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## Process as Suffering: How U.S. Immigration Court Process and Culture Prevent Substantive Justice

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## ARTICLES

### PROCESS AS SUFFERING: HOW U.S. IMMIGRATION COURT PROCESS AND CULTURE PREVENT SUBSTANTIVE JUSTICE

*Christopher Levesque\**, *Kimberly Horner\*\**, and *Linus Chan\*\*\**

#### I. INTRODUCTION

In this article, we argue that there is a form of double punishment unique to the immigration court system that attorneys and their noncitizen clients must navigate throughout changing political contexts. The first form of punishment is the court process during removal proceedings, and the second form of punishment is removal from the United States. Our interviews with removal defense attorneys in the U.S. Upper Midwest illustrate how these punishments intersect with one another and push attorneys to adopt strategies that may not lead to winning a case, but intend to protect their clients by losing as slowly as possible. These strategies reaffirm how the severity of deportation can be so harsh that non-citizens are willing to risk more exacerbated forms of punishment via extended contact with the court process to avoid removal from the United States. Focusing on the process-as-punishment, we explore what limitations there may be to past understandings of how legal stakeholders—i.e., defense attorneys, judges, and prosecutors—mete out and negotiate “just” punishment in U.S. courts.

In what follows, we first engage Malcolm Feeley’s work to re-frame the concept of double punishment in the context of the immigration court system—pointing out how fluctuation in immigration policy and the lack of access to substantive justice in immigration courts alter the way legal representatives navigate double punishment on

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behalf of their noncitizen clients. We analyze interviews with 35 removal defense attorneys conducted between August 2021 and December 2021 to understand why and how attorneys use time to navigate the double punishment faced by noncitizens in a way that often extends—rather than curtails—their clients’ exposure to the punitive removal process.<sup>1</sup> The timing of these interviews—during the first year of the Biden administration—is a key component of our analysis, as it allows for insights into the role lawyers play in the context of changing national political rhetoric regarding immigrants.

Our interview sample includes removal defense lawyers who have defended clients in the immigration courts in Omaha, Nebraska, or Fort Snelling, Minnesota who are either practicing or had been in the past five years (13 operate out of Omaha, while 22 practice in Fort Snelling).<sup>2</sup> Using Nvivo 12, a qualitative coding software, we use text-based queries and inductive coding schemes to identify conversations with attorneys that directly discuss double punishment (first as court process, second as deportation) and what time-based strategies they employ to work against these sanctions.<sup>3</sup>

Our interviewees detail how attorneys’ use of time first acts as a practical response to serve their client.<sup>4</sup> By speeding a case up (or slowing it down), they are able to act upon the political volatility that shapes immigration adjudication at various institutional levels; this includes volatility at the top, such as changing presidential administrations who have diverging policy agendas, as well as volatility at the “street” or “meso” level where government employees (such as judges) shift and adapt their interactions with individuals subject to the law.<sup>5</sup>

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<sup>1</sup> See, e.g., Interview with Attorney A (Aug. 2021–Dec. 2021) (on file with authors); Interview with Attorney H (Aug. 2021–Dec. 2021) (on file with authors).

<sup>2</sup> See, e.g., Interview with Attorney A, *supra* note 1. For more information on interview methods, see *infra* Appendix A.

<sup>3</sup> See generally BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 18 (1979).

<sup>4</sup> See, e.g., Interview with Attorney H, *supra* note 1.

<sup>5</sup> See JORGE LOWEREE & AARON REICHLIN-MELNICK, *TRACKING THE BIDEN AGENDA ON IMMIGRATION ENFORCEMENT* 5–7 (2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/tracking\\_the\\_biden\\_agenda\\_on\\_immigration\\_enforcement\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/tracking_the_biden_agenda_on_immigration_enforcement_0.pdf) [<https://perma.cc/ZBP7-Y9RX>]; Interview with Attorney C (Aug. 2021–Dec. 2021) (on file with authors). For more on “street-level” and “meso-level” immigration enforcement, see Asad L. Asad, *Deportation Decisions: Judicial Decision-Making in an American Immigration Court*, 63 *AM. BEHAV. SCIENTIST* 1221, 1222–23 (2019) and Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 *SOCIO. RACE & ETHNICITY* 82, 83 (2017), respectively.

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Second, attorneys use time to resist an unjust system and delay or prevent the imposition of punishment in the form of deportation.<sup>6</sup> Our interviewees point out that their time-based strategies reflect the widely-held perception among removal defense attorneys that the immigration court process is unable to negotiate substantively just outcomes.<sup>7</sup> As a form of resistance lawyering, attorneys advocate for their clients while also calling a referendum on an unjust and illegitimate legal system.<sup>8</sup> Their work aims to mitigate harm through the act of slowing the process down, or—to use one attorney’s words—“losing slowly.”<sup>9</sup> Ultimately, we argue that immigration court serves as a counterfactual to Feeley’s work, demonstrating how political instability and the lack of access to substantive justice require immigration attorneys to utilize time to navigate the “double punishment” faced by immigrants, either by speeding the process up or slowing it down.

## II. BACKGROUND

I’ve heard some people say that it’s . . . like a double sentence, basically. . . . When you get convicted of a criminal crime, you serve your sentence and then you basically get re-criminalized, or re-serve a sentence in the terms of your immigration, deportation proceedings.<sup>10</sup>

### A. *Double Punishment as Process and Outcome*

Whether or not deportation should be considered punishment has been debated for the better part of two centuries.<sup>11</sup> In *Fong Yue Ting v. United States*,<sup>12</sup> the Supreme Court decided that deportation is not a criminal form of punishment, meaning that noncitizens face deportation proceedings without protections afforded criminal defendants.<sup>13</sup> Yet, over a century later, in *Padilla v. Kentucky*,<sup>14</sup> the Court described deportation as “intimately related to the criminal

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<sup>6</sup> See, e.g., Interview with Attorney H, *supra* note 1.

<sup>7</sup> See, e.g., *id.*

<sup>8</sup> See Daniel Farbman, *Resistance Lawyering*, 107 CAL. L. REV. 1877, 1879, 1951 (2019); see also Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. 1597, 1636–37 (2022); Interview with Attorney C, *supra* note 5.

<sup>9</sup> See, e.g., Interview with Attorney C, *supra* note 5.

<sup>10</sup> Interview with Attorney A, *supra* note 1.

<sup>11</sup> See Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1304–05 (2011).

<sup>12</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>13</sup> See *id.* at 730.

<sup>14</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

process,” exposing the complicated legal space occupied by deportation.<sup>15</sup> In addition, scholars and commentators continue to describe the removal of people from the United States as a sanction, a punishment, or perhaps a “quasi-punishment” even if it does not qualify constitutionally as a form of “criminal punishment.”<sup>16</sup>

The sanction of deportation is split into two: first via a court process that must be endured, and second via a decision or outcome from a judge.<sup>17</sup> Both constitute a form of punishment which begins during the process of “deportability” deciding who is forced to leave the United States and who is allowed to stay.<sup>18</sup> Deportation is an action that takes an individual away from their home, family and community; thus, deportation is both a process and outcome that may result in the “loss of . . . all that makes life worth living,” as noted by the Supreme Court.<sup>19</sup> Because this sanction has such severe consequences and it is a reaction to an act (not having proper documentation, or commission of a crime after entry into the United States), we argue—as a growing body of legal and social sciences literature does—that deportation should be considered punishment.<sup>20</sup>

The removal hearing process exacts severe physical, emotional, and economic tolls on non-citizens and their communities.<sup>21</sup> Harsh treatment on its own does not qualify a process as punitive, but if its purpose is to sanction certain actions and express retribution for such actions, then such treatment qualifies as punishment.<sup>22</sup> The legal process for deportation can vary, as some deportations take place in front of an administrative officer or immigration judge while others may involve only interactions with federal law enforcement officers working within Customs and Border Protection (CBP) or

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<sup>15</sup> See *id.* at 365; *cf. Fong Yue Ting*, 149 U.S. at 730.

<sup>16</sup> See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893–94 (2000); Markowitz, *supra* note 11, at 1305–07; Fatma Marouf, *Immigration Law’s Missing Presumption*, 111 GEO. L.J. (forthcoming 2023) (manuscript at 1, 3) (on file with authors); Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 217 (1958).

<sup>17</sup> See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641–42 (2010).

<sup>18</sup> See Asad, *supra* note 5, at 1231–33.

<sup>19</sup> See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 162 (1996).

<sup>20</sup> See sources cited *supra* note 16.

<sup>21</sup> See BETH C. CALDWELL, DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO 67 (2019).

<sup>22</sup> See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 474 (2007).

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Immigration and Customs Enforcement (ICE).<sup>23</sup> Regardless, these legal mechanisms are in place not just to decide who may stay within the physical boundaries of the United States and who must be forcibly expelled, but also to punish everyone who finds themselves within its jurisdiction at all.<sup>24</sup> The process of deportation punishes those who are forced to go through it.<sup>25</sup>

Malcolm Feeley's study of a New Haven, CT criminal misdemeanor court during the 1970s provides a template for understanding how a legal process can become a punishment itself.<sup>26</sup> He shows how, when dealing with defendants who were legally "innocent," criminal court procedure meted out punishment not just through the final sentence or fine imposed, but also through the very process of deciding guilt.<sup>27</sup> As such, the negative consequences to the defendant invoking their due process protections in the lower criminal court system even transcend the consequences of a judge's final decision.<sup>28</sup> In the decades that followed Feeley's research, many have built upon, revised, and critiqued his claim that "the process is the punishment."<sup>29</sup> There has been sustained interest in revisiting this idea in modern-day misdemeanor courts, studying how punitive processes have evolved within legal institutions and in turn taken new forms of social control.<sup>30</sup>

Immigration scholars have previously used Feeley's frame to analyze the deportation and removal process, mainly as a way to show that the processes of deportation are often harsh and thus punitive.<sup>31</sup> One key example has been Juliet Stumpf's detailed and careful analysis of *Process is the Punishment* ("PiP") as Feeley

<sup>23</sup> See W.D. REASONER, DEPORTATION BASICS: HOW IMMIGRATION ENFORCEMENT WORKS (OR DOESN'T) IN REAL LIFE 9–10 (2011), <https://cis.org/sites/cis.org/files/articles/2011/reasoner-alien-removal.pdf> [<https://perma.cc/7QEX-SQL5>]; see also Legomsky, *supra* note 17, at 1641–42.

<sup>24</sup> See Juliet Stumpf, *The Process is the Punishment in Crimmigration Law*, in *THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION* 58, 73 (Katja Franko Aas & Mary Bosworth eds., 2013).

<sup>25</sup> See *id.*

<sup>26</sup> See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

<sup>27</sup> See *id.* at 291, 297.

<sup>28</sup> See *id.* at 290–91, 295, 297.

<sup>29</sup> See, e.g., Jennifer Earl, *The Process is the Punishment: Thirty Years Later*, 33 L. & SOC. INQUIRY 737, 737 (2008) (book review); Shauhin Talesh, *The Process is the Problem*, in *THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY*, 72, 73 (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019).

<sup>30</sup> See NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* 11 (2016); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 10–11 (2018).

<sup>31</sup> See Stumpf, *supra* note 24, at 60.

understood it and how the concept relates to deportation proceedings.<sup>32</sup> Using both frames of reference (criminal and immigration), she writes about how non-citizens punished by the criminal system and charged with migration crimes are then subject to an elongated and doubly punitive process of deportation proceedings.<sup>33</sup> Stumpf's examination treats as a single process a non-citizen's criminal process combined with the subsequent deportation process.<sup>34</sup> Procedural punishment occurs even if defendants are able to later avoid deportation based on legal relief available to them such as cancellation or withholding of removal, asylum, or adjustment.<sup>35</sup> This tracks with the idea that the modern deportation system has not only evolved in scope and size, but also increasingly draws upon the criminal justice system in ways that render non-citizens as "illegal."<sup>36</sup> Criminalizing the process of deportation raises the question as to whether or not Feeley's observations about PiP in criminal proceedings are in fact analogous to immigration proceedings and deportation.

Crimmigration scholars' approach to double punishment often focuses on the so-called "citizenship penalty" that criminalized non-citizens face when they are in immigration detention facing deportation for criminal penalties already served.<sup>37</sup> As further retribution for criminal justice sentencing, the U.S. immigration system punishes non-citizens a second time in removal proceedings.<sup>38</sup> In this framework of double punishment, the current U.S. crimmigration system subjects individuals to criminal and immigration sanctions which ultimately push immigrants toward an immigration judge's removal decision.<sup>39</sup> Also referred to as enhanced

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<sup>32</sup> *Id.* at 64–65.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* at 73.

<sup>35</sup> *See id.* For a sense of the different ways to prevent deportation while in the process, see IMMIGRANT LEGAL RESOURCE CENTER, IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS: HOW TO QUICKLY SPOT POSSIBLE IMMIGRATION RELIEF FOR NONCITIZEN DEFENDANTS 11–13, 28–30, 36 (2018), [https://www.ilrc.org/sites/default/files/resources/relief\\_toolkit-20180827.pdf](https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf) [<https://perma.cc/5T7Y-D94K>].

<sup>36</sup> *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 268–69 (2004).

<sup>37</sup> *See, e.g.*, Armenta, *supra* note 5, at 92; Michael T. Light, *Legal Inequality's Newest Face*, CONTEXTS, Summer 2015, at 33–37; Amairini Sanchez, Michele Cadigan, Dayo Abels-Sullivan & Bryan L. Sykes, *Punishing Immigrants: The Consequences of Monetary Sanctions in the Crimmigration System*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 76, 80 (2022).

<sup>38</sup> *See* Sarah Tosh, *Mandatory Detention for Criminal Convictions: The Reproduction of Facial Inequality Through U.S. Immigration Law*, 44 LAW & POLY 70, 70, 81–85 (2022).

<sup>39</sup> *See id.* at 70. Tosh has argued, for instance, that "in doubly punishing immigrants who have already served time for criminal convictions, the immigration system funnels criminalized

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punishment, these back-to-back sanctions primarily target Latinx and Black non-citizens due to their racialized legal status.<sup>40</sup> Aggravated felony charges leading to mandatory detention during the immigration process silo the respondent away from legal consultation and additional resources meant to safeguard due process.<sup>41</sup> Importantly, this siloing and segregation also demonstrate how immigration status leads to wealth extraction in the criminal justice system, where non-citizens often pay higher fines, fees, court costs, and legal financial obligations (LFOs) as an initial punishment to avoid the second punishment of immigrant detention and deportation.<sup>42</sup>

Our conceptualization of double punishment mirrors these concerns, but frames it differently to show how multiple immigrant sanctions unfold within the deportation process and again during the final removal decision. While Feeley exposed the paradigm of a process that can be harsher than the sanction that it was designed to impose, certain important features of his case study in New Haven are misaligned with how immigration court and removal proceedings operate today.<sup>43</sup> For example, as Stephen Yale-Loehr, Gabriel Chin and Juliet Stumpf have observed, the deportation process has adopted most of the punitive procedural accrual of the criminal system yet failed to adopt substantive criminal procedural protections for defendants such as a public defense system, or a presumption of innocence.<sup>44</sup> Instead of focusing on non-citizens sanctioned by the criminal justice system, this analysis widens the scope and examines anyone facing deportation. We ask a related question: *how has the PiP concept evolved in immigration law to mete out a distinct form of punishment in removal proceedings, a punishment separate from the removal order itself?*

To address the above question, we next discuss three factors that set the context of removal proceedings apart from the misdemeanor

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noncitizens—particularly those from poor Black and Latinx communities—toward deportation, perpetuating inequality and upholding existing racial hierarchies.” *Id.*

<sup>40</sup> Armenta, *supra* note 5, at 82–83; Jeremy Raff, *The “Double Punishment” for Black Undocumented Immigrants*, ATL. (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/> [perma.cc/76UJ-9LA5].

<sup>41</sup> See Tosh, *supra* note 39, at 71.

<sup>42</sup> See Sanchez et al., *supra* note 37, at 76–77 (referring to these costs as “immigration sanctions,” or “enhanced financial and nonfinancial penalties that are the result of an undocumented immigrant’s liminal legality”) (emphasis removed).

<sup>43</sup> FEELEY, *supra* note 26, at 278, 291; see, e.g., Marouf, *supra* note 16 (manuscript at 3).

<sup>44</sup> See Marouf, *supra* note 16 (manuscript at 1–5); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *Death is Different* and a Refugee’s Right to Counsel, 42 CORNELL J. INT’L L. 361, 361–62, 376–80 (2009); Stumpf, *supra* note 24, at 64–65.



courts examined in the PiP: (1) a lack of access to substantive justice, (2) the political ebb-and-flow of immigration policy, and (3) the higher severity of the sanctions noncitizens face in light of deportation decisions.

### 1. The Removal Process Lacks Substantive Justice

In Feeley's model of criminal adjudication, lawyers representing criminal defendants negotiate with other stakeholders, including the judge and prosecutor, to recognize the punitive realities of criminal prosecution and impose a "just" disposition.<sup>45</sup> Reaching a just disposition involves balancing 1) exposure to the punitive criminal prosecution process with 2) formal punishment for the crime committed.<sup>46</sup> As Feeley demonstrates, stakeholders come to an understanding of what the relative treatment of a defendant should be, and then use both substantive and procedural mechanisms to impose the just disposition for those defendants.<sup>47</sup> The defense attorney, the prosecutor, and the judge all act within a "marketplace" to decide the appropriate punishment—which includes not just the ultimately declared sentence, but also the processes involved.<sup>48</sup> In this manner, stakeholders are able to adjust not only the pronounced sanction but the underlying processes in order to effectuate a negotiated norm of substantive justice—i.e., a level of punishment for the underlying crime to which the stakeholders agreed.<sup>49</sup>

With that said, what counts as substantively just in immigration proceedings? This question sets an important departure point from how procedural negotiations unfold among stakeholders. In misdemeanor courts, Feeley's observation of substantive justice assumed that defendants in the New Haven court were for the most part guilty.<sup>50</sup> While this assumption is oft-criticized in the criminal justice context, the deportation process more closely conforms to an assumption of widespread guilt.<sup>51</sup> "Guilt" in this context refers simply to the idea that most of the people placed into deportation procedures are in fact legally subject to removal from the United States.<sup>52</sup> Deportation proceedings are split into two inquiries, the

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<sup>45</sup> See *id.* at 64; FEELEY, *supra* note 26, at 289–90.

<sup>46</sup> See Talesh, *supra* note 29, at 72–73.

<sup>47</sup> See FEELEY, *supra* note 26, at 283–84.

<sup>48</sup> See *id.* at 12, 30.

<sup>49</sup> See *id.* at 22, 24–25, 283, 290–91.

<sup>50</sup> See *id.* at 273.

<sup>51</sup> See Earl, *supra* note 29, at 754.

<sup>52</sup> See Marouf, *supra* note 16 (manuscript at 21). Some commentators have shown the number of U.S. citizens who have been placed into deportation proceedings, while unacceptably high,

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first being whether a person is removable from the United States.<sup>53</sup> The court may determine a respondent to be a United States citizen or it could decide the government’s version of facts or legal theory to be untrue; in either case, the respondent is considered to be non-removable.<sup>54</sup> The second inquiry is whether, despite being “removable,” a person can nevertheless qualify to stay in the United States by applying for legal relief.<sup>55</sup> The percentage of cases that involve people who are not “removable” remains a small percentage overall.<sup>56</sup> The end result of such proceedings is either a person is allowed to stay in the United States or must be removed.<sup>57</sup> Another crucial feature is that once a person is placed into such proceedings, the burden of proof is placed on the person facing deportation.<sup>58</sup> Because the burden of proof is flipped in immigration proceedings, non-citizen defendants are criminalized using a legal calculus separate from U.S. citizens, as Attorney B makes clear:

I wish I were dealing with a prosecutor that did not start from the mindset of, “convince me why I shouldn’t deport him?” Because that’s where we’re starting from. We’re starting from “everyone who’s an [sic] immigration court is going to be deported, convince me otherwise.” That’s not how it’s supposed to be.<sup>59</sup>

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remains a relatively low percentage of the overall population of those facing deportation. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L., 606, 622–23 (2011). And while there are those who can legally terminate their removal, mainly because their crimes do not legally subject them to removal under the law, they still remain a relatively low number of the overall group of deportees. *See FY 2022 Seeing Rapid Increase in Immigration Court Completions*, TRAC IMMIGR. (Sept. 16, 2022), <https://trac.syr.edu/reports/695/> [<https://perma.cc/NQ5K-BCGM>].

<sup>53</sup> *See* Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1813 (2013).

<sup>54</sup> *See* Stevens, *supra* note 52, at 616 & n.25.

<sup>55</sup> *See* Koh, *supra* note 53, at 1813.

<sup>56</sup> *See Immigration Court Processing Time by Outcome: By Removals, Voluntary Departures, Terminations, Relief, Administrative Closures*, TRAC IMMIGR. (2022), [https://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php) [<https://perma.cc/7JXV-279V>]. For example, among completed cases in FY 2023, we see that out of over 15,000 cases completed only 932 were resolved when the person was found not to be “removable.” *See id.*

<sup>57</sup> *Cf.* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 190 (2017) (noting that removal proceedings end in either the immigrant’s departure from the United States or relief from removal).

<sup>58</sup> *See* Marouf, *supra* note 16 (manuscript at 22). The existence of a legal presumption of innocence does not play out that way in actual proceedings. *See id.* (manuscript at 12, 16). This defective presumption has resulted in situations where even U.S. citizens must prove their citizenship in order to avoid deportation. *See id.* (manuscript at 8–9). Sadly, it is not an uncommon occurrence for citizens to be deported. *See* Stevens, *supra* note 52, at 625–26, 683.

<sup>59</sup> Interview with Attorney B (Aug. 2021–Dec. 2021) (quotation marks added).

As demonstrated in this quote, removal defense attorneys like Attorney B are acutely aware that “deportability”—the ongoing presumption of guilt during the removal process—negatively impacts their clients, regardless of their chances of staying in the United States.<sup>60</sup> Entering into the process at all presumes guilt and thus forces people to justify their ability to stay or to avoid particularly punitive features of deportation proceedings such as detention.<sup>61</sup> To illustrate this point, Attorney C, a Fort Snelling private attorney, explains that while in front of an immigration judge for a bond hearing,

you, the immigrant, have to prove that you are not a danger to the community and you are not a flight risk. It's your burden of proof. Otherwise, you stay in, well, forever, according to the Supreme Court, until they make a decision on your case. That's entirely the opposite of our general concept of justice.<sup>62</sup>

Attorney C adds that this guilt presumption stands in stark contrast to criminal court proceedings where

“[The government] actually [has] to have a burden. There have to be witnesses. You start with the concept that the person is innocent and work backwards from there.” Structurally speaking, it always has worked better in the ideal principles than the otherwise, but the number of those principles still exist in a system in a way that the immigration system is very clearly not. . . .

In the criminal court system . . . there still is the basic prospect that if you go into court and say, “Nope, I didn't do it. You prove that I did it,” it's still incumbent upon the other person to provide evidence that's admissible to do that. Very few people force that process because 99% of the cases resolve on plea, but the pleas themselves come because that threat exists. Whereas in the immigration court, you can say, “I deny everything,” and then they can force you to testify and say,

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<sup>60</sup> *See id.*

<sup>61</sup> *See* Marouf, *supra* note 16 (manuscript at 7–8, 23–24).

<sup>62</sup> Interview with Attorney C, *supra* note 5.

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“Are you from Mexico?” and then establish the burden that way.<sup>63</sup>

Because stakeholders understand how difficult it can be to either “disprove” questions of dangerousness or flight risk, or alternatively “prove” worthiness and rehabilitation, the final result can often feel quite predictable, as the above response demonstrates.<sup>64</sup> With nationality or “country of origin” as its proxy, the confluence of race and legal status figures prominently into who gets targeted for punishment—including deportation.<sup>65</sup>

Feeley’s marketplace concept does not translate well to how stakeholders such as attorneys and judges negotiate in immigration court, particularly during removal proceedings. In fact, they are often *unable* to negotiate for substantive justice due to three important reasons: (a) the binary outcome between deportation and staying falls along two extremes, leaving little room for gray-area decisions in immigration law; (b) the lack of universal defense representation leads to a power imbalance with little leverage for non-citizens on trial; and (c) the top-down approach for executing and enacting immigration policy prevents discretionary decision-making for those enforcing and adjudicating immigration law on-the-ground. Instead of a marketplace, the removal proceedings process operates more as a *switchboard* with clearly delineated paths towards punishment, switching “on” or “off” based on one’s deportability and/or eligibility for relief.

#### a. Binary Outcomes

A person is either allowed to stay in the United States or they are not—that such an outcome in deportation proceedings is a binary one seems obvious.<sup>66</sup> And yet there is some nuance in understanding why the binary nature of the outcome matters when examining the lack

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<sup>63</sup> *Id.*

<sup>64</sup> *See id.*; 8 U.S.C. § 1227. While not the focal center of this article, we do note how social scientists have reported extensively on race and racialization with reference to the conceptualization and empirical understanding of PiP. *See* Sanchez et al., *supra* note 37, at 79–81.

<sup>65</sup> *See* NGAI, *supra* note 36, at 7–8, 23; *see also* Dylan Farrell-Bryan & Ian Peacock, *Who Gets Deported? Immigrant Removal Rates by National Origin and Period, 1998 to 2021*, 8 *SOCIUS* 1, 1–3 (2022). They provide visual assessment of removal order rates by national origin group, where above-average rates of removal orders are prominent for foreign nationals from Mexico, Honduras, Guatemala, and El Salvador, who are often racialized as “Latino” in the United States. *See id.* at 2.

<sup>66</sup> *See* Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 *U. PITT. L. REV.* 431, 451 (2011); Koh, *supra* note 57, at 190.

of substantive justice in immigration proceedings and specifically how it differs from the criminal justice model. It is useful to compare how the binary nature of the outcome from deportation compares to the outcomes in the misdemeanor court systems that Malcolm Feeley studied in PiP.

Criminal punishments vary along different tracts. Misdemeanor offenses are distinguished from felonies given that the former can only involve a sentence of equal to or less than one year of confinement.<sup>67</sup> Sentences can vary from no time in jail to a full year spent in confinement; similarly, fees can range from a mere pittance to hundreds of dollars.<sup>68</sup> Moreover, the criminal justice system has created other means to encourage rehabilitation or compliance with the law by creating such dispositions as “stayed sentences,” “probation,” or other conditions that may include classes to deal with substance abuse or anger management.<sup>69</sup>

Even setting aside considerations of rehabilitation, the criminal justice system inherently opens itself up to a wide range of potential outcomes.<sup>70</sup> Different offenses warrant different sanctions. For instance, a disorderly conduct conviction has a lower threshold of punishment than a domestic violence conviction.<sup>71</sup> A person convicted of disorderly conduct may face a small fine, while a person convicted of domestic violence can find themselves imprisoned for 180 days.<sup>72</sup> Additionally, criminal court judges often have wide discretion to punish the same *offense* differently based on different factual circumstances.<sup>73</sup> For example, the circumstances surrounding a theft can differ enough such that the “just” punishment can vary substantially.<sup>74</sup> When a sentencing structure limits this discretion it is criticized as unjust and unduly harsh, such as with the three strikes laws from California or the rigid federal sentencing guidelines.<sup>75</sup>

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<sup>67</sup> See *id.* at 136–37.

<sup>68</sup> See *id.* at 137, 139.

<sup>69</sup> See Linus Chan & Caleb Harrison, *How Crime-Based Deportations Undermine State Sovereignty and Community Rehabilitation*, 1 AILA L.J. 173, 175–77 (2019) (discussing the various mechanisms under state law that encourage rehabilitation).

<sup>70</sup> See KOHLER-HAUSMANN, *supra* note 30, at 11.

<sup>71</sup> See *id.*; see also, e.g., *State v. Burgess*, 607 N.E.2d 918, 920 (Ohio Ct. App. 1992).

<sup>72</sup> Compare OHIO REV. STAT. ANN. §§ 2917.11(E)(2), 2929.28(A)(2)(a)(v) (LexisNexis 2023), with OHIO REV. STAT. ANN. §§ 2919.25(D)(2), 2929.24(A)(1) (LexisNexis 2023).

<sup>73</sup> See KOHLER-HAUSMANN, *supra* note 30, at 6, 74, 84, 166; see also, e.g., OHIO REV. STAT. ANN. § 2929.21 (LexisNexis 2023).

<sup>74</sup> See KOHLER-HAUSMANN, *supra* note 30, at 74, 84; see also, e.g., OHIO REV. STAT. ANN. §§ 2913.02(B)(2), 2929.21 (LexisNexis 2023).

<sup>75</sup> See Sara Sun Beale, *The Story of Ewing v. California: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review*, in CRIMINAL LAW STORIES 7, 11, 19–20 (Donna

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Allowing different sanctions to apply for different offenses is a legislative expression that some crimes require more punishment, while the allowance for judicial discretion in applying a range of punishment for the same offense recognizes that factual circumstances can mitigate or aggravate the need for punishment for the specific defendant.<sup>76</sup> This form of flexibility—particularly for judicial discretion—coupled with the various burdens of the procedural costs of adjudication allows various stakeholders to ensure that a defendant’s punishment is proportional to their crime.<sup>77</sup>

Proportionality, however, is missing from the federal deportation system. As Michael Wishnie explains, the deportation system and its binary outcome prevents any application of proportionality.<sup>78</sup> People can face deportation for various reasons and they range widely in terms of moral blameworthiness.<sup>79</sup> Children whose visa status expires can be deported in the same manner as those who commit serious violent felonies.<sup>80</sup> Both violations result in the same exact penalty: removal from the United States.<sup>81</sup> As Professor Wishnie explains, the inability of the deportation process to adjust sanctions to different factual circumstances violates the proportionality requirement for substantive justice.<sup>82</sup> The immigration court, when deciding the case of an undocumented child or that of a violent felon can only make the same two choices for either person—it can allow them to stay in the United States, or it can order deportation.<sup>83</sup> If the court decides that the felon can stay, then the person would be able to live and work in the United States; if not, then the person is

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Coker & Robert Weisberg eds., 2013); Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319–20, 1333–34, 1340, 1343 (2005).

<sup>76</sup> See KOHLER-HAUSMANN, *supra* note 30, at 5–6, 103, 106; Beale, *supra* note 75, at 7.

<sup>77</sup> See KOHLER-HAUSMANN, *supra* note 30, at 6, 65, 73–74; Karen Lutjen, Student Article, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 389, 389–91 (1996); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 56 (2014).

<sup>78</sup> See Wishnie, *supra* note 66, at 450–51; Michael J. Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?*, IMMIGR. POL’Y CTR. 2–3 (2012), [https://www.americanimmigrationcouncil.org/sites/default/files/research/wishnie\\_-\\_proportionality\\_in\\_immigration\\_041112.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/wishnie_-_proportionality_in_immigration_041112.pdf) [<https://perma.cc/D3SL-VERK>].

<sup>79</sup> See Wishnie, *supra* note 66, at 456–57; see generally 8 U.S.C. § 1227.

<sup>80</sup> See 8 U.S.C. § 1227(a)(1)(B), (2)(A)(iii); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1691 (2009).

<sup>81</sup> See 8 U.S.C. § 1227; Stumpf, *supra* note 80, at 1691. It is true that the process of deciding deportation in those situations may vary—but they also may not. While the violent felon may be detained, so could the undocumented child. See 8 U.S.C. §§ 1227, 1231(a)(2). Different standards and remedies to deportation may apply, but the point here is that the ultimate result leads to the same place-expulsion from the country. See 8 U.S.C. § 1227.

<sup>82</sup> See Wishnie, *supra* note 78, at 9, 13; Wishnie, *supra* note 66, at 457.

<sup>83</sup> See 8 U.S.C. § 1229a(c)(1)(A); Stumpf, *supra* note 80, at 1691–95.

deported.<sup>84</sup> This is not to say that both people have an equal chance to stay in the United States or that they will not be given different considerations in deciding deportation. The deportation process may include consideration of important factual circumstances, such as family ties in the United States, harm a person may face in their home country, rehabilitation, or hardships to family members.<sup>85</sup> But these factors cannot change the binary nature of the decision; namely, that the person can either stay in the United States or must be removed from the United States.<sup>86</sup> The underlying factors can decide which outcome is given, but they cannot create any additional levels of sanctions that can better fit the blameworthiness of the person.<sup>87</sup>

This lack of spectrum or options imposes a large hurdle for negotiations between the removal defense attorney and the Department of Homeland Security (DHS) attorneys prosecuting the case.<sup>88</sup> Any disagreement over the key question of whether a person should stay or be forced to leave makes consensus impossible.<sup>89</sup> Without any other way to strike a bargain, the only means to decide the case is to fully litigate the case. This feature of immigration deportation has gone on to infect the ability for stakeholders in *criminal* proceedings to properly use plea bargaining to get consensus.<sup>90</sup> While the ability to plea bargain generally can be important to try and reach consensus, it is not without problems,

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<sup>84</sup> See Stumpf, *supra* note 80, at 1691–95.

<sup>85</sup> See 8 U.S.C. §§ 1182(h)(1)(A), 1229b(a), 1229b(b)(1)(d), 1231(b)(3)(A); 8 C.F.R. § 208.1(d)–(e) (2022); see also Wishnie, *supra* note 78, at 8 (explaining that courts may look beyond statutes when sentencing).

<sup>86</sup> See Stumpf, *supra* note 80, at 1694–98.

<sup>87</sup> See *id.* It is true that a person who is only allowed to stay to prevent persecution under INA § 241(b)(3) or to prevent torture under the Convention Against Torture is subject to a “removal order,” but we are not looking at the legal outcome. Rather, we are looking at the outcome as experienced by the person undergoing the court process. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16(c), 208.17 (2022); G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

<sup>88</sup> See Stumpf, *supra* note 80, at 1704–06.

<sup>89</sup> See *id.* at 1706. DHS attorneys can exercise prosecutorial discretion in cases which may result in termination of a case or an agreed disposition, but this only happens if the DHS attorney can agree to the ultimate result of a person being able to stay in the United States. See Cade, *supra* note 77, at 24–25; Stumpf, *supra* note 80, at 1706. In other words, the DHS attorney must agree that the person won’t be “punished” formally, and that the only punishment inflicted would be from the process itself. See Stumpf, *supra* note 80, at 1704–06; Stumpf, *supra* note 24, at 67.

<sup>90</sup> See Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1755 (2013).

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especially when questions of guilt cannot be assumed.<sup>91</sup> Nonetheless, whatever issues can arise from coercion from plea bargaining, the lack of plea bargaining itself makes it more difficult to reach a just outcome.<sup>92</sup>

b. The Role (and Lack) of Attorney Representation

Because noncitizens in removal proceedings do not have a right to government appointed counsel, the majority face immigration proceedings alone.<sup>93</sup> The national average rate of representation in immigration court has been quite low (roughly 65% in FY 2015).<sup>94</sup> Although this rate has increased significantly since FY 2005, overall representation rates have been relatively stable since FY 2013.<sup>95</sup> In contrast to the criminal public defender system, the civil nature of immigration court only ensures the right to counsel when it is not at the government's expense.<sup>96</sup> Attorney C, a private bar attorney based at Fort Snelling, outlines a key difference for non-citizens seeking attorney representation in immigration proceedings:

You have a right to due process in both civil and criminal proceedings, but your rights are different and less in civil. This applies to citizens in places like asset forfeiture or things like that, where people are like, "Holy shit, I don't even get an attorney? The state can just take my stuff?" That [is the] same thing for immigration court, but it's about a human being.<sup>97</sup>

Attorney D adds that

In criminal defense, for anyone who was unrepresented and over the public defender line, the prosecutor had a period of time where they would meet with all of the *pro se* clients, and go over offers, and go over this and go over that. [The

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<sup>91</sup> See Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz, Rachel Z. Novick, Sarah Dincin & Amanda E Cort, *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 PSYCH. CRIME & L. 915, 917 (2018).

<sup>92</sup> See *id.* at 915–17; Malcolm M. Feeley, *Perspectives on Plea Bargaining*, 13 L. & SOC'Y REV. 199, 201–02 (1979).

<sup>93</sup> See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 3, 8 (2015).

<sup>94</sup> *Who is Represented in Immigration Court?*, TRAC IMMIGR. (2017), <https://trac.syr.edu/immigration/reports/485/> [<https://perma.cc/7E4X-L9N3>]

<sup>95</sup> See *id.*

<sup>96</sup> See Eagly & Shafer, *supra* note 93, at 3; Markowitz, *supra* note 11, at 1315 & n.67.

<sup>97</sup> Interview with Attorney C, *supra* note 5.



immigration prosecutor] is just going to fight on everything, and make their opinion known on the record to the judge. Never communicating with the respondent themselves. It's very, very different.<sup>98</sup>

Given the limited rights to counsel and that interactions between prosecutors and *pro se* respondents are relatively more hostile, there is a clear disparity between the “haves” and the “have-nots” that remains unique to immigration court proceedings.<sup>99</sup> Without representation, noncitizens are much more likely to face deportation as well as prolonged detention.<sup>100</sup> A much more difficult question than *whether* the presence of legal representatives matters in immigration proceedings, is asking *how* they contribute to substantive justice. Colbert et al., for instance, describe both subjective and objective benefits that lawyers may provide to their clients.<sup>101</sup> Subjective benefits include the perception of fair treatment throughout the process, while objective benefits center on lawyers’ “substantive expertise,” which includes knowing what information to present to the judge, as well as how and when to do so.<sup>102</sup> Rebecca Sandefur similarly describes relational and substantive benefits in reference to attorneys, focusing more explicitly on interpersonal dynamics and knowledge of the law, respectively.<sup>103</sup>

This knowledge of the law, what relevant facts to present, and generally how to discuss the legal issues in a case, allows for negotiation and consensus between the judge, prosecuting attorneys and the removal defense attorney.<sup>104</sup> *Pro se* litigants are necessarily handicapped, both in understanding what information they can or should present and in the ability to be treated as an authority,

<sup>98</sup> Interview with Attorney D (Aug. 2021–Dec. 2021) (on file with authors).

<sup>99</sup> See *id.*; Eagly et al., *supra* note 106, at 14; Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 103–04 (1974).

<sup>100</sup> See Eagly & Shafer, *supra* note 93, at 47, 50, 70–71; see also Aditi Shah, *Without Access to Counsel, Detained Immigrants Face Increased Risks of Prolonged Detention and Unlawful Deportation*, ACLU (June 22, 2022), <https://www.aclu.org/news/immigrants-rights/without-access-to-counsel-detained-immigrants-face-increased-risks-of-prolonged-detention-and-unlawful-deportation> [<https://perma.cc/8TJL-SSHT>].

<sup>101</sup> Douglas L. Colbert, Ray Paternoster & Shawn D. Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1743–45 (2002).

<sup>102</sup> See *id.*; Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 LAW & SOC’Y REV. 503, 509, 523, 526 (2018). Ryo calls this attorneys’ “knowledge of what information is relevant and advantageous to present to the judge, and how to present such information.” See Ryo, *supra*, at 509.

<sup>103</sup> See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 80 AM. SOCIO. REV. 909, 910, 924–25 (2015).

<sup>104</sup> See *id.* at 910–11, 924–25; Sandefur, *supra* note 103, at 924–25.

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especially when compared to other cases in the system.<sup>105</sup> Attorneys, even as advocates, are treated as authorities and also expected to understand the overall picture of the system; *pro se* litigants are neither.<sup>106</sup> Attorneys also help move the process along, as Attorney E points out:

Yesterday, I represented six people on the docket because it meant they weren't going to be *pro se*. And that meant the judge didn't have to spend 20 minutes for each of them explaining what was happening and try to talk to them through a translator. I could just show up, be like, all right judge, this is what we're doing, this is what we're asking for. They're going to be released tomorrow. We'll just set it up two weeks, four minute hearing move on to the next thing. We knocked it [sic] all six of mine in the amount of time that would've taken for or heard one of them *pro se*.<sup>107</sup>

The above response suggests that the presence of lawyers, rather than the specific actions taken by or prompted by lawyers on behalf of their clients, is linked to a higher rate of efficiency in court. But does substantive expertise relate to substantive justice? Emily Ryo's work reminds us that the impact lawyers have on positive case outcomes "*throughout* the removal process" is difficult to measure, even if they provide efficiency in that process.<sup>108</sup> Attorney F recognizes that even attorneys themselves have difficulty understanding their impact as attorneys within a broader broken legal system:

The idea that we're somehow sitting in this kind of omnipotent life impacting role, I think just doesn't really sit well with many of us because we think we recognize that there are cases that no matter how sympathetic, no matter how uniquely kind and loving and wonderful a person might be sitting in front of us, that because the law doesn't provide for a remedy or because they've done something that categorically disqualifies them for relief or whatever it is, that we will end up separating

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<sup>105</sup> See Sandefur, *supra* note 103, at 924–25.

<sup>106</sup> See Colbert et al., *supra* note 101, at 1743–45, 1751, 1759–60; Sandefur, *supra* note 103, at 924–25.

<sup>107</sup> Interview with Attorney E (Aug. 2021–Dec. 2021) (on file with authors).

<sup>108</sup> See Ryo, *supra* note 102, at 526.

families and sending people home to places that they don't know.<sup>109</sup>

Without remedies in place, some attorneys, like Attorney F remain cynical about the possibility of substantive justice even with attorney representation.<sup>110</sup> There is concern, as Professor Laila Hlass points out, that attorneys—despite their honest efforts to advocate for their clients—simply grease the wheels and help legitimize the deportation regime, specifically through surveillance, enforcement, detention, and prosecution.<sup>111</sup> However, immigration courts are hamstrung by many systemic issues regardless of their attorney roles, particularly in how agencies handle immigration issues from the top down.<sup>112</sup>

### c. Top-Down Approaches Limit Discretion

The top-down design of immigration policies and law restricts discretion in immigration proceedings, discouraging a shared understanding of what would be a substantively just result among legal stakeholders.<sup>113</sup> There are consistent attempts to consolidate power at executive agencies from within (including Executive Office for Immigration Review (EOIR) and DHS), though these inconsistent agendas across administrations also create inter-agency confusion on which immigration enforcement and adjudication guidelines to follow, as well as a reduced ability to negotiate a shared understanding of discretionary power on a case-by-case basis.<sup>114</sup>

Sociologist Asad Asad's 2019 study of immigration judges in the Dallas immigration court gives fresh context to how they unevenly interpret the law to enforce government directives.<sup>115</sup> As “street level” bureaucrats, judges interface with legal stakeholders and assess the “deservingness” of the non-citizen defendant subject to such directives, while following (or bending) the rules to produce what they believe to be substantively just.<sup>116</sup> What Asad finds is that

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<sup>109</sup> Interview with Attorney F (Aug. 2021–Dec. 2021) (on file with authors).

<sup>110</sup> *See id.*

<sup>111</sup> *See Hlass, supra* note 8, at 1602 n.21, 1649–50.

<sup>112</sup> *See* Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1042–44 (2021).

<sup>113</sup> *See id.* at 1042, 1044–45.

<sup>114</sup> *See* Hamed Aleaziz, *Biden's Approach to Immigration Is Causing a Huge Internal Rift and Leading to a Lot of Confusion*, BUZZFEED NEWS (Sept. 23, 2021, 9:54 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/biden-immigration-policy-internal-frustration> [<https://perma.cc/KB7G-5N9W>].

<sup>115</sup> *See* Asad, *supra* note 5, at 1222.

<sup>116</sup> *See id.*; MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13 (1980).

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despite holding relatively high authority in the courtroom, immigration judges “largely described themselves as powerless to intervene on behalf of noncitizens.”<sup>117</sup> This comes not only from a recognition that the law itself is immune to radical change, but also via conflict between those exercising street-level discretion, such as immigration judges (IJs) and ICE prosecutors, and those exercising discretion at the top, such as the President, Attorney General, and other high-ranking officials.<sup>118</sup>

For example, Trump officials revoked forms of discretion which either provided relief for non-citizens or slowed down the deportation process.<sup>119</sup> Judicial discretion had once safeguarded legal resident visa holders with final removal orders; those same protections were taken away under Trump, while EOIR instituted quotas to track individual IJ performance.<sup>120</sup> Similarly, prosecutorial discretion had once protected many low-enforcement priority individuals with a temporary form of protection known as deferred action (the Deferred Action for Childhood Arrivals program (DACA), for example); DHS no longer prioritized such protections under Trump.<sup>121</sup> In contrast, Biden administration officials (and Obama before Trump) have worked to reinstate discretionary protections for cases they determine to be highly sympathetic, though there has also been resistance from the ICE Office of the Principal Legal Advisor (OPLA) and the lower courts to enact these policies.<sup>122</sup> Similarly, in the Fifth

<sup>117</sup> See Asad, *supra* note 5, at 1227.

<sup>118</sup> See *id.* at 1227, 1237–38, 1242; Jennifer Lee Koh, *Executive Discretion and First Amendment Constraints on the Deportation State*, 56 GA. L. REV. 1473, 1496 (2022).

<sup>119</sup> See SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 29–30 (2019).

<sup>120</sup> See *id.* at 33; Maria Sacchetti, *Immigration Judges Say Proposed Quotas from Justice Dept. Threaten Independence*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-ae1-11e7-be94-fabb0f1e9ffb\\_story.html](https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-ae1-11e7-be94-fabb0f1e9ffb_story.html) [<https://perma.cc/D63H-ZUKG>].

<sup>121</sup> See WADHIA, *supra* note 119, at 39, 41–42. It is important to note that it was not until 2011 that DHS formally recognized for itself the ability to create prosecutorial discretion. See Editorial, *Toward Immigration Sanity*, N.Y. TIMES (Aug. 19, 2011), <https://www.nytimes.com/2011/08/20/opinion/toward-immigration-sanity.html> [<https://perma.cc/UW7C-JEFA>]. Prior to 2011, discretion in the immigration context was utilized but on a smaller scale and in a system that had not grown to its massive scale until the mid-2000s. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–65 (2010). Thus, the 2011 policy solidified the idea that discretion would be nationwide because of the need for uniformity in an increasingly growing and large system and to combat perceptions of a “lawless” deportation system. See Editorial, *supra*.

<sup>122</sup> See Dara Lind, *Immigration Prosecutors Were Told Not to Push for Deportation in Cases Like His. He Was Ordered Deported the Next Day*, PROPUBLICA (July 27, 2021), <https://www.propublica.org/article/immigration-prosecutors-were-told-not-to-push-for-deportation-in-cases-like-his> [<https://perma.cc/TJR8-5WUQ>].

Circuit, a federal judge vacated the prosecutorial discretion memorandum issued by the Secretary of Homeland Security “as arbitrary and capricious, contrary to law, and failing to observe procedure under the Administrative Procedure Act.”<sup>123</sup> Even absent decisions that impact large policy decisions, federal circuit courts can impact the ability of non-citizens to remain in the U.S. on technical grounds, such as whether or not state drug convictions qualify as a federally controlled substance ground of removability.<sup>124</sup>

This top-down approach to limiting discretion does not preclude the fact that street-level bureaucrats and career officials still maintain their own beliefs and institutional workplace cultures that reaffirm or contradict orders from above.<sup>125</sup> ICE prosecutors do not always follow and at times actively resist the discretion guidelines set by senior leadership, as was the case with the so-called Morton Memos during the Obama administration.<sup>126</sup> IJs have also fought back against these top-level policies, including Trump’s imposition of a quota system and his administration’s attempts to replace court interpreters with pre-recorded video instructions.<sup>127</sup> Thus, as policies form at the top, lower-level employees’ actions may also have the power to embrace or deny immediate or sustained institutional change within immigration agencies as a whole.<sup>128</sup>

One executive strategy to counteract such rigidity has been for agencies to transfer power away from lower-level employees to the decision-makers at the top, or at least in a lateral direction.<sup>129</sup> For instance, in response to ICE stalling administrative directives, the Obama administration implemented DACA partly to move discretionary power out of ICE agents’ hands to U.S. Citizenship and Immigration Services (USCIS) adjudicators.<sup>130</sup> Similarly, Trump attempted to decentralize the IJs’ union by decertifying their collective bargaining power at the end of his 2017-21 term, a decision

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<sup>123</sup> See *Texas v. United States*, 606 F. Supp. 3d 437, 502 (S.D. Tex.), *stay denied*, 40 F.4th 205 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 51 (2022).

<sup>124</sup> See *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 448 (7th Cir. 2022).

<sup>125</sup> See ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 217 (2020); Asad, *supra* note 5, at 1242.

<sup>126</sup> See COX & RODRÍGUEZ, *supra* note 125, at 220.

<sup>127</sup> See Sacchetti, *supra* note 120; Tal Kopan, *Trump Administration Ending In-Person Interpreters at Immigrants’ First Hearings*, S.F. CHRON. (July 3, 2019), <https://www.sfchronicle.com/politics/article/Trump-administration-ending-in-person-14070403.php> [<https://perma.cc/TNU6-Q9HH>]; Aleaziz, *supra* note 114.

<sup>128</sup> See Sacchetti, *supra* note 120; Asad, *supra* note 5, at 1237.

<sup>129</sup> See COX & RODRÍGUEZ, *supra* note 125, at 220.

<sup>130</sup> See *id.* As Cox and Rodríguez write, “[t]he triumph of DACA was not to eliminate enforcement discretion, but to shift it up the chain of command.” *Id.*

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Biden later reversed during his first year in office.<sup>131</sup> Another strategy has been to hire newer, much larger cohorts of prosecutors and judges.<sup>132</sup> As political appointees, these more recent cohorts can work to change the institutional culture of the courts and other immigration agencies such that they conform to and maintain the political prerogatives of the appointing administration.<sup>133</sup>

Removal defense attorneys' responses reveal the lack of any negotiated settlement between parties for cases, even when the underlying case or situation seems clearly unjust. Some attorneys, like Attorney G (a private bar Omaha attorney), believe there is "less room for discretion with the immigration judges" compared to criminal court judges.<sup>134</sup> Similarly, Attorney H tells us that criminal court judges and ICE agents' comparably expansive discretionary power means that "it really is up to them" to influence bond eligibility determinations in immigration court later on.<sup>135</sup> They continue to say that

I mean, you could have charges for crimes, but you haven't been convicted of anything, that's enough to keep you detained in Immigration. That's not enough, that's not due process of law for the purposes of a criminal hearing yet that's enough to get you deported.<sup>136</sup>

IJs have limited discretion and negotiation power to ignore the facts of a criminal charge and its implications for deportability – once a charge or conviction is rendered in the criminal justice system, its

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<sup>131</sup> See Eric Katz, *Biden Administration Recognizes Immigration Judge Union, Reversing Trump Decision*, GOV'T EXEC. (Dec. 7, 2021), <https://www.govexec.com/workforce/2021/12/biden-administration-recognizes-immigration-judge-union-reversing-trump-decision/187358/> [<https://perma.cc/5HJT-ENZL>].

<sup>132</sup> See Press Release, White House, President Biden Makes Twenty-Seventh Judicial Nominations Announcement and Announces New Nominees to Serve as U.S. Attorneys and U.S. Marshals (Oct. 14, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/14/president-biden-makes-twenty-seventh-judicial-nominations-announcement-and-announces-new-nominees-to-serve-as-u-s-attorneys-and-u-s-marshals/> [<https://perma.cc/J8KJ-4NRP>]; Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 583–84 (2019).

<sup>133</sup> See LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 32–33 (2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> [<https://perma.cc/T3N3-EG42>]; see also Legomsky, *supra* note 17, at 1665–67.

<sup>134</sup> See Interview with Attorney G (Aug. 2021–Dec. 2021) (on file with authors).

<sup>135</sup> See Interview with Attorney H, *supra* note 1.

<sup>136</sup> *Id.*

consequences expand during the immigration court process.<sup>137</sup> Unlike in the New Haven misdemeanor courts of the 1970s and misdemeanor courts more generally today, defense attorneys practicing in immigration court find themselves unable to come to any shared understanding with other parties of what a just outcome on a case looks like.<sup>138</sup> Talking about the negotiation process, Attorney D reveals a similar conclusion:

[T]he government will fight, just for the sake of fighting. USCIS will send notices of intent to deny, requests for evidence that just make no sense. Immigration is a very non-immigrant friendly realm. The OPLA, DHS, or ICE, the attorneys really change strategies. The chief there, he's great now, but he really just changes with the policy memos that they get from the president, or from that administration. If the administration says, "Fight on everything," they'll fight on everything. If the administration says, "You can use your discretion on these types of cases," then they'll very specifically use their discretion on those types of cases.<sup>139</sup>

While DHS prosecutors are at times given some discretion in how to dispose of a case, including stipulating to legally available relief, the difficulty is two-fold.<sup>140</sup> First, most people put into deportation proceedings, regardless of their underlying circumstances, do not have any legally available relief to gain status in the United States.<sup>141</sup> And once in deportation proceedings, both the immigration courts and DHS prosecutors will "fight on everything" while also having limited legal means to seek a solution.<sup>142</sup>

## 2. Political Ebb-and-Flow of Presidential Immigration Law

In the previous section, we covered three intertwining factors (binary outcomes, lack of attorney representation, and top-down

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<sup>137</sup> See *supra* text accompanying notes 32–42; Interview with Attorney G, *supra* note 134.

<sup>138</sup> See, e.g., Arwa Mahdawi, *Defense Attorneys Challenge Judges over Trump Immigration Policies*, THE GUARDIAN, <https://www.theguardian.com/us-news/2018/aug/20/defense-attorneys-challenge-judges-over-trump-immigration-policies> [https://perma.cc/8SAT-F7A8]; Interview with Attorney G, *supra* note 134. Compare *supra* text accompanying notes 53–57, with Interview with Attorney D, *supra* note 98.

<sup>139</sup> Interview with Attorney D, *supra* note 98.

<sup>140</sup> See *supra* note 89 and accompanying text.

<sup>141</sup> See Interview with Attorney F, *supra* note 109; Stumpf, *supra* note 80, at 1698.

<sup>142</sup> See Interview with Attorney D, *supra* note 98; see also *supra* notes 88–89 and accompanying text.

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approaches to discretion) and how they prevent a negotiated settlement from ending in a just result in immigration proceedings. These limitations to substantive justice, however, are not static; they are subject to what we call the “political ebb-and-flow” of immigration law. The term refers both to the changing political persuasion of different presidential administrations and how legal stakeholders employ different tools to shape substantive justice outcomes depending on who is in office.

Political scientists Adam Cox and Cristina Rodríguez similarly refer to this as the “rise and consolidation of presidential immigration law[,]” where the current gridlock in congressional immigration reform has opened up the executive branch to work diligently on immigration enforcement and policy in the form of executive orders and directives.<sup>143</sup> The ebbs and flows of presidential immigration law, therefore, allocate punishment to noncitizens differently depending on who is in office and what their immigration platform consists of.<sup>144</sup> One attorney details this phenomenon below:

The administration changes, and there’s a flip of a switch. This is no longer considered an acceptable particular social group, or unacceptable reason for someone to apply for asylum, or even just taking non-private actors as a whole, whether that is based on domestic violence, hacking activity. And I mean, those cases, I still had some wins based on that, under the Trump administration, that were appealed. But as far as the government’s position on them, it was just a flip of a switch of, “Yes, this is fine. We have no issue with this.” To then being like, “Nope, we are going to fight you tooth and nail. This is not viable. No one should be granted asylum on this basis anymore.”<sup>145</sup>

Similarly, additional attorneys in our interview sample referred to these shifts as “whiplash”:

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<sup>143</sup> See COX & RODRÍGUEZ, *supra* note 125, at 215. In contrast to previous presidents, a greater proportion of Trump’s executive orders and proclamations have limited the entrance of legal immigrants and ramped up enforcement along the border and U.S. interior. See Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. MIGRATION & HUM. SEC. 54, 54 (2020).

<sup>144</sup> See COX & RODRÍGUEZ, *supra* note 125, at 215; Aleaziz, *supra* note 114.

<sup>145</sup> Interview with Attorney I (Aug. 2021–Dec. 2021) (on file with authors).



[Y]ou say the law stays the same, but it doesn't, because the [Attorney General (AG)] refers cases from the [Board of Immigration Appeals (BIA)] to himself or herself. And it's just like, I feel like I have whiplash sometimes going through a new administration because of how much it changes. Real courts are not like this, is what I've just decided.<sup>146</sup>

It's whiplash . . . I'm out on maternity leave, I'm nearing the end of it, and I'm easing my way back into doing work, but I am . . . Even just being out for about three months, I know I'm going to be back and be like, "Wait, what the hell is going on now?" In other areas of the law, it's pretty steady and consistent about in a three-month time. But I'm a little concerned being, okay, wait, so what's OPLA agreeing and not agreeing to right now? What memos came down? What stays are there? So much changes so frequently that it can be really hard to stay on top of everything.<sup>147</sup>

Past work demonstrates how presidential changes provoke legal and political shifts in immigration enforcement and adjudication.<sup>148</sup> When President Clinton executed "get tough on crime" policies such as the Antiterrorism and Effective Death Penalty Act ("AEDPA") and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, his administration also expanded the deportation architecture, ushered in a more explicit "crimmigration" era and substantially altered the political nature of deportation.<sup>149</sup> Anti-drug legislation ensured that non-citizens are mandatorily detained for longer periods of time, with deportation or voluntary departure from the United States as the only way out.<sup>150</sup> Congress's inability to come to an agreement on immigration policy has stagnated formal changes to immigration law.<sup>151</sup>

At the same time, the vast architecture and creation of a larger agency following the changes in law in 1996 and the framing of immigration as a national security issue after the attacks on 9/11

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<sup>146</sup> Interview with Attorney J (Aug. 2021–Dec. 2021) (on file with authors).

<sup>147</sup> Interview with Attorney I, *supra* note 145.

<sup>148</sup> See Kim & Semet, *supra* note 132, at 640.

<sup>149</sup> See Yolanda Vasquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1104, 1114–15, 1116 & n.135 (2017); Koh, *supra* note 118, at 1493.

<sup>150</sup> See Vasquez, *supra* note 149, at 1116–17.

<sup>151</sup> See, e.g., Nolan Rappaport, *Crafting an Immigration Bill That Could Pass in Congress*, THE HILL (Nov. 8, 2022, 11:30 AM), <https://thehill.com/opinion/immigration/3724963-crafting-an-immigration-bill-that-could-pass-in-congress/> [<https://perma.cc/E4TC-LH4S>].

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placed more power with the executive branch with respect to deportation.<sup>152</sup> The choice and use of resources, either through prosecutorial discretion or decisions on implementation of policies such as section 287(g) of the Immigration and Nationality Act, the creation of DACA, the expansion of expedited removal, and even decisions on whether and how to prosecute migration crimes under 8 U.S.C. sections 1325 and 1326 all made the President much more consequential with respect to deportation.<sup>153</sup> The President, as the person in charge of directing vast resources and implementing the law of deportation, became paramount in setting immigration policy, especially in the absence of congressional action.<sup>154</sup> One might agree from recent history that this becomes especially dangerous when that same person in charge repetitively stokes the fires of fears based upon drug cartels and illegal activity, which often appear as immigrant “threats” in news media.<sup>155</sup>

Today, one of the areas of presidential immigration law that changes most frequently is how top-level administrators implement guidelines for discretion.<sup>156</sup> Data show that between 1998 and 2021, the average removal rate in the U.S. has generally declined, but it has ebbed and flowed depending on which President is in office.<sup>157</sup> Much of the decline took place under executive decisions during the Obama administration and then reversed course during the Trump administration, with the rate of removal rising to its highest point in over a decade.<sup>158</sup> These numbers have since changed direction again, dropping in part due to the COVID-19 pandemic, but also due to the

<sup>152</sup> See, e.g., Madeline Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, TIME (Sept. 11, 2021, 7:00 AM), <https://time.com/6096903/september-11-legal-history/> [<https://perma.cc/67ND-2E26>]; Koh, *supra* note 118, at 1493.

<sup>153</sup> See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 518–19, 518 n.214 (2009); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 143 (2016); COX AND RODRÍGUEZ, *supra* note 139, at 215; Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 DUKE L.J. 251, 286–87 (2011); Jason D. Anton, Note, *Defining “Found In”: Constructive Discovery and the Crime of Illegal Reentry*, 113 COLUM. L. REV. 1239, 1247–50 (2013).

<sup>154</sup> See COX & RODRÍGUEZ, *supra* note 125, at 215.

<sup>155</sup> See, e.g., Daniel R. Alvord & Cecilia Menjívar, *The Language of Immigration Coverage: The Arizona Republic and Media’s Role in the Production of Social Illegality*, 65 SOCIO. PERSPS. 461, 461 (2022); John Fritze, *Trump Used Words Like ‘Invasion’ and ‘Killer’ to Discuss Immigrants at Rallies 500 Times: USA Today Analysis*, USA TODAY (Aug. 21, 2019, 10:18 AM), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/XC3N-2QFN>]. Alvord and Menjívar (2022) mention how despite different usages of “illegal” and “undocumented” in news media, the criminalizing message remains the same. See *id.*

<sup>156</sup> See Aleaziz, *supra* note 114; COX & RODRÍGUEZ, *supra* note 125, at 219–20.

<sup>157</sup> See Farrell-Bryan & Peacock, *supra* note 65, at 1–2.

<sup>158</sup> See *id.* at 2–3.

2020 election of President Biden where some (though not all) Trump-era immigration policies were either suspended or reversed.<sup>159</sup>

The Trump and Biden administrations have enacted divergent immigration policy agendas that either expand or contract prosecutorial discretion.<sup>160</sup> Trump's goal was to dramatically increase deportations, reduce employment opportunities for immigrants, and construct a high-rising wall prohibiting migrants from crossing the U.S. southern border.<sup>161</sup> As Fort Snelling non-profit Attorney H put it, Trump's immigration system followed a "deny, deny, deny" approach that removed their clients' options and took away prosecutorial discretion.<sup>162</sup> Additionally, in circuit courts that supposedly enjoy political independence, the rhetoric and policies of a sitting President may still impact decision-making by the court.<sup>163</sup> Specifically, the rhetoric of President Trump became a focus in the Travel or "Muslim Ban" cases, where several circuit courts such as the Ninth and Fourth Circuits found the rhetoric used by President Trump important in deciding questions of religious bias.<sup>164</sup> Even as SCOTUS ultimately dismissed concerns over rhetoric in *Trump v. Hawaii*,<sup>165</sup> it nonetheless shaped the litigation and decisions of the federal courts.<sup>166</sup> The Biden administration has since relaxed a number of Trump-era immigration enforcement priorities, reducing attention from the U.S. interior.<sup>167</sup> Asylum grant rates have

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<sup>159</sup> See *id.* at 3; Muzaffar Chishti & Jessica Bolter, *Biden at the One-Year Mark: A Greater Change in Direction on Immigration Than Is Recognized*, MIGRATION POL'Y INST. (Jan. 19, 2022), <https://www.migrationpolicy.org/article/biden-one-year-mark> [<https://perma.cc/SY3Y-UKYD>]. Farrell-Bryan and Peacock add that "[i]n 2020, removal rates dropped considerably, reaching record lows for most nationality groups. This likely owes to pandemic-related changes in case processing while courts were closed rather than an increase in immigrant-friendly policy." Farrell-Bryan & Peacock, *supra* note 65, at 3.

<sup>160</sup> See Chishti & Bolter, *supra* note 159.

<sup>161</sup> See Laura Wray-Lake, Rachel Wells, Lauren Alvis, Sandra Delgado, Amy K. Syversten & Aaron Metzger, *Being a Latinx Adolescent Under a Trump Presidency: Analysis of Latinx Youth's Reactions to Immigration Politics*, 87 CHILD. & YOUTH SERVS. REV. 192, 193 (2018).

<sup>162</sup> Interview with Attorney H, *supra* note 1; see also WADHIA, *supra* note 119, at 30–31, 41.

<sup>163</sup> See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 576 (4th Cir. 2017); see also Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 41 (2006).

<sup>164</sup> See *Washington*, 847 F.3d at 1167–68; *Int'l Refugee Assistance Project*, 857 F.3d at 576.

<sup>165</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>166</sup> See *id.* at 2417–21; *Arab Am. C.R. League v. Trump*, 399 F. Supp. 3d 717, 720 (E.D. Mich. 2019).

<sup>167</sup> See LOWEREE & REICHLIN-MELNICK, *supra* note 5, at 25.

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risen during Biden's term,<sup>168</sup> and immigration detention rates have generally fallen.<sup>169</sup>

The political ebb-and-flow of immigration enforcement can create polarizing effects within legal and bureaucratic institutions.<sup>170</sup> For instance, a study by the political scientist Mark Richard Beougher finds that switching to Republican control actually increases the percentage of liberal and moderate judges granting asylum while decreasing the percentage of conservative judges who do so.<sup>171</sup> According to Professors Catherine Y. Kim and Amy Semet, IJs take cues from and align their decisions with the actual and perceived policy preferences of a sitting President, which can undermine the assumed independence of the judicial decision-making process.<sup>172</sup> These findings align with non-immigration-related studies outlining why and how judges sometimes conform to public opinion and policy change during the decision-making process.<sup>173</sup> As such, while one can argue that IJs and prosecutors may provide more latitude to non-citizens and their attorneys under Democratic administrations, they may also react strongly against certain policy directives depending on who is in office.<sup>174</sup> Attorney J adds context to this claim:

In the Obama Administration, I feel like the ICE attorneys were better at communicating and were more receptive to communicating prior to individual hearings and that sort of thing to narrow the issues . . . I've also noticed during the Trump Administration, it was like I didn't even waste my

<sup>168</sup> *Asylum Grant Rates Climb Under Biden*, TRAC (Nov. 10, 2021), <https://trac.syr.edu/whatsnew/email.211110.html> [<https://perma.cc/B48Z-F7TV>].

<sup>169</sup> *See Immigrant Detention Numbers Fall Under Biden, but Border Book-Ins Rise*, TRAC IMMIGR. (Mar. 15, 2021), <https://trac.syr.edu/immigration/reports/640/> [<https://perma.cc/P77J-GDYQ>].

<sup>170</sup> *See* Mark Richard Beougher, *Who Controls Immigration Judges?: Toward a Multi-Institutional Model of Administration Judge Behavior* 150, 167–68 (Dec. 2016) (Ph.D. dissertation, Western Michigan University), <https://scholarworks.wmich.edu/dissertations/2492> [<https://perma.cc/EST2-AART>].

<sup>171</sup> *See id.* at 150. *But see* BANKS MILLER, LINDA CAMP KEITH & JENNIFER S. HOLMES, *IMMIGRATION JUDGES AND U.S. ASYLUM POLICY* 150, 176–86 (2015). Another study from Banks Miller, Linda Keith, and Jennifer Holmes finds that IJs had higher asylum grant rates under Democratic presidential administrations than Republican ones. *See* Banks Miller, Linda Camp Keith & Jennifer S. Holmes, *The Preferences of Political Elites and Humanitarian Immigration to the United States*, 6 RUSSELL SAGE FOUND. J. SOC. SCIS. 150, 161 (2020).

<sup>172</sup> *See* Kim & Semet, *supra* note 132, at 630–31.

<sup>173</sup> *See* Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1211, 1219, 1223 (1997); Natalie C. Rogol, Matthew D. Montgomery & Justin T. Kingsland, *Going Public: Presidential Impact on Supreme Court Decision-Making*, 39 JUST. SYS. J. 210, 211 (2018).

<sup>174</sup> *See* Miller et al., *supra* note 171, at 161; Beougher, *supra* note 170, at 167–68.

time. It's not even worth a phone call because I'm not going to get a call back. And if I do get a call back, it's going to be like, why are you even talking to me about this?<sup>175</sup>

The above response indicates how discretion cuts both ways. While the concept is salient to the reduction of immigration prosecution, it also lends legal decision-makers the option to be more punitive during both the court process and outcome.<sup>176</sup> In that sense, some attorneys also anticipate the concern that when the pendulum swings one way, it can swing right back.<sup>177</sup> As Attorney K puts it:

I think ultimately, there are some good things that the Biden administration is doing, like lifting the quotas, rolling back ACAA,<sup>178</sup> rolling back AB,<sup>179</sup> rolling back LEA,<sup>180</sup> those are all good moves, but none of it is durable. All of the good things that are being done can just as easily be undone by some neo-Trumpian regime.<sup>181</sup>

In a similar vein, Attorney J adds that

[i]f we have a different president in the next few years, then the case law changes. I have clients here in immigration court for years. There's no such thing as speedy trial or anything like that in immigration court. I could have told them one thing about their case at the beginning of their case, but it's lingered. And then of course, the pandemic has set everything back, rightfully so and understandably so. Then I tell them something different, complete 180 a few years later because there's a new president who has appointed new people to that position. So, that fluctuation is super frustrating, especially when trying to do case plans and help people through the system. Even people with real forms of relief, like a family member's petitioning them, things like being able to close their case, administratively close their case while collateral relief is pending, oh, fluctuated wildly under the Trump

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<sup>175</sup> Interview with Attorney J, *supra* note 146.

<sup>176</sup> See Stumpf, *supra* note 24, at 66–67.

<sup>177</sup> See, e.g., Interview with Attorney K (Aug. 2021–Dec. 2021) (on file with authors); see also Interview with Attorney J, *supra* note 146.

<sup>178</sup> See A-C-A-A-, 28 I. & N. Dec. 351 (Att'y Gen. 2021).

<sup>179</sup> See A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

<sup>180</sup> See L-E-A-, 28 I. & N. Dec. 304 (Att'y Gen. 2021).

<sup>181</sup> Interview with Attorney K, *supra* note 177.

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Administration. We're only just now starting to get our bearings back.<sup>182</sup>

As mentioned in the two quotes above, removal defense attorneys have largely welcomed the Biden administration's reversals of Trump-era policies in its attempts to usher in an increased focus on due process and discretion.<sup>183</sup> Yet, they also acknowledge how the Biden administration has largely reinforced aspects of immigration policy either implemented or maintained under the Trump administration, such as ramping up funding and efforts at the U.S. southern border and maintaining exclusionary policies such as Title 42.<sup>184</sup>

These facts demonstrate how, despite political ebb and flow, some policies remain in order to serve their gatekeeping functions regardless of party affiliation.<sup>185</sup> In his FY2023 budget, Biden requested additional resources for Customs and Border Patrol (CBP) operations and support to "enforce immigration law, further secure U.S. borders and ports of entry, and effectively manage irregular migration along the Southwest border," asking for a 12% increase over the enacted spending level for 2021.<sup>186</sup> The budget request for Immigration and Customs Enforcement (ICE) only increased 1.6% in contrast, with spending lines in place for alternative-to-detention (ATD) programs to account for a reduction in the number of ICE detention beds.<sup>187</sup> While deprioritizing ICE funding signals a key divergence from Trump's previous enforcement goals, it also remains unclear how the general public has reacted to Biden's pro-immigrant

<sup>182</sup> Interview with Attorney J, *supra* note 146.

<sup>183</sup> See *supra* notes 178–180; Chishti & Bolter, *supra* note 159.

<sup>184</sup> See, e.g., Interview with Attorney H, *supra* note 1; LOWEREE & REICHLIN-MELNICK, *supra* note 5, at 4; Chishti & Bolter, *supra* note 159; Cházaro, *supra* note 112, at 1063, 1065.

<sup>185</sup> See *supra* note 200 and accompanying text.

<sup>186</sup> See OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2023 72 (2022), [https://www.whitehouse.gov/wp-content/uploads/2022/03/budget\\_fy2023.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf) [<https://perma.cc/36JK-7GMV>]; see also DEPT. OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW: FISCAL YEAR 2023 6 (2022), [https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf) [<https://perma.cc/MTA4-SYNX>].

<sup>187</sup> See DEPT. OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW: FISCAL YEAR 2023 5 (2022), [https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf) [<https://perma.cc/2CY3-Q3YL>]. In its FY2023 congressional budget overview, DHS requested \$8 billion to fund ICE's operations and support, 1.6% higher than the \$7.9 billion enacted spending level in FY2021.

policies, and whether they will sustain beyond his term.<sup>188</sup> This is because deportation is a defense of sovereignty; to many regardless of political affiliation, it remains a final and fundamental verdict that draws boundaries between citizens and non-citizens.<sup>189</sup>

### 3. Deportation as an Ultimate Sanction

The sanctions faced by noncitizens in removal proceedings are qualitatively different from those faced by the New Haven defendants described in Feeley's study. Noncitizens in removal proceedings face the possibility of deportation and leaving their entire lives behind in the United States—it is, for many, an ultimate sanction that fundamentally alters their and their family's livelihoods.<sup>190</sup> By comparison, the crimes that were being decided in the New Haven court were misdemeanors, and the prescribed sanction of those crimes was ultimately relatively low-cost.<sup>191</sup> This was an important aspect of Feeley's work: he observed how the lower costs of the actual sentence, whether it be fines, fees or short stays in jail, meant that the punitive nature of the process did not need to clear a high bar in order for defendants to opt out of the process.<sup>192</sup> As Issa Kohler-Hausmann writes in her book *Misdemeanorland*, comparably trivial misdemeanor offenses still “entangle people in the tentacles of the criminal justice system, impose burdens to comply with judicial processes, [and] require time away from work and children,” pummeling individuals as a form of social and bureaucratic control.<sup>193</sup> If given the option, a criminal defendant can choose to pay a \$500 fine for their misdemeanor, rather than go through a process that would extract a physical and emotional toll along with lost wages, before ultimately still requiring a payment of a \$500 fine.<sup>194</sup>

In contrast, the ultimate sanction for the deportation system is quite high, especially when the costs for re-entry have increased both from a legal and logistical point of view.<sup>195</sup> The forced removal of a

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<sup>188</sup> See Priscilla Alvarez, 'Hail Mary After Hail Mary': Biden Administration Struggles with Border Policy, Fueling Frustration, CNN POL. (Oct. 20, 2022, 12:57 PM), <https://www.cnn.com/2022/10/20/politics/immigration-migrants-biden-border-policy/index.html> [https://perma.cc/VN5R-BS9V].

<sup>189</sup> See Cházaro, *supra* note 112, at 1096–97.

<sup>190</sup> See 8 U.S.C. § 1229a(a)(1); Markowitz, *supra* note 11, at 1301–02.

<sup>191</sup> See FEELEY, *supra* note 26, at xxvii–xxviii, 29–30.

<sup>192</sup> See Earl, *supra* note 29, at 744.

<sup>193</sup> See KOHLER-HAUSMANN, *supra* note 30, at 1.

<sup>194</sup> See Earl, *supra* note 29, at 744.

<sup>195</sup> See CALDWELL, *supra* note 21, at 93–94.

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person is not akin to a fine, or several weeks in a county jail. For some, deportation can mean permanent separation from family members and community and the ability to make a living wage.<sup>196</sup> For others, it can be the difference between persecution, torture or even death.<sup>197</sup> As Attorney L, a private bar Fort Snelling attorney revealed during an interview, “[e]ven the criminal court recognize[s] that the immigration consequences of some of these convictions are worse than the criminal sentences.”<sup>198</sup> Rather than facing fines or short imprisonment, noncitizens face what might be more aptly described as a life sentence, or even a death penalty.<sup>199</sup> Attorney A, another private bar Fort Snelling attorney, provides another example:

A controlled substance conviction in most circumstances will sink most options for relief in front of an immigration judge, especially if you’re convicted of any sort of stale related. And even like . . . I have a client who has been convicted of accept accessory to sale. They drove their friend to a drug deal when they were young, stupid and made a mistake and didn’t, at least according to them, didn’t know what was going on. Who knows what the circumstances were now like 20 years later, but being accessory to can also prevent at you from receiving things like cancellation of removal and some of the protections for criminal convictions.<sup>200</sup>

As such, non-citizens are prosecuted and deported based upon convictions served (sometimes decades) prior.<sup>201</sup> This systemic feature is important, for it means that those facing deportation may not be able to “opt out” of the process, and thus their exposure to procedural punishment is involuntary.<sup>202</sup> Many such deportees are forced to undergo the full aspect of the punitive process *and* the

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<sup>196</sup> See NEUMAN, *supra* note 19, at 162.

<sup>197</sup> See Markowitz, *supra* note 11, at 1302.

<sup>198</sup> Interview with Attorney L (Aug. 2021–Dec. 2021) (on file with authors).

<sup>199</sup> See Mark A. Drummond, “Death Penalty Cases in a Traffic Court Setting”: *Lessons from the Front Lines of Today’s Immigration Courts*, AM. BAR ASS’N (Jan. 15, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/death-penalty-cases-traffic-court-setting-lessons-front-lines-immigration-courts/> [https://perma.cc/F9FS-JQC8].

<sup>200</sup> Interview with Attorney A, *supra* note 1.

<sup>201</sup> See TANYA GOLASH-BOZA, DUE PROCESS DENIED: DETENTIONS AND DEPORTATION IN THE UNITED STATES 27 (2012).

<sup>202</sup> Compare *id.* at 4, with FEELEY, *supra* note 26, at 30–31.



sanction of deportation at the end.<sup>203</sup> These deportees are punished in full, twice.<sup>204</sup>

As liaisons between their clients and the state, what is a lawyer supposed to do knowing that as executive policies change in the post-1965 era of U.S. immigration, so can the bureaucratic processes which render and deploy the ultimate sanction of deportation? What strategies do they employ in order to reduce harm towards their client while anticipating upcoming political changes (such as an election or a forthcoming policy memo) and when policy directives are immediately overturned (e.g., *Texas v. United States*)?<sup>205</sup> To address these questions, we turn to a discussion of attorneys' roles as timekeepers in immigration proceedings, roles that aim to reduce the amount of punishment clients receive due to negative political consequence (timeliness) or to extend clients' cases out in anticipation of a positive policy change (delay).

### *B. How Procedural Punishment Shapes Lawyers' Actions*

#### 1. Strategies of Time and Timeliness in a Losing Game

In our interviews, removal defense attorneys revealed their strategies to navigate the immigration court system on behalf of their noncitizen clients. As alluded to in previous sections, this primarily involves navigating a system that lacks access to substantive justice and is designed to remove individuals from their homes and communities, while accounting for ongoing changes in political context that affect the functioning of that system.<sup>206</sup> In such a system, there is little or no likelihood of “win[ning]” these cases, and attorneys are forced to adopt a “risk management” mindset.<sup>207</sup> In these situations, time becomes a key currency - used much differently in immigration court than in the misdemeanor cases observed by Feeley.<sup>208</sup> One attorney reveals that

It's like a risk management thing. Right now, today, is my client in a strong position or a weak position? If they're in a weak position, might it become stronger in the future? If

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<sup>203</sup> See GOLASH-BOZA, *supra* note 201, at 27.

<sup>204</sup> See *id.*

<sup>205</sup> See *Texas v. United States*, 606 F. Supp. 3d 437, 502 (S.D. Tex.), *stay denied*, 40 F.4th 205 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 51 (2022).

<sup>206</sup> See *supra* Parts II.A.1, II.A.2.

<sup>207</sup> See Interview with Attorney C, *supra* note 5.

<sup>208</sup> Compare *id.*, with FEELEY, *supra* note 26, at 30–31.

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they're in a strong position, might it become weaker in the future? To the extent to which you can, as an attorney, do anything about these things, that's when you make strategic decisions, like slow-rolling things that you could be doing to maximize the amount of time available, because a lot of cases . . . Well, they're not likely to win, so losing slowly is how to win.<sup>209</sup>

In misdemeanor cases, Feeley observed that once a process itself becomes punitive, those within the process will want to limit their time in that process, oftentimes by pleading guilty and allowing themselves to be formally punished.<sup>210</sup> But as indicated in Attorney C's response above, this is not a practical approach to just resolution in immigration courts. Removal defense attorneys describe finding ways to do the opposite - extending the deportation process for their clients and helping them to lose slowly rather than have the client "plead out" or take the sanction of deportation.<sup>211</sup> This choice runs counter to experiences recorded in misdemeanor courts, but it is driven in part by the severity of the deportation penalty exceeding the severity of the process of deportation.<sup>212</sup> This is true even if the process of deportation is extremely punitive and extracts high costs.<sup>213</sup> Deportees and their lawyers are often willing to prolong their exposure to the process of detention, even if they can't ultimately avoid deportation, because the sanction of deportation is so harsh and extracts such a high cost that even a delay can be preferable.<sup>214</sup>

Yet, time is not a fixed "good" or "bad" in the context of immigration removal proceedings, but a resource lawyers navigate and act upon with respect to the implications of extended or shortened time to a judge's final decision.<sup>215</sup> These considerations can differ based on their client's custody status, their personal resources, as well as how the current executive administration applies discretion and prioritizes a given case.<sup>216</sup> In some cases, there are incentives to

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<sup>209</sup> Interview with Attorney C, *supra* note 5.

<sup>210</sup> See FEELEY, *supra* note 26, at 27–31.

<sup>211</sup> See *id.*; Farbman, *supra* note 8, at 1950.

<sup>212</sup> See Farbman, *supra* note 8, at 1950; Interview with Attorney C, *supra* note 5.

<sup>213</sup> See Farbman, *supra* note 8, at 1950.

<sup>214</sup> See *id.* at 1950–51.

<sup>215</sup> See *id.* at 1951.

<sup>216</sup> See Christopher Levesque, *Time is on Their Side?: A Duration Analysis of U.S. Immigration Court Decisions 9–10* (Minn. Population Ctr., Working Paper No. 2022-04, 2022), [https://assets.ipums.org/\\_files/mpc/wp2022-04.pdf](https://assets.ipums.org/_files/mpc/wp2022-04.pdf) [<https://perma.cc/58EC-AQJR>]; Interview with Attorney H, *supra* note 3; Interview with Attorney C, *supra* note 8.

speed up aspects of the process, while in other cases there are incentives to slow down the process.<sup>217</sup> Thus, one strategy among immigration attorneys has been to utilize their timekeeping roles to either grant non-citizens greater access to timeliness (speed up the process) or time (slow down the process) in order to counter the political ebbs-and-flows of immigration law.<sup>218</sup> With a timekeeper by their side, clients are more likely to file applications and submit paperwork which can add weeks, months, or even years before a final decision, but also “strike when the iron is hot,” so to speak, to capitalize on loopholes and seize other opportunities within a calculated timeframe.<sup>219</sup>

An example of timeliness, as opposed to delay, is when Attorney C—who practices both criminal and immigration law in Fort Snelling—moves quickly to resolve their noncitizen client’s criminal case, gathering positive equities for their client in anticipation that the immigration process, later on, may be more punitive.<sup>220</sup> In immigration court,

You have to prove you’re fricking Saint Teresa on a DUI. What I do as the person who takes on the criminal and the immigration case is I start working on the criminal case right away, and I am attempting to plead guilty right away and get really severe probation consequences imposed. I’ve had to argue with prosecutors for . . . They get very confused because they’re like, “You don’t need to do an alcohol monitor.” I’m like, “I want an alcohol monitor. Otherwise, there’s no deal.” . . . It’s because then I can go to the immigration court and be like, “This judge has ordered all of these things,” to meet my burden that the person’s not going to drink and drive again.<sup>221</sup>

Because Attorney C perceives the negotiation process as broken at the immigration court stage, they must first turn to the criminal courts to archive proof of their client’s rehabilitation.<sup>222</sup> This work must be done quickly, so that the client has time to accumulate marks of “good behavior” prior to facing another judge in immigration court

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<sup>217</sup> See Levesque, *supra* note 216, at 3.

<sup>218</sup> See *id.*; Interview with Attorney C, *supra* note 5.

<sup>219</sup> See SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS’ STRUGGLE FOR U.S. RESIDENCY 74–75, 185 (2003); Farbman, *supra* note 8, at 1950–51; Interview with Attorney C, *supra* note 5.

<sup>220</sup> See Interview with Attorney C, *supra* note 5.

<sup>221</sup> *Id.*

<sup>222</sup> See *id.*

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who will be judging whether or not the defendant is morally deserving and rehabilitated enough to stay in the United States, despite their exposure to the criminal justice system.<sup>223</sup>

However, there are also instances when timeliness is ultimately detrimental to favorable outcomes in immigration court proceedings.<sup>224</sup> Hausman (2016) explores how the Obama administration's decision to expedite the cases of unaccompanied minors and children actually impeded favorable outcomes for those noncitizens, as the majority did not have enough time to retain legal representation in such a short timeframe.<sup>225</sup> Similarly, Syracuse University researchers utilizing TRAC data found that swiftly moving dedicated dockets implemented under the Biden administration have resulted in cases moving faster but also a much lower rate of percent of cases being granted asylum.<sup>226</sup>

Delaying cases and giving clients access to time thus becomes an additional strategy used by attorneys.<sup>227</sup> Attorneys can improve non-citizens' legal and political chances to stay in the United States, including when country conditions alter one's asylum eligibility.<sup>228</sup> For some, a longer case may allow for more opportunities to remain long-term in the United States because of changes in personal circumstances.<sup>229</sup> Marriage, for example, might open the possibility of a family-based petition, or if a client is a victim of a crime, they may become eligible for a U Visa.<sup>230</sup> Attorney C describes this strategy of elongating the process, knowing that deportation is at the end of removal proceedings, but allowing for the possibility that an exit from the process may emerge for their client due to political ebb and flow or changes in personal circumstances:

I might lose those cases. At some point, I will likely lose some of those cases, but in the meantime, some of them will get

<sup>223</sup> See *id.*; COUTIN, *supra* note 219, at 74–75; Asad, *supra* note 5, at 1240.

<sup>224</sup> See *Quality vs. Quantity: How Does Sitting on the Dedicated Docket Impact the Judging Process?*, TRAC IMMIGR. (Nov. 16, 2022), <https://trac.syr.edu/reports/702/> [<https://perma.cc/NJ9Y-6DR7>] [hereinafter *Quality vs. Quantity*].

<sup>225</sup> See David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1826, 1828 (2016).

<sup>226</sup> See *Quality vs. Quantity*, *supra* note 224.

<sup>227</sup> See Interview with Attorney C, *supra* note 5.

<sup>228</sup> See Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOB. LEGAL STUD. 197, 208, 214–15, 221–22 (2000) (discussing importance of, and problems with, documentation of country conditions in asylum cases); see also *supra* note 102 and accompanying text.

<sup>229</sup> Hlass, *supra* note 8, at 1651; see Interview with Attorney C, *supra* note 5.

<sup>230</sup> Hlass, *supra* note 8, at 1651 n.362.

married to [U.S.] citizens. There'll be immigration reform at some point, maybe. There'll be new policies, new practices. The longer I keep that can kicking in the air, the more likely that person is to get an off-ramp to some status, and they don't care how they get the Green Card at the end of the day.<sup>231</sup>

Delaying cases in a fluctuating legal space can additionally act as a form of resistance and draw attention to how the immigration court system overall lacks legitimacy and moral credibility.<sup>232</sup> In her article *Lawyering from a Deportation Abolition Ethic*, Laila Hlass writes that lawyers can use time and delay to chip away at the current system without creating new harms or helping some individuals at the expense of others.<sup>233</sup> Similarly, we argue that timekeeping is part of a broader set of “non-reformist reforms” within an abolitionist ethic, which Dan Berger, Mariame Kaba and David Stein define as “[the] measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”<sup>234</sup> Again, Attorney C describes using the structure of the immigration court system to work against the system itself:

But in the meantime, I've got clients who have cases that span administrations, where then at this point then, like you were saying, “How do you mitigate the risk?” Well, fuck it. You just keep it going long enough, and you hope that the wheel doesn't stop because it's musical chairs, except for there's 10,000 chairs and you just have no idea how long the music is on repeat.<sup>235</sup>

While there is clearly still a power imbalance that introduces uncertainty into the longevity of this strategy and disenfranchises the position of the client, the attorney utilizes the cumbersome

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<sup>231</sup> Interview with Attorney C, *supra* note 5.

<sup>232</sup> See Farbman, *supra* note 8, at 1897–98, 1950–51. Farbman writes about resistance lawyering in the context of fugitive slave laws, highlighting how they worked within a system they disagreed with while obtaining favorable outcomes for their clients. *See id.* at 1897–98. They did so by using court procedure to request delays, backlog the system, and seek transfers from federal to state custody. *See id.*

<sup>233</sup> See Hlass, *supra* note 8, at 1601, 1649–50.

<sup>234</sup> Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <http://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/Z9YP-WXX7>].

<sup>235</sup> Interview with Attorney C, *supra* note 5.

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process of immigration court to benefit his or her client.<sup>236</sup> While this involves increasing exposure to a punitive process, it forestalls the ultimate sanction of deportation.<sup>237</sup>

We also note that time is not a resource exclusive to attorneys. IJs and prosecutors may also speed up or slow down cases in ways that disadvantage the respondent, leaving little time and restricting opportunities for non-citizens to act.<sup>238</sup> Attorney N, a private bar attorney from Omaha, revealed how immigration judges are “flat out rejecting my motions, denying them, and just proceeding with the case” in an effort to keep the court process moving.<sup>239</sup> Detained dockets follow a “hurry up and wait” rhythm where IJs schedule final hearings with little time for the respondent to prepare.<sup>240</sup>

## 2. Thinking Long-Term in the Substantive Justice Context

Given our previous discussion of substantive justice and that multiple stakeholders play timekeeping roles over the course of a trial, our study understands that the specific role of lawyers in immigration court requires more than a snapshot of a particular proceeding, such as bond or master calendar hearings.<sup>241</sup> Navigating double punishment and political ebb and flow means more than understanding that lawyers utilize different strategies of time and timeliness depending upon the political context or their clients' personal circumstances. Understanding these dynamics requires attention to how immigration attorneys' use of time and timeliness may change over the course of a case - shifting not just to match the current political context, but also strategizing to match predicted political ebb and flow.<sup>242</sup> Immigration attorneys discussed how adaptability and thinking through long time horizons are critical to their strategic use of time and timeliness to navigate the political ebb and flow of double punishment faced by their clients.<sup>243</sup> Attorney K shares their response:

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<sup>236</sup> See *id.*; Farbman, *supra* note 8, at 1950.

<sup>237</sup> See Farbman, *supra* note 8, at 1950.

<sup>238</sup> See Levesque, *supra* note 216, at 3; Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, 53 U. MICH. J.L. REFORM 139, 158 (2019).

<sup>239</sup> Interview with Attorney N (Aug. 2021–Dec. 2021) (on file with authors).

<sup>240</sup> See Rabin, *supra* note 238, at 158.

<sup>241</sup> See *supra* Parts II.A.1, II.B.1.

<sup>242</sup> See Interview with Attorney H, *supra* note 1; Interview with Attorney K, *supra* note 177.

<sup>243</sup> See, e.g., Interview with Attorney H, *supra* note 1; Interview with Attorney C, *supra* note 5.

Thinking of it as a, first as an attorney, I think it requires being really up to speed on all the various latest changes so that you can know how to navigate whatever systems are currently changing, but then also think long-term, pass to the horizon of this administration into the next administration and realize, look, there may be arguments that we need to preserve that feels like an abundance of caution, but we've lived long enough to realize that that the wind can start blowing in another direction.<sup>244</sup>

The above quote demonstrates the importance of thinking about how lawyers' actions matter but also remain malleable over time. It is too limited to understand these strategies as shaped by the divergent contexts that political ebb and flow produce; instead, attorneys' strategic use of time is shaped by both the context and the *process* of political ebb and flow. One strategy to account for these factors is through appeal, as Attorney I details:

One thing that we're always thinking about is, if a judge, especially in the Trump era is going to deny this case, we want to make sure that the record is really solid for appeal. So I still do, regardless of which judge it is, I try and be very thorough on the testimony from the client. I think where it changes is really in the other work that I do, especially if it involves . . . Well, I mean, I always do, we have testimony, file [an] affidavit, we have whatever supporting evidence the client has. I file country conditions, I file a brief.

Thankfully . . . with the changes of the administration, even if the board, or there's a terrible attorney general decision that they had taken on themselves to reevaluate, one thing that I always try and do is, especially if we're appealing, well, if I'm presenting, writing a brief for the court is to remind them of what Eighth Circuit or what circuit law is still good. Because even if an administration changes its tune, and there's an attorney general decision that is unfavorable, or a board decision that's unfavorable . . . [the option of appeal] still is available.<sup>245</sup>

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<sup>244</sup> Interview with Attorney K, *supra* note 177.

<sup>245</sup> Interview with Attorney I, *supra* note 145.

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Anticipating an appeal is therefore another form of risk management, where attorneys aim to have their client's case heard in a space where substantive justice, in their eyes, can be more properly meted out.<sup>246</sup> But Attorney K also qualifies this by claiming "we can't take current good law for granted. And you also can't be unduly devastated when the current law is bad."<sup>247</sup> They continue in saying that

[W]e were making arguments challenging a lot of the bad Trump decisions in a case, we just had a trial on Monday for a woman here in [a state in the U.S. South]. And when her first brief was filed it was under the Trump administration, all the bad law. And we were making arguments, these cases are bad. Somewhat in faith that by the time we actually got to a hearing, a year later, the things would be better and in fact, they were. And so we were able to submit a supplemental brief that updated the court on all those positive changes, but we weren't taking it as a given that the bad law was always going to be a bad law. So there's a certain sense in which you have to look into the future and prepare for good things and bad things when you're doing your present work.<sup>248</sup>

In preparing for both good and bad outcomes, it is also worth mentioning that some attorneys adapt their losing slowly approach by occasionally advising clients against having representation in the first place.<sup>249</sup> "[S]ometimes[.]" Attorney M, a private bar Fort Snelling attorney revealed, "I do advise people that maybe it would be better for them to say *pro se*, especially the way they have the docket modeled now as far as moving cases forward more quickly when there's representation, so that definitely can be a benefit to people."<sup>250</sup>

Take the case-management process that they've put in place to increase efficiency. They're essentially canceling master-calendar hearings for everybody that has an attorney and just making you make your arguments by a written motion, essentially, and making it more efficient by having less actual time with the judge and just turning you on a conveyor belt

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<sup>246</sup> *See id.*

<sup>247</sup> *See* Interview with Attorney K, *supra* note 177.

<sup>248</sup> *Id.*

<sup>249</sup> *See* Interview with Attorney M (Aug. 2021–Dec. 2021) (on file with authors).

<sup>250</sup> *Id.*



towards the end. They haven't yet announced how they're going to do this with *pro se* applicants, partially because I don't see how, but it's . . . Yeah. You're in a position now where if you get an attorney, you're actually worse off because you're going to get shuffled onto that conveyor belt, and everybody else is just going to, "We'll deal with you when we get to you."<sup>251</sup>

In both examples above, *pro se* serves as a rough heuristic for judges to determine deservingness and provide latitude as a form of protection towards the defendant because, in their eyes, there is no other legal stakeholder to represent them.<sup>252</sup> This relates to past work exploring how judges apply higher leniency to cases without attorney representation, often extending cases out for longer periods of time before a final verdict is eventually served.<sup>253</sup> It also situates the losing slowly approach into a broader framework of what the attorneys' advocacy goals are: do they involve seeing a case to a swift resolution, or do they veer away from efficiency in order to help those in need, clients or not? Attorneys' responses in this article indicate that resistance lawyering as framed in past immigration scholarship is multifaceted in its approach and involves disrupting the law even when legal stakeholders cannot find a resolution themselves.<sup>254</sup>

### III. DISCUSSION AND CONCLUSION

In this article, we revisit the idea that the "Process is the Punishment" ("PiP") model as proposed by Feeley assumes that access to justice on some level exists in the lower criminal courts. However, as we outline in our interviews with removal defense attorneys, the PiP model is different when deportation is the ultimate sanction. Removal proceedings often lack such access because punishment and guilt are rendered differently in the immigration

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<sup>251</sup> Interview with Attorney C, *supra* note 5.

<sup>252</sup> See Christopher Levesque, Jack DeWaard, Linus Chan, Michele Garnett McKenzie, Karumi Tsuchiya, Olivia Toles, Amy Lange, Kim Horner, Eric Ryu & Elizabeth Heger Boyle, *Crimmigrating Narratives: Examining Third-Party Observations of US Detained Immigration Court*, L. & SOC. INQUIRY (forthcoming 2022) (manuscript at 4), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1D82CA085F4EFEE0D77A83C4D5B24F10/S0897654622000168a.pdf/crim-migrating-narratives-examining-third-party-observations-of-us-detained-immigration-court.pdf> [https://perma.cc/Q7BX-FHAT].

<sup>253</sup> See Asad, *supra* note 5, at 1237–38; see also *id.* (manuscript at 20).

<sup>254</sup> See, e.g., Farbman, *supra* note 8, at 1950–51.

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context.<sup>255</sup> In contrast to Feeley and also past crimmigration scholars' approaches to PiP, we argue that the process of removal proceedings creates distinct paths towards punishment. More of a switchboard than a marketplace, the immigration court system prevents legal stakeholders such as attorneys and judges to negotiate for substantive justice due to: the binary nature of deportation decision-making, the lack of representation for deportees, and the tension between top- and street-level approaches to using discretion in the implementation and enactment of immigration policy. The deportation process is a volatile system of immigrant punishment that incentivizes the denial of substantive justice to noncitizens – a system in which the process of punishment is exacting and the punishment itself may require forfeiture of “all that makes life worth living.”<sup>256</sup>

We posit that because of the fluctuating political ebb-and-flow of presidential immigration law in the United States, the law-as-written can remain the same while the law-in-action targeting immigrants remains highly volatile. Attorneys' time-based methods aim to account for this ebb-and-flow. But that strategy does not resolve the fundamental issue, which includes the lack of independent decision-makers, and the seemingly immovable harshness of the laws as written. Policymakers should relinquish the use of criminal proceedings as a template and stop treating the question of immigration as one of punishment or even as worthiness. Improving the process can reduce harm, but can only reach so far without a recalibration of understanding both migration and deportation.<sup>257</sup>

For now, the rate of attorney representation remains low and the number of pending cases is approaching the two million mark.<sup>258</sup> Insights shared by attorneys in this study make clear that future work should measure the longitudinal impact of removal defense counsel during an entire case's lifespan – examining what attorneys can do knowing that their clients cannot achieve a positive result.

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<sup>255</sup> See Stumpf, *supra* note 24, at 64.

<sup>256</sup> See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>257</sup> See, e.g., *EOIR Announces “Access EOIR” Initiative*, U.S. DEPT JUST. (Sept. 28, 2021), <https://www.justice.gov/eoir/pr/eoir-announces-access-eoir-initiative> [<https://perma.cc/JN9L-ZM7E>]. Recent attempts to improve attorney representation rates and diversify judge appointments outside of ICE are a positive development, though the looming concern about restrictions to judicial and prosecutorial discretion continues. See *id.*

<sup>258</sup> See Daniel M. Kowalski, *Pace of Immigration Court Processing Increases While Backlog Continues to Climb*, TRAC (July 15, 2022), <https://trac.syr.edu/whatsnew/email.220715.html> [<https://perma.cc/79RW-F8VJ>]; *Details on Immigration Proceedings in Immigration Court*, *supra* note 94.

Continuing to use lawyer perspectives will help describe the necessary changes to calibrate not just the process but the outcome for deportation. Future studies can further bridge together legal and social science perspectives analyzing longitudinal data would allow for an exploration of the rich complexity added by a temporal understanding of these processes.

Attorneys' strategies often express opposition to a court process they believe to be fundamentally and procedurally unfair. Some have the objective to lose slowly as a way to manage risk and provide time for their client while remaining cognizant of upcoming (and ongoing) changes to immigration law and how it is enacted on the ground.<sup>259</sup> As timekeepers, attorneys employ their legal and technical knowledge to identify avenues towards relief within the bureaucratic delay of the immigration court system, and they are often motivated to delay the process until either political or legal changes can become favorable.<sup>260</sup> There are also instances, as shared by some of our interviewed attorneys, where they advise clients to remain *pro se* in order to keep them in the system for longer periods of time while remaining in a liminal, tenuous status towards prolonged resolution.<sup>261</sup> These strategies illuminate the dearth of formal options that match what would be a just result in the treatment of non-citizens who face the loss of family, home, careers and community.

The lack of legally sanctioned favorable results for the majority of those facing deportation in turn pushes the onus onto the manipulation of the process, which, because of the various conflicting incentives, cannot provide a coherent, legitimate or workable solution.<sup>262</sup> As a result, strategic delays place pressure on the state to try and increase the punitive nature of the process (taking the form of so-called efficiency in court), but also extract more costs for delaying the deportation process. However, given that the sanction of deportation itself is often too costly, the punitive nature of the process must continually rise in order to deter anyone from using delays to avoid deportation.<sup>263</sup> This sort of Gordian knot leads inevitably to the conclusion that reforming the process of deportation will likely not be effective.

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<sup>259</sup> See, e.g., Interview with Attorney C, *supra* note 5; Interview with Attorney H, *supra* note 1.

<sup>260</sup> See *supra* Part II.B.1.

<sup>261</sup> See Interview with Attorney M, *supra* note 249.

<sup>262</sup> See, e.g., Farbman, *supra* note 8, at 1950–51.

<sup>263</sup> See *supra* notes 212–214 and accompanying text.

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These strategies occur while substantial U.S. immigration reforms still lack bipartisan support towards meaningful resolution. However, the ever-shifting policies set forth by presidential immigration law continue to impact how attorneys manage their time, set realistic expectations, and act as liaisons between the government and their clients.<sup>264</sup> Although not all lawyers adopt the losing slowly strategy, many interviewees revealed that by prolonging a case in an already backlogged system, they are able to find opportunities in unjust legal procedures and attempt to secure substantively just outcomes for their clients.<sup>265</sup> Broadly speaking, attorneys' timekeeping strategies fulfill two important attorney aims: the first being advocacy for their client, and the second being resistance to a legal system which does not conform to how migration networks and state sovereignty function today.

When describing the punitive nature of deportation, one temptation is to try and alleviate the punitive nature of the process and make it less harsh. One prime example has been the move to abolish immigration detention, which arguably is the most punitive aspect used in the deportation process.<sup>266</sup> But our examination of the deportation process through the strategic considerations of removal defense attorneys reveals that the deportation process may be resistant to change its punitive nature.<sup>267</sup> Recent studies of the Alternatives-to-Detention ("ATD") model highlight some positives but maintain the critique that immigrant punishment is simply rearing its head beyond brick and mortar sanctions.<sup>268</sup> In anticipating the future of immigration law and punishment, our results point out how the severity of the deportation sanction – coupled with an inability to produce equitable and substantively just results for the vast majority of those facing deportation – incentivizes making the process punitive in new and ever-expanding ways.

As such, backlogs and delays in the immigration court system signal a deeper and more complex set of concerns within immigration law itself. State power and boundary-making today criminalize

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<sup>264</sup> See Interview with Attorney I, *supra* note 145; Interview with Attorney K, *supra* note 177.

<sup>265</sup> See, e.g., Interview with Attorney C, *supra* note 5; Interview with Attorney H, *supra* note 1.

<sup>266</sup> See Sarah R. Sherman-Stokes, *Detention Abolition and the Violence of Digital Cages* 28 (Boston Univ. Sch. L., Rsch. Paper No. 23-6, 2023), [https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4216&context=faculty\\_scholarship](https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4216&context=faculty_scholarship) [<https://perma.cc/M9XG-F546>].

<sup>267</sup> See, e.g., Interview with Attorney C, *supra* note 5; Interview with Attorney H, *supra* note 1.

<sup>268</sup> See Sherman-Stokes, *supra* note 266, at 34; STEPHANIE J. SILVERMAN, DOWN THAT WRONG ROAD: US IMMIGRATION DETENTION ELECTRONIC MONITORING 'ALTERNATIVES' AS NET-WIDENING 9 (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4136578](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136578) [<https://perma.cc/4JCP-H27A>].

immigrants in ways that encourage unbridled bias, discrimination, and a legislated system of exclusion.<sup>269</sup> While attorney representation, judicial independence, and court efficiency are desirable goals, our interviews with attorneys demonstrate that any systemic change to immigration law necessitates greater reflection over whom the law chooses not to protect and how the state defines belonging in the first place.

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<sup>269</sup> See *supra* Part II.A.1.

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## IV. APPENDIX A

**Table 1. Interview sample distribution by state and gender**

State	Female	Male	Total
Iowa	2	0	2
Minnesota	13	9	22
Nebraska	6	4	10
North Dakota	1	0	1
Total	22	13	35

During the sample selection process, the lead author took note of a few significant distinctions among the Omaha and Fort Snelling networks of immigration attorneys in our sample. First, the lead author made sure to speak with defense lawyers who had either private bar (29) or nonprofit attorney experience (6). Second, although most lawyers informed the lead author they have experience serving both detained and non-detained respondents, caseloads occasionally contained solely detained or non-detained respondents. Third, the lead author made an effort to interview two lawyers who had previously worked as immigration court employees.

Most interviews took place via Zoom or by phone, with the remainder occurring in person in Omaha or the Twin Cities. With few exceptions, the majority of interviews were recorded and transcribed. The use of pseudonyms in the results presentation was approved by all respondents. The lead author directly contacted over 120 potential interview candidates during the initial recruitment round using publicly accessible emails, LinkedIn, or recommendations from earlier interview candidates. Interviews also occurred through recruitment announcements made on the MN-Dakotas listserv of the American Immigration Lawyers Association

(AILA). This interview study was approved by the University of Minnesota's Institutional Review Board (IRB) in October 2020, determining that the proposed activity was exempt as it does not pertain to research involving human subjects as defined by DHHS and FDA regulations.

The lead author used a semi-structured interview approach and open-ended questions to elicit responses from participants about their own perceptions of procedural fairness within and across four domains: participation, neutrality, authority, and treatment with respect. Along with "what do your clients expect to be fair about the process," the questions also asked "what do you think is important for the court procedure to be fair for your client." The lead author followed up with participants in these discussions during interviews to gauge their level of agreement with the idea that the procedures and verdicts of immigration courts are generally fair.

Building from Sunshine and Tyler (2003),<sup>270</sup> this interview method gave latitude to ask each participant for more information and provided the opportunity to go beyond ideas of procedural fairness, bias, and impartiality. The lead author then captured these ideas using field notes, interview memos, and subsequent coding schemes. This also gave respondents space to reflect on their own perceptions and exert more control over their ideas during the interview, including opportunities for participants to spontaneously articulate their ideas and explore them in greater depth.

In order to approach our data reflexively and from many angles, we implemented an inductive coding scheme while concentrating on themes of double punishment, political ebb-and-flow, and attorneys' time-based strategies based on the resistance lawyer framework. Taken as a whole, these key themes provided guidance for our study during the interview and coding phases. These codes were evident in our interview guide and initial memos and became more apparent to us during the inductive research process.

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<sup>270</sup> Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513 (2003).