301</sup>

Despite the esteem in which criminal prosecutors are held and the largely unreviewable freedom they are given, they are not left completely to their own devices with respect to the “justice” part of the job. Rather, numerous mechanisms are employed to check prosecutorial abuse and error and to reduce power asymmetries between the government and the defendants. Constitutionally driven procedural measures include the rights to (1) counsel at the government’s expense for indigents, (2) effective assistance of counsel, (3) review of probable cause determinations, (4) a public trial, (5) a trial by a jury of peers or an impartial judge, (6) the prohibition of double jeopardy, and

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298. See, e.g., GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 111-36 (2003) (discussing judicial incentives to prefer plea bargains). Although a trio of recent Supreme Court cases may spur judges to investigate the content of plea negotiations, these concern the effective assistance of defense counsel and therefore offer little in the way of checks on prosecutorial discretion. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1390-91 (2012) (holding that a defense counsel’s incompetent advice about the merits of taking a particular plea offer establishes prejudice); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (requiring that defendants be informed about any potentially beneficial plea offers from the prosecution); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486-87 (2010) (holding that defendants have a constitutional right to advice about the deportation consequences of convictions).

299. See ALEINIKOFF ET AL., *supra* note 30, at 1270-80; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

300. DAVIS, *supra* note 28, at 14; see also Bowers, *supra* note 271, at 1663-78. Criminal prosecutors, wielding the immense power of the government, are also expected to seek just outcomes and ensure fair process. See Green, *supra* note 99, at 612-18.

301. *Berger v. United States*, 295 U.S. 78, 88 (1935).

(7) exoneration if the government does not meet its burden of proof.<sup>302</sup> Other mechanisms have constitutional origins but have also been developed and expanded through legislation and administrative policy, including the availability of pretrial motions and hearings, speedy trial rules, and discovery obligations.<sup>303</sup> Still other organizational design features, like vertical prosecution arrangements, have been widely implemented in prosecutors' offices as a related policy choice to increase accountability and efficiency.<sup>304</sup> All of these protections may not attach to every kind of prosecution, and there are variations in the form of each rule across jurisdictions and types of criminal proceedings. Nor are the features fail-safe: prosecutorial errors and overreaches persist.<sup>305</sup> Nevertheless, the administrative mechanisms considered here can be usefully generalized and are more or less a part of all criminal systems. Our history is replete with reminders of how much more tenuous the criminal system's hold on justice would be if these protective procedures did not check prosecutorial authority.<sup>306</sup>

To be sure, there are significant differences between criminal tribunals and immigration courts. The presumption of a defendant's innocence until guilt is proven beyond a reasonable doubt helps justify heightened procedural safeguards in criminal systems. In addition, criminal sanctions can include lengthy prison sentences (including life without parole) and capital punishment. They also can trigger a host of collateral consequences that follow the convicted individual for an entire lifetime.<sup>307</sup>

On the other hand, the Supreme Court has long recognized that an order of deportation is often more onerous than many penal sanctions.<sup>308</sup> This is increasingly the case, as tougher immigration laws retroactively make lawfully present noncitizens with deep roots in their

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302. See WAYNE R. LAFAYE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION (2d ed. 2009); Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975) (summarizing the universe of procedural rights potentially available in any proceeding).

303. Friendly, *supra* note 302.

304. See, e.g., Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005).

305. *Id.*

306. See DAVIS, *supra* note 28, at 9-12 (relating the history of the American prosecutor); see also Cade, *supra* note 46, at 391-98, 402-04 (surveying historical uses of the pardon power that stimulated reforms to criminal defendants' procedural protections).

307. See MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE 35-179 (2013).

308. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010); *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001); *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

communities subject to deportation, even on the basis of minor convictions that occurred many decades ago.<sup>309</sup> And despite the higher burden of proof in criminal cases, the real-world operation of the criminal justice system often makes it easy for prosecutors to obtain guilty pleas simply by piling up charges that the accused must defend against.<sup>310</sup> It is at trial where most due process criminal procedure rights come into play. Yet most criminal prosecutions do not go to trial,<sup>311</sup> so that in practice, the criminal system bears a closer resemblance to removal proceedings than might first meet the eye. In short, while there are natural differences between administrative removal hearings and criminal prosecutions, they are a great deal alike in important respects.<sup>312</sup>

It follows that DHS would do well to consider borrowing certain pretrial mechanisms that criminal systems typically use to encourage prosecutors to facilitate justice and, more particularly, to counter the pressures that prosecutor bias and case overload bring to bear in the criminal justice system. In the remainder of this Article, I focus on four such measures that the Executive Branch might adopt without the need for additional legislation: discovery obligations, vertical prosecution, enhanced declination power, and prehearing conferences. These procedures would work together to increase prosecutorial accountability and encourage earlier screening of cases for merit and possible exercises of equitable discretion, while reducing the asymmetries that can produce inaccurate or unjust results, particularly when ICE attorneys employ hardball tactics.

I offer two overarching observations before proceeding to my proposals for reform. First, the most direct route to a more humane

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309. *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, *supra* note 141, at 16-34.

310. See, e.g., Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, COLUM. L. REV. SIDEBAR (July 2013), [http://www.columbialawreview.org/ham-sandwich-nation\\_Reynolds](http://www.columbialawreview.org/ham-sandwich-nation_Reynolds).

311. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013).

312. See Austin T. Fragomen, Jr., *The "Uncivil" Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34-35 (1978) ("[D]eportation proceedings should be deemed 'criminal' or 'quasi-criminal' in nature . . . ." (footnote omitted)); Legomsky, *supra* note 29, at 481 ("[I]mporting the criminal enforcement model into immigration law without the accompanying criminal adjudication model exposes the affected noncitizens to harsh consequences without the necessary procedural safeguards."); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307 (2000) (explaining why traditional constitutional protections in criminal proceedings should apply in deportation proceedings).

and efficient enforcement system would involve changes to the substantive immigration laws that define grounds of inadmissibility, deportability, and eligibility for relief. Rolling back some of the more punitive statutory measures enacted in the mid-1990s would greatly reduce, though not eliminate, the current need for increased prosecutorial discretion in immigration enforcement.

But such reforms are not at all likely to take hold. Most politicians see little benefit in enacting laws that make it easier for noncitizens to avoid removal. The year 2013 witnessed an epic struggle to pass a wide-ranging immigration bill.<sup>313</sup> It was the fifth failed comprehensive reform effort of the past decade. Once again, the breadth of division between opposing camps, the depth of passions on immigration issues, and the intensity of public scrutiny stood in the way of change. At this point, it is safe to assume that any legislation surviving in 2014 will not reduce the code's expansive, harsh removal grounds. Instead, if enactment of a legalization program for some portion of the eleven million undocumented persons in this country occurs, it is likely to come with a trade-off for strengthened enforcement measures, both at the border and in the strictness of substantive criteria for admission and removal. Similarly, although the right to counsel is arguably the most important procedural measure to equalize power and achieve justice,<sup>314</sup> it is also the most expensive measure to implement and would likely require congressional action to be successful nationwide.<sup>315</sup> In addition to the financial barriers to the establishment of a general or limited right to appointed counsel in

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313. Rebecca Kaplan, *Can Immigration Reform Pass in 2014?*, CBS NEWS (Dec. 26, 2013, 6:00 AM), <http://www.cbsnews.com/news/can-immigration-reform-pass-in-2014/>.

314. See *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533, 543-45 (2001) (emphasizing the role of attorneys in the administration of justice); *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."). For recent arguments in favor of at least a limited right to counsel in immigration court, see Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012); and Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000).

315. In 2014, New York City launched the nation's first indigent immigrant defender system, training 25 law graduates to provide representation to 135 individuals, funded by a \$500,000 grant from the Robin Hood Foundation. See Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES (Jan. 28, 2014), [http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?\\_r=0](http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?_r=0); Kirk Semple, *City To Help Immigrants Seeking Deportation Reprieves*, N.Y. TIMES (July 17, 2013), <http://nytimes.com/2013/07/18/nyregion/city-to-help-immigrants-seeking-deportation-reprieves.html>.

immigration proceedings, other significant systemic barriers to ensuring that such representation will be effective will likely persist and may require additional legal reform.<sup>316</sup> The recognition, funding, and implementation of a broad right to counsel in immigration court thus faces substantial obstacles.

The second point to observe is that one need not necessarily look to the criminal system, or frame the problem in terms of prosecutors' duty to seek justice, to conclude that the existing removal system is in need of change.<sup>317</sup> Regardless of how our criminal system works, when trial attorneys litigate in ways that fail to live up to their responsibility to see that justice is done, the values of accuracy,<sup>318</sup> consistency,<sup>319</sup> efficiency,<sup>320</sup> and fairness<sup>321</sup>—all fundamental objectives of any administrative adjudicative system—are compromised. These values are interrelated and connected with other values, as well. For example, the promotion of correct (and uniform) outcomes promotes the

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316. See Keyes, *supra* note 196 (discussing the persistent culture of poor defense of immigrants in removal proceedings and the significant institutional pressures hampering zealous advocacy); Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43, 47 (2011) (discussing how the current administrative case law gives adjudicators no constraints in evaluating effectiveness).

317. For example, as Geoff Heeren demonstrates, in the last half century many administrative courts have embraced “liberal discovery processes similar to those in civil litigation.” Heeren, *supra* note 13, at 1617; see also *id.* at 1577-78 & n.56 (citing examples of many administrative agencies that have adopted formal discovery rules that are broader than those provided in immigration court).

318. MASHAW, DUE PROCESS, *supra* note 248, at 103-04; Edward K. Cheng, *Changing Scientific Evidence*, 88 MINN. L. REV. 315, 322 (2003); Robert Pauw, *Judicial Review of “Pattern and Practice” Cases: What To Do When the INS Acts Unlawfully*, 70 WASH. L. REV. 779, 793 (1995) (explaining that both factual and legal determinations should be correct).

319. MASHAW, DUE PROCESS, *supra* note 248, at 103-04 (explaining that although error is unavoidable and, therefore, tolerable within limits, agencies are expected to strive to pursue outcomes that align with the relevant criteria and rules in a given factual situation).

320. Pauw, *supra* note 318, at 791 (explaining that efficiency goals include minimizing costs to parties and the government (which are passed on to taxpayers), as well as reducing waiting times for a decision).

321. See, e.g., Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 262-63 (2002); Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111-12 (1963); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313 (1986); Pauw, *supra* note 318, at 796; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 57 (2012) (describing the author's efforts to obtain data on individual deferred action grants by various DHS subagencies and arguing that lack of transparency about the criteria for deferred action leads to unequal access, inconsistent results, and inefficiencies).

perception of fairness, public respect for governing legal institutions, and judicial confidence in the agency's representations and positions.<sup>322</sup>

The pursuit of these values might seem to warrant judicial intervention to promote more due process in removal proceedings. Judges, however, have a distinctly limited capacity to inject fairness into immigration court. In general, judicial review is a sluggish form of challenging agency action.<sup>323</sup> More particularly, Congress has exempted removal hearings from the Administrative Procedure Act.<sup>324</sup> While Fifth Amendment due process does apply, our traditions do not provide courts with much room to maneuver in overlaying constitutional protections on the immigration system.<sup>325</sup> If anything, judicial inclinations to impede deportations through procedural protections may have diminished in the wake of the 9/11 attacks.<sup>326</sup> The bottom line is that if change is going to occur in how DHS processes deportation cases, it is most likely to come from within the agency.<sup>327</sup>

## V. MODEST AGENCY REFORMS

Reforming the immigration adjudication system without congressional legislation must focus on achievable goals. In this Part, I propose four modest reforms that borrow directly from already-existing practice in the criminal law field. These measures, which DHS or the Attorney General could readily implement, would not drastically affect the agency's enforcement culture. They would, however, increase the accountability of trial attorneys and incentivize them to screen cases at an early stage, thus raising the likelihood that they would (1) exercise discretion more carefully and consistently and (2) focus limited resources on the most important targets for removal. Many trial attorneys will continue to litigate removal cases as they do now, even if agency leaders bolster their already-declared commitment

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322. Green, *supra* note 101, at 271-73.

323. Rubin, *supra* note 265, at 75.

324. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 654, 662-64 (5th ed. 2009).

325. Legomsky, *supra* note 316; Motomura, *supra* note 299.

326. See Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343 (David A. Martin & Peter H. Schuck eds., 2005).

327. MASHAW, BUREAUCRATIC JUSTICE, *supra* note 248, at 15 (“[T]he task of improving the quality of administrative justice is one that must be carried forward primarily by administrators.”); Cade, *supra* note 11 (arguing that in the absence of an effective judicial exclusionary rule in immigration proceedings, ICE prosecutors should administratively suppress evidence obtained in violation of the Fourth Amendment); Rubin, *supra* note 265, at 75-77.

to promoting justice in the adjudicative process. Even so, a reduction of informational disparities, along with increased prehearing communication, will diminish the likelihood that hardball tactics will lead to inaccurate and disproportionate results. While the measures considered here would not replace the benefits of an indigent right to counsel in immigration court or a rollback of excessively punitive immigration laws, they are realistic possibilities that could be implemented in the near future without the congressional intervention that more far-reaching reforms would require.

#### A. *Discovery Obligations*

While ICE has access to vast data stores that it can use against noncitizens in removal proceedings, noncitizens must initiate and wait on the results of formal FOIA requests, even to obtain documents in the government's A-file that directly concern them. This form of discovery is cumbersome and inefficient even when successful and is all but unavailable to those who proceed pro se or while in detention. Although a variety of discovery innovations may warrant consideration,<sup>328</sup> the most critical reform would require trial attorneys to turn over contents of the noncitizen's A-file (excepting confidential information) upon request or at the first master calendar hearing in every case where the noncitizen intends to contest removability, seek relief, or obtain the assistance of counsel.

In criminal proceedings, discovery rules oblige prosecutors to give defendants access to a variety of information. To be sure, the criminal defendant's baseline right of access to material exculpatory evidence within the government's possession is grounded in the Constitution.<sup>329</sup> But the disclosure rules in every federal and state jurisdiction are significantly shaped by a combination of statutes, professional responsibility rules, common law doctrines, and administrative policies.<sup>330</sup> While subject to significant variation with

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328. See Heeren, *supra* note 13, at 1617-27 (evaluating a range of discovery measures).

329. See 6 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 24.3(a) (3d ed. 2007) (discussing the constitutional sources of a defendant's right of access to evidence); Brady v. Maryland, 373 U.S. 83 (1963).

330. See 5 LAFAYE ET AL., *supra* note 329, § 20.2(a)-(b) (discussing the statutory and court rules governing discovery); 6 *id.* § 24.3(a) ("Various statutes, common law rules, and constitutional commands combine to shape the capacity of the defense to gain access to evidence it might use at trial."); see also 5 *id.* § 20.1(c) (describing how both the federal system and the states have "uniformly" expanded defense discovery).

respect to the timing and content of disclosure obligations, the rules in all jurisdictions exceed the constitutional minimum.<sup>331</sup>

In the federal system, Rule 16 mandates disclosure of a broad range of material, including the defendant's written and recorded statements, the substance of oral statements, reports of physical and medical examinations, and other relevant documents.<sup>332</sup> Some federal district courts have implemented local rules that exceed the scope of Rule 16,<sup>333</sup> and DOJ's internal guidelines instruct U.S. attorneys that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases."<sup>334</sup> In particular, "[e]xculpatory information . . . must be disclosed to the defendant reasonably promptly after discovery."<sup>335</sup>

Many states' discovery rules in criminal cases go even further than the federal rule. The ABA has long recommended liberal defense access to prosecutors' files, in recognition of the possibility of prosecutorial abuse and the inherent difficulty and subjectivity of identifying relevant or even material evidence.<sup>336</sup> In accordance with various iterations of the ABA guidelines, a small but growing number of jurisdictions have mandated "open-file discovery," or something close to it, thereby giving defense attorneys substantial access to prosecutorial and law enforcement files involved in investigating or prosecuting the defendant.<sup>337</sup> Over thirty other states stop short of open-file discovery while still providing for broader disclosure obligations than the federal rule.<sup>338</sup>

Discovery rules that give defendants access to evidence in the government's possession help ensure that prosecutors do not prioritize winning cases over achieving justice by capitalizing on information and power asymmetries. Implementing, at a minimum, a universal A-

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331. *See* 5 *id.* § 20.2(c) (discussing variations in the operation of discovery provisions).

332. *See* FED. R. CRIM. P. 16; 5 LAFAVE ET AL., *supra* note 329, § 20.1(c).

333. *See* 5 LAFAVE ET AL., *supra* note 329, § 20.2(b).

334. Memorandum from David W. Ogden, Deputy Att'y Gen., DOJ, to Department Prosecutors, DOJ, DOJ (Jan. 4, 2010), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00165.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm).

335. *Id.* *But see* United States v. Ruiz, 536 U.S. 622, 628-29 (2002) (failing to turn over impeachment material to a defendant does not invalidate a guilty plea). It has never been squarely decided whether exculpatory evidence need be turned over preplea in federal criminal proceedings, because so far no one seems to have challenged a United States Attorney's decision to withhold that material.

336. *See* 5 LAFAVE ET AL., *supra* note 329, § 20.1(c).

337. *See, e.g.*, N.C. GEN. STAT. §§ 15A-902 to -910 (2013); ALASKA R. CRIM. P. 16; FLA. R. CRIM. P. 3.220; MINN. R. CRIM. P. 9; N.J. R. CRIM. P. 3:12-2, 3:13-3.

338. *See* 5 LAFAVE ET AL., *supra* note 329, § 20.2(b) nn.32-33.



file disclosure rule in immigration court would thus further justice-seeking goals in several respects. First, more accessible discovery would give noncitizens access to critical documents bearing on their ability to rebut the governments' charges of deportability or to establish eligibility for discretionary relief from the immigration judge. The importance of providing access to applications and documents previously filed by, or on behalf of, a noncitizen now facing removal is well illustrated by the *Dent* litigation.

Second, increased discovery would also improve the removal system's administration of justice in a related but distinct way. The current lack of discovery in immigration court contributes to the system's inefficiencies because it elevates the unpredictability of merits hearings. The inability to access evidence held by the government exacerbates, for example, the Hobson's choice created by one-time-only, last-minute discretionary offers of administrative closure in cases where noncitizens may be eligible for more significant adjudicative relief. With better access to evidence the government intends to introduce at a merits hearing, noncitizens could make more informed choices about whether to accept administrative closure (or voluntary departure) in lieu of proceeding to a hearing, thus saving the government considerable resources.

Third, further-reaching disclosure obligations would have the likely effect of requiring trial attorneys to take a look at cases earlier in the process than they currently do. This may not be true if ICE mechanically serves the entire A-file, but presumably trial attorneys would first screen the file for information implicating national security concerns before turning over any material. In low-priority cases with strong equities, earlier review might encourage trial attorneys to narrow issues or exercise prosecutorial discretion; in high-priority cases, an earlier look might lead them to be proactive in developing further evidence against the noncitizen.

Finally, mandating disclosure obligations would reduce the chance that a noncitizen with a valid claim to stay is deported on the basis of the government's ability to create the appearance of inconsistencies through surprise cross-examinations. In immigration proceedings, "[s]urprising the applicant in court with her past inconsistent statements is the government's one tried and true means of challenging . . . credibility."<sup>339</sup> Yet preventing unfair surprise is a central reason that more liberal discovery rules were adopted in the

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339. Heeren, *supra* note 13, at 1615.

criminal system,<sup>340</sup> as well as in civil litigation contexts.<sup>341</sup> In the words of Justice Roger Traynor of the California Supreme Court, “The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.”<sup>342</sup>

It is true that noncitizens with better information may gain an opportunity to clarify past statements and avoid inconsistencies in court. But that is the case in all proceedings with discovery procedures.<sup>343</sup> Despite the presence of significant stakes in criminal proceedings, which opponents of liberalized discovery argued elevate the defendant’s incentive to commit perjury, the viewpoint that prosecutions should be “less a game of blindman’s [bluff] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent” carried the day.<sup>344</sup> There is reason to believe that trial attorneys currently overrely on wide-ranging cross-examination based on informational advantages.<sup>345</sup> If so, the system as a whole will benefit if they engage with the merits more directly.

Enhanced disclosure rules should not inhibit ICE’s ability to obtain removal orders for those persons who lack eligibility to remain in the United States or who otherwise compromise important public interests. Federal statutes already exempt national security or confidential information from ICE’s disclosure obligations.<sup>346</sup> And much of the information in the A-file is gathered, in the first place, through disclosures made by the respondent from whom the information is later held back.<sup>347</sup>

The optimal scope and timing of discovery in immigration court likely lies somewhere between Federal Rule of Criminal Procedure 16 and open-file discovery. At a minimum, however, noncitizens in removal proceedings should be provided with the full contents of their A-file (excluding sensitive or confidential information) upon request or at the first master calendar hearing, unless they elect not to seek the assistance of counsel, contest removability, or request relief from

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340. 5 LAFAVE ET AL., *supra* note 329, § 20.1(b).

341. Heeren, *supra* note 13, at 1573-74.

342. Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964).

343. Heeren, *supra* note 13, at 1577-79 (citing to a variety of administrative proceedings with formal discovery rules).

344. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

345. Heeren, *supra* note 13.

346. 8 U.S.C. § 1229a(b)(4)(B) (2012) (stating that a noncitizen is not entitled to examine national security information); *id.* § 1229a(c)(2) (stating that a noncitizen is not entitled to have access to records or documents deemed to be confidential).

347. Heeren, *supra* note 13.

removal. The opportunity to examine the contents of the A-file early in the proceedings would significantly aid immigration attorneys in advising noncitizens as to the appropriate course of action, contributing in many cases to a more efficient proceeding.

There remains the question of which agency is the right one to implement discovery-related reforms. As the DOJ has done for United States attorneys, the DHS could use its supervisory powers to implement broader disclosure rules for ICE trial attorneys.<sup>348</sup> However, if discovery is primarily a matter of DHS policy, the rules will be harder to enforce and will likely be exercised inconsistently. Accordingly, discovery obligations in immigration court are most likely to be successful if implemented through rule making by the Attorney General, so that immigration judges have authority and control over the process. Formal rule making will also give interested stakeholders an opportunity to weigh in on the scope of discovery obligations in immigration court, as a range of possibilities are reasonable (for example, whether noncitizens should have access to other material in the government's possession that is related to their cases but not contained in their A-files). The bottom line is that measures requiring ICE attorneys, early in the life of a removal case, to review and turn over any nonconfidential documents in their possession that bear on an individual's claims of a right to remain will heighten the likelihood of a just and efficient outcome.

### *B. Vertical Prosecution*

Trial attorneys are not assigned to individual cases. Instead, they typically rotate through the immigration judges' dockets by date and become responsible for cases only shortly before merits hearings are scheduled to take place.<sup>349</sup> This arrangement contrasts with the model employed in many criminal prosecutors' offices and other civil enforcement bureaus, where "vertical prosecution" ensures that one attorney (or a small team) is assigned to handle all aspects of a case from its arrival in the office to its resolution.<sup>350</sup>

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348. Memorandum from David W. Ogden, Deputy Attorney Gen., DOJ, to All United States Attorneys, DOJ, DOJ (Jan. 4, 2010), <http://www.justice.gov/dag/memorandum-heads-department-litigating-components-handling-criminal-matters-all-united-states>.

349. Cavendish & Schulman, *supra* note 97, at 44-45; *Assembly Line Injustice: Blueprint To Reform America's Immigration Courts*, *supra* note 207, at 18; see ICE, OFFICE PROCEDURES MANUAL 24 (July 2, 2009) (noting that trial attorney assignments for individual merits hearings are made one month beforehand) (on file with author).

350. See, e.g., Levine, *supra* note 304, at 1141 (describing different types of vertical prosecution arrangements).

A lack of vertical prosecution in immigration court interferes with the trial attorney's capacity to exercise careful discretion for several reasons. When no prosecutor is assigned to a case, noncitizens and their counsel are without a meaningful point of contact with whom to communicate or negotiate. Thus, even if a noncitizen has a clear right to remain in the country or presents significant equities warranting prosecutorial leniency or adjudicative discretion, there may be little chance of communicating these factors effectively until the case has trudged all the way through the long journey to a final hearing. Nor is the limited interaction with the prosecutor at the court's master calendar hearings sufficient. Master calendars typically are crowded, all-day affairs with scores of cases to schedule. Moreover, as a practical matter, the trial attorney relies on a cart full of unfamiliar A-files to gain only an initial sense of the government's allegations and evidence as each case is called by the judge. ICE attorneys also have important specialized work to do at master calendar proceedings. They must, for example, present the government's position in uncontested cases and request in absentia removal orders against respondents who fail to show up.<sup>351</sup>

Additionally, when trial attorneys do not have ownership over the cases on the court's calendar, they have an incentive to pass the buck along and let someone else consider discretion further down the line.<sup>352</sup> In a horizontal model, attorneys do not internalize (or perhaps even notice) the consequences for individuals whose cases should have been screened and dropped or negotiated at an earlier stage. On the other side of the coin, when attorneys are not accountable for cases from filing (or soon after) to adjudication, they may not fully develop evidence in the higher priority cases that should have been pursued most vigorously. Finally, a system of vertical prosecution will increase transparency and accountability with respect to implementation of the discovery reforms proposed in the previous Subpart.

For these reasons, ICE should implement vertical prosecution in every removal case. Indeed, assignments could be made even before the NTA is filed with the court, so that the trial attorney who will be prosecuting the matter has ownership and control over whether the charges are accurate or whether removal should be pursued at all.

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351. See discussion *supra* Part II.B (explaining master calendar hearings).

352. Cf. Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1181 (2004) ("In the lower-level court in which I practice, the prosecutors very rarely appear on their own cases. They read from a note in the file, have no personal knowledge about the case in front of them and precious little discretion.").

Although in some field offices ICE attorneys are given the responsibility to review some NTAs before filing, such occurrences are not mandated by any agency-wide policies and occur only sporadically. Moreover, an ICE attorney might approach the review of an NTA that he or she likely will be responsible for prosecuting more carefully than one to be handled by others.

Program administrators may raise questions about whether prefiling assignments make sense, however. They might emphasize that many noncitizens choose not to contest their proceedings and simply consent to being removed right away, thus reducing the need for vertical integration. Furthermore, some agency supervisors have argued that resource limitations preclude assigning one attorney to each case in light of inevitable scheduling conflicts.<sup>353</sup> These objections should be taken seriously but are not deal breakers for the need for vertical prosecution.

First, in many hearing locations there are only a few sitting immigration judges, obviating or at least reducing scheduling difficulties.<sup>354</sup> Moreover, even in the busier jurisdictions, each trial attorney could be assigned to a particular immigration judge's docket as a routine matter. That way, when a case is filed in immigration court it would be assigned to both prosecutor and judge at the same time, so that scheduling conflicts would be minimized. To further increase efficiency, judge-prosecutor assignments could be made provisional until the noncitizen's first master calendar appearance. This would allow maximum flexibility in the event the respondent chooses not to contest removal.

When a government attorney becomes part of a working group with a particular judge, there is some risk that the judge will over time tend to defer to, rather than second-guess, a de facto working partner.<sup>355</sup>

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353. Cavendish & Schulman, *supra* note 97, at 45.

354. *EOIR Immigration Court Listing*, *supra* note 154.

355. See, e.g., JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 27-28, 32-34 (1977) (explaining that working groups strive to maintain cohesion and reduce conflict within the courtroom); HENRY R. GLICK, *COURTS, POLITICS, AND JUSTICE* 234 (3d ed. 1993) (contending that the dynamics of courtroom working groups encourage plea bargain settlements); Eric Lane, *Due Process and Problem-Solving Courts*, 30 *FORDHAM URB. L.J.* 955, 966 (2003) ("In a setting in which the defense counsel . . . , the prosecutor, and the judge are all 'regulars,' in that they work together daily in the same courtroom, they develop shared goals, attitudes, and rules of conduct that allow the system to work . . . ."); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 *LAW & SOC. INQUIRY* 823, 829 (1998) ("Accommodation to each other's priorities is the rule, however, not just because of the payoffs it offers, but because the work group comes to share professional values and experiences."). Additionally, vertical schemes can produce inconsistencies between

This concern might give pause when regularly assigning trial attorneys to particular immigration judges' dockets. But in fact, similar relationships already exist between trial attorneys and immigration judges in many immigration courts, in light of the frequency of their contact, their shared government employment, and the fact that a majority of immigration judges take the bench after serving as trial attorneys.<sup>356</sup> This is not to suggest impropriety, but rather to observe that—as in many courts—working relationships between regular participants already are a norm in immigration court.<sup>357</sup> Moreover, even if some danger of undue prosecutorial “capture” exists, it is likely outweighed by gains in accountability, efficiency, and depth of knowledge that vertical arrangements present.<sup>358</sup>

Recently, a few but growing number of chief counsel offices have experimented with “unit prosecution,” assigning each case to a team of attorneys.<sup>359</sup> In anonymous interviews, trial attorneys I spoke with from two such offices reported that the change has increased pretrial communication between noncitizens and ICE, particularly with respect to requests for the exercise of prosecutorial discretion.<sup>360</sup> Both also reported that the measure had reduced, to some extent, the incentive to pass the buck.<sup>361</sup> Although it is early to assess the gains of experiments in team-based prosecution, these initial reports provide a promising

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prosecutors, particularly if there ends up being a prosecutor-judge alliance in the courtroom. See also Levine, *supra* note 304, at 1141 (discussing the pros and cons of vertical prosecution arrangements). Each immigration court may have a consistent internal approach, but one that differs from other jurisdictions.

356. See Ramji-Nogales et al., *supra* note 185.

357. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 30 (2012) (discussing working groups among criminal prosecutors, judges and defense attorneys).

358. Cf. Lane, *supra* note 355, at 958, 962-67, 974-78 (acknowledging the problem of threats to judicial neutrality in problem-solving courts, but concluding they compare favorably to traditional courts and will be successful with sufficient attention to procedural precautions). Of course, immigration courts are very different from problem-solving courts, in that the latter forum's prosecutor is no longer trying to convict or punish and the judge's range of outcomes may be more flexible.

359. See SAN ANTONIO OFFICE OF THE CHIEF COUNSEL, ICE, *supra* note 107, at 17-21 (describing unit prosecution in the San Antonio office); Cavendish & Schulman, *supra* note 97, at 45 (indicating that offices implementing unit prosecution include Los Angeles, Chicago, San Antonio, and San Francisco).

360. See Interview with ICE Trial Attorney in Large Urban Office, *supra* note 79; Interview with ICE Trial Attorney in Small Midwestern Office, *supra* note 76 (framed in terms of “accountability”); see also *id.* (stating that unit prosecution was really just a formalization of an already existing de facto policy, due to the small size of her office).

361. Interview with ICE Trial Attorney in Large Urban Office, *supra* note 79; Interview with ICE Trial Attorney in Small Midwestern Office, *supra* note 76 (pointing out that prosecutorial discretion requests were the only instances where she believed the shift to formal unit prosecution was making a difference).

signal. However, even where unit prosecution has been implemented, teams are not typically assigned until an individual merits hearing is scheduled, defeating some of the gains that could be realized through earlier assignments.<sup>362</sup>

Vertical prosecution could be implemented as a matter of DHS policy without any agency rule making and at relatively little additional expense to the government. In fact, vertical integration will produce efficiencies by reducing inefficiency-generating handoffs, even if some problematic staffing complications result. Most important, vertical staffing holds the potential of heightening individualized assessment by, and communication with, ICE attorneys as they process cases. And if such assessment and communication occur, the opportunities for achieving justice in removal proceedings will be enhanced.

### *C. Increased Responsibility and Authority for Screening and Declining Cases*

The discretionary right of prosecutors not to pursue a criminal prosecution has long been recognized.<sup>363</sup> The initial decision to decline prosecution is the most protected from scrutiny. This makes sense because prosecutors are likely to be better positioned than other actors in the criminal justice system to determine whether a particular prosecution that they will be responsible for prosecuting is warranted, according to the magnitude of the offense, the community's norms, the strength of the evidence, the available resources, the wishes of the victim, and other factors.

In many cases, ICE trial attorneys do not have the opportunity to exercise independent judgment about whether to file removal proceedings in cases that they will be responsible for litigating.<sup>364</sup> Other government officers and agencies share the authority to commence removal proceedings, and no rule or agency practice requires or even regularly facilitates the review of an NTA by *any* attorney before it is filed with the immigration court. And, as the BIA has interpreted agency regulations, trial attorneys are divested of the

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362. See, e.g., SAN ANTONIO OFFICE OF THE CHIEF COUNSEL, ICE, *supra* note 107, at 18-21 (explaining that the trial attorney "present at the last master calendar where an IC merits hearing is set will inherit the case to completion" unless there is a conflict, in which case another attorney in the unit will handle the case).

363. Reiss, *supra* note 297, at 1368.

364. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

authority to withdraw NTAs, even if legally insufficient, that already have been filed with the immigration court.<sup>365</sup> Instead, once jurisdiction vests with the court, the trial attorney can only file a motion asking a judge to administratively close or terminate proceedings. In short, ICE attorneys have insufficient tools and incentives to decline to prosecute removal proceedings early on in appropriate cases.

The problem could be addressed through implementation of a policy requiring that ICE lawyers screen all incoming cases before proceedings are initiated in immigration court.<sup>366</sup> If trial attorneys are to be assigned cases, either individually or as a team, before they are filed, it would be most appropriate for that particular attorney (or group) to consider whether the NTA should be filed with the court. If trial attorneys are not assigned to individual cases until further along in the proceedings (such as at the first master calendar), then prefiling NTA review should be made by any attorney in the office who *might* be responsible for the case shortly down the line. This would increase the likelihood of careful review and help facilitate the exercise of independent judgment.

It is true that a trial attorney sometimes may have insufficient information before a case is filed to determine whether a dismissal or other step back is warranted. Still, in many cases the equities will be ascertainable from documents in the A-file, which may include the noncitizen's length of residence, immigration history, medical records, employment and tax records, criminal history, country of origin, and so on. Oftentimes it will be apparent at the outset whether the person would appear to be a good candidate for discretion. In close cases, trial attorneys could give respondents an opportunity to provide additional information, ideally with the assistance of counsel who has had the opportunity to review nonconfidential information in the government's A-file. At a minimum, giving trial attorneys greater screening responsibility would give them the incentive to review NTAs for insufficiency and error, and the ability to quickly get rid of those that should not be in court at all.

Another reform that should be considered is whether to increase ICE attorneys' authority to independently dismiss cases, even after they have been filed. Under the current system, trial attorneys who wish to decline to pursue a removal case that is already under the

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365. 8 C.F.R. § 239.2 (2014).

366. *To File or Not To File a Notice To Appear: Improving the Government's Use of Prosecutorial Discretion*, *supra* note 175, at 60 (making this recommendation).



jurisdiction of EOIR can exercise discretion to file a motion, but then the immigration judge must adjudicate whether to administratively close the case.<sup>367</sup> To be sure, immigration judges often grant such motions, especially when the noncitizen supports that outcome. After all, immigration judges seek to clear their dockets and in fact are subject to case completion goals.<sup>368</sup> Because immigration judges may deny motions to close proceedings for any number of reasons,<sup>369</sup> however, trial attorneys may hesitate to screen cases carefully once filed with the court. Should ICE have increased authority to dismiss removal prosecutions even after jurisdiction has vested with the immigration court?

Here again, recourse to criminal practice is useful. At common law, even after the filing of formal charges, prosecutors were generally allowed to withdraw from continuing to prosecute.<sup>370</sup> Concern over unbridled *nolle prosequi* power led many jurisdictions to implement judicial or legislative rules requiring prosecutors to at least explain their reasons for dropping a prosecution in writing.<sup>371</sup> In some jurisdictions this requirement attaches after formal indictment, while in others prosecutors are free to drop prosecutions without giving a reason up until a preliminary hearing.<sup>372</sup> The federal rule, like that of many states, requires a judge's leave to dismiss an indictment. But as a leading case has instructed, "The exercise of [the executive's] discretion with respect to the termination of pending prosecution should not be judicially disturbed unless clearly contrary to manifest public interest."<sup>373</sup>

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367. *In re Avetisyan*, 25 I. & N. Dec. 688 (B.I.A. 2012).

368. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXEC. OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 4 (2006).

369. In *Avetisyan*, the BIA set forth factors for the immigration judge to weigh in ruling on a motion to administratively close proceedings, including (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared. *See Avetisyan*, 25 I. & N. Dec. at 696.

370. *See DAVIS*, *supra* note 28.

371. 4 LAFAYE ET AL., *supra* note 329, § 13.3(c).

372. *Id.*

373. *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975); *see also* 4 LAFAYE ET AL., *supra* note 329, § 13.3(c) n.44 (discussing the requirements for judicial approval of *nolle prosequi*).

In essence, then, a criminal prosecutor's early decision to withdraw a pending prosecution will generally be granted unless the reasons given somehow violate manifest public interest, but judicial scrutiny increases as proceedings progress.<sup>374</sup> Some variation of these rules could be workable in immigration court, too. Trial attorneys could be required to file a written statement explaining why an NTA is being withdrawn, and immigration judges could retain the power to reject that action in proceedings where doing so would be at significant odds with the public interest, for example if the noncitizen appears to have recent and serious criminal convictions or to be a threat to national security. At some point, perhaps at the first master calendar or other hearing, trial attorneys would lose the authority to independently cancel NTAs (subject to scrutiny). At that step, trial attorneys would need to make a motion to administratively close proceedings.

Increasing ICE prosecutors' power to dismiss so that it more closely resembles the *nolle prosequi* norms in the criminal system would help facilitate just outcomes in many removal proceedings. This is especially true if the current system continues, in which other officials can initiate proceedings without the input of ICE prosecutors. In tandem with a move towards vertical prosecution, trial attorneys should screen at an early stage all cases that they will have responsibility for handling in the event that an adjudicative hearing occurs. If the attorney knows they will be accountable for the case down the line, there is an increased incentive to more carefully review the merits of prosecution earlier in the proceedings. The ability to quickly dispose of cases at the outset that in the trial attorney's independent judgment should not be pursued will help reduce excessive caseloads and allow them to focus on the cases that matter most. At the very least, the existing system generates delay and inefficiencies, as in many cases all concerned parties believe judicial dismissal to be appropriate.

To be sure, enhancing the trial attorney's power to decline prosecution after proceedings have commenced would slightly reduce the immigration judge's authority. But under the measures suggested in this Part, the encroachment would not be significant, since immigration judges could retain the authority to reject ICE's withdrawal of a removal prosecution if clearly contrary to the public interest. It would also be time-limited; at some point along the

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374. 4 LAFAYE ET AL., *supra* note 329, § 13.3(c).

progression of proceedings ICE could only make a motion to administratively close, subject to immigration judge approval, as is the case now.

For these reasons, DHS should implement a rule or policy requiring that its trial attorneys review all NTAs before they are filed with the immigration court. Additionally, the Attorney General should consider amending existing DOJ regulations to provide that, even after jurisdiction vests with the immigration court, trial attorneys have the authority to cancel NTAs through written submission to the court, for legal insufficiency or for any reason, unless determined by the immigration judge to be clearly contrary to the public interest (and subject to some cutoff point such as the first appearance). Again, enhanced responsibility and authority to decline cases, whether before or after the commencement of proceedings, will work best in tandem with a system of vertical prosecution.

#### *D. Prehearing Case Conferences*

The life of most criminal cases begins and ends before ever reaching trial. The vast majority of criminal prosecutions are resolved through plea agreements or (to a much lesser extent) motion practice.<sup>375</sup> In this scheme, prehearing conferences are critical to giving the parties the opportunity to communicate, negotiate, and resolve cases.

Current agency regulations contemplate prehearing conferences in removal proceedings.<sup>376</sup> The *Immigration Court Practice Manual* also specifically sets out procedures for meetings of this kind.<sup>377</sup> In the real world, however, these pretrial conferences do not frequently occur. Immigration judges rarely schedule them with parties. Savvy attorneys typically must file motions in order to request a prehearing conference and then wait for the immigration judge to adjudicate the motion and schedule the conference, perhaps far in the future. And of course, nothing ensures that the trial attorney who appears on behalf of

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375. See Roberts, *supra* note 311 (explaining the need for the right to effective assistance in plea bargains in light of the fact that very few criminal cases proceed to trial).

376. 8 C.F.R. § 1003.21(a) (2014) (“Pre-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding.”).

377. Office of the Chief Immigration Judge, *The Immigration Court Practice Manual*, DOJ 82-83, [http://www.justice.gov/eoir/vll/OCIJPracManual/Practice\\_Manual\\_1-27-14.pdf#page=67](http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf#page=67) (last modified June 10, 2013); see also LEGOMSKY & RODRIGUEZ, *supra* note 324, at 653-54.

the government at a pretrial conference will be ultimately responsible for the case.

As in many criminal prosecution systems, respondents in immigration court should have the opportunity to confer with knowledgeable, accountable trial attorneys before any hearing on the merits. This would facilitate the exchange of information, narrowing of issues, and potential settlement of cases. In addition, and importantly, prehearing conferences would encourage trial attorneys to look at cases more closely before the eve of trial. If vertical prosecution were also implemented, trial attorneys would be better incentivized to take advantage of a prehearing opportunity to gauge the strength of the noncitizens' case and potentially narrow the issues in cases they will likely be responsible for down the line.

Some noncitizens may not wish to engage in prehearing conferences and should be permitted to decline to request such meetings, so as not to waste ICE attorneys' time. Moreover, prehearing conferences could often be of value without immigration judge supervision, thus limiting their impact on the overall operation of the adjudication system.<sup>378</sup>

This reform should be accomplished through rule making by DHS or the Attorney General. Alternatively, DHS could institute an internal policy of offering prehearing conferences, or immigration judges could make a practice of encouraging parties to employ the existing practice manual provisions. But, without an enforceable default rule, workload and enforcement pressures—as well as traditional practice—will push against prosecutor participation, despite the overall efficiency gains promised by prehearing communication. The better course would therefore involve adopting a formal and mandatory rule rather than mere managerial policy.

#### *E. Resource Objections*

Some will raise objections to these proposed reforms based on resource constraints. As an initial matter, the strength of those arguments turns on how much we value the justice-seeking norms that the system currently fails to provide.<sup>379</sup> Our country's legal standards

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378. However, if supervision by the immigration judge is required or desired, there would need to be a sufficient buy-in for this reform because the court might need to maintain a separate pretrial calendar.

379. Several DHS policies enacted or expanded under the Obama Administration suggest that it is sometimes willing to undertake policies that prioritize the administration of justice despite increased bureaucratic complexity and expense, including Morton's

largely bespeak a strong commitment to fair dealing and getting things right. Accordingly, adding mechanisms to further those values in institutions where they are not yet fully realized is an endeavor the government may wish to undertake, even where doing so is not costless.

But the economic argument, even taken on its own terms, may not pose a persuasive objection. Under the current system, noncitizens win the right to stay in roughly 50% of cases in which ICE seeks a removal order.<sup>380</sup> Additionally, a sizeable number of persons ordered removed eventually win their cases on appeal.<sup>381</sup> And if, as studies have suggested, fewer noncitizens in removal proceedings were unrepresented or subject to detention, there is reason to expect the government would prevail in even fewer cases.<sup>382</sup>

It would be ludicrous to suggest that the system must have a 100% success rate, but when one of every two cases fails to result in a removal order, scarce resources clearly are being expended on some removal prosecutions that should not have been pursued in the first place. With the addition of procedures to encourage earlier screening, accountability, and information flow, many of those cases would rise to the surface more quickly, releasing those persons from the hardships exacted by the system and freeing up the government to go all in on the cases that matter most. Seen in this way, the cost of implementing the additional procedures considered in this Part is likely offset by gains in efficiency, as well as in justice.

In terms of numbers, deporting one person likely costs the government somewhere between \$12,500 and \$23,480.<sup>383</sup> Additionally,

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prosecutorial discretion initiative and the Deferred Action for Childhood Arrivals program. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, USCIS, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Sept. 9, 2014).

380. *ICE Targeting: Odds Noncitizens Ordered Deported by Immigration Judge*, *supra* note 181. This figure is up from the already high percentage of cases in which ICE was unable to convince immigration judges to order removal between FY2001 and FY2010, which averaged around 25%. *ICE Seeks To Deport the Wrong People*, *supra* note 182, fig.1 & accompanying tabular details.

381. See Letter from Crystal Souza to Thomas Striepe, *supra* note 186 (presenting data on noncitizen appeals to the BIA that are remanded or sustained); Becker & McDonnell, *supra* note 171 (citing sources discussing erroneous detention and removal of U.S. citizens); see also Rosenbloom, *supra* note 109, at 146-53 (discussing errors in removal proceedings leading to wrongful deportations).

382. See Markowitz et al., *supra* note 169.

383. See Jana Kasperkevic, *Deporting All Of America's Illegal Immigrants Would Cost a Whopping \$285 Billion*, BUS. INSIDER (Jan. 30, 2012, 10:00 AM), <http://www.businessinsider.com/deporting-all-of-americas-illegal-immigrants-would-cost-a-whopping-285-billion-2012-1#ixzz2kd8kUJ2b> (contrasting the ICE deputy director's 2011 statement to Congress

deportations generate expenses beyond those to the federal government. For example, a recent report estimates that if noncitizens in detention had access to a lawyer, New York State would save nearly \$2 million annually through reduced spending on public health insurance programs, foster care services, and lost tax revenue, while employers would save an additional \$4 million annually by avoiding turnover-related costs.<sup>384</sup> These figures do not suggest that deportable noncitizens should never be deported. They do, however, bolster the arguments for adding measures that heighten prosecutorial scrutiny of the merits of pursuing removal early in every case—ideally before charges are ever filed—in the interests of accuracy, efficiency, and equitable considerations.

## VI. CONCLUSION

The current removal adjudication system allows trial attorneys to prosecute removal with little regard for their duty to see justice done. For many noncitizens, the government's charges trigger mandatory or discretionary civil detention, in which noncitizens are transferred to prison-like conditions (or actual prisons), far from family and community support. The case then joins a massive backlog and waits, often languishing for over a year before the immigration judge finally reaches the merits of the government's prosecution, and sometimes lingers years more before the noncitizen's eligibility for relief is finally assessed.<sup>385</sup> Many respondents are unable to access counsel or evidence during this time, and even if they are able to find representation, attempts to communicate or negotiate with ICE before a hearing may be futile. Noncitizens potentially eligible for adjudicative relief from removal might be offered the opportunity to close the case just before their individual hearing and on a take-it-or-leave-it basis. Due to the government's vast informational advantages and the prosecutor's potential nondisclosure of any evidence in the noncitizen's favor, the deal might seem worth it even though it leaves the noncitizen in perilous limbo. Those perseverant individuals who do venture to a hearing—pro se if they cannot afford an attorney or

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that the cost of deportation per person is \$12,500 with a 2010 report by the Center for American Progress finding the cost to be \$23,480).

384. See *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers*, CENTER FOR POPULAR DEMOCRACY 5, 10-14, [http://populardemocracy.org/sites/default/files/immigrant\\_family\\_unity\\_project\\_print\\_layout.pdf](http://populardemocracy.org/sites/default/files/immigrant_family_unity_project_print_layout.pdf) (last visited Oct. 31, 2014).

385. *Immigration Court Processing Time by Outcome*, *supra* note 136.

find pro bono counsel—may face a prosecutor willing to capitalize on any mistake, advantage, or vulnerability in order to secure a removal order. This system simply cannot be characterized as consistently producing just results.

The agency should continue to encourage and train its attorneys to exercise discretion consistently and to litigate cases in ways that develop full and fair records. But it also should recognize that ICE prosecutors operate under significant pressures, including an omnipresent concern for national security and massive caseloads. Accordingly, as with criminal prosecutors, the overall performance of trial attorneys would benefit from concrete procedural rules that increase their accountability and incentives to seek justice. Four workable reforms could make a difference right away: vertical prosecution in all offices, improved access to trial attorneys through prehearing conferences, enhanced power to screen and decline cases, and heightened disclosure obligations. While the procedural rules discussed in this Article would not fully rectify the harshness and inefficiencies of the current removal system, they are realistic reforms by which the Executive Branch can reshape the role of ICE prosecutors in a way that benefits all participants in the immigration system, and the nation as a whole.