THE ACCOUNTABILITY DEFICIT: WHEN IMMIGRATION DETENTION OBSTRUCTS ONE'S DAY IN CRIMINAL COURT

*Tiffany J. Lieu**

The right to have your day in court is foundational to the U.S. criminal legal system. Yet, many noncitizens in immigration detention facing criminal charges are denied this right when ICE routinely fails to produce immigration detainees to criminal court to resolve charges. In immigration proceedings, immigration judges regularly use those unresolved charges to detain and deport. This Article is the first to examine this obstruction of court access and its implications—a particularly imperative study as recent executive and congressional proclamations foretell a gross expansion of the number of individuals in immigration detention with pending criminal charges.

Immigration obstruction of court access occurs because of an accountability deficit: Neither the immigration jailor nor criminal prosecutor suffers consequences for obstructing court access, and thus the accountability deficit falls on the noncitizen defendant. This Article posits the following three implications. First, noncitizen defendants suffer constitutional criminal procedure violations when obstructed from accessing criminal proceedings. Second, noncitizen defendants are harmed in immigration proceedings because the unresolved criminal charge is used to detain and deport them, perpetuating a cycle of obstruction. Finally, noncitizen defendants' rights are in even greater jeopardy because the jailor and prosecutor are the same entity in the immigration apparatus and are further commingled with the judge. This Article proposes to close the deficit by assigning accountability to criminal and immigration enforcement actors through a two-pronged remedy: dismissal of charges on the criminal side and prohibiting use of the pending charge to detain or deport on the immigration side.

* Clinical Instructor, Harvard Law School Crimmigration Clinic; Lecturer on Law, Harvard Law School; J.D., Stanford Law School; B.A., Duke University. I would like to thank the participants of the 2024 *Clinical Law Review* Writers' Workshop and the Harvard Law School Clinical Writing Partners Workshop. Special thanks to Matthew Boaz, Hannah Chartoff, Gemma Donofrio, Randy Hertz, Mary Holper, Faiza Sayed, David Alan Sklansky, Philip L. Torrey, and Shira Wisotsky for their thoughtful comments and feedback on this Article. I am grateful for the meticulous editing by the editors of the *Columbia Law Review.*

INTRODUCTION

Recent executive and legislative proclamations foretell the gross expansion of the U.S. immigration detention system, particularly for individuals with pending criminal proceedings. Days after being sworn into office, President Donald Trump issued quotas to U.S. Immigration and Customs Enforcement (ICE) to increase immigration arrests from a few hundred per day to at least 1,200 to 1,500 per day.[1] Just a few months later, the Trump Administration increased the quota to 3,000 arrests per day.[2] As a result, ICE detention facilities are over capacity. Detention centers were reportedly already at 109% capacity within the first few weeks

1. Nick Miroff & Maria Sacchetti, Trump Officials Issue Quotas to ICE Officers to Ramp Up Arrests, Wash. Post, https://www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/ (on file with the *Columbia Law Review*) (last updated Jan. 26, 2025).

2. Julia Ainsley, Ryan J. Reilly, Allan Smith, Ken Dilanian & Sarah Fitzpatrick, A Sweeping New ICE Operation Shows How Trump's Focus on Immigration Is Reshaping Federal Law Enforcement, NBC News (June 4, 2025), https://www.nbcnews.com/politics/justice-department/ice-operation-trump-focus-immigration-reshape-federal-law-enforcement-rcna193494 (on file with the *Columbia Law Review*).

of the Administration,[3] and the number of immigrants in detention had increased by 20% six months later.[4] The Trump Administration has long said that its top priority for such detention and deportation is noncitizens with criminal convictions or pending charges.[5] Moreover, in January 2025 Congress enacted the Laken Riley Act, which requires that certain individuals be detained by ICE with no opportunity for a bond hearing, even if they have only been arrested or charged—and not yet convicted—for a host of crimes, including minor crimes like shoplifting.[6] A few months later in July 2025, Congress passed the so-called One Big Beautiful Bill Act[7]—a massive budget reconciliation bill that will "supercharge" the Administration's anti-immigration agenda, allocating approximately $170 billion to immigration detention and enforcement.[8] The immigration detention dragnet, then, is set to sweep in many individuals who face pending criminal charges and thus need to have their day in criminal court.

That ICE detains individuals with pending criminal proceedings is not surprising. But what many may be shocked to learn is that, once noncitizen defendants are detained, many are barred from accessing criminal court proceedings.[9] Indeed, ICE routinely refuses to permit individuals in its custody to attend criminal court hearings, in person or virtually, even when ordered to do so by a state criminal court.[10] As a result, individuals are obstructed from having their day in criminal court to resolve those charges. Meanwhile, unresolved charges are used against noncitizen defendants in their immigration proceedings to deny release from

3. Camilo Montoya-Galvez, ICE Releases Some Migrant Detainees as Its Detention Facilities Reach 109% Capacity, CBS News, https://www.cbsnews.com/news/ice-releases-some-migrant-detainees-detention-facilities-reach-109-percent-capacity/ [https://perma.cc/5PHB-QNTS] (last updated Feb. 5, 2025).

4. Meg Anderson, Private Prisons and Local Jails Are Ramping Up as ICE Detention Exceeds Capacity, NPR (June 4, 2025), https://www.npr.org/2025/06/04/nx-s1-5417980/private-prisons-and-local-jails-are-ramping-up-as-ice-detention-exceeds-capacity [https://perma.cc/4L9N-HGYL].

5. Allison McCann, Albert Sun & Eileen Sullivan, Who Are the Millions of Immigrants Trump Wants to Deport?, N.Y. Times, https://www.nytimes.com/interactive/2025/01/17/us/immigrants-trump-deportations.html (on file with the *Columbia Law Review*) (last updated Jan. 24, 2025); Miroff & Sacchetti, supra note 1 ("Tom Homan has said for weeks that ICE . . . would prioritize immigrants with criminal records and who are gang members.").

6. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (codified in scattered sections of 8 U.S.C.).

7. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025) (codified in scattered titles of U.S.C.).

8. Juliana Kim, How Trump's Tax Cut and Policy Bill Aims to 'Supercharge' Immigration Enforcement, NPR (July 3, 2025), https://www.npr.org/2025/07/03/g-s1-75609/big-beautiful-bill-ice-funding-immigration [https://perma.cc/LV7S-6T5E].

9. See infra Part I.

10. See infra section I.B.

immigration detention—therefore prolonging detention—or to deny immigration relief, thereby leading to deportation.[11]

This Article is the first to shed light on this little-known and constitutionally problematic immigration detention practice—which this Article calls "obstruction of court access"—and the ways it shapes the crimmigration[12] paradigm. Consider the case of Ramirez, who arrived in the United States at age fourteen and worked throughout high school to support his family.[13] Ramirez's immigration troubles began when, in high school, he was charged with an offense against a minor for sexual involvement with a schoolmate.[14] Based on this pending charge, ICE detained him and placed him in immigration removal proceedings.[15] In immigration court, Ramirez sought relief from removal by applying for adjustment of status to become a legal permanent resident, which he became eligible for after his mother became a naturalized U.S. citizen.[16] Although the immigration judge concluded that Ramirez was statutorily eligible for adjustment of status, the judge denied him relief and ordered him deported *based solely* on the pending criminal charge.[17] He was ultimately deported to a country where he feared persecution.[18]

Ramirez's deportation, based solely on the pending criminal proceedings, is all the more troubling in light of what did—or rather, did *not*—occur in those criminal proceedings. For nearly four years, Ramirez never had his day in criminal court to refute the allegations levied against him because he was stuck in immigration detention.[19] ICE failed to produce him despite numerous state court writs of habeas corpus ordering that he be produced to court.[20] In the end, immigration authorities deported him based solely on a charge that immigration authorities obstructed him from resolving.[21] More than a year after he was deported, the First Circuit remanded his case to the Board of Immigration Appeals (BIA)—the administrative appellate body that reviews immigration judges' decisions and the highest administrative body for interpreting and applying immigration laws—to properly analyze the impact of the pending

11. See infra Part III.

12. See generally Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367 (2006) (coining the term "crimmigration" to describe the growing criminalization of immigration law).

13. Rosa v. Garland, 114 F.4th 1, 5 (1st Cir. 2024). This author was counsel in this petition for review before the First Circuit. A pseudonym is used for purposes of this Article.

14. Id.

15. Id.

16. Id. at 5–6.

17. Id. at 7.

18. Attestation of Tiffany J. Lieu (Aug. 26, 2025) (on file with the *Columbia Law Review*) [hereinafter Lieu, Attestation].

19. *Rosa*, 114 F.4th at 22 n.9.

20. Lieu, Attestation, supra note 18.

21. *Rosa*, 114 F.4th at 7.

charge on his application for relief.[22] But still, he remains deported, as ICE has refused to permit his return to the United States.

Ramirez's story is just one of many. Yet, thus far, immigration obstruction of court access has occurred in the shadows of public[23] and scholarly attention. Criminal law scholars have examined *defendants'* failure to appear in criminal court after being released on bail,[24] but, as Lindsay Graef and others recently noted, failure to appear because a *jailor* failed to bring the defendant from jail to court is a type of failure to appear that "has been largely unrecognized in [criminal law] scholarship and policy conversations."[25] Moreover, this body of criminal law scholarship does not consider the interaction between the criminal and immigration legal systems when the individual impacted is a noncitizen defendant stuck in immigration detention. Nor has there been much litigation challenging immigration failure to produce.[26] Indeed, it bears noting that, while anecdotes like Ramirez's abound, it is difficult to ascertain the precise scope of the problem empirically due to a lack of systematic recordkeeping by state or federal entities.[27]

22. Id. at 25.

23. Although press sources have reported on the obstruction-of-court-access problem, there has thus far been no systematic description or examination of the practice or its implications. See, e.g., Barbara Howard, ICE Detainees Can Now Answer State Charges, GBH (Jan. 30, 2019), https://www.wgbh.org/news/local/2019-01-30/ice-detainees-can-now-answer-state-charges [https://perma.cc/MVV7-HLLU] (last updated Aug. 1, 2023) ("It has been a problem for a while now: immigrants failing to show up to their state court hearings because they're not being transported from federal [ICE] detention."); Adrian Walker, Criminal Defendants in ICE Custody Haven't Always Been Able to Have Their Day in Court. That's About to Change, Bos. Globe (Jan. 29, 2019), https://www.bostonglobe.com/metro/2019/01/29/criminal-defendants-ice-custody-haven-always-been-able-have-their-day-court-that-about-change/L7xrSntmEyAh1InLXScZ7L/story.html (on file with the *Columbia Law Review*) ("You can't clear your name if you can't go to court, and many of those held—no one knows how many—weren't being allowed to go to court.").

24. See, e.g., Lauryn P. Gouldin, Keeping Up Appearances, 58 U.C. Davis L. Rev. 1019, 1021–29, 1068–89 (2024) (examining pretrial appearances and critiquing the consequences for nonappearance).

25. Lindsay Graef, Sandra G. Mayson, Aurélie Ouss & Megan T. Stevenson, Systemic Failure to Appear in Court, 172 U. Pa. L. Rev. 1, 22 (2023).

26. This author is co-counsel on a first-of-its-kind putative class action lawsuit challenging ICE's policy of denying individuals in its custody at the Moshannon Valley Processing Center remote attendance to state criminal court proceedings in violation of their constitutional right to court access. See Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD (W.D. Pa. docketed Sep. 11, 2024). That litigation is ongoing.

27. It is difficult to ascertain the precise scope of the problem because detention facilities do not keep close track of or report who in detention has pending criminal court proceedings, whether the facility received a state court writ for production of the individual, or whether the individual was ultimately produced to court. Similarly, criminal courts do not track in any systematic way, if at all, which defendants are detained in ICE custody and whether their failure to appear was due to immigration detention. Some advocates have sought this information on a local level in New Jersey through federal Freedom of Information Act requests and state public access records requests to ascertain the scope of ICE's practice of failing to produce. These requests are pending. See Complaint for

Yet immigration obstruction of court access is an important subject of study not only because of the unique jeopardy noncitizen defendants face but also because it sheds new light on the interaction between the criminal and immigration legal systems when a noncitizen defendant faces active proceedings in both. This new understanding of crimmigration is all the more imperative as executive and congressional priorities and mandates increasingly bring active criminal and immigration proceedings into conflict.

This Article fills the scholastic and information gap. It examines the systems that permit obstruction of court access in immigration detention and the harms it imposes on noncitizen defendants as a matter of criminal law rights and immigration law rights, and it proposes a two-pronged solution to remedy the harms as an adjudicatory matter. In so doing, this Article contributes to existing criminal law and immigration law scholarship.

Drawing on court rulings, government documents, and client experience, Part I describes immigration obstruction of court access. It examines the immigration priorities and enforcement practices that result in a detention system that detains many noncitizens who have pending criminal proceedings. It then examines the ways ICE affirmatively and effectively obstructs those individuals from having their day in criminal court to answer those charges.

Part II turns to the question of how immigration detention could possibly be permitted to obstruct a noncitizen defendant's constitutional rights to court access in this way. This Article argues that the answer lays in what Professor David Sklansky has called in other contexts an "accountability deficit."[28] When neither the immigration jailor nor the criminal prosecutor face consequences for refusing to produce a noncitizen defendant to criminal court proceedings, obstruction of court access is permitted to occur with effective impunity. The accountability deficit, then, is paid by the noncitizen defendant stuck in immigration detention who suffers harms under both the criminal and immigration legal systems.

The existence of the accountability deficit in immigration obstruction of court access is glaring when compared with the accountability mechanisms that lawmakers have legislated in the criminal custody context.[29] Indeed, the problem of obstruction of court access is not unique to immigration detention. For much of U.S. history, defendants serving carceral sentences in one jurisdiction while facing prosecution in another

---

Declaratory and Injunctive Relief at 1–3, Legal Servs. of N.J. v. U.S. Immigr. & Customs Enf't, No. 2:23-cv-22222 (D.N.J. filed Nov. 9, 2023) [hereinafter LSNJ FOIA Complaint]. Seeking empirical information through records requests on the state and federal levels is an area for further research.

28. See David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 New Crim. L. Rev. 157, 217–19 (2012).

29. See infra section II.A.

jurisdiction have similarly struggled to exercise their rights to face charges against them.[30] Recognizing this problem, the states and federal government enacted the Interstate Agreement on Detainers,[31] which requires that charges be dismissed if incarcerated individuals are not brought to court and timely tried.[32] Lawmakers, in effect, legislated accountability to protect defendants' rights in criminal custody. Such legislated accountability, however, does not apply when a noncitizen defendant is subject to civil immigration detention.[33]

Having identified the accountability deficit, Part III examines the consequences of that dearth. It posits three interrelated implications that are underexplored in criminal law scholarship and immigration law scholarship and give rise to an accountability imperative.

First, noncitizen defendants stuck in immigration detention suffer criminal law harms of constitutional proportion when they are obstructed from participating in criminal proceedings.[34] The right to have one's day in court is a foundational precept of the U.S. criminal justice system, safeguarded by a constellation of rights under the First, Fifth, Sixth, and Fourteenth Amendments.[35] The Supreme Court has long made explicit that these criminal procedure rights apply to anyone in criminal proceedings, regardless of whether they are a citizen or are detained.[36] Thus, through a criminal rights lens, the constitutional dilemma that occurs when ICE obstructs a noncitizen defendant from appearing in court is, perhaps, intuitive. In *Doe v. Department of Homeland Security*, a putative class action on which this author is co-counsel, the district court concluded that ICE's obstruction of court access policy at the Moshannon Valley Processing Center was likely unconstitutional, emphasizing that even defendants agreed "that a deprivation of access to criminal court proceedings causes a waterfall of further . . . deprivations [that] are illegal under the United States Constitution."[37] The court issued a preliminary injunction ordering defendants to "immediately function in compliance with the tenants of the United States Constitution" by granting individuals access to criminal court proceedings virtually.[38] But outside the context of

30. See infra section II.A.

31. See 18 U.S.C. app. § 2 (2018).

32. See infra section II.A.2.

33. See infra section II.B.

34. See infra section III.A.

35. See generally Wayne R. LaFave, Jerold H. Isarael, Nancy J. King & Orin S. Kerr, Modern Criminal Procedure: Cases, Comments, and Questions (16th ed. 2023) (examining a defendant's constitutional rights to counsel, speedy trial, confrontation, and compulsory process in criminal proceedings).

36. See, e.g., Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (explaining that noncitizens in criminal proceedings are entitled to full constitutional criminal procedural protections).

37. Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD, 2025 WL 360534, at *5 (W.D. Pa. Jan. 31, 2025).

38. Order Granting Preliminary Injunction at 1, *Doe*, 2025 WL 360534.

this one case, which remains ongoing, individuals who are in ICE custody are continually obstructed from attending criminal proceedings in violation of their constitutional rights.

Second, this criminal law obstruction, in turn, harms noncitizen defendants in immigration proceedings in what this Article calls "cyclical obstruction." Immigration judges, as an evidentiary and adjudicatory matter, are permitted to and do often consider unresolved criminal proceedings against an individual to deny release from detention or deny immigration relief, leading to deportation.[39] These dual immigration consequences are harms in and of themselves and, moreover, interact with the criminal legal system to fuel cyclical obstruction. That is, the very detention that obstructs the criminal process perpetuates that detention, which in turn perpetuates the obstruction of criminal process, and so on. Deportation fuels the same cycle of obstruction. Obstruction of court access and the accountability deficit, then, shed light on the interaction between the criminal and immigration legal systems that occurs because immigration judges can consider the resulting unresolved charges.

This cyclical obstruction, and its evidentiary/adjudicatory origins, compels a new understanding of the criminal–immigration interaction. Much of the crimmigration scholarship has focused on the impact of one system on the other. Professor Stephen Legomsky, for example, has theorized that elements of the criminal legal system have been asymmetrically incorporated into immigration proceedings and adjudication—that is, criminal law enforcement methodologies but not criminal procedural protections have been incorporated.[40] Flowing in the opposite direction, scholars like Jennifer Chacón,[41] Ingrid Eagly,[42] and Amy Kimpel[43] have theorized the ways immigration law and adjudication have begun to erode criminal procedural norms. This Article's study of the obstruction of court access builds on this scholarship by articulating the bidirectional impact of the criminal and immigration legal systems and the ways in which the immigration system, quite literally, obstructs criminal process. This cyclical obstruction is significant: The noncitizen

39. See infra section III.B.

40. See Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 474–75 (2007).

41. See Jennifer M. Chacón, Managing Migration Through Crime, 109 Colum. L. Rev. Sidebar 135, 136–37 (2009), https://columbialawreview.org/wp-content/uploads/2016/08/Chacon1.pdf [https://perma.cc/9GNZ-M6PR] (arguing that the relaxed procedural norms of civil immigration proceedings are being imported into the criminal realm).

42. See Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1288 (2010) (arguing that the immigration agency interacts with criminal process to erode procedural protections afforded to criminal defendants).

43. See Amy F. Kimpel, Alienating Criminal Procedure, 37 Geo. Immigr. L.J. 237, 241 (2023) (arguing that the increased prosecution of immigration crime is changing criminal procedure in the federal courts, including through mass hearings and eroding Fourth Amendment rights).

defendant stuck in immigration detention faces a double and cyclical jeopardy.

The third and final implication of obstruction of court access and the accountability deficit must be understood through the institutional design of the immigration apparatus. That design is one in which the jailor and prosecutor are the same entity and are commingled with the judge. Drawing on the growing body of scholarship that has examined the administration of immigration law through the lens of institutional design,[44] this Article posits that the roles of jailor, prosecutor, and judge lack sufficient internal checks and balances. Indeed, the same entity, ICE, is both the jailor who prevents noncitizen defendants from resolving criminal charges and the prosecutor who uses those pending charges against them to detain and seek to deport. In other words, ICE as the jailor and prosecutor is capable of effectively manufacturing evidence against a noncitizen defendant in immigration proceedings in the form of unresolved criminal charges or, at the very least, preventing noncitizen defendants from presenting exculpatory evidence. That evidence, or lack thereof, in turn, is then considered by immigration judges—whom scholars have critiqued as lacking independence because they are also governed by an executive department with the same immigration policy agenda[45]—to detain and deport noncitizen defendants, which further drives the cyclical obstruction of criminal court access. The implications of this institutional design in the context of obstruction of court access make the need for accountability all the more imperative.

Part III, in sum, tells the story of the implications of the accountability deficit in obstruction of court access. It demonstrates that immigration obstruction of court access quite literally obstructs criminal process in violation of individual constitutional criminal law rights, and it identifies two facets of the immigration system—one adjudicatory and one

---

44. See, e.g., Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration Law, 59 Stan. L. Rev. 809, 814 (2007) (examining the design choices governing how immigrants are screened and selected and conflicting incentives within the immigration system); Alina Das, Immigration Detention: Information Gaps and Institutional Barriers to Reform, 80 U. Chi. L. Rev. 137, 139 (2013) (examining the institutional design choices governing the use of information in immigration detention); Eagly, supra note 42, at 1290–91 (examining the institutional design of criminal immigration prosecutions).

45. Mary Holper, The Fourth Amendment Implications of "U.S. Imitation Judges", 104 Minn. L. Rev. 1275, 1306–13 (2020) [hereinafter Holper, Imitation Judges] (arguing that immigration judges are not neutral arbiters in bond hearings in violation of the Fourth Amendment); Stephen H. Legomsky, Deportation and the War on Independence, 91 Corn. L. Rev. 369, 372–75 (2006) [hereinafter Legomsky, War on Independence] (describing immigration judges' concerns with Justice Department involvement in their adjudication of immigration cases); Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 Duke L.J. 1635, 1644–76, 1685–720 (2010) (calling for a new immigration system with immigration judges independent from the Justice Department); Tara Magner, Immigration Judges Seek Independence From Department of Justice, 16 Geo. Immigr. L.J. 733, 733 (2002) (referencing the National Association of Immigration Judges' petition for immigration courts to be placed under an independent agency).

institutional design—that interact with the criminal system to create a cycle of harm in both criminal and immigration proceedings.

Part IV then turns to closing the accountability deficit. The focal point of the proposed solution is not about how to directly force ICE to produce a noncitizen defendant in criminal court, but rather to assign accountability to criminal prosecutors and ICE as the jailor and immigration prosecutor when obstruction of court access occurs. To do so, Part IV proposes a two-pronged remedy that draws upon the implications previously identified. The remedy is two-pronged because the consequences of the accountability gap are cyclical and flow to both the criminal and immigration systems. Accountability mechanisms, therefore, must attach in both. On the criminal side of the ledger, this Part proposes that if an individual is not able to appear in criminal court, the charges against them must be dismissed. As to immigration proceedings, this Part proposes that the BIA restrict immigration judges from considering pending or dismissed criminal proceedings against an individual if ICE has obstructed their ability to resolve those proceedings. Omitting such evidence mitigates the adjudicatory and institutional design concerns. While these remedies may seem improbable in the current political environment, they are what strict adherence to constitutional principles demands.

I. Obstruction of Court Access in Immigration Detention

This Part illustrates, as a descriptive matter, immigration obstruction of court access. It begins with a broad overview of the immigration apparatus and the roles within it to establish the structural underpinnings of the immigration detention landscape. The reality of immigration detention is that many individuals detained have pending criminal proceedings that they must attend. This Part then explores the little-known phenomenon of immigration obstruction of court access: Once placed in immigration detention, many immigrants cannot attend those criminal proceedings.

A. *The Need to Access Criminal Court in Detention*

Enforcement and adjudication of U.S. immigration law is the purview of the executive branch and is largely governed by two umbrella executive agencies: DHS—the enforcement arm—and DOJ—the adjudicatory arm.

Within DHS, ICE manages all aspects of the immigration enforcement process, including deciding who to prosecute for removal, initiating removal proceedings against an individual, deciding who to detain, and serving as the legal custodian for those in immigration detention.[46] ICE is also tasked with serving as immigration prosecutor, representing the government in removal proceedings against noncitizens in immigration court.[47] Once DHS initiates removal proceedings against a noncitizen, that individual has an opportunity to defend against removal in immigration court. The immigration court system is housed within the Executive Office of Immigration Review (EOIR), which in turn is housed within DOJ and operates under the delegated authority of the U.S. Attorney General.[48] In removal proceedings in immigration court, an immigration judge determines, as pertinent to this Article, whether an individual should be released from immigration detention on bond pending removal proceedings; whether an individual is removable from the United States; and, if so, whether they are entitled to relief from removal through forms of immigration relief like asylum or adjustment of status.[49] These court proceedings are adversarial—an ICE prosecutor presents evidence against a noncitizen, who is often unrepresented.[50] Either the noncitizen or DHS may appeal the immigration judge's decision to the BIA, which is also housed within EOIR within the DOJ.[51] Either party may then appeal certain BIA decisions to the federal courts of appeal via a petition for review.[52]

Turning specifically to immigration detention, ICE is statutorily authorized to detain an individual for the duration of removal proceedings, until they are either found not removable[53] or ordered deported.[54] In some cases, ICE may be required by statute to detain an individual—so-called mandatory detention—if they have been convicted of certain crimes.[55] The Laken Riley Act in 2025 expanded mandatory

46. These duties fall within a subcomponent of ICE: Enforcement and Removal Operations. See U.S. Immigration and Customs Enforcement, ICE, https://www.ice.gov/about-ice [https://perma.cc/9L7M-NEJ7] (last updated Mar. 7, 2025).

47. ICE attorneys work within a subcomponent of ICE: the Office of the Principal Legal Advisor. Id.

48. Exec. Off. for Immigr. Rev., About the Office, DOJ, https://www.justice.gov/eoir/about-office [https://perma.cc/D9SF-RP8R] (last updated May 29, 2025).

49. See infra section III.C.

50. See, e.g., Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 32 (2015) (reporting that, between 2007 and 2012, only 14% of detained immigrants were represented). Although noncitizens have the right to counsel under the Immigration and Nationality Act, they do not have the right to government-funded counsel. See 8 U.S.C. § 1362 (2018).

51. 8 C.F.R. § 1003.1(a)(1) (2025).

52. 8 U.S.C. § 1252(a)(2)(D).

53. Notably, ICE may continue to detain an individual even after they obtain certain forms of relief from removal like withholding of removal or protection under the United Nations Convention Against Torture. See 8 U.S.C. § 1231(a).

54. ICE may continue to detain an individual who has been ordered removed for ninety days to effectuate removal. Id.

55. 8 U.S.C. § 1226(c); see also Philip L. Torrey, Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody", 48 U. Mich. J.L. Reform 879, 883–96, 906–12 (2015) (tracing the history of mandatory detention and arguing that

detention for certain noncitizens to include additional crimes—like shoplifting, theft, and burglary—and for criminal dispositions less than a conviction—like being arrested, charged, or merely admitting to sufficient facts for one of these additional crimes.[56] Even if an individual is not subject to mandatory detention, ICE maintains discretion to detain an individual—so-called "discretionary detention"—pending the resolution of their removal proceedings.[57] Eligible noncitizens subject to discretionary detention may seek release from detention in a bond hearing, which is an adversarial proceeding against an ICE prosecutor before an immigration judge.[58]

The prominence of immigration detention as a tool of immigration enforcement is poignantly reflected in the numbers. In the weeks leading up to President Trump's inauguration, ICE detained approximately 39,703 noncitizens.[59] Within a month of the change to the new administration, which has made immigration enforcement one of its top priorities, that number had increased to 43,759 noncitizens, and within six months had skyrocketed to 56,397 noncitizens—an expansion fueled by executive-mandated detention quotas.[60] Congressional budget allocation similarly reflects the emphasis on detention. In fiscal year 2024, Congress allocated ICE an annual budget of $19.6 billion, with $3.43 billion specifically earmarked for immigration detention centers alone.[61] By contrast, Congress allocated only $840 million for the entire immigration court system that year.[62] Moreover, in July 2025, Congress enacted and the President signed into law the One Big Beautiful Bill Act, which allocates $45 billion for immigration detention centers and an additional approximately $30 billion to hire more ICE personnel and maintain ICE detention facilities, among other spending.[63]

DHS should interpret the statutory mandatory custody requirement to encompass alternatives to detention). While the Supreme Court held that mandatory detention is not facially unconstitutional in Demore v. Kim, 538 U.S. 510, 531 (2003), lower courts have since held that prolonged mandatory detention without a bond hearing may violate procedural due process. See, e.g., Black v. Decker, 103 F.4th 133 (2d Cir. 2024); German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203 (3d Cir. 2020).

56. Laken Riley Act, Pub. L. 119-1, sec. 2, 139 Stat. 3, 3 (2025) (codified at 8 U.S.C. § 1226(c)).

57. See 8 U.S.C. § 1226(a).

58. See infra sections III.B–.C.

59. ICE Detainees, TRAC Immigr., https://tracreports.org/immigration/detentionstats/pop_agen_table.html [https://perma.cc/F7QQ-EGAK] (last visited Aug. 9, 2025) (reporting 39,703 individuals detained in ICE custody on January 12, 2025).

60. Id. (reporting 43,759 and 56,397 individuals detained in ICE custody on February 23, 2025, and June 15, 2025).

61. Am. Immigr. Council, The Cost of Immigration Enforcement and Border Security 3, 5 (2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/cost_of_immigration_enforcement_factsheet_2024.pdf [https://perma.cc/AF7J-AAGK].

62. Id. at 3.

63. Kim, supra note 8.

Importantly, the civil immigration system is procedurally separate from the criminal legal system. Certainly, the immigration system, like other civil systems such as family court and housing court, are "enmeshed"[64] with the criminal system. For example, whether a noncitizen is removable or subject to mandatory detention under immigration law depends on whether they have been arrested, charged, or convicted for qualifying state or federal criminal offenses.[65] Nonetheless, the two systems are entirely separate procedurally. Thus, a noncitizen may face concurrent prosecutions with separate court proceedings that they must attend: one in civil immigration court and one in state or federal criminal court.

Many individuals in detention face such concurrent prosecution. A number of them have pending criminal proceedings—many of which are minor infractions, such as traffic violations[66]—and therefore need to go to criminal court either to defend against pending charges or to challenge wrongful convictions through post-conviction relief. This reality is due to ICE's arrest practices and the enforcement priorities set by the governing Administration.

Perhaps unsurprisingly, ICE targets sites of criminal law enforcement to arrest noncitizens who have pending criminal charges. ICE arrests individuals at courthouses[67] when they appear for pretrial hearings to have their day in court on pending charges.[68] ICE also arrests individuals at

---

64. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

65. 8 U.S.C. §§ 1226(a)–(c), 1227(a)(2) (2018); see also César Cuauhtémoc García Hernández, Crimmigration Law 23–93 (2d ed. 2022) (explaining the immigration consequences of criminal dispositions).

66. Immigration Detention Quick Facts, TRAC Immigr., https://tracreports.org/immigration/quickfacts/ [https://perma.cc/7ZV7-UTM9] (last visited Aug. 9, 2025).

67. See Memorandum from Caleb Vitello, Acting Dir., ICE, to ICE Emps. (Jan. 20, 2025), https://www.ice.gov/doclib/foia/policy/11072.3_CivilImmEnfActionsCourthouses_01.21.2025.pdf [https://perma.cc/AAD2-H4HA] (setting forth the Trump Administration's policy for detaining individuals at courthouses). Others have persuasively articulated that courthouse detentions vitiate access to justice. See, e.g., Douglas Keith, States Push Back Against ICE Courthouse Arrests, Brennan Ctr. Just. (Nov. 22, 2019), https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests [https://perma.cc/DL9A-SNLL] ("Advocates have documented the chilling effect ICE's presence has on courthouse access—deterring victims, survivors, and witnesses from pursuing justice and using court services—and the resulting harm it does to the justice system."); ICE out of Courts Coal., Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State 24–36, 56–59, https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf [https://perma.cc/W5CB-8GP9] (last visited Aug. 9, 2025) (providing statistical support for the proposition that access to justice is limited by ICE's presence in courthouses).

68. See, e.g., Baptista v. Lyons, 440 F. Supp. 3d 42, 45 (D. Mass. 2020) (explaining that when the noncitizen petitioner attempted to appear at the district court to schedule hearings on his open criminal matters, he was taken into immigration custody); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 686 (D. Mass. 2018) (same); Figueroa v. McDonald, 680 F. Supp. 3d 18, 20 (D. Mass. 2018) (same); *Ramirez v. Tompkins*, ACLU Mass.,

police stations and jails.[69] ICE may make arrests by simply waiting on the premises and arresting noncitizens when they are released or through more formal cooperation with jurisdictions by issuing an immigration detainer requesting that local authorities notify ICE before releasing a noncitizen who has been arrested.[70] ICE may also identify individuals for targeted enforcement using databases and information-sharing tools, such as the IRS[71] and LexisNexis,[72] among others, or by deputizing state and local law enforcement officials through 287(g) agreements to perform specified immigration enforcement functions.[73] Troublingly, even after a

---

https://www.aclum.org/en/cases/ramirez-v-tompkins [https://perma.cc/FS26-MUH3] (last visited Oct. 11, 2025) (describing how ICE agents arrested Ramirez in the courthouse parking lot shortly after he appeared for a pretrial conference for a charge relating to a minor car accident).

69. For example, of the approximately 180 people that ICE apprehended in New Jersey and detained at Moshannon between January and July 2024, between twenty-five and thirty-five people per day were apprehended at police stations and thirty-five to forty-five people per day from jails. See Supplemental Declaration of Ian G. Peacock, Ph.D., in Support of Plaintiffs' Motion for a Temporary Restraining Order and Permanent Injunction at exhs. C–E, Doe v. Dep't of Homeland Sec., No. 2:24-cv-9105-MEF-LDW (D.N.J. filed Oct. 16, 2024), Dkt. No. 31-14 (on file with the *Columbia Law Review*).

70. See 8 C.F.R. § 287.7(a) (2025); see also National Map of Local Entanglement With ICE, Immigrant Legal Res. Ctr. (Nov. 13, 2019), https://www.ilrc.org/resources/national-map-local-entanglement-ice [https://perma.cc/YMH3-2CWN] (tracking each county's level of cooperation with ICE, including cooperation with ICE detainers).

71. See Nat'l Immigr. F., IRS & ICE Immigration Data-Sharing Agreement: Explainer 1 (2025), https://forumtogether.org/wp-content/uploads/2025/05/IRS-ICE-Immigration-Data-Sharing-Agreement-Explainer.pdf [https://perma.cc/BQ5T-SATB] ("The [IRS] finalized a memorandum of understanding (MOU) with [ICE] on April 7, 2025 to share sensitive taxpayer information to aid in deportation efforts."); see also Suzanne Gamboa, IRS to Share Info With ICE About Some Undocumented Immigrant Taxpayers, NBC News (Apr. 8, 2025), https://www.nbcnews.com/news/latino/irs-share-taxpayer-info-ice-immigrants-rcna200250 [https://perma.cc/QPT6-6DXK] ("The Department of Homeland Security said in a court document that the IRS has agreed to share certain tax information filed by undocumented taxpayers with Immigration and Customs Enforcement.").

72. ICE holds a $16.8 million contract with LexisNexis, set to expire in 2028, for access to information and tools that allegedly help to track noncitizens and their activities. See Sam Biddle, LexisNexis Is Selling Your Personal Data to ICE so It Can Try to Predict Crimes, The Intercept (June 20, 2023), https://theintercept.com/2023/06/20/lexisnexis-ice-surveillance-license-plates/ (on file with the *Columbia Law Review*) (last updated June 23, 2023) (describing how LexisNexis is providing ICE with tools for immigration enforcement); Maurizio Guerrero, ICE Is Swiftly Expanding Its Sprawling Surveillance Apparatus, Prism (Jan. 30, 2025), https://prismreports.org/2025/01/30/ice-surveillance-immigrants/ [https://perma.cc/VH8S-TZKC] (confirming that the LexisNexis–ICE con-tract is set to expire in 2028); see also Sam Biddle, ICE Searched LexisNexis Database Over 1 Million Times in Just Seven Months, The Intercept (June 9, 2022), https://theintercept.com/2022/06/09/ice-lexisnexis-mass-surveillances/ (on file with the *Columbia Law Review*).

73. Section 287(g) of the Immigration and Nationality Act permits DHS to, through written agreement, deputize state and local law enforcement officers to, inter alia, investigate whether individuals in state and local custody are noncitizens and transfer them into ICE custody (the so-called "Jail Enforcement Model" (JEM)), enforce limited immigration authority during routine police duties (the so-called "Task Force Model" (TFM)), and serve and execute administrative warrants on certain noncitizens (the so-called

criminal court judge has granted bail and determined that the individual is neither a flight risk nor a danger to the community, ICE still frequently arrests individuals as they are released from pretrial detention.[74] In *United States v. Trujillo-Alvarez*, for example, the federal magistrate judge ordered that Trujillo-Alvarez be released pending trial because he was not a flight risk or, as even the government conceded, a danger to the community.[75] In so doing, the judge acknowledged that ICE could choose to detain Trujillo-Alvarez upon release but stated that ICE's conduct was "not within [his] control."[76] ICE agents detained Trujillo-Alvarez the next day.[77] Individuals are, in other words, released into detention. This problematic practice of releasing noncitizens into ICE detention[78] is so common that noncitizens often do not seek bail in the first instance, fearing that they will be immediately transferred to ICE custody.[79]

ICE also arrests individuals who have been found guilty but were not sentenced to a term of imprisonment. The Agency often arrests individuals

---

"Warrant Service Officer" (WSO)). See 8 U.S.C. § 1357(g) (2018); Am. Immigr. Council, The 287(g) Program: An Overview 1–2 (2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2012/11/the_287g_program_an_overview.pdf [https://perma.cc/35ZW-TKNL] (explaining 287(g) agreements and the deputization of state or local law enforcement); Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, ICE, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/6A4S-TAB3] (last updated Oct. 10, 2025) (same). As of September 18, 2025, ICE reports that it has signed 287(g) agreements with 1,001 localities over 40 states, including 129 JEM agreements across 27 states, 371 WSO agreements across 35 states, and 501 TFM agreements across 33 states. Id.

74. See, e.g., Asolo v. Prim, No. 21-CV-50059, 2021 WL 3472635, at *1–2 (N.D. Ill. Aug. 6, 2021) (explaining that ICE detained an individual right after a state court judge released him on a $500 bond); Vargas v. Wolf, No. 2:19-cv-02135-KJD-DJA, 2020 WL 1929842, at *1 (D. Nev. Apr. 21, 2020) (explaining that ICE detained an individual even though "[t]he government did not seek [pretrial] detention . . . and the magistrate judge released her on a personal recognizance bond"). When an individual is released from jail after paying bail but is subsequently detained and deported by ICE, that money is often not returned. See Jack Herrera, For One Texas County, Arresting Migrants Made Big Money, N.Y. Times (May 1, 2025), https://www.nytimes.com/2025/05/01/us/migrants-border-bail-forfeit-kinney-county-texas.html (on file with the *Columbia Law Review*) ("Over the past four years, [Kinney County] has refused to return $1.7 million in bail from migrant trespass cases . . . .").

75. 900 F. Supp. 2d 1167, 1170, 1173 (D. Or. 2012).

76. Id. at 1172.

77. Id.

78. Courts and scholars have argued that ICE's practice of arresting individuals who are released from federal pretrial detention violates the Bail Reform Act. See, e.g., Kerry Martin, Jail by Another Name: ICE Detention of Immigrant Criminal Defendants on Pretrial Release, 25 Mich. J. Race & L. 147, 155 (2020) (analyzing "the legality of ICE's . . . detention of noncitizen criminal defendants upon their release from pretrial detention").

79. Lena Graber & Amy Schnitzer, Nat'l Laws. Guild, The Bail Reform Act and Release From Criminal and Immigration Custody for Federal Criminal Defendants 1 (2013), https://kmbllaw.com/wp-content/uploads/ImmigrationDetainerNatlImmProjectArticle.pdf [https://perma.cc/TM99-25B2] ("[N]oncitizen defendants who do make bail are often transferred to immigration custody instead of being released. . . . [S]ome noncitizens do not seek bail because they fear such a transfer.").

when they return to the courthouse to meet with their probation officer[80] and even immediately upon release after trial. In *Omari v. United States*, for example, the court granted Omari probation and released him under conditions of supervised release.[81] But immigration authorities arrested him right after he was released and detained him for over four months without a bond hearing, thereby impeding his ability to comply with the conditions of probation and release.[82] In still other cases, ICE waits for individuals who have finished serving a criminal sentence—and thus are presumably rehabilitated—and arrests them as they leave the jail or prison.[83] As one individual who served a twenty-year sentence recounted, he saved up enough while serving his sentence to purchase a pair of new white sneakers to wear on his walk out of prison and back into the "free world."[84] He walked only a few steps before ICE put him on a bus and took him to immigration detention.[85] ICE detained him for two years in conditions he claimed were worse than prison.[86] Unable to stand further detention, he requested to be deported rather than continue to fight his immigration case in detention.[87]

ICE's broader arrest operations may also sweep individuals with pending criminal court proceedings into the detention dragnet as they walk through day-to-day life. For years, ICE has arrested individuals in their homes, often implementing the so-called "knock and talk"[88] practice whereby ICE agents approach an individual's home without a judicial warrant and misrepresent themselves as police or probation officers to gain entry and make an arrest.[89] ICE also detains individuals at their

80. See, e.g., Diaz-Ceja v. McAleenan, No. 19-cv-00824-NYW, 2019 WL 2774211, at *1 (D. Colo. July 2, 2019) (explaining that ICE detained an individual while he was checking in with his probation officer after entering into a diversionary program under a deferred judgment).

81. No. 3:03-CV-1044-M, 2003 WL 21321239, at *1 (N.D. Tex. June 4, 2003).

82. Id.

83. See, e.g., Memorandum from Tiffany Lieu to the Columbia L. Rev. (Aug. 2, 2025) (on file with the *Columbia Law Review*) (describing an interview with a former client who was detained in these circumstance).

84. Id.

85. Id.

86. Id.

87. Id.

88. A federal district judge held that ICE's "knock and talk" practice, when conducted with the purpose of arrest, was unconstitutional in a class action lawsuit challenging the Agency's home arrest practice in Los Angeles and the surrounding regions. Kidd v. Mayorkas, 734 F. Supp. 3d 967, 982 (C.D. Cal. 2024).

89. See, e.g., Christopher Bao, Charlie Roth & Miriam Waldvogel, ICE Conducts Raid in Downtown Princeton, Community Intervenes, Daily Princetonian (July 10, 2024), https://www.dailyprincetonian.com/article/2024/07/princeton-news-town-ice-downtown-raid-community-undocumented-migrants [https://perma.cc/Q6DW-8RPL] ("The American Civil Liberties Union . . . has previously termed the use of police vests as 'impersonation,' arguing that it falsely insinuates that ICE agents belong to local law enforcement."); ICE Ruses, Immigr. Def. Project, https://www.immigrantdefenseproject.

workplace during worksite raids,[90] hospitals where they are receiving care,[91] religious institutions, and schools,[92] sometimes without providing a warrant or identifying themselves as ICE agents or law enforcement officers.[93] ICE agents also identify and target noncitizens who go to the courthouse for mundane matters like paying traffic tickets.[94]

As a result of ICE's detention practices, many individuals in ICE custody need access to criminal courts to answer pending state and federal charges against them. In fiscal year 2024, ICE arrested 23,624 noncitizens with pending criminal charges and 57,688 noncitizens with criminal convictions nationwide—that comprises, respectively, approximately 20.8% and 50.9% of ICE arrests that year.[95] Moreover, of the approximately 277,913 noncitizens ICE detained in fiscal year 2024, 26,528 individuals had pending criminal charges and 70,279 had criminal convictions.[96] Between May 2019 and January 2021, during the first Trump Administration, 10% to 19% of those detained by ICE on a given day had pending criminal charges, and 30% to 54% had criminal convictions.[97] Under the Biden Administration, the number of individuals in detention

---

org/ice-ruses/ [https://perma.cc/WSM5-ACGJ] (last visited Aug. 30, 2025) ("One common ruse is where ICE agents pretend to be local law enforcement in order to hide that they are ICE.").

90. From 2017 to 2020, ICE arrested more than 1,800 workers through worksite raids. Worksite Raids Under the Trump Administration, Nat'l Immigr. L. Ctr. (Jan. 1, 2020), https://www.nilc.org/issues/workersrights/worksite-raids/ (on file with the *Columbia Law Review*).

91. See, e.g., Deborah M. Weissman, Angelina Godoy & Havan M. Clark, The Final Act: Deportation by ICE Air, 49 Hofstra L. Rev. 437, 457–58 (2021) (describing instances of ICE arresting an immigrant who was at the hospital donating bone marrow and a ten-year-old child with cerebral palsy after she had emergency surgery).

92. See Rebecca Santana, Migrants Can Now Be Arrested at Churches and Schools After Trump Administration Throws Out Policies, PBS (Jan. 22, 2025), https://www.pbs.org/newshour/politics/migrants-can-now-be-arrested-at-churches-and-schools-after-trump-administration-throws-out-policies [https://perma.cc/G74N-VEU2].

93. See, e.g., Chloe Atkins & Patrick Smith, Columbia Student Mahmoud Khalil Was Detained Without an Arrest Warrant, Trump Administration Says, NBC News (Apr. 25, 2025), https://www.nbcnews.com/news/us-news/columbia-student-mahmoud-khalil-was-detained-arrest-warrant-trump-admi-rcna202946 (on file with the *Columbia Law Review*); Martin Kaste, Masked Officers in Tufts Student Arrest Raise Fears Among Immigrants and Bystanders, NPR (Mar. 28, 2025), https://www.npr.org/2025/03/28/nx-s1-5342428/tufts-student-arrest-raises-questions-about-masked-ice-agents [https://perma.cc/79FD-JARD] (describing an instance of masked and unidentified law enforcement agents arresting a Turkish doctoral student).

94. See, e.g., Press Release, ACLU S. Cal., ACLU Condemns ICE for "Bait-and-Switch" Courthouse Policy (Feb. 10, 2014), https://www.aclusocal.org/en/press-releases/press-release-aclu-condemns-ice-bait-and-switch-courthouse-policy [https://perma.cc/68DY-2QPV] (describing several cases in which ICE agents identified and arrested noncitizens after noncitizens paid traffic tickets).

95. ICE Enforcement and Removal Operations Statistics, ICE, https://www.ice.gov/spotlight/statistics [https://perma.cc/65MT-HSPH] (last updated May 30, 2025).

96. Id.

97. See ICE Detainees, supra note 59.

who had criminal law encounters decreased. Between August 2021 and August 2024, 4% to 13% of those detained by ICE on any given day had pending criminal charges, and 18% to 37% had criminal convictions.[98] Within the first six months of the second Trump Administration, 14% to 27% of those detained by ICE on any given day had pending criminal charges, and 27% to 31% had criminal convictions.[99]

These numbers will only expand in light of recent legislation and the Trump Administration's proclaimed priorities. Indeed, the Laken Riley Act expands the mandatory detention regime, explicitly requiring that ICE detain certain individuals even if they have only been arrested or charged with shoplifting and other crimes.[100] Moreover, the Trump Administration has explicitly targeted noncitizens with criminal charges or criminal convictions for enforcement activity.[101] Thus, the number of noncitizens in ICE detention who need to go to court, which was already high, is set to balloon. But, as the next section explains, many of the noncitizens that ICE detains are, once in detention, no longer able to participate in criminal court proceedings against them.

B. *Stuck in Immigration Detention*

For many in immigration detention, the closing of the detention cell door also closes the courthouse doors. ICE, as the legal custodian of those it detains, determines whether to temporarily release an individual so they may appear in court in person or to produce them virtually via remote platforms. But ICE often obstructs individuals in its custody from appearing in criminal court, ignoring individual grievances[102] and directly refusing to comply with state court orders demanding that an individual in its custody be produced[103]—a lack of accountability wrought by federalism dynamics, as explored in Part II. Judge Kermit Lipez of the First

98. Id.

99. Id.

100. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (codified in scattered sections of 8 U.S.C.).

101. See McCann et al., supra note 5 (noting that President Trump's top priority for deportations are those with criminal records).

102. See, e.g., 8 U.S.C. § 1226(a) (2018) (providing that the Attorney General may detain and release certain noncitizens); Garcia v. Valdez, No. EDCV 14-02533-MWF (AS), 2021 WL 3918134, at *4 (C.D. Cal. Aug. 12, 2021) (alleging that ICE rejected the plaintiff's grievance regarding ICE's refusal to transport him to his court hearing).

103. See, e.g., Affidavit of Jennifer Klein ¶ 7, Ramirez v. Tompkins, No. 1:18-cv-12452 (D. Mass. filed Nov. 27, 2018), Dkt. No. 4 [hereinafter Klein Affidavit] (on file with the *Columbia Law Review*) (describing ICE's refusal to release an individual into the custody of local law enforcement acting despite a judicial order); LSNJ FOIA Complaint, supra note 27, at exh. AA (containing an email exchange showing ICE refusing to comply with a state court "writ of production compelling ICE to virtually produce [the individual] for Court," claiming that "[ICE] do[es] not have the recourses [sic] to facilitate criminal court hearings by tele video at Moshannon").

Circuit recently called this practice "troubling."[104] This section describes the little-known obstruction of court access problem that occurs in the shadows of immigration detention. It examines the ways ICE affirmatively and effectively obstructs criminal court access.

1. *Affirmative Obstruction.* — In some cases, ICE affirmatively prevents an individual from accessing criminal court proceedings by refusing to physically transport the individual to court[105] and, moreover, refusing to permit anyone else to transport the individual.

In Massachusetts, for example, in 2017 advocates reported a series of instances in which individuals detained at the Plymouth County Correctional Facility, a detention center in Massachusetts, obtained state court writs of habeas corpus ordering that individuals be produced for in-person court hearings.[106] When officers from the sheriff's department would arrive at Plymouth to pick up the individual, however, ICE would refuse to temporarily release the individual into the sheriff's department's custody, in violation of the state court writ.[107] These were not isolated incidents.[108] At a public meeting in 2018, then-Acting Field Office Director Thomas Brophy acknowledged that ICE had developed a policy of refusing to allow individuals to attend state court proceedings after the Massachusetts high court issued a decision barring state officials from cooperating with ICE.[109] It is possible, then, that ICE's refusal was motivated by its concern that local law enforcement would not return the individual to detention after the hearing.

ICE's practice of refusing to produce an individual to criminal court and barring others from doing so affirmatively obstructs individuals from having their day in criminal court.

2. *Effective Obstruction.* — Even when ICE does not affirmatively prevent individuals from appearing in court, its policies and practices may

---

104. Oral Argument at 27:45–27:55, Rosa v. Garland, 114 F.4th 1 (1st Cir. 2024) (No. 22-1523), https://www.ca1.uscourts.gov/doar/search-results?query=22-1523 (on file with the *Columbia Law Review*). This author was counsel in this case.

105. See, e.g., Pensamiento v. McDonald, 315 F. Supp. 3d 684, 686 (D. Mass. 2018) (ordering, in habeas proceedings, ICE to transport the noncitizen from immigration detention to all future hearings for his state criminal charges because "ICE was refusing to transport [the plaintiff] to his criminal proceedings in state court"); Figueroa v. McDonald, 680 F. Supp. 3d 18, 20 (D. Mass. 2018) (same); see also Asolo v. Prim, No. 21 CV 50059, 2021 WL 3472635, at *8 (N.D. Ill. Aug. 6, 2021) (alleging in a preliminary injunction that "ICE refuses to take [the plaintiff] to his hearings" (internal quotation marks omitted) (quoting Motion for Preliminary Injunction at 9)).

106. Klein Affidavit, supra note 103, ¶ 7.

107. Id.

108. See, e.g., Garcia v. Valdez, No. EDCV 14-02533-MWF (AS), 2021 WL 3918134, at *4 (C.D. Cal. Aug. 12, 2021) (claiming that ICE "refused to allow Plaintiff to be transported from [immigration detention] to Superior Court" and that Defendants "consistently refused to allow Plaintiff to be transported" to criminal proceedings (internal quotation marks omitted) (first quoting Dkt. No. 5 at 4; then quoting Dkt. No. 28 at 4, 6)).

109. Klein Affidavit, supra note 103, ¶ 8.

effectively obstruct court access. In these cases, while ICE does not itself provide transportation, it agrees to temporarily release an individual into the custody of local law enforcement to attend a criminal court hearing so long as local law enforcement provides transportation to and from the hearing. Yet, practical barriers—many of which ICE itself manufactures—prevent local officials from being able to fill the transportation gap.

Chief amongst these barriers is ICE's practice of transferring noncitizens to detention facilities far from criminal court proceedings and often across state lines.[110] ICE cites 8 U.S.C. § 1231(g)(1) to justify its authority to transfer individuals in its custody at any time and without notice,[111] which it has increasingly exercised over time.[112] In 1999, 23% (46,914) of individuals detained were transferred at least once; by 2009, 52% (405,544) of individuals detained were transferred at least once.[113] By 2015, 60% (177,402) of adults detained were transferred between immigration detention facilities at least once.[114] Such transfers move individuals to facilities far from—and often to a different state than—their families, attorneys, evidence, and, importantly, pending criminal court proceedings. Between 1999 and 2010, ICE transferred individuals to

110. See generally Jessica Rofé, Peripheral Detention, Transfer, and Access to the Courts, 122 Mich. L. Rev. 867, 894–901 (2024) (documenting ICE's practice of transferring immigrants between detention centers and the harms immigrants face). ICE has stated that it transfers individuals due to bedspace availability, facility closures, ICE contract terminations, and medical or security reasons. See Off. of Inspector Gen., DHS, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers 2 (2009), https://tracreports.org/tracker/dynadata/2010_01/OIG_10-13_Nov09.2.pdf [https://perma.cc/33J6-M4CF] (reviewing ICE detainee transfer policies and procedures). Some, however, have posited more nefarious motivations for transferring noncitizens between immigration detention facilities, including retaliation for asserting rights and forum shopping for jurisdictions with less favorable caselaw. See, e.g., Sabrina Balgamwalla, ICE Transfers and the Detention Archipelago, 31 J.L. & Pol'y 1, 35–37 (2022) (examining ICE's policy and practice of transferring individuals and the goals of government forum shopping); Natasha Phillips, Note, Keeping Counsel: Challenging Immigration Detention Transfers as a Violation of the Right to Retained Counsel, 27 Mich. J. Race & L. 375, 380, 382 (2022) (examining, on a systemic and individual level, the considerations motivating ICE transfer decisions).

111. Scholars have argued that § 1231(g)(1) does not in fact authorize ICE to transfer individuals, but several courts have upheld ICE's practice. See, e.g., Rofé, supra note 110, at 901 & n.219 (examining ICE's justifications for transferring individuals and citing court decisions); Adrienne Pon, Note, Identifying Limits to Immigration Detention Transfers and Venue, 71 Stan. L. Rev. 747, 759–62 (2019) (arguing that § 1231(g)(1) pertains to ICE's discretion over where to construct and manage brick-and-mortar facilities, not transfers between facilities).

112. Hum. Rts. Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States 17 (2011), https://www.hrw.org/reports/us0611webwcover.pdf [https://perma.cc/T52Z-YK69].

113. Id. at 17–18 & fig. 1, tbl. 1.

114. Emily Ryo & Ian Peacock, A National Study of Immigration Detention in the United States, 92 S. Cal. L. Rev. 1, 39–40 (2018) (finding that 27% of adults released in 2015 experienced one transfer, approximately 15% experienced two transfers, and approximately 12% experienced three or more transfers).

detention facilities an average of 370 miles away.[115] In 2015, 37% of transfers occurred across state lines and 29% occurred across federal judicial circuits.[116] ICE continued to increase its practice of transferring individuals in 2025 under the second Trump Administration, with some individuals being transferred ten to twenty times, often with no notice.[117] Scholars have well documented the harms of such transfers on individuals, their families, and their access to counsel.[118] But such transfers also harm individuals in another way: When ICE transfers individuals hundreds of miles from criminal court proceedings, often across state lines, ICE erects practical barriers that make it much more difficult, if not effectively impracticable, for local authorities to transport individuals when ICE fails to do so.[119]

Consider the case of Martinez,[120] a longtime resident of the United States who was detained by ICE and had a pending charge in a Massachusetts state criminal court. ICE originally detained Martinez at the Plymouth detention center in Massachusetts but later, without explanation, transferred him hundreds of miles away to be detained at Moshannon in Pennsylvania. As a result, Martinez went from being detained approximately 73 miles from the courthouse to over 460 miles away. In an attempt to have his day in court for his scheduled criminal trial, Martinez and the state prosecutor obtained a writ from the Massachusetts state criminal court ordering ICE and the local county Sheriff's Office to facilitate the necessary arrangements to transport him. But ICE refused to transport him itself and, while it stated that it would temporarily release him into the custody of local officials, county officials

115. Hum. Rts. Watch, supra note 112, at 1, 20.

116. Ryo & Peacock, supra note 114, at 40.

117. Maanvi Singh & Will Craft, Plane to Purgatory: How Trump's Deportation Program Shuttles Immigrants Into Lawless Limbo, The Guardian (Sep. 10, 2025), https://www.theguardian.com/us-news/ng-interactive/2025/sep/10/trump-globalx-airline-deportation-immigration [https://perma.cc/RUK9-EZRQ] (explaining that in the first one hundred days of the Trump administration, immigrants were "moved between detention facilities more than before," with some being moved as many as ten or twenty times).

118. See, e.g., César Cuauhtémoc García Hernández, Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel, 21 Berkeley La Raza L.J. 17, 38–56 (2011) (arguing that ICE's widespread use of transfers violates the procedural due process rights of lawful permanent residents); Pon, supra note 111, at 762–68 (discussing the hardships of being transferred between detention centers on detained individuals, including psychological and emotional harms, interference with the right to counsel and their ability to access evidence, and changes in substantive law).

119. In addition, some states, like New Jersey, have bail reform laws that preclude state authorities from obtaining custody over certain individuals. See, e.g., N.J. Stat. Ann. §§ 2A:162-15–2A:162-26 (West 2025); see also State v. Molchor, 235 A.3d 235, 243 (N.J. Super. Ct. App. Div. 2020) (concluding that an individual may not be "detained where release conditions may be crafted to assure the defendant's appearance, but for his possible detention and removal by federal immigration officials").

120. This Article uses a pseudonym to protect the individual's privacy. Records of this individual's case are on record with the author and the *Columbia Law Review*.

were unable or unwilling to travel 460 miles across state lines to fill the transportation gap. As a result, Martinez was unable to attend his trial, and the court issued a default warrant. As a measure of last resort to get Martinez produced to court, the state prosecutor asked the district attorney's office in Pennsylvania to charge Martinez as a fugitive from justice. Eventually—after Martinez, through counsel, filed a writ of habeas corpus ad testificandum in federal district court[121]—Martinez's counsel, ICE, and local law enforcement reached an agreement for his production. Martinez was finally able to attend court nine months after his original trial date. At that hearing, he was acquitted pursuant to a joint stipulation of dismissal.

ICE's decision, then, to transfer individuals to detention facilities far from pending criminal court proceedings while abdicating any responsibility to provide transportation itself erects practical and logistical barriers that make it effectively impossible for individuals to access criminal court.

ICE could mitigate the manufactured challenges of in-person court attendance by permitting individuals to appear in criminal court by virtual means, such as Zoom.[122] In some cases, courts require virtual attendance.[123] But ICE often refuses to produce an individual to criminal proceedings virtually.[124] At Moshannon, this refusal is a matter of policy, the constitutionality of which is currently being challenged in federal district court.[125] As the *Doe v. DHS* putative class action reveals, ICE at Moshannon—which detains approximately 1,340 noncitizens,[126] many of

---

121. See infra section II.B (explaining how writs of habeas ad testificandum have been issued by federal courts to order individuals in ICE custody to be brought to state criminal court proceedings for the purpose of giving testimony).

122. It is beyond the scope of this Article whether virtual proceedings are sufficient to satisfy an individual's criminal court rights.

123. Following the COVID-19 pandemic, some state courts only operate virtually. See, e.g., Class Action Complaint for Declaratory and Injunctive Relief at 42–44, Doe v. Dep't of Homeland Sec., No. 2:24-cv-09105 (D.N.J. filed Sep. 11, 2024), Dkt. No. 1 [hereinafter *Doe v. DHS* Complaint].

124. See, e.g., Commonwealth v. Erilus, 113 N.E.3d 935, *2 (Mass. App. Ct. 2018) (unpublished table decision) ("The defendant did not appear because he was in ICE custody, and ICE refused to transport him to the hearing or to allow him to participate by videoconference."); *Doe v. DHS* Complaint, supra note 123, at 9; LSNJ FOIA Complaint, supra note 27, at 16.

125. See *Doe v. DHS* Complaint, supra note 123, at 11. The *Doe v. DHS* putative class action is a bellwether case challenging ICE's policy of refusing to produce noncitizen defendants in its custody to virtual criminal proceedings at Moshannon. While advocates report that ICE refuses to produce noncitizens to criminal proceedings virtually or in person at other detention facilities beyond Moshannon, advocates have not yet challenged ICE's practice at other facilities, likely due to resource constraints or informational barriers. In light of the preliminary injunction issued in *Doe v. DHS*, putative class actions challenging similar refusal policies at other detention centers may become more widespread.

126. Detention Facilities Average Daily Population, TRAC Immigr., https://tracreports.org/immigration/detentionstats/facilities.html [https://perma.cc/W5BL-WUFV] (last visited Aug. 11, 2025).

whom have criminal court proceedings out of state—maintains a policy that it will not produce immigrants for state criminal court proceedings virtually by tele- or videoconferencing.[127] This is so even though ICE at Moshannon *does* produce individuals to immigration court proceedings and certain family court proceedings by videoconference.[128] In accordance with this policy, ICE repeatedly refuses to honor state court writs ordering it to produce individuals for court. In one illustrative example, the court administrator for the Union City Municipal Court informed ICE that the court had issued a writ for the production of an individual in ICE's custody. ICE refused to honor the writ, stating in an email to the court administrator:

> Just to confirm, Union County will be coming to MVPC to take custody of subject and return same day?
>
> The facility does not have the staff or resources for virtual hearings at all. The writ would entail local law enforcement physically assuming custody of the subject and returning him to ICE upon completion of local charges.[129]

When informed that municipal court proceedings required virtual appearance, ICE responded that in order for an individual to attend a criminal court hearing virtually, the individual must obtain a state court writ ordering local law enforcement to pick up the individual at Moshannon, transport them to another jail from which they can attend court virtually, and then transport them back to ICE custody at Moshannon.[130] To put this policy in concrete terms, consider Martinez's case. ICE's policy would require Massachusetts state authorities to travel approximately 460 miles over seven hours to pick him up from Moshannon, transport him to another jail to use its facilities to appear virtually to the hearing, transport him back to Moshannon after the virtual hearing, and then travel the 460 miles over seven hours back to Massachusetts—all to appear for a virtual hearing using readily available technology like Zoom designed to avoid precisely these unnecessary resource expenditures. Thus, ICE's acknowledgment that its virtual production policy is "rather involved"[131] is rather an understatement.

Many state authorities, understandably, cannot and do not accommodate this policy, leaving individuals unable to attend their court proceedings physically or virtually. Indeed, ICE at Moshannon only produced eight individuals to New Jersey criminal court proceedings

127. *Doe v. DHS* Complaint, supra note 123, at 33.

128. See, e.g., id. at 40 (recognizing this policy); LSNJ FOIA Complaint, supra note 27, at exh. W (containing an email from a case manager to a detainee's attorney stating that "ICE does not permit hearings to be held via zoom unless they are family court" and that for other "outside hearing[s]" noncitizens must obtain a state court writ).

129. LSNJ FOIA Complaint, supra note 27, at exh. L.

130. Id.

131. Id.

between March 2023 and October 2024.[132] Thus, even when ICE does not affirmatively impede access to courts, its policies and practices effectively obstruct an individual's right to have their day in criminal court.

* * *

When ICE affirmatively or effectively obstructs an individual from appearing in criminal court, that individual suffers a host of harms of constitutional significance in criminal proceedings and immigration proceedings. Before examining those harms in Part III, the next Part turns to the operative question: How is such obstruction permitted to happen in immigration detention?

II. WHEN THE JAILOR AND PROSECUTOR ARE INTERJURISDICTIONAL

The obstruction of court access problem is not unique to immigration detention. For much of U.S. history, individuals and states grappled with the same conundrum in interjurisdictional criminal prosecutions—that is, when an individual in criminal custody serving a carceral sentence in one jurisdiction faced criminal prosecution in another jurisdiction. Historically, these individuals had no way of requiring their jailor to produce them in criminal court to answer charges against them. This Part examines the federalism dynamics that give rise to this lack of production in interjurisdictional contexts as a structural matter, and how the criminal custody and immigration custody contexts have—and have not—created structural accountability to protect individual rights. In so doing, this Part argues that immigration obstruction of court access can be understood as the outgrowth of what Professor Sklansky calls an "accountability deficit"—that is, "the blurred lines of responsibility between local, state, and federal authorities."[133] It begins by looking to the criminal custody context for lessons learned before turning to the immigration detention context.

A. *Criminal Custody*

An individual serving a carceral sentence in the custody of State A may need to go to court to defend against prosecution in State B. Writs of habeas corpus are the traditional way of gaining access to court from detention, but there are gaps in this mechanism because State A officials are not always required to comply with court orders from State B. Over time, the states and federal government came to recognize the problems inherent in such interjurisdictional prosecutions and accordingly established a compact—the Interstate Agreement on Detainers—to create

132. Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction at exh. 4, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD (W.D. Pa. filed Nov. 15, 2024), Dkt. No. 60-4.

133. Sklansky, supra note 28, at 217–18.

a mechanism by which individuals and prosecutors can compel custodians to make individuals available for prosecution, and jailors and prosecutors can be held accountable for failing to comply. This section first explores the federalism dynamics that create the production gap before turning to the rise and mechanics of legislated accountability.

1. *Habeas Corpus: The Federalism Problem.* — Writs of habeas corpus are a common mechanism incarcerated individuals and prosecutors use to order that an individual in custody be produced for criminal court.[134] Such writs are typically issued by the state or federal court with jurisdiction over the criminal prosecution.[135] While such writs are binding in intrajurisdictional prosecutions—that is, when an individual is detained by State A while facing prosecution by State A—problems arise when the individual is detained by one jurisdiction, federal or state, and prosecuted by another.

Beginning with federal court orders, federal courts may issue a writ of habeas ad prosequendum pursuant to 28 U.S.C. § 2241(c)(5) to order a custodian to bring an individual to court to be prosecuted.[136] As the Supreme Court held in *Carbo v. United States*, federal courts have jurisdiction to issue such writs extraterritorially.[137] In *Carbo*, for example, the U.S. District Court for the Southern District of California properly issued a writ ad prosequendum ordering the New York City prison to produce Carbo from state custody to federal criminal proceedings in California.[138] While the Supreme Court has not definitively determined whether state officials are bound to comply with federal writs ad prosequendum as a matter of law,[139] as a matter of practice, state officials

134. See Evan M. O'Roark, Note, Saying "No" After *Pleau*: Exploring the Conflict Between the Interstate Agreement on Detainers Act and the Federal Writ Ad Prosequendum, 47 Suffolk U. L. Rev. 189, 192–98 (2014) (explaining that writs of habeas corpus and the Interstate Agreement on Detainers are the mechanisms for interjurisdictional transfers for incarcerated individuals).

135. See, e.g., 28 U.S.C. § 2241 (2018) (providing that Justices of the Supreme Court or judges of federal district courts and circuit courts may issue federal writs of habeas corpus); Mass. Gen. Laws Ann. ch. 248, § 2 (West 2025) (providing that judges of the Massachusetts Supreme Judicial Court, superior courts, or district courts may issue state writs of habeas corpus).

136. 28 U.S.C. § 2241(c)(5) (authorizing federal courts to issue a writ of habeas when "[i]t is necessary to bring [an individual] into court to testify or for trial").

137. 364 U.S. 611, 612–13 (1961).

138. Id.; see also United States v. Mauro, 436 U.S. 340, 344 (1978) (describing how the U.S. District Court for the Eastern District of New York issued writs of habeas corpus ad prosequendum directing the warden of the New York state prisons where defendants were incarcerated to produce the defendants to federal district court proceedings).

139. In *Carbo*, the Supreme Court noted that because the state authorities had honored the federal writ at issue as a matter of comity, it left for another day "what would be the effect of a similar writ absent such cooperation." 364 U.S. at 621 & n.20; see also O'Roark, supra note 134, at 198–99 ("[T]he Supreme Court has never definitively answered whether a state must always comply with a federal writ ad prosequendum . . . ." (emphasis omitted)).

generally comply with federal writs out of comity.[140] State officials in *Carbo*, for example, produced Carbo pursuant to the writ.[141] The Supreme Court in *United States v. Mauro* noted that writs of habeas ad prosequendum have historically been an "efficient means of obtaining prisoners" for federal authorities.[142]

Challenges abound, however, when a state court seeks to order another jurisdiction to produce an individual in its custody.[143] In such cases, the traditional remedy of seeking a writ of habeas corpus from the state court of jurisdiction falls flat because state courts lack extraterritorial authority to bind other states or the federal government. The Supreme Court first established these precepts in *Ableman v. Booth*, in which the Court held that the Supreme Court of Wisconsin lacked authority to issue writs of habeas corpus to release Booth, a federal prisoner who was charged with aiding and abetting an alleged fugitive enslaved person to escape from federal custody under the Fugitive Slave Act.[144] The Court reasoned that states lacked judicial power to bind authorities beyond the state[145]: "[N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government,"[146] including requiring that an individual "be brought before them."[147] The Court further pointed to federal supremacy in the federal-state overlap. While the state "is sovereign within its territorial limits," when state and federal territorial authorities overlap, "many of the rights of sovereignty which the States then possessed should be ceded to the General Government."[148] The Supreme Court reaffirmed its holding fourteen years later in *Tarble's Case*, clarifying that state courts lack jurisdiction to issue a writ of habeas corpus to release any person in federal custody, whether they are "held under the authority, or claim and color of the authority, of the United States."[149]

---

140. See *Mauro*, 436 U.S. at 363 (noting the Court was "unimpressed" with the government's argument that "it would be contrary to the Supremacy Clause . . . to permit a State to refuse to obey [a federal writ of habeas corpus ad prosequendum]" and binding the United States to the Interstate Agreement on Detainers).

141. *Carbo*, 364 U.S. at 612.

142. *Mauro*, 436 U.S. at 355.

143. See Edward A. Hartnett, The Constitutional Puzzle of Habeas Corpus, 46 B.C. L. Rev. 251, 258–60 (2005) (cataloguing some of these issues).

144. 62 U.S. (21 How.) 506, 507–14 (1858). For a more thorough history of the development of this doctrine, see Richard S. Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385, 1386–88 (1964); Charles Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 354 (1930).

145. Some have questioned the Supreme Court's rationale in these cases. See, e.g., Arnold, supra note 144, at 1389 (questioning "where the Court found this absolute prohibition," as the Constitution does not confer exclusive habeas corpus jurisdiction on the federal courts).

146. *Booth*, 62 U.S. at 515–16.

147. Id. at 524.

148. Id. at 516–17.

149. 80 U.S. (13 Wall.) 397, 402, 406 (1871).

In *Ponzi v. Fessenden*, the Supreme Court confirmed that the Attorney General has the power and discretion to transfer a federal prisoner to a state court, but that any decision to do so is discretionary as a matter of comity.[150] In *Ponzi*, a Massachusetts state court issued a writ ad prosequendum ordering federal officials to transfer a federal prisoner to stand trial for state larceny charges, and federal officials opted to comply, though the Supreme Court made it clear that no express authority compelled such a transfer.[151] Thus, state courts lack authority to order other state or federal authorities to produce an individual in their custody to state criminal proceedings—they must rely on comity.[152]

2. *Legislated Accountability: Interstate Agreement on Detainers.* — As a result of these federalism dynamics, states did not have a reliable means of obtaining incarcerated individuals from other states' or federal custody for criminal prosecution.[153] Historically, states relied on formal extradition proceedings, whereby the prosecuting state had to issue an arrest warrant against the individual.[154] In some cases, states entered into special contracts with another state to govern the transfer of incarcerated individuals between the party states.[155] But these bilateral contracts were uncommon, as the effort required to establish such contracts often outweighed any benefit unless incarcerated individuals were frequently transferred between the two states.[156] States' only recourse, then, was to issue detainers notifying the custodial authority that the state requested

150. 258 U.S. 254, 262–63 (1922).

151. Id. at 261.

152. See, e.g., id. at 262–66 (noting that the Attorney General has the authority and discretion to comply with or decline state court orders in relation to the confinement of individuals incarcerated in federal prisons); see also, e.g., *Booth*, 62 U.S. at 515–16 ("And the State . . . had no more power to authorize these proceedings [including habeas corpus] of its judges and courts, than it would have had if the prisoner had been confined in . . . any other State . . . ."); Commonwealth v. McGrath, 205 N.E.2d. 710, 712 (Mass. 1965) (explaining that although the state has no right to secure the presence of a defendant in federal custody, "[o]n principles of comity . . . the Federal government may waive its right to exclusive jurisdiction . . . and consent to a trial of the defendant in our courts"); Escamilla v. Superintendent, 777 S.E.2d 864, 869 (Va. 2015) ("Habeas corpus relief under [the Virginia State] Code . . . is available only to those subject to the actual or constructive detention of the Commonwealth [of Virginia] . . . ."); 39 C.J.S. Habeas Corpus § 295, Westlaw (2025) ("The jurisdiction vested in state courts by state laws to issue writs of habeas corpus does not extend to the discharge from custody of persons held by federal officers under authority of the United States."); Note, Limitations on State Judicial Interference With Federal Activities, 51 Colum. L. Rev. 84, 87 (1951) ("[I]t is established that state courts have no jurisdiction to release on habeas corpus persons held by federal authorities under color of federal law." (footnote omitted)).

153. See S. Rep. No. 91-1356, at 2 (1970) ("In the absence of the agreement on detainers, prisoners do not have any way of initiating legal proceedings to clear detainers filed against them by authorities outside the State or other jurisdiction in which they are imprisoned.").

154. See, e.g., United States v. Mauro, 436 U.S. 340, 355 n.23 (1978).

155. See id. (describing the special contracts between states and the effort required).

156. See id.

custody of an individual and wait—often for the duration of the individual's sentence—for the custodial state to produce the individual.[157]

Recognizing the problems inherent in this system, the various states, and later the federal government,[158] entered into a formalized solution to the interjurisdictional dilemma: the Interstate Agreement on Detainers (the "Agreement").[159] The Agreement is a compact between the United States, the District of Columbia, and forty-eight states[160] that prescribes procedures to ensure that individuals criminally incarcerated in a member jurisdiction are expeditiously produced to answer criminal prosecution in another member jurisdiction.[161] The Agreement applies to cases in which, while an individual is serving "a term of imprisonment in a penal or correctional institution of a party State,"[162] another party state lodges a detainer[163] against the individual based on "any untried indictment, information, or complaint."[164] The Agreement establishes procedures for either the incarcerated individual[165] or the prosecuting state[166] to demand speedy resolution of the charges underlying a detainer. The governor of

157. See id. at 358 n.25.

158. S. Rep. No. 91-1356.

159. 18 U.S.C. app. § 2 (2018).

160. Louisiana and Mississippi are not members to the Agreement. See Interstate Agreement on Detainers, Council of St. Gov'ts, https://compacts.csg.org/compact/interstate-agreement-on-detainers/ (on file with the *Columbia Law Review*) (last visited Aug. 3, 2024).

161. While there are a number of other interstate compacts, such as the Uniform Mandatory Disposition of Detainers Act (UMDDA), which eight states have adopted, this Article focuses on the Interstate Agreement on Detainers because it is the most widely adopted and commonly used compact. See 5 Crim. Proc. § 18.4(d), Westlaw (4th ed. 2024) (explaining that the UMDDA provides that if a custodian doesn't inform an incarcerated individual of a detainer filed against them within a year, the charge will be dismissed with prejudice and provides a mechanism for an incarcerated individual to request disposition of any outstanding charge).

162. 18 U.S.C. app § 2, art. III(a).

163. A detainer "is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." United States v. Mauro, 436 U.S. 340, 359 (1978) (internal quotation marks omitted) (first quoting H.R. Rep. No. 91-1018, at 2 (1970); then quoting S. Rep. No. 91-1356, at 2). Detainers are distinct from writs of habeas ad prosequendum—the former serves as a notice to custodians and may remain pending for some time, while the latter are ordered by a court pursuant to state or federal statute and are "immediately executed." Id. at 360.

164. 18 U.S.C. app § 2, art. III(a).

165. Under the Agreement, the incarcerated individual has the right to request final disposition of all charges underlying the detainer by sending written notice to the warden or other official of the custodial facility. See id. § 2, art. III(c).

166. Under the Agreement, the state that lodged the detainer "shall be entitled to have a prisoner . . . made available" after filing a written request for temporary custody or availability to the custodial state. Id. § 2, art. IV(a).

the custodial jurisdiction maintains certain refusal rights.[167]

Critically, the Agreement establishes a system of accountability. If an individual exercises their right under the Agreement, the prosecuting jurisdiction must bring them to trial within 180 days.[168] If the prosecution requests production under the Agreement, it must commence trial within 120 days of an individual's arrival.[169] The penalty for failing to comply with these timelines is dismissal of the charges with prejudice, with limited exceptions.[170] In this way, the states created a legislative solution to the interjurisdictional problem. The Agreement establishes a structural mechanism for individuals and states to demand that an individual be produced for court,[171] and, importantly, a system of accountability whereby the prosecuting authority—not the individual stuck in custody—bears the consequences of any interjurisdictional challenges.

A review of the federal legislative history[172] reveals that protecting the integrity of the criminal process was at least one concern that motivated Congress to join the Agreement and the accountability mechanism it creates.[173] Intriguingly, while the Senate approved the Agreement with no apparent opposition in 1970,[174] it had, just the year before, rejected the

167. See id. § 2, art. IV(a) ("[T]here shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability . . . .").

168. Id. § 2, art. III(a), (c).

169. Id. § 2, art. IV(c).

170. Id. § 2, art. III(d), IV(e), V(c).

171. The federal government as a member state has delegated the authority to the Federal Bureau of Prisons (BOP) to decide upon requests by states under the Agreement. See 28 C.F.R. § 0.96(m) (2025). The BOP, in turn, has established internal procedures to effectuate the Agreement. See Fed. Bureau of Prisons, DOJ, Legal Resource Guide to the Federal Bureau of Prisons 18 (2019), https://www.bop.gov/resources/pdfs/legal_guide_march_2019.pdf [https://perma.cc/LBF4-NAXK].

172. The origins of the Agreement date back to 1948, when a group of state entities known as the Joint Committee on Detainers issued a report outlining concerns about the use of interstate detainers and guiding principles for prosecutors, prison officials, and parole authorities. United States v. Mauro, 436 U.S. 340, 349–50 & n.16 (1978).

173. Congress was also concerned that imprisoned individuals suffer worsened conditions when subject to a detainer and that unresolved detainers may disrupt an individual's rehabilitation in prison. See United States v. Reed, 620 F.2d 709, 711 (9th Cir. 1980) ("The purpose of the Interstate Agreement on Detainers Act is 'to minimize the adverse impact of a foreign prosecution on rehabilitative programs of the confining jurisdiction.'" (quoting United States v. Milhollan, 599 F.2d 518, 528 (3d Cir. 1979))); S. Rep. No. 91-1356, at 3 (1970) ("[W]hen detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing."); Janet R. Necessary, Note, The Interstate Agreement on Detainers: Defining the Federal Role, 31 Vand. L. Rev. 1017, 1021 (1978).

174. 116 Cong. Rec. 38,840–42 (1970).

Agreement when it was first introduced in the Senate.[175] What change did a year make? The legislative record specifically references a pair of Supreme Court cases that came down that year that refocused the interjurisdictional paradigm on incarcerated individuals' Sixth Amendment right to a speedy trial.[176] In *Smith v. Hooey*, the petitioner was incarcerated in a federal penitentiary in Kansas and sought repeatedly over six years to be brought to pending proceedings in Texas.[177] The Texas court denied these requests, reasoning, as courts had for many years,[178] that because the petitioner was confined in a federal prison, the state had no duty to produce him to court.[179] The Court rejected this approach, holding that, under the Sixth Amendment right to a speedy trial, a state has a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction for trial.[180] Because the prosecuting state failed to make any good faith effort, the Court remanded for further proceedings.[181] A year later in *Dickey v. Florida*, the Supreme Court took a step further and vacated a conviction after concluding that the defendant's speedy trial rights were violated when he was not produced from prison in one jurisdiction to criminal court proceedings in another jurisdiction.[182]

Thus, the criminal procedure rights of individuals detained in one jurisdiction but subject to prosecution in another jurisdiction were very much on lawmakers' minds. As Senator Roman Lee Hruska of Nebraska stated: "At the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion—another manner of stating the speedy trial guarantees of the Constitution."[183] In this way, Congress was motivated by the integrity of the criminal process in two regards: on the one hand, protecting the rights of prisoner defendants—that is, "afford defendants

175. The Agreement was first introduced in the 90th Congress, where it passed in the House but failed in the Senate. *Mauro*, 436 U.S. at 353. The Act ultimately passed both chambers a year later when it was introduced again during the 91st Congress.

176. In his remarks in support of the Agreement and the Senate Report, Senator Roman Lee Hruska discussed the Supreme Court's decisions in Smith v. Hooey, 393 U.S. 374 (1969), and Dickey v. Florida, 398 U.S. 30 (1970). See S. Rep. 91-1356 (1970); 116 Cong. Rec. 38,840 (statement of Sen. Hruska).

177. 393 U.S. at 375.

178. See, e.g., 5 Crim. Proc., supra note 161, § 18.4(a) ("For many years, it was commonly held that a person who was charged with another offense while he was serving a term of imprisonment for an earlier crime had no speedy trial right during that period of imprisonment."). Some courts concluded that speedy trial rights did not attach because a detained individual was unavailable for trial due to their own culpability. See, e.g., *Dickey*, 398 U.S. at 32–33 (explaining that the Florida court denied the habeas application because the individual's "unavailability for trial in Florida" was due to incarceration).

179. *Smith*, 393 U.S. at 377.

180. Id. at 383.

181. Id. at 382–83.

182. 398 U.S. at 37.

183. 116 Cong. Rec. 38,840 (1970) (statement of Sen. Hruska).

in criminal cases the right to a speedy trial"—and, on the other hand, protecting the rights of victims and prosecuting states—that is, "diminish the possibility of convictions being vacated or reversed because of a denial of this right."[184] The Agreement and the accountability mechanism it establishes was, as Congress recognized, a "vitally needed system"[185] to protect those interests.

It bears acknowledging, as Professor Leslie W. Abramson has pointed out, that the Agreement is an imperfect system and courts have limited its scope since its enactment.[186] The point in discussing the Agreement is not to hoist it as the ideal solution to the interjurisdictional dilemma. The point, rather, is to demonstrate that lawmakers recognized the dilemma of interjurisdictional prisoner defendants and that they sought to protect both the rights of individuals and the integrity of the criminal process by establishing a system of accountability in which the government, not the individual, bears the consequences of obstruction of court access. This recognition makes the lack of commensurate accountability safeguards in the immigration detention context all the more glaring.

B. *Immigration Custody: The Accountability Deficit*

Noncitizen defendants in ICE detention who face state charges are interjurisdictional defendants. Yet—unlike in the criminal custody context—when the custodian is ICE, there is no readily available mechanism to compel the production of a noncitizen defendant to state court, nor are there consequences to the jailor or prosecutor for failing to produce.

The same federalism dynamics that once left incarcerated individuals without an avenue from custody to court across jurisdictions still apply to noncitizen defendants in immigration detention facing state prosecution. ICE, as a federal agency, is not legally obligated to comply with state court writs.[187] Thus, when a state criminal court issues a writ ordering that an individual be produced to court, ICE may—and commonly does—affirmatitvely or effectively obstruct court access by refusing to itself produce the individual to criminal court in person or virtually, or even to temporarily release the individual into the custody of local law enforcement to transport the individual.[188] As in the criminal custody context, then, the federal–state dynamics leave state courts without

184. S. Rep. No. 91-1356, at 2 (1970).

185. 116 Cong. Rec. 38,840 (statement of Sen. Hruska).

186. See Leslie W. Abramson, The Interstate Agreement of Detainers: Narrowing Its Availability and Applications, 21 New Eng. J. on Crim. & Civ. Confinement 1, 42 (1995) (explaining that the Supreme Court and lower courts have reduced the scope of the Interstate Agreement of Detainers and recommending reforms).

187. See supra section II.A; see also Special Prosecutor of N.Y. v. U.S. Att'y for S.D.N.Y., 375 F. Supp. 797, 804 (S.D.N.Y. 1974) ("[S]tate courts possess no power to remove a person from the jurisdiction of federal courts or agencies by writ of habeas corpus.").

188. See supra section I.B.1.

authority to order that a noncitizen defendant in ICE custody be produced to court.

Federal writs of habeas corpus provide a more effective means of binding ICE, as a federal agency, to produce an individual in its custody to state or federal court. In particular, federal courts have issued writs of habeas ad prosequendum—which, as discussed above, provide temporary custody for the purpose of prosecution[189]—or writs of habeas ad testificandum—which provide temporary custody for the purpose of giving testimony[190]—to order custodians to produce an individual to state or federal court.[191] Although underutilized, federal courts have issued these so-called lesser writs to order that individuals in ICE custody be brought to state criminal court proceedings.[192] In *Pensamiento v. McDonald*, for example, a federal district judge granted a writ of habeas ordering that ICE and local authorities coordinate to transport Pensamiento from ICE detention to his Massachusetts criminal hearing after ICE repeatedly refused to transport him to court.[193] In a similar case, a federal district judge granted similar relief "on the ground that Petitioner has a due process right to be present at the state court criminal proceedings against him."[194] The lesser writs, then, present a potential pathway to ensuring that immigrants have their day in criminal court. As yet, however, immigrants in ICE custody have not widely leveraged the lesser writs. This underutilization is not surprising. Petitioning the federal courts for writs of habeas is a complex and resource-intensive process, which, for many, is

189. See supra section II.A.1.

190. See Barber v. Page, 390 U.S. 719, 724 (1968) (holding that "28 U.S.C. § 2241(c)(5) gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state prosecutorial authorities" (emphasis omitted)); 65 A.L.R. Fed. 321 Art. 6 (1983) ("28 U.S.C.[] § 2241(c)(5) . . . give[s] federal courts authority to issue writs of habeas corpus ad testificandum to enable federal prisoners to appear as witnesses at state trials.").

191. See, e.g., United States v. Poole, 531 F.3d 263, 267–68 (4th Cir. 2008) (explaining that the Maryland federal district judge issued a writ of habeas corpus ad testificandum to order the Kentucky prison warden to produce the incarcerated individual to Maryland federal district court for his hearing); United States ex rel. Quinn v. Hunter, 162 F.2d 644, 646 (7th Cir. 1947) (explaining that the Illinois district court issued a writ of habeas corpus ad testificandum ordering an individual incarcerated in Leavenworth, Kansas, to be brought to Chicago for court proceedings).

192. See, e.g., Rangolan v. County of Nassau, 370 F.3d 239, 249 (2d Cir. 2004) (explaining that the New York district court issued a writ of habeas corpus ad testificandum ordering immigration officials in York, Pennsylvania, to deliver the individual in their custody to a detention center in Brooklyn, New York, so that he could attend every day of trial); J.S.R. v. Sessions, 330 F. Supp. 3d 731, 744–45 (D. Conn. 2018) (granting a writ of habeas corpus ad testificandum for immigrant detainees in Texas to appear physically in federal court in Connecticut); Figueroa v. McDonald, 680 F. Supp. 3d 18, 21 (D. Mass. 2018) (ordering ICE to transport an immigrant "to all future hearings for the state criminal charges").

193. 315 F. Supp. 3d 684, 686–89, 694 (D. Mass. 2018).

194. Order at 1, *Figueroa*, 680 F. Supp. 3d 18 (No. 1:18-cv-10097-PBS), Dkt. No. 41.

inaccessible without an attorney.[195] Yet many individuals stuck in detention are deprived of appointed defense counsel precisely because they are unable to attend criminal proceedings, as discussed in section III.A. Federal writs, then, are no panacea to the obstruction of court access dilemma.

Federalism dynamics leave individuals stuck in ICE detention similarly unable to meaningfully compel production as those in criminal custody. Yet, unlike in the criminal custody context,[196] when ICE is the custodian, no interstate agreements apply. The Agreement applies only to individuals who are serving "a term of imprisonment in a penal or correctional institution."[197] Because immigration detention is neither a term of imprisonment nor penal, the Agreement does not apply to noncitizen defendants in immigration detention.[198] The court in *Ayala-Heredia v. Executive Office U.S. Marshals*, for example, concluded that the Agreement did not apply because Ayala-Heredia was in ICE custody at the time he sought relief under the Agreement, having already completed his prison term for unlawful reentry.[199] Noncitizen defendants stuck in immigration detention, then, are precluded from the protections of the Agreement, even though they face many of the same harms that motivated lawmakers to legislate accountability through the Agreement.[200]

---

195. For example, 28 U.S.C. § 2254(b)(1) (2018) provides that a federal court may not grant a writ of habeas unless the applicant has "exhausted the remedies available in the courts of the State" or the state lacks effective corrective process and protections.

196. See supra section II.A.

197. 18 U.S.C. app. § 2, art. III(a) (2018).

198. See United States v. Roy, 771 F.2d 54, 57–58 (2d Cir. 1985) (applying the Agreement when the defendant was awaiting trial on pending charges only because he was concurrently serving a sentence for a parole violation conviction); United States v. Reed, 620 F.2d 709, 711–12 (9th Cir. 1980) (holding that defendant was not "serving a term of imprisonment" while awaiting trial and awaiting revocation of parole arising out of an earlier charge (quoting 18 U.S.C. app. § 2, art. IV(a))); United States v. Collins, 863 F. Supp. 102, 106 (E.D.N.Y. 1994) ("[T]he weight of authority rejects the Agreement's application to [pretrial detainees]."); United States v. Evans, 423 F. Supp. 528, 531 (S.D.N.Y. 1976) (finding that defendants are unable to invoke the Agreement because its express language and purpose exclude pretrial detainees), aff'd, 556 F.2d 561 (2d Cir. 1977). Scholars estimate that in approximately 7% of Pennsylvania criminal cases in which the defendant missed at least one hearing, the defendant was in pretrial detention and not brought from jail to court, often due to miscommunication about court dates, staffing issues, and jail lockdowns. See Graef et al., supra note 25, at 22. Whether pretrial custody should be included within the Agreement is beyond the scope of this Article. Arguably, individuals in ICE detention face an even greater risk of not being produced to criminal proceedings than pretrial detainees do because, while the very purpose of pretrial detention is to ensure that defendants will be brought to trial, the purpose of immigration detention is unmoored from criminal proceedings and is instead designed to ensure that defendants are present for immigration proceedings. Thus, ICE, as a custodian, has no mission mandate to bring the individual to criminal court.

199. No. 11-CV-1072 (RPM)(LB), 2011 WL 3348226, at *3 n.5 (E.D.N.Y. Aug. 2, 2011).

200. See supra section II.A.2; infra Part III.

Therein lies the accountability deficit: When ICE, the jailor, claims that the responsibility of transportation lies with the prosecuting authorities, and the prosecuting authorities claim the converse,[201] the end result is that the noncitizen defendant remains stuck in detention and obstructed from their day in criminal court. As we have seen in the criminal custody context, this deficit can be mitigated through establishing accountability: The government bears the consequences for failing to produce through dismissal of the charges with prejudice. Yet immigration detention lacks legislated accountability, and thus it is the noncitizen defendant—not the jailor or prosecutor—that suffers the consequences. Absent accountability, any existing mechanisms to seek production in criminal court are mere "empty rituals."[202]

III. THE ACCOUNTABILITY IMPERATIVE AT THE CRIMINAL–IMMIGRATION INTERSECTION

While the federalism dynamics underlying obstruction of court access are not unique to the criminal–immigration custody context, the lack of structural accountability and attendant consequences very much are. Individuals stuck in immigration detention suffer consequences both as criminal defendants and as immigrants.

This Part examines the harms of obstruction of court access and posits three interrelated implications that give rise to the accountability imperative. The first is that noncitizen defendants unable to appear in criminal court proceedings suffer criminal law harms. Specifically, it argues that the inability to appear in criminal court is an obstruction of criminal proceedings that, in turn, subverts criminal constitutional due process. The second implication is that because of adjudicatory norms in immigration proceedings, criminal law obstruction harms noncitizen defendants in immigration proceedings—namely, by detaining and deporting them—which in turn perpetuates criminal obstruction in a cycle. Adjudicatory norms in the immigration legal system, then, drive cyclical obstruction with both criminal and immigration ramifications. Finally, the institutional design of the immigration apparatus prevents individuals from having a meaningful opportunity to be heard in immigration court. By institutional design concerns, this Article means the lack of meaningful checks and balances that occur, first, when the jailor—who controls whether a noncitizen defendant may appear in criminal court—is also the immigration prosecutor that uses the unresolved charge against that noncitizen defendant in immigration proceedings; and second, when the judge who considers this evidence is governed by the same executive branch. Part III takes each in turn.

---

201. See Klein Affidavit, supra note 103, ¶ 16.

202. See Tiffany J. Lieu, Effectively Irrebuttable Presumptions: Empty Rituals and Due Process in Immigration Proceedings, 92 Geo. Wash. L. Rev. 580, 612–14 (2024).

A. *Criminal Procedure Jeopardy*

As the Supreme Court recognized in *Gideon v. Wainwright*, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[203] These safeguards include the Fifth Amendment rights to due process and access to the courts and the Sixth Amendment rights to representation by counsel, confront adverse witnesses, and compulsory process. The Supreme Court has long held that these safeguards apply to all individuals in criminal proceedings—regardless of their citizenship status.[204] Thus, while an individual standing as an immigrant may not be entitled to criminal safeguards in immigration removal proceedings,[205] they are uncontrovertibly entitled to those safeguards when they stand as a defendant in criminal proceedings. Yet, when ICE prevents a noncitizen defendant from appearing in criminal court, it jeopardizes these rights. This section explores the constitutional implications of obstruction of court access. The intent is not to provide a comprehensive analysis or exhaustive list of all rights that may be violated or to prove definitively that these criminal procedure rights are necessarily violated in all obstruction of court access cases. Rather, the purpose is to demonstrate the ways obstruction of court access quite literally obstructs criminal *proceedings*, which in turn subverts the constitutional rights to criminal *process*.

We begin by considering the right of an "accused . . . to have the Assistance of Counsel for his defense."[206] The Supreme Court has long recognized that "in our adversary system of criminal justice, any person

203. 372 U.S. 335, 344 (1963).

204. See, e.g., Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (explaining that noncitizen defendants in criminal proceedings are entitled to constitutional criminal procedural safeguards); see also Jennifer M. Chacón, A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 Duke L.J., 1563, 1603–04 (2010) [hereinafter Chacón, Diversion of Attention] (explaining that, in criminal proceedings, citizen and noncitizen defendants alike are entitled to the same constitutional criminal procedure protections under the Fourth, Fifth, Sixth, and Eighth Amendments).

205. Abel v. United States, 362 U.S. 217, 237 (1960) (explaining that deportation proceedings "are not subject to the constitutional safeguards for criminal prosecutions"). Scholars have persuasively argued that safeguards in criminal proceedings should apply in immigration proceedings. See, e.g., Chacón, Diversion of Attention, supra note 204, at 1624–27 (proposing the application of the Fourth Amendment exclusionary rule to removal proceedings); Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply, 52 Admin. L. Rev. 305, 307–13 (2000) (summarizing arguments that the Ex Post Facto Clause and the Sixth Amendment's right to counsel should apply in deportation proceedings); Michael J. Wishnie, Immigration Law and the Proportionality Requirement, 2 U.C. Irvine L. Rev. 415, 417–18 (2012) (arguing that removal "is sufficiently punitive to trigger constitutional proportionality review" pursuant to the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause).

206. U.S. Const. amend. VI.

haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[207] The Court has also long recognized that the right to be represented by counsel is "by far the most pervasive" right that an accused person has "for it affects his ability to assert any other rights he may have."[208] The right to appointed counsel, in other words, is a "necessit[y]"[209] both because it ensures a fair trial and because it has cascading impact on the ability to meaningfully access other safeguards.

But for many noncitizen defendants stuck in immigration detention, obstruction of court access obstructs their ability to obtain and maintain appointed public defense counsel.[210] Court procedures for appointing counsel in New Jersey and Massachusetts illustrate the mechanisms of this obstruction. In New Jersey, public defense counsel is typically appointed for indigent individuals at their first appearance before the state court.[211] When an individual cannot appear for the initial court proceeding, they cannot request appointment of or demonstrate their eligibility for a public defender.[212] Having missed this critical juncture, an individual must successfully navigate a complex process to get an appointed public defender, including completing a specific online form and advocating for timely appointment of counsel with numerous offices.[213] The court in *Doe*

---

207. *Gideon*, 372 U.S. at 344.

208. United States v. Cronic, 466 U.S. 648, 654 (1984) (internal quotation marks omitted) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

209. *Gideon*, 372 U.S. at 344.

210. The Sixth Amendment right to counsel attaches at the initial appearance. Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (holding that the right to counsel attaches at "the initiation of adversary judicial criminal proceedings"). Once the right attaches, a defendant is entitled "to counsel at all critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80–81 (2004) (citing Maine v. Moulton, 474 U.S. 159, 170 (1985); United States v. Wade, 388 U.S. 218, 224 (1967)). A proceeding constitutes a critical stage when "potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Wade*, 388 U.S. at 227; see also *Moulton*, 474 U.S. at 170 ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.").

211. See N.J. R. Crim. P. 3:4-2(d)(3)–(5) (providing that, at an indigent defendant's initial appearance before the court, the judge must inform the defendant of their right to appointed counsel, ask if they want counsel, and provide them with "an application for public defender services . . . [to] complete and submit . . . for immediate processing"); *Doe v. DHS* Complaint, supra note 123, at 67.

212. *Doe v. DHS* Complaint, supra note 123, at 67; Declaration of M.F. ¶¶ 6–7, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-5 (on file with the *Columbia Law Review*) ("[T]he municipal court would not appoint a public defender to represent me without a court appearance."); Declaration of Isabela Doe ¶ 19, *Doe*, No. 3:24-cv-00259, Dkt. No. 31-1 (on file with the *Columbia Law Review*) ("Because I have not been able to go to Court, I have not been assigned with a public defender to help me in that case. I do not know how to fix this without going to court.").

213. *Doe v. DHS* Complaint, supra note 123, at 67.

v. DHS thus opined that the right to counsel is "one of many rights subverted when a detainee is denied an appearance in court."[214]

Even if an individual is able to obtain appointed counsel, they may not be able to retain said counsel due to procedural barriers. In Massachusetts, a court may designate a case as defaulted when an individual fails to appear in court—a designation that may remove appointed counsel from the case.[215] In both states, it is a complex process to request that public defense counsel be appointed—one that many require an attorney to navigate. As one individual aptly put it: "You should not need a lawyer in order to get a public defender appointed to help you in a criminal case."[216] By obstructing a noncitizen defendant's ability to appear in court, immigration failure of production subverts the foundational right to counsel.[217]

Bench warrants, a common collateral consequence of failing to appear, illustrate the harms of being deprived counsel. These warrants instruct law enforcement to arrest an individual for failing to appear in court,[218] often without asking why the individual is not present.[219] The consequences are steep. Even if an individual is able to secure release from immigration detention, an outstanding bench warrant means that state law enforcement may apprehend and redetain them—this time in another

---

214. Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD, 2025 WL 360534, at *5 n.6 (W.D. Pa. Jan. 31, 2025).

215. See Interview with Eleni Bakst, Clinical Instructor, Harvard Immigr. & Refugee Clinical Program (Jan. 2025) (on file with the *Columbia Law Review*).

216. Declaration of V.A.C. ¶ 29, *Doe*, No. 3:24-cv-00259, Dkt. No. 31-6 (on file with the *Columbia Law Review*); see also Declaration of I.H.B. ¶ 4, *Doe*, No. 3:24-cv-00259, Dkt. No. 31-9 (on file with the *Columbia Law Review*) [hereinafter I.H.B. Declaration] ("I had a public defender only because lawyers at the Legal Services of New Jersey . . . helped me get assigned one—I could not figure out how to get one appointed on my own while I was detained at Moshannon.").

217. As examined in section III.B, infra, ICE's failure to produce individuals to criminal proceedings may result in deportation. Numerous state and federal courts have held that such removal may violate an individual's Sixth Amendment right to counsel if it interferes with their ability to communicate with counsel, review evidence, and effectively prepare a defense to the charge. See, e.g., United States v. Castillo, 537 F. Supp. 3d 120, 128 (D. Mass. 2021) (finding that an individual's Sixth Amendment right to counsel was violated because his deportation interfered with the ability to consult with counsel and prepare a defense); United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *5 (D. Ariz. May 11, 2020) (same); United States v. Resendiz-Guevara, 145 F. Supp. 3d 1128, 1138 (M.D. Fla. 2015) (same).

218. See Bench Warrant, Black's Law Dictionary (12th ed. 2024) ("A writ issued directly by a judge to a law-enforcement officer, esp. for the arrest of a person who has been held in contempt, has been indicted, has disobeyed a subpoena, or has failed to appear for a hearing or trial.").

219. See Nirej Sekhon, Dangerous Warrants, 93 Wash. L. Rev. 967, 985–87 (2018) (explaining that bench warrants "tend to be issued in rote fashion," without judges inquiring why the defendant is not present).

entity's custody—through no fault of their own.[220] As one individual who was scheduled to be released from detention because he was granted immigration relief put it: "The bench warrant has brought me a lot of worry that I will be released from Moshannon just to be arrested again and not be able to be liberated until this case is resolved."[221] When a noncitizen defendant who is stuck in detention is represented by counsel who can explain their absence in court, the judge is less likely to issue a bench warrant.[222]

As to the proceedings themselves, because a defendant has a constitutional right to be present,[223] judges most often continue proceedings to a future date or until the individual is able to appear.[224] But as a practical matter, an immigrant defendant suffers long delays before they are able to have their day in court, if ever they have their day in court.[225] Judges often have to reset hearings many times over many months—during which the individual remains detained.[226] In some cases, individuals are deported without ever having the opportunity to appear in court.[227]

When adjudication of a criminal charge is delayed for months or years, that delay may run afoul of the constitutional[228] and statutory[229] right

---

220. Bench warrants may also pose barriers to accessing employment and public benefits or services and may make defendants less likely to seek medical aid or report victimization. Gouldin, supra note 24, at 1083.

221. See I.H.B. Declaration, supra note 216, ¶ 11.

222. Sekhon, supra note 219, at 986.

223. See, e.g., United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam) (explaining that a defendant has a constitutional right to presence, rooted in the Sixth Amendment's Confrontation Clause and the Due Process Clause, "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge" (internal quotation marks omitted) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105–06, 108 (1934))).

224. See Graef et al., supra note 25, at 5 (explaining that cases cannot proceed when essential witnesses fail to appear and, hence, judges typically continue or dismiss the case).

225. See, e.g., United States v. Lutz, No. CR-19-00692-001-TUC-RM (BGM), 2019 WL 5892827, at *1 (D. Ariz. Nov. 12, 2019) (explaining that ICE detention caused Lutz to miss two preliminary hearings after a federal judge granted him conditional pretrial release); Valadez-Lopez v. Chertoff, No. C-05-04192 RMW, 2007 WL 2070215, at *2 (N.D. Cal. July 16, 2007) (explaining that ICE prevented the individual from attending at least five scheduled hearings in state criminal court).

226. See, e.g., *Lutz*, 2019 WL 5892827, at *1.

227. See, e.g., infra section III.B.

228. U.S. Const. amend. VI. In *Barker v. Wingo*, the Supreme Court established a four-factor balancing test for speedy trial violations: the length of delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and the presence of any prejudice to the defendant resulting from the delay. 407 U.S. 514, 530 (1972). Immigration obstruction of court access and the accountability deficit pose a particular constitutional dilemma under the reason for delay and prejudice factors.

229. Congress and nearly all states have also enacted legislation to implement the constitutional right. See Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2018); 5 Crim. Proc., supra note 161, § 18.3(c) (discussing state laws safeguarding the right to speedy trial);

to a speedy trial. As the Supreme Court emphasized in *Klopfer v. North Carolina*, when it incorporated the speedy trial protections of the Sixth Amendment against the states, the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment."[230] Two years after *Klopfer*, the Court further elaborated in *Smith v. Hooey* that speedy trial protections "prevent undue and oppressive incarceration prior to trial," "minimize anxiety and concern accompanying public accusation," and "limit the possibilities that long delay will impair the ability of an accused to defend himself."[231] The Court recognized that "[t]hese demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction"[232]—including immigrants in immigration detention. Indeed, *Smith* and these constitutional speedy trial concerns were part of the congressional impetus for legislating accountability through the Agreement.[233]

In some cases, judges proceed with a hearing without the individual or their counsel, if any, present. Consider the case of Geovanna, a survivor of domestic violence, whom police arrested and charged after an instance of abuse.[234] From the moment ICE detained her, the courthouse doors were closed. Geovanna was not appointed defense counsel and missed multiple criminal court hearings even though she repeatedly requested that ICE produce her virtually.[235] In the end, the judge dismissed the charges against her after her partner informed the court he no longer wished to pursue the charges at a hearing at which Geovanna was not present.[236] While the outcome was favorable, it occurred only after Geovanna suffered months in immigration detention and without her ever having the ability to have her day in court.[237] Instead, Geovanna was left to "rely on [her] partner, the person who hurt [her] and who had brought the charges against [her], to explain what was happening in the Court."[238] When an individual like Geovanna is unable to confront witnesses who

---

Marc I. Steinberg, Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974, 66 J. Crim. L. & Criminology 229, 229 (1975) (explaining that Congress enacted the Speedy Trial Act of 1974 "[i]n order to more effectively implement the interests of both society and the accused").

230. 386 U.S. 213, 223 (1967).

231. 393 U.S. 374, 377–78 (1969) (internal quotation marks omitted) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

232. Id.; see also id. at 379–80 (opining that the harm of long delays on an individual's ability to defend themselves are "*markedly increased* when the accused is incarcerated in another jurisdiction" (emphasis added)).

233. See supra section II.A.2.

234. Geovanna is a pseudonym used to protect the declarant's privacy. See Declaration of G. ¶¶ 5–13, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-10 (on file with the *Columbia Law Review*).

235. Id.

236. Id.

237. Id.

238. Id. ¶ 11.

appear in court or testify on their own behalf, their Sixth Amendment rights to confrontation[239] and compulsory process,[240] as well as the related right to be present,[241] may be jeopardized.

More generally, when an individual is obstructed from court proceedings, that obstruction subverts the Supreme Court's recognition in *Bounds v. Smith* that it is "established beyond doubt that [individuals] have a constitutional right of access to the courts."[242] That access must be "adequate, effective, and meaningful."[243] Indeed, lower courts have raised

239. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). The Supreme Court has recognized that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Violation of the confrontation right is subject to harmless-error analysis. Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988).

240. A defendant's right to compulsory process is violated if they were deprived of the opportunity to present evidence in their favor, the excluded testimony would have been material and favorable to their defense, and the deprivation was arbitrary and disproportionate to any legitimate evidentiary or procedural purpose. Rock v. Arkansas, 483 U.S. 44, 55–56 (1987).

241. See Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (describing a defendant's right to face their accusers).

242. 430 U.S. 817, 821 (1977). For a survey of the development of the access to the courts doctrine in the Supreme Court, see Alexander Linden, Note, The Library Is Closed: Disagreement Over a Prisoner's Right to Access the Courts, 104 B.U. L. Rev. 989, 997–1005 (2024).

243. *Bounds*, 430 U.S. at 822. The Supreme Court has held that access to the courts requires that an individual have access to an adequate law library, id.; assistance from nonlawyers like law students, Procunier v. Martinez, 416 U.S. 396, 421–22 (1974); free access to hearing transcripts to facilitate "adequate and effective appellate review," Griffin v. Illinois, 351 U.S. 12, 20 (1956) (plurality opinion); and adequate materials to file legal documents such as paper, pen, notarial services, and stamps, *Bounds*, 430 U.S. at 824–25. While *Bounds* and its progeny are commonly invoked to vindicate these tools to assist an individual in accessing the courts, the right certainly encompasses the predicate, basic proposition that meaningful access to the courts requires just that: access to attend court proceedings. See, e.g., id. at 830 (explaining that "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts" and that nothing "foreclose[s] alternative means to achieve that goal"); Drew A. Swank, In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation, 54 Am. U. L. Rev. 1537, 1563 (2005) ("The Constitution requires that all individuals, whether represented or not, have more than mere physical access to the courts; the access must be adequate, effective, and meaningful."); Linden, supra note 242, at 1000–01 ("[T]he constitutional right is access to the courts, not access to a law library."). In *Lewis v. Casey*, the Supreme Court clarified that this right is violated if an individual suffers an actual injury—that is, if the challenged conduct "hindered his efforts to pursue a legal claim." 518 U.S. 343, 351 (1996) (providing as examples of actual injury an instance in which an individual prepares a complaint that is dismissed due to a defect that could have been avoided with legal assistance and an individual who is unable to put together a complaint at all because the law library was inadequate); see also Christopher v. Harbury, 536 U.S. 403, 413–14 (2002) (identifying two categories of court access claims—ones in which official action frustrates a plaintiff's ability to prepare and file future litigation and ones that look backward to a poor outcome in a case or a case that "could not have commenced"). Critics have argued that *Lewis*'s actual injury requirement poses too high a

constitutional concerns under *Bounds* when defendants are not brought to court. The Seventh Circuit's decision in *May v. Sheahan*[244] is illustrative. There, May was arrested for possession of a controlled substance and, unable to post bond, was held in the county jail and later the county hospital.[245] At issue was whether the Sheriff's Department's policy of refusing to produce hospital detainees to assigned court dates in person or virtually violated May's constitutional right of access to the courts.[246] The Seventh Circuit held that May had sufficiently stated an access-to-the-courts claim because the policy prevented him from attending court, which delayed the final disposition of his case, prolonged his detention, prevented him from requesting a lower bond, and impeded access to his attorney.[247] In so holding, the court reasoned that "[a] policy both preventing detainees from going to court and limiting drastically their access to attorneys has obvious problems under these precedents."[248] It is precisely these "obvious problems" that are at stake in obstruction of court access.[249]

Thus, obstruction of court access fueled by the accountability deficit quite literally obstructs criminal proceedings, with constitutional significance to criminal justice.

B. *Crimmigration Cyclical Obstruction*

Obstruction of court access harms noncitizen defendants in immigration proceedings as well. When individuals are obstructed from criminal proceedings and cannot resolve criminal charges against them, those unresolved charges may be used against them in immigration proceedings to deny release from detention on bond, thereby prolonging detention, and to deny immigration relief, thereby leading to deport-

---

barrier to bringing access to the courts claims. See, e.g., Joseph L. Gerken, Does *Lewis v. Casey* Spell the End to Court-Ordered Improvement of Prison Law Libraries?, 95 L. Libr. J. 491, 504 (2003) ("[I]t will be virtually impossible to identify plaintiffs in sufficient numbers to support a claim for systemic relief, even where a prison's law library or advocacy services are abysmal."); see also Walters v. Edgar, 163 F.3d 430, 436 (7th Cir. 1998) (noting "the paradox that ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim").

244. 226 F.3d 876 (7th Cir. 2000).

245. Id. at 878.

246. Id. at 878–79 (describing May's constitutional claim against the Sheriff's Department for its policies regarding hospitalized detainees).

247. See id. at 883.

248. Id.

249. See Doe v. U.S. Immigr. & Customs Enf't, 490 F. Supp. 3d 672, 694 (S.D.N.Y. 2020) (concluding that ICE's practice of arresting individuals in and around courthouses was constitutionally suspect because such arrests "created an 'atmosphere of fear' so significant that it deters [individuals] . . . from bringing meritorious suits," which was the "functional equivalent of denial of access" (internal quotation marks omitted) (first quoting Complaint ¶¶ 3–6, 58, 60, 62, 69, 77–78, 83–84, 87, 96–98; then quoting Monsky v. Moraghan, 127 F.3d 243, 247 (2d Cir. 1997))).

ation.[250] These dual consequences—detention and deportation—in and of themselves exact grave humanitarian harms.[251] While the Supreme Court has noted that immigration detention is civil in nature,[252] the consequences and harms of detention on those detained are severe.[253] Similarly, the Supreme Court "ha[s] long recognized that deportation is a particularly severe 'penalty'" that is the "equivalent of banishment or exile."[254] But the collateral impact of these harms is not isolated to immigration; rather, continued detention and deportation loop back to perpetuate obstruction of the criminal process. Another implication of obstruction of court access, then, is that adjudication norms in immigration proceedings regarding detention and deportation fuel cyclical obstruction of criminal and immigration processes and rights.[255]

---

250. See, e.g., Guerra, 24 I. & N. Dec. 37, 41 (B.I.A. 2006) ("For purposes of determining bond during the pendency of removal proceedings, [respondent's criminal charges were] sufficient for the Immigration Judge to conclude that the respondent poses a risk to others, even in the absence of a conviction."); Thomas, 21 I. & N. Dec. 20, 20 (B.I.A. 1995) ("In determining whether an application for relief is merited as a matter of discretion, evidence of unfavorable conduct, including criminal conduct which has not culminated in a final conviction . . . may be considered.").

251. See, e.g., Physicians for Hum. Rts., Harvard Immigr. & Refugee Clinical Program & Peeler Immigr. Lab, "Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention 1–2, 8 (2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf [https://perma.cc/J78W-9WKG] ("ICE's failure to adhere to domestic and international law and its own guidelines has created dangerous conditions in detention centers . . . ." (emphasis omitted)).

252. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (describing the civil nature of the detention proceedings in the case); Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . .").

253. Individuals in immigration detention suffer conditions akin to those in carceral detention, including solitary confinement, inadequate access to medical care, and lack of access to counsel, among others. See, e.g., Physicians for Hum. Rts. et al., supra note 251, at 1–2, 8; Letter from Immigrants' Rts. Advocs. to Andrea Campbell, Mass. Att'y Gen., 6–7 (Aug. 8, 2024), https://harvardimmigrationclinic.org/files/2024/08/MA-AG-Complaint-Summer-2024_FINAL.pdf [https://perma.cc/6DLK-R3XK] (providing information on civil rights violations experienced by immigrant individuals detained at Plymouth County Correctional Facility).

254. Padilla v. Kentucky, 559 U.S. 356, 365, 373 (2010) (internal quotation marks omitted) (first quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893); then quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)); see also Sabrineh Ardalan, Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation, 48 U. Mich. J.L. Reform 1001, 1004 (2015) (explaining that individuals who are deported are separated from their families and forced to return to a country where they may fear persecution or death).

255. Obstruction of court access also impedes an individual's ability to seek post-conviction relief, which in turn impedes their ability to challenge deportation orders based on wrongful convictions or sentences. See, e.g., Baptista v. Lyons, 440 F. Supp. 3d 42, 45–46 (D. Mass. 2020) (noting that the district judge granted habeas relief in a case in which a noncitizen challenged the state court convictions underlying his immigration order of removal, but ICE failed to transport him to the post-conviction relief proceedings). While

First, immigration judges may consider unresolved charges in determining whether an individual merits release from immigration detention on bond.[256] Individuals subject to discretionary detention may request that an immigration judge review ICE's custody determination at a bond hearing.[257] An individual may be released on bond if an immigration judge determines that the individual is neither a danger to the community nor likely to abscond[258] and the immigration judge exercises discretion to grant bond.[259] In *Guerra*, the BIA determined that, in reaching these determinations, immigration judges may consider an individual's criminal record, including open charges that have not resulted in a conviction.[260] Scholars have documented that immigration judges regularly consider so-called criminal law outputs short of conviction, such as police reports, in determining whether an individual may be released on bond.[261]

Thus, when an individual stuck in detention is unable to appear in court to resolve the charges against them, that unresolved charge may be used against them to perpetuate the very detention that obstructed criminal court access in the first place. The proceedings in *Velasco Lopez v.*

---

the impact of post-conviction relief on removal proceedings is beyond the scope of this Article, one example illustrates the harms of immigration obstruction of court access in the post-conviction relief context. In *Baptista*, a legal permanent resident in immigration detention was ordered deported based on a state conviction. Id. He sought a new trial in post-conviction relief, and the state court issued a writ of habeas corpus ordering that he be brought to court so that he could be heard on his motion for post-conviction relief. Id. ICE failed to produce him for several hearings. Id. When ICE did finally produce him to his criminal proceedings, he successfully vacated the state conviction. Id. As a result, he was able to reopen and terminate his immigration proceedings and was released from immigration custody. Id.

256. See, e.g., Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (finding no error in the immigration judge's consideration of documented criminal activity absent conviction).

257. 8 C.F.R. § 1003.19 (2025).

258. Id. § 1003.19(h)(3). Generally, the individual seeking bond bears the burden of proof, though the First Circuit has shifted the burden to the government. See Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021) (holding on due process grounds that the government bears the burden of proof to show an individual subject to detention poses danger to the community or flight risk); Mary Holper, The Beast of Burden in Immigration Bond Hearings, 67 Case W. Rsrv. L. Rev. 75, 80 (2016) (arguing that the government should bear the burden of proof in bond hearings by clear and convincing evidence).

259. See, e.g., Stacy L. Brustin, A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings, 88 Brook. L. Rev. 163, 166 (2022) ("Under the current statutory framework, an [immigration judge] has broad discretion to decide whether to overturn ICE's denial of bond, release on recognizance, or change the bond amount set by ICE.").

260. *Guerra*, 24 I. & N. Dec. at 40.

261. See Mary Holper, Confronting Cops in Immigration Court, 23 Wm. & Mary Bill Rts. J. 675, 677–78 (2015) (noting that an immigration judge may use police reports to decide whether to release a noncitizen detainee on bond); Sarah Vendzules, Guilty After Proven Innocent: Hidden Factfinding in Immigration Decision-Making, 112 Calif. L. Rev. 697, 708–20 (2024) (explaining that immigration adjudicators often consider criminal law outputs other than a conviction in reaching discretionary determinations).

Decker are illustrative.[262] At the time ICE discretionarily detained Velasco Lopez and placed him in removal proceedings, he faced two pending criminal proceedings in New York state courts.[263] For three and a half months, ICE repeatedly refused to produce Velasco Lopez to criminal court hearings relating to the two proceedings, resulting in a bench warrant for his arrest.[264] Meanwhile, in his immigration proceedings, Velasco Lopez sought release on bond but the immigration judge denied release "in part due to the outstanding charges."[265] Four days later, ICE finally produced Velasco Lopez to a criminal court hearing in one proceeding, and the charges were dismissed.[266] ICE, however, continued to obstruct his ability to attend hearings in the remaining criminal proceedings.[267] When Velasco Lopez sought release from immigration detention a second time four months later, the immigration judge again denied bond, this time based solely on the remaining proceedings.[268] But as the Second Circuit noted, "[T]hat case had not progressed as a result of Velasco Lopez's incarceration, and he had not yet been able to answer the charges."[269] Velasco Lopez was eventually released from detention only after he filed a writ of habeas corpus in federal district court and a federal judge concluded that his prolonged detention was unconstitutional.[270] By that point, he had been detained for fourteen months.[271]

As Velasco Lopez's case illustrates, a noncitizen defendant who suffers obstruction of court access because of immigration detention may be forced to remain in immigration detention precisely *because* of that detention. In some cases, immigration judges have explicitly instructed individuals not to apply for bond until they resolve the pending charge.[272] As one individual detained at Moshannon put it: "People here cannot get bond because they cannot close the criminal case. They cannot close the criminal case because they are stuck at Moshannon and unable to go to court. They cannot get out of Moshannon because they cannot get bond."[273] Consideration of pending charges, then, fuels the cycle of obstruction.

262. 978 F.3d 842 (2d Cir. 2020).

263. Id. at 847–48.

264. Id.

265. Id.

266. Id.

267. Id.

268. Id.

269. Id.

270. Id.

271. Id.

272. See, e.g., Declaration of C.J.W. ¶ 19, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-3 (on file with the *Columbia Law Review*).

273. Declaration of A.M. ¶ 12, *Doe,* No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-8 (on file with the *Columbia Law Review*).

Second, immigration judges may also consider pending charges to deny forms of relief from removal, resulting in the "ultimate irreparable harm—deportation."[274] Immigrants who are deemed to be removable from the United States may seek relief from removal through various forms, such as asylum,[275] cancellation of removal,[276] and adjustment of status.[277] Nearly all forms of relief from removal are discretionary.[278] This means that to be granted relief, an individual must demonstrate to an immigration judge that they meet all of the statutory eligibility requirements, and that they warrant a favorable exercise of discretion. For example, to be eligible for adjustment of status to legal permanent resident, the Immigration and Nationality Act (INA) requires that the applicant (1) was inspected and admitted or paroled upon entry to the United States; (2) has an immigrant visa immediately available to them; (3) is not subject to any enumerated bars under INA section 245(c); and (4) is admissible, meaning they have not been convicted of any offenses or engaged in any other conduct that would render them inadmissible under INA section 212(a).[279] In addition to meeting these statutory requirements, an individual must persuade the immigration judge that they warrant a favorable exercise of discretion.[280] As a result, an individual who is statutorily eligible for relief may nonetheless be denied relief as a matter of discretion—a phenomenon that Professor Shoba Sivaprasad Wadhia aptly characterizes as "Darkside Discretion."[281]

Unresolved criminal proceedings may be considered in these discretionary determinations. In *Thomas*, the BIA held that immigration judges may consider criminal conduct that has not culminated in a final conviction in determining whether an individual warrants discretionary relief.[282] It bears noting that several weeks later in *Arreguin de Rodriguez*,[283] the BIA imposed some narrow restrictions on consideration of such evidence. In *Arreguin de Rodriguez*, the BIA clarifies that while immigration

274. De Jesus Martinez v. Nielsen, 341 F. Supp. 3d 400, 409 (D.N.J. 2018).

275. 8 U.S.C. § 1158(b)(1)(A) (2018).

276. Id. § 1229b.

277. Id. § 1255(a).

278. See, e.g., id. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General may grant asylum . . . ."); id. § 1229b ("The Attorney General may cancel removal . . . ."); id. § 1255(a) ("The status of [a noncitizen] . . . may be adjusted by the Attorney General, in his discretion . . . .").

279. Id. § 1255; see also Veronica Garcia, Immigrant Legal Res. Ctr., Adjustment of Status Eligibility 2 (2024), https://www.ilrc.org/sites/default/files/2024-10/Family-Based%20Adjustment%20of%20Status%20Options.pdf [https://perma.cc/39SY-E5KB].

280. 8 U.S.C. § 1255(a).

281. Shoba Sivaprasad Wadhia, Darkside Discretion in Immigration Cases, 72 Admin. L. Rev. 367, 369–70 (2020) (proposing that Congress eliminate discretion in immigration adjudication or create a rebuttable presumption in favor of noncitizens who have met the statutory criteria for relief).

282. Thomas, 21 I. & N. Dec. 20, 23 (B.I.A. 1995).

283. Arreguin de Rodriguez, 21 I. & N. Dec. 38 (B.I.A. 1995).

judges may consider nonfinal criminal interactions, immigration judges may not give *substantial weight* to *uncorroborated* police reports and charges.[284] Outside of the narrow *Arreguin de Rodriguez* exception, however, immigration adjudicators can, and regularly do, consider pending charges to deny relief.[285] Discretionary denials of relief are difficult to challenge because of jurisdictional hurdles.[286] As a result, an individual who is statutorily eligible for relief may be denied relief and deported based at least in part on a pending charge.

Revisiting Ramirez's case is illustrative both of how unresolved criminal proceedings may be used to deport an individual and the ways such deportation fuels the cycle of obstruction.[287] Ramirez was statutorily eligible for adjustment of status to legal permanent resident after his mother naturalized, but the immigration judge denied him relief as a matter of discretion based solely on a pending criminal indictment and associated police report.[288] That pending indictment, however, had languished in criminal court for over two years without resolution because ICE detained Ramirez in immigration detention and repeatedly refused to comply with state writs ordering that he be produced to attend criminal proceedings.[289] ICE subsequently deported Ramirez while he sought review of that denial before the First Circuit.[290] More than a year after Ramirez was deported, the First Circuit held that the immigration agency had erred in denying him relief based solely on the pending indictment and remanded the case to the agency to reconsider his application for relief.[291] Moreover, the criminal court eventually dismissed the sole charge

---

284. Id. at 42 ("Just as we will not go behind a record of conviction to determine the guilt or innocence of [a noncitizen], so we are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein."). Numerous circuits have confirmed that *Arreguin de Rodriguez* prohibits immigration judges from giving substantial weight to an uncorroborated police report or charge. See Rosa v. Garland, 114 F.4th 1, 16–22 (1st Cir. 2024) (listing cases).

285. See *Rosa*, 114 F.4th at 16–22 (explaining that the immigration judge and BIA denied discretionary relief based on an unresolved charge); Garcia Rogel v. Garland, No. 21-1163, 2022 WL 4244508, at *1 (4th Cir. Sep. 15, 2022) (per curiam) (same); Toomer v. Att'y Gen. U.S., 810 F. App'x 147, 149–50 (3d Cir. 2020) (same); Avila-Ramirez v. Holder, 764 F.3d 717, 719 (7th Cir. 2014) (same); Billeke-Tolosa v. Ashcroft, 385 F.3d 708, 712–13 (6th Cir. 2004) (same); cf. Doyduk v. Att'y Gen. U.S., 66 F.4th 132, 134 (3d Cir. 2023) ("[T]he language of the Immigration and Nationality Act . . . allows [immigration judges] to consider facts underlying expunged charges.").

286. See 8 U.S.C. § 1252(a)(2)(B) (2018); Wilkinson v. Garland, 144 S. Ct. 780, 792 (2024) ("As this Court said in *Guerrero-Lasprilla* and reiterated in *Patel*, [§ 1252(a)(2)'s jurisdiction-stripping] provisions still operate to exclude 'agency fact-finding from review.'" (citing Patel v. Garland, 142 S. Ct. 1614, 1623 (2022)) (quoting Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1072 (2020))).

287. See *Rosa*, 114 F.4th at 4–5; see also supra note 13 and accompanying text.

288. *Rosa*, 114 F.4th at 6–7.

289. Id. at 22 n.9; see also Petitioner's Opening Brief, *Rosa*, 114 F.4th 1 (No. 22-1523), Dkt. No. 00117950249.

290. *Rosa*, 114 F.4th at 8.

291. Id. at 22.

against him because he was unable to meaningfully defend against the charge from abroad.[292] But Ramirez remains deported, unable to return to the United States.

Once a noncitizen is deported—even if wrongly so, as in Ramirez's case—it is exceedingly difficult for them to return to the United States to appear in criminal proceedings.[293] Among numerous challenges, individuals must navigate a bureaucratic system of requesting that ICE facilitate their return,[294] which is often denied, and for individuals seeking to apply for a visa, criminal history is one of the frequent grounds for denying nonimmigrant visas.[295] Kilmar Abrego Garcia's high-profile case is a poignant example of the obstacles noncitizens may face in reversing an unlawful deportation. On March 15, 2025, ICE deported Abrego Garcia to El Salvador even though it was undisputed, which the government itself admitted, that the deportation was illegal—an immigration judge had previously granted Abrego Garcia withholding of removal, a form of relief that forbade the government from deporting him to El Salvador.[296]

292. Commonwealth v. Ramirez, No. 1:18-cv-12452 (Mass. Super. Ct. Feb. 27, 2024) (on file with the *Columbia Law Review*).

293. See, e.g., Goddard v. Nielsen, No. 8:18-cv-1134-T-36AAS, 2018 WL 11447437, at *1 (M.D. Fla. Dec. 6, 2018) (explaining that after the individual was deported, the state judge issued a writ of habeas corpus ad testificandum compelling ICE to produce the deported individual to criminal proceedings, but "ICE 'refused to cooperate,'" forcing the state court to continue the criminal hearings at least six times).

294. Notably, the government maintains that it will pay for certain noncitizens who were wrongfully deported to be returned to the United States. See, e.g., FAQs: Facilitating Return for Lawfully Removed Aliens, ICE, https://www.ice.gov/remove/facilitating-return [https://perma.cc/5V4D-XB2V] (last updated Feb. 2, 2024); see also Oral Argument at 15:50–17:20, Peguero Vasquez v. Garland, 80 F.4th 422 (2d Cir. 2023), https://www.courtlistener.com/audio/82792/puguera-vasquez-v-garland/ (on file with the *Columbia Law Review*) (statement of Craig Newell, Trial Att'y, DOJ) (claiming that when a lawful permanent resident is wrongfully deported "the government facilitates his or her return to the country," including paying for their return). In practice, however, it is exceedingly difficult for individuals to return to the United States, even after successfully appealing a deportation order. See, e.g., N.Y.U. Sch. of L. Immigrant Rts. Clinic, Victory Denied: After Winning on Appeal, an Inadequate Return Policy Leaves Immigrants Stranded Abroad 19–28 (2014), https://www.law.nyu.edu/sites/default/files/upload_documents/Victory%20Denied.pdf [https://perma.cc/VLH2-H8VR]; Nat'l Laws. Guild, N.Y.U. Immigrant Rts. Clinic & Am. Immigr. Council, Practice Advisory: Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider 4–7 (2012), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/return_to_the_united_states_after_prevailing_on_a_petition_for_review_or_motion_to_reopen_or_reconsider.pdf [https://perma.cc/VRT4-ATKF].

295. See Corrected Brief of Amici Curiae ACLU of Mass. & the Comm. for Pub. Couns. Servs., Immigr. Impact Unit at 20–21, Baez v. Commonwealth, 231 N.E.3d 932 (Mass. 2024) (No. SJC-13467) [hereinafter ACLU & CPCS Amicus Brief].

296. Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025); see also Devlin Barrett, Justice Dept. Leader Suggested Violating Court Orders, Whistle-Blower Says, N.Y. Times (June 24, 2025), https://www.nytimes.com/2025/06/24/us/politics/justice-department-emil-bove-trump-deportations-reuveni.html (on file with the *Columbia Law Review*) (reporting that the DOJ attorney who informed the court that Abrego Garcia had been

Despite this indisputable fact, it took a district court order mandating return, a Supreme Court affirmance, a subsequent district court order mandating return, and nearly three months, during which Abrego Garcia was incarcerated in El Salvador, before the government brought him back to the United States,[297] where he remained in state custody for months to prevent ICE from immediately redetaining and removing him.[298] While Abrego Garcia's case captured national attention, in part because of the firestorm of litigation involved in seeking his return and the blatant illegality of the deportation in the first instance, many individuals are wrongfully removed in the shadows and do not have access to counsel to fight for their return. Individuals like Ramirez, for example, are deported while appealing an order of removal, and even if they are successful on appeal—meaning they should never have been deported—it is exceedingly difficult for that individual to return to the United States to attend criminal proceedings or otherwise.[299]

Deportation, then, fuels cyclical obstruction. The state criminal court in Ramirez's case articulated the conundrum succinctly:

---

deported in error was fired and filed a whistleblower complaint documenting internal discussions about deportations).

297. On April 4, the U.S. District Court for the District of Maryland ordered the government to return Abrego Garcia to the United States within three days. Abrego Garcia v. Noem, No. 8:25-cv-00951-PX, 2025 WL 1024654 (D. Md. Apr. 4, 2025). The government appealed, and the Supreme Court administratively stayed the order pending a decision on the merits. *Abrego Garcia*, 145 S. Ct. at 1018. On April 10, the Supreme Court affirmed the district court's order requiring that the government "facilitate" his return but remanded the case for clarification on what was needed to "effectuate" his return. Id. (internal quotation marks omitted) (quoting *Abrego Garcia*, 2025 WL 1024654, at *1). On remand that same day, the district court explicitly ordered the government to "take all available steps to facilitate the return of Abrego Garcia to the United States as soon as possible." Abrego Garcia v. Noem, No. 8:25-cv-00951-PX, 2025 WL 1085601, at *1 (D. Md. Apr. 10, 2025). The Fourth Circuit denied the government's efforts to stay the order. Abrego Garcia v. Noem, No. 25-1404, 2025 WL 1135112 (4th Cir. Apr. 17, 2025). Throughout these proceedings, the government refused to take the necessary steps to return Abrego Garcia after erroneously claiming that he was a member of the gang MS-13 and that his return would pose a threat to public safety. See, e.g., Defendant's Memorandum of Law in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order at 18–19, *Abrego Garcia*, No. 8:25-cv-00951-PX (D. Md. Apr. 4, 2025), Dkt. No. 11. The government did not return Abrego Garcia to the United States until June 6—eighty-three days after he was illegally deported and during which time he was incarcerated in El Salvador. Suzanne Gamboa, Tom Winter & Chloe Atkins, Kilmar Abrego Garcia Has Been Returned to the U.S. to Face Federal Criminal Charges, NBC News (June 6, 2025), https://www.nbcnews.com/news/us-news/kilmar-abrego-garcia-was-mistakenly-deported-el-salvador-will-face-fed-rcna211514 (on file with the *Columbia Law Review*) (last updated June 7, 2025).

298. Jacob Rosen & Melissa Quinn, Judge Orders Kilmar Abrego Garcia Released From Criminal Custody, Second Judge Bars ICE From Immediately Detaining Him, CBS News, https://www.cbsnews.com/news/kilmar-abrego-garcia-ordered-released-criminal-custody-ice-barred-from-immediately-detaining-him/ [https://perma.cc/7AVA-CFB5] (last updated July 23, 2025).

299. See supra notes 293–294 and accompanying text.

> [H]e is presumed innocent of this indictment, yet he has been deported by federal authorities strictly because of it, and he is now prohibited from returning to the United States to defend against the very charge that caused his deportation in the first place. He is in the precarious position of never being able to return to the United States to defend against these allegations, which will not only remain open, but will continue to prevent him from returning to address them.[300]

Cyclical obstruction is significant for two reasons. First, it demonstrates that the interaction between the immigration system and criminal system when a noncitizen defendant is detained is one of obstruction, not just encroachment.[301] Understanding the cyclical and obstructionist nature is important, as it illustrates how a noncitizen defendant faces not just immigration harms but in fact how those immigration harms fuel the criminal law harms discussed in section III.A. We should care about these harms as a matter of rule of law, as Professor Amy Kimpel argues,[302] and also as a matter of individual rights. Second, understanding the *cause* of this cycle as an evidentiary/adjudicatory problem—that is, immigration adjudicators are able to consider pending charges against an individual—helps to identify potential solutions to the problem, as discussed further in Part IV.

In short, the very criminal matter that an individual is unable to resolve because ICE is detaining them is then used against them to perpetuate detention and, eventually, deportation. Absent a system of accountability, ICE may continue to obstruct criminal court access without consequence to immigration or state prosecutors, but with severe consequences—of constitutional and humanitarian proportions—to the noncitizen defendant stuck in detention and later deported.

C. *Immigration Design: Jailor, Prosecutor, and Judge*

Relatedly, the accountability deficit and ICE's obstruction of court access reveal foundational problems with our immigration system as a matter of institutional design.[303] Regarding institutional design, Professor Rachel Barkow has effectively explained that the "model of internal separation" in administrative law provides that structural separation and

---

300. Commonwealth v. Ramirez, No. 1:18-cv-12452, at 5 (Mass. Super. Ct. Feb. 27, 2024) (on file with the *Columbia Law Review*).

301. See supra notes 40–44 and accompanying text.

302. See Kimpel, supra note 43, at 242 (concluding that federal courts risk a crisis of legitimacy if immigration policy remains unchanged).

303. See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law, 61 Stan. L. Rev. 869, 873–74, 887 (2009) (drawing on principles of institutional design from administrative law to recommend ways in which "federal prosecutors' offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision"); supra note 44 (citing a growing body of immigration scholarship examining immigration law through the lens of institutional design).

supervision within an agency "is a critically important means of checking agencies and holding bureaucrats accountable."[304] But obstruction of court access reveals the structural jeopardy within the immigration apparatus and the lack of meaningful checks when the jailor and immigration prosecutor are the same entity, which is, in turn, commingled with the judge.

As outlined in Part I, ICE is tasked with determining who to detain and the conditions of that confinement, including whether to produce an individual to criminal court proceedings.[305] ICE also represents the government in immigration court proceedings seeking to detain and deport individuals.[306] ICE, in other words, serves as both the jailor and immigration prosecutor. These dual roles pose structural concerns that should be glaring in light of ICE obstruction of court access and the accountability gap that has been the subject of this Article thus far.[307] ICE, as the jailor, either affirmatively or effectively obstructs an individual from appearing in criminal court to resolve pending charges against them; then ICE, as the immigration prosecutor, uses the fact of the pending charge in immigration proceedings to seek continued detention and deportation. ICE, in effect, manufactures evidence that can result in, or prevents noncitizen defendants from presenting exculpatory evidence that would weigh against, prolonged detention, deportation, and the continued obstruction of constitutional criminal law rights.

If this evidence were considered by a neutral adjudicator in bond and removability determinations, ICE's ability to effectively manufacture adverse evidence, intentional or not, would still be troubling but mitigated. But immigration scholars have persuasively questioned whether immigration judges are truly independent.[308] A brief history of the current immigration apparatus helps to contextualize the concern. For much of U.S. history, jailor, prosecutor, and judge were housed under the same agency. In 1933, Congress established the Immigration and Naturalization Service (INS) to handle all immigration matters.[309] The INA of 1952 established "special inquiry officers"—which would later be called immigration judges[310]—to adjudicate deportation cases under the

304. Barkow, supra note 303, at 874, 887.

305. See supra section I.A.

306. See supra section I.A.

307. Cf. Denezpi v. United States, 142 S. Ct. 1838, 1855 (2022) (Gorsuch, J., dissenting) (expressing concern that, in the context of double jeopardy, the "[f]ederal agency officials played every meaningful role in his case: legislator, prosecutor, judge, and jailor").

308. See supra note 45 and accompanying text.

309. Exec. Off. for Immigr. Rev., Evolution of the U.S. Immigration Court System: Pre-1983, DOJ, https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/257X-6BMK] [hereinafter EOIR, Evolution Pre-1983] (last updated Apr. 30, 2015). Originally established under the Department of Labor, INS was transferred to DOJ under the authority of the Attorney General in 1940 during World War II. Id.

310. In 1973, a federal regulation was promulgated permitting special inquiry officers to use the title of immigration judge and wear judicial robes. 38 Fed. Reg. 8590 (Apr. 4,

operational supervision of INS District Directors.[311] Jailor, prosecutor, and adjudicator remained under the operational umbrella of the INS until 2002.[312] It was not until 2002 that the adjudicatory function and the detention and prosecution functions were structurally separated. The Homeland Security Act of 2002[313] abolished the INS and transferred the detention and prosecution functions from the DOJ to the newly established ICE and DHS, while maintaining the adjudicatory function within the DOJ.[314] At a surface level, then, this shift would seem to achieve at least some separation of powers.

Yet, scholars have effectively argued that the separation of ICE and immigration judges into DHS and DOJ has far from resolved the commingling of the adjudicatory and enforcement functions.[315] To begin, DHS and DOJ are both law enforcement agencies. As the National Association of Immigration Judges cautioned: DOJ, which governs immigration judges, is "an agency that is closely aligned with the DHS and shares its primary mission of law enforcement rather than objective adjudication."[316] In a 2019 address to a newly appointed class of immigration judges, then–Deputy Attorney General Rod J. Rosenstein cautioned that immigration judges are "member[s] of the executive branch," and as such they must "follow lawful instructions from the Attorney General, and . . . share a duty to enforce the law."[317] Political appointees within DOJ face similar pressures, Professor Gerald Neuman posits, because they are held "politically accountable for their success in creating the reality or appearance of border control."[318] Moreover, immigration adjudicators, who, like ICE, are governed by the executive

1973) ("[T]he terms 'immigration judge' and 'special inquiry officer' may be used interchangeably.").

311. Sidney B. Rawitz, From *Wong Yang Sung* to Black Robes, 65 Interpreter Releases 453, 454 (1988); EOIR, Evolution Pre-1983, supra note 309.

312. For a robust history of the evolution of immigration adjudication and enforcement, see Rawitz, supra note 311; see also 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (codified at 8 C.F.R. pts. 1, 3, 100) (creating the Executive Office for Immigration); Holper, Imitation Judges, supra note 45, at 1312 ("In 1983, the adjudicators were officially moved out of the INS, with the creation of the Executive Office for Immigration Review (EOIR).").

313. Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in relevant part at 6 U.S.C. §§ 101–681g (2018)).

314. Mark Dow, American Gulag: Inside U.S. Immigration Prisons 11 (2004); see also EOIR, Evolution Pre-1983, supra note 309.

315. See supra note 45 and accompanying text.

316. Holper, Imitation Judges, supra note 45, at 1314 (internal quotation marks omitted) (quoting Dana Leigh Marks, Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today, Fed. Law., Mar. 2012, at 25, 29).

317. Rod J. Rosenstein, Deputy Att'y Gen., Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges (Mar. 15, 2019), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-opening-remarks-investiture-31-newly [https://perma.cc/4ASQ-YBEG].

318. Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1024 (1998).

branch, are susceptible to executive policy imposition and pressure. Consider, for example, performance evaluations imposed under the second Bush Administration, production quotas imposed under the first Trump Administration that required immigration judges to rush through completing seven hundred cases per year while holding a remand rate of under 15%,[319] and performance metrics under the second Trump Administration that require immigration judges to complete 95% of cases within 365 days.[320] Indeed, Professor Stephen Legomsky has warned that the executive branch has begun a "war on independence" on immigration adjudicators,[321] and Professor Mary Holper contends that immigration judges are not neutral arbiters.[322]

The institutional design flaws, then, are twofold and compounding. When the jailor and immigration prosecutor are the same entity, that entity, ICE, may effectively manufacture evidence and then use the resulting unresolved criminal charge against an individual in immigration proceedings, with attendant criminal law and immigration law consequences. When the arbiter who decides whether and how to consider that evidence to prolong detention or order deportation is of questionable independence, those commingled functions are all the more grave.

Even so, the coterminous nature of jailor and immigration prosecutor and commingling of prosecutorial and adjudicatory functions could be ameliorated if there were meaningful alternative "administrative law checks."[323] One of the most fundamental checks in immigration proceedings is the constitutional and statutory right to a meaningful opportunity to be heard and present evidence in immigration proceedings.[324] But this check too proves an empty ritual when the evidence against the noncitizen is an unresolved criminal charge. To be sure, noncitizen defendants are generally given the opportunity to speak to the unresolved charge and associated allegations in immigration court. But many are, understandably, wary of so testifying under oath. Such testimony can be used against an individual in future criminal proceedings, even though immigration court proceedings lack the procedural protections that apply

319. See Holper, Imitation Judges, supra note 45, at 1315–21 (describing these and other examples of executive encroachment on the neutrality of immigration judges).

320. Memorandum from Sirce E. Owen, Acting Dir., Exec. Off. for Immigr. Rev., to Exec. Off. for Immigr. Rev. Emps. (Sep. 12, 2025), https://www.justice.gov/eoir/media/1413981/dl?inline [https://perma.cc/J6U3-DKG4].

321. Legomsky, War on Independence, supra note 45, at 370.

322. Holper, Imitation Judges, supra note 45, at 1306–13.

323. See Barkow, supra note 303, at 895 (advancing the argument that administrative law checks could remedy bias).

324. See, e.g., Lieu, supra note 202, at 615–23 (discussing the right to a meaningful opportunity to be heard); see also Barkow, supra note 303, at 893–94 (explaining that the Administrative Procedure Act requirement that proceedings be "conducted in an impartial manner" is an alternative check on agency power (internal quotation marks omitted) (quoting 5 U.S.C. § 556(b)(3) (2006))).

in criminal and other civil court contexts.[325] For instance, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure, which provide protections for what evidence can be admitted and what information is privileged, applies in immigration court, and individuals do not have the right to state-funded counsel.[326] Yet, choosing to remain silent comes at a potential cost. The BIA in *Marques* held that immigration judges may draw an adverse inference from an individual's invocation of the Fifth Amendment right against self-incrimination.[327] Individuals, then, are faced with a proverbial "heads I win, tails you lose" situation: If they invoke their right against self-incrimination, that information may be used against them in immigration court; if they choose to testify, that testimony, fraught with weakened protections, may be used against them in the criminal proceedings they are obstructed from.

Noncitizen defendants stuck in immigration detention, then, are silenced twice over: They are literally silenced by obstruction in criminal court[328] and effectively silenced again in immigration court when the jailor, prosecutor, and judge consider the still-pending criminal charge against them.

This analysis does not presume any nefarious intent on behalf of ICE. It is, rather, a critique of how the institutional design of the immigration apparatus—left unchecked—has severe consequences on both criminal and immigration rights. Part IV turns to creating checks by reassigning accountability.

IV. REASSIGNING ACCOUNTABILITY

Having established the existence of the accountability deficit in ICE obstruction of court access in Part II and the cyclical consequences it imposes on both criminal law and immigration law in Part III, this Article turns to closing that accountability deficit in Part IV. The focus of these recommendations is not on how to directly force ICE to produce noncitizen defendants to criminal court, but rather what should and

---

325. See Tania N. Valdez, Pleading the Fifth in Immigration Court: A Regulatory Proposal, 98 Wash. U. L. Rev. 1343, 1358 (2021) (describing how the right against self-incrimination is afforded weaker procedural protection in immigration court).

326. Id. at 1358, 1391; see also 8 U.S.C. § 1362 (2018) (providing that immigrants in removal proceedings "shall have the privilege of being represented (at no expense to the Government)").

327. Marques, 16 I. & N. Dec. 314, 316 (B.I.A. 1977); see also Rivera v. Sessions, 903 F.3d 147, 151 (1st Cir. 2018) (noting that drawing a negative inference against an individual for invoking the Fifth Amendment arguably does not violate due process); Garcia-Aguilar v. Lynch, 806 F.3d 671, 676 (1st Cir. 2015) ("[A]n IJ may draw an adverse inference from [a noncitizen's] invocation of the Fifth Amendment during removal proceedings . . . ."); Valdez, supra note 325, at 1358 (arguing for legislative reform to protect the right against self-incrimination in immigration court).

328. See supra section III.A.

should not occur when ICE in fact fails to produce an individual to criminal court.

One natural question, of course, is who is ultimately responsible for production: ICE or the prosecuting state? The answer is perhaps, as Professor Sklansky opines, "blurred."[329] The only court to have explicitly addressed the issue opined in *Doe v. DHS* that because "ICE assumed sole custody for the detainee . . . it is tasked with ensuring detainees' constitutional rights are supported."[330] After all, "[T]he institution with legal and physical custody of an individual is best situated to ensure the individual's civil rights remain intact."[331]

But the inquiry, rethought, may in fact be much simpler. Instead of who *ought* to be held accountable, the pertinent inquiry is who *ought not* be held accountable. That answer—as this Article has demonstrated—is clearer: the noncitizen defendant stuck in detention.[332] Thus, regardless of whether the immigration or prosecuting authorities are responsible for producing an individual to court, accountability mechanisms must be put in place under both systems to ensure that any breakdowns, intentional or not, do not come at the expense of the individual whose rights are jeopardized.

The first and perhaps most obvious solution is that ICE should release the individual from immigration detention. Short of such release, this Part proposes a two-part remedy to close the accountability deficit. The two-part nature of the remedy is necessary both because individuals suffer consequences in both criminal law and immigration law and, crucially, because those consequences are cyclical, as argued in Part III. On the criminal law side, this Article proposes that if the prosecuting state is unable to produce the immigrant to their criminal proceedings, those proceedings must be dismissed. On the immigration law side, immigration judges should not be permitted to consider pending criminal proceedings and related allegations when ICE obstructs the noncitizen defendant from appearing in criminal court to resolve those proceedings.

A. *Criminal Law Accountability*

Accountability must flow in criminal law proceedings when a noncitizen defendant is stuck in immigration detention. This Article proposes that if a noncitizen defendant is unable to appear in criminal

329. Sklansky, supra note 28, at 218.

330. Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD, 2025 WL 360534, at *6 (W.D. Pa. Jan. 31, 2025).

331. Id.

332. See, e.g., United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *5 (D. Ariz. May 11, 2020) (explaining that when ICE deports an individual who is facing federal prosecution, the fact that the "separate agencies . . . do not communicate and cooperate[] cannot serve to deprive a defendant of his rights under the Constitution" (internal quotation marks omitted) (quoting United States v. Lutz, No. CR-19-00692-001-TUC-RM (BGM), 2019 WL 5892827, at *5 (D. Ariz. Nov. 12, 2019))).

court because of obstruction of court access, the criminal charges against the individual must be dismissed. This proposal is supported by several principles.

First, dismissal of charges is the proper remedy to establish accountability when an individual is unable to appear in criminal court because they are stuck in immigration detention. As the Supreme Court has made clear, dismissal is the appropriate remedy when an individual's constitutional or statutory right is violated.[333] While dismissal may seem, as the *Barker* Court opined, an "unsatisfactorily severe remedy" because an individual who "may be guilty of a serious crime will go free, without having been tried," "it is the only possible remedy" for constitutional violations.[334] The seeming steepness of the remedy is a reflection of and proportional to the magnitude of the individual constitutional and procedural rights at jeopardy.[335]

Legislators implemented precisely this assignment of responsibility in legislating accountability through the Interstate Agreement on Detainers. Under the Agreement, the penalty for failing to produce a detained individual to criminal proceedings is that the prosecuting state must dismiss charges against the individual, no matter whether the custodial or prosecuting jurisdiction is at fault.[336] In other words, as practitioner Janet Necessary aptly pointed out, when the prison fails to produce a detained individual, the Agreement effectively holds the criminal prosecutor vicariously liable.[337]

Second, requiring dismissal of charges protects the integrity of the criminal process from both a defendants'-rights and victims'-rights perspective. To begin, requiring dismissal of charges acts as a deterrent, incentivizing government entities to hold each other accountable to ensure that individuals are produced to their criminal hearings in an expeditious manner.[338] This deterrence protects the rights of criminal

333. See, e.g., Strunk v. United States, 412 U.S. 434, 439–40 (1973) (ordering the lower court to set aside the judgment, vacate the sentence, and dismiss the indictment because of a speedy trial violation); Dickey v. Florida, 398 U.S. 30, 38 (1970) (remanding to vacate judgment and dismiss charges when the government violated defendant's speedy trial right); 5 Crim. Proc., supra note 161, § 18.1(e) (explaining that the Supreme Court has repeatedly held that the proper remedy for a violation of an individual's speedy trial right is dismissal of the charge).

334. Barker v. Wingo, 407 U.S. 514, 522 (1972); see also *Strunk*, 412 U.S. at 439–40 ("[S]uch severe remedies are not unique in the application of constitutional standards.").

335. See supra section III.A.

336. See supra section II.A.2.

337. Necessary, supra note 173, at 1033.

338. See, e.g., United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991) (explaining that courts may dismiss an indictment in an exercise of their supervisory powers "to remedy a constitutional or statutory violation; to protect judicial integrity . . . ; or to deter future illegal conduct"); United States v. Coronado-Vejar, No. CR-19-01962-001-TUC-RM (BGM), 2020 WL 2782502, at *3 (D. Ariz. May 29, 2020) (dismissing charges with prejudice in part to "deter ICE" from detaining a noncitizen in violation of the BRA while they face

defendants by ensuring that individuals are able to have their day in court and meaningfully answer charges against them. It further protects defendants' rights by ensuring that the consequence of obstruction of court access falls on the government, not on the individual stuck in detention. As Justice William Brennan opined in *Dickey* in the speedy trial context, if the defendant did not cause the delay—as is the case when a noncitizen defendant is stuck in detention—"the responsibility for [the delay] will almost always rest with one or another governmental authority."[339] In such cases, the consequences must then flow to those government authorities, not the individual. Moreover, ensuring that a noncitizen defendant can have their day in court further protects the interests of the victims of the alleged offense in obtaining closure and ensuring that charges are prosecuted in a timely manner.[340] It also serves the interests of victims in finality: As Congress recognized in enacting the Agreement, ensuring that defendants were able to appear in court in a timely manner "diminish[ed] the possibility of convictions being vacated or reserved because of a denial of" constitutional rights.[341]

The concerns surrounding the integrity of the criminal process are all the more salient given the cyclical interaction between the criminal and immigration legal systems.[342] When a noncitizen defendant is obstructed from attending criminal court proceedings, they suffer the same criminal law consequences that a citizen defendant suffers. But the noncitizen defendant suffers even greater jeopardy: The unresolved criminal charge can and is often used against them in immigration proceedings to continue detaining them or to deport them, either of which perpetuates the obstruction of criminal justice.[343] Put differently, when noncitizen defendants are cyclically obstructed from answering charges against them, they are, in effect, "guilty until proven innocent,"[344] with no opportunity to prove their innocence.

Having established that dismissal of charges is the proper remedy, the mechanism for such dismissal may take several forms. One possibility—albeit an unlikely one—is for Congress to legislatively impose accountability. Congress could do so by expanding the scope of the

---

federal prosecution (internal quotation marks omitted) (quoting United States v. Lutz, No. CR-19-00692-001-TUC-RM (BGM), 2019 WL 5892827, at *5 (D. Ariz. Nov. 12, 2019))).

339. Dickey v. Florida, 398 U.S. 30, 51 (1970) (Brennan, J., concurring).

340. See, e.g., Blanche Bong Cook, Stepping Into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away From Zero Sum Resolutions, 101 Ky. L.J. 671, 678–79 (2013) (proposing that courts apply "speedy trial analysis to a victim's right to finality"); see also Mary Margaret Giannini, The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement, 9 Drexel L. Rev. 43, 62–66 (2016) (tracing the evolution of the victims' rights movement).

341. S. Rep. No. 91-1356, at 2 (1970).

342. See supra Part III.

343. See supra section III.B.

344. Joseph Goldstein, Note, Guilty Until Proven Innocent: The Failure of DNA Evidence, 12 Drexel L. Rev. 597, 608 (2020) (internal quotation marks omitted).

Interstate Agreement on Detainers to include immigration detention or by enacting similar interstate legislation that requires dismissal as the consequence of obstruction of court access. Legislated accountability would bind ICE, as a federal agency, to honor requests for production to state criminal court proceedings as a matter of law rather than comity. It would further ensure that the consequence of any failure to bring an individual to court is dismissal of the underlying charges.[345]

Admittedly, obtaining congressional support for any form of legislated accountability may be a tall order in the current political climate.[346] Indeed, in the current era of anti-immigrant sentiment and congressional gridlock, immigration-related lawmaking has eroded, rather than protected, immigrants' rights. In January 2025, Congress enacted the Laken Riley Act, which expands the scope of mandatory detention.[347] In July 2025, Congress passed and President Trump signed into law a budget reconciliation bill[348] that grossly increases funding for immigration enforcement, allocating a total of $170 billion for the Administration's immigration agenda that is set to double immigration detention capacity to more than 100,000 beds and increase border security efforts.[349] Nonetheless, lawmakers may perhaps be moved to legislate because, as this Article has shown, ICE obstruction of court access is different: The rights at stake implicate not just the immigration system, but the criminal legal system as well. Legislating accountability thus protects the integrity of the criminal justice system, with benefit to defendants' and victims' rights.

Alternatively, criminal prosecutors and courts may also dismiss charges. When the prosecuting jurisdiction, despite its best efforts, is unable to produce a detained individual to criminal proceedings, prosecutors can and should exercise prosecutorial discretion to dismiss charges.[350] Such dismissals would conserve judicial resources, and

345. See Necessary, supra note 173, at 1031 ("The purpose of the [Interstate Agreement on Detainers] is to provide a legal basis for the detainer, so that the warden honors the detainer or request as a statutory duty rather than as a matter of comity.").

346. See Marc Jacob, Barton Lee & Gabriele Gratton, Is a Gridlocked Congress Causing More Polarization?, ProMarket (June 26, 2024), https://www.promarket.org/2024/06/26/is-a-gridlocked-congress-causing-more-polarization/ [https://perma.cc/8FPY-9G3Y]; Joe LoCascio, Benjamin Siegel & Ivan Pereira, 118th Congress on Track to Become One of the Least Productive in US History, ABC News (Jan. 10, 2024), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/D66W-9MCC].

347. Laken Riley Act, Pub. L. No. 119-1, 139. Stat. 3 (2025) (codified in scattered sections of 8 U.S.C.).

348. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025) (codified in scattered titles of U.S.C.).

349. Lauren-Brooke Eisen, Budget Bill Massively Increases Funding for Immigration Detention, Brennan Ctr. Just. (July 3, 2025), https://www.brennancenter.org/our-work/analysis-opinion/budget-bill-massively-increases-funding-immigration-detention [https://perma.cc/Y5SV-7Z7V]; Kim, supra note 8.

350. See Leslie C. Griffin, The Prudent Prosecutor, 14 Geo. J. Legal Ethics 259, 263–74, 287–307 (2001) (examining the role and reform of prosecutorial discretion).

prosecutors have sought dismissal in cases in which ICE deports a defendant.[351] Absent prosecutorial discretion, state[352] and federal[353] courts can and should dismiss the charges upon motion by either party. When possible, state high courts should establish clear guidance[354] to grant motions to dismiss when an individual cannot be produced to criminal court proceedings because they are detained in ICE custody.[355] Admittedly, state courts may be reticent to affirmatively issue such guidance given the current sociopolitical climate, particularly when judges face elections; the Massachusetts Supreme Judicial Court, for example, has thus far sidestepped a call from advocates to issue guidance to dismiss charges.[356] That said, court-issued guidance would certainly be more expedient than federal or state legislation, and courts may be motivated to adopt such guidance to uphold noncitizen defendants' constitutional rights in criminal court.[357] By way of example, albeit on the federal level

351. See, e.g., United States v. Ferreira-Chavez, No. 1:20-cr-00145-BLW, 2021 WL 602822, at *2 n.1 (D. Idaho Feb. 12, 2021) ("Typically, where the defendant is deported before criminal proceedings are concluded, the Government moves to dismiss the indictment."); United States v. Rojo-Alvarado, No. CR-19-00257-PRW, 2019 WL 4482712, at *1 (W.D. Okla. Sep. 18, 2019) (requesting dismissal of the indictment without prejudice because DHS deported the defendant); United States v. Alvarado-Velasquez, 322 F. Supp. 3d 857, 859 (M.D. Tenn. 2018) (requesting dismissal without prejudice when the defendant's removal was in process).

352. See, e.g., Commonwealth v. Balliro, 433 N.E.2d 434, 438 (Mass. 1982) (noting that state court judges have "the inherent right in [their] discretion" to determine that charges should be dismissed); see also Mass. R. Crim. P. 36(c) (requiring dismissal of charges upon the defendant's motion when the prosecuting attorney was not reasonably diligent in bringing the defendant to trial and such conduct prejudiced the defendant).

353. See, e.g., United States v. Hasting, 461 U.S. 499, 505 (1983) (explaining that, "'[g]uided by considerations of justice,' and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," including "implement[ing] a remedy for [the] violation of recognized rights" (citation omitted) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943))); United States v. Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991) (explaining that "[d]ismissal is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available").

354. For example, Massachussets law gives the Supreme Judicial Court of Massachusetts the power of "general superintendence [over] all courts of inferior jurisdiction," in the state, which permits the court to "issue all writs and processes to such courts . . . which may be necessary to the furtherance of justice and to the regular execution of the laws." Mass. Gen. Laws Ann. ch. 211, § 3 (West 2025).

355. See, e.g., ACLU & CPCS Amicus Brief, supra note 295, at 34 (urging the Massachusetts Supreme Judicial Court to "fashion a clear remedy" to the problem of ICE's obstruction of court access that would authorize lower courts to dismiss without prejudice with limited exceptions).

356. See id.; see also Baez v. Commonwealth, 231 N.E.3d 932, 932–34 (Mass. 2024) (affirming a criminal charge without addressing a request from amicus curiae to issue guidance to dismiss charges when an individual is unable to attend criminal proceedings due to immigration enforcement).

357. Non-uniform adoption of such guidance by some state high courts but not others may lead to a patchwork across the country, in which whether a detained noncitizen defendant's charge is dismissed depends on the charging state. While uniform adoption

where judges do not face elections, the U.S. District Court of Maryland issued a standing order in May 2025 enjoining the federal government from deporting any noncitizen who filed a writ of habeas corpus within the district for two business days.[358] This standing order, which the government challenged,[359] was issued by the district in response to increased federal deportations of noncitizens seeking relief in federal court and demonstrates that courts may act swiftly to establish jurisdiction-wide relief for noncitizens even amid broad anti-immigrant sentiment.

To be sure, dismissing the charge does not entirely eliminate the possibility that ICE may still attempt to use, and immigration judges may consider, a dismissed charge against an individual in immigration proceedings.[360] Nonetheless, dismissal is still the proper remedy because, from a criminal justice perspective, it protects a noncitizen defendant stuck in ICE detention from continued violation of their constitutional rights in criminal court. Moreover, in immigration proceedings, a dismissed charge will certainly be viewed more favorably than one that is still pending. In any event, the outside possibility that ICE and immigration judges may still use dismissed charges against a noncitizen defendant stuck in immigration detention is all the more reason to couple this proposal for criminal law accountability with immigration law accountability, as discussed next.

B. *Immigration Law Accountability*

Accountability must flow from the immigration system as well. As Part III demonstrates, problems at the criminal–immigration intersection abound as a matter of evidence and adjudication—that is, how immigration judges use unresolved charges against an individual to fuel cyclical obstruction—and as a matter of institutional design—that is, the lack of meaningful checks on abuse of discretion within the Agency. This Article proposes a solution that addresses these dual concerns: Immigration judges may consider unresolved or dismissed criminal matters and associated allegations in discretionary determinations *only if* they first determine that ICE properly produced the individual to criminal

---

across the country would certainly be the ideal, such a patchwork would hardly be out of the norm: States already have non-uniform criminal laws.

358. Standing Order 2025-01, No. 00-308 (D. Md. filed May 21, 2025).

359. See Complaint, United States v. Russell, No. 1:25-cv-02029-CJC (D. Md. Aug. 26, 2025), Dkt. No. 1.

360. See Thomas, 21 I. & N. Dec. 20, 23–24 (B.I.A. 1995) (listing cases in which an immigration judge considered a charge that was dismissed or did not result in a conviction); Vendzules, supra note 261, at 699–700 (describing a case in which an immigration adjudicator denied relief based on dismissed charges because the mere facts of the charges "appear to show [the applicant is] a risk to the property and the public safety of others" (quoting Letter from U.S. Citizenship & Immigr. Servs. (Mar. 17, 2016))).

court proceedings relating to that unresolved charge.[361] In all cases, and particularly when an individual does not have counsel, the immigration judge should affirmatively ascertain whether ICE obstructed an individual's ability to attend criminal court proceedings before considering a pending or dismissed criminal charge.[362]

To begin, this proposal addresses the evidentiary and adjudicatory concerns outlined in section III.B. The BIA itself has long recognized that immigration judges should not and cannot assume the role of the criminal courts. In *Arreguin de Rodriguez*, for example, the BIA underscored that it would be impermissible for immigration adjudicators to "go behind a record of conviction to determine the guilt or innocence" of a noncitizen.[363] Indeed, the Supreme Court has repeatedly affirmed that immigration proceedings are civil in nature because immigration courts are distinct from criminal adjudications and do not mete out criminal punishments.[364] Yet, as Professor Sarah Vendzules persuasively argues, immigration judges are, in fact, engaged in "hidden factfinding."[365] When immigration judges port over and consider outputs from the criminal legal system, like allegations in a police report that have not been established beyond a reasonable doubt, they are impermissibly engaged in fact-finding under the guise of exercising discretion.[366] Vendzules thus proposes a framework that limits whether and how much immigration judges can consider criminal law outputs depending on how much fact-finding has occurred in criminal proceedings.[367] When no criminal law fact-finding has occurred, immigration judges must be cautious in considering that information in immigration proceedings.

361. The INA includes examples in which immigration adjudicators need to establish a prerequisite before taking action. For example, 8 U.S.C. § 1229a(b)(5) requires that the government establish by "clear, unequivocal, and convincing evidence" that an individual received notice of a hearing before ordering them removed in absentia. 8 U.S.C. § 1229a(b)(5) (2018).

362. Federal appellate courts have unanimously agreed that immigration judges have a duty to develop the record in immigration court proceedings, which includes eliciting information from the noncitizen, particularly when the individual is unrepresented. See, e.g., Quintero v. Garland, 998 F.3d 612, 622–23 (4th Cir. 2021) (collecting cases and holding that immigration judges have a legal duty to develop the record in all cases, and particularly in pro se cases).

363. Arreguin de Rodriguez, 21 I. & N. Dec. 38, 42 (B.I.A. 1995).

364. See Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 285 (1966) ("[A] deportation proceeding is not a criminal prosecution." (citing Harisiades v. Shaughnessy, 342 U.S. 580 (1952))); *Harisiades*, 342 U.S. at 594 ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."). Scholars have persuasively argued, however, that this designation of deportation proceedings as civil does not comport with the present reality of deportation and the immigration statutory regime and enforcement apparatus. See, e.g., Chacón, Diversion of Attention, supra note 204, at 1573.

365. Vendzules, supra note 261, at 708–21.

366. Id. at 716–19, 746.

367. Id. at 721–23.

Immigration judges' consideration of charges that remain unresolved because of obstruction of court access, as described in this Article, is precisely one such example of hidden fact-finding. When an individual is obstructed from criminal court proceedings to confront charges and evidence against them or present evidence on their own behalf, there certainly has been no fact-finding (or process) in criminal court. When immigration judges then consider those unresolved charges to deny bond or relief as a matter of discretion, they effectively and impermissibly stand in for criminal adjudicators.

The proposal also addresses the institutional design concerns that stem from ICE's ability, as both the jailor and immigration prosecutor, to effectively (intentionally or not) manufacture evidence that has both cyclical criminal law and immigration law consequences. By preventing immigration judges from considering this evidence, this proposal establishes an internal check that mitigates any concerns about ICE's abuse of discretion. In this way, ICE is stymied from, as the jailor, preventing an individual from attending criminal proceedings to resolve charges, and then, as the immigration prosecutor, attempting to use that evidence against the individual to continue detaining or to deport them.[368]

Practically speaking, this proposal could be achieved through several judicial mechanisms. First, the BIA could issue a published decision—like *Arreguin de Rodriguez*[369] but broader in scope—providing that immigration judges categorically cannot consider pending charges when ICE detention has obstructed a noncitizen's ability to attend criminal proceedings. As the highest administrative body for interpreting and applying immigration laws, the BIA's published decisions are binding on all immigration judges across the country.[370] Second, the Attorney General could self-certify a BIA decision and issue an Attorney General decision that would be binding on the BIA and immigration judges.[371] Admittedly, the likelihood that this proposal would be achieved through Attorney General self-certification is vanishingly small. Administrations with anti-immigrant agendas, like the Trump Administration, would certainly decline to take such action to protect the rights of noncitizens, and even administrations with more

368. Preventing ICE from using evidence—in the form of a pending or dismissed charge—against an individual whose constitutional rights ICE has violated sounds in Justice Benjamin Cardozo's famous articulation of the consequences the Fourth Amendment exclusionary rule mandates: The defendant "is to go free because the constable has blundered." People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

369. Arreguin de Rodriguez, 21 I. & N. Dec. 20 (B.I.A. 1995).

370. 8 C.F.R. § 1003.1(g) (2025) ("[D]ecisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.").

371. The Code of Federal Regulations authorizes the Attorney General to certify cases from the Board for review. Id. § 1003.1(h)(1) ("The Board shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him."). For more information regarding the Attorney General's self-certification authority, see Lieu, supra note 202, at 588 n.49.

immigrant-friendly policies have historically been hesitant to protect the rights of noncitizens as they intersect with the criminal legal system. Finally, if the issue was properly exhausted at the administrative level, advocates could raise these arguments before federal circuit courts on a petition for review of an adverse BIA or Attorney General decision. A circuit court decision holding that it is unlawful for immigration judges to consider pending charges when ICE has obstructed an individual's ability to attend criminal proceedings would be binding on immigration judges and the BIA within the circuit. Advocates, then, should raise these arguments in immigration court, on appeal to the BIA, and in petitions for review so that the issue is ripe for an administrative or federal court decision.

This proposal suggests a change to adjudicatory practices that avoids the need for a structural overhaul of the immigration apparatus. Rather than separate the immigration jailor and prosecutor functions, this proposal meaningfully separates the immigration prosecutor and adjudicator functions. Moreover, the proposal addresses ICE's common refrain that it lacks resources to produce individuals to court.[372] Indeed, ICE's premise—however doubtful it may be as a practical matter, given that DHS has the largest budget of all enforcement agencies across the federal government[373]—is beside the point under this framework. If ICE cannot produce an individual in its custody to criminal court proceedings, it simply cannot use the unresolved charge and associated allegations that the individual has never had the opportunity to refute against the individual in immigration proceedings. ICE's supposed lack of resources and decision to detain, in other words, cannot come at the expense of an individual's constitutional rights.

Accordingly, before considering unresolved criminal proceedings to deny discretionary relief, ICE must demonstrate, and immigration adjudicators must affirmatively find, that the individual was not subject to immigration obstruction of court access.

---

372. See, e.g., Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction at 32–34, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD (W.D. Pa. filed Nov. 15, 2024), Dkt. No. 60 (citing immigration agencies' "limited resources" in arguing that defendants cannot produce individuals detained at Moshannon to criminal court virtually).

373. Margy O'Herron, Big Budget Act Creates a "Deportation-Industrial Complex", Brennan Ctr. Just. (Aug. 13, 2025), https://www.brennancenter.org/our-work/analysis-opinion/big-budget-act-creates-deportation-industrial-complex [https://perma.cc/NDB6-KRFN] ("The $170 billion price tag for immigration enforcement eclipses other law enforcement expenditures at the federal, state, and local level. . . . Even the slice that goes just to ICE this year—nearly $29 billion—exceeds the budget for all other non-immigration federal law enforcement functions put together . . . .").

CONCLUSION

The accountability imperative, which has always lurked in the shadows of the U.S. criminal legal system, is more urgent now than ever as the criminal legal and immigration legal systems are poised to interact in unprecedented ways and volumes. Executive branch priorities and Congress's recent enactment of the Laken Riley Act and the One Big Beautiful Bill Act promise to increase the number of noncitizens subjected to immigration detention who also have active criminal proceedings that they must and have constitutional rights to attend. But, in the existing paradigm of the accountability deficit, those individuals may be obstructed from having their day in criminal court, with severe and cyclical criminal and immigration law consequences.

By rethinking the interaction between the criminal and immigration legal systems, this Article aims to provide a framework to understand and a proposal to address the accountability deficit. It brings out of the shadows the obstruction-of-court-access problem and the systemic lack of accountability on the part of the immigration jailor and criminal prosecutor that permits the accountability deficit to be paid by the noncitizen stuck in detention. Understanding the implications of obstruction of court access sets up the accountability imperative. As this Article sets forth, those implications are threefold: (1) The immigration legal system in obstruction of court access quite literally obstructs criminal proceedings and constitutional criminal process; (2) that obstruction is, in fact, cyclical, because immigration adjudicatory norms permit immigration judges to consider the resulting unresolved charges to continue detention and order deportation—immigration harms that only perpetuate the obstruction of criminal process; and (3) the immigration apparatus as designed lacks sufficient checks when the jailor that obstructs a noncitizen defendant's access to criminal court is the very immigration prosecutor that then seeks to use that still-pending charge against the individual before an immigration judge who is governed by the same executive to detain and deport that individual. The accountability imperative, then, is urgent.

To remedy this lack of accountability, this Article's focus is not on forcing ICE to produce individuals to court—which may become increasingly difficult as ICE subjects more noncitizen defendants to detention and transfers them widely across the country far from criminal proceedings. Instead, this Article argues that we must reassign accountability away from the noncitizen to the criminal prosecutor and the immigration jailor/prosecutor/judge, through dismissing the charge on one side of the ledger and not considering the unresolved charge on the other. Put differently, as this Article has described, the noncitizen defendant stuck in immigration detention is riddled with Hobson's choices. Whether to choose to stay in jail to avoid being put in immigration detention, where they will be cyclically obstructed from the criminal and immigration process. Whether to testify in immigration court about criminal proceedings without criminal protections or choose to invoke their constitutional right to remain silent and have that invocation used against them in immigration court. This Article proposes to flip the paradigm. If neither immigration jailor/prosecutor nor criminal prosecutor can ensure that a noncitizen defendant has their day in criminal court, it is they, not the noncitizen defendant, that must be held to account.