

Zealous Advocacy: Pushing Against the Borders in Immigration Litigation

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I. INTRODUCTION

Anyone who ever wanted to become a lawyer while reading *TO KILL A MOCKINGBIRD*, or who saw law as a tool for responding to injustice, probably drew inspiration from the profession's commitment to zealous advocacy. Zealous advocacy is core to the popular ethos of what good lawyering *is*, and yet for many areas of law, it is only vaguely defined, and is honored too often in the breach. Zeal may be absent because it is not part of the legal culture, especially in the under-resourced, over-burdened court systems affecting some of our most vulnerable populations, very much including the court system that oversees immigration cases. Two central ideas this Article explores are why the legal culture matters, and what role a well-articulated standard and broadly held commitment to zealous advocacy could play in the specific context of immigration court.

Zealousness has at least two manifestations. One is simply a kind of lawyering thoroughness, where lawyers use all tools available to advance their client's interests—and indeed, it is now officially housed in the ethical rules under the principle of diligence. While zeal-as-diligence is not easy, it is also not terribly controversial. The other manifestation of zeal is in pushing boundaries and taking risks for clients, which quickly becomes far more controversial as it calls upon lawyers to tiptoe up to the edges of ethically permissible behavior instead of remaining in a safe, neutral zone. Often cast in negative lawyer-as-hired-gun-terms, this form of zeal is complex, and may still be both client-centered *and* justice-oriented, especially where clients lack

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ZEALOUS ADVOCACY

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power relative to the system or systems they are confronting.¹ One example may better explain these two aspects of zeal, and show their significance:

Cynthia had lived in the United States for seventeen years, working as a nanny. Along the way she married, and later divorced, a fellow Jamaican with whom she had two daughters. She called the police on him once during a fight, and the police arrested them both. In court, each accepted a deferred sentencing agreement, agreeing to do twenty hours of community service to make the issue go away. Cynthia's older daughter is excelling at school and won a scholarship to a private high school where she plays flute in a traveling orchestra. Her younger daughter suffers from juvenile rheumatoid arthritis, and Cynthia has managed her care over the years. Recently, police pulled Cynthia over for a traffic stop while she was driving in the predominantly white neighborhood where she works, found that she had two IDs with two different names, and placed her under arrest. They notified immigration enforcement officers, leading to her removal hearing because the deferred sentencing agreement constituted a domestic violence conviction that made her deportable.

Now Cynthia is in immigration court. On any given day in immigration courts around the country, dozens, if not hundreds, of immigrants in removal proceedings concede the allegations filed by the Department of Homeland Security on a charging document called the Notice to Appear, in a process that takes only a moment. Many, if not most, of those immigrants will concede that the Government has the legal basis to deport them. And with that, in less than a minute, the Government has met its burden, and the immigrant can be deported unless there is some form of relief he or she can seek.²

But Cynthia's lawyer did not concede the basis for deportation, even though the lawyer knew that she did, in fact, lack status—simply because it was still the Government's burden. Now, instead of the Government proving its case within a minute by relying on a concession from the immigrant's attorney, the process stopped and the judge had to hear arguments concerning the sufficiency of the Government's evidence supporting the conviction. An individual without legal immigration status can win her case if the Government cannot, in fact, meet its burden, without ever getting to the question of whether the immigrant is eligible for any kind of relief from removal.³ Let us imagine that in this case, though, the Government was able to meet its burden, meaning the Government

¹ See generally W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004), for an excellent overview of zeal and its critics, among other complicated ethical issues. Kate Cruse also thoughtfully explores the tensions among client-centeredness, zeal and justice in Kate Cruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

² Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1809 (2013).

³ The Government can refile charging documents with better evidence in the future if it so chooses.

had now made its case against Cynthia.

The story continues momentarily, but note here how this decision to deny the charge of removability disrupts norms of performance with lawyering that differs sharply from the daily mill of cases churning through the immigration removal system. But this lawyer is simply zealously, if unexpectedly, using all the tools she has at her disposal. This choice is only modestly controversial—many lawyers argue that a duty of candor to the tribunal requires them to concede removability if they know that the Government can ultimately amass evidence to sustain the charge, or if they think it would be frivolous to litigate the charge—but here the lawyer sees this as a weak but not frivolous strategy, and worthy of putting the Government to its burden in case the proof is not present.

Cynthia now tries to avoid deportation by showing she is eligible for the form of relief known as Cancellation of Removal, an application she affirmatively makes to the Government. She is likely eligible because she has been here more than ten years, and her removal would cause “exceptional and extremely unusual hardship”⁴ to her U.S. citizen daughter with arthritis. But there is one wrinkle: the application asks about any arrests, and in response to that question, Cynthia told her lawyer that she was once arrested for theft for taking her ex-husband’s car without his permission. A guilty plea for this would make her ineligible for Cancellation. Cynthia said her defender “sorted it all out” for her, but she does not remember what happened at the one court appearance she had, just that the problem seemed to go away.

The lawyer looked in the criminal courts of Virginia, where Cynthia had lived since coming to the U.S., and found no evidence of an arrest or subsequent charges. Between that and Cynthia’s vagueness about what had happened, the lawyer decided she had no duty to dig deeper with Cynthia for details that could help unearth any conviction that might or might not exist. The Government, despite running Cynthia’s fingerprints through its fairly comprehensive system, found no evidence of a theft either. Cynthia won her case, got a green card, and stayed in the U.S. to work and to raise and care for her daughters.

This second ethical decision, about how far to dig for the theft conviction, is more controversial. Here, the duty to present a truthful application to the court conflicted with the lawyer’s duty of loyalty to her client, and many lawyers would have erred on the side of interrogating the client to be as forthcoming as possible with the tribunal. Indeed, had Cynthia’s lawyer asked her a few more questions, she could have found out that the charge was, strangely, adjudicated

⁴ This level of hardship is a requirement for one form of relief from deportation, Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents. INA § 240B(b)(1)(D); 8 U.S.C. § 1229b(b)(1)(D) (2013).

in family court alongside the divorce itself—and she could easily have produced the document that would have made Cynthia ineligible for relief. Her diligence would have resulted in her client’s deportation, but the lawyer would have secured the court’s respect for her honesty and integrity, something that likely matters profoundly to a lawyer who appears before that judge time and time again.

By contrast, the lawyer ran the risk of being hauled up on ethics charges by creeping toward the edge of the murky line between *knowing* about a fact she had a duty to tell the tribunal,⁵ *recklessly disregarding* the existence of a relevant fact,⁶ or deciding that there was enough ambiguity present that she did *not* “know” about a conviction.⁷ This lawyer’s choice of interpreting unclear rules in favor of her client is risky to her, but zealousness, as she defined it, demanded she go with that less safe choice.

There is no question that zealous representation has profound consequences in immigration court, where clients may contend with prolonged detention, family separation, and ultimately, for many, deportation with its many attendant losses.⁸ Attorneys generally know that zealousness is within their box of tools as they represent clients, and that it is required by the rules of professional conduct in so far as lawyers are to act diligently on their clients’ behalves. But zealousness is often tempered by duties to the tribunal, and by attendant role confusion caused by competing duties to clients and the system as a whole. The broader legal context exacerbates these forces, where court systems and the ethical rules increasingly favor more conciliatory

⁵ Model Rule 3.3(a)(1) requires her not to put forth facts she knows to be false. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (1983).

⁶ The immigration court ethical rules governing the lawyers’ conduct go farther than the Model Rules, as discussed in Part 5, *infra*.

⁷ Comment 8 to Model Rule 3.3 permits lawyers to resolve doubts in favor of their clients. Comment 8 in its entirety reads:

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

MODEL RULES OF PROF’L CONDUCT.

⁸ This Article does not intend to rank practice areas by difficulty, as other practice areas share many of these same challenges and comparable consequences, such as abuse and neglect proceedings. Indeed, as I have shared earlier versions of this Article with lawyers in diverse fields, they have all painfully recognized these issues and identified closely with the challenges described in this Article. Clearly, the forces against zealous advocacy permeate far more than the immigration bar, and are worthy of intensive conversation across legal practice areas.

modes of litigation. Moreover, while some pressures against zealousness are endemic to any system with a relatively small number of repeat players, others result from by skyrocketing immigration court dockets that overwhelm both judges and lawyers for the Government, by widespread, powerful narratives that assume everything from the feebleness of the constitution in immigration court to the presumed removability of the immigrants who appear there. Indeed, in overstretched court systems like this one, it may sometimes seem that zealousness is disfavored entirely. This Article takes the stance, however, that given the stakes in immigration litigation, zealousness is *required* for true attorney effectiveness, no matter how difficult, uncomfortable, or costly it may be, and therefore lawyers in the immigration system urgently need to understand and overcome those barriers to zealous advocacy.

The complexity of these issues, the scope of the consequences, and the importance of a well-defined norm of zealousness all call to mind the world of criminal defense, which has a split personality important to understand. Although all lawyers are bound by rules of professional conduct, criminal defense has a strong history of establishing norms that challenge defenders to rise above the ethical floor often set by those rules, where effectiveness is defined at a minimally effective level. Defenders have created a culture whereby the best defenders stake their reputations on their zeal and on the clarity of their understanding that they stand with their clients against the weight of other forces in the overall legal system. It is true that examples of poor-quality defenders plague the criminal defense bar, and even well-intentioned defenders find themselves unable to live up to their desired level of representation because of impossibly high workloads. Moreover, the law itself defines effectiveness far below the standards of the best defenders, thanks to the extraordinary permissiveness created by *Strickland*⁹ and the cases interpreting it, which serve to separate legally-sufficient “effectiveness” from truly effective lawyering. Legally-sufficient effectiveness is a terribly low standard, while truly effective lawyering is a demanding high one. In a context where legally-sufficient effectiveness might have become the norm, however, defenders have actively sought and defined a much higher standard of practice, which involves oftentimes aggressive interpretations of the rules of ethics in favor of zealous advocacy. Part II of this Article explores the lengthy, sophisticated debate around the justifications (or lack thereof) for such zealousness, looking at factors

⁹ *Strickland v. Washington*, 466 U.S. 668 (1984).

such as resources, procedural advantages, political and psychological advantages, as well as the legitimacy of the immigration court ethical rules themselves.¹⁰

True effectiveness (as opposed to legally-sufficient effectiveness) is not easy in immigration litigation. Immigration lawyers¹¹ face a constant and varied set of ethical challenges while working in an exceptionally difficult practice context: administrative law whose complexity is often likened to the tax code; often intransigent bureaucracies; limited judicial review; the demanding solo-practitioner and small-firm business-model that dominates the immigration bar; the presence of trauma; complex cultural and linguistic barriers; and so forth. The uniqueness of immigration practice also makes it likely that immigration lawyers are less likely to be held to high standards than their counterparts in other areas of practice, for many reasons, but especially because those who pay the price for ineffective assistance are often deported and unable to hold counsel accountable.¹²

Complicating matters further, immigration practitioners operate in a unique form of the adversarial system, lacking some of the critical tools and protections—limited though they are—that their closest colleagues, criminal defenders, possess. These limitations certainly arise from the different (oftentimes lesser) constitutional protections

¹⁰ Here, this Article applies a framework developed by ethicist and legal philosopher David Luban to justify including immigration with criminal defense as meriting the choice of “zealous advocacy” and not “litigation fairness” as the baseline for resolving ethical dilemmas. See Part II.B, *infra*; see also David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1998). This Article sidesteps the question of whether different practice areas might adopt different principles, or whether the bar should have a uniform approach to ethics, as this is a subject richly explored and part of ongoing scholarly conversations elsewhere.

¹¹ I use the term “immigration lawyers,” but as will be discussed *infra* in Part B there are several categories of non-lawyers who can practice in immigration court, including students, accredited representatives and “reputable individuals.” 8 C.F.R. § 1292.1 (2008). Likewise, immigration prosecutors within the Department of Homeland Security certainly practice immigration law, but for ease of identification, I am calling them prosecutors, and their adversaries “immigration lawyers.”

¹² This phenomenon is discussed in Part III, *infra*. An empirical study would be well-merited on this point, but it is interesting here to note that immigrants *do* have an incentive to file bar complaints to get their cases reopened under *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988) (permitting a case to be reopened where an immigrant demonstrates prejudice from a prior attorney’s ineffective assistance of counsel). *Lozada*, however, requires that the immigrant still be present in the U.S., requires (most likely) that the immigrant has secured a second lawyer to understand about the options that may be available under *Lozada*, and, most important to this discussion of incentives for effectiveness, does not require that a disciplinary action actually result against the prior attorney.

surrounding immigration proceedings, but they also arise from the posture of immigration cases themselves. Specifically, as Cynthia's story shows, although advocates may see themselves as *defending* their clients against removal, they are affirmatively seeking benefits and have burdens of proof that can, and often do, put their duties to their clients in direct opposition to their duties as officers of the court. These and other ethical issues create ethical dilemmas for immigration litigators, but a broadly-held commitment to zealous advocacy would encourage litigators to explore and act at the edges of ethically permissible behavior to ensure truly effective representation of their clients.

Part III addresses the question of why this kind of powerful standard-setting matters. Again, the world of criminal defense shows how voluntary standards help counteract the erosion of effectiveness that occurs when the legally-sufficient understanding of "effectiveness" is so poor. While not halting the forces of erosion, the standards provide a healthy counter-force. Likewise, the articulation of a heightened standard of effectiveness for immigration attorneys, one that elevates zealous advocacy, could help the practice of immigration in numerous ways. Not only would it bolster, support and encourage the work being done by the many excellent, zealous immigration advocates currently practicing, but it would provide a measure against which the dominant-narrative "bad immigration lawyers" can be judged.

Part IV begins the examination of ways that such a commitment to zealous advocacy might help make difficult choices amid the challenges of immigration litigation. Those challenges may be grouped into ones where zealousness can make a difference, and those where the very structure of immigration law and the ethical rules may make truly client-centered zealous advocacy impossible. These dilemmas will help show the ways that immigration law itself challenges practitioners from adhering to often conflicting ethical duties, let alone achieving a higher standard of effectiveness. This Article calls upon the immigration bar to make zealous advocacy a broadly-shared and well-articulated norm of practice. For the seemingly impossible situations, where lawyers simply cannot meet their competing duties to the clients and to the court, law reform efforts may be needed as well—with some as simple as fine-tuning the governing ethical rules. The untenable contrasts and conflicts set forth in this Article require a shift in the laws and structures so that lawyers in immigration court have the possibility of playing their multiple roles responsibly, something precluded by the current laws and structures.

II. JUSTIFYING ZEALOUSNESS

It is broadly understood that the various ethical duties imposed upon lawyers are frequently in tension with each other. At their core, many of these tensions exist between those duties owed to the client and those owed to the court or legal system generally. Over the centuries, there has been an ongoing struggle between two approaches to this central tension. One approach holds zealous duty to the *client* as the primary duty, one that is only secondarily tempered by duties to the court or legal system generally (hereinafter called the “zealous advocate” approach).¹³ The other is an approach where the duties to the court and legal system are more important. This second approach aligns the lawyer and the court as sharing the ultimate objectives of truth and justice (hereinafter referred to as the “litigation fairness” approach).¹⁴

The decline of the zealous advocate model, as noted in Part 1, manifests in many ways, but most notably in the revision of rules of conduct to minimize or omit references to zeal. As two lawyers note: “The demise and disappearance of ‘zeal’ from our ethical rules is more than a matter of semantics. In fact, it is evidence of a fundamental paradigm shift that is and has been occurring in our legal system.”¹⁵ One powerful intentionally-articulated counterpoint is in the practice of criminal defense, where zealous advocacy retains its power. This Article now briefly sketches out this debate, describing “litigation fairness” and the justifications for it, and contrasting it with the zealous advocacy approach, before assessing the extent to which either model is appropriate in the immigration court context. This Article cannot possibly do justice to the nuances of the various models or to the sophisticated debates among them, but aims to provide just enough context to be instructive to those who are not immersed in ethics literature to understand that there *is* a robust alternative framework urging lawyers to be less uniquely focused on client-centered advocacy.

¹³ Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381 (2012). William Simon underscores the longevity of these themes, but notes that they are not either/or propositions: “There has never been a consensus about where to draw the line between these two aspects of the lawyer’s role, and the two have always been in tension within the professional culture.” William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1133 (1988).

¹⁴ Andrews, *supra* note 13. .

¹⁵ Lawrence J. Vilaro & Vincent E. Doyle III, *Where Did the Zeal Go?* 38 A.B.A LITIG. 53, 56 (2011), available at http://www.americanbar.org/publications/litigation_journal/2011_12/fall/where_did_zeal_go.html.

A. *Competing Approaches to Professional Conduct*

1. Alternatives to Zealous Advocacy

Various approaches to professional conduct recognize the ways in which ethical duties sometimes conflict, and choose “first-order” moral values, such as truth and justice, as the guiding principle to resolve any conflicts, instead of placing zealous advocacy to the client first.¹⁶ Although the variations on this are diverse, for the sake of simplicity I will focus on one described as “litigation fairness.”¹⁷ As one scholar has written, “[t]he lawyer still has a duty to zealously advocate for the client’s interest and position, but the duty of zeal should not be allowed to be a justification for lawyer behavior that imposes significant costs on the legal system and society in general.”¹⁸ Fairness to the court encompasses such characteristics as reasonable behavior, truth (as to both law and fact), and merit (again, as to both law and fact).¹⁹ Premised upon a vision that two adversaries have comparable levels of power, litigation fairness suggests that a lawyer may not need to unleash every weapon in a brutal struggle for the client’s interests.²⁰

Carol Rice Andrews has explored this concept in depth, considered its long history, and has suggested that a distinct but encompassing duty that encapsulates what it means to be fair to the court is the concept of “just cause.”²¹ “Just cause” means assuring that an action is “reasonable, honest, objectively meritorious, and properly motivated.”²² A French ecclesiastical oath from the thirteenth century cautions against knowingly taking cases that are “not just,” and while

¹⁶ Wendel, *supra* note 1.

¹⁷ “Litigation fairness” is but one name and approach for multiple critiques of zealous advocacy. A particularly important approach that shares some characteristics of this model is that of William Simon who offers deep critiques of what he calls the “dominant model” of zealous advocacy, discussed further below, but nicely summarized in Wendel, *supra* note 1. Compare Andrews, *supra* note 13, with William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085–87 (1988).

¹⁸ John S. Dzienkowski, *Ethical Decisionmaking and the Design of the Rules of Ethics*, 42 HOFSTRA L. REV. 55, 75 (2013).

¹⁹ “Over the centuries, the concept of litigation fairness has included different duties and standards of conduct, including reasonable behavior, truth, just cause, proper motive, and objective merit.” Andrews, *supra* note 13, at 383.

²⁰ See Richard Marcus, *Cooperation and Litigation: Thoughts on the American Experience*, 61 U. KAN. L. REV. 821 (2013).

²¹ Andrews, *supra* note 13, at 387. Andrews examines this concern for the “justness” of a legal action in an interesting examination of historical records, from the Justinian oath, through the French ecclesiastical oaths from the 13th century, “[e]very single advocate shall swear that he will faithfully perform his duties; that he will not support cases that are unjust or militate against his conscience.” *Id.*

²² *Id.*

demanding duties to the client, sets forth many more duties to the court itself.²³ As Andrews notes summarizing developments in both the English and French contexts: “Truth and reasonable behavior were paramount duties from the very beginning of the profession in both cultures. . . . Client concerns were often unstated, and when stated, the client duties, including zealous advocacy, were expressly subordinate to the lawyer’s duties to the court.”²⁴ As the various legal oaths moved closer to the modern age, a similar emphasis continued. The 1816 oath from Geneva formed the basis for the Field Code and U.S. professional responsibility duties later on. This oath concerned itself primarily with the justness of the litigation and the lawyer’s duties to the court, although as noted below, conceives of criminal defense as meriting something different.²⁵

Such a focus on the “just cause” of the action is clearly consistent with zealous advocacy where the cause is, in the lawyer’s reasonable view, “just”—of particular note here is that the lawyer’s view must be a reasonable one, and this mitigates against the fear that zeal is the last refuge of unscrupulous lawyers. However, the litigation fairness approach also recognizes that zealous advocacy is likely to be the duty “most at odds with the lawyer’s duties to the court.”²⁶ When imposed, these duties to the court “have been paramount over any conflicting client duties.”²⁷

This primacy of duties to the court marks a change from the earliest presentation of legal ethics in the Justinian Oath from the sixth century, where duties to the court were seen as tempering the *primary* duty of zealous advocacy.²⁸ The Oath reads, in part, that

[T]hey will undertake with all their power and strength, to carry out for their clients what they consider to be just and true, doing everything which it is possible for them to do. However, they, with their knowledge and skill, shall not prosecute a lawsuit with a bad conscience when they know that the case entrusted to them is dishonest or utterly hopeless or composed of false allegations.²⁹

²³ *Id.* at 396–97 (quoting 23 SACRORUM CONCILIORUM: NOVA ET AMPLISSIMA COLLECTIO, as translated in JOSIAH HENRY BENTON, THE LAWYER’S OFFICIAL OATH AND OFFICE 9 (1909)).

²⁴ *Id.* at 401.

²⁵ *Id.* at 400.

²⁶ *Id.* at 386.

²⁷ *Id.* at 383.

²⁸ *Id.*

²⁹ Andrews, *supra* note 14, at 389 (quoting the Justinian code).

The Justinian Oath thus strikes a balance in favor of the client while recognizing the importance of lawyerly integrity, without which the system would be degraded by zeal. The different balance struck by litigation fairness has less trust that zealousness (with integrity) would be to the benefit of the overall system.

Litigation fairness does not necessarily proscribe all zealous advocacy, and certainly not in all instances. For example, requiring reasonable behavior is, with very few exceptions, not inconsistent with zealous advocacy. Nor is a zealous advocate likely to be overly conscribed by a duty to avoid offensiveness in treatment of judges and adversaries. Likewise, zealous advocates may reasonably be convinced of the justness of their cause, and not simply be shilling for lying clients, meeting that notion of “proper motivation” that Andrews characterizes alongside just cause as part of duties to the court.³⁰

There are many times, however, where putting the needs of the system before the needs of the client makes the two models incompatible. This is especially true in immigration court where the overburdened, under-resourced system would benefit greatly in terms of efficiency and caseload management if lawyers filed fewer motions, allowed the Government to meet its burden easily, consented to abbreviated client testimony to finish hearings more quickly, and so forth. Zealous advocacy in such a setting *does* impose significant burdens on the tribunal itself, and all players in the system are surely aware of those burdens because years-long docket backlogs and understaffing of the immigration courts are widely noted phenomena,³¹ to the dismay of the Government and advocates alike. Thus, immigration lawyers who choose to zealously advocate make a choice at odds with the needs of the system itself—an instance of litigation fairness clashing squarely with zealous advocacy.

The litigation fairness model has been ascendant in American legal culture, and within the ethical literature. Important voices such as William Simon have developed sophisticated arguments for the notion that all players in the adversarial system should define themselves as working toward justice in the system, instead of putting *client* interests first and foremost—although Simon recognizes that once a worthy client is chosen, a lawyer may advocate fully to achieve

³⁰ Andrews, *supra* note 13 at 386.

³¹ See, e.g., Zoe Tilleman, *Immigration Courts Backlog Grows as Obama Prepares Executive Action*, NAT'L L. J. (Nov. 20, 2014), <http://www.nationallawjournal.com/id=1202677017577/Immigration-Courts-Backlog-Grows-as-Obama-Prepares-Executive-Action#ixzz3RHYSDPNc>.

justice.³² In this view, lawyers can discern what justice looks like from case to case, and matter to matter, and should commit to working toward that result.

The litigation-fairness model also shows up in recent reforms to the Model Rules, state rules and contested understandings of the roles of lawyers in problem-solving courts. Notice first the changes in the Model Rules themselves. As Professor Anita Bernstein has written, the ABA's 1980 Model Code of Professional Responsibility "omitted zeal from its enforceable rules, replacing the verb phrase 'shall represent' with 'should represent'—its Canon 7 read 'A Lawyer Should Represent a Client Zealously Within the Bounds of the Law'—thereby signaling mere guidance rather than a basis for discipline."³³ States have followed suit. Arizona struck the phrase "zealous advocacy" from its rules of professional conduct in 2003: "Last December, the adverb 'zealously' was removed and replaced with words demanding that lawyers 'conduct themselves honorably.' As the state bar put it, the change was made because 'lawyers had misused' zealous advocacy 'to justify unprofessional, intemperate, and uncivil conduct while engaging in the practice of law.'"³⁴ In 2004, the Colorado Bar Association President wrote to his membership that: "Diligence, competence, confidentiality, with no conflicts of interest: elegant simplicity. The rules are comprehensive, describing a lawyer's duties not only to clients, but also to others. In short, the word 'zealous' is not a word needed to describe a lawyer's ethical duties."³⁵ In 2009, New York amended its rules, removing all references to zeal.³⁶ In problem-solving courts, as has been explored elsewhere in the literature, lawyers may be seen to have greater duties to the community and to abstract notions of justice than to the client,³⁷ although some assert that the

³² Simon, *supra* note 17.

³³ Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV 1165, 1167 (2006) (citation omitted).

³⁴ Lincoln Caplan, *The Good Advocate*, LEGAL AFFAIRS (May/June 2004), http://www.legalaffairs.org/issues/May-June-2004/editorial_mayjun04.msp.

³⁵ Steve C. Briggs, *The Myth and Mischief of Zealous Advocacy*, THE COLO. LAW. (2004), available at <http://coloradomentoring.org/wp-content/uploads/2013/10/Briggs-S-The-Myth-and-Mischief-of-Zealous-Advocacy-34-The-Colorado-Lawyer-33-2005.pdf>.

³⁶ Vilardo & Doyle, *supra* note 15, at 56.

³⁷ For an interesting conversation about this debate, see John Feinblatt & Derek Denckla, *What Does It Mean to be a Good Lawyer? Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206 (2001). See also Tamar Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007).

conflict in duties is overstated.³⁸

The diminution of zeal in the rules seems to reflect a conflation of zeal with incivility, rudeness and utterly unethical behavior—none of which is actually a problem of zeal. Professor Bernstein defines zeal as “commitment to one side (rather than to a neutral search for truth), and passion.”³⁹ She identifies the many flaws misattributed to zeal.⁴⁰ One example of such misattribution, using her definition of zeal, comes from a chapter devoted to “Excessive Zeal” in Richard Abel’s excellent *LAWYERS IN THE DOCK*, a rich set of case studies on unethical practices in a variety of settings.⁴¹ Abel highlights vivid examples of behaviors explicitly in violation of the Model Rules, including rude, personal attacks by lawyers, and falsification of evidence by lawyers. All of the examples noted are problematic, but problematic on their own terms as rule violations, not as examples of zeal itself.⁴² One can be a passionate advocate committed to one side in a dispute without engaging in fraudulent, criminal, or hostile behavior. As Professor Bernstein writes, “Lawyers who err deserve blame; zeal does not.”⁴³

In the immigration context, one appeal of litigation fairness is how it sweeps the rug from under the feet of lawyers who will falsify evidence or file anything for the sake of delaying a client’s case, who rely on an *unreasonable* zealousness (not the “reasonable” aspect of a just cause) to shill for clients. Clearly these lawyers are unethical by any standard, but they try to hide their actions under the cloak of zealousness, and a different emphasis on duties to the court system would take that cloak from them.⁴⁴ More significantly, a litigation fairness approach lives up to the neglected spirit of *Matter of S-M-J*,⁴⁵ a pivotal case in asylum jurisprudence that is the closest immigration law has come to articulating a collaborative approach in the immigration court system. Notably, however, *S-M-J* urged that the collaborative

³⁸ Julie Goldman, *The Need for Mental Health Courts for Lawyers to Fulfill Their Duties Under ABA Model Rule 1.14*, 26 *GEO. J. LEGAL ETHICS* 683, 689–90 (2013); Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 *HASTINGS L.J.* 1349 (2011).

³⁹ Bernstein, *supra* note 33, at 1171.

⁴⁰ *Id.* at 1175–78.

⁴¹ RICHARD ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008), Chapters 7 and 8.

⁴² *Id.*

⁴³ *Id.* at 1169.

⁴⁴ Aristotle himself provides a simple response to this argument, noting that “[a] man can confer the greatest of benefits by a right use of [things that are most useful], and inflict the greatest of injuries by using them wrongly.” ARISTOTLE, *RHETORIC* (W. Rhys Roberts trans.), bk 1, ch. 1, sec. 13, at 3.

⁴⁵ 21 I. & N. Dec. 722 (B.I.A. 1997).

spirit between judge, Government counsel and the immigrant/immigrant's attorney be to the benefit of the *immigrant*, not the system itself, in recognition of the tremendous consequences at stake.⁴⁶ Such collaboration is sometimes present in *pro se* cases where judges or Government counsel will point out the immigrant's potential eligibility for some form of relief, and urge the immigrant to find counsel who can help him or her apply for relief. Once counsel enters an appearance for the immigrant, however, that notion of collaboration typically evaporates and the proceedings are often highly contested, with even judges playing an active role in adversarial questioning of the immigrant.⁴⁷ With such adversariality comes the occasion for zealous advocacy.

2. Zealous Advocacy

Zealous advocacy draws from a longstanding tradition in legal ethics. In 1908, the ABA discussed "the lawyer's obligation to give 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability.'"⁴⁸ This was the "rhetorical apogee" of zealous advocacy, which has been more recently subsumed under the rule exhorting attorney diligence,⁴⁹ with a separate mention in the preamble to the Model Rules.⁵⁰ Nonetheless, it continues on as a popular ideal.

In modern-day practice, the leading voices for zealous advocacy have been criminal defenders, with abundant scholarship providing justifications for that position.⁵¹ The criminal justice system provides a rich body of accumulated wisdom regarding zealous advocacy in the context of appointed counsel.⁵² The ethical norms of criminal

⁴⁶ *Id.* at 727.

⁴⁷ Maria Baldini-Potermin, *Preparation of Testimony of Noncitizen and Other Lay Witnesses*, IMMIGRATION TRIAL HANDBOOK § 6:17 (2014).

⁴⁸ MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 79 (2d ed. 2002) (quoting ABA CANONS OF PROFESSIONAL ETHICS 15 (1908)).

⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1983) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.").

⁵⁰ "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROF'L CONDUCT Preamble, at ¶ 2 (2013).

⁵¹ FREEDMAN and SMITH, *supra* note 48; SMITH, *infra* note 55

⁵² The NAACP Legal Defense Fund (LDF) has written extensively on this issue in the South. The LDF noted that "[o]n the eve of Gideon's 40th anniversary, these paper guarantees, however, are functionally meaningless in Mississippi, a state which provides almost no regulation, oversight, or funding for indigent defense." NAACP LDF, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS (Feb. 2003),

defenders suggest that among the sometimes competing roles that lawyers play as advocates and officers of the court, the role as advocate is particularly important. Indeed, the first of thirty-eight guidelines issued by the National Legal Aid and Defender Association (“NLADA”) states that: “The *paramount* obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys *also* have an obligation to abide by ethical norms and act in accordance with the rules of the court.”⁵³ David Luban shows how the power differential between the defendant and the opposing party—the State—demands heightened attention to the client, an argument set forth in more detail in the next section. This Article will show that the same, and more, can be said of immigration proceedings.

While the reality in criminal courts across the country is far from the ideal envisioned by *Gideon*,⁵⁴ as described in *Part III.A, infra*, the zealous defender remains a dominant paradigm. Freedman and Smith, criminal defense lawyers and scholars, have written extensively on the primacy of zealous advocacy in a defender’s practice, and Smith provides an eloquent summary of the philosophy:

[A] lawyering paradigm in which zealous advocacy and the maintenance of client confidence and trust are paramount. Simply put, zeal and confidentiality trump most other rules, principles, or values. When there is tension between these “fundamental principles” and other ethical rules, criminal defense lawyers must uphold the principles, even in the face of public or professional outcry. Although a defender must act within the bounds of the law, he or she should engage in advocacy that is as close to the line as possible, and, indeed, should test the line, if it is in the client’s interest in doing so.⁵⁵

Freedman and Smith have been among the most significant proponents of the importance of zealous advocacy for the practice of criminal defense, although they draw upon the longer tradition of zealous advocacy throughout the broader legal profession.⁵⁶ Their

available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

⁵³ NATIONAL LEGAL AID DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES, available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#oneone (last visited Feb. 28, 2015) (emphasis added) [hereinafter NLADA Standards].

⁵⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁵ Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL’Y 83, 89–91 (2003).

⁵⁶ Lord Brougham famously described this principle in 1838 as follows: An advocate, by the sacred duty which he owes his client, knows, in the

arguments are grounded in the particular needs of criminal defense, given that in the criminal justice system, individuals are seeking protection from the full weight of the State—and given the stakes involved, where life and liberty are on the line.⁵⁷ For them, “the central concern of a system of lawyers’ ethics is to strengthen and protect the role of the lawyer in enhancing individual dignity and autonomy through advocacy.”⁵⁸ This view of zealous advocacy does more than defend the constitutional rights of the accused in any given case; it also promotes the broader societal goods of dignity and autonomy.

With such strong historical antecedents, Smith and Freedman have not developed a new principle so much as justified the ongoing relevance and primacy of an old principle. As any practitioner quickly realizes, rules of ethics often conflict with one another (even *within* one jurisdiction, let alone across jurisdictions), and the Freedman view is that in situations of conflict, the defender must resolve the conflict in favor of zealous advocacy for the client.⁵⁹ Clinical legal scholars across many disciplines have also recognized zeal as a component of client-centered lawyering, the “predominant model for teaching lawyering skills” in American law schools (although problematically in tension with other values of client-centered lawyering).⁶⁰

3. Debate Over a Unitary Standard or a Context-Specific Standard of Practice

Even among proponents of zealousness, extensive debate exists concerning the question of whether zealous advocacy is justified uniquely for criminal defense, justified for some broader subset of legal practice areas, or justified as a standard for all practice areas. While ultimately beyond the scope of this Article, this question is worth exploring briefly because this Article at a minimum assumes either that zealous advocacy is the right unitary standard or, at least, the necessary standard within the immigration-context.

discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other.

1 SPEECHES OF HENRY LORD BROUGHAM 105 (Edinburgh: A. & C. Black, 1838).

⁵⁷ Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

⁵⁸ Smith, *supra* note 55, at 88.

⁵⁹ Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

⁶⁰ Cruse, *supra* note 1, at 370.

At one end of the debate are Simon, discussed above, and Fred Zacharias, who advance the view that criminal defense is *not* particularly exceptional, and therefore should be governed by the same ethical norms as the rest of the legal profession—and not by norms of zealous advocacy. Zacharias, whose scholarship focuses on prosecutorial ethics, has argued that the difference between civil litigants and criminal defendants is overblown, first because civil cases can have enormous impact on litigants, and second because incarceration is often brief and not terribly disruptive to the incarcerated.⁶¹ For these reasons, there is not enough of a difference between civil and criminal cases, in his view, to justify a different ethical standard.⁶²

Moving toward a justification for zealous advocacy in certain contexts is David Luban, a renowned philosopher and legal ethicist who has also taught in an immigration clinic and written of immigration's difficult ethical challenges.⁶³ Where Simon and Zacharias put forward a unitary theory of ethics that would not justify criminal defense exceptionalism,⁶⁴ Luban provides a justification for treating criminal defense differently.⁶⁵ Luban's framework applies usefully for evaluating the world of immigration, and will therefore be discussed in greater detail below. He particularly examines the question of who has the advantages in a criminal prosecution by looking at resources, procedural advantages, political and

⁶¹ Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 177–78 (1996). Smith critiques this article:

He goes so far as to assert that being arrested or incarcerated is no big deal to most “modern” defendants who “may meet incarcerated friends” at the local jail, thus, equating jail for the underclass to Starbucks for the coffee klatsch. Zacharias concludes that, at the very least, “the assertion that criminal defendants are unique is a vast overgeneralization.”

Smith, *supra* note 55, at 106–07.

⁶² Zacharias, *supra* note 61.

⁶³ David Luban, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995).

⁶⁴ Simon does not believe the power of the State against the individual is a significant enough factor to justify criminal defense exceptionalism, at least partly because he is most concerned with lawyers hired by wealthy elites (think: OJ Simpson defense team) who may have almost limitless resources at their disposal. In Simon's view, such lawyers greatly overpower the “small number of harassed, overworked bureaucrats” who comprise the prosecution. William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707 (1993). Smith and Freedman have responded vigorously to his arguments, questioning, *inter alia*, whether his theory derives from the correct understanding of how criminal justice operates, and suggesting that his more collaborative approach to ethics ignores the reality of the power imbalances present in trial courts across the nation. SMITH & FREEDMAN, *supra* note 48.

⁶⁵ David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).

psychological advantages, and bargaining power, and concludes that for the overwhelming majority of criminal prosecutions (and not including the high-price defense that preoccupies Simon), the state has far more power, which justifies a “rebuttable presumption” of zealous advocacy: the defender should assume that zealous advocacy is appropriate, unless something in the specific situation argues otherwise.⁶⁶ He writes:

[T]here are substantial objections to a double standard in legal ethics, including the obvious objection that practitioners may disagree about which standard applies to them. In that case, my conclusion is that, if the standard is to be single, it should be the single standard of permitting aggressive defense in every case, rather than Simon’s single standard of presuming that aggressive defense is improper except when the threats of overpunishment, racism, or assembly line justice are imminent. After all, since these are the most typical cases, the exception threatens in any event to swallow up the presumption.⁶⁷

A possible line between civil and criminal theories of ethics runs throughout legal history and ethics scholarship.⁶⁸ Zealous advocacy is often treated as so innate to criminal defense that it needs no particular justification, and is just a distraction to the more complicated questions of zealousness in non-criminal law practice.⁶⁹

Abbe Smith has pushed back against the silo-ing of zeal to the world of criminal defense, arguing that zealous advocacy is the necessary, defining mode of lawyering across the profession—and not exceptional to criminal defense.⁷⁰ Smith acknowledges how criminal defense is unique, but notes that there is simply no line that can be meaningfully drawn between it and the rest of the legal profession:

⁶⁶ *Id.* at 1757–58.

⁶⁷ *Id.* at 1766.

⁶⁸ “Many of the core ideals are the same in both contexts, but a lawyer’s duties may vary depending on whether the litigation is civil or criminal. In my discussion of the historical standards, I occasionally note the different context of criminal cases where that difference helped define the duty on the civil side.” Andrews, *supra* note 14, at 385. The 1814 Swiss oath that otherwise falls squarely under the “litigation fairness” model, emphasizing both duties to the court and the justness of the cause, itself carved out an exception for criminal defense: “To not counsel or maintain any cause that I do not feel is just or equitable, as long as it does not refer to a criminal defense.” Andrews, *supra* note 14, at 400.

⁶⁹ See, e.g., John S. Dzienkowski, *Ethical Decision-Making and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 75 (2013) (“Of course, in criminal cases, the duty of zeal has an especially important place

⁷⁰ Smith, *supra* note 55.

Although thoughtful scholars have proposed ethical schemes with two or more tiers, I believe this is a bad idea and ultimately a dangerous one. Not only is it impossible to draw a principled line between criminal and civil practice, but it is impossible to draw tenable categorical lines at all. There are also a host of practical difficulties in developing an ethical scheme that reflects all of the contexts of legal practice. The danger is to the adversary system itself, and the constitutional principles underlying it. The push to curb zealous representation in civil cases will inevitably jeopardize zealous representation in criminal cases and the rights of the accused. As we have seen, the critique of “adversarial excess” invariably spills over into the criminal system.⁷¹

The broader and deeper question of whether zealous advocacy should be the unitary standard for every form of law practice is beyond the scope of this Article. In the following section, this Article does reject the notion that zealous advocacy is *never* justified. By bringing the ethical standards of immigration practitioners in line with those of criminal defenders, this work could support Smith—because it shows how difficult it truly is to find a meaningful line between criminal and non-criminal work.⁷² It could also support Luban because he justifies zealous advocacy in certain criminal *and* quasi-criminal contexts,⁷³ and the analysis below situates immigration practice squarely within the kind of “quasi-criminal” context he suggests.

B. Justifying Zealous Advocacy for Immigration Practice

Because part of the justification for zealous advocacy is the unevenness of the adversaries in multiple ways, the immigration system, too, needs to be evaluated as to that question. Indeed, it compares in some regards quite easily to the criminal system, but also exceeds its lopsidedness in other regards.⁷⁴ In an immigration proceeding, immigrants face the full power of the Government just as defendants in criminal trials do, but without even the minimal protections available in the criminal setting. “A deportation proceeding is a purely civil action to determine eligibility to remain in this country Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not

⁷¹ *Id.* at 137.

⁷² Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL’Y 83, 89–91 (2003).

⁷³ DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 31 (2007).

⁷⁴ Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282 (2013).

apply in a deportation hearing.”⁷⁵ As in the criminal justice system, the stakes in immigration proceedings are extraordinarily high: the possible outcomes usually affect an individual’s ability to live with his or her family, to work, and to feel safe. What is being litigated through the immigration laws, in the words of one commentator, strikes “not at the trappings of social, economic, or political advantage, but at the trappings of identity: home, family, community, and self, resulting in ‘loss of both property and life; or all that makes life worth living.’”⁷⁶ Also as in the criminal system, much of the population in removal proceedings is incarcerated in detention facilities that are only nominally “civil” detention facilities.⁷⁷

These similarities to the criminal system, explored in more depth below, make it a useful exercise to examine how the justifications for zealous advocacy in the criminal context may justify zealous advocacy in immigration as well. In his article, *Are Criminal Defenders Different?*, Luban examines the question of who has the advantages in a criminal prosecution by looking at four factors: resources, procedural advantages, legitimacy, and bargaining power. He concludes that for the overwhelming majority of criminal prosecutions, the State’s power far exceeds that of the defense. For this reason, in most cases zealous advocacy will be appropriate and should be the default position of the defender.⁷⁸ Applying Luban’s four factors in the immigration context, this Article finds a similarly robust justification for zealousness, making zealous advocacy the appropriate default principle in immigration proceedings as well. Indeed, as Professor Susan Carle has pointed out, the “extreme case” where Luban sees a need for moving toward the ethical edges is actually not the extreme for lawyers who routinely

⁷⁵ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

⁷⁶ Susan Pilcher, *Justice Without a Blindfold*, 50 *ARK. L. REV.* 269, 270 (1997) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

⁷⁷ The harshness of immigration detention, though nominally civil in nature, is well known. See generally DR. DORA SCHIRO, DHS IMMIGRATION AND CUSTOMS ENFORCEMENT: IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (noting how immigration detention facilities resemble criminal facilities, and how ICE officials are not experts in the delivery of services needed to run such facilities). For typical accounts of such facilities, see Edwidge Danticat, *Detained Immigrants Deserve Humane Treatment*, *WASH. POST* (Mar. 14, 2013), http://www.washingtonpost.com/opinions/edwidge-danticat-wasting-money-lives-through-the-detention-of-immigrants/2013/03/14/3d3e08c4-8b70-11e2-b63f-f53fb9f2fcb4_story.html; Azadeh N. Shahshahni, *The Reality of Life Inside Immigration Detention*, *ACLU BLOG* (Nov. 20, 2012), <https://www.aclu.org/blog/immigrants-rights-racial-justice/reality-life-inside-immigration-detention>.

⁷⁸ Luban, *supra* note 67.

practice in such areas.⁷⁹

1. Resources

The relative power of the state and the immigrant in immigration removal cases largely shares the power dynamic found in criminal proceedings. The Migration Policy Institute determined that the United States Government spends more on immigration enforcement than all other law enforcement activities combined.⁸⁰ Much of this spending is concentrated in border enforcement, including speedy, mass-trials brought by federal prosecutors for recent border-crossers, and the spending has not benefited the kind of litigation at the heart of this Article—litigation in immigration courts in the country's interior.⁸¹

Although the Office of Principal Legal Advisor within the Bureau of Immigration and Customs Enforcement (ICE), which houses the ICE prosecutors, has not benefited from these budget increases, ICE still possesses relative advantages in most of the cases in immigration court. First, ICE has access to the individual's entire immigration and criminal history, much of which may not end up being shared with the applicant. ICE has notes from Customs and Border Patrol, which could include interviews done at the border, or from USCIS, which would include asylum interviews notes if the immigrant filed for asylum affirmatively.⁸² Under a recent court order, ICE must now provide these notes *if* the applicant submits a Freedom of Information Act (FOIA) request. ICE has no affirmative duty to turn over the notes to counsel or to the applicant, and one scholar suggests this will leave

⁷⁹ Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1319–20 (2008) (asserting that Luban as starting to use a dividing line centered around clients with power and clients without power).

⁸⁰ Doris Meissner, et. al., Donald M. Kerwin, Muzaffar Christi, and Claire Bergeron, *Immigration Enforcement in the United States*, MIGRATION POLICY INST. (Jan. 2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

⁸¹ The President's Fiscal Year 2015 Budget: Department of Homeland Security, NATIONAL IMMIGRATION FORUM (Mar. 11, 2014), <http://immigrationforum.org/blog/the-presidents-fiscal-year-2015-budget-department-of-homeland-security/> (showing that the Office of Principal Legal Advisor prosecuting cases in court had a budget of roughly \$204.5 million in 2014, out of an enforcement budget of approximately \$5.6 billion) (last visited Feb. 17, 2015). Note that for FY2016, ICE is seeking a budget increase to fund approximately 300 more attorney positions. Dibya Sarkar, *The President's 2016 Budget Request: Immigration and Customs Enforcement*, FIERCE HOMELAND SECURITY (Feb. 5, 2015), <http://www.fiercehomelandsecurity.com/story/presidents-2016-budget-request-immigration-and-customs-enforcement/2015-02-05>.

⁸² Maria Baldini-Potermin, IMMIGRATION TRIAL HANDBOOK, § 3:12. FOIA requests to the EOIR and DHS.

many out from receiving these crucial notes as a result.⁸³ Second, ICE prosecutors typically hear all their scheduling matters in one consolidated session in front of one judge, while an individual attorney may have matters on multiple days of the week, requiring hours to be spent in court simply awaiting a ten minute status hearing.⁸⁴ Third, ICE has the capability of investigating documents, courtesy of the Homeland Security Investigations Forensic Document Laboratory (“FDL”).⁸⁵ The FDL has “[m]ore than 60 specially trained staff members [who] have access to a library and databases of identity and travel documents from across the world and the latest technology to identify inconsistencies.”⁸⁶ By contrast, an immigrant can attest to the validity of a passport or birth certificate or political membership card introduced into evidence, but cannot usually independently provide proof of authentication. Although that may be sufficient to meet their burden of authentication,⁸⁷ it hardly carries the same level of weight as documentation submitted to the FDL.

In the specific realm of asylum litigation, the balance of investigatory resources is more sharply tilted toward the Government, for the simple reason that as a matter of safety, asylum-seekers often fear obtaining evidence from the persecuting country,⁸⁸ and may fear

⁸³ E-mail from Professor Phil Schrag, one of the authors of the influential REFUGEE ROULETTE, to the CAIR Coalition (Nov. 22, 2013) (on file with author):

By its literal terms, the consent agreement only applies to officers handling FOIA requests. That will help referred asylum applicants who have representatives many months before their hearings. But it won’t help the many others—with no representatives, with incompetent representatives who don’t file FOIA requests, or who retain representatives within a few months before their court hearings—because they will never get the notes in time.

⁸⁴ Although not a procedural advantage, the extent of this face time also raises a “repeat player” issue that may provide ICE with a distinct advantage over the immigrant’s attorney. Some immigration attorneys are frequently enough at court to be considered repeat players but none has the extensive time logged in front of particular judges that ICE counsel would. This may, of course, work to the disadvantage of an ICE attorney if that attorney has established a bad reputation with a particular judge.

⁸⁵ *Homeland Security Investigations Forensic Laboratory*, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/hsi-fl/> (last visited Feb. 28, 2015).

⁸⁶ *TOP STORY: ICE’s Forensic Document Lab Serves as Authentication Authority*, IMMIGRATION AND CUSTOMS ENFORCEMENT (Aug. 15, 2011), <https://www.ice.gov/news/releases/1108/110815washingtondc.htm>.

⁸⁷ Documents may be considered authentic where they are inherently reliable. *Matter of Barcenas*, 19 I. & N. Dec. 609 (B.I.A. 1988).

⁸⁸ One attorney known to the author used to seek authentication until a client’s sister was killed in Burundi in the attempt to authenticate a document. The difficulties of seeking such authentication were examined—and found plausible—by the Fourth Circuit in a case about discretion in asylum proceedings. *Zuh v. Mukasey*, 547 F.3d

any action—like authentication, or contacting witnesses—that might alert the persecuting government to the fact that the individual is seeking asylum. The availability of the Homeland Security Investigations Forensic Document Laboratory is an extra advantage in this delicate setting. More profoundly, as will be discussed below under procedural advantages, the evidentiary imbalance is aggravated by the burden on the applicant to provide all corroborating evidence that would be reasonable to obtain, while the Government can win its case without producing any evidence whatsoever—simply by finding discrepancies in the asylum-seeker’s statements.⁸⁹ The demands on the Government are simply smaller than the demands on the applicant, which means that far more resources must go into preparing an asylum-seeker’s case than would go into opposing it.⁹⁰

2. Procedural advantages

When considering procedures, it is clear that here the advantages available to the Government greatly outweigh—and perhaps completely obliterate—those available to immigration lawyers, in numerous ways. This section examines how constitutional infirmities in immigration law advantage the Government, and how the posture of immigration cases (where the immigrant is seeking a benefit from the State) disadvantages the immigrant.

a. Constitutional infirmities in immigration law

One set of constitutional infirmities in immigration law arises from the plenary power doctrine, which permits the political branches of government to create and administer immigration policy largely free of constitutional scrutiny.⁹¹ While the criminal system has a host of constitutional protections (even if many are weakly implemented),

504, 508–09 (2008).

⁸⁹ See Part II.B.2(b), *infra*.

⁹⁰ Private immigration attorneys practicing in the area of removal defense earn approximately \$63,000 as a median salary (compared to \$100,000 for their colleagues who do business immigration, and work approximately 50 hours per week (the median weekly hours)). *AILA Marketplace Study*, at 44, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (Dec. 2011), available at <http://www.aila.org/content/fileviewer.aspx?docid=36823&linkid=245426>. Fifty-two percent say they have all the work they can handle and another 21 percent have more than they can handle. *Id.* at 36. By comparison, a position posted in 2014 for an ICE attorneys opening listed a salary of \$106,263–\$157,100. See USAJOBS, Job Announcement, <https://www.usajobs.gov/GetJob/PrintPreview/385875000#> (last visited Mar. 30, 2015) (job announcement on file with author).

⁹¹ See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

immigration courts are required only to be “fundamentally fair” under the Fifth Amendment.⁹²

The fundamental fairness standard, governed by the *Mathews v. Eldridge*⁹³ balancing test, allows immigrants to have interpreters,⁹⁴ and to present evidence—such as hearsay evidence—that would not be admissible in federal proceedings.⁹⁵ The standard, however, also permits numerous practices that work against the immigrants, and does not apply in a large number of areas that could be considered part of fairness, such as having an attorney at all. Consider just four of these practices. First, under the “fundamental fairness” standard, an individual need not be physically present for their hearing.⁹⁶ Detained immigrants need to be present only by video for their removal hearings, because transporting them from detention facilities would, it is argued, be cost-prohibitive for the Government.⁹⁷ Second, in immigration proceedings, a mentally incompetent individual’s case can go forward so long as the proceeding is simply “fair,” although courts have recognized that this likely means the appointment of counsel.⁹⁸ By contrast, in the criminal setting, cases cannot go forward at all where the defendant is not mentally competent.⁹⁹ Third, the

⁹² Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 515–16 (2007).

⁹³ 424 U.S. 319 (1976).

⁹⁴ *Niarchos v. INS*, 393 F.2d 509, 511 (7th Cir. 1968) (“We think that the absence of an interpreter at the 1962 hearing is contrary to the aim of our law to provide fundamental fairness in administrative proceedings.”). Notions of fairness clearly shift over time, as the current standard providing for interpreters is based upon fundamental fairness, as was a seminal case reaching the opposite result in 1891. *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (finding that lack of an interpreter for a Japanese woman did not violate due process).

⁹⁵ *Matter of Grijalva*, 19 I. & N. Dec. 713 (B.I.A. 1988) (hearsay evidence permitted unless its use would be fundamentally unfair).

⁹⁶ 8 U.S.C. § 1229a(b)(3) (2006) (“If it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”).

⁹⁷ This practice could be litigated, as the balancing test has strong compelling factors on the immigrant’s side as well. However, as a practical matter, an interlocutory appeal on such a pre-trial issue would be made unlikely by the fact of the immigrant’s detention, as a delay of even two or three months and continued detention while the matter was pending before the BIA, would considerably deter most immigrants from filing the appeal.

⁹⁸ *Matter of M-A-M-*, 25 I. & N. Dec. 474 (B.I.A. 2011).

⁹⁹ Caleb Foote, *A Comment on Pre-Trial Detention of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) (“The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.”) *Id.* at 834.

right to be represented at the immigrant's own expense is available only as a statutory matter, not from a constitutional right.¹⁰⁰ Although decades of immigration decisions recognized that the immigrants can expect their counsel to be effective (under the Fifth Amendment Due Process Clause),¹⁰¹ that right applies only if they *have* counsel, and there is no right to counsel under the Sixth Amendment for immigration proceedings.¹⁰² Furthermore, the recent *Compean* decision, later vacated by the Attorney General, found that there was no Fifth Amendment right to counsel, and therefore no right to *effective* counsel.¹⁰³ Although vacated, the issue is not settled—the Attorney General asked EOIR to develop a rule on the subject when he vacated *Compean*, and EOIR has not yet done so.¹⁰⁴

Whether or not immigrants with counsel are entitled to *effective* counsel, what is yet more significant is that immigrants largely have no constitutional right to counsel in the first place. As long established, removal proceedings are not punishment, no matter how serious a consequence deportation may be. As the Court noted in *Padilla*, “We have long recognized that deportation is a particularly severe ‘penalty’;

¹⁰⁰ INA § 240(b)(4)(A); 8 U.S.C. § 1229a(b)(4)(A) (2013).

¹⁰¹ For example, in *Matter of Assaad*, 23 I. & N. Dec. 553, 558 (B.I.A. 2003) (citations omitted), the court stated:

[S]ince *Matter of Lozada* was decided 15 years ago, the circuit courts have consistently continued to recognize that . . . [an alien] has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents the respondent from meaningfully presenting his or her case.

Id. *Matter of Lozada* requires that individuals file a complaint with the attorney's bar and if able to demonstrate prejudice, they may have their cases reopened or reviewed. It is unclear how much of a deterrent this system is to immigration practitioners.

¹⁰² *Trench v. INS*, 783 F.2d 181, 183 (10th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). See generally Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1775–80 (2010).

¹⁰³ *Matter of Compean*, 24 I. & N. Dec. 710 (B.I.A. 2009). The Ninth Circuit has found that fundamental fairness does matter, looking at “whether the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case,” and requiring the individual to demonstrate prejudice, a high bar to meet. *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (citing *Lara-Torres v. Ashcroft*, 383 F.3d 968, 974 (9th Cir. 2004), *amended sub nom.* *Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005)). Steven Legomsky has thoughtfully explored how this leaves adjudicators unconstrained in assessing effectiveness, and potentially subject to severe new limitations by Congress, and crafted an approach to require greater constitutional protections for immigrants post-*Padilla*. Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effectiveness of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43, 47 (2011).

¹⁰⁴ *Attorney General Vacates Compean Order, Initiates New Rulemaking to Govern Immigration Removal Proceedings*, DEP'T OF JUSTICE (June 3, 2009), <http://www.justice.gov/opa/pr/attorney-general-vacates-compean-order-initiates-new-rulemaking-govern-immigration-removal>.

but it is not, in a strict sense, a criminal sanction.”¹⁰⁵ In these non-criminal proceedings, immigrants are not generally entitled to appointed counsel.¹⁰⁶ This sets in motion, as Professor Noferi has termed it, “cascading constitutional deprivations” for the immigrant.¹⁰⁷

Another right available to criminal defendants that is not available to immigrants is that of *Brady* disclosures.¹⁰⁸ *Brady* entitles defendants to see the evidence against them, including potentially exculpatory evidence.¹⁰⁹ In immigration court, pre-trial discovery is nominally available as a regulatory matter, but in practice does not exist.¹¹⁰ ICE prosecutors have routinely refused requests to see the immigrant’s “A file,” or immigration file; the Ninth Circuit held in 2013 that the immigrant had a right to the file,¹¹¹ but other circuits have not yet followed suit. A recent lawsuit has improved the availability of notes from asylum interviews, but such notes must be requested through FOIA and not automatically turned over by the Government. Since the credibility of the immigrant in court is always important, and in asylum cases particularly critical, this inability to see the file and discover potential discrepancies before trial matters profoundly. Where discrepancies are probable (traumatized individuals testifying about events that may have occurred years in the past)¹¹² and determinative (an adverse credibility finding jeopardizes asylum cases), immigrants are at a significant procedural disadvantage not being able to examine their file before a hearing.

Another constitutional infirmity is the reach of *I.N.S. v. Lopez-Mendoza*,¹¹³ the case that limited the “fruit of the poisonous tree” doctrine in immigration proceedings. In *Lopez-Mendoza*, the Court

¹⁰⁵ *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

¹⁰⁶ As noted above, this is being incrementally addressed through appointment of counsel for specific sub-groups of immigrants.

¹⁰⁷ Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 81 (2012).

¹⁰⁸ The landmark *Brady v. Maryland* case found a due process violation where the prosecution did not turn over potentially exculpatory evidence to defense. 373 U.S. 83 (1963).

¹⁰⁹ *Id.*

¹¹⁰ Geoffrey Heeren, *Shaking the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014).

¹¹¹ *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010) (citation omitted) (noting that the immigrant has a right to a “full and fair hearing in a deportation proceeding” under the Fifth Amendment, and holding that denying him access to his immigration file (“alien file”) constituted a violation of this constitutional right).

¹¹² *Ilunga v. Holder*, No. 13-2064, 2015 WL 332110 (4th Cir. Jan. 27, 2015).

¹¹³ 468 U.S. 1032 (1984).

held that evidence obtained in violation of the Fourth Amendment could nonetheless be admissible in immigration court, absent “particularly egregious” Fourth Amendment violations, because immigration proceedings are “purely” civil actions where criminal protections need not apply.¹¹⁴ Immigration practitioners still sometimes seek to suppress illegally obtained evidence, and occasionally succeed, but judges are hesitant to engage in Fourth Amendment litigation in their administrative tribunals, and practitioners face pressure from both their adversary (ICE) and the judge him or herself to refrain from raising these issues.

Likewise, secret evidence has been permitted in immigration court for decades. In *Knauff v. Shaughnessy*, a case which arose in the context of national security concerns during the Second World War, the Government permitted the exclusion of Ellen Knauff on the basis of secret evidence.¹¹⁵ INA §240(b)(4)(B) also permits the Government to rely upon secret evidence in the removal context.¹¹⁶ Secret evidence clearly inhibits immigrants’ ability to defend themselves because they will typically only receive a summary of the evidence, making it difficult to contest its accuracy, challenge its sources, and so forth.¹¹⁷

b. Posture of immigration cases

A critical source of difference between the criminal and immigration court settings arises from the different posture of immigration cases. In criminal cases, the defendant is seeking protection from the State. In immigration cases, the immigrant is seeking protection from the State’s desire to remove him or her, and the State initially has the burden to prove removability.¹¹⁸ This is a burden that the State is seldom required to prove. Even when contested, which happens seldom, the standard of proof for the State is lower than in the criminal context, which may help explain the number of U.S. citizens who end up being deported despite their protestations that they are, indeed, citizens.¹¹⁹

¹¹⁴ *Id.* at 1050.

¹¹⁵ U.S. *ex rel.* *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

¹¹⁶ INA § 240(b)(4)(B); 8 C.F.R. § 1240.11(c)(3)(iv) (2013). *See also* INA § 504(e)(1)(A) (creating Alien Terrorist Removal Courts where secret evidence may be used). *But see* Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 301–02 (noting that this provision has never yet been invoked).

¹¹⁷ Niels W. Frenzen, *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 INTERPRETER RELEASE 45 (1999).

¹¹⁸ INA § 240(c)(3).

¹¹⁹ William Finnegan, *The Deportation Machine*, NEW YORKER (Apr. 29, 2013); Ted

Once the State meets this initial burden, usually with the immigrant conceding removability at a master calendar hearing, the burden shifts to the immigrant to establish a right to remain and this generally means that the immigrant must request a *benefit* from the State, instead of seeking enforcement of a right.¹²⁰ This basic tenet of immigration law creates countless procedural disadvantages and ethical dilemmas for the immigration practitioner, some of which are examined in more detail in Part B, *infra*. At root, because the immigrant is affirmatively seeking a benefit, almost anything the Government may require to show eligibility for that benefit must be given—if the requirement is too onerous, the individual can simply choose not to apply for the benefit.¹²¹

Finally, simply in terms of the task set for each side, the procedural posture means that the task is vastly more difficult and resource-intensive for the immigrant's attorney than for the Government. First, the attorney must establish every element of eligibility by a preponderance of the evidence, which means the Government need simply disprove one element.¹²² Second, in asylum cases in particular, the attorney must provide corroborating evidence of the asylum claim where reasonable to expect that such evidence is available, despite the relative unlikelihood of someone fleeing persecution with corroborating documents.¹²³ By contrast, the Government can win its case merely by finding inconsistencies in the applicant's testimony, usually via cross-examination and sometimes by introducing notes from initial asylum interviews conducted months, if not years, before the final hearing.¹²⁴ For reasons well explored

Robbins, *In the Rush to Deport, Expelling U.S. Citizens*, NAT'L PUB. RADIO (Oct. 24, 2011). See also DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 14–15 (2012).

¹²⁰ INA § 240(c)(2).

¹²¹ Similar issues abound in welfare law, such as requirements that candidates undergo drug testing before receiving welfare benefits, although some of these laws are being struck down as unconstitutional. See, e.g., *Lebron v. Wilkins*, 990 F. Supp. 2d 1280 (M.D. Fla. 2013), *aff'd sub nom. Lebron v. Sec'y of Florida Dep't of Children & Families*, No. 14-10322, 2014 WL 6782734 (11th Cir. Dec. 3, 2014).

¹²² INA § 240(c)(4).

¹²³ “In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.” UNHCR, UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 REFUGEE CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 196, *available at* <http://archive.hrea.org/learn/tutorials/refugees/Handbook/partii.htm> (last visited Feb. 28, 2015).

¹²⁴ The Fourth Circuit recently acknowledged this unfairness powerfully in *Ilunga v. Holder*, No. 13-2064, 2015 WL 332110 (4th Cir. Jan. 27, 2015), but advocates still must contend with the REAL ID's definition of credibility, which includes consistency.

elsewhere, even asylum-seekers with truthful, unembellished claims may be inconsistent, creating another challenge for their lawyers to overcome.

3. Legitimacy

This aspect of Luban's justification for zealous advocacy in the criminal context is the most weakly applied to the immigration context, but has resonance here, too. Writing about jury impressions of the State's criminal case, he notes the narrative and normative power that the State has in pursuing a case against a defendant, as juries will think "where there's smoke, there's fire."¹²⁵ The Government's reliance on police officers as witnesses, too, taps into powerful perceptions about law enforcement reliability, and who constitute the "good guys" in a particular case. The jurors' faith that a case brought by the State is credible because the State itself is "democratic and legitimate" also strengthens the State's hand at trial, in his view.

Immigration hearings are bench trials, so if this factor of legitimacy resonates in the immigration context, it is through the susceptibility of judges to those narrative dynamics.¹²⁶ Those dynamics may, indeed, be powerful, as I have explored in other scholarship.¹²⁷ The dynamics emerge through such phenomena such as the availability heuristic (the mental shortcut filling in dispositive information when the fact-finder has a litany of available stories, often from popular media, that help make sense of the case in front of him or her) or cognitive dissonance (the difficulty of reconciling new information with previously understood information or, even more powerfully, previously made decisions).¹²⁸ But while legitimacy aspect may be a factor, it is likely less of a factor here than in the criminal jury-trial context, where most judges are also keenly aware of their duty to rule impartially—a factor that may help diminish the biases and heuristics noted above, at least as compared to juries.

See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231; 8 U.S.C.A. § 1252 (West 2015).

¹²⁵ Luban, *supra* note 65 at 1741.

¹²⁶ See generally Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

¹²⁷ *Id.*

¹²⁸ *Id.*

4. Bargaining power

Luban posits that the weak bargaining power of criminal defendants can justify zealous advocacy, because such advocacy may be the only true bargaining chip that a criminal defender has.¹²⁹ The same can be said for immigration attorneys. Many immigrants are in removal proceedings because of some prior contact with the criminal justice system.¹³⁰ The conflation of the immigration and criminal systems, and the consequences to immigrants' removability, have been well studied in both criminal and immigration scholarship.¹³¹ An immigrant's bargaining power within immigration has often been eliminated at that stage of proceedings, where he or she accepted a guilty plea that rendered him or her deportable, yielding to complex pressures that have been well documented elsewhere.¹³²

Within the immigration system itself, bargaining power is extremely limited. Other scholars have noted, correctly, that this stems from the binary nature of removal proceedings, where the outcomes are either removal or admission.¹³³ What little opportunity exists for negotiation focuses on two specific avenues: seeking prosecutorial discretion to administratively close or terminate a case (or stay removal if ordered removed) or by requesting voluntary departure in lieu of a removal order.¹³⁴ As described here, the immigrant has extraordinarily

¹²⁹ Luban, *supra* note 65 at 1747 (“In the criminal defense context, by contrast, it seems intuitively correct to me that the prospect of aggressive defense can indeed function to take away the prosecutor’s built-in bargaining advantage . . . and it seems plain that prosecutors have little incentive to bargain fairly unless defenders reestablish the balance of bargaining power.”)

¹³⁰ See Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

¹³¹ Jason A. Cade and Jenny Roberts have explored this intersection from the criminal justice perspective. See Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011). Many have explored this intersection on the immigration side, since the early work of Juliet Stumpf and Jennifer Chacón. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

¹³² Cade, *supra* note 131; Roberts, *supra* note 131.

¹³³ See, e.g., Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) (calling for proportionate immigration sanctions in lieu of the one currently available sanction, deportation); Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 393 (2008) (“[T]here is little bargaining in modern deportation proceedings, relative to the bargaining that occurs in the criminal justice system, because deportation is a largely binary rather than graduated sanction.”).

¹³⁴ A third, specific to the asylum context, concerns offers by the government to stipulate to withholding of removal (a higher evidentiary burden, but a lesser form of

little bargaining power in requests for prosecutorial discretion, and the more effective requests for voluntary departure actually yield little by way of benefit to the immigrant—thus, they are bargains easily given by the Government and not reflective of a diminished governmental bargaining power.

One of the broadest means available to securing relief from removal is the favorable exercise of prosecutorial discretion, but as the name implies, it is relief that is solely determined by the prosecutor himself. Although having a long history in the immigration context,¹³⁵ prosecutorial discretion came to prominence among immigration practitioners with the release of two memos by ICE Director John Morton in the summer of 2011.¹³⁶ These two memos were followed by an announcement that the new agency vision would be implemented in conjunction with the Department of Justice through an individualized review of existing cases to permit closure or other discretionary actions for those deemed to be low priorities.¹³⁷ Then-Secretary of Homeland Security Janet Napolitano explained the administration's policy in a speech given on October 5, 2011, emphasizing that the Administration's stated focus had been clearing immigration courts' dockets so that priority could be given to the "identification and removal of public safety and national security threats."¹³⁸

Despite the attention given to it, however, and despite the breadth permitted by the Morton Memos, actual favorable exercises of discretion have been extremely limited. There is little cost to the

relief) in lieu of litigating and risking an adverse decision from the judge. The difficulties associated with this particular bargaining position merit far more detailed consideration than this Article can afford.

¹³⁵ See generally Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action and the DREAM Act*, 91 TEX. L. REV. 59 (2013).

¹³⁶ The first memo concerned civil immigration priorities generally. MEMORANDUM FROM JOHN MORTON ON EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (June 17, 2011), www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. The second concerned discretion for particular victims, witnesses and plaintiffs. MEMORANDUM FROM JOHN MORTON ON PROSECUTORIAL DISCRETION REGARDING CERTAIN VICTIMS, WITNESSES AND PLAINTIFFS (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

¹³⁷ Letter from Janet Napolitano to Senator Dick Durbin (Aug. 18, 2011), available at http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Prosecutorial%20Discretion_Napolitano%20Durbin%20letter%2008-18-11.pdf (last visited Mar. 30, 2015).

¹³⁸ DHS, Press Release, *Secretary Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement*, DEP'T OF HOMELAND SECURITY (Oct. 5, 2011), <http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm>.

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Government for denying a prosecutorial discretion request, especially where the prosecutor could point to any negative equity. Although there are supposed to be systemic advantages to granting the requests where the applicant meets enough of the prosecutorial discretion factors, there is little advantage to the prosecutor in any particular case. The prosecutor bears the risk of being the name associated with a decision not to remove someone who later proved dangerous, either in terms of national security or crimes—and while that risk may be small, the impact would be strongly negative if it did happen. With the outcomes in the hands of the prosecutors, and incentives skewed toward denying requests, it is unsurprising that the rate of favorable prosecutorial discretion decisions remains low. The latest data, from December 2014, showed that only 6.6 percent of cases before the immigration courts were closed through an exercise of prosecutorial discretion.¹³⁹ An earlier report indicated that 95 percent of those granted prosecutorial discretion were represented by attorneys, so even with advocates, the vast majority of immigrants were unable to bargain for the desired result of administrative closure or termination of their cases.¹⁴⁰

The second form of negotiation that happens in immigration court, voluntary departure, is the reverse of prosecutorial discretion in terms of incentives and availability. Voluntary departure is designated by statute to permit certain immigrants to avoid the ten-year bar associated with an immigration court removal order and “voluntarily depart” the country at their own expense.¹⁴¹ Voluntary departure meets multiple government objectives: removing the unlawful immigrant, avoiding litigation, and saving the money it would take to litigate and enforce an order, as well as to actually transport the immigrant to the home country.¹⁴² Absent any of the statutory bars to voluntary departure, such as certain criminal convictions,¹⁴³ ICE prosecutors routinely agree to requests for voluntary departure.

¹³⁹ TRAC Immigration, *Immigration Court Cases Closed Based on Prosecutorial Discretion*, http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html (last visited Feb. 28, 2015).

¹⁴⁰ TRAC Immigration, *ICE Prosecutorial Discretion Program* (June 28, 2012), <http://trac.syr.edu/immigration/reports/287/> (last visited Mar. 30, 2015).

¹⁴¹ INA § 240B (2013).

¹⁴² *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976) (“The purpose of authorizing voluntary departure in lieu of deportation is to effect the alien’s prompt departure without further trouble to the Service. Both the aliens and the Service benefit thereby.”).

¹⁴³ Aggravated felonies disqualify immigrants from seeking voluntary departure. INA § 240B(a)(1).

Although this might seem to be an area where the immigrant has great bargaining power, the fact is that the benefit to the immigrant is usually negligible—if there is any benefit at all. Immigrants who have accrued a year or more of unlawful presence in the United States are subject to a ten-year bar whether they leave the country with an immigration court removal order, through voluntary departure, or simply by self-deportation.¹⁴⁴ Many of those in immigration removal proceedings have this ten-year bar already, in one of two ways. Either they were picked up after having been in the country a year or more, or for more recent arrivals, their continued accrual of unlawful presence while awaiting their hearing pushes them past the all-important year mark. The Government therefore loses nothing, gains the same ten-year bar on the individual returning, and avoids litigation. Moreover, the immigrant leaves at his or her own expense—a specific cost, although one that is perhaps compensated for by the dignitary value of not being deported. To the extent the immigrant is bargaining, it is for something of considerable *benefit* to the Government, hardly a robust example of bargaining power.

Moreover, detention casts a shadow over any bargaining processes. Detained immigrants comprised 36 percent of immigration court cases, or roughly 100,000 people, completed in FY2012.¹⁴⁵ Of these 100,000 cases, some were detained because they were subject to the mandatory detention provision of the INA, which covers almost all drug offenses, as well as many theft convictions, violent crimes, and others.¹⁴⁶ Others are detained simply because the government sees them as a flight risk and/or a danger to public safety, or because they are unable to pay bond, if bond was set.¹⁴⁷ In either situation, very difficult detention conditions¹⁴⁸ create a strong incentive to agree to any option that will end the detention quickly and provide a strong

¹⁴⁴ INA 212 (a) (9) (B) (i) (II).

¹⁴⁵ FY 2012 STATISTICAL YEARBOOK FY 2012, at O1, DEP'T OF JUSTICE (Feb. 2013, revised Mar. 2013), <http://www.justice.gov/eoir/statspub/fy12syb.pdf> [hereinafter EOIR STATISTICAL YEARBOOK].

¹⁴⁶ INA § 236(c).

¹⁴⁷ Discretionary detention is authorized by INA § 236(a), and its parameters are fleshed out in *Matter of Patel*, 15 I&N Dec. 666 (B.I.A. 1976).

¹⁴⁸ See, e.g., Robert Morgenthau, *Immigrants Jailed Just to Hit a Number*, N.Y. DAILY NEWS (Jan 19, 2014), available at <http://www.nydailynews.com/opinion/immigrants-jailed-hit-number-article-1.1583488>; Ian Urbina and Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 24, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all&_r=0; Nina Bernstein, *Officials Hid Truths of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), available at <http://www.nytimes.com/2010/01/10/us/10detain.html?ref=incustodydeaths>.

disincentive to exercising rights of appeal, which can stretch a period of detention out for months longer. Moreover, some immigrants are unlikely to be ultimately removed because they are from a country where, for example, there is ongoing strife, and these individuals become eligible for post-order release (usually with intensive monitoring and/or an ankle bracelet) 180 days after an administratively final order.¹⁴⁹ An appeal would delay their possibility of release on that basis as well, as it would delay the existence of an administratively final order. Finally, detainees have great difficulty securing representation for possible appeals, often because of the increased cost of access to detention facilities by lawyers (distance and bureaucratic obstacles, as well as higher costs for hiring experts who might be needed in the case).¹⁵⁰

These dramatic limitations on the existence of immigrants' bargaining power justify zealous advocacy. As Luban writes in the criminal context, "[t]he credible threat of an aggressive defense that will not necessarily lead to acquittal—remember that only 1% of state felony prosecutions end in acquittal—may provide a bargaining chip sufficient to persuade an otherwise recalcitrant prosecutor to bargain in good faith."¹⁵¹ In immigration, knowing that a case will be fiercely litigated may be sufficient to have the Government attorney take a closer look at whether, indeed, this case could benefit from prosecutorial discretion instead of litigation. While Government attorneys have not fully availed of prosecutorial discretion in line with the Morton memos,¹⁵² the prospect of vigorous litigation, instead of the likelihood of accepting voluntary departure or facing a weak opponent, may be enough to add some vitality to the prosecutorial discretion option.

¹⁴⁹ 8 C.F.R. § 241.4 (2013).

¹⁵⁰ See generally Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548 (2009); HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY § VII (Dec. 2, 2009), <http://www.hrw.org/en/node/86760/section/8> (describing the phenomenon of ICE transfers of detainees to remote locations, and the incumbent strains placed on their attorneys, particularly pro bono attorneys).

¹⁵¹ Luban, *supra* note 67, at 1745 (citation omitted).

¹⁵² As of this writing, there is no data on the superseding Johnson memos.

5. Moral (II) legitimacy of the Rules Governing Immigration Lawyers

To all of these factors enumerated by David Luban in the criminal context, I add a fifth that is unique to immigration law. Lawyers practicing in immigration court are governed not just by the rules of the bar(s) where they are admitted, but also by the rules of immigration court itself, which are set by the Executive Office of Immigration Review (“EOIR”), the agency within Department of Justice that administers the immigration courts themselves.¹⁵³ These rules apply *only* to the immigrant’s representative, not to the Government attorneys for whom separate rules and regulations exist.¹⁵⁴

This is not merely a question of authorship, but of interest. Rules of professional conduct have long been written by lawyers’ associations to govern themselves: a means of regulating themselves so as to avoid regulation (and possibly interference) by the Government.¹⁵⁵ Although lawyers presumably have strong self-interest in rules that favor their ability to meet their clients’ needs in any way possible, rules which were too heavily focused on duties to the client with no countervailing duties to the court would likely invite criticism and, eventually, governmental rule-setting. As such, the rules consider a number of interests, and attempt to balance those interests, with the result being tensions and ambiguities, but ones that lawyers have for generations been largely able to navigate.

By contrast, the rules authored by the immigration court system itself favor the court’s interests in excess of what is in state and model rules of professional conduct. Several of the rules are analogous to common rules of professional conduct, but not all. As clinical law professor and immigration scholar Lauren Gilbert has shown, the EOIR rules have a significant difference when it comes to the lawyer’s ability to protect client confidences (explored in Part B). AILA ethicist Reid Trautz underscores this problem: EOIR rules “have no

¹⁵³ 8 C.F.R. § 1003.102 (2013).

¹⁵⁴ EOIR, FACT SHEET: PROFESSIONAL CONDUCT FOR IMMIGRATION PRACTITIONERS – RULES AND PROCEDURES (Aug. 19, 2004), *available at* <http://www.justice.gov/eoir/press/00/profcondfaks.htm>.

¹⁵⁵ Critiques of this, too, abound. As Patrick J. Schiltz has written:
I don’t have anything against the formal rules. Often, they are all that stands between an unethical lawyer and a vulnerable client. You should learn them and follow them. But you should also understand that the formal rules represent nothing more than “the lowest common denominator of conduct that a highly self-interested group will tolerate.”
Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (quoting Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 730 (1994)).

counterpart to Rule 1.6—Maintaining Confidentiality. None. The federal rules are primarily to benefit the agencies, not clients. The agencies want disclosure. They value and require candor, so they do not address client confidentiality.”¹⁵⁶ James Garvin echoes this, noting that while the EOIR rules were formulated, among other reasons, with an imperative of “safeguarding a vulnerable client population,” the rules—unlike those for states—“do not deal nearly so much with conduct offensive to individuals as they do with conduct offensive to the Government.”¹⁵⁷ For these and other reasons, immigration attorneys fiercely critiqued the rules when they were proposed.¹⁵⁸ Thus, the EOIR rules of conduct provide another compelling reason to embrace zealous advocacy: where attorney choices are sharply circumscribed by rules less legitimate than those adopted by state bar associations, lawyers should be seeking to push those rules to their limits to defend the interests of their clients.

III. WHY ADOPT A GUIDING PRINCIPLE AT ALL?

Although immigrants are not entitled to counsel at the Government’s expense, when they do secure counsel—and in the slowly increasing numbers of cases where appointed counsel *is* provided—they are, at least for now, entitled to have that counsel be effective. There is very little guidance, however, as to what constitutes effective counsel in the immigration context, and in any case, as discussed above, legally-sufficient effectiveness may differ enormously from truly effective lawyering. In the absence of guidance, ethical standards may tend toward the lowest norm permitted under the applicable rules of professional conduct particularly since many lawyers will never be held accountable for poor-quality lawyering.¹⁵⁹ In the absence of a well-articulated principle for resolving tensions, multiple pressures (described in Part B make it far more likely that tensions will resolve in favor of the tribunal and not in favor of any one particular client. Articulating the principle of zealous advocacy as an obligation of professional responsibility and lawyerly effectiveness matters precisely *because* of all these factors, trends and impulses that work against it.

¹⁵⁶ Reid F. Trautz, *When a Client Lies: Balancing Confidentiality and Candor* (Dec. 18, 2012), available at <http://agora.aila.org/product/detail/1220> (emphasis added) (last visited Feb. 28, 2015).

¹⁵⁷ James G. Garvin, *Multi-Jurisdictional Disciplinary Enforcement*, in AILA, ETHICS IN A BRAVE NEW WORLD: PROFESSIONAL RESPONSIBILITY, PERSONAL ACCOUNTABILITY, AND RISK MANAGEMENT FOR IMMIGRATION PRACTITIONERS, AILA (2004) 84.

¹⁵⁸ *Id.*, at 83.

¹⁵⁹ Discussed *supra* in Part 5.

A. *The Power of Standard Setting: Lessons from Criminal Defense*

Experiences in the criminal context help us see the need for articulating standards of effectiveness that include zealousness. In the decades since *Gideon v. Wainwright*¹⁶⁰ established the right indigent criminal defendants have to a lawyer, the experience of appointed counsel in the criminal setting has shown us that not all defenders are equal. An unfortunate percentage of appointed defenders turn in miserably deficient performances.¹⁶¹ Criticisms about concerning the nation's failure to live up to the promise of *Gideon*: poor state funding¹⁶² has led to overwhelmingly large dockets for defenders,¹⁶³ exacerbated by the expanded reach of the criminal justice system in an era of massive incarceration.¹⁶⁴ Compounding these factors is the laughably limited protection afforded to defendants who believe they have been inadequately represented and who must satisfy the onerous ineffective assistance of counsel requirements under *Strickland v. Washington*.¹⁶⁵ One prominent criminal defense attorney, Steven Bright, has lamented that the *Strickland* standard "demeans the Sixth Amendment" promise of counsel.¹⁶⁶ *Strickland*, famously, allows representation by "anyone with a 'warm body and a law degree' to satisfy the Sixth Amendment."¹⁶⁷

¹⁶⁰ 372 U.S. 335 (1963).

¹⁶¹ See generally Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009). See also Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261 (Fl. 2013) (holding that enormous workloads violated the defendants' Sixth Amendment right to counsel); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 682–83 (2007) (describing "pervasive" deficiencies in defense). "The result [of enormous caseloads] is rampant ineffectiveness of trial counsel even among conscientious public defenders, to say nothing of lawyers who sleep through trial or abuse alcohol and drugs while representing their clients." *Id.* at 83.

¹⁶² Thomas Giovanni and Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNAN CENTER FOR JUSTICE (2013), available at http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

¹⁶³ *Id.*

¹⁶⁴ Abbe Smith has described "the increasingly muted sound of Gideon's Trumpet as the criminal justice system has grown beyond all imagination." Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363, 1364 (2013) (citation omitted); see also Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 18, 2013, at A21.

¹⁶⁵ 466 U.S. 668 (1984).

¹⁶⁶ Steven Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1883 (1994).

¹⁶⁷ Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363, 1385 (2013) (quoting David Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 819 (1976)). And beyond these

Understandably, just as the effectiveness of the criminal defense bar ranges widely, so does the level of zealous advocacy. Often, criminal defendants receive subpar, decidedly *un-zealous* representation from appointed counsel. As Bright has written, “Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed in case after case.”¹⁶⁸ This problem has been documented and critiqued widely.¹⁶⁹ As lawyers have tried to put meaning into the *Strickland* standard, seeking findings that counsel was ineffective at the trial level, a pattern of poor representation has become part of the story of criminal defense.

If *Strickland* represents one force moving toward substandard representation, then well-developed principles of zealous advocacy constitute a force pushing back against *Strickland*. Thanks to the exceptional leadership of many defender services and the National Legal Aid and Defender Association (“NLADA”), robust standards of competent representation have been developed and the best defenders provide exceptional service to their clients at defender services from Washington, D.C. to Seattle to the Bronx. NLADA’s role articulating and defining the standard for ethical practice of criminal defense was recognized by the Supreme Court in *Padilla*. In the Court’s examination of effectiveness of counsel, the Court emphasized the “weight of prevailing professional norms,” citing NLADA and others.¹⁷⁰

Among these prevailing norms, zealousness reigns supreme. According to NLADA, the very first standard that a defender must meet is this: “The *paramount* obligation of criminal defense counsel is to provide *zealous* and quality representation to their clients at all stages of the criminal process. Attorneys *also* have an obligation to abide by ethical norms and act in accordance with the rules of the court.”¹⁷¹ The primacy of zealous advocacy here is clear, tempered by other ethical

existing criticisms, some have said that *Strickland* is diluted still farther by the *Padilla* decision, imposing a lesser duty of effectiveness on criminal defenders representing noncitizens. See generally César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844 (2013) (criticizing the Court’s failure to fully remedy the problem of inaccurate advice for noncitizen criminal defendants).

¹⁶⁸ Bright, *supra* note 166, at 1836. But see Butler, *supra* note 164.

¹⁶⁹ EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES, INNOCENCE PROJECT 3 (2010) (noting that 81 percent of ineffective assistance of counsel claims were rejected in cases where the defendant was ultimately exonerated through DNA); Bright, *supra* note 166.

¹⁷⁰ *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

¹⁷¹ NLADA Standards, *supra* note 53 (emphasis added).

norms and court-rules. The specificity of the subsequent standards provides a fuller sense of what zealous advocacy entails: undertaking every possible motion and action to secure the best outcome for the client. For example, contrary to the conciliatory legal culture that exists in many fora, Guideline 5.1 sets the default mode in favor of filing pretrial motions; such motions should be filed “whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.” The same guideline states that “[c]ounsel should withdraw or decide not to file a motion *only* after careful consideration.”¹⁷²

The articulation of these standards matters. Literature on organizational culture shows that the repeated articulation of values and norms influences the conduct of cases.¹⁷³ As scholar Darryl Brown has written, particularly considering the criminal practice setting, “In localized, close-knit practice settings, lawyers and judges often adopt strong social norms. . . . On crucial issues, attorney judgment is affected by norms that coerce or persuade attorneys to choose options they would not otherwise choose, for reasons other than the client’s best interest.”¹⁷⁴ He goes on to powerfully describe the ways that local norms constrain attorneys from filing certain kinds of motions, seeking jury trials, and so forth, because the consequences of violating the norms are so costly.¹⁷⁵ Other scholars have defined legal culture as the “bundle of shared, local perceptions and expectations in the operation of a legal system.”¹⁷⁶ This “bundle” may or may not comport with actual laws and regulations, as Brown writes, but they become a set of “‘rules of thumb’ that seem to arise spontaneously and supplant the exercise of discretion in the mass processing of cases.”¹⁷⁷ They may be seen as heuristics, mental short-cuts that help attorneys navigate law that “is too complex for attorneys to internalize and apply on a daily basis.”¹⁷⁸

¹⁷² *Id.* at 5.1(c) (emphasis added).

¹⁷³ See, e.g., *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices*, 31 CARDOZO L. REV. 1961, 1995–99 (2010) (discussing systemic and cultural aspects of prosecutorial offices, and how they impact conduct).

¹⁷⁴ Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 803 (2000).

¹⁷⁵ *Id.* at 806–13.

¹⁷⁶ Theresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 803 (1994). See generally Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture, and Place*, 18 CLINICAL L. REV. 183, 205–20 (2011) (discussing the multiple factors that create and sustain local lawyering cultures).

¹⁷⁷ Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads*, 90 NW. U. L. REV. 1498, 1518 (1996).

¹⁷⁸ McNeal, *supra* note 176, at 212.

Legal culture is also powerful in terms of ethics. After studying the legal culture of Baltimore attorneys, one scholar noted that “no coherent account of professionalism, legal ethics, or the contemporary legal profession is possible without understanding the workings of practice organizations.”¹⁷⁹ And unfortunately, culture is not always in a positive relationship with ethics. Noted ethics scholar Deborah Rhode has assessed the impact there has been as the legal profession as shifted from “informal regulatory controls” to “reliance on official codes.”¹⁸⁰ She writes that:

[A]spirational norms have largely given way to minimal rules. The result does not necessarily reflect what most commentators (or even lawyers) would consider right or moral. And the danger in diluting the ethical content of ethical codes is that they will nonetheless pass for ethics. New entrants are socialized to the lowest common denominator of conduct that a highly self-interested group will tolerate.¹⁸¹

If organizational culture and norms affect the practice of law, as they surely do, then the content of professional norms matters greatly to the practice of zealous advocacy. The ethos promoted by a commitment to zealous advocacy creates a cultural counterweight to prevailing norms of conciliation. Negotiation, mediation, and other forms of alternative dispute resolution dominate civil justice (and within civil *litigation* in particular, some estimate that as many as 99 percent of cases resolve without going to trial).¹⁸² In the criminal justice sphere, the vast majority of cases are negotiated, or pleaded, out instead of fully litigated.¹⁸³ This overall tendency toward non-litigation is compounded by the dynamics of lawyers who are harried and overworked, and who are, perhaps most problematically, subject to the “repeat player” dilemma. This dilemma, well known to practitioners, arises when lawyers appear before the same set of judges, against the same adversaries, over and over, where relationships and reputation—not wanting to rock the boat—may inveigh powerfully against zealousness.¹⁸⁴ Against such a context, the principled articulation of

¹⁷⁹ *Id.* at 217 (quoting MICHAEL KELLY, *THE LIVES OF LAWYERS* 18 (1996))

¹⁸⁰ Deborah L. Rhode, *Institutionalizing Ethics*, 44 *CASE W. RES. L. REV.* 665, 730 (1994).

¹⁸¹ *Id.*

¹⁸² Hilarie Bass, *The End of the Justice System as We Knew It?*, 36 *LITIGATION* 1, 1 (2010).

¹⁸³ *Padilla v. Kentucky*, 559 U.S. 356, 372–73 (2010) (citing statistics from the Department of Justice Bureau of Justice Statistics). *See generally* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 *YALE L.J.* 2650 (2013) (discussing why a right to effective counsel in plea-bargaining should be recognized).

¹⁸⁴ *See, e.g.*, Mary Helen McNeal, *Slow Down, People Breathing: Lawyering, Culture and Place*, 18 *CLINICAL L. REV.* 183, 216–17 (2011) (discussing the “repeat player”

and commitment to zealous advocacy as a guiding principle makes it possible to *be* zealous and for those repeat players to understand that the zealousness is the defender doing her or his job.

NLADA and leading defender services provide the counterpoint in an era when there are “too few resources, too many clients, and fee systems that discourage zealous advocacy.”¹⁸⁵ At their best, these organizations deliver client-centered lawyering that—whether the client wins, loses or something in-between—helps create procedural justice. Procedural justice sees value in zealous representation where it leaves a client trusting (relatively) the fairness of the process, regardless of the actual result. Moreover, the articulation of the standard may provide necessary support and encouragement to those advocating fiercely for their clients. As Abbe Smith has written:

The ethic of zeal is especially important here because it is comfortingly simple. How else might would-be defenders be assured that they will be able to do the work and sleep at night, and even feel good about it? The paradigm of devotion and zeal serves as both the motivation for doing the work and the excuse for doing it well.¹⁸⁶

Robust assertion of ethical standards and precise definitions of the elements of zealous advocacy, as embodied by the NLADA Standards, is particularly important given the phenomenon of “ethical fading.” Ethical fading is “the cognitive tendency of individuals to conflate acting ethically with acting in a self-interested way.”¹⁸⁷ Perceiving our desired actions as unethical leads to cognitive dissonance (“as a good person, how could my actions be unethical?”) and a corresponding desire to find a way to relieve the dissonance. As described by one of the founding scholars on the subject, “[b]ecause the occurrence of cognitive dissonance is unpleasant, people are motivated to reduce it; this is roughly analogous to the processes involved in the induction and reduction of such drives as hunger or thirst—except that, here, the driving force arises from cognitive discomfort rather than physiological needs.”¹⁸⁸

phenomenon in criminal, bankruptcy and family law).

¹⁸⁵ Smith, *supra* note 55, at 92 (citation omitted).

¹⁸⁶ *Id.* at 118.

¹⁸⁷ Paul R. Tremblay & Judith A. McMorrow, *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS L.J. 568, 579 (2011).

¹⁸⁸ Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Policy Lying*, 32 U.C. DAVIS L. REV. 389, 424 (1999) (quoting ELLIOT ARONSON, *THE SOCIAL ANIMAL* 178 (7th ed., 1995)).

A strong organizational culture affects the practice of ethical fading by providing a “‘default’ orientation toward which the ‘fading’ tends.”¹⁸⁹ This is partly because “social organization and, in particular, community norms are almost always more important influences on individual conduct than formal rules.” Although more emphasis has been placed on the negative effects of ethical fading, it is possible that organizational culture promoting strong ethical norms would have a comparably powerful effect in a positive direction.¹⁹⁰

While the standards have been developed with specificity for certain aspects of criminal practice, Jenny Roberts has shown how standards are limited or absent in the particular context of misdemeanor court.¹⁹¹ She demonstrates how the absence of such powerfully articulated norms permits ineffective assistance of counsel in that arena.¹⁹² The rest of this Article explores the absence of strongly articulated norms in immigration, too, and examines the implications of that absence.

B. The Immigration Bar in the Absence of Heightened Standards

1. Structure of the Immigration Bar and Disciplinary Mechanisms

Like other administrative law bars, the immigration bar practices in a complicated world, often hidden from the view of mainstream legal practitioners. There are two basic streams of immigration matters: affirmative applications submitted seeking benefits from the Department of Homeland Security, and administrative exclusion and removal hearings conducted by the Executive Office for Immigration Review (“EOIR”), situated in the Department of Justice. This Article focuses on the EOIR removal hearings, although many of the same issues apply in DHS applications. EOIR removal hearings address one of two principal legal matters, although procedurally, each looks

¹⁸⁹ Tremblay & McMorrow, *supra* note 187, at 579.

¹⁹⁰ “The new institutionalism, however, does not suggest that the norm creation will inevitably erode ethical decision-making.” Tremblay & McMorrow, *supra* note 187, at 579 (quoting Brown, *supra* note 174, at 813).

¹⁹¹ Professor Roberts cites a lack of case law applying Strickland to the lower criminal courts. Roberts, *supra* note 131, at 315–22. She also notes the extremely limited applicability of professional standards like those from the ABA or the National Association of Criminal Defense Lawyers. “[T]he [ABA Criminal Justice] Standards do not address the ways in which defense counsel might effectively represent misdemeanor clients, given the particular needs and challenges of misdemeanor representation, when the right to counsel applies. There is a similar lack of guidance in other standards . . .” *Id.* at 329.

¹⁹² *Id.*

almost exactly the same. One kind of hearing determines whether someone who has not yet been formally admitted *can* be admitted, or instead must be removed; this hearing happens whether or not the individual has physically entered the U.S. prior to the removal process beginning and the key question is admissibility. The other kind of hearing determines whether someone who has already been formally admitted can be removed, and the key question is deportability.¹⁹³

Those authorized to appear before EOIR courts include both attorneys and a wide range of permissible non-attorney representatives. Federal regulations permit not just licensed attorneys, but also supervised law students and law graduates, representatives accredited by the Board of Immigration Appeals (a component of EOIR), foreign lawyers, and other “reputable individuals.”¹⁹⁴

Those appearing in immigration tribunals are subject to at least two different sets of ethics rules. First, as federal administrative tribunals operated by the Department of Justice, practitioners are subject to the professional conduct rules that EOIR has promulgated specifically for the immigration courts,¹⁹⁵ which encompass many, but not all, of the same principles as the ABA Model Rules of Professional Conduct, and they may be sanctioned for violating those rules.¹⁹⁶ James Gavin, an immigration lawyer who has been active in AILA’s ethics work, has categorized these rules, noting that only five of the thirteen

¹⁹³ The difference between these two types of cases is critical. For example, in “*Conditional Admission*” and *Other Mysteries: Setting the Record Straight on the “Admission” Status of Refugees and Asylees*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 37 (2014), Laura Tjan-Murray states:

A noncitizen’s “admission” status is fundamental to his or her procedural options and constitutional standing. First, it determines whether the noncitizen is subject to the grounds of inadmissibility or deportability in removal proceedings. Generally speaking, the latter are far more favorable to noncitizens. A noncitizen’s admission status also may control whether she is eligible for bond or subject to mandatory detention over the course of proceedings, including during any government appeal of a victory by the noncitizen at trial. Even more sobering, whether a noncitizen is deemed “admitted” may be decisive as to whether she possesses any constitutional right to be released from detention following a removal order—or may be incarcerated indefinitely. Finally, whether and when a noncitizen has been “admitted” can determine whether she is eligible for a defense to removal or is removable at all.

¹⁹⁴ 8 C.F.R. § 1292.1(a) (2008). Although there are no publicly available statistics on the breakdown of kinds of appearances, this last category of “reputable individuals” appears to be very rare; I have not yet encountered such an appearance in immigration court, while other categories are reasonably common.

¹⁹⁵ 8 C.F.R. § 1003.102 (2003).

¹⁹⁶ 8 C.F.R. § 1003.103 (2003) (Immediate suspension and summary disciplinary proceedings).

have analogs in the Model Rules, while others like the prohibition against “contumelious and otherwise obnoxious conduct” and “repeated lateness for hearings” do not.¹⁹⁷ Second, those practitioners who are licensed attorneys are subject to the rules of the state bar(s) to which they have been admitted. As discussed in Part IV, *infra*, those state rules may conflict with EOIR rules, especially where the EOIR rules lean more toward duties to the tribunal and not to the client.¹⁹⁸

Immigration lawyers are subject to the same disciplinary mechanisms as any of their non-immigration peers, including censure, suspension, and disbarment. These mechanisms can be used both by states and by the Department of Justice.¹⁹⁹ The extent to which they *are* used is a separate, important question. EOIR publishes a list of suspended and expelled practitioners; as of February 2015, that list contained 622 names, of which 198 were disbarred, 88 suspended indefinitely, and almost all of the rest suspended between 30 days and 10 years.²⁰⁰ What cannot be gleaned from EOIR data is the number of complaints brought against attorneys—whether directly to EOIR or through state bars—that went nowhere, and why. What also cannot be discovered is how many complaints were not brought in the first place. Particularly when victims of ineffective assistance are deported, they may be unable to pursue a complaint from outside the country.²⁰¹ Even those not deported may be insufficiently familiar with the U.S. legal system to be aware of their right to file such complaints—often complaints are filed if and when they acquire new counsel who can diagnose the prior ineffectiveness. On the other hand, one factor

¹⁹⁷ James G. Garvin, *Multi-Jurisdictional Disciplinary Enforcement*, in AILA, *ETHICS IN A BRAVE NEW WORLD: PROFESSIONAL RESPONSIBILITY, PERSONAL ACCOUNTABILITY, AND RISK MANAGEMENT FOR IMMIGRATION PRACTITIONERS*, 84 (2004).

¹⁹⁸ See, e.g., Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 *GEO. J. LEGAL ETHICS* 219 (2007); REID TRAUTZ, *WHEN GOOD LAWYERS GO BAD: STRATEGIES TO REDUCE YOUR RISKS* (AILA 2007).

¹⁹⁹ Executive Office of Immigration Review, *List of Currently Disciplined Practitioners*, DEP'T OF JUSTICE, available at <http://www.justice.gov/eoir/discipline.htm> (last visited Feb. 28, 2015) [hereinafter EOIR DISCIPLINE LIST]. State bar associations also post information on attorneys disciplined for various violations of professional conduct in the immigration setting, although the data are not published by field of practice and are therefore difficult to aggregate. See, e.g., Maryland Attorney Grievance Commission, *Maryland Attorneys Disciplinary Actions FY 2015*, MDCOURTS.GOV, <http://www.courts.state.md.us/atygrievance/sanctions15.html> (last visited Feb. 28, 2015).

²⁰⁰ EOIR DISCIPLINE LIST, *supra* note 199.

²⁰¹ The complaint form itself presumes a location within the United States. EOIR, *Immigration Practitioner Complaint Form*, available at <http://www.justice.gov/eoir/eoirforms/eoir44.pdf> (last visited Feb. 28, 2015). Even if someone filed the complaint from another country, the process often involves interviews with witnesses, and that could prove difficult for complainants outside the country. *Id.*

pushes for more complaints to be filed: those who do remain in the United States, and have sophisticated legal knowledge or effective new counsel, have an incentive to file complaints as a basis for reopening their cases. *Matter of Lozada* permits immigrants to reopen their cases on the basis of prior ineffective assistance of counsel, but must file a bar complaint to qualify for reopening.²⁰²

2. Reputation of the Immigration Bar

Whether due to the mix of individuals able to appear, the complexity of the law itself, or some other difficulty, the immigration bar (broadly defined) has a poor reputation. Nightmare stories of ineffective, incompetent and fraudulent attorneys abound, such as the case study of a New York attorney, Joseph Muto, who routinely missed hearings and was ultimately disbarred in New York for acting as a front for non-lawyers manufacturing fraudulent cases²⁰³ (although his punishment before EOIR itself was only a seven year suspension).²⁰⁴ Another case is that of the Father Bob Vitaligione, an accredited representative who was beloved for providing representation to thousands of needy individuals, until the extent of his incompetence was revealed.²⁰⁵ In both cases, the practitioners seemed to be stepping in to help meet immense legal needs, perhaps demonstrating the view that any lawyer—even an overworked one—was better than no lawyer. But in both cases, their missteps, mistakes and, in the case of Muto, fraud, did more damage to their clients than might have happened with no lawyer at all.²⁰⁶

²⁰² *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988), *overruled by* *Matter of Compean*, 24 I. & N. Dec. 710, 711 (B.I.A. 2009), *vacated*, 25 I. & N. Dec. 1, 1 (B.I.A. 2009). The *Lozada* approach has been criticized from many angles. The Attorney General in *Compean* noted that “[b]y making the actual filing of a bar complaint a prerequisite for obtaining (or even seeking) relief, it appears that *Lozada* may inadvertently have contributed to the filing of many unfounded or even frivolous complaints.” *Compean*, 24 I. & N. Dec. at 737. One scholar proposed doing away with the bar complaint requirement, noting that the goals of validity and notice are met by other aspects of the *Lozada* procedure. Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345, 367–68 (2010).

²⁰³ Richard L. Abel, *Practicing Immigration Law in Filene’s Basement*, 84 N.C. L. REV. 1449 (2006).

²⁰⁴ EOIR DISCIPLINE LIST, *supra* note 199.

²⁰⁵ Sam Dolnick, *Removal of Priest’s Cases Exposes Deep Hole in Immigration Courts*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/nyregion/priests-former-caseload-exposes-holes-in-immigration-courts.html?pagewanted=all&_r=0.

²⁰⁶ Indeed, regulations require that both the Immigration Judge and ICE attempt to identify what relief might be available for *pro se* individuals, and judges often urge individuals for whom some relief might be available to try even harder to find an attorney for their case. At least the “regulations require” claim should have a citation. Such a *pro se* individual is far better off than if represented at the outset by someone

Due to well-known stories like those above and many others, as prominent immigration attorney Michael Maggio noted, “the collective ethical reputation of the immigration bar, which has never been great, is worse now than ever.”²⁰⁷ Maggio, whose own zealous advocacy was a trademark of his career,²⁰⁸ thoughtfully lays out the multiple dimensions of the ethics challenges facing the immigration bar, noting how some of the least experienced immigration practitioners are among the most likely to be working on the most complex cases for the most vulnerable clients. More seasoned lawyers, he notes, tend to derive business from the world of labor certifications, which require craftsmanship and great skill, but are not as treacherous as removal proceedings, asylum cases and so forth.²⁰⁹

The American Immigration Lawyers Association has done enormous work trying to address the challenge noted by Michael Maggio. In addition to employing someone full time to educate members on ethics issues, the website for AILA members features practice and professionalism prominently on its homepage, and links to ethics publications and state-by-state compendia of rules providing guidance to immigration lawyers.²¹⁰ It also has a message board where members can seek guidance on ethical obligations and dilemmas, but these mostly focus on matters beyond removal proceedings (such as the dual representation problems in employment-based and family-based applications).²¹¹ Given the non-adversarial context of these inquiries, it is perhaps unsurprising that the thoughtful analysis found in these resources tends to be fairly conservative in its approach—focusing carefully on lawyer liability exposure, and not on zealous

like Muto or Vitaligione who misses hearings, fails to screen for relief, and concedes removability or seeks voluntary departure when other, better courses of action were available.

²⁰⁷ Michael Maggio, *Matter of Ethics*, in BRAVE NEW WORLD *supra*, note 157.

²⁰⁸ Patricia Sullivan, *Immigration Lawyer Michael A. Maggio*, WASH. POST (Feb. 12, 2008), http://articles.washingtonpost.com/2008-02-12/news/36922813_1_fight-deportation-immigration-lawyer-ins-agents; *Firm Carries on Michael Maggio's Pro Bono Legacy*, AILA, <http://ailahub.aila.org/i/49654/2> (last visited Feb. 28, 2015).

²⁰⁹ Maggio, *supra* note 207.

²¹⁰ AMERICAN IMMIGRATION LAWYERS ASSOCIATION, www.aila.org (last visited Feb. 28, 2015). A post in the message board available to members solicits ethics articles that AILA is interested in publishing, and suggests that “possible topics include advertising immigration legal services across state lines, application of ethics rules on global practice, ‘unbundling’ legal services, and oversight of independent paralegals.” (Post, Sept. 20, 2013). While these are undoubtedly important topics, they do not cover anything close to the topic of zealous advocacy in immigration removal.

²¹¹ See, e.g., Jill Marie Bussey & Jane W. Chen, *A Primer on the Ethical Considerations in Family-Based Practice*, AILA (2010); Trautz, *supra* note 198; Hilary Sheard, *Ethical Issues in Immigration Proceedings*, 9 GEO. IMMIGR. L.J. 719 (1995).

advocacy for clients. Furthermore, AILA—while exceptionally influential for immigration practitioners—is a membership organization, and not all immigration lawyers pay the dues needed to access these resources.²¹²

In the removal context, one resource does lay out detailed steps that lawyers can take to prepare and defend their cases effectively: The Immigration Trial Handbook.²¹³ This resource has a wealth of information relevant to different stages of trial preparation, and provides a path for advocates to be extremely effective, and at times zealous.²¹⁴ It carries less authority for articulating standards of zealousness for the profession, however, than something like the NLADA standards developed for criminal defenders.²¹⁵ It is a private publication not developed as part of an effort to reach consensus about professional standards of effectiveness. As such, it falls well short of even the voluntary NLADA standards. Clearly, many lawyers *do* routinely practice zealously in immigration removal; the concern of this article is that they are unsupported and too often alone, not able to relay on a legal culture shared throughout the immigration bar. The flip side of this tarnished coin is that those lawyers who do *not* practice zealously have no commonly accepted standards in this practice area showing them precisely the degree to which they are falling short.

3. Efforts to Extend *Gideon*

Into this confounding world where lawyers and many kinds of non-lawyers can practice, and where unique and multiple ethical rules govern those who practice, come the questions of right to counsel, and the importance of that counsel being effective. The former question has been studied in some depth, but only recently has attention turned

²¹² It is not possible to state how many immigration lawyers are *not* AILA members, especially because attorneys practicing in immigration court may consider themselves general practitioners working in multiple fields. But the dues likely price some percentage of lawyers out of membership, even where they are interested. For 2014, they range from \$125 for non-profit attorneys to \$455 for regular members with 7+ years of practice. *2014 AILA Dues Structure*, AILA.ORG, <http://www.aila.org/membership/join> (last visited Feb. 28, 2015). For an excellent study of the impact of AILA on immigration lawyer practices and actions, see Leslie Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194 (2011).

²¹³ MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK (2013) [hereinafter IMMIGRATION TRIAL HANDBOOK].

²¹⁴ *Id.* at § 7:12. For example, it says that “counsel can and should object to [the] admission” of Form-213 when it contains information the client disputes.

²¹⁵ *Blue Ribbon Advisory Committee on Indigent Defense Services* (1996), NLADA.ORG, available at http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon.

to the latter question.²¹⁶

The right to appointed counsel matters in a world where so many are unrepresented. During FY 2012, only 56 percent of immigrants had representation in removal proceedings.²¹⁷ The increasing use of detention, particularly in isolated locations, also decreases the ability of immigrants to secure representation.²¹⁸ Pro bono legal services for detainees are exceptionally limited, largely because of time and travel costs associated with access to far-flung facilities, such that a single two-hour interview with one client might consume 8–10 hours of an attorney's day.²¹⁹ At the same time and travel costs make private representation more expensive than many detainees can afford.²²⁰ Even facilities close to major metropolitan areas have very low rates of representation for detainees, with one New York study showing only 40 percent have counsel by the time their hearing is completed (compared to 73 percent for those who are not detained).²²¹ Farther afield, that rate tumbles to 21 percent.²²² And “farther afield” is increasingly the norm in immigration detention. With roughly 36 percent of the immigration courts' cases comprised of detained cases,²²³ these high rates of being unrepresented represent a significant problem.

Since 1989, there have been programs around the country trying to improve access to justice by providing pro bono representation and/or legal representation to detainees in different ways.²²⁴ The Florence

²¹⁶ Compare Beth Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000) with Hamutal Bernstein and Andrew I. Schoenholtz, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55 (2008).

²¹⁷ EOIR STATISTICAL YEARBOOK, *supra* note 145, at G1.

²¹⁸ Stacy Caplow has done statistical analysis of the rise of detained cases within the immigration court system. Stacy Caplow, *After the Flood: The Legacy of the Surge of Federal Immigration Appeals*, 7 NW J. L. & SOC. POL'Y 1, 25–26 (2012). Criticisms of ICE's detention quota abound. See e.g., Morgenthau, *supra* note 148.

²¹⁹ Consider, for example, an attorney in Washington, D.C. representing a detainee in Farmville, Virginia, 170 miles away. Driving time each way is roughly three hours without traffic, and there can be significant delays between arriving at the detention facility and actually seeing the detainee client.

²²⁰ Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548–59 (2009).

²²¹ *The New York Immigrant Representation Study: Preliminary Findings*, N.Y. TIMES (May 3, 2011), available at <http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf>.

²²² *Id.*

²²³ EOIR STATISTICAL YEARBOOK, *supra* note 145, at O1.

²²⁴ Ingrid V. Eagly has examined the ways that current legal service provision (via non-profits, pro bono representation, and law school clinics) could provide a

Immigrant and Refugee Rights Project has been representing immigrants and providing legal information to thousands of unrepresented immigrants at detention facilities in Arizona since 1989, and in that same year the American Bar Association, AILA and the State Bar of Texas set up ProBar to improve access to justice for immigrants in South Texas.²²⁵ Since that time, legal orientation programs (LOPs) have increased massively in scale, under the monitoring of the Department of Justice's Office of Legal Access Programs.²²⁶ Since 2008, the American Bar Association, in collaboration with several other entities, founded the Immigration Justice Project of San Diego to respond to the crisis in lack of representation. The project uses a network of pro bono attorneys to "promote due process and access to justice at all levels of the immigration and appellate court system."²²⁷ The project specifically notes that the pro bono assistance is to be of "high-quality," although it does not define that term.²²⁸

Recognizing that such programs are, at best, a patchwork solution, there have been increasing—and increasingly effective—calls from the bar, policy advocates and legal scholars to recognize a right to *appointed* counsel in specific contexts. The quest to extend *Gideon* to the immigration context began decades ago and has been studied and justified in academic and policy literature.²²⁹ These authors seek

foundation for expanding *Gideon* to immigration practice. Eagly, *supra* note 74.

²²⁵ *Our History*, THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, <http://www.firrp.org/who/history/> (last visited Feb. 28, 2015); *What Is ProBAR*, PROBAR DETENTION PROJECT, <http://www.americanbar.org/content/dam/aba/administrative/immigration/probar/probaradultsbrochure7-12.authcheckdam.pdf> (last visited Mar. 30, 2015).

²²⁶ *Office of Legal Access Programs*, DEP'T OF JUSTICE, <http://www.justice.gov/eoir/probono/probono.htm> (last visited Feb. 28, 2015).

²²⁷ *Immigration Justice Project (IJP) of San Diego: About Us*, ABA.ORG, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/immigration_justice_project_ijp_of_san_diego/about_us.html (last visited Feb. 28, 2015).

²²⁸ *Id.* Professor Andrew Schoenholtz and Hamutal Bernstein also note the importance of competence: "The crucial role of competent representation is one of the motivating factors behind the ABA Immigration Justice Project, which seeks not only to provide representation but also to train and prepare counsel in order to provide competent services." Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 59 (2008).

²²⁹ See, e.g., Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 ABA HUMAN RIGHTS MAGAZINE, no. 4, (2013), http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html; Donald Kerwin, *Revisiting the Need for Appointed Counsel* no. 4 (Apr. 2005), <http://www.migrationpolicy.org/research/revisiting-need-appointed-counsel>; Beth I.

the extension of *Gideon* appointed counsel to immigration proceedings generally, for reasons very similar to the ones set forth in Part I, *supra*, comparing the immigration and criminal systems' stakes, complexity and power-imbalances.²³⁰ Others have begun the process of defining specific contexts within immigration law that might justify the appointment of counsel.²³¹

The phenomenon of appointed counsel in the immigration context is becoming more widespread for two reasons: development of case law providing counsel as a matter of due process, and expansion of appointed counsel through statutes or Government programs. First, the *M-A-M*-case recognized deficiencies in the due process available to mentally incompetent immigrants in the immigration court system.²³² The court in *M-A-M*- considered the Fifth Amendment due process rights of immigrants in removal proceedings, applying the standard of "fundamental fairness" to the question of whether a mentally incompetent individual had a right to appointed counsel in this particular civil context.²³³ *Turner v. Rogers*²³⁴ which examined the right to counsel in a child support enforcement case where the father was incarcerated, likewise offered a framework for evaluating Fifth Amendment due process right to counsel. While the Court found no right in that particular case, its framework, as scholar Ingrid Eagly has shown, could justify appointed counsel in the immigration context.²³⁵

Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B. C. THIRD WORLD L.J. 393 (2000).

²³⁰ *Id.*

²³¹ Kevin Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013) (appointment of counsel for lawful permanent residents in removal proceedings); Noferi, *supra* note 107 (appointment of counsel for hearings to determine whether mandatory detention applies); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1359–60 (2011) (right to counsel for immigrants in removal proceedings because of a criminal conviction, post-*Padilla*).

²³² *Matter of M-A-M*-, 25 I. & N. Dec. 474 (B.I.A. 2011). This marked a leap forward from the statutory standard simply requiring the mentally incompetent individual's rights to be protected, without stating *how* such rights were to be protected:

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien

The Act's invocation of safeguards presumes that proceedings can go forward, even where the alien is incompetent, provided the proceeding is conducted fairly.

Id. at 477 (internal citations omitted).

²³³ *Matter of M-A-M*-, 25 I & N Dec. 474 (B.I.A. 2011).

²³⁴ 131 S. Ct. 2507 (2011).

²³⁵ Eagly, *supra* note 74, at 2302–03 (noting that if the framework requires "weighing case complexity, representation status of the parties, and available procedural safeguards" it could justify appointed counsel in the immigration context).

Second, appointed counsel is increasing as a legislative matter, and may continue to increase through immigration and other reforms. The Senate immigration bill, passed in June 2013, permitted appointed counsel for any proceeding at the discretion of the immigration judge, but *required* appointment of counsel for minors and mentally incompetent individuals.²³⁶ Then, without waiting for federal reform, New York City created the first publicly funded “defender system” for immigrants in removal proceedings, in July 2013.²³⁷ The \$500,000 allocation creates a pilot project that would provide representation to 135 individuals.²³⁸ If expanded, the project would coordinate a network of lawyers drawn from both private firms and non-profit immigration legal service providers.²³⁹ As Ingrid Eagly has noted, “[r]egardless of how courts ultimately resolve the constitutional question, all levels of Government retain the ability to take legislative action to expand access to appointed counsel.”²⁴⁰

C. *New Focus on Effectiveness of Counsel*

Clearly, appointed counsel is increasing, and likely to increase further, either through litigation or legislation. Appointment of counsel is, however, merely a starting point in considering access to justice. Increasingly, scholars are also looking at the effectiveness of the counsel that immigrants do have. As Professor Andrew Schoenholtz and Hamutal Bernstein write:

²³⁶ S.B. 744, § 3502(c) (2013) reads:

Notwithstanding subsection (b) [providing discretionary authority to appoint counsel], the Attorney General shall appoint counsel, at the expense of the Government, if necessary, to represent an alien in a removal proceeding who has been determined by the Secretary to be an unaccompanied alien child, is incompetent to represent himself or herself due to a serious mental disability that would be included in section 3(2) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)), or is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings.

²³⁷ Kirk Semple, *City to Help Immigrants Seeking Deportation Reprieves*, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/18/nyregion/city-to-help-immigrants-seeking-deportation-reprieves.html?ref=nyregion&_r=0.

²³⁸ *Id.*

²³⁹ PETER L. MARKOWITZ, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN (2009), <http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf>.

²⁴⁰ Eagly, *supra* note 74, at 2303.

The problem is not only lack of representation but also poor quality of representation. Low-quality representation is too often the case at the Immigration Court level. Some applicants manage to secure representation, but their representative (1) may not have the appropriate legal expertise, (2) may be overloaded with too many cases, (3) may not give due attention and care to individuals, or (4) may even be fraudulent.²⁴¹

Chief Immigration Judge Juan Osuna has similarly emphasized that counsel is not enough, and that the representation itself must be *good*: “Good lawyers help immigrants navigate a complex process. . . . [T]he system overall benefits when good lawyers get involved.”²⁴² Judge M. Margaret McKeown and Allegra McLeod have also examined the question of effectiveness, looking at such trademarks of bad lawyering as placing clients unnecessarily into removal proceedings and failing to offer evidence, concluding that the view that *any* lawyer is better than no lawyer is fundamentally in error, a conclusion this Article supports.²⁴³

Beyond avoiding the importance of avoiding such unarguably bad lawyering (an important and herculean task in and of itself), this Article wants to ensure that our definition of competence is defined not against the lowest common denominator, but *upward* toward an aspirational standard. The way that zealous advocacy can make a practical difference in establishing a better standard for immigration lawyers is the subject of the next section of this article.

IV. THE IMPACT AND LIMITATIONS OF ZEALOUS ADVOCACY AS A GUIDING PRINCIPLE

A. *Where Zealousness Might Make a Difference*

There are multiple scenarios in immigration court where zealousness would be somewhat counter-cultural and could work to the benefit of clients, particularly those with more limited options or cases with weaker evidence. Certainly, many lawyers already do these things. However, in the fast-paced world of master calendars, where dozens of cases are processed swiftly, and trials that are condensed to just two or

²⁴¹ Schoenholtz & Bernstein, *supra* note 228 at 59–60.

²⁴² Allegra McLeod & M. Margaret McKeown, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 286–306 (New York: New York University Press 2009).

²⁴³ *Id.*

three hours, many of these maneuvers are exceedingly rare.

This section concretizes the notion of zealous advocacy in the immigration context. But it is also worth noting at the outset what, in this author's view, zealous advocacy is *not*. It is not uncivil and it is not dishonest. Zealousness may seem to demand an aggressive style or promote a propensity to exaggerate evidence. While different lawyers have different styles, incivility rarely serves any good purpose, and attorney dishonesty hurts not just the integrity of the system, but the interests of the clients known to be represented by someone with a reputation for dishonesty. The scenarios below show multiple contexts in which a lawyer can be zealous while remaining civil and honest.

1. Putting the Government to its Burden

The Government has the initial burden in a removal proceeding, to establish alienage, i.e. that the immigrant is not a U.S. citizen.²⁴⁴ Once this burden is met, the burden shifts to the immigrant to prove he or she has a right to remain, and/or a defense to removal.²⁴⁵

The Government may seek to meet its burden by submitting a Form I-213 ("record of deportable alien") at the initial status hearing for a removal proceeding (the "master calendar"), although such documents are also introduced later, just for impeachment purposes during an individual hearing.²⁴⁶ The Form I-213 contains information about the immigrant and the circumstances of his or her arrest and, if relevant, criminal history.²⁴⁷ Immigration agents also include in Form I-213 any statements made by the immigrant upon arrest by DHS, as well as information from investigations made by ICE or other agencies pertaining to the immigrant.²⁴⁸ The document is signed only by the arresting agent, and by the receiving officer who authorizes prosecution of the case. The court considers Form I-213 "inherently trustworthy," as a default matter, despite the presence of hearsay on the document.²⁴⁹ The Form often contains information that is prejudicial to the immigrant's case, including the facts that the Government can use to meet its burden of establishing alienage, like

²⁴⁴ INA § 240(c)(3)(A).

²⁴⁵ INA § 240(c)(2).

²⁴⁶ *Matter of Ponce-Hernandez*, 22 I. & N. Dec. 784, 785 (B.I.A. 1999) ("[A]bsent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage or deportability.") (citation omitted).

²⁴⁷ IMMIGRATION TRIAL HANDBOOK, *supra* note 213, at § 7:12. *Matter of Mejia*, 16 I. & N. Dec. 6 (B.I.A. 1976).

²⁴⁸ IMMIGRATION TRIAL HANDBOOK, *supra* note 213.

²⁴⁹ *Matter of Mejia*, 16 I. & N. Dec. 6, 8 (B.I.A. 1976).

nationality, and date, place and manner of entry. The form may also include allegations of criminal involvement not supported by records of conviction.²⁵⁰

Despite its “inherent reliability,” advocates can challenge the admission of the Form. One reason for objection is that rarely has the lawyer been given a chance to examine it more than cursorily before the Government seeks to have it admitted. The lawyer has a statutory right to examine the evidence²⁵¹ a right that is diminished when custom and collegiality subtly pressure a decision to go along to get along and not waste the court’s time by examining the document closely. Another is a simple objection to its hearsay, which, while likely to be overruled, preserves the objection for appeal if necessary; just because an objection is unlikely to be sustained does not mean the lawyer should resist making it. This is fairly cost-less zealous advocacy: something well within a lawyer’s ability to do with minimal disruption of the litigation for either side. It is thus a place where zealous advocacy would prove easy to apply if adopted as a guiding principle.

The Government also meets its burden when the immigrant concedes the allegations made on the Notice to Appear (Form I-286, “NTA”).²⁵² The NTA usually makes several factual allegations, including: nationality, date, and place and manner of entry, and sometimes other allegations about criminal activity, failure to remain in status, or others. Regulations provide for many different reasons why a notice to appear can be canceled,²⁵³ from contesting the allegations, to asserting that the individual is actually a citizen of the U.S., to asserting that the notice was “improvidently issued.” There is no data available showing the number of cases where an immigrant objects to admission of the NTA, but any observation of a master calendar shows how unusual it is to see attorneys make objections to the NTA or deny allegations thereon (except, sometimes, to make technical corrections which can be—and are—rapidly resolved with the issuance of a new NTA). When the newly created New York Immigration Defenders corps began litigating cases, their routine denial of NTAs sparked notice from lawyers unaccustomed to seeing

²⁵⁰ While frequently damaging to the immigrant’s case, the Immigration Trial Handbook also notes that Form I-213 may contain information about the arrest that could provide the basis for a Motion to Suppress Evidence. IMMIGRATION TRIAL HANDBOOK, *supra* note 213, at § 7:12.

²⁵¹ INA § 240(b)(4)(B); 8 U.S.C. § 1229a(b)(4)(B) (2013).

²⁵² 8 C.F.R. § 1240.8 (2013).

²⁵³ 8 C.F.R. § 239.1(a) (2013). The Immigration Trial Handbook lists eleven different means of challenging a notice to appear, most of which derive from the immigration regulations. IMMIGRATION TRIAL HANDBOOK, *supra* note 213, at 5:10.

that done.²⁵⁴

When the allegations stem from evidence obtained unconstitutionally, lawyers can—and should—deny the allegations and pursue a Motion to Suppress Evidence. The regulations themselves provide for this: When the NTA is “issued under circumstances involving duress, a lack of due process, violations of a noncitizen’s rights under the regulations, or *other violation of a constitutional right*,” it may be challenged.²⁵⁵ *Matter of Garcia*²⁵⁶ provides one excellent example of this, although its contours are currently the subject of federal litigation.²⁵⁷ The BIA found that Mr. Garcia’s statements were made involuntarily when the then-INS handcuffed him and repeatedly refused him access to his attorney, even erasing the attorney’s number from Mr. Garcia’s arm (where he had written it).²⁵⁸

Beyond the regulatory violations, *INS v. Lopez-Mendoza*²⁵⁹ opened the door to filing suppression motions under the Fourth Amendment when abuses were egregious, and possibly even more widely than that.²⁶⁰ Concurrent with the rise in immigration enforcement done by local law enforcement agents, such constitutional issues have risen in immigration court as well, but are still a relatively unusual basis for challenging a NTA. This is so partly because *Lopez-Mendoza* is sometimes read as saying that the Fourth Amendment’s exclusionary rule does not apply in immigration court,²⁶¹ and partly because such

²⁵⁴ Rich commentary on this phenomenon emerged in a closed Facebook group for private immigration lawyers. (Sept. 11, 2014) (entire thread on file with author).

²⁵⁵ Absent proof that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability or inadmissibility. *Matter of Barcenas*, 19 I&N Dec. 609 (B.I.A. 1988); *Matter of Mejia*, 16 I&N Dec. 6 (B.I.A. 1976).

²⁵⁶ *Matter of Garcia*, 17 I.&N. Dec. 319 (B.I.A. 1980).

²⁵⁷ The BIA held in 2011 that statements made prior to the issuance of an NTA. *Id.*

²⁵⁸ *Id.* at 320.

²⁵⁹ 104 S. Ct. 3479 (1984).

²⁶⁰ The American Immigration Council Legal Action Center (affiliated with the American Immigration Lawyers Association) has shown how much of the reasoning behind *Lopez-Mendoza*’s “egregious violations” standard is based on facts no longer true in the present-day immigration enforcement apparatus. *Practice Advisory: Motions to Suppress in Removal Proceedings: Cracking Down on Fourth Amendment Violations by State and Local Law Enforcement Officers*, AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER (Aug. 15, 2013), http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-cracking_down_on_fourth_amendment_violations.pdf.

²⁶¹ Deborah Anker, *Asylum Status*, AMERICAN LAW INSTITUTE AMERICAN BAR ASSOCIATION TRAINING, C394 ALI-ABA 355 (Apr. 1989) (citing C. Slovinsky & M. Van Der Hout, *Motions to Suppress After Delgado and Lopez-Mendoza*, 13 IMMIGRATION

litigation is poorly understood.²⁶² Moreover, as one practice resource notes, “[Filing a motion to suppress under the Fourth Amendment] will not endear you to the Office of Chief Counsel and may adversely affect how DHS trial attorneys think of you and treat you.”²⁶³ Here, the disruption to the litigation is significant; such motions can take years to resolve as both sides work their way through appeals. Moreover, the reputational costs to the disruptive litigator can be significant.²⁶⁴ However, disruption in defense of a constitutional right is at the least ethically defensible, under a guiding principle of zealous advocacy would be *required* to be a truly effective attorney.²⁶⁵ Understanding the tactic as a key piece of effectiveness might reduce the reputational costs borne by lawyers who, at present, are litigating against cultural norms in immigration court.

2. Fighting Within Any Given Case

Zealousness also may shape how any given case is litigated, and will affect how well an attorney deploys motions, calls witnesses, counsels a client, or pushes to have evidence introduced. Even where there is no basic conflict in duties, the absence of a strongly articulated principle of zealous advocacy matters if the legal culture, as described in Part III(A) *supra*, deters such ethically permissible conduct simply as a matter of custom.

One scenario is not unique to immigration practice but is powerful there: the familiar scenario of the judge who wishes to hurry along proceedings. Imagine an immigration judge who wants to rush through testimony in a particular case because an overcrowded docket in the system generally has left her with too little time to patiently hear all the testimony. Does the lawyer push back and insist? Make an objection for the record? This is not a difficult choice, and a zealous

NEWSLETTER No. 5–6 at 1 (1984).

²⁶² See generally Maureen Sweeney, *Shadow Immigration Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 227, 277-79 (2014) (describing the lack of an analytical framework for immigration judges to determine motions to suppress, and noting the attendant confusion when such motions are filed).

²⁶³ *Motions to Suppress in Removal Proceedings: A General Overview* 34, AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-a_general_overview_1-26-15_fin.pdf (last visited Feb. 28, 2015).

²⁶⁴ From discussion of an earlier draft of this Article, at the Mid-Atlantic Clinical Theory Workshop, held at University of Baltimore (Feb. 2014) (notes on file with author).

²⁶⁵ Indeed, the Sixth Circuit just found that an unwarranted concession of removability by an immigrant’s prior counsel constituted egregious circumstances, sufficient to allow the individual to reopen proceedings and withdraw the original admissions and concessions. See *Hanna v. Holder*, 740 F.3d 379 (6th Cir. 2014).

advocate would do at least one of those two things. But when zealousness is not the norm, and there are powerful pressures to please the Court, to be a good repeat player in the system, some lawyers will refrain from doing either of these simple litigation maneuvers, privileging the legal system over their client.

More difficult is the question of truthfulness and the lawyer's role in eliciting and presenting the truth. A common example of this arises for those seeking relief by applying for a crime-victim visa (a "U visa") from USCIS, an increasingly prevalent way to gain immigration status.²⁶⁶ Although not adjudicated in court, courts often permit continuances if an immigrant appears to have a chance of regularizing status through an application to USCIS, and will postpone proceedings while that application is adjudicated. One question asked on the U visa application is "Have you EVER committed a crime or offense for which you have not been arrested?"²⁶⁷ Some lawyers believe that they must answer "yes" to this question if the client discloses any possible transgressions (and because the lawyer must ensure that the client has answered every question on the form, this is information the lawyer *will* obtain from a client who is reasonably forthcoming). Others argue that the question itself implies that that no judge or jury has found the immigrant guilty of any offense, so it cannot be known with certainty whether there was a crime or offense committed at all. In this view, the lack of certainty permits a "no" answer even in the presence of questionable conduct.²⁶⁸

The fact that there are two possible paths demonstrates that this is an ethical gray area, where different actions may both be justified, and where duties come into sharp tension. On the one hand, the path of saying "yes" puts the lawyer in the role of being judge and jury for

²⁶⁶ The visa came into creation in 2000, but lacked implementing regulations until 2008. Since then, through trainings and education, it has become widely known and widely sought. Ten thousand of such visas are available each year, and USCIS now routinely meets that quota. *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year*, USCIS (Dec. 11, 2013), <http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year>.

²⁶⁷ *I-918, Petition for U Nonimmigrant Status*, at 3, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/i-918> (last visited Feb. 28, 2015).

²⁶⁸ Still others say that the information is protected by the Fifth Amendment right to remain silent, but such a right must be invoked and in a civil matter, such as the adjudication of a U visa, invocation of the right permits the decision-maker to make an inference of guilt. *See Gutierrez v. Holder*, 662 F.3d 1083, 1091 (2011). Furthermore, while in a civil proceeding, an individual may invoke the Fifth Amendment, and let the fact-finder draw what conclusions they will from its invocation, there is no mechanism for doing so in immigration applications, short—perhaps—of writing "I invoke the Fifth Amendment" in the margin of the form or in a supplement.

their own client, which is squarely in collision with duties to the client—and yet, to lawyers making this choice, this likely feels like a fairly safe ethical choice, privileging the legal system over the client. It may be unfortunate and frustrating, but not unethical. Why that seems like the straightforward ethical choice is difficult to know. Perhaps answering yes appeals to the lawyer’s need to prove that lawyers can be honest, contradicting the profession’s (unearned) reputation for pervasive dishonesty. Perhaps answering yes shows respect or even some awe for the legal system, the same system that drew the lawyer into the profession in the first place. Answering yes may let the lawyer align with the legal system in a gatekeeping role that feels important, even if wrongly ascribed in an adversarial context.²⁶⁹ Regardless, it is a safe choice that is unlikely to bear any negatives consequences for the lawyer.²⁷⁰

On the other hand, the defensible path of saying “no” even when possibly the truth is “yes,” is a choice made by the zealous advocate, but for the risk-averse among us, this choice comes uncomfortably close to a collision with duties to the legal system. And why is that? Again, legal cultures develop shared norms, and it is difficult for lawyers to go against those norms. Because zealous advocacy is *not* the guiding principle within immigration law, a borderline decision such as this may lead to considerable discomfort with going against the cultural grain. A clearer, well-defined and broadly shared value of zealousness might ease that discomfort and make it easier to tip the balance toward duties to the client.

Another area where lawyers self-censor is in providing evidence to the tribunal. It is broadly understood that the Model Rules prohibit a lawyer from acting simultaneously as witness and advocate in a particular trial.²⁷¹ However, this rule, Rule 3.7 (which has no analog in the rules governing immigration court appearances) contains an exception for situations where “disqualification of the lawyer would work substantial hardship on the client.”²⁷² Arguably, this exception applies frequently in the context of asylum litigation, where the attorney is a witness to efforts to corroborate the asylum-seeker’s claim. In asylum cases, the legal standard is that applicant’s own statement

²⁶⁹ The gatekeeping role has been suggested in non-litigation contexts like corporate counsel work. See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005).

²⁷⁰ The reason the lawyer is unlikely to face consequences from the client whose duty was compromised is addressed in Part III.B.1, *supra*.

²⁷¹ ABA MODEL RULES OF PROF’L CONDUCT R. 3.7 (1983).

²⁷² *Id.*

may be sufficient to win asylum, but *only* when it would not be reasonable to expect corroboration.²⁷³ This legal standard has been criticized as disadvantaging asylum-seekers who cannot produce adequate corroboration, and who cannot know what any particular immigration judge will expect to be “reasonably available.”²⁷⁴ Sometimes the client can offer testimony about attempts to obtain evidence, but often it is the lawyer who has done much of the case investigation, and knows much better than the client how hard or easy a particular document or witness statement was to obtain.²⁷⁵ In a well-known case study from Georgetown Law’s Center for Applied Legal Studies, students went to heroic lengths and deployed extraordinary creativity to find a key witness for their client’s case.²⁷⁶ They succeeded, but had they not ultimately succeeded (and not all efforts yield such excellent results), their efforts are surely evidence relevant to the determination of what evidence was “reasonably available” in the case—and therefore precluding testimony would impose substantial hardship on the client and thus meet the Rule 3.7 exception. Yet this thorough reading of the rule, coupled with a legal culture that assumes lawyers cannot offer testimony, could prevent such evidence from being offered at all. A legal culture that had zealous advocacy embedded as a guiding principle might lead more attorneys to try.

B. When Zealous Advocacy is Impossible

While zealous advocacy can resolve some dilemmas like those described so far in this section, there are other situations in immigration court, particularly as concerns candor to the tribunal, where it is simply not possible. Immigration law is not unique for experiencing tensions in the ethical rules where further guidance is needed. Such tensions have been examined in a variety of contexts.²⁷⁷ Nonetheless, immigration law, and particularly the practice in immigration court where removal hearings are heard, is rife with such dilemmas, and those dilemmas often turn upon whether the lawyer

²⁷³ REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231; 8 U.S.C.A. § 1252 (West 2015).

²⁷⁴ Deborah Anker, Emily Gumper, Jean C. Han & Matthew Muller, *Any Real Change? Credibility and Corroboration After the REAL ID Act*, in IMMIGRATION & NATIONALITY LAW HANDBOOK (2008–09).

²⁷⁵ See, e.g., DAVID NGARURI KENNEY & PHIL SCHRAG, ASYLUM DENIED 136 (2009) (describing the efforts made by student attorneys to find a copy of a key news article in an asylum case).

²⁷⁶ Agata Szypszak, *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*, 6 CLINICAL L. REV. 517 (2000).

²⁷⁷ Andrews, *supra* note 14.

chooses to favor duties to the client over duties to the court, or vice versa. Under different sets of ethical rules, lawyers have some grey area within which they can navigate competing duties and make a range of choices. That range of choices is sharply curtailed in immigration court, leaving lawyers in an untenable position.

AILA ethicist Reid Trautz introduces us to this problem:

Our profession's ethical rules of conduct contain rules that may appear to conflict with each other, making it difficult for even experienced practitioners to properly apply and follow. Among the most difficult of these arises when a client lies: the intersection of our obligations of client confidentiality and candor toward an adjudicative tribunal. *For immigration lawyers, this frequently manifests itself when we learn a client may have been untruthful in an adjudicative hearing.* It is in this zone of difficulty that many lawyers find themselves, seeking a path to extract their clients and themselves from a legal and ethical quagmire.²⁷⁸

Note first, that in this example about honesty to the tribunal, that the lawyer has learned the client *may* have been untruthful. Under most rules of practice, such ambiguity about whether the client actually was or was not untruthful permit the lawyer to continue representing the client without any duty to share any doubts with the Court. The normal ethical standard imposing a duty to correct the record is "actual knowledge,"²⁷⁹ which does not seem to exist in this example. However, in immigration court, the standard for knowledge included "reckless disregard" of the possibly false story.²⁸⁰ So, indeed, the rules do not just *appear* to conflict, in Trautz's formulation; they do conflict.

Professor Gilbert has laid out these dilemmas and tensions in her scholarship.²⁸¹ In a wonderfully detailed case study (and one all too familiar to anyone who has represented clients in immigration court), she describes the multilayered dilemmas facing a particular pro bono attorney. This attorney represented a woman who, among other issues, made questionable, if not illegal, decisions about who to claim as a dependent on her tax returns. This issue put the lawyer in a bind as the immigration judge had demanded to see those tax returns as proof of the woman's good moral character (a requirement for the relief being sought). Gilbert explores the shades of whether the lawyer knew, suspected or recklessly disregarded information about the truth

²⁷⁸ Trautz, *supra* note 156.

²⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

²⁸⁰ 8 C.F.R. § 1003.102(c) (2013).

²⁸¹ Gilbert, *supra* note 198, at 234–36.

or falsity of those returns.²⁸² Exploring client truthfulness is an issue familiar to all lawyers.²⁸³ But Gilbert explores how this tension is exacerbated by numerous factors: the burden on immigrants to provide such evidence; by the likelihood of even minor issues and discrepancies to undermine a legal case; and by the under-resourced overwhelmed nature of immigration court dockets—“an increasingly draconian legal environment,” as Gilbert describes it.²⁸⁴

In Gilbert’s case study, the lawyer opts for solidarity with his client, and favors zealous advocacy over candor to the tribunal where those two values come into conflict.²⁸⁵ As she writes,

Faced with an ethical dilemma that threatened to derail his client’s case, Attorney S considered not only the precise ethical issues he was facing, but the context in which the issues arose. Attorney S was representing a client before a decidedly hostile government attorney and a judge with one of the highest denial rates in the country. The stakes for his client were extremely high. Failure to win at this stage of the proceedings on discretionary grounds was likely to result in Bertha’s immediate deportation.²⁸⁶

Such a decision may have violated the ethical rules in the lawyer’s particular jurisdiction, because standards for what constitutes knowledge do vary across jurisdictions. The decision also, though, almost certainly runs afoul of the EOIR rules, which favor candor to the tribunal and do not acknowledge the lawyer’s competing (and here, conflicting) duties to the client.²⁸⁷ Recognizing that the zealous lawyer may be liable for ethical violations, Gilbert worries about the “chilling effect” of the recklessness standard and concludes that”

While the Model Rules would allow attorneys to exercise discretion and their own moral judgment in deciding whether to offer evidence they believe might be false, the EOIR/DHS Rules appear to require practitioners to evaluate the veracity of their clients’ testimony or the authenticity of their documentation and decline to offer such evidence if they suspect it may be false Subjecting practitioners to disciplinary sanctions for offering probative evidence that the attorneys suspect may be false is likely to have a chilling

²⁸² *Id.*

²⁸³ See generally Lisa G. Lerman & Philip G. Schrag, *Lawyers’ Duties to Courts, Adversaries and Others: Truth and Falsity in Litigation*, in *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* (3d ed. 2012).

²⁸⁴ Gilbert, *supra* note 198, at 220.

²⁸⁵ *Id.* at 258.

²⁸⁶ *Id.* at 258–59.

²⁸⁷ *Id.*

effect on advocacy, pose a serious threat to the independence of immigration practitioners, and result in abuse of authority by immigration judges and DHS, upon whom practitioners become dependent for the right to practice.²⁸⁸

Gilbert closes her article by assessing that attorneys may be guided more by fear of liability under the EOIR rules, and less by the needs of their clients, an untenable situation.²⁸⁹

Other dilemmas emerge in the context of an applicant's criminal activity. Frequently in immigration law, the structure of the process and the nature of the applications for relief from removal require the immigrant to incriminate him or herself in some criminal wrongdoing; forms for common applications like asylum or cancellation of removal ask about criminal offenses committed, and the inquiry is not limited to convictions.²⁹⁰ Regulations require that the attorney provide *all* the client's criminal records to the Court.²⁹¹ This is a reversal of the criminal context, where the Government has the duty to disclose exculpatory information,²⁹² the defender has no affirmative duty to present any evidence at all, and the accused has the right to remain silent. By contrast, here the immigrant—in removal, but affirmatively seeking something from the Government—has no such shields. For the most part, because applicants' biometric information is used to produce their criminal records,²⁹³ the duty is simply acquiescing to the inevitable with no actual harm done to the clients' interests: the Government already possesses the information. However, not all criminal records are equally readily available, and when the Government does not find a record, but it comes to the attention of the lawyer, the lawyer now faces the stark choice between honoring her duty to the Court, by producing the record, and her duty to her client, whose chance at relief may now be reduced or destroyed by the disclosure. This is the scenario envisioned in the Cynthia case described at the beginning of this Article,²⁹⁴ when the lawyer dug with her client to discover where the mysterious missing conviction record

²⁸⁸ *Id.* 229–30.

²⁸⁹ *Id.* at 260.

²⁹⁰ *EOIR Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents*, at 5, DEP'T OF JUSTICE (July 2014), available at <http://www.justice.gov/eoir/eoirforms/eoir42b.pdf>; *USCIS Application for Asylum and Withholding of Removal*, at 8, UCSIS.GOV (Dec. 29, 2014), available at <http://www.uscis.gov/sites/default/files/files/form/i-589.pdf>.

²⁹¹ 8 U.S.C. § 1229a(c)(2)(A) (2013); 8 C.F.R. § 1240.8(d) (2013).

²⁹² See *Brady v. Maryland*, 373 U.S. 83 (1963).

²⁹³ *Fingerprints*, UCSIS.GOV, <http://www.uscis.gov/forms/fingerprints> (last visited Feb. 28, 2015).

²⁹⁴ See Introduction, *supra*, and text accompanying notes 2–4.

might be found.

In the moment *before* asking that digging question of the client, zealousness for the client should have stopped the student from inquiring further. She had done her due diligence, and could honestly stand before the court and said “we went to the courthouses to get the records, and this conviction did not come up, and we do not know what it was about.” *Now*, however, she knew. And her duty to produce the record came into sharp conflict with her duty to her client—because the theft made her ineligible for Cancellation because it was considered an aggravated felony for immigration purposes. Every actor in the Court that day felt a weight of frustration with this outcome. The law prevented the Judge from granting the relief he thought she merited, and the student-attorneys, exercising their ethical obligations, had given him the information that led to that result.

It is worth stepping back a moment and thinking about the competing purposes of these duties in the first place. The duty to our clients is, of course, designed to promote trust so that the client can confide in the lawyer with the utmost confidence that her or his interests will be protected as a result of divulging the truth. The duty to the court helps ensure a well-functioning legal system, one in which all the players can have confidence because all the actors are behaving according to known, understood, shared rules. And the benefits are not just to the system, but also to the litigants. A growing body of scholarship and empirical work on the idea of “procedural justice” shows that litigants value a fair system even when they ultimately lose their case.²⁹⁵ Lawyers, too, can derive satisfaction from an ethos of “playing by the rules”; respect for the rules feels virtuous, and can be far more comfortable than working along the edges of the rules and perhaps engaging in (civil) confrontation with opposing parties and the Court along the way.

When such important duties collide, then, there is a significant cost. What the dilemmas above show is that in immigration proceedings, where applicants must present information affirmatively in order to defend against removal, the client is wrong to trust the lawyer, because the lawyer is not always going to be able to protect the

²⁹⁵ Legal scholars have imported this idea from the realm of social psychology. *See, e.g.,* Deborah A. Goldfarb, *Shaping Perceptions of Justice: A Familial Model of Procedural Justice*, 82 UMKC L. REV. 465, 466 (2014) (citing, *inter alia*, John Thiabaut & Lauren Walker, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) and Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011)).

client's confidences so long as duties to the court triumph over duties to the client.²⁹⁶ And there is a true cost associated with that for the *client*. But the costs do not stop with the client; they also extend to the system as a whole, which is predicated on clients trusting their lawyers. There are myriad reasons *ex ante* why clients might not trust their lawyers—from the reputation of the immigration bar generally to cultural views about lawyers to more individual fears about engaging with authority figures—and in the immigration context, people are sometimes coming from countries where lawyers are not as independent as they are in the United States.²⁹⁷ Now, to a situation where trust is difficult to establish, we add structural factors that make trust even riskier—and we set up incentives for savvy clients, and perhaps all clients, to be less than fully honest with their attorneys. In such a context, the goals of the legal system itself are ill-served.

C. *Ways Through the Impasse*

As the above scenarios suggest, commitment to a principle of zealous advocacy could provide a useful and necessary counterbalance to the skewed adversarial world of immigration court. A well-articulated principle could become a touchstone for attorneys going against the current cultural grain, and help build a new legal culture within the world of immigration court. This Article has begun the work of providing the theoretical justification for such a principle, and has demonstrated numerous contexts in which it would make a significant difference to the conduct and outcome of immigration removal cases. The simplest conclusion to draw from this is that leaders of the bar, mentors to new attorneys, and teachers of law students must do more to articulate, elevate, and embody this principle so that cultural change will follow.

A principle of zealous advocacy is not all-powerful, however. Given that there are situations where the rules of professional conduct in immigration court actually *prevent* a lawyer from being a zealous advocate for her client, what are the lawyer's options? Hew to the lowest common denominator, being as zealous as the court-favoring rules permit (which is not particularly zealous)? Advocate for a change in the rules that will permit ethical practice that also allows for

²⁹⁶ Stephen Ellman portrays this dilemma starkly in his article on the ethics of interviewing. Stephen Ellman, *Truth and Consequences*, 69 Fordham L. Rev. 895 (2000).

²⁹⁷ See, e.g., *2014 Report of Special Rapporteur on the Country Visit to El Salvador*, at ¶¶ 90–95, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (May 24, 2013), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43/Add.1.

zealousness? Determine that those rules are morally inferior and thus less worthy of respect? Engage in civil disobedience to defy the rules?

The last two options fail for different reasons. Indeed, though similar in act—breaking the rules—the two options differ importantly. Disregarding rules from a private judgment that the rules lack moral authority is not the same as civil disobedience. Civil disobedience requires making the disagreement public, and accepting the legal consequences of violating the rules. This Article in no way endorses the view that rules may simply be ignored—indeed, much of the analysis above shows simply how to work more zealously within these existing rules, flawed as they sometimes are.

This Article also suggests now that the time is not right for civil disobedience. The argument *for* civil disobedience is that lawyers are being asked to resolve irresolvable moral tensions. Arguably, when two sets of professional conduct rules permit two different outcomes, as in this hypothetical, the one more favorable to duties to the client should outweigh the one set by the court itself: as a moral issue, the two are not equal, as one set of rules was developed by lawyers who endure the competing duties, and the other set was developed by a court with a strong self-interest in favoring the duty to the court over duties to the client. Civil disobedience is a way of expressing dissent with that status quo, and lawyers do have a right and an ability to engage in civil disobedience,²⁹⁸ but civil disobedience is truly justified when the legal system fails to accommodate any other forms of dissent, and where dissent through lawful channels has been stifled and stymied.²⁹⁹ It is not the case that lawful channels have been exhausted on this issue; indeed, very little action has taken place beyond regulatory comments, to even raise the difficulties explored in this Article. Furthermore, as a practical point, the question of lawyers engaging in civil disobedience has been justified in the context of actions taken outside of the lawyer's client matters (civil disobedience on issues of concern to the public, not to a particular client). A lawyer's stance in protesting a policy by, for example, being part of a sit-in at the Capitol to get arrested, is unlikely to directly affect the lawyer's clients.³⁰⁰ But any act of civil disobedience in the context of a removal proceeding would likely result in chaos, impossible disruptions to the legal process, and severe

²⁹⁸ Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057 (2005).

²⁹⁹ *Id.*

³⁰⁰ If newsworthy enough, perhaps a judge or ICE attorney would hear of it and that could affect their attitudes to the lawyer and, by extension, to the lawyer's clients, but the risks of this seem attenuated at best.

prejudice to the client.³⁰¹

Nor is hewing to an ethical “lowest common denominator” a sufficient response. A typical view taken from a different sphere of immigration practice (business immigration) suggests that “[d]espite the complexity of the client’s situation, it is *always prudent to remain well within the boundary line of what is ethical. Since this boundary line is often amorphous and can shift, subject to varying interpretations, why should the lawyers take a risk?*”³⁰² Although written about a different context, this quotation also seemingly describes too much of immigration removal practice. The Article has shown that in removal proceedings, the answer to “why take a risk” is the very nature of the proceedings, the stakes involved, and the disparities of power between the sides.

In removal proceedings, hewing to safe, familiar standards (ones that do not elevate zealous advocacy as the guiding principle) is likely to set up the client to lose in any collision between duties to the court and duties to the client. So many factors work against immigrants in the removal system that their representatives must approach the boundary lines wherever possible, and seek to push those boundaries where there are decent arguments to do so. And as the previous sections have shown, it is possible to be far more zealous within the confines of those boundary lines than might seem possible from the vantage point of a risk-averse legal culture.

Zealous advocacy can often be as ethical as a more conservative approach, even when it *feels* like it is a risk. And when an ethical strategy or approach works to the advantage of the client, the client’s interests must be foremost on their representatives’ minds, thus forcing an effective lawyer to reject a safer option chosen *merely* because it is safe.

The first significant way through the impasses sketched above, therefore, is a simple one—to elevate the principle of zealous advocacy such that it feels like a routine, expected choice and not a risky one. Changing the legal culture to embrace principles of zealous advocacy will encourage the risk-averse to see their zone of permissible, ethical conduct more broadly and to approach the boundary lines more fearlessly.

³⁰¹ How, for example, could a lawyer forthrightly disavow a duty to the court without indirectly revealing that the client has something negative the lawyer is refusing to disclose?

³⁰² Cyrus D. Mehta, Howard S. Myers & Kathleen Campbell Walker, *How to Walk the Ethical Line: Being Less Stressed Out* 51 (2011), available at <http://www.aialawebcde.org/resources/Resources%20for%2012-13-11%20Seminar.pdf>.

The second way through the impasse is to identify the areas where zealous advocacy—and therefore effective lawyering—is impossible, and begin challenging the structures that give rise to these impossibilities, including the rules of conduct for immigration practitioners themselves. This Article has attempted to identify some of those areas, but has just begun a task worthy of fuller development. But even just drawing from two of the impossible situations described above, we could imagine immigration attorneys deploying regulatory processes, advocacy or impact litigation to alter the underlying problems giving rise to the ethical dilemmas. For example, attorneys could seek to renegotiate the terms of EOIR’s rules governing professional conduct of immigration practitioners, so that the recklessness test is abated, or could file a lawsuit challenging the overbroad formulation of the question on the U visa application seeking information about offenses ever committed, as *ultra vires*.³⁰³ Lobbying, negotiating, defining rules, and challenging rules are all tasks that lawyers are well-equipped to engage in, and advocacy by lawyers in these and other areas could prove effective for removing the source of some of the dilemmas this article has described.

V. CONCLUSION

As immigration laws and enforcement of those laws have become more severe, and as appointed counsel increases in the world of immigration, the time is right to think thoroughly and creatively about how immigration lawyers can be more effective, individually and collectively, as the “immigration bar.” While the efforts to reduce the worst practices and remove the worst offenders are critical, these efforts are insufficient in the face of the enormous challenges and burdens immigrants face in the removal system. A higher standard is needed, and zealous advocacy is a critical piece of that high standard. With zealous advocacy as the baseline, as a core, guiding principle for immigration lawyers, lawyers will be empowered to take stronger stances in defense of their clients—demanding every advantage ethically permitted to advance the interested of their clients, without crossing over into unethical behavior. As Abbe Smith exhorted in the criminal context, “Although a defender must act within the bounds of the law, he or she should engage in advocacy that is as close to the line

³⁰³ The question does not elicit legally relevant information for screening an individual for admissibility under the Immigration and Nationality Act; the other more narrowly tailored questions on the form do implement the admissibility screening contained in the INA, but this question does not, and eliminating it would remove the dilemma for practitioners.

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as possible, and, indeed, should test the line, if it is in the client's interest in doing so."³⁰⁴ The same is true for those engaging in the defense of immigrants facing removal. This Article has shown how often this can be done without subverting existing rules, and calls upon immigration practitioners to identify and challenge the barriers to zealous advocacy that still remain. The nature of the task—defending clients against removal to other countries, separation from their families and lives they have built here—demands that we challenge the borders of expected behavior in immigration court, by pushing against prevailing norms, and raising the bar of what constitutes truly effective lawyering.

³⁰⁴ Smith, *supra* note 55, at 89–91.