

RETHINKING PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT

Nicole Hallett[†]

Prosecutorial discretion in immigration enforcement stands at a crossroads. It was the centerpiece of Obama's immigration policy after efforts to pass comprehensive immigration reform failed. Under the Trump administration, it was declared all but dead, replaced by an ethos of maximum enforcement. Biden has promised a return to the status quo ante, but the record of using prosecutorial discretion to accomplish humanitarian goals in immigration enforcement under Obama was, at best, mixed. Moreover, it is unclear whether Biden can depend on the availability of programs such as Deferred Action for Childhood Arrivals (DACA), Obama's signature prosecutorial discretion program. Although the Supreme Court struck down the Trump administration's attempt to end DACA, it did so without deciding whether the program was lawful. Future legal challenges may leave the executive branch with even fewer options for reforming the immigration system without Congressional action. The Biden administration will need to rethink how to use prosecutorial discretion to accomplish its immigration policy goals.

This Article argues that the Obama administration's experience revealed the clear shortcomings of using prosecutorial discretion in lieu of legislative reform to mitigate the harshest consequences of the current immigration system. Though it has, in some circumstances, led to positive individual outcomes, it has failed to provide the kind of systemic relief that was promised, both because of the limitations of prosecutorial discretion in general, and because of special characteristics of the immigration system that make it particularly ill-suited for the widespread use of discretion to accomplish humanitarian goals. Rather than simply reinstating Obama-era discretion policies, future administrations must implement reforms to

[†] Associate Clinical Professor of Law, University of Chicago Law School, Director of the Immigrants' Rights Clinic. The author would like to thank Shoba Sivaprasad Wadhia, Hiroshi Motomura, Guyora Binder, Anthony O'Rourke, and the participants of the AALS New Voices in Immigration Law: Works in Progress Panel and the University at Buffalo School of Law faculty workshop for their feedback on drafts of this article.

the immigration system that would allow prosecutorial discretion to work better to advance the stated goal of these policies—injecting some humanity into an otherwise inhumane system.

TABLE OF CONTENTS

INTRODUCTION	1767
I. A SHORT PRIMER ON PROSECUTORIAL DISCRETION IN IMMIGRATION	
ENFORCEMENT	1771
A. <i>Legal, Moral, and Practical Foundations of Prosecutorial Enforcement</i>	1771
B. <i>Prosecutorial Discretion Policies from the 1970s to Present</i>	1778
II. THE PROBLEMS WITH PROSECUTORIAL DISCRETION AS A HUMANITARIAN TOOL	
1789	
A. <i>Problems with Prosecutorial Discretion Generally</i>	1789
1. <i>Implicit Bias</i>	1789
2. <i>Illegitimate Criteria</i>	1792
3. <i>Institutional Design Problems</i>	1795
B. <i>Special Problems with Prosecutorial Discretion in the Immigration</i> <i>Context</i>	1798
1. <i>System Differences</i>	1798
2. <i>Legal Differences</i>	1804
C. <i>Case Study: DACA</i>	1807
III. TOWARDS A BETTER PROSECUTORIAL DISCRETION SYSTEM	1812
A. <i>Statute of Limitations for Removability Grounds</i>	1814
B. <i>Expand Available Penalties for Civil Immigration Violations</i>	1818
C. <i>Redesigned Immigration Adjudication</i>	1821
CONCLUSION	1823

INTRODUCTION

Two weeks after President Trump took office, Guadalupe García de Rayos was deported.¹ She had crossed the U.S.-Mexico border illegally at fourteen and had lived in the United States for more than two decades.² In 2008, she was arrested by immigration authorities and ordered deported by an immigration judge.³ But Immigration and Customs Enforcement (ICE) did not move to deport her. Instead, García de Rayos had regular check-ins with ICE. It was at one of these check-ins shortly after Trump's inauguration that she was arrested and deported to Mexico, one of the first people deported under the Trump administration's policy of designating every undocumented immigrant a priority for deportation. She left behind her two U.S.-citizen children and the country she had called home for more than half her life.⁴

The U.S. immigration system is broken; almost everyone on all sides of the issue agrees.⁵ And yet, we are no closer to comprehensive immigration reform than we were in 2007 and 2013; the last two times such efforts failed in Congress.⁶ Instead, the congressional impasse on immigration has emboldened successive administrations to stretch executive power to its limits in attempts to accomplish what Congress either cannot or will not. The result is an immigration policy that swings violently depending on the administration in office. Obama's generous enforcement priorities and creation of programs such as Deferred Action for Childhood Arrivals (DACA), which allowed undocumented immigrants brought to the United States as children to apply for deferred action, is followed by Trump's "zero tolerance" at the border

¹ Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html> [<https://perma.cc/QG4P-KVBB>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Remarks on Immigration Reform, 2019 DAILY COMP. PRES. DOC. 1, 3 (May 16, 2019) (President Trump detailing "broken asylum system" and "broken rules" for who can come to the United States); Address to the Nation on Immigration Reform, 2 PUB. PAPERS 1509 (Nov. 20, 2014) (President Obama declaring that "our immigration system is broken—and everybody knows it").

⁶ Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 360 (2018) (detailing successive failures by Congress to pass comprehensive immigration reform); RUTH ELLEN WASEM, CONG. RSCH. SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS 2–5 (2013).

and a crackdown on sanctuary jurisdictions.⁷ In his first months in office, Biden has changed course on immigration policy yet again, implementing new priorities for deportation that decrease the number of people that the federal government has prioritized for deportation.⁸ Meanwhile, Congress has abdicated its role in trying to fix the system, instead delegating most of its power to the executive branch to decide how to enforce the draconian immigration laws Congress has passed.⁹

Prosecutorial discretion—or the power of the executive to decide when, how, and whether to enforce the law against particular individuals or groups¹⁰—has always been a feature of the immigration system and has been a predominant one since at least the 1990s.¹¹ Like in the criminal justice system, prosecutorial discretion is important both in terms of allocating scarce resources and in mitigating unjust outcomes.¹² But prosecutorial discretion as it is used today in immigration enforcement goes beyond these twin objectives. It has become a tool for a wholesale rewriting of immigration policy to suit the objectives the current administration espouses. There are limits, of course; both the Obama and Trump administrations' immigration policies were subject to extensive legal challenges in the courts.¹³

⁷ SARAH PIERCE & ANDREW SELEE, IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION, MIGRATION POL'Y INST. (2017), <https://www.migrationpolicy.org/sites/default/files/publications/TrumpatOne-final.pdf> [<https://perma.cc/T2QR-J34B>] (detailing the shift in immigration policy under President Trump).

⁸ Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enft, to All ICE Emps. (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [<https://perma.cc/S4FQ-AG9Y>].

⁹ See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464–65 (2009) (arguing that the complex regulatory scheme enacted by Congress, which makes a large majority of non-citizens deportable, has the effect of delegating power to the executive to decide enforcement priorities).

¹⁰ Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

¹¹ See SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7 (2015); *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials.”); HIROSHI MOTOMURA, THE PRESIDENT’S DISCRETION, IMMIGRATION ENFORCEMENT, AND THE RULE OF LAW 5 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf [<https://perma.cc/56ZH-JHUU>].

¹² WADHIA, *supra* note 11, at 8; ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

¹³ See, e.g., *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

However, the breadth and scope of the laws governing deportation and the heightened power that the executive branch enjoys in the area of immigration has meant that successive administrations have been able to use prosecutorial discretion to accomplish what they could not legislatively.¹⁴

The record of using prosecutorial discretion to make immigration policy has been mixed at best. It has provided temporary relief to deserving individuals who otherwise would have been deported or forced to live in the shadows, undoubtedly a positive result. On the other hand, this widespread use of prosecutorial discretion has inflicted severe costs. Criminal justice scholars have long recognized that reliance on prosecutorial discretion almost inevitably leads to arbitrary, biased, and unjust results.¹⁵ This is even more so in the immigration context because the system has fewer constitutional safeguards and because the immigration laws themselves are even more capacious and open to interpretation. Moreover, certain features of immigration law, such as the lack of a statute of limitations for most immigration violations,¹⁶ the black-and-white consequences of committing an immigration violation,¹⁷ and the lack of procedural protections for immigrants in removal proceedings¹⁸ make the immigration system uniquely unsuitable for extensive reliance on prosecutorial discretion.

While scholars such as Shoba Sivaprasad Wadhia and Daniel Kanstroom have previously written about the use of prosecutorial discretion in the immigration context, their focus has been primarily on understanding how it has operated and why it has become so important.¹⁹ Less explored is how often these policies have failed to fulfill their humanitarian objectives and how it has given rise to a whole new problem—individuals like Guadalupe García de Rayos and the DACA recipients who remain in limbo indefinitely.

¹⁴ See Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 96 (2017) (noting that the Immigration and Nationality Act “employs exceptionally broad and ambiguous language”); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006).

¹⁵ DAVIS, *supra* note 12, at 4–5.

¹⁶ 8 U.S.C. § 1227(a)(1)(b) (“Any alien who is present in the United States in violation of this chapter . . . is deportable.”).

¹⁷ *Id.*

¹⁸ Carrie Rosenbaum, *Immigration Law’s Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 125–26 (2018).

¹⁹ WADHIA, *supra* note 11; DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007).

Now is a particularly good time to rethink prosecutorial discretion in immigration enforcement. In June 2020, the Supreme Court struck down the Trump administration's rescission of DACA without resolving fundamental questions about its legality.²⁰ The Biden administration has restored DACA to its status under the Obama administration,²¹ but new legal challenges are looming.²² Although it is difficult to read the Supreme Court tea leaves, the *Regents* decision suggests the Court could find a DACA-like program unlawful in the future.²³ Moreover, the Trump administration's attempt to end DACA has revealed just how vulnerable such programs are to revocation by hostile administrations, leaving those affected by these policies in a constant state of limbo.

This Article lays out how past discretion policies have failed and how, given the design of the current immigration system, they were destined to fail. It assumes that prosecutorial discretion will always be a feature of any enforcement system, including the immigration system, and, therefore, it explores ways to design future discretion policies to accomplish the stated goals of such policies' proponents—injecting humanity into an otherwise inhumane system. It does not assume either that comprehensive immigration reform will happen or that it will not. The author is skeptical that comprehensive immigration reform is on the horizon, but such reforms would improve the system, even in the absence of a legislative overhaul. However, it takes a critical eye towards the decision by some immigration advocates and policymakers to invest political capital into expanding prosecutorial discretion rather than on pushing for legislative action. In the end, it concludes that the system itself must change in order for prosecutorial discretion to work the way it should. Implementing these reforms should be a priority of the Biden administration, which takes over at a time when systematic reform of immigration policy has never been more urgent.

²⁰ Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

²¹ Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 2021 DAILY COMP. PRES. DOC. 1 (Jan. 20, 2021).

²² Sabrina Rodriguez, *'They Need to Move Quickly': A Texas DACA Case Could Force Congress to Move on Immigration*, POLITICO (Feb. 10, 2021, 4:30 AM), <https://www.politico.com/news/2021/02/10/texas-daca-congress-biden-immigration-468199> [https://perma.cc/QND9-ULCP].

²³ *Regents*, 140 S. Ct. at 1910–15.

I. A SHORT PRIMER ON PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT

A. *Legal, Moral, and Practical Foundations of Prosecutorial Enforcement*

Prosecutorial discretion has been a feature of the executive branch's duty to "take care that the laws be faithfully executed" since the beginning of the Republic.²⁴ Courts have largely taken for granted the power of the executive to determine how to utilize its limited enforcement resources, and have repeatedly held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."²⁵ As the sheer number of criminal and civil laws has exploded over the past century, the importance of prosecutorial discretion has only increased.²⁶ There is simply no way that the government can fully enforce all of the criminal and civil offenses on the books today; doing so would require dedicating vastly more resources than are currently available for enforcement activities.²⁷

These decisions are justified not only because the government has limited resources, but also because justice requires the executive to have such discretion.²⁸ The legislatures that enact the laws cannot anticipate how those laws will interact with the facts and circumstances of individual cases. Even just laws, if enforced fully, will give rise to unjust results, and thus, law enforcement must have discretion in deciding how, when, and whether to enforce the laws in any particular case or category of cases. Moreover, some individuals who could be justly convicted of a crime or charged with a civil offense are nevertheless worthy of leniency because of extenuating factors in their lives.²⁹ Similar

²⁴ U.S. CONST. art. II, § 3, cl. 5; Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 497–98 (2017) (collecting Framers' discussions on importance of prosecutorial discretion).

²⁵ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); see also *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . .").

²⁶ DAVIS, *supra* note 12, at 13; Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853 (2012) (detailing civil penalties imposed by federal administrative agencies).

²⁷ DAVIS, *supra* note 12, at 13.

²⁸ *Id.* at 14; WADHIA, *supra* note 11, at 8.

²⁹ WADHIA, *supra* note 11, at 8.

to the pardon power, prosecutorial discretion gives the executive the power to exercise mercy in appropriate circumstances.³⁰

Today, it is well established that the government has the power to decline prosecution in both individual cases, and to make policy decisions regarding enforcement that apply to groups of individuals.³¹ For example, when states began to legalize marijuana use, the federal government issued guidance that it would not enforce low-level marijuana offenses in jurisdictions that had legalized marijuana as long as those states implemented robust regulatory schemes to minimize harmful effects of legalization.³² The Bush administration took similar actions in the field of environmental regulation, declining to enforce some provisions of the Clean Air Act.³³

In the immigration context, decisions regarding when to exercise prosecutorial discretion in individual cases has been equally uncontroversial.³⁴ In *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court reaffirmed that immigration authorities have discretion to “decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation” and upheld a statute that stripped judicial review from courts reviewing such decisions.³⁵ Although the Obama administration’s Deferred Action for Parents of Americans (DAPA) program was challenged in the courts as both a violation of the Administrative Procedure Act and the Take Care Clause,³⁶ the administration’s guidelines for which non-citizens would be priorities for deportation were not challenged and

³⁰ Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 18–19 (2005).

³¹ See, e.g., *Armstrong v. United States*, 80 U.S. 154, 155 (1871) (upholding President’s pardon of individuals for acts related to the Civil War).

³² Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Just., to All U.S. Att’y’s (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/H4R3-XG7S>] (providing “Guidance Regarding Marijuana Enforcement”).

³³ Markowitz, *supra* note 24, at 491.

³⁴ See, e.g., Memorandum from Sam Bernsen, Gen. Couns., U.S. Immigr. & Naturalization Serv., to Comm’r (July 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf> [<https://perma.cc/3TW5-VHHJ>] (issuing “Legal Opinion Regarding Service Exercise of Prosecutorial Discretion”).

³⁵ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999).

³⁶ *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016). For a discussion of the constitutionality of DACA, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–60 (2014).

were considered to be squarely within the government's discretionary powers.³⁷

There are multiple ways that immigration officials can exercise prosecutorial discretion. First, ICE can decline to initiate removal proceedings for individuals with whom it comes in contact during its enforcement activities.³⁸ This type of prosecutorial discretion occurred often during the Obama administration, when individuals would be arrested, fingerprinted, questioned, and then released.³⁹ Such discretion occurs through both prioritization policies and through the decisions of individual ICE officers.

Second, ICE can obtain a removal order from an immigration court, but then decline to execute it, allowing the individual to stay indefinitely. This is the type of prosecutorial discretion that García de Rayos had enjoyed before ICE deported her in February 2017. Almost a million non-citizens remain in the United States after receiving a removal order, and many of whom have the tacit or express permission of ICE to do so.⁴⁰

Third, ICE can decide not to engage in certain enforcement activities. For instance, until recently, ICE had a policy not to engage in

³⁷ See *Texas*, 809 F.3d at 166 (“Part of DAPA involves the Secretary’s decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens. But importantly, the states have not challenged the priority levels he has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities.”) (footnote omitted); Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t et al. (Nov. 20, 2014) [hereinafter *Prioritization Memo*], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/5Y3Q-5RVU>] (instituting “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”).

³⁸ There used to be a related form of prosecutorial discretion wherein ICE would initiate removal proceedings and then seek to have them administratively closed by the immigration judge. This form of discretion was foreclosed by the Attorney General’s decision in *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), which held that immigration judges do not have the authority to administratively close cases.

³⁹ See, e.g., Nicole Hallett, *The #Buffalo25 and the New Era of Immigration Enforcement*, 21 CUNY L. REV. 1, 9 (2017); *Prioritization Memo*, *supra* note 37.

⁴⁰ *Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration: Hearing Before the Subcomm. on Immigr. and the Nat’l Int. of the S. Comm. on the Judiciary*, 114th Cong. (2016). ICE can place non-citizens with final orders of removal on “order[s] of supervision,” which give them the ability to apply for work authorization and require them to check-in periodically with ICE. 8 C.F.R. § 274a.12(c)(18) (2021).

civil immigration enforcement at schools, courthouses, and hospitals.⁴¹ Similarly, the Obama administration moved away from large workplace raids and instead focused workplace enforcement on employer violations.⁴²

Fourth, ICE can affirmatively grant what is called “deferred action,” which grants an individual quasi-legal status and work authorization for one- or two-year increments.⁴³ Deferred action can be granted in individual cases, or it can be granted as part of a program such as DACA.⁴⁴ Importantly, prosecutorial discretion does not and cannot lead to lawful or permanent status in the United States or to U.S. citizenship.⁴⁵ It simply allows the non-citizen in question to remain temporarily in the United States and, in some circumstances, to work legally.⁴⁶ Although there are differences between these types of prosecutorial discretion, in terms of both scope and effect, they share a common feature—they all involve a decision by an executive branch official not to fully enforce the law in a particular case.

Prosecutorial discretion has been a feature of immigration enforcement since the early days of restricted immigration in the late 1880s. However, two factors have led the immigration system to become increasingly dependent on widespread use of prosecutorial discretion to function. First, the number of non-citizens subject to the immigration laws has grown, necessitating the need to allocate enforcement resources efficiently. After falling slightly in the middle of

41 Memorandum from John Morton, Dir., U.S. Dep’t of Homeland Sec., to Field Off. Dirs. et al. (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/PCH9-N979>] (providing guidance for “Enforcement Actions at or Focused on Sensitive Locations”).

42 Hallett, *supra* note 39, at 4–5.

43 WADHIA, *supra* note 11.

44 *Deferred Action Basics*, NAT’L IMMIGR. F. (Apr. 15, 2016), <https://immigrationforum.org/article/deferred-action-basics> [<https://perma.cc/2PZJ-SFAQ>]. Daniel Kanstroom has identified two other types of discretion used by the immigration agencies: relief-based discretion (which Kanstroom calls “ultimate discretion”), where discretion is written into the eligibility requirements for various forms of relief, and interpretive discretion, where the executive exercises its discretion in how it interprets ambiguous statutes and regulations. KANSTROOM, *supra* note 19, at 233–40. Both forms of discretion clearly play a role in the administration of the immigration laws, though neither are within the scope of this Article.

45 *Texas v. United States*, 809 F.3d 134, 147–48 (5th Cir. 2015) (“[A]lthough [d]eferred action does not confer any form of legal status in this country, much less citizenship[,] it [does] mean[] that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States.”) (internal quotation marks omitted) (emphasis and modifications in original), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016).

46 8 C.F.R. § 274a.12(c)(14) (2021).

the twentieth century, the number of non-citizens residing in the United States has increased, from slightly less than 10 million in the mid-1960s to almost 45 million today.⁴⁷

Perhaps more importantly, the number of undocumented immigrants has increased from roughly 3.5 million in 1990 to 10.7 million in 2016, tripling the number of non-citizens who are deportable by their mere presence in the United States.⁴⁸ Although resources spent on immigration enforcement have also increased,⁴⁹ there is widespread recognition that the government can only prosecute a small percentage of immigration violators each year. There are currently 1.3 million (and growing) backlogged removal cases in immigration courts waiting to be adjudicated.⁵⁰ More arrests would simply increase the queue, not lead to more deportations, without a massive influx of funds into the immigration system.⁵¹

In addition, Congress has passed increasingly harsh immigration laws, which have made a large percentage of non-citizens deportable.⁵² This trend began in the 1980s, roughly at the same time as skyrocketing crime rates led to the enactment of draconian criminal laws.⁵³ The Anti-Drug Abuse Act of 1988 created a new category of deportability for non-citizens convicted of “aggravated felonies,” which at that point were

⁴⁷ Jeanne Batalova, Brittany Blizzard & Jessica Bolter, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 14, 2020), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [https://perma.cc/8QSZ-BRLS].

⁴⁸ Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. (Nov. 27, 2018), <https://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade> [https://perma.cc/4UUD-M5SF].

⁴⁹ AM. IMMIGR. COUNCIL, *THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY* (2020), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> [https://perma.cc/PQ58-5C4L].

⁵⁰ *Immigration Court Backlog Tool*, TRAC IMMIGR. (Nov. 2020), https://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/6HCY-77CF].

⁵¹ The Trump administration increased the number of immigration judges, but not nearly enough to clear the backlog. See Press Release, Dep’t of Just., Executive Office for Immigration Review Announces Investiture of 20 New Immigration Judges, Resulting in a 70 Percent Expansion of the Immigration Judge Corps Since 2017 (Oct. 9, 2020), <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-investiture-20-new-immigration-judges-resulting> [https://perma.cc/9BT4-ZN8G].

⁵² KANSTROOM, *supra* note 19, at 226–28.

⁵³ MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, *CRIME TRENDS: 1990–2016* (2017), <https://www.brennancenter.org/our-work/research-reports/crime-trends-1990-2016> [https://perma.cc/D4NQ-C7F2].

limited to crimes such as murder and serious drug trafficking offenses.⁵⁴ By 1996, Congress had expanded the definition of aggravated felony to include many serious and non-serious crimes, including in some circumstances simple assault and shoplifting.⁵⁵

At the same time, Congress severely limited the forms of relief that were available to non-citizens who had been convicted of a crime or who were undocumented. What had once been quite a broad form of relief called “suspension of deportation” became what is now called “cancellation of removal.”⁵⁶ Unless a non-citizen fears persecution or other harm in their home country or can gain status through a U.S. citizen relative, cancellation of removal is the main form of relief available to most non-citizens in removal proceedings. And most non-citizens are not eligible or will not meet the exacting requirements. Non-citizens convicted of an aggravated felony are now categorically barred from eligibility for cancellation of removal.⁵⁷ Other criminal convictions do not constitute an absolute bar, but often result in a denial.⁵⁸ Moreover, undocumented immigrants—in addition to showing good moral character—must show that their deportation would cause “exceptional and extremely unusual hardship” to a U.S. citizen or permanent resident spouse, parent, or child,⁵⁹ a standard that courts have interpreted to preclude relief in all but the most extraordinary cases.⁶⁰

The result is what then-General Counsel of the Immigration and Nationality Service David Martin called a “perfect storm”—the vast majority of non-citizens today are or could be deportable, either because of criminal conduct or because of status-related violations, and if they are placed into removal proceedings, most will have no available

⁵⁴ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

⁵⁵ See KANSTROOM, *supra* note 19, at 227–28 (describing development of law towards “criminal aliens”); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA or IIRAIRA) of 1996, Pub. L. No. 104–208, 110 Stat. 3009, 546, 627–28; Andrew David Kennedy, Note, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847 (2007) (detailing history of aggravated felony provision of the Immigration and Nationality Act).

⁵⁶ 8 U.S.C. § 1254, *repealed by* 8 U.S.C. § 1254a; 8 U.S.C. § 1229b.

⁵⁷ § 1229b(a)(3).

⁵⁸ *In re N-A-M-*, 24 I. & N. Dec. 336, 336 (B.I.A. 2007) (explaining crime need not be an aggravated felony to be a particularly serious crime barring an individual from asylum).

⁵⁹ § 1229b(b)(1)(D).

⁶⁰ See, e.g., *Matter of Andazola-Rivas*, 23 I. & N. Dec. 319, 320 (B.I.A. 2002) (finding that the mother of two U.S. citizen children who had no social support in Mexico and who would be separated from the children’s father had not shown requisite hardship).

form of relief.⁶¹ As Adam Cox and Cristina Rodríguez have explained, the current structure of the immigration system—wherein many non-citizens are deportable but few will ever be deported because of resource constraints—gives the executive branch enormous power over who will be deported from the country.⁶² As Congress has asserted itself in the immigration field with progressively harsher amendments to the Immigration and Nationality Act, the power to make the actual decisions about who will be able to stay and who will be deported has been transferred almost exclusively to the executive.

In addition, because the immigration laws have become so unforgiving, prosecutorial discretion has become necessary to avoid cruel outcomes. Indeed, there is some evidence that Congress itself assumed that the immigration agencies would use prosecutorial discretion to moderate the harshest consequences of the 1996 laws. As Shoba Sivaprasad Wadhia has written,⁶³ a few years after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, members of Congress—including a few who sponsored the 1996 law—wrote to the Immigration and Nationality Service (INS) to urge it to issue guidelines on the use of prosecutorial discretion because “[t]here has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship.”⁶⁴ Though the INS pushed back on this notion, arguing in a letter that “prosecutorial discretion guidelines—without carefully drafted substantive amendments to the INA—remain an inadequate tool to alleviate the excessively harsh consequences of the 1996 amendments in truly exceptional cases,”⁶⁵ Congress failed to revisit the law.

Similarly, all efforts to pass the DREAM Act, which would have protected undocumented immigrants brought to the United States as children,⁶⁶ died as soon as President Obama announced the DACA

⁶¹ Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666, 671 (2014).

⁶² See *supra* note 9, at 513–14.

⁶³ See WADHIA, *supra* note 11, at 22–23.

⁶⁴ Letter from Members of Congress to Janet Reno, Att’y Gen., U.S. Dep’t of Just. & Doris M. Meissner, Comm’r, Immigr. & Naturalization Serv. (Nov. 4, 1999), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf> [<https://perma.cc/V723-CZ53>].

⁶⁵ Letter from Robert Raben, Assistant Att’y Gen., to Barney Frank, U.S. House of Representatives (Jan. 19, 2000), <https://www.aila.org/infonet/ins-use-of-prosecutorial-discretion-iiraira> [<https://perma.cc/Y4XJ-UYZ7>].

⁶⁶ DREAM Act, S. 952, 112th Cong. (2011).

program in 2012.⁶⁷ After President Trump cancelled the program in September 2017, renewed efforts were made to pass the DREAM Act through Congress, but efforts were again shelved after courts enjoined the program's cancellation.⁶⁸ Implicit in these decisions is the belief that legislative reform was unnecessary because DACA—essentially a large prosecutorial discretion program—made it unnecessary. DACA allowed Congress to shirk its responsibilities a little longer.

Thus, at various points Congress has forged ahead with strict immigration overhauls and declined to amend those policies once the harsh consequences became clear. The executive branch is both required to utilize prosecutorial discretion because of resource demands *and is expected to* by a Congress that has abdicated its authority to fix the problems that it has created through its past legislative actions. Moreover, this practice of using prosecutorial discretion has increased over time as the number of potentially deportable non-citizens has gone from a few individuals to a large percentage of the non-citizens currently in the United States. It has now become the dominant form of humanitarian relief available to the majority of deportable non-citizens.

B. *Prosecutorial Discretion Policies from the 1970s to Present*

The progression of the executive's prosecutorial discretion policies and guidelines track these developments in the immigration system. In the 1970s, the numbers of deportations were fairly low—just over 17,000 in 1973, for example⁶⁹—and the government's use of prosecutorial discretion was much opaquer than it is today. Prior to 1975, INS could put individuals into “non-priority” status, whereby certain deportable non-citizens were declared not to be a priority for

⁶⁷ After being introduced in 2009, 2010, and 2011, the DREAM Act was not reintroduced until after Trump rescinded DACA in 2017. DREAM Act of 2009, S. 729, 111th Cong. (2009); DREAM Act of 2010, H.R. 6497, 111th Cong. (2010); DREAM Act of 2011, S. 952, 112th Cong. (2011); Dream Act of 2017, S. 1615, 115th Cong. (2017).

⁶⁸ Michael D. Shear & Adam Liptak, *It's Now the Supreme Court's Turn to Try to Resolve the Fate of the Dreamers*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/supreme-court-daca-dreamers.html> [<https://perma.cc/Y5NL-KPB9>].

⁶⁹ OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS 103 (2014), <https://www.dhs.gov/sites/default/files/publications/DHS%202014%20Yearbook.pdf> [<https://perma.cc/HW7N-VVHE>].

deportation.⁷⁰ The program operated largely in secret, with INS officials going so far as to deny its existence.⁷¹

The government finally released information about the program in response to litigation brought by the attorney for John Lennon, who, they alleged, had been improperly denied “non-priority” status because of political reasons.⁷² The purpose of the policy was “to avoid a result which on humanitarian grounds would be unconscionable.”⁷³ The Operations Instructions, in which the program was memorialized, listed five factors for the INS to consider when deciding whether to grant “non-priority” status: “(1) advanced or tender age, (2) long residence in the United States, (3) physical or mental condition requiring care . . . in the United States, (4) family situation [that would be affected by expulsion], and (5) “criminal, immoral, or subversive activities or affiliations—recent conduct.”⁷⁴

Lennon’s attorney, Leon Wildes, analyzed records of the 1,843 non-priority decisions issued in 1974 that he had obtained under the Freedom of Information Act and found that individuals of all types had been granted “non-priority” status:

Nonpriority has been granted to aliens who have committed serious crimes involving moral turpitude, drug convictions, fraud, or prostitution. Moreover, nonpriority has been given to Communists, the insane, the feebleminded, and the medically infirm. In sum, nonpriority has been granted to those who have violated almost any provision of the Act.⁷⁵

Decisions were made based on humanitarian factors, regardless of the grounds of deportability.⁷⁶

“Non-priority” status eventually became known as deferred action with the Operations Instructions becoming the Standard Operating

⁷⁰ 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).

⁷¹ *Id.* at 42–43.

⁷² In the foreword to Shoba Sivaprasad Wadhia’s book *Beyond Deportation*, Leon Wildes explains that the INS Commissioner had received a letter from Senator Strom Thurmond that said that Lennon’s presence in the United States would be detrimental to Nixon’s reelection plans and that this letter led the INS to institute deportation proceedings against Lennon and Yoko Ono. WADHIA, *supra* note 11, at ix–xi.

⁷³ Wildes, *supra* note 70, at 50.

⁷⁴ Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 100, 100 n.5 (1979).

⁷⁵ Wildes, *supra* note 70, at 51.

⁷⁶ *Id.* at 53.

Procedures in 1996.⁷⁷ Though the standards remained functionally similar,⁷⁸ in practice, many fewer non-citizens with criminal convictions, particularly drug convictions, were granted deferred action after the passage of IIRIRA and the modern dawn of draconian immigration laws.⁷⁹ In other words, as legal changes increased the importance of prosecutorial discretion, the actual use of discretion declined.

In the waning days of the Clinton administration, INS Commissioner Doris Meissner issued a memo reiterating that prosecutorial discretion remained an important tool and that “[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process.”⁸⁰ Meissner’s memo sets forth an expanded list of factors to be considered, including immigration status (in particular whether a non-citizen is a lawful permanent resident), length of residence in the United States, criminal history, humanitarian concerns, past immigration violations, likelihood of ultimately removing the individual, whether the individual is eligible for relief, current or past cooperation with law enforcement, honorable U.S. military service, community attention on the case, and resource constraints.⁸¹ It also contained a list of factors that were not to be considered, including an individual’s race, political opinion, or religion, an individual officer’s personal feelings regarding the individual, and the effect on the officer’s own career or professional advancement.⁸²

Throughout the early 2000s and after the transfer of immigration enforcement from the Department of Justice to the newly created

⁷⁷ Wadhia, *supra* note 10, at 251.

⁷⁸ *Id.*

⁷⁹ Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 838 (2004) (“The major change is that those with criminal or drug charges and convictions are no longer being granted deferred action status at the rate they were once granted this status.”).

⁸⁰ Memorandum from Doris Meissner, Comm’r, U.S. Immigr. & Naturalization Serv., to Reg’l Dirs. et al. 1 (Nov. 17, 2000), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf> [<https://perma.cc/T2NA-NRWU>].

⁸¹ *Id.* at 7–8. The memo also identifies certain characteristics that should trigger a review of whether the exercise of prosecutorial discretion is appropriate in a particular case, including lawful permanent residents, juveniles, the elderly, adopted children of U.S. citizens, U.S. military veterans, and non-citizens who have been physically present for more than ten years. *Id.* at 11.

⁸² *Id.* at 9.

Department of Homeland Security (DHS),⁸³ prosecutorial discretion remained an important feature of the immigration system. Successive memoranda from DHS officials laid out specific situations in which prosecutorial discretion should be exercised, while reaffirming the right of immigration officers to make decisions regarding whether to pursue removal in particular cases.⁸⁴ Although the process was more transparent than it had been before the 1970s—at least the memos that governed prosecutorial discretion were made public—it remained difficult to understand exactly how these decisions were made. The guidelines were applied unevenly and inconsistently. The 1996 laws and the spike in illegal border crossings—which peaked at 1.6 million a year in 2000⁸⁵—put enormous strain on the immigration system. But rather than utilizing prosecutorial discretion more broadly, the backlog in the immigration courts began to grow, and many non-citizens with removal orders were not removed, not because a decision was made to decline to execute the removal order, but simply because there were not enough planes to put people on.

The Obama administration came into office with grand hopes of comprehensive immigration reform.⁸⁶ But after repeated attempts to get Republicans to the bargaining table,⁸⁷ Obama began to use his executive authority to reform the immigration system administratively. Obama first took a conservative approach, utilizing the same kinds of memoranda on prosecutorial discretion that had been favored by his predecessors. In 2011, ICE Director John Morton issued a memo listing no fewer than thirty-one factors for officers to consider when deciding whether to exercise discretion.⁸⁸ Still, many non-citizens who did not

⁸³ *Who Joined DHS*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/who-joined-dhs> [<https://perma.cc/TR5S-9QM5>].

⁸⁴ Wadhia, *supra* note 10, at 259–60 (collecting discretion memos from 2000 to 2008).

⁸⁵ *More U.S. Border Apprehensions of Non-Mexicans Than Mexican in 2017*, PEW RSCH. CTR. (Dec. 4, 2018), https://www.pewresearch.org/fact-tank/2019/06/28/what-we-know-about-illegal-immigration-from-mexico/ft_18-12-03_mexicoillegalimmigration_apprehensions_final [<https://perma.cc/KQP5-EM3U>].

⁸⁶ See Andrew Kaczynski, *In 2008, Obama Promised Immigration Reform in First Year of First Term*, YOUTUBE (Apr. 18, 2012), <https://youtu.be/yUWJHmRjy0> [<https://perma.cc/V6WA-QR6>]; Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), http://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html [<https://perma.cc/KZ87-ZG9U>].

⁸⁷ Hicks, *supra* note 86.

⁸⁸ Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Off. Dirs. et al. 4–5 (June 17, 2011) [hereinafter Morton Memo], <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/S6DN-CK87>].

meet the enforcement priorities were being removed despite the guidance.⁸⁹

After the failure of the DREAM Act in 2010,⁹⁰ Obama decided to take further action. In 2012, he announced DACA, which protected undocumented immigrants brought to the United States as children from deportation and gave them the opportunity to apply for work authorization, which in turn made them eligible for other benefits.⁹¹ Though the program was not unprecedented—past presidents had issued policies to protect particular categories of people from deportation⁹²—it was unprecedented in its scope. It was estimated that 1.8 million people might be eligible for the program; approximately 800,000 ended up applying and being granted deferred action for renewable two-year periods.⁹³

After the failure of comprehensive immigration reform in 2013, the Obama administration announced DAPA and an expanded DACA program. DAPA would have allowed undocumented immigrants who met certain conditions and who had at least one U.S. citizen child to apply for deferred action.⁹⁴ The expanded DACA program removed several of the requirements in the original program, such as the upper age limit.⁹⁵ Altogether, approximately five million undocumented immigrants would have been eligible for relief from deportation under these programs.⁹⁶ Several states went to court to block DAPA and

⁸⁹ Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014, 5:00 PM), <https://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html> [<https://perma.cc/3AEE-8ENM>].

⁹⁰ Brian Montopoli, *DREAM Act Dies in Senate*, CBS NEWS (Dec. 18, 2010, 2:48 PM), <https://www.cbsnews.com/news/dream-act-dies-in-the-senate-18-12-2010> [<https://perma.cc/42YP-XNSP>].

⁹¹ Remarks by the President on Immigration and an Exchange with Reporters, 1 PUB. PAPERS 800 (June 15, 2012).

⁹² Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States, 38 Op. O.L.C. 39, 57–61 (2014) (collecting examples).

⁹³ Alan Gomez, *Who Are the DACA DREAMers and How Many Are Here?*, USA TODAY (Feb. 13, 2018, 4:21 PM), <https://www.usatoday.com/story/news/politics/2018/02/13/who-daca-dreamers-and-how-many-here/333045002> [<https://perma.cc/7N9X-YHT8>].

⁹⁴ Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Serv. et al. (Nov. 20, 2014) [hereinafter Johnson Memo], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [<https://perma.cc/KB4K-J558>].

⁹⁵ *Id.* at 3.

⁹⁶ RANDY CAPP, HEATHER KOBALL, JAMES D. BACHMEIER, ARIEL G. RUIZ SOTO, JIE ZONG & JULIA GELATT, DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF

expanded DACA.⁹⁷ After a district court in Texas and the Fifth Circuit Court of Appeals enjoined the programs,⁹⁸ the injunction was upheld by an equally divided Supreme Court.⁹⁹ The programs never went into effect.¹⁰⁰

At the same time, then-Secretary of Homeland Security Jeh Johnson issued a memorandum with new civil immigration enforcement priorities that rescinded most previous memos on prosecutorial discretion.¹⁰¹ Unlike previous memos that listed factors that officers were instructed to consider when determining whether to exercise discretion, the Johnson Memo listed three clear priority categories for removals, and designated a very large group of individuals who would not be a priority absent an additional determination by immigration officials.¹⁰²

Priority 1 listed five categories of non-citizens who were considered threats to national security, border security, and public safety, including non-citizens engaged in terrorism, those apprehended crossing the U.S.-Mexico border, and non-citizens convicted of aggravated felonies.¹⁰³ Individuals in the first priority were to be removed unless “there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.”¹⁰⁴

Priority 2 was “misdemeanants and new immigration violators,” including non-citizens convicted of three or more misdemeanors, a significant misdemeanor, or who had illegally reentered the country

DAPA’S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN 3–4 (2016), <https://www.migrationpolicy.org/sites/default/files/publications/DAPA-Profile-FINALWEB.pdf> [<https://perma.cc/7LE5-GRTS>].

⁹⁷ David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html> [<https://perma.cc/3C5X-S37V>].

⁹⁸ *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

⁹⁹ *Texas*, 136 S. Ct. 2271.

¹⁰⁰ Memorandum from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin K. McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful> [<https://perma.cc/E845-4H8C>].

¹⁰¹ Prioritization Memo, *supra* note 37, at 1.

¹⁰² *Id.*

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

after being deported.¹⁰⁵ Non-citizens in the second priority category were to be removed unless “there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.”¹⁰⁶

Priority 3 was “other immigration violations,” which despite sounding broad, was actually limited to non-citizens who had been issued orders of removal after January 1, 2014, about ten months before the memo was issued.¹⁰⁷ These individuals were to be removed “unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.”¹⁰⁸

That left most undocumented immigrants, at least those without criminal records who had been in the United States for more than a couple years, as non-priorities for deportation. Though the memo stated that “[n]othing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein,” it required the ICE Field Office Director to determine that the removal of an individual not designated a priority be determined to serve an “important federal interest” by the ICE Field Director.¹⁰⁹

This was the first time that the immigration agencies had set a default position of non-removability for a large category of removable individuals. The Obama administration decided to take a categorical approach to prosecutorial discretion, as opposed to the case-by-case determinations that had been favored in previous administrations, largely because of institutional pushback from immigration officials who resented the directives not to enforce the law to the fullest extent possible.¹¹⁰ The Morton Memo, which had been Obama’s first attempt to expand the use of prosecutorial discretion, had not in fact changed

¹⁰⁵ *Id.* at 3–4.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5.

¹¹⁰ Press Release, ICE Union, ICE Agent’s Union Speaks Out on Director’s “Discretionary Memo”: Calls On the Public to Take Action (June 23, 2011). After DACA was announced, several immigration officers filed suit against Obama administration officials, alleging that implementing DACA required them to violate various statutory and constitutional obligations to enforce the immigration laws. The lawsuit was eventually dismissed for lack of standing by the Fifth Circuit Court of Appeals. *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

policy on the ground very much.¹¹¹ DACA and DAPA, and to a lesser extent the Johnson Memo, were attempts by the administration to take discretion away from rank-and-file immigration officers who were perhaps disinclined to exercise it.¹¹²

And indeed, prosecutorial discretion became much more commonly exercised under the Johnson Memo than it had been previously. After the memo was issued, interior deportations dropped thirty-two percent the following fiscal year.¹¹³ Moreover, the overwhelming majority of individuals removed were in one of the three priority categories. In fiscal year 2015, ICE only removed sixty-seven individuals who did not fall within a priority category but whose removal had been determined to serve a federal interest.¹¹⁴ Despite the institutional resistance to the policy, it was effective in implementing guidelines that were being followed by individual immigration officers.

The status quo was upended once again with the election of Donald Trump in November 2016. Trump had made immigration the centerpiece of his campaign and had been particularly critical of the Obama administration's use of prosecutorial discretion,¹¹⁵ calling for the President's impeachment after Obama's November 2014 executive actions.¹¹⁶ Shortly after his inauguration, Trump issued three executive orders concerning immigration. One of those orders, "Enhancing Public Safety in the Interior of the United States," changed ICE's enforcement priorities once again in a way that completely transformed the immigration system.¹¹⁷ The priorities, as stated in the new executive order, were individuals who:

¹¹¹ Morton Memo, *supra* note 88.

¹¹² Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 193 (2015).

¹¹³ Interior removals decreased from 102,224 in fiscal year 2014 to 69,478 in fiscal year 2015, the first year that the Johnson Memo was in effect. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 8 (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> [<https://perma.cc/7NSA-Z7ND>].

¹¹⁴ *Id.* at 4–5.

¹¹⁵ Chris Cillizza, *Donald Trump on 'Meet the Press,' Annotated*, WASH. POST (Aug. 17, 2015, 11:28 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/08/17/donald-trump-on-meet-the-press-annotated> [<https://perma.cc/TZ29-Q8JU>].

¹¹⁶ Andrew Kaczynski, *Trump Once Called Executive Action on Immigration Dangerous, Unconstitutional and Impeachable*, CNN (Feb. 14, 2019, 9:40 PM), <https://www.cnn.com/2019/02/14/politics/kfile-trump-immigration-executive-action-2014/index.html> [<https://perma.cc/3MZE-5Q8Z>].

¹¹⁷ Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

(a) Have been convicted of any criminal offense; (b) Have been charged with any criminal offense, where such charge has not been resolved; (c) Have committed acts that constitute a chargeable criminal offense; (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; (e) Have abused any program related to receipt of public benefits; (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.¹¹⁸

The executive order had the effect of prioritizing most undocumented immigrants for removal. There were no factors to be considered and the humanitarian element of previous prosecutorial discretion policies was completely eliminated. It did not matter how long an individual had been in the United States, whether they had U.S. citizen family members, or whether they had a medical condition. Moreover, given the fact that the priorities included individuals who had committed the elements of a crime, even if they had not been convicted, it allowed immigration officials to find almost any reason to designate someone as a priority for removal. In the words of one advocacy organization, it “expanded ‘enforcement priorities’ so broadly as to render the term meaningless.”¹¹⁹

On February 20, 2017, then-Secretary of Homeland Security John Kelly issued a memorandum implementing the President’s executive order.¹²⁰ Like the Johnson Memo, it rescinded all previous memos on prosecutorial discretion, except for those governing DACA and DAPA.¹²¹ It also banned the exercise of discretion “in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws.”¹²² Instead, under the memo, discretion could only be exercised on a “case-by-case basis in

¹¹⁸ *Id.* at 8800.

¹¹⁹ AM. IMMIGR. COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION 1 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf [https://perma.cc/8245-SGS6].

¹²⁰ Memorandum from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/4YPY-MZBX].

¹²¹ *Id.* at 1–2.

¹²² *Id.* at 4.

consultation with the head of the field office.”¹²³ The memo contained no factors for immigration officials to consider when deciding whether to exercise discretion. Though it technically still allowed the immigration agencies to exercise discretion in individual cases, the purpose of the memorandum was to seriously curtail the use of prosecutorial discretion: “Effective immediately . . . Department personnel shall faithfully execute the immigration laws of the United States against *all removable aliens*.”¹²⁴

It became clear in the months following the issuance of the memorandum that the use of prosecutorial discretion in immigration enforcement was all but dead.¹²⁵ In fiscal year 2018, the first full fiscal year of the Trump administration, removals were up seventeen percent from 2016.¹²⁶ Many of those removals were people, like Guadalupe García de Rayos, who were checking in with ICE on old orders of removal. But they also included people who would have been obvious candidates for prosecutorial discretion during any other administration. The case of Rosa María Hernández, a 10-year-old with cerebral palsy who was arrested on her way to the hospital for gallbladder surgery, illustrates the extent to which the immigration officials have ceased exercising discretion on humanitarian grounds.¹²⁷

Of course, because resources were still limited, the administration could not deport all removable non-citizens. Instead, whether someone

¹²³ *Id.*

¹²⁴ *Id.* at 2 (emphasis added).

¹²⁵ Muzaffar Chishti & Jessica Bolter, *The Trump Administration at Six Months: A Sea Change in Immigration Enforcement*, MIGRATION POL’Y INST. (July 19, 2017), <https://www.migrationpolicy.org/article/trump-administration-six-months-sea-change-immigration-enforcement> [https://perma.cc/E4AE-TFBG]; KJ, *Trump Administration Ends Prosecutorial Discretion? All Undocumented Immigrants Threatened With Removal?*, IMMIGR. PROF. BLOG (July 8, 2017), <https://lawprofessors.typepad.com/immigration/2017/07/trump-administration-ends-prosecutorial-discretion-all-undocumented-immigrants-threatened-with-remov.html> [https://perma.cc/8B4M-L4P5]; Dean DeChiaro, ‘Open Season’ on Immigrants as Discretion Fades, ROLL CALL (Dec. 11, 2017, 5:04 AM), <https://www.rollcall.com/news/politics/open-season-on-immigrants> [https://perma.cc/RRC8-P7FL].

¹²⁶ John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump> [https://perma.cc/HT3T-YPXM].

¹²⁷ Vivian Yee & Caitlin Dickerson, *10-Year-Old Immigrant Is Detained After Agents Stop Her on Way to Surgery*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/us/girl-cerebral-palsy-detained-immigration.html> [https://perma.cc/K8JP-7V5L]; Am. Immigr. Council Staff, *How Discretion Failed One 10-Year-Old Girl and What the Future Holds*, IMMIGR. IMPACT (Oct. 30, 2017), <http://immigrationimpact.com/2017/10/30/rosa-maria-hernandez-immigration-enforcement> [https://perma.cc/K8JP-7V5L].

was slated for removal depended on being in the wrong place at the wrong time—a kind of random enforcement that is not tied to priorities at all. In addition, because due process still requires that most non-citizens have the opportunity to fight their removal in immigration court, the death of prosecutorial discretion simply meant an even longer backlog of cases in immigration court. The administration's efforts to speed up removal proceedings and clear the backlog—for instance, through case completion quotas for immigration judges—were unsuccessful at addressing the problem.¹²⁸

The Biden administration took action immediately to resurrect prosecutorial discretion. On January 20, 2021, Biden revoked the Kelly memo and directed his Department of Homeland Security to issue new directives.¹²⁹ That same day, DHS issued a memorandum putting a one hundred day pause on deportations, and naming new interim enforcement priorities: (1) national security risk; (2) recent border crossers; and (3) individuals convicted of aggravated felonies.¹³⁰ The deportation pause was later enjoined,¹³¹ an ominous sign for the future of DACA, but the new enforcement priorities remain in effect. As a result, immigration arrests have fallen sharply in the early months of the new administration.¹³² With these changes, many undocumented immigrants will be able to avoid deportation for a few more years. But these swings in enforcement priorities obscure the fact that the laws governing removal of non-citizens have remained largely unchanged since 1996. Prosecutorial discretion has become the primary way that immigration policy is made in the United States, and it is not working very well.

¹²⁸ EOIR *Performance Plan: Adjudicative Employees*, U.S. DEP'T OF JUST., http://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf [<https://perma.cc/BNG6-QW38>]; *Backlog of Pending Cases in Immigration Courts as of February 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php [<https://perma.cc/W549-JZZB>] (showing backlog continuing to grow despite completion quotas).

¹²⁹ Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

¹³⁰ Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot. et al. (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [<https://perma.cc/M43G-2STU>].

¹³¹ *Texas v. United States*, No. 21-cv-00003, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021).

¹³² Nick Miroff & Maria Sacchetti, *Immigration Arrests Have Fallen Sharply Under Biden, ICE Data Show*, WASH. POST (Mar. 9, 2021, 4:36 PM), https://www.washingtonpost.com/national/ice-deportations-immigration-arrests/2021/03/09/af27b164-80fa-11eb-bb5a-ad9a91faa4ef_story.html [<https://perma.cc/NY2B-PXS4>].

II. THE PROBLEMS WITH PROSECUTORIAL DISCRETION AS A HUMANITARIAN TOOL

The use of prosecutorial discretion is unavoidable, morally necessary, and legally sound, and this is no less the case in the immigration context. And yet, the widespread reliance on prosecutorial discretion to correct the injustices in our immigration system is not without severe costs to the immigrant communities who are subjected to the immigration system.

A. *Problems with Prosecutorial Discretion Generally*

The costs of prosecutorial discretion have long been recognized in the criminal justice system, and many of these costs translate to the immigration system as well. Prosecutors in both systems have an enormous amount of power in deciding how to enforce the law. Absent extreme circumstances, prosecutorial decisions are unreviewable. Thus, when officials act according to implicit bias, take illegitimate criteria into account, or fail to act in the interests of justice, there is very little recourse available.

1. Implicit Bias

When individual prosecutors make decisions about who and how to charge, the biases of those individuals are unavoidably imported into the decision-making process. Two of the most pernicious biases are race and class. In her book, *Arbitrary Justice*, Angela Davis describes two murders in Washington, D.C., one committed by a white college student and the other committed by a working-class black man, where the charging decisions came out differently:

Both cases were homicides involving a decedent with a reputation for violence and a defendant who claimed that he acted in self-defense. Yet the cases were prosecuted differently, with no apparent justification for the difference in treatment. It was difficult not to attribute McKnight's favorable treatment to his status as a white student at a prestigious university.¹³³

¹³³ DAVIS, *supra* note 12, at 21.

The empirical research supports Davis's conclusion. For example, some studies have found that prosecutors are far more likely to seek the death penalty in the case of homicides in which the victim was white and the perpetrator was black.¹³⁴ A study of indigent defendants in San Francisco found that black suspects are booked for seven percent more crimes and twenty-four percent more felonies than white defendants, controlling for other contextual factors.¹³⁵ White defendants are also offered better plea deals.¹³⁶ All of these disparate effects are layered on top of the over-policing of low-income communities of color that contributes to more poor people of color entering the criminal justice system to begin with. Although there are overtly racist prosecutors and police officers, most of these disparities are caused by implicit bias that is not easily ferreted out of the system.

These biases hold equal or greater sway in the immigration system.¹³⁷ The same implicit biases that cause disparate outcomes for defendants of color also affect decisions about which immigrants get arrested, placed into removal proceedings, and deported. To begin with, racial profiling in immigration enforcement is rampant, with ICE in particular targeting Latinx immigrants in enforcement actions.¹³⁸ Unlike in the criminal justice system, courts have permitted immigration officers to use race as one factor used to establish reasonable suspicion or probable cause to arrest suspected undocumented immigrants.¹³⁹ Practically speaking, race or ethnicity is often the only evidence immigration officers have before questioning and arresting individuals for immigration violations.¹⁴⁰ And such

¹³⁴ DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 257 (1990).

¹³⁵ EMILY OWENS, ERIN M. KERRISON & BERNANDO SANTOS DA SILVEIRA, EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO 6 (2017).

¹³⁶ Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1207–08 (2018).

¹³⁷ See generally Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

¹³⁸ Ryan Devereaux, *Hispanic Caucus on Trump's Deportations: "We're Creating an Immigration Police State,"* INTERCEPT (Feb. 15, 2017, 4:30 PM), <https://theintercept.com/2017/02/15/hispanic-caucus-on-trumps-deportations-were-creating-an-immigration-police-state> [<https://perma.cc/V9XT-UDLC>].

¹³⁹ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

¹⁴⁰ See, e.g., Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far From Border*, NBC NEWS (June 5, 2019, 4:30 AM), <https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased->

Fourth Amendment violations cannot be used to stop an individual's deportation unless he or she can show the violation was egregious.¹⁴¹ The same biases that give rise to racial profiling also are likely to influence individual officers' decisions about whether to exercise prosecutorial discretion in any particular case, regardless of whether race or ethnicity are explicitly prohibited factors for consideration.

Moreover, the biases of the criminal justice system are replicated in the immigration system due to the connection between criminal convictions and deportability.¹⁴² Because people of color have higher rates of felony convictions (despite committing crimes at similar rates as whites), a greater percentage of immigrants of color have convictions that make them deportable. For example, although only seven percent of non-citizens in the United States are black, they make up twenty percent of the non-citizens facing removal on criminal grounds.¹⁴³ Disparate sentencing practices also have an effect. One study found that black defendants receive sentences that are on average nine percent longer than sentences of white defendants.¹⁴⁴ Since many convictions only become aggravated felonies with sentences of at least one year,¹⁴⁵ sentence length could lead to more black non-citizens being subjected to the harshest immigration consequences.

Many immigrants of color are vulnerable to removal even if they have never committed a crime. Undocumented immigrants who are arrested but never convicted may end up in ICE custody due to programs like Secure Communities, through which ICE lodges detainers and takes custody of individuals in local and state jails.¹⁴⁶ The incentives to plead guilty in the criminal system even when a person is innocent also take a toll. Although in 2010 the Supreme Court held in

greyhound-other-buses-far-border-n1012596 [<https://perma.cc/5FW7-NQWU>] (border patrol stopping to question only people of color on Greyhound bus); Andrea Castillo, *'Collateral Arrests' By ICE Amount to Racial Profiling, Violate Immigrants' Rights, Lawyers Say*, L.A. TIMES (Feb. 4, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-ice-collateral-arrests-20180204-story.html> [<https://perma.cc/SQ6H-EE87>] (ICE often arrests all Latinx people first and asks questions later in workplace raids and other enforcement actions).

¹⁴¹ *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

¹⁴² Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RESV. L. REV. 993, 998 (2016).

¹⁴³ JULIANA MORGAN-TROSTLE, KEXIN ZHENG & CARL LIPSCOMBE, *THE STATE OF BLACK IMMIGRANTS* 40 (2016).

¹⁴⁴ M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323–24 (2014).

¹⁴⁵ 8 U.S.C. § 1101(a)(43)(F).

¹⁴⁶ *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/secure-communities> [<https://perma.cc/CSP9-E9SQ>] (last visited Jan. 28, 2021).

Padilla v. Kentucky that defense attorneys must advise non-citizen defendants of the immigration consequences of plea deals,¹⁴⁷ the Court subsequently held that its holding was not retroactive.¹⁴⁸ As a result, many non-citizens are removable for criminal convictions that they pled guilty to on advice of counsel to avoid serving a lengthy sentence at a time when their attorney had no obligation to inform them that the conviction would lead to their deportation.

Thus, immigrants of color are affected by implicit bias in a layered, multi-faceted way. They are victimized by over-policing, the biases of criminal prosecutors, and the criminal justice system, like all people of color. But they are also victimized by an immigration system that prioritizes them for removal on the basis of their prior encounters with the criminal justice system,¹⁴⁹ amplifying the effects of implicit bias. In a system rife with implicit bias, prosecutorial discretion will always be applied unevenly with “the least favored members of the community— racial and ethnic minorities, social outcasts, the poor . . . treated [the] most harshly.”¹⁵⁰ In a system totally dependent on discretion to function, the problem of implicit bias will inflict heavy costs on low-income immigrants of color, ensuring that the goal of a just immigration system remains out of reach.

2. Illegitimate Criteria

Race and class are not the only biases that affect the exercise of discretion by prosecutors. Prosecutors often use criteria that many people would consider illegitimate or unrelated to the resource-management or humanitarian rationales for broad use of discretion, including the prosecutor’s personal animus or beliefs and political considerations. High-profile crimes often prompt prosecutors to seek harsh penalties, even in cases where it would not otherwise be warranted because of public pressure. Conversely, a high-profile

¹⁴⁷ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹⁴⁸ *Chaidez v. United States*, 568 U.S. 342, 344 (2013).

¹⁴⁹ See Johnson Memo, *supra* note 94; Kelly Memo, *supra* note 120.

¹⁵⁰ James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981).

suspect may not get charged at all if it would be politically inexpedient.¹⁵¹

Immigration officials are likewise susceptible to using illegitimate criteria to decide whether to arrest, initiate removal proceedings, or execute a removal order. For example, ICE has targeted immigrants' rights activists in enforcement actions in retaliation for engaging in protected speech. Migrant Justice, a Vermont farmworker organization, filed suit against ICE in 2018 alleging that the agency had targeted its members and leaders because of its anti-immigration enforcement activism.¹⁵² The plaintiffs dismissed the lawsuit after ICE agreed to pay the plaintiffs \$100,000 in damages and to grant them deferred action for five years.¹⁵³

In another example, ICE arrested and attempted to execute a removal order against Ravi Ragbir, an activist with the New Sanctuary Coalition (NSC) in New York City, after he spoke out against President Trump's immigration policies and made statements to the media critical of ICE.¹⁵⁴ Ragbir alleged in a lawsuit that an ICE official had told a minister connected to NSC that activists "don't want to make matters worse by saying things."¹⁵⁵ The Second Circuit concluded in 2019 that

¹⁵¹ For example, the case of Bill Cosby illustrates how political considerations can cause charging decisions to go either way, even with respect to the same suspect. Prosecutors declined to prosecute Cosby for the 2004 sexual assault on Andrea Constand at the time of the assault. Shannon Troetel, *Prosecutors End Cosby Investigation*, CNN (Feb. 22, 2005, 2:36 PM), <http://www.cnn.com/2005/LAW/02/17/cosby/index.html> [https://perma.cc/FT9S-9U8W]. However, after many other women came forward to report that they had also been assaulted by Cosby, prosecutors reversed their decision in 2015. See Noreen Malone, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, N.Y. MAG. (July 26, 2015), <https://www.thecut.com/2015/07/bill-cosbys-accusers-speak-out.html> [https://perma.cc/57RW-NTT4]. In 2018, Cosby was convicted on three counts related to the assault. Manual Roig-Franzia, *Bill Cosby Convicted on Three Counts of Sexual Assault*, WASH. POST (Apr. 26, 2018, 9:12 PM), https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1flee_story.html [https://perma.cc/3QHL-AACM].

¹⁵² First Amended Complaint at 9–10, *Migrant Justice v. Nielsen*, No. 18-cv-00192 (D. Vt. Feb. 7, 2019); Jack Herrera, *Is ICE Targeting Activists?*, PAC. STANDARD (Apr. 17, 2019), <https://psmag.com/social-justice/is-ice-targeting-activists> [https://perma.cc/GTR3-Z46J].

¹⁵³ Stipulation for Compromise Settlement and Release and Dismissal With Prejudice of All Claims in this Action at 2–3, *Migrant Justice v. Nielsen*, No. 18-cv-00192 (D. Vt. Oct. 28, 2020).

¹⁵⁴ *Ragbir v. Homan*, 923 F.3d 53, 59–60 (2d Cir. 2019). The Supreme Court later vacated the Second Circuit judgment and remanded "in light of *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020)." *Pham v. Ragbir*, 141 S. Ct. 227, 227 (2020) (internal citations omitted).

¹⁵⁵ *Ragbir*, 923 F.3d at 60.

Ragbir had stated a cognizable First Amendment claim.¹⁵⁶ These are just two examples of activists who have alleged that ICE has targeted them because of their First Amendment-protected activities. Though ICE denies targeting anyone because of their speech, ICE's almost limitless discretion inevitably leads to questions about how they choose to exercise it in individual circumstances.

For non-citizens without constitutional claims, the legal options are far more limited. The Supreme Court made clear in *Reno v. American-Arab Anti-Discrimination Committee* that, like in the criminal context, most selective prosecution claims in the immigration context are unreviewable.¹⁵⁷ In *Reno*, the Court concluded that members of the Popular Front for the Liberation of Palestine, which the government characterized as a terrorist organization, could not bring a selective prosecution claim.¹⁵⁸ In explaining its decision, it reasoned that selective prosecution claims were less compelling in the immigration context both because deportation is not a punishment and because of the foreign policy and national security concerns inherent in immigration enforcement are higher than in the domestic context.¹⁵⁹ The Supreme Court's recent decision in *Department of Homeland Security v. Thuraissigiam* further complicates attempts to litigate claims against ICE by holding that the constitutional writ of habeas corpus is not available to litigate challenges to deportation orders.¹⁶⁰ For most immigrants targeted by ICE, there will be no recourse in the courts.

Conversely, public pressure has occasionally been effective at getting ICE to reverse course and exercise discretion after initially declining to. For example, after ICE deported Jose Gonzalez Carranza, a widower of a soldier who had been killed in Afghanistan, the public opprobrium was swift and unforgiving.¹⁶¹ ICE reversed course and allowed him to reenter the United States four days later after Republican Governor of Arizona, Doug Ducey, criticized the decision.¹⁶² At first,

¹⁵⁶ *Id.* at 57.

¹⁵⁷ 525 U.S. 471, 487–89 (1999).

¹⁵⁸ *Id.* at 488–92.

¹⁵⁹ *Id.* at 490–91.

¹⁶⁰ 140 S. Ct. 1959, 1963–69 (2020).

¹⁶¹ Tim Elfrink, *ICE Deported the Spouse of a Soldier Killed in Afghanistan, Attorney Says*, WASH. POST (Apr. 16, 2019, 5:08 AM), <https://www.washingtonpost.com/nation/2019/04/16/ice-deported-widow-soldier-killed-afghanistan-attorney-says> [<https://perma.cc/5KSV-ASUK>].

¹⁶² Tara Law, *ICE Deported a U.S. Veteran's Widower Before a Judge Reversed the Order*, TIME (Apr. 16, 2019, 6:14 PM), <https://time.com/5571923/doug-ducey-military-spouse-deported-ice-arizona> [<https://perma.cc/PU4L-QEJP>].

this may appear to be a good use of prosecutorial discretion. But the decision was not made based on the application of a set of factors to Gonzalez's case. Instead, the widower was lucky enough to have a lawyer, and even luckier to have a lawyer who knew how to leverage the press coverage to his client's advantage. For every case like Gonzalez's, there are ten other non-citizens without lawyers whose stories did not garner press coverage and who were deported in obscurity despite their positive equities.

In these cases, ICE made decisions about who to deport based either on impermissible factors, such as political speech, or on factors that have little to do with the merits of individuals' cases, such as the amount of press coverage the case has garnered. A system that gives prosecutors enormous power comes at a cost—similarly situated individuals will be treated differently based on factors that ICE should not consider.

3. Institutional Design Problems

The prosecutor holds a unique position in our adversarial system. Unlike other parties, including the lawyer representing the criminal defendant, prosecutors have an obligation to see that justice is done.¹⁶³ They represent “the people,” not themselves, and have special ethical duties that other lawyers do not have. As the American Bar Association's *Criminal Justice Standards for the Prosecutor Function* puts it:

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.¹⁶⁴

¹⁶³ DAVIS, *supra* note 12, at 144.

¹⁶⁴ CRIM. JUST. STANDARDS FOR THE PROSECUTOR FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017); *see also* MODEL CODE OF PRO. RESP. r. 3.8 (AM. BAR ASS'N 2020); *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting the prosecutor's goal “is not . . . [to] win a case, but that justice shall be done”).

In practice, these principles are rarely upheld. Instead, prosecutors inevitably suffer from a “prosecutor bias” that tilts the system away from justice and towards maximum enforcement.¹⁶⁵ As Rachel Barkow has explained, when an institution has dueling missions, one mission will inevitably win out.¹⁶⁶ It is simply unrealistic to expect prosecutors to act both as zealous advocates for their positions and to operate with the best interests of justice in mind.¹⁶⁷ This institutional conflict is seen most clearly in cases in which new evidence casts doubt on old convictions. Even when evidence of actual innocence is overwhelming, prosecutors often refuse to join in motions to overturn the conviction, choosing to double down instead of admit error.¹⁶⁸

The institutional design problems in the immigration system are equally problematic, and perhaps more so. The ethical obligations of immigration officials to “seek justice” are less clear-cut than in the criminal context. Arguably, as government employees, they have the same obligations as traditional law enforcement and prosecutors to be ministers of justice, not simply zealous advocates for a particular result.¹⁶⁹ In practice, however, ICE operates with an ethos of maximum enforcement, perhaps even more so than criminal prosecutors.

The Office of the Principal Legal Advisor states its mission as “protect[ing] the homeland by diligently litigating cases,” not seeking justice.¹⁷⁰ The mission of Enforcement and Removal Operations, the division of ICE that is most often responsible for deciding whether to initiate proceedings, is even more unambiguous. Its mission is “to protect the homeland through the arrest and removal of those who undermine the safety of our communities and the integrity of our

¹⁶⁵ Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 309–15 (2013).

¹⁶⁶ *Id.* at 307–08.

¹⁶⁷ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 883 (2009).

¹⁶⁸ See Bruce A. Green & Ellen Yaroshfsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 501–03 (2009); Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), <https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html> [https://perma.cc/JJ43-R98E].

¹⁶⁹ Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 20–28 (2014) (arguing that ICE attorneys have the same ethical obligations as prosecutors to be ministers of justice).

¹⁷⁰ *Office of the Principal Legal Advisor*, U.S. IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/opla> [https://perma.cc/7GQS-T76D] (last visited Jan. 14, 2021).

immigration laws.”¹⁷¹ Compare that to the mission statement of the Department of Justice, which includes “to ensure fair and impartial administration of justice” among the Department’s aims.¹⁷²

Forged in the aftermath of 9/11 and populated by officials with extreme views on immigration enforcement,¹⁷³ ICE’s culture is perhaps unsurprising. While some ICE officials do take seriously the commitment to exercise discretion to achieve humanitarian goals, many do not. For example, some immigration courts have a much higher percentage of removal proceedings closed by ICE as an exercise of discretion than others, ranging from 46.6 percent of all cases in the Tucson Immigration Court, to 0 percent in many immigration court locations.¹⁷⁴ Not only does this lead to unjust results in individual cases, but it leads to a system in which discretion is often exercised arbitrarily depending on which official happens to make the decision. From a humanitarian perspective, we should be bothered by a system in which some officials decline to exercise discretion at all because of their mission tilt.

President Obama attempted to solve this problem by relocating the decision-making authority on whether to grant deferred action to United States Citizenship and Immigration Services (USCIS), the sub-agency in DHS that grants immigration benefits.¹⁷⁵ But in the Trump era, even USCIS has been reoriented into an enforcement agency.¹⁷⁶ As long as the power of discretion is located in the agency tasked with enforcement, then the use of discretion to accomplish humanitarian goals will be limited.

¹⁷¹ *Enforcement and Removal Operations*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/ero> [<https://perma.cc/868A-WET3>] (last visited Jan. 14, 2021).

¹⁷² *About DOJ*, U.S. DEP’T OF JUST., <https://www.justice.gov/about> [<https://perma.cc/7DL8-6HGM>] (last visited Jan. 14, 2021).

¹⁷³ Cade, *supra* note 169, at 18–20 (detailing the creation of the agency in response to 9/11); Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772> [<https://perma.cc/6GLG-S8GP>] (“At various moments during [the Obama] years, a broad swath of ICE officers behaved as a rogue unit within the federal government.”).

¹⁷⁴ *Immigration Court Cases Closed Based on Prosecutorial Discretion*, TRAC IMMIGR. (July 31, 2017), <https://trac.syr.edu/immigration/prosdiscretion> [<https://perma.cc/57C4-YGJF>].

¹⁷⁵ Cox & Rodríguez, *supra* note 112, at 193–94.

¹⁷⁶ Jim Acosta & Sophie Tatum, *US Immigration Agency Updates Statement to No Longer Say ‘Nation of Immigrants,’* CNN (Feb. 22, 2018, 8:24 PM), <https://www.cnn.com/2018/02/22/politics/uscis-mission-statement/index.html> [<https://perma.cc/FRA2-CCP7>].

B. *Special Problems with Prosecutorial Discretion in the Immigration Context*

Many of the problems that plague the criminal justice system's reliance on prosecutorial discretion apply with equal force in immigration enforcement. But the immigration system has additional features that make the widespread use of prosecutorial discretion even more problematic, and less likely to accomplish the humanitarian goals that supporters of discretion tout.

1. System Differences

Prosecutors in the criminal justice system wield enormous power to decide who and what to charge and whether to offer a plea. Many scholars have written about how prosecutors abuse this power. Yet, there are checks that exist in the criminal justice system that prevent prosecutors from going too far. Angela Davis writes about a case dismissed because of “prosecutorial vindictiveness,” after the prosecutor punished a criminal defendant for not acting as an informant by charging the underage defendant as an adult.¹⁷⁷ Davis makes the point that judicial intervention of this type is very rare,¹⁷⁸ but the prospect, however remote, that a court will intervene puts a restraint on prosecutorial behavior.

Those checks on prosecutorial power are absent in the immigration context. ICE trial attorneys operate in administrative tribunals that are “courts” in name only.¹⁷⁹ Immigration courts are not Article III courts, and they even lack some of the basic features that many Article I courts have. Immigration judges are not administrative law judges (ALJs) under the Administrative Procedure Act, meaning they are not required to pass merit-based screening to be appointed and they lack statutory protection from removal.¹⁸⁰ What this means is that immigration judges are at the mercy of the administration that employs

¹⁷⁷ DAVIS, *supra* note 12, at 123–25.

¹⁷⁸ *Id.* at 126–27.

¹⁷⁹ Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts,”* 33 GEO. IMMIGR. L.J. 261, 266–67 (2019).

¹⁸⁰ 8 U.S.C. § 1101(b)(4) (immigration judges); 8 C.F.R. § 1001.1(l) (2021) (immigration judges); 8 C.F.R. § 1003.1(a)(1) (2021) (B.I.A. members); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1665 (2010); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1647 (2016).

them. If their grant rates drift too high, or if they are seen as disadvantaging ICE in removal proceedings, then their appointment can be non-renewed, or even terminated. Though historically the Attorney General has not taken such actions, the mere specter can cause immigration judges to adjust their conduct to be more government friendly.¹⁸¹

The Trump administration took multiple steps in order to curtail the independence of immigration judges in its last two years.¹⁸² Former Attorney General Jeff Sessions issued several decisions that curtailed immigration judges' ability to manage their own docket by restricting the ability to terminate proceedings and administratively close cases unless ICE consents.¹⁸³ In 2018, an immigration judge was removed from dozens of cases in the Philadelphia immigration court because he had raised due process concerns in a case in which ICE sought a removal order of an unaccompanied minor who had failed to appear in court.¹⁸⁴ The union of immigration judges filed a grievance, arguing that the move violated the judge's "decisional independence."¹⁸⁵ Immigration judges are supposed to exercise "independent judgment and discretion" by regulation,¹⁸⁶ but the reality is far different.

In March 2018, the Department of Justice announced a series of benchmarks that immigration judges need to meet in order to receive satisfactory job reviews.¹⁸⁷ These included a case completion quota of

¹⁸¹ For a discussion of the problems with the current state of immigration adjudication, see Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 468–70 (2008); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370–73 (2006).

¹⁸² Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 728–37 (2019).

¹⁸³ *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) (finding immigration judges may only administratively close cases in specific, limited circumstances); *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018) (finding immigration judges have no inherent authority to terminate proceedings absent ICE consent).

¹⁸⁴ Tal Kopan, *Immigration Judge Removed From Cases After Perceived Criticism of Sessions*, CNN (Aug. 8, 2018, 5:49 PM), <https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html> [<https://perma.cc/Y22T-EYW6>].

¹⁸⁵ Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ from Hon. Steven A. Morley, Immigr. Judge, & Nat'l Ass'n of Immigr. Judges, to Christopher Santoro, Deputy Chief Immigr. Judge 4 (Aug. 8, 2018), <https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf> [<https://perma.cc/BTQ7-E2BX>].

¹⁸⁶ 8 C.F.R. § 1003.10(b) (2021).

¹⁸⁷ *EOIR Issues Guidance Implementing Immigration Judge Performance Metrics*, AM. IMMIGR. LAWS. ASS'N (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics> [<https://perma.cc/Y4Y9-5LUH>].

more than 700 per year (which amounts to almost three cases per day, assuming no vacation or sick days), as well as benchmarks regarding how quickly individual cases are resolved.¹⁸⁸ Though the benchmarks do not instruct immigration judges on how the cases must be resolved, shorter resolution times inevitably lead to a higher rate of removal orders. For example, one of the benchmarks requires that “[i]n 95% of all cases, individual merits hearing is completed on the initial scheduled hearing date, unless, if applicable, DHS does not produce the alien on the hearing date.”¹⁸⁹ Complicated claims for relief may require multiple days of testimony; the benchmark encourages immigration courts to deny a non-citizen’s request for a second hearing day, which could lead a meritorious claim to be denied. As one immigrants’ rights organization argued, “forcing judges to meet an arbitrary quota within an underfunded and backlogged court system will only result in limiting due process, curtailing judges’ deliberations, and denying immigrants adequate time to find lawyers and gather evidence.”¹⁹⁰

In 2019, the Department of Justice moved to decertify the immigration judges’ union on the ground that immigration judges were “managers,” unable to unionize.¹⁹¹ The Federal Labor Relations Authority agreed, decertifying the union and leaving immigration judges with even fewer protections against political interference.¹⁹² Dozens of immigration judges resigned or retired “due to concerns about their jobs becoming politicized.”¹⁹³ Though many of the Trump administration’s actions with respect to immigration courts were unprecedented, the system is set up in such a way as to permit such politicization and lack of independence. With such a system, prosecutors do not need to fear a judge who will check their prosecutorial power, leading to greater abuses.

The other incentives that prosecutors have in the criminal justice system to exercise discretion are also absent in the immigration context.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Press Release, Nat’l Immigrant Just. Ctr., With New Immigration Judge Quotas, AG Sessions Hijacks U.S. Justice System to Hurt Immigrants (Apr. 3, 2018), <https://www.immigrantjustice.org/press-releases/new-immigration-judge-quotas-ag-sessions-hijacks-us-justice-system-hurt-immigrants> [<https://perma.cc/A6AX-SBAD>].

¹⁹¹ U.S. Dep’t of Just., Exec. Off. for. Immigr. Rev., 71 F.L.R.A. 1046 (2020).

¹⁹² *Id.*

¹⁹³ Rachel Frazin, *Immigration Judges Say They’re Leaving Jobs Because of Trump Policies*, HILL (Feb. 13, 2019, 9:24 PM), <https://thehill.com/latino/429940-immigration-judges-say-theyre-leaving-jobs-because-of-trump-policies> [<https://perma.cc/EN7A-DS3R>].

There are no juries, and no possibility for jury nullification,¹⁹⁴ which is a rare but important consequence for a prosecutor who has abused his or her authority.¹⁹⁵ Prosecutors in the criminal system may be more inclined to exercise favorable discretion when they fear jury nullification than when they do not.¹⁹⁶ Unlike in many state systems, ICE prosecutors are not elected and so do not have the democratic accountability that such elections provide. While democratic electability of prosecutors may cause prosecutors to avoid exercising discretion lest they upset their voters,¹⁹⁷ there is no doubt that it helps avoid the worst abuses. Prosecutors have, on occasion, been voted out for egregious examples of misconduct, something an ICE prosecutor does not fear.¹⁹⁸ Only non-citizens—by definition non-voters—are subject to the immigration system, further complicating any democratic accountability.¹⁹⁹

Non-citizens in removal proceedings are not entitled to counsel at the government expense,²⁰⁰ and only about thirty-seven percent of non-

¹⁹⁴ Cf. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1344–45 (2008) (exploring the lack of jury nullification in administrative proceedings); see also Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 88 (1980) (explaining that jury nullification is an important check in “prosecutorial practices”).

¹⁹⁵ Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1109 (2013) (explaining approximately four percent of cases end with jury nullification).

¹⁹⁶ Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 296–300 (1996).

¹⁹⁷ See, e.g., Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 PUB. CHOICE 141, 142 (2014).

¹⁹⁸ See, e.g., Joaquin Sapien, *For Brooklyn Prosecutor, a Troubled Last Term, and a Trail of Lingering Questions*, PROPUBLICA (Dec. 30, 2013, 11:16 AM), <https://www.propublica.org/article/for-brooklyn-prosecutor-a-troubled-last-term-and-a-trail-of-lingering-quest> [<https://perma.cc/7A93-UUBJ>].

¹⁹⁹ Johnson, *supra* note 142, at 996 (discussing democratic accountability problems in systems of non-voters such as immigrants).

²⁰⁰ 8 U.S.C. § 1362; *Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010) (“Because immigration proceedings are of a civil rather than criminal nature, aliens in removal proceedings ‘enjoy[] no specific right to counsel’ under the Sixth Amendment to the Constitution.” (quoting *Zheng v. U.S. Dep’t of Just.*, 409 F.3d 43, 46 (2d Cir. 2005))); *Lopez-Vega v. Holder*, 336 F. App’x 622, 626 (9th Cir. 2009) (Smith, J., dissenting) (“[W]e have never extended a Sixth Amendment right to counsel to immigration proceedings.”); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (“It is well-settled that, while there is no Sixth Amendment right to counsel, aliens have a statutory right to counsel at their own expense”) (citation omitted); *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) (“[T]here is no Sixth Amendment right to counsel in deportation hearings”); *Mustata v. U.S. Dep’t. of Just.*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999) (“[I]t is clear that the Sixth Amendment does not apply to civil deportation proceedings.”); *Castaneda-*

citizens in removal proceedings have counsel as a result.²⁰¹ This means that even non-citizens who might be good candidates for prosecutorial discretion are unlikely to be able to navigate the system to request and obtain it. Prosecutors know that given the complexity of immigration law, unrepresented non-citizens are going to be unlikely to be able to fight their removal effectively, which removes one of the primary incentives that prosecutors have in the criminal system to exercise discretion. Indeed, eighty-three percent of non-detained non-citizens without attorneys are ordered removed versus forty percent who have counsel.²⁰²

Likewise, the burden of proof in immigration cases is much lower than the “beyond reasonable doubt” standard mandated by the Sixth Amendment.²⁰³ In many cases, the non-citizen has the burden of proof. For example, once the government proves alienage,²⁰⁴ the non-citizen must prove that they are present pursuant to a lawful admission,²⁰⁵ or if not, that they are eligible for some form of relief from deportation.²⁰⁶ For most undocumented immigrants, for whom proving alienage is not onerous, this means that burden of proof rests entirely with them and not the government. Even in cases where ICE bears the burden of proof, for instance in proving that a lawful permanent resident was convicted of a deportable offense, the burden—which is “clear and convincing evidence,” not “beyond a reasonable doubt”—is easily met with court documents.²⁰⁷ The burden then shifts to the non-citizen to prove eligibility for relief.

Suarez v. Immigr. and Naturalization Serv., 993 F.2d 142, 144 (7th Cir. 1993) (“Deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment.”); Lozada v. Immigr. and Naturalization Serv., 857 F.2d 10, 13 (1st Cir. 1988) (“Because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment.”).

²⁰¹ INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/X4L2-LBMF>].

²⁰² *Id.* at 19.

²⁰³ *In re Winship*, 397 U.S. 358, 362 (1970) (“[I]t has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.”).

²⁰⁴ 8 C.F.R. § 1240.8(c) (2021) (“In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent.”).

²⁰⁵ 8 U.S.C. § 1229a(c)(2).

²⁰⁶ § 1229a(c)(4).

²⁰⁷ § 1229a(c)(3)(A)–(B).

Neither do the other protections of the Sixth Amendment apply, ²⁰⁸ despite the fact that deportation is often a greater punishment than what is at risk in many criminal trials.²⁰⁹ Thus, for example, evidentiary rules are relaxed in removal proceedings,²¹⁰ and the government often uses affidavits that contain anonymous allegations to prove removability grounds related to gang membership or terrorism.²¹¹ Unlike in the criminal context, ICE rarely declines to initiate proceedings because it is worried about meeting its burden of proof.²¹² Instead, ICE has every incentive to initiate proceedings.

All of these features mean that ICE has none of the incentives to exercise discretion that exist in the criminal system. There is nothing about the system that tempers the ethos of maximum enforcement discussed above. In such a system, it is unsurprising that prosecutorial discretion has failed to mitigate the harshest aspects of our immigration system.

²⁰⁸ *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (“[S]ince deportation and removal proceedings are civil, they are ‘not subject to the full panoply of procedural safeguards accompanying criminal trials’” (quoting *Magallanes-Damian v. Immigr. and Naturalization Serv.*, 783 F.2d 931, 933 (9th Cir. 1986))); *Montilla v. Immigr. and Naturalization Serv.*, 926 F.2d 162, 166 (2d Cir. 1991) (“Because a deportation proceeding is civil, not criminal, in nature, various constitutional protections are not required.”).

²⁰⁹ See, e.g., Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

²¹⁰ *Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam) (“The Federal Rules of Evidence . . . do not apply in immigration hearings. Rather, [t]he sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.”) (internal citation and quotation marks omitted); *Solis v. Mukasey*, 515 F.3d 832, 835–36 (8th Cir. 2008) (“[T]raditional rules of evidence do not apply in immigration proceedings.”).

²¹¹ PAIGE AUSTIN, JP PERRY, IRMA SOLIS & CAMILLE MACKLER, *STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS* 14 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf [<https://perma.cc/47NK-4KUB>] (“DHS documents memorializing allegations of gang affiliation—including memoranda authored by Homeland Security Investigations (HSI) and I-213s—typically mention the respondent’s attire, tattoos, associations or alleged self-admission, or unnamed third parties’ accusations. But, these documents lack even basic details about when, where, or in what context the suspicious incidents occurred. This makes the allegations very difficult to effectively refute.”).

²¹² CRIM. JUST. STANDARDS, *supra* note 164, at § 3-4.3(a) (“A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.”); Cade, *supra* note 169, at 34–39 (outlining incentives for ICE attorneys to file weak claims of removability).

2. Legal Differences

The use of prosecutorial discretion in the immigration context to accomplish humanitarian goals is further complicated by two features of immigration law that distinguish it from criminal law. As discussed above, the immigration laws are written in such a way that the majority of non-citizens could be removed for one reason or another. In this way, the immigration and criminal laws are similar—criminal justice scholars have long noted that the proliferation of federal and state criminal statutes means that we are all violating the law all the time without even realizing it.²¹³ For example, certain loitering laws have long been criticized, and occasionally struck down, as allowing for the arrest of almost anyone in public.²¹⁴ Likewise, traffic rules can provide police with a pretext to pull over almost anyone they want.²¹⁵ Immigration laws are similar in that they regulate a wide range of conduct and even simple clerical errors can render a non-citizen deportable. A motivated ICE official can find a pretext upon which to initiate proceedings for all but the most law-abiding individuals.

However, immigration law is different in two key respects. First, immigration violations are continuing violations and there is no statute of limitations on their applicability. A non-citizen without status is without status every second of every day in perpetuity unless they gain status in some way, or they are removed. A non-citizen convicted of a crime thirty years ago remains removable today, despite the passage of time. A person engaging in criminal activity is most worried about getting caught while engaged in the activity and shortly afterwards. A removable non-citizen can be arrested at any time and placed in removal proceedings for conduct that occurred half a lifetime ago. There has been much criticism of the term “illegal” to describe undocumented immigrants as dehumanizing and othering.²¹⁶ But it is

²¹³ DAVIS, *supra* note 12, at 13.

²¹⁴ Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. PA. J. CONST. L. 474, 480 (2001); *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down Chicago anti-loitering ordinance as void for vagueness).

²¹⁵ *Whren v. United States*, 517 U.S. 806, 817–19 (1996) (finding police can stop and detain for even minor traffic violations, regardless of the officer’s true intent).

²¹⁶ Emily C. Torstveit Ngara, *Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice*, 12 STAN. J. C.R. & C.L. 389, 417–19 (2016); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1575–76 (2011); Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276–77 (1997).

accurate in one respect: our immigration laws declare that the person's mere existence is unlawful, something that cannot be said for most other legal violations.

Second, all grounds of removability lead to the same outcome regardless of the severity of the conduct that gives rise to it.²¹⁷ Thus, a non-citizen convicted of murder is subject to the same consequence as a lawful permanent resident who does not carry their green card with them at all times: removal. This is very different from the criminal context where prosecutorial discretion can be exercised not only in whether to charge someone, but also in how much time they will serve, either in the decision on what to charge or in a plea agreement. Except in the most egregious criminal conduct, a life sentence is not possible. Many people get convicted of minor crimes and are sentenced to community service or probation. There is no equivalent in the immigration context.

There are a few caveats to this second point. First, there is a type of relief called "voluntary departure," that some might view as a type of plea bargain. Voluntary departure allows a removable non-citizen to leave the country voluntarily and avoid a removal order, which allows them to avoid some of the bars to reentry that attach to a removal order.²¹⁸ But if the primary consequence is separation from family and community, it hardly matters that the person was free to leave on their own.

Those bars to reentry represent another type of difference in the length of the "sentence" imposed. Individuals who have been removed from the United States face anywhere from a five-year bar to a lifetime bar on reentry, depending on the grounds of removability.²¹⁹ Thus, an undocumented immigrant might have a five-year or ten-year bar, depending on how long they were present in the United States unlawfully, whereas a person convicted of an aggravated felony is barred for life.²²⁰ However, the bars do not give people the right to reentry after the specified period of time. Instead, they merely remove a barrier. Most undocumented immigrants will not be eligible to reenter regardless of the bar. A non-citizen removed on criminal grounds will

²¹⁷ Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009) ("Proportionality is conspicuously absent from the legal framework for immigration sanctions. One sanction—deportation—is the ubiquitous penalty for any immigration violation.").

²¹⁸ 8 U.S.C. § 1229c; *Azarte v. Ashcroft*, 394 F.3d 1278, 1284 (9th Cir. 2005) (explaining voluntary departure allows non-citizens to avoid bars to future relief).

²¹⁹ 8 U.S.C. § 1182(a)(9).

²²⁰ *Id.*

in all likelihood be found inadmissible because of that past criminal conduct and will be unable to return.²²¹ Thus, while the differences in the length of bars appears to represent a difference in the length of a “sentence,” in reality it is nothing of the sort. The harsh reality is that most people who are deported will never be permitted to return legally.²²²

The third type of “plea bargaining” that happens occasionally in the immigration context is when ICE consents to the grant of relief (e.g., asylum or cancellation of removal). While this type of discretion cannot be dismissed, it also represents a kind of binary choice—either ICE consents to the grant of relief in their discretion or it does not. There is no possibility of a reduced sentence, probation, or some other equivalent to the range of choices that are available in the criminal context.

Within this landscape, deferred action has emerged as a kind of a middle path for ICE officials who want to exercise discretion, equivalent to the role a plea bargain would play in the criminal justice system. It provides a non-citizen with temporary permission to stay in the country, as well as permission to work in certain circumstances. But it does not lead to a green card or citizenship and can be revoked at any time. The person remains removable.²²³ In some ways, this solves the twin dilemmas of using prosecutorial discretion in the immigration context: the fact that removal is the only consequence available for committing an immigration violation and the fact that a non-citizen who is removable often remains removable for life.

However, it comes with its own set of costs. Mainly, that the discretion is always revocable. Once a non-citizen enters the enforcement and removal system, they are never done with it. Non-citizens who receive this kind of discretion must live a kind of temporary existence, knowing that at any point, for any reason, that discretion can be revoked.²²⁴ Many of the most heart-breaking stories in

²²¹ Most crimes that will render a non-citizen deportable will also render them inadmissible on subsequent reentries. *Id.*; § 1182(a)(2).

²²² Of course, many of those deported return illegally, which merely complicates their legal situation by adding possible exposure to federal felony charges. 8 U.S.C. § 1326; *see also Immigration Convictions for April 2019*, TRAC IMMIGR. (May 31, 2019), <https://trac.syr.edu/tracreports/bulletins/immigration/monthlyapr19/gui> [<https://perma.cc/WHQ2-5244>].

²²³ *See Casa De Maryland v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 693 (4th Cir. 2019) (discussing the benefits and exclusions for individuals granted deferred action).

²²⁴ For a discussion of this type of temporary “non-status,” *see* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1174–76 (2015).

the Trump era are stories in which such discretion was revoked, none more sensationally than with DACA.

C. Case Study: DACA

DACA presents an interesting case study for exploring whether prosecutorial discretion can be used to accomplish humanitarian goals in the immigration context because it was created in part to address the problems with previous discretion policies. DACA was the result of years of advocacy by immigration advocates to sidestep Congress's inaction on immigration and agency resistance to aggressive uses of discretion.²²⁵ The program was trumpeted by supporters and DACA recipients themselves as a successful public policy that had improved the lives of the hundreds of thousands of young people who applied and were granted deferred action under the program.²²⁶

It was designed in such a way as to avoid some of the problems that come with using prosecutorial discretion to accomplish humanitarian goals. DACA addressed concerns about bias and inconsistency by making the process more rule-bound than before.²²⁷ In lieu of factors to consider or priority categories, DACA set forth seven requirements. A person was eligible to apply if they: (1) were under thirty-one years of age as of June 15, 2012; (2) came to the United States while under the age of sixteen; (3) continuously resided in the United States from June

²²⁵ Cox & Rodríguez, *supra* note 112, at 138–39, 169; Remarks by the President, *supra* note 91, at 801 (“In the absence of any immigration action from Congress to fix our broken immigration system, what we’ve tried to do is focus our immigration enforcement resources in the right places.”); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. 665, 671 (2016) (“President Obama’s immigration policies represent a strategy by which the elected Chief Executive and the head of an agency seek to thwart resistance from their policies by subordinate public employees.”); Arulanantham, *supra* note 89.

²²⁶ Roberto G. Gonzales, *Here’s How DACA Changed the Lives of Young Immigrants, According to Research*, VOX (Feb. 16, 2018, 8:50 AM), <https://www.vox.com/2017/9/2/16244380/daca-benefits-trump-undocumented-immigrants-jobs> [<https://perma.cc/BS5L-BHXN>]; Tom K. Wong, Greisa Martinez Rosas, Adam Luna, Henry Manning, Adrian Reyna, Patrick O’Shea, Tom Jawetz & Philip E. Wolgin, *DACA Recipients’ Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017, 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow> [<https://perma.cc/5WCR-TK9L>]; Brian Latimer, *What Successful Young Immigrants #WithDACA Want Trump to Know*, NBC NEWS (Nov. 11, 2016, 6:04 PM), <https://www.nbcnews.com/news/latino/withdaca-dreamers-share-stories-financial-success-after-daca-n682601> [<https://perma.cc/W5W4-V2UD>].

²²⁷ Cox & Rodríguez, *supra* note 112, at 177–80.

15, 2007 to the present; (4) entered the United States without inspection before or their lawful immigration status expired as of June 15, 2012; (5) were physically present in the United States on June 15, 2012 and at the time of making the request for consideration of deferred action with USCIS; (6) were currently in school, graduated from high school, obtained a GED, or honorably discharged from the Coast Guard or armed forces; and (7) had not been convicted of a felony offense, a significant misdemeanor, or more than three misdemeanors and did not pose a threat to national security or public safety.²²⁸ Although DHS retained discretion to deny applications for deferred action in individual cases even when these criteria were met, the vast majority of applications were granted.

DACA also addressed institutional resistance by moving adjudication of discretion requests from frontline ICE enforcement officials to USCIS.²²⁹ USCIS traditionally has not had a role in immigration enforcement, and thus, moving the process to USCIS allowed a somewhat more “neutral” adjudicator to decide whether to grant deferred action. In this way, DACA was very successful. While the 2011 Morton Memo had little effect on grants of prosecutorial discretion, approximately 800,000 people applied and were granted DACA in the first five years of the program.²³⁰

Yet, the program was unable to solve some of the challenges of using prosecutorial discretion as a humanitarian tool in the immigration context. The main problem continued to be that DACA provided only temporary status that could be revoked at any time. Because lack of legal status is a continuing violation, DACA did not and could not provide any type of permanent relief. It was, as Lindsay Pérez Huber has described it, an “‘illusion of freedom’ that provide[s] limited opportunities, yet, continue[s] to exclude undocumented youth from

²²⁸ Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/SLD8-A3E2>].

²²⁹ Cox & Rodríguez, *supra* note 112, at 193–95.

²³⁰ U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS FISCAL YEAR 2012–2017 (SEPTEMBER 30) (2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr4.pdf [<https://perma.cc/LP9X-7G4D>].

full participation in American society.”²³¹ Moreover, the institutional resistance to DACA and broad discretion policies more generally did not disappear; it just went underground, waiting for a more receptive administration in which to reassert itself.

Shortly after Trump’s inauguration, it became clear that the “illusion of freedom” was gone. In February 2017, Daniel Ramirez became one of the first DACA recipients to be arrested under Trump after ICE accused him of having a gang affiliation.²³² A month later, Daniela Vargas, a DACA recipient and immigrants’ rights advocate, was arrested after speaking at a rally.²³³ The fear that all DACA recipients were at risk was confirmed when on September 5, 2017, the Trump administration announced that it was rescinding the program.²³⁴ Court challenges quickly enjoined the rescission of the program, and DACA recipients waited anxiously for the Supreme Court to weigh in.²³⁵

In June 2020, the Supreme Court decided *Department of Homeland Security v. Regents of the University of California*, which held that the Trump administration’s attempt to end DACA was unlawful under the Administrative Procedure Act.²³⁶ However, the decision did very little to resolve the question of DACA’s legality. Justice Roberts, writing for the majority, reaffirmed that “[a]ll parties agree” that DHS can end DACA and the only question before the Court was whether it

²³¹ Lindsay Pérez Huber, “*Como Una Jaula De Oro*” (*It’s Like A Golden Cage*): *The Impact of DACA and the California Dream Act on Undocumented Chicanas/Latinas*, 33 CHICANA/O-LATINA/O L. REV. 91, 94 (2015).

²³² Dara Lind, *Daniel Ramirez Medina: What We Know About the DREAMer Trump Is Trying to Deport*, VOX (Feb. 16, 2017, 2:51 PM), <https://www.vox.com/policy-and-politics/2017/2/15/14622346/daniel-ramirez-medina-daca-arrest-ice> [https://perma.cc/3B6S-R9UT].

²³³ Christine Hauser, *Woman Detained After Speaking About Deportation Fears Is Released*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/us/daniela-vargas-detained-daca-released.html> [https://perma.cc/YPS6-93QJ].

²³⁴ Statement on the Deferred Action for Childhood Arrivals Policy, 2017 DAILY COMP. PRES. DOC. 1 (Sept. 5, 2017); see also Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [https://perma.cc/DU88-P5RV].

²³⁵ *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), *rev’d in part* by Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); *Nat’l Ass’n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018), *granting stay in part*, 321 F. Supp. 3d 143 (D.D.C. 2018); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *rev’d in part, vacated in part*, 140 S. Ct. 1891; *Casa De Maryland v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684 (4th Cir. 2019).

²³⁶ 140 S. Ct. 1891.

did so in a lawful manner.²³⁷ On this question, the Court held that DHS had failed to consider whether the different parts of DACA could be disentangled and did not take into account the reliance interests of DACA recipients.²³⁸ It thus struck down the rescission as arbitrary and capricious, while giving the administration a roadmap if it wanted to try again.²³⁹

Justice Roberts was careful not to decide the question of DACA's legality, but his opinion suggests an answer anyway. If the entire program was unlawful, it would not matter whether DHS considered whether to disentangle the decision not to initiate removal proceedings from the decision to provide DACA recipients work authorization and other benefits. Yet, if the entire program was lawful, then terminating it because it was unlawful would clearly not pass muster under the Administrative Procedure Act. The only conclusion to draw is that Roberts believes that *part* of DACA is unlawful. Given his recitation of the clearly established principle that the executive can decline to initiate proceedings²⁴⁰ and the Court's equally divided decision upholding the injunction striking down DAPA's work authorization provision,²⁴¹ it seems clear which part of DACA may be held unlawful in the future.

DACA has now been reinstated by Biden.²⁴² Yet, the last four years have exposed two major problems with DACA-like programs. First, the aspects of DACA that distinguished it from previous discretion policies—namely that it provided a level of security and access to work authorization that previous policies lacked—may be challenged and eventually struck down. It is this part of DACA that has allowed DACA recipients to go to school, have careers, access state and federal benefits, and start families. Second, as the Supreme Court made clear, a future administration may decide to end such programs at any time as long as they abide by the requirements of the Administrative Procedure Act.

The legal and political uncertainty surrounding DACA is devastating. In a study of undocumented youth before DACA, Roberto Gonzales found that their unlawful status “took a serious toll on their health, well-being, and future outlooks.”²⁴³ Those harms, partially

²³⁷ *Id.* at 1905.

²³⁸ *Id.* at 1911–15.

²³⁹ *Id.* at 1910.

²⁴⁰ *Id.* at 1911.

²⁴¹ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

²⁴² Memorandum, *supra* note 21.

²⁴³ ROBERTO G. GONZALES, LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA xx (2016).

mitigated after DACA went into effect, have returned. As one DACA recipient tweeted: “MY DACA WAS RENEWED! This means 2 more yrs of living/working/driving without the constant fear of deportation. It also means 2 more yrs of soul crushing anxiety + stress as my future, and that of 700K #DACA recipients, remains uncertain”²⁴⁴ Indeed, many DACA-eligible individuals never applied, citing fear that applying would expose them or their families to immigration enforcement.²⁴⁵

DACA was always a poor substitute for legislative reform. When it was announced, President Obama made clear that he preferred that Congress act to pass the DREAM Act, stating that “[p]recisely because [DACA] is temporary, Congress needs to act. There is still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments.”²⁴⁶ Still, the conventional wisdom was that while DACA was technically temporary, future administrations—even conservative ones—would pay a heavy political cost for ending the program.²⁴⁷ That conventional wisdom has proven false.

Moreover, the political capital that Obama expended on DACA was not without costs, particularly in the field of immigration. DACA at once polarized the immigration debate and also relieved whatever political pressure there was to pass the DREAM Act. It is, of course, uncertain what would have happened had Obama declined to take executive action to solve the problem of undocumented youth. Perhaps nothing would have happened, leaving undocumented youth without even the short-term protection that DACA provided. But moving forward, future administrations will need to decide where to spend their political capital on immigration. Likewise, advocates will need to make strategic decisions about where to focus their organizing energy.

²⁴⁴ Juan Escalante (@JuanSaaa), TWITTER (Apr. 17, 2019, 3:32 PM), <https://twitter.com/JuanSaaa/status/1118598191824494595> [<https://perma.cc/TL2T-8CWJ>].

²⁴⁵ Cinday Carcamo, *Half of Eligible Immigrants Sign Up for Deferred Deportation Program*, L.A. TIMES (Aug. 14, 2013), <https://www.latimes.com/nation/nationnow/la-na-nn-ff-deferred-deportation-20130813-story.html> [<https://perma.cc/KE3V-NUKB>].

²⁴⁶ Remarks by the President, *supra* note 91, at 801.

²⁴⁷ The conventional wisdom was bolstered by the well-studied endowment effect in economics and behavioral psychology, which theorizes that because of institutionalization and loss-aversion, it is much easier to refuse to grant something of value than it is to take it away. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 691 (2011); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193, 194–96 (1991).

DACA unquestionably had positive effects,²⁴⁸ and few DACA recipients would say that it would have been better for the program to have never existed at all. Still, DACA has exposed the severe limitations of using prosecutorial discretion to solve the problems in our immigration system. Even a program that was designed in order to solve the problems inherent in previous prosecutorial discretion regimes was unable to overcome some of the fundamental problems with using discretion in place of legislative reform to accomplish humanitarian goals. And future DACA-like programs may be even less effective because of legal constraints caused by future court decisions.

III. TOWARDS A BETTER PROSECUTORIAL DISCRETION SYSTEM

Given the failure of prosecutorial discretion to inject humanity into our immigration system, legislative reforms remain a priority. Many immigration scholars have identified “over-removability” as a problem in the current immigration system. Some have written about the need to revise the criminal grounds of deportability to decrease the number of minor crimes that might render a non-citizen deportable, or even get rid of the criminal grounds of deportability altogether. For example, Kari Hong has argued that criminal grounds of removability are “[o]verinclusive, [d]isproportionate, [i]rrational, [i]nefficient, and [e]xpensive” and should be abolished.²⁴⁹ Other scholars have written about ways to more explicitly incorporate a balancing of the equities in removability, which would essentially turn a plea for discretion into a legal claim. For instance, Shoba Sivaprasad Wadhia has argued that prosecutorial discretion should be codified in regulations and subjected to judicial review.²⁵⁰ Michael Wishnie takes another tack by reading into the Immigration and Nationality Act, by way of the Due Process Clause, a requirement that a sanction (deportation) should be proportional to the offense.²⁵¹ This “proportionality” claim would allow immigration judges and federal courts to weigh the equities in the cases of individual

²⁴⁸ See, e.g., Roberto G. Gonzales, Veronica Terriquez & Stephen Rusczyk, *Becoming DACAmended: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 AM. BEHAV. SCIENTIST 1852 (2014).

²⁴⁹ Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2130 (2017).

²⁵⁰ Wadhia, *supra* note 10, at 286–99.

²⁵¹ Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416–18 (2012).

immigrants. Still others have called for an expanded form of cancellation of removal that would allow more non-citizens with positive equities to qualify for relief.²⁵² Comprehensive immigration reform proposals usually include some form of amnesty for undocumented immigrants without criminal records who have been here for a certain length of time.²⁵³ A few scholars have even gone as far as calling for an end to deportation altogether.²⁵⁴

These are all proposals worthy of consideration, but they suffer from several problems. First, some of them fall into the “pie in the sky” category of proposals that are unlikely to be enacted in our lifetimes. Abolishing the criminal grounds of deportability, for example, seems about as likely as the author of this Article winning an Olympic medal—it could conceivably happen, but the confluence of events that would be necessary to make it so are so attenuated that no one should bet on it. Some of the proposals seem more likely, but are still remote. Courts could step in and hold that deportation is subject to proportionality under the Due Process Clause, but early litigation has not thus far been particularly promising.²⁵⁵ An amnesty as part of comprehensive immigration reform is possible, but like past amnesties, it would provide a one-time solution to the problem. And while Congress may step in and expand forms of relief to mitigate the need for prosecutorial discretion, the prospects of such reform seem tenuous at best.²⁵⁶ Furthermore, any expanded form of relief would undoubtedly still exclude individuals worthy of discretion. Absent a true end to all deportations, prosecutorial discretion will remain an important feature of any system—an enforcement system without it would be as unjust as it would be unworkable.

Absent broad legislative reform, there may be ways to tweak the immigration laws and system to allow it to function more like the criminal justice system when it comes to prosecutorial discretion. The criminal justice system is, quite obviously, not perfect. But the immigration system is even less so, and bringing it more in line with

²⁵² Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1675 (2009) (“To enable immigration judges and the BIA to make . . . individualized determinations, the Attorney General would need greater authority to grant cancellation of removal, similar to the INA section 212(c) regime.”).

²⁵³ See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, § 2101-04 (as passed by Senate, June 27, 2013).

²⁵⁴ Angélica Cházaro, *The End of Deportation*, UCLA L. REV. (forthcoming 2021).

²⁵⁵ See, e.g., *Hinds v. Lynch*, 790 F.3d 259, 270 (1st Cir. 2015).

²⁵⁶ Cox & Rodríguez, *supra* note 9, at 538.

what already exists in the criminal context would make prosecutorial discretion both function better and be less vital to producing just outcomes. These changes fall into two major categories: (1) reforming both the limits and consequences of removability to more effectively mirror criminal liability, and (2) redesigning the immigration adjudicatory system to more closely resemble the criminal justice system with respect to institutional checks and individual rights.

A. *Statute of Limitations for Removability Grounds*

One way to reform the immigration system to more closely mirror the criminal justice system would be to implement a statute of limitations for removability grounds.²⁵⁷ A statute of limitations would bring immigration law more in line with other criminal and civil statutes. Civil immigration violations are almost unique in not having a statute of limitations. All but the most serious crimes (such as murder and treason) have a statute of limitations, as do civil regimes that impose fines or other penalties.²⁵⁸ Putting a limit on how long the government has from when a non-citizen becomes removable, because of a criminal conviction, entering without inspection, or overstaying a visa, would both encourage the government to remove non-citizens quickly and solve the problem of non-citizens being removed decades after becoming removable. It would also limit the length of time non-citizens could remain in limbo after being granted prosecutorial discretion, creating an endpoint after which the fear and threat of deportation would cease. Individuals like Guadalupe García de Rayos would not have to live in fear indefinitely.

Though a statute of limitations may seem like a remarkable proposition given the current legal regime and political climate, one existed for the first seventy years of U.S. immigration enforcement. In 1888, when Congress passed the first statute that provided for deportation of non-citizens who fell into certain categories, it limited

²⁵⁷ See Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1745–47 (2011) (proposing a statute of limitations for criminal grounds of inadmissibility).

²⁵⁸ For an overview of the history and development of statutes of limitations in American legal history, see *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

deportation to one year following entry into the country.²⁵⁹ That limitations period was gradually expanded from one year to three years²⁶⁰ to five years,²⁶¹ before being abolished completely in the 1952 Immigration and Nationality Act (INA).²⁶²

Vestiges of time limitations still exist in the current law. For example, a little-known provision of the INA allows individuals who have been physically present since January 1, 1972, to register for a green card despite any unlawful presence they have accrued.²⁶³ The date for “registry” as it is called was updated multiple times in the twentieth century, but has not been updated since the Immigration Reform and Control Act of 1986.²⁶⁴ Cancellation of removal also has a time limitation built into it—requiring lawful permanent residents to have resided in the United States for seven years and all other non-citizens to have resided in the United States for ten years before being eligible to apply,²⁶⁵ although these provisions function less like a statute of limitations and more like a substantive requirement because of the other onerous requirements non-citizens have to meet in order to qualify. Finally, there is precedent for the criminal grounds of removability to have a statute of limitations of sorts. A single crime involving moral turpitude, one of the categories of crimes that renders an individual deportable, does not render an individual deportable unless it occurred within five years of initial entry.²⁶⁶

Andrew Tae-Hyun Kim has written about how the historical justifications for statutes of limitations apply with equal force in the immigration context.²⁶⁷ The first reason typically advanced for statutes of limitations is the idea that “at some point in time, even highly culpable defendants deserve to be free of civil or criminal liability.”²⁶⁸

²⁵⁹ Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 (repealed). The Act “authorize[d] the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came” See also *Yamataya v. Fisher*, 189 U.S. 86, 96 (1903).

²⁶⁰ Immigration Act of 1907, Pub. L. No. 59-96, ch. 1134, § 20, 34 Stat. 898, 904–05.

²⁶¹ Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874, 877, 889.

²⁶² Pub. L. No. 82-414, 66 Stat. 163, 167 (codified as amended at 8 U.S.C. § 1101 et seq.).

²⁶³ 8 U.S.C. § 1259(a).

²⁶⁴ Pub. L. 99-603, 100 Stat. 3361, § 203(a).

²⁶⁵ 8 U.S.C. § 1229b.

²⁶⁶ 8 U.S.C. § 1227(a)(2)(A)(i)(I).

²⁶⁷ See generally Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531 (2017).

²⁶⁸ *Id.* at 543.

This justification is what has animated past amnesty programs for undocumented immigrants who have been here for a certain number of years, such as the 1986 legalization program that resulted in 2.7 million gaining legal status.²⁶⁹ It also accords with the public discourse that has developed around the Trump administration's aggressive enforcement actions against individuals with old removal orders. There is something particularly troubling about someone facing deportation for events that occurred decades ago. This justification is perhaps even stronger when talking about individuals who are removable because of old criminal convictions because they have already been convicted and have paid their debt to society.

Statutes of limitations are superior to prosecutorial discretion at producing humanitarian outcomes in multiple respects. For one, statutes of limitations do not depend on fickle or biased decision-makers to grant mercy in particular cases. For another, they are absolute and not subject to future reconsideration if circumstances change.

The second justification Kim discusses—the costs of uncertainty to those at risk for future prosecution²⁷⁰—is even more important in the immigration context than in many of the civil and criminal contexts in which statutes of limitations are taken for granted. The consequences of deportation can be extremely dire—permanent banishment from community, permanent separation from friends and loved ones, entire lives destroyed. A person facing civil or criminal liability in other contexts may fear serious consequences, but they are rarely as life-altering as those suffered by someone facing deportation. As discussed above, the uncertainty of existing in a liminal immigration status such as deferred action, or in living life in the shadows, cannot be dismissed lightly.²⁷¹

It is unclear how this proposal would affect the million or so individuals who already have removal orders, given that statutes of limitations typically only apply to the initiation of proceedings. But there is some precedent for the idea that there should be a limit on how long a legal obligation should hang over someone's head, even after the

²⁶⁹ Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Ronald Reagan?*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan [<https://perma.cc/Q8MW-LXNN>].

²⁷⁰ Kim, *supra* note 267, at 547–48.

²⁷¹ See *supra* Section II.C.

conclusion of proceedings. For example, civil judgments can typically only be collected for a certain number of years.²⁷²

One possible critique of a statute of limitations in the immigration context is that it would encourage non-citizens to avoid capture by law enforcement, and that it would reward non-citizens who can successfully evade discovery. This critique, of course, is equally valid in all cases in which there is a statute of limitations. Individuals who have committed criminal or other civil offenses likewise have an incentive to avoid discovery until after the statute of limitations has run. Moreover, non-citizens who fear deportation already have such incentives in the current system and are unlikely to act any differently because there may be a light at the end of the tunnel.

A statute of limitations based on discovery of a removability ground rather than the accrual of that ground would, of course, solve this problem. So, a statute would begin to run when an individual who crossed the border without inspection was discovered to be in the country unlawfully rather than on the date they crossed the border.²⁷³ This is currently how federal law treats the crimes of improper entry and illegal reentry.²⁷⁴ However, a discovery-based limitation would also fail to provide many of the benefits that an accrual-based limitation would. It would provide no certainty for the millions of removable non-citizens who have not encountered the immigration enforcement system. Nor would it allow mercy in some of the most deserving cases of individuals who have lived long, productive lives in the United States before being caught.

It is also worth considering whether a statute of limitations would create incentives for government actors that would undercut these justifications. One could argue that rather than making the prosecutorial discretion system work better, a statute of limitations may have the opposite effect. For example, a statute of limitations on removability grounds may discourage the government from granting deferred action because the option of later removing an individual may be foreclosed. But there may be advantages to a system in which the government must prioritize whom to remove lest they lose the right to remove them at all. The government simply cannot deport everyone,

²⁷² For example, judgments obtained under federal law are valid for twenty years. 28 U.S.C. § 3201(c).

²⁷³ Kim, *supra* note 267, at 577.

²⁷⁴ 8 U.S.C. §§ 1325, 1326(a)(2); 18 U.S.C. § 3282; *United States v. Herrera-Ordonez*, 190 F.3d 504, 510–11 (7th Cir. 1999); *United States v. Bencomo-Castillo*, 176 F.3d 1300, 1303 (10th Cir. 1999); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996).

and a statute of limitations would require them to focus on recent arrivals, who are less likely to have the kinds of positive equities that would counsel in favor of discretion anyway. After a brief adjustment period, where the government may be moved to quickly remove individuals who are nearing the statute of limitations, the system would function better overall. Moreover, other reforms, such as expanding the available penalties for civil immigration violations, reforms discussed below, may ameliorate this concern by giving the government other options besides removing someone or letting them go entirely.

B. *Expand Available Penalties for Civil Immigration Violations*

As discussed above, unlike in most other civil and criminal enforcement regimes, there are essentially only two outcomes in removal proceedings. Either relief is granted and proceedings are terminated, or an individual is ordered removed.²⁷⁵ The result is the same whether the individual was convicted of serious crimes such as murder or terrorism, or whether they committed a technical violation like failing to file the correct form in a timely matter.²⁷⁶ The black-and-white nature of deportation increases the importance of prosecutorial discretion to avoid unjust outcomes. It also decreases the options available for an official who wants to exercise discretion but does not want to completely absolve the individual of culpability for the past immigration violation. There is no equivalent to a reduced sentence, probation, or diversionary programs that are commonplace in the criminal justice system.²⁷⁷

Giving the government other options besides removal for enforcing our immigration laws would decrease reliance on deferred action and other current forms of discretion and would allow ICE officials to exercise discretion in more durable ways. What other options are possible? It could be a fine-based system, which would allow non-citizens to avoid removal and instead pay a fine to the government

²⁷⁵ See *supra* Section II.B.2.

²⁷⁶ This disproportionality is the basis of Michael Wishnie's argument that the removal system currently violates the Due Process Clause. Wishnie, *supra* note 251, at 416–17.

²⁷⁷ Cf. DAVIS, *supra* note 12, at 5 (discussing prosecutor's power of charging and plea bargaining).

to violate the law.²⁷⁸ Non-citizens could agree to serve in the military or could be sentenced to a certain number of hours of public service. Similar to sentences of incarceration, non-citizens could be ordered removed for a certain amount of time, before being allowed to apply to reenter at the conclusion of the sentence, similar to the current bars to reentry but with a promise of reentry at the end.

There may be objections to all of these outcomes. Fine-based systems disadvantage the poor. Service-related sentences are difficult for individuals with onerous work or family obligations to fulfill. There is the question about what would happen if individuals given lesser sentences cannot or do not comply with the requirements of the sentence. Removal, even temporary removal, would be a hardship on individuals, families, and communities. But all of these sentences would be preferable for many facing permanent and irrevocable removal in the current system.

The main objection to such a proposal would undoubtedly be that it ignores the foundational principle underlying the modern immigration enforcement regime, which is that control over a nation's borders is an issue of national security and sovereignty, and that deportation is not a punishment, but a process by which the government exercises its right to determine who can remain in the country. The Supreme Court established this principle early in the nation's experiment with deporting non-citizens in *Fong Yue Ting v. United States* in 1893.²⁷⁹ In that case, the Court explained that “[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.”²⁸⁰ As a result, it held that “[d]eportation’ is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated.”²⁸¹

The understanding of deportation as an exercise of sovereignty rather than a system of punishment has held for more than one hundred years, despite the change in immigration enforcement from an

²⁷⁸ The idea of using fees or fines to penalize previous immigration violations is not new. Recent immigration reform proposals have included similar provisions. See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 2101-04 (as passed by Senate, June 27, 2013).

²⁷⁹ 149 U.S. 698, 709 (1893).

²⁸⁰ *Id.* at 711.

²⁸¹ *Id.* at 709.

administrative system operating at ports of entry to a vast law enforcement regime that incarcerates almost 500,000 non-citizens a year,²⁸² costs almost \$25 billion per year in federal funding to operate,²⁸³ and employs 50,000 immigration enforcement officers²⁸⁴—more than the total number of people (including support staff) working for the FBI.²⁸⁵ There have been a few cracks in the designation of deportation as nonpunitive—for instance, in *Padilla v. Kentucky*, the Supreme Court recognized deportation as a collateral consequence of criminal convictions, holding that “deportation is a particularly severe ‘penalty.’”²⁸⁶ Many scholars have called for deportation to be reclassified as a criminal process so that the Sixth Amendment’s procedural protections would attach.²⁸⁷

However, expanding the penalties available for violations of civil immigration laws would not require such a drastic change in the understanding of what deportation is and why it exists. Indeed, any such proposal would surely still include the right of the government to remove individuals permanently when they are declared public safety threats to the United States. It would merely recognize that deportation does not need to be the only penalty for every civil immigration violation, and that the national security and sovereignty interests of the United States can continue to be protected in a system that allows some deserving individuals to escape deportation by “pleading” or being “sentenced” to a lesser penalty.

There are questions that would need to be answered in order to implement this proposal. For instance, for an individual who received a “lesser” sentence than removal, would that sentence then come with

²⁸² Emily Kassie, *Detained: How the US Built the World’s Largest Immigrant Detention System*, GUARDIAN (Sept. 24, 2019), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump> [https://perma.cc/854S-BVG7].

²⁸³ U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FY 2019 (2019), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf> [https://perma.cc/ADA2-5G5A]; AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 3 (2021) [hereinafter AIC REPORT], <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> [https://perma.cc/F4CZ-ESDD].

²⁸⁴ AIC REPORT, *supra* note 283, at 1.

²⁸⁵ *How Many People Work for the FBI?*, FBI, <https://www.fbi.gov/about/faqs/how-many-people-work-for-the-fbi> [https://perma.cc/D7SK-PXZ5] (last visited on Dec. 4, 2019).

²⁸⁶ 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting*, 149 U.S. at 740).

²⁸⁷ See, e.g., Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2301 (2013); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 114–15 (2008); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1514 (2011).

work authorization, permanent status, and a path to citizenship at its conclusion, or would an individual continue to live a contingent, if slightly more secure, existence? There would surely be questions about who would be deserving of removal in this new context. Hard questions would remain about how to implement lesser penalties, particularly for non-citizens suffering from physical, mental, or financial limitations. Yet, moving away from a black-and-white system of punishment would open up these possibilities for the first time, and would allow us to actually address the question of what should be the penalty for committing a civil immigration violation.

C. *Redesigned Immigration Adjudication*

Another way to improve the functioning of the prosecutorial discretion system is to design the immigration adjudication system so that it provides a true check on executive enforcement power. Two features of the criminal justice system that could be imported into the immigration system are the right to assigned counsel at the government's expense and an independent immigration court that operates separately from the political branches of government. These reforms would not only increase the integrity of the immigration system more generally, but would also lead to a more sensible use of prosecutorial discretion by immigration officers.²⁸⁸ These reforms, together with the changes to the limits and consequences of removability discussed above, would go far in reforming the prosecutorial discretion system to function more like discretion in other contexts.

Courts have consistently held that non—citizens do not have a Sixth Amendment right to appointed counsel in removal cases.²⁸⁹ Although several courts of appeals have opined that the Due Process

²⁸⁸ DAVIS, *supra* note 12, at 135 (discussing how courts occasionally act as check on overzealous prosecutors).

²⁸⁹ See, e.g., *Romero v. U.S. Immigr. & Naturalization Serv.*, 399 F.3d 109, 112 (2d Cir. 2005); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001); *Stroe v. Immigr. & Naturalization Serv.*, 256 F.3d 498, 500–01 (7th Cir. 2001); *Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Mustata v. U.S. Dep't of Just.*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); *Gandarillas-Zambrana v. Bd. of Immigr. Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995); *Mantell v. U.S. Dep't of Just.*, 798 F.2d 124, 127 (5th Cir. 1986).

Clause could occasionally require the appointment of counsel,²⁹⁰ courts engaging in the *Mathews v. Eldridge* balancing test have for the most part concluded that the burden on the government would be too great to require appointed counsel in all removal proceedings. Courts have even failed to find a right to appointed counsel in the case of particularly vulnerable non-citizens such as children,²⁹¹ though one district court did find that mentally incompetent individuals in removal proceedings have a due process right to appointed counsel under the Rehabilitation Act.²⁹² Some states and localities have moved to implement “civil *Gideon*” programs for some non-citizens in removal proceedings, but those programs have been enacted legislatively, not through the courts.²⁹³

Nevertheless, expanding access to counsel for non-citizens in removal proceedings would have several benefits on the functioning of the system as a whole. First, represented non-citizens are much more likely to win their cases because the avenues for relief currently available are so complicated that most non-citizens only have a realistic possibility of winning with counsel.²⁹⁴ Second, because represented citizens are more likely to win, ICE prosecutors and immigration officials would be encouraged to exercise prosecutorial discretion in meritorious cases, either by declining to initiate proceedings, or by utilizing some of the alternative penalties discussed above.

²⁹⁰ See *Michelson v. Immigr. & Naturalization Serv.*, 897 F.2d 465, 468 (10th Cir. 1990); *Escobar Ruiz v. Immigr. & Naturalization Serv.*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986); *Aguilera-Enriquez v. Immigr. & Naturalization Serv.*, 516 F.2d 565, 568 (6th Cir. 1975); *Barthold v. U.S. Immigr. & Naturalization Serv.*, 517 F.2d 689, 690–91 (5th Cir. 1975).

²⁹¹ The Ninth Circuit held that non-citizen children are entitled to heightened due process protections in *Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004), but has refused to find a right to appointed counsel under the Due Process Clause. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1143 (9th Cir. 2018), *vacated on reh'g en banc sub nom. C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).

²⁹² *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2013 U.S. Dist. LEXIS 186258, at *14 (C.D. Cal. Apr. 23, 2013). The government did not appeal and later announced it would respect the ruling nationwide. *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, U.S. DEP'T OF JUST. (Apr. 22, 2013), <https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented> [<https://perma.cc/7VCJ-QZHE>].

²⁹³ Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 213 (2019) (detailing civil *Gideon* efforts in New York, as well as New Jersey, Chicago, and California).

²⁹⁴ *Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (comparing the INA to the tax code in complexity).

Similarly, an independent immigration court would not only increase the legitimacy of the immigration system as a whole, but it would encourage better use of prosecutorial discretion. Like in the case of access to counsel, many scholars have proposed reforms to the immigration courts. Some have proposed that Congress should create an Article I court, similar to U.S. bankruptcy courts and U.S. tax courts.²⁹⁵ Others have gone so far as to propose that removal hearings should be conducted by Article III courts.²⁹⁶ Both proposals stem from the widespread belief that the immigration courts as they are currently constituted are beholden to political forces, crippled by overwhelming caseloads, and lacking in procedural safeguards for non-citizens.

Making immigration courts more independent would allow prosecutorial discretion to function better by providing a true check on prosecutorial overreach and encouraging executive branch officials to utilize discretion to avoid losses in the courts. This would be especially so if immigration courts were given the authority to levy penalties that fell short of permanent removal, or to terminate proceedings for prosecutorial misconduct. Facing a court that may disagree that a particular individual deserved permanent banishment would encourage officials to exercise discretion before reaching the conclusion of proceedings. Like prosecutors who are not sure that a jury will buy their case, immigration officials will need to make calculations about which cases to bring, or risk losing their reputations in front of independent judges. Moreover, independent judges could slap down egregious prosecutorial misconduct by terminating proceedings in rare cases. Like in the criminal context, this would not have to happen very often to have a real effect on prosecutorial behavior.

CONCLUSION

Prosecutorial discretion in immigration enforcement is here to stay. Even with legislative reforms, it will remain an important part of a just and humane enforcement regime. Yet, the focus on getting the

²⁹⁵ 2 COMM'N ON IMMIGR., AM. BAR. ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM pt. 6, at 3–4, 12–15 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [<https://perma.cc/NQC8-YNX4>]; Christine Lockhart Poarch, *The FBA's Proposal for the Creation of a Federal Immigration Court*, 61 FED. LAW. 10 (2014); Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 21 (2013).

²⁹⁶ Legomsky, *supra* note 180, at 1685–87.

executive to exercise more and more discretion has largely failed to account for the ways that prosecutorial discretion fails to mitigate unjust outcomes. The best hopes for discretion-based relief—DACA and DAPA—are not the panacea they once appeared to be. And future legal developments may render DACA-like programs incapable of accomplishing the goals its supporters set out to accomplish. If discretion is going to remain a major feature of our immigration policy, we must focus on reforming the system so that discretion works better. Immigrants' rights advocates should be careful about advocating for more discretion in the absence of these structural reforms.

The solutions proposed here may be unsatisfying to some who are pessimistic about the prospect of any legislative reform whatsoever. It may be, however, that some of these reforms would appeal to legislators who are not keen on granting affirmative relief to a large number of individuals in one fell swoop, but who might be open to certain structural reforms that would make the system fairer. Moreover, the alternative—a system overly reliant on discretion that is exercised in an inconsistent, arbitrary, and biased way—is simply not viable. Reformers should work to design a system in which prosecutorial discretion works to advance justice, rather than the opposite.