

VICTIMS OR CRIMINALS? DISCRETION, SORTING, AND BUREAUCRATIC CULTURE IN THE U.S. IMMIGRATION SYSTEM

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ABSTRACT

This Article examines the Obama administration's effort to encourage the use of prosecutorial discretion by Immigration and Customs Enforcement (ICE), the executive agency in charge of the enforcement of immigration laws. Since 2010, the Obama administration has repeatedly stated that agency officials are to focus enforcement efforts on those who pose a threat or danger, rather than pursuing deportation of all undocumented immigrants with equal fervor. Yet, despite repeated directives by the Administration, the implementation of prosecutorial discretion is widely considered a failure. Data and anecdotes from the field suggest that ICE has yet to embrace this more nuanced approach to the enforcement of immigration laws.

In this Article, I argue that one key reason that prosecutorial discretion has not taken hold within ICE is the failure of the President and his Administration to adequately account for agency culture. In particular, the prosecutorial discretion initiative directly conflicts with the central role that criminal convictions play in ICE culture. To support my argument, I present an in-depth case study of the agency's refusal to exercise

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discretion in a highly compelling case. For over two years, ICE aggressively prosecuted a client of the University of Arizona's immigration clinic who appeared to be the quintessential recipient of prosecutorial discretion, as the victim of domestic violence, sex trafficking, and the primary caregiver for three young U.S citizen children. Despite these equities, ICE's decision to prosecute was based wholly on the single conviction on her record, which was directly related to her victimization and for which she received a sentence of probation only.

I situate this case study in a theoretical framework regarding bureaucratic culture. Applying this analysis to ICE brings into focus key elements of the agency's culture, particularly its tendency to view all immigrants as criminal threats. This culture makes the sole fact of a conviction—without regard to its seriousness or context—a nearly irreversible determinant of the agency's approach to any given case. My analysis of the nature and intensity of ICE's bureaucratic culture has troubling implications for the capacity of the President and his Administration to implement reforms that counter the lack of nuance in the immigration system's current legal framework. It suggests that locating discretion primarily in the enforcement arm of the immigration bureaucracy has inherent limitations that lead to a system poorly designed to address humanitarian concerns raised in individual cases.

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I. INTRODUCTION

Since 2010, the Obama administration has encouraged the use of prosecutorial discretion by U.S. Immigration and Customs Enforcement (ICE), the executive agency in the Department of Homeland Security (DHS) charged with enforcement of immigration laws. Through a series of public announcements, agency directives, trainings, and a nationwide case review, the Obama administration has endeavored to shift the agency’s focus to prioritize first and foremost “aliens who pose a danger to national security or a risk to public safety,” as opposed to pursuing deportation of all undocumented immigrants with equal fervor.¹ President Obama proudly referenced this effort in his most high-profile speech on immigration policy, declaring, “[w]e focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education. And today, deportation of criminals is up 80 percent. We’ve improved on that discretion carefully and thoughtfully.”²

In fact, however, the story of the prosecutorial discretion program is not generally considered to be a success story. On the

¹ DEP’T HOMELAND SEC., FACT SHEET: TRANSFORMING THE IMMIGRATION ENFORCEMENT SYSTEM (June 15, 2012), *available at* <http://www.dhs.gov/news/2012/06/15/fact-sheet-transforming-immigration-enforcement-system>; Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enforcement, to All ICE Employees 2–4 (March 2, 2011) [hereinafter Morton Memo March 2011], *available at* <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (ranking national security and public safety as the agency’s primary priorities and noting that removal of “recent illegal entrants” and “aliens who are fugitives” will be a priority).

² President Barack Obama, Rose Garden Announcement of “Deferred Action for Childhood Arrivals” Program (June 15, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

contrary, the program has been widely decried as ineffectual.³ Statistics reveal that, through 2012, only a small percentage of immigration cases were closed pursuant to the program.⁴ Further, advocates and scholars have reported widely on cases that demonstrate the agency's failure to embrace its stated goals.⁵

I encountered the program's failure up close, when the clinic that I co-direct at the University of Arizona represented a client who appeared to be the quintessential recipient of an exercise of prosecutorial discretion. The victim of domestic violence and sex trafficking, as well as the primary caregiver of three young U.S. citizen children, our client had a single conviction on her record that arose as a result of her domestic violence, and for which she received a sentence of one year probation. Despite repeated requests for prosecutorial discretion, for over two years ICE held her in detention and prosecuted her case with intensity and tactics one would ordinarily associate with the pursuit of a serious criminal threat.

Data on the cases that ICE has closed pursuant to the exercise of prosecutorial discretion confirm that my client's experience was not an anomaly. On the contrary, ICE's decision to exercise favorable prosecutorial discretion for anyone charged with a criminal conviction is the highly anomalous circumstance: since launching the nationwide case review in 2011, less than two percent of all cases closed pursuant to

³ See, e.g., ALEXSA ALONZO ET AL., AM. IMMIGR. LAWYERS ASS'N & AM. IMMIGR. COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 12–25 (2011) [hereinafter AILA/AIC REPORT], available at <http://www.aila.org/content/default.aspx?docid=37615> (indicating that despite the presence of mitigating factors, such as no criminal history and strong family ties in the United States, many requests for prosecutorial discretion were denied); Michael May, *Los Infiltradores: How Three Young Undocumented Activists Risked Everything to Expose the Injustices of Immigrant Detention—and Invented a New Form of Protest*, AM. PROSPECT (June 21, 2013), <http://prospect.org/article/los-infiltradores> (telling the story of young undocumented activists who “infiltrated” a detention center to expose ICE's detention and prosecution of immigrants without serious convictions); Julia Preston, *Deportations Continue Despite U.S. Review of Backlog*, N.Y. TIMES, June 7, 2012, http://www.nytimes.com/2012/06/07/us/politics/deportations-continue-despite-us-review-of-backlog.html?_r=0 [hereinafter Preston, *Deportations Continue*] (discussing the minimal effect of the prosecutorial discretion program).

⁴ AIC/AILA REPORT, *supra* note 3; Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 437, 471–76 (2013).

⁵ See, e.g., AILA/AIC REPORT, *supra* note 3, at 4–23; Hing, *supra* note 4, at 451–58; Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RIGHTS J. 463, 464 (2012); May, *supra* note 3; Preston, *Deportations Continue*, *supra* note 3.

prosecutorial discretion have involved individuals charged with a criminal conviction other than immigration violations.⁶

This Article is an effort to understand why the Obama administration's effort to encourage prosecutorial discretion has failed my client and countless others like her, who have non-serious criminal convictions and strong equities, and what this failure means for future immigration reform efforts. I will argue that one key reason the Administration has been unsuccessful is its failure to adequately account for the powerful role of agency culture. Prosecutorial discretion, particularly of the kind that is intended by the ICE directives, requires agents to draw on internal, often informal, regulation to decide whether to proceed on an individual case. In ICE's case, all these internal cues point in the direction of enforcement when immigrants have criminal convictions, regardless of the seriousness of the crime. ICE's reliance on convictions as the key metric for case processing determinations directly contradicts the prosecutorial discretion initiative, which was undertaken in part to respond to concerns that ICE was focusing its enforcement efforts on immigrants with non-serious, misdemeanor convictions. My analysis of the nature and intensity of ICE's culture has troubling implications for the capacity of the executive branch to implement reforms that counter the lack of nuance in the immigration system's current legal framework. It suggests that locating discretion primarily in the enforcement arm of the immigration bureaucracy has inherent limitations that lead to a system poorly designed to address humanitarian concerns raised in individual cases.

The Article proceeds as follows. Part II provides a detailed study of the clinic's client, whom I refer to as Claudia.⁷ After describing the highly sympathetic circumstances that led to Claudia's conviction, this account focuses on how, at the moment Claudia pled guilty to a conviction, all her equities—domestic violence, U.S. citizen children,

⁶ This figure is discussed further *infra* note 166 and accompanying text. It is based on data on file with the author, and obtained by the Transactional Records Access Clearinghouse (TRAC), a research organization at Syracuse University. TRAC receives comprehensive data initiated by the Freedom of Information Act (FOIA) from the Executive Office of Immigration Review (EOIR) in the Department of Justice (DOJ), which keeps statistics on all removal proceedings initiated in immigration court and all cases closed pursuant to prosecutorial discretion.

⁷ This is a pseudonym, as are all the other names used in telling Claudia's story. All other facts are accurately drawn from Claudia's actual account and are shared with her permission.

trafficking—fell away. In the eyes of the ICE agents in charge of her case, Claudia was viewed solely as a criminal alien.

Unlike most cases, however, ICE's rejection of Claudia's request for prosecutorial discretion did not end in deportation. Instead, after Claudia had spent two years in detention, U.S. Citizenship and Immigration Services (CIS) reviewed her case and granted her a special visa for victims of trafficking, the "T" visa,⁸ thereby cancelling her deportation. As the agency charged with handling immigration benefits, CIS determined that she qualified for both a T visa and an accompanying waiver of her criminal conviction. Through the eyes of the CIS agents, Claudia was a victim rather than a criminal. In this way, Claudia's story vividly captures how agency culture shapes the behavior of the bureaucracy's front-line agents. Both ICE and CIS were faced with the same set of facts, and yet CIS agents saw a victim deserving of legal status, while ICE agents saw a criminal deserving of removal.

To begin my effort to understand ICE's behavior in Claudia's case, Part III examines how and why bureaucracies function as they do, drawing on the analysis developed by political scientist James Q. Wilson. It focuses on three factors central to shaping bureaucratic culture: historic formation, critical tasks, and quantitative metrics. Applying these factors to ICE brings into focus key elements of the agency's culture. The agency's historic formation after September 11, 2001, its focus on tasks traditionally used by law enforcement in the criminal justice system, and its fixation on quantifying criminal alien removals all combine to create a culture that views all immigrants as criminal threats. This culture makes the sole fact of a conviction—without regard to its seriousness or context—a nearly irreversible determinant of the agency's approach to any given case.

Part IV reviews the Obama administration's efforts to encourage ICE to exercise prosecutorial discretion. It analyzes the role that prosecutorial discretion has historically played in the immigration agency and discusses why agency culture has stymied the Obama administration's efforts to encourage discretion. I provide data on the cases closed pursuant to prosecutorial discretion that demonstrate the extent to which convictions serve as a key sorting mechanism. The powerful role of convictions in

⁸ The T visa is available to victims of a "severe form of trafficking in persons." 8 U.S.C. § 1101(a)(15)(T)(i) (2013).

case processing determinations directly conflicts with the goals of prosecutorial discretion, which require the facts and context of a conviction to be considered and balanced against other considerations, particularly humanitarian factors.

Finally, Part V discusses three lessons drawn from using Claudia's story as a lens through which to consider ICE's failure to implement the Obama administration's prosecutorial discretion initiative.

First, this account vividly demonstrates the central role that criminal convictions play in ICE's agency culture. The intertwined nature of immigration and criminal law has been the subject of a significant body of scholarship over the past decade.⁹ This Article contributes to this growing literature by exploring how "crimmigration," as it is often called, has shaped the administrative bureaucracy that implements immigration law.

Second, this account of the failed prosecutorial discretion initiative highlights the powerful and under-recognized role of agency culture in the structure of immigration law and policy. In recent years, scholars, advocates, and policy makers have directed significant attention to the important structural role the President plays in establishing immigration policy.¹⁰ This structural insight has taken on increasing real world significance in the current political context, in the face of congressional paralysis on immigration reform. One strand of this discussion has focused on the structural implications of over-criminalization—the fact that current immigration laws make a vast number of people potentially subject to deportation, but the executive branch lacks the means or intent to actually deport them all. As a result, the executive branch plays an especially key role in setting enforcement priorities within very broad legislative contours.¹¹ My analysis suggests an important corollary to this insight: in

⁹ For a sampling of this literature, see Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005) [hereinafter Miller, *Blurring the Boundaries*]; David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

¹⁰ See, for example, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 458–66 (2009), which is discussed along with additional citations in notes 176–84, *infra*, and the accompanying text.

¹¹ See *id.* at 516.

fact, the ability of the executive branch to actually implement its priorities depends significantly on the administrative agencies tasked with their implementation. The ineffectual implementation of prosecutorial discretion strikingly demonstrates the limits of the executive branch's capacity to undertake policy reforms if inattentive to the role of agency culture.

Third and finally, this analysis highlights the significance of where discretion is located in the immigration system. President Obama's prosecutorial discretion initiative could be viewed as an effort to address one of the most vexing and central problems in our current immigration system: its lack of proportionality. There are estimated to be eleven million undocumented people living in the country, and most would agree that not all should be summarily banished, without regard to contextual factors above and beyond the singular fact of their lack of legal immigration status. Yet, current laws and enforcement policies criminalize all immigrants, creating complicated questions about where in the system is the capacity for discretion. This story of ICE's failure to implement prosecutorial discretion suggests that discretionary safeguards are a poor fit for the enforcement bureaucracy. At the same time, the failure suggests that the current legislative and administrative framework, which sorts immigrants between victims and criminals based in large measure on the presence of criminal convictions, does not allow sufficient room for individualized considerations of proportionality. Providing for this type of discretionary assessment with care for where it is located institutionally is a crucial step in any effort to implement reform with humanitarian values.

II. CLAUDIA'S STORY

A. BECOMING A CRIMINAL ALIEN

Claudia first arrived in the United States at age fifteen, when her aunt brought her across the border unlawfully to escape from a relationship with a man in the Mexican drug cartels. Upon arrival, Claudia immediately began working in a variety of cleaning and kitchen jobs in Phoenix, Arizona. At age twenty-two, she had her first daughter. Shortly thereafter, Claudia met a U.S. citizen named Victor. Soon they moved in together, and went on to have two children together.

Claudia's troubles began when her fifteen-year-old niece Lisa moved into their home so she could attend a charter school in Phoenix. Victor

began having a secret affair with Lisa, and became increasingly violent and emotionally abusive toward Claudia and their young children, who were ages one, two, and five. One night, Victor chased Claudia and the children out of the house. For several months, she struggled to find stable employment and housing, living with her children in her car, in a friend's apartment, and in a domestic violence shelter. A friend introduced Claudia to someone who supposedly ran a cleaning business, but it turned out to be an escort service.

The escort service had about fifteen girls, mostly immigrants, some as young as fifteen, working in a small apartment. Several armed men guarded the apartment and escorted the girls on their calls, which Claudia initially understood included dancing, companionship, and having meals with men in hotels and apartments. Claudia accepted the job, and arranged for a babysitter to watch her children three nights a week.

Soon, it became clear that the "services" offered included sex. Claudia was frightened and disgusted by the work, but she felt she could not risk leaving the job. The working conditions grew worse. The managers began withholding her money, and the men who accompanied the girls on their nightly jobs threatened violence if anyone snitched or quit. One night, armed masked men burst into the apartment, and forced the women to strip and lie on the floor. They gathered all the money they could find in the apartment, ordered some of the women to perform oral sex, and then left.

After this incident, Claudia was terrified to return to work, but continued to do so because she began receiving threatening phone calls, informing her that she and her children would be hurt if she stopped working. Claudia began to notice that a car would often follow her home and sit outside her apartment. At one point, the anonymous caller sent photos to her cell phone of her, her children, and her babysitter to show her that he knew where to find her if she did not obey the managers.

One day, the police raided the escort service's apartment. They confiscated weapons and drugs, lined up all the girls and managers for fingerprinting and questioning, and asked Claudia, in front of the managers, whether she was there against her will. As previously instructed by the managers, Claudia responded that she was there for a party.

After the police raid, Claudia found a job in a restaurant and cut ties with the escort service. One day, when Claudia went to pick up her children from a brief stay with their father, Lisa, now pregnant and living

with Victor, refused to allow the children out of the house. In frustration, Claudia called the police. When the police arrived, they discovered that there was a warrant for Claudia's arrest, and they arrested her for her previous employment with a criminal enterprise. After two months in pre-trial custody, Claudia pleaded guilty to facilitation to illegally conduct an enterprise.¹² The judge granted her a suspended sentence and one year of probation.

At this crucial juncture, Claudia became a "criminal alien." Immediately upon her sentencing, an ICE agent arrived at the jail and issued a "Notice to Appear," which officially placed her in removal proceedings and transferred her to ICE custody.¹³ For the next two years, Claudia remained in immigration detention. Initially, like the vast majority of immigrants in detention, she represented herself pro se in her immigration proceedings.¹⁴ Eventually, she was referred to the University of Arizona's Immigration Clinic (the Clinic) for pro bono representation.

B. PROSECUTING THE CRIMINAL ALIEN

1. Claudia and ICE

The Clinic applied for "VAWA cancellation of removal" for Claudia. This is a form of relief from deportation established by the Violence Against Women Act for immigrant victims of domestic violence.¹⁵

¹² ARIZ. REV. STAT. ANN. § 13-2312(B) (2011).

¹³ ICE would have been notified by local law enforcement of Claudia's arrest upon her entry into state custody pursuant to the Secure Communities program. *Secure Communities*, ICE, http://www.ice.gov/secure_communities/ (last visited November 21, 2013) (click on "The Secure Communities Process"); see also *infra* note 82 (providing a description of how the Secure Communities program works).

¹⁴ NINA SIULC ET AL., VERA INST. JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), available at http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf (reporting on government data that documented 84 percent of detainees without legal representation in their removal proceedings).

¹⁵ Immigration and Nationality Act (INA) § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2008). The Violence Against Women Act (VAWA) of 1994 created this form of relief in recognition of the fact that domestic violence can result in particularly cruel consequences for immigrant women. Their abusers can use lack of immigration status as an additional means of control in the relationship, threatening and in some cases actually reporting a spouse to immigration enforcement if she tries to protect herself from violence. If a woman in this situation is placed in removal proceedings, VAWA cancellation of removal voids her deportation and adjusts her

However, since Claudia's conviction was classified as a "crime involving moral turpitude," which ordinarily bars VAWA cancellation of removal,¹⁶ Claudia needed to have her conviction waived. The Clinic argued that the immigration judge could waive her conviction if he determined that it was directly connected to the abuse.¹⁷

ICE responded by arguing that Claudia lacked the "good moral character" necessary to qualify for VAWA cancellation of removal. To support its claim, the government attorney prosecuting the case for ICE (known as the "trial attorney") tracked down an order from a family court in Maricopa County granting her ex-partner, Victor, sole custody of their two younger children. When the ICE trial attorney raised this argument in immigration court, Claudia was shocked; she knew nothing of the order. As it turned out, a family court entered a default judgment against her several months previously, when she had been transferred from criminal custody to immigration detention. No one in the family court system knew where Claudia was in order to notify her of the custody hearing, so the judge granted her ex-partner sole custody without her knowledge.¹⁸ Once Claudia learned of the order, with the help of a pro bono family law attorney, she was able to get it reversed and amended to a grant of joint custody, with primary custody returning to her upon release from detention.

This success was tangential to Claudia's immigration case, however, and after five months, four hearings, and multiple briefs, the immigration judge rejected Claudia's VAWA application, finding her statutorily ineligible due to her conviction.¹⁹ The Clinic immediately appealed this

status to that of a legal permanent resident, which is the status she would have received had her U.S. citizen spouse petitioned for her. *See generally* Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 114–16 (2001).

¹⁶ 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).

¹⁷ Specifically, the Clinic argued that Claudia should be able to apply for a waiver of inadmissibility pursuant to INA § 212(h), which is codified at 8 U.S.C. § 1182(h) (2012). If the waiver were granted, she would no longer be ineligible under INA § 240A(b)(2)(iv) and the judge could waive the good moral character bar if he found that her conviction was sufficiently related to the abuse. However, at the time, there was no case directly on point establishing that a waiver under INA § 212(h) could be provided concurrently with an application for VAWA cancellation of removal.

¹⁸ By receiving sole custody, Victor would be relieved of his child support obligations.

¹⁹ The judge read the statute to contain a per se bar to eligibility that could not be cured by a § 212(h) waiver.

decision and simultaneously requested that ICE release Claudia on “humanitarian parole” while the appeal was pending.²⁰ This would enable Claudia to return to her children and pursue her immigration case from outside detention.²¹ The parole request, submitted in December 2010, emphasized factors such as concerns about leaving her children in the care of her abusive ex-partner, the non-violent nature of her criminal conviction, her status as a victim of domestic violence, and her low flight risk.

The Clinic updated Claudia’s parole request in June 2011 to alert ICE to the child custody agreement and to provide additional evidence of Claudia’s status as a victim of domestic violence. It also pointed to recent memoranda regarding the need to prioritize enforcement efforts and emphasizing the importance of prosecutorial discretion in ICE practices.²² As described further in Part IV, the first of these memoranda was issued in June 2010 by then assistant secretary of ICE, John Morton, who later became ICE’s director. The memorandum articulated groups that were considered high and low priorities for the agency and emphasized that these priorities were to be applied to a range of enforcement decisions,

²⁰ During the pendency of her appeal, the Clinic could not request that Claudia be released subject to a bond because the mandatory detention statute applies to all stages of removal proceedings, including appeals. See INA § 236(c), 8 U.S.C. § 1226(c) (2012). Despite this statutory provision, the Ninth Circuit has issued a series of decisions requiring bond hearings for immigrants subject to prolonged detention, most recently *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (upholding a preliminary injunction requiring individualized bond hearings for aliens subject to prolonged detention, including those subject to mandatory detention). At the time, however, there was no case law to support granting a bond hearing for an immigrant subject to mandatory detention during an appeal to the Board of Immigration Appeals (BIA). See *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008) (triggering the required provision of an individualized bond hearing upon appeal to the circuit court of the issuance of the final removal order by the BIA).

²¹ This is a benefit left to the sole discretion of ICE. ICE has the statutory power to grant parole to certain detained aliens for “urgent humanitarian reasons or significant public benefit.” INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (2012). Humanitarian parole can be accompanied by a range of monitoring and supervising mechanisms to ensure that the immigrant does not abscond. DORA SCHRIRO, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20–21 (2009) [hereinafter SCHRIRO REPORT], available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (describing the limited use of monitoring and other alternatives to detention); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 54 (2010).

²² Memorandum from John Morton, Assistant Sec’y of U.S. Immigr. & Customs Enforcement, to All ICE Employees 4 (June 30, 2010), http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

including detention decisions.²³ Detainees who were primary caretakers of young children were listed among the low priority groups.²⁴ In June 2011, Director Morton issued two more memoranda on prosecutorial discretion, which reiterated the need for prosecutorial discretion for primary caregivers.²⁵ Moreover, he stated that for victims of domestic violence and trafficking, “in the absence of . . . serious adverse factors, exercising favorable discretion, such as release from detention . . . will be appropriate.”²⁶

After submitting the update, the Clinic continued to call ICE to follow up, but ICE never responded to the request for prosecutorial discretion in Claudia’s case. Despite ICE’s intransigence, the immigration judge finally granted her release on bond in April 2012, two years after Claudia was detained.²⁷ When ICE announced its intention to appeal the bond decision, the Clinic again wrote a request for prosecutorial discretion. As in the previous requests, the Clinic did not ask for ICE to drop its prosecution altogether. Instead, the request asked only that ICE

²³ See *infra* note 156.

²⁴ The June 30, 2010 memorandum was reissued on March 2, 2011 with the following addition: “These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.” Morton Memo March 2011, *supra* note 1, at 4.

²⁵ Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2–4 (June 17, 2011) [hereinafter Morton Memo A June 2011], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (providing guidance on the exercise of prosecutorial discretion generally); Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 2 (June 17, 2011) [hereinafter Morton Memo B June 2011], available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> (addressing prosecutorial discretion for victims and witnesses of crime, including domestic violence). These memoranda are discussed further *infra* in notes 156–58 and the accompanying text.

²⁶ Morton Memo B June 2011, *supra* note 25. The adverse factors enumerated included serious criminal history, national security threats, and public safety concerns.

²⁷ Claudia’s bond was granted under unusual circumstances. In January 2012, the Clinic requested a new custody hearing in immigration court based on the theory that the prolonged nature of Claudia’s detention required a bond hearing even though she was subject to mandatory detention. In a surprising decision, the immigration judge granted Claudia bond based on a different theory. Relying on a recent decision from the BIA, *Matter of Vo*, 25 I. & N. Dec. 426 (B.I.A. 2011), the judge held that her conviction for “facilitation” was an inchoate offense that would not trigger inadmissibility as a crime involving moral turpitude and, therefore, did not subject her to mandatory detention. The judge then conducted a bond hearing and in light of Claudia’s lack of dangerousness and low flight risk, set a \$5,000 bond for her release.

drop its appeal of the bond determination so that Claudia could await the decision on the appeal of her removal case from home. Again, ICE did not respond to this request. When the Clinic called to discuss the request with the ICE trial attorney, he explained that the conviction was a real concern for the agency, explaining, “You know, [her prostitution-related conviction] is the oldest crime involving moral turpitude.”

It was at this point that the disconnect between the stated priorities of ICE in the prosecutorial discretion memos and the agency’s actions became the most glaring. As discussed further in Part IV, Claudia’s conviction was not, in fact, the type of conviction that was officially considered a serious agency concern pursuant to the Morton memoranda. The trial attorney’s response encapsulated the degree to which agency culture pervasively shaped the ICE agents’ view of Claudia. The Clinic had provided ICE with extensive evidence of Claudia’s character. ICE’s independent attempt to call her character into question—tracking down a family court order granting her ex-partner sole custody—had failed when it came to light that the order was granted without her knowledge, was due to ICE’s own decision to keep her in custody, and was reversed when a family judge had the opportunity to hear from Claudia herself. The criminal conviction itself was clearly not reflective of a history of similar conduct on the part of Claudia; ICE received extensive information about the circumstances of the conviction and how it was directly linked to her ex-partner’s documented domestic violence. There was nothing to account for the vehemence of ICE’s prosecution—which went so far as to appeal an immigration judge’s decision to grant bond from detention—other than a pervasive, deep-seated belief that immigrants “like her” were criminals, and the ICE trial attorney’s role was to deport them.

2. Claudia and CIS

In preparing for Claudia’s bond hearing during her final months in detention, the Clinic asked Claudia for more details about the circumstances surrounding her conviction, since one of the primary factors considered is the potential bond recipient’s “danger to the community.”²⁸ Through these questions, the details of coercion and violence at the criminal enterprise emerged.²⁹ It became clear that Claudia’s experience

²⁸ *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

²⁹ In the initial months of representing Claudia, the Clinic did not ask her about the details

met the definition of severe trafficking in persons, which under the Trafficking Victims Protection Reauthorization Act, includes “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion.”³⁰ In Claudia’s case, the managers of the organization had used all three—force, fraud, and coercion—to induce Claudia to provide commercial sex acts for the criminal enterprise.

With Claudia’s permission, the Clinic contacted state and federal law enforcement regarding the trafficking case. The state did not respond,³¹ but the Clinic promptly received a call from an ICE “Victim Assistant,” an agent from a special ICE unit devoted to trafficking investigations.³² The agent assured the Clinic on the phone, “Don’t worry, we have no interest in deporting your client. We just want to get the bad guys.” We had to tell him the awkward truth that, in fact, his agency was interested in deporting our client. Still, ICE proceeded with the trafficking investigation.

In July 2012, Claudia spoke extensively with ICE and Federal Bureau of Investigation (FBI) agents, showing them where the crimes occurred. The Clinic filed an application for a T visa with CIS in September 2012. In January 2013, CIS granted Claudia’s T visa and an accompanying waiver of her conviction, which cancelled her removal order by operation of law.³³ In this way, CIS recognized the discretionary factors warranting relief from deportation in Claudia’s case and prevented her removal.

III. ICE BUREAUCRATIC CULTURE

Based on the same set of facts, CIS concluded that Claudia was a

of her conviction because she was visibly ashamed and distraught when talking about it, and a detailed account was not necessary at the eligibility phase of her VAWA claim. However, for purposes of the bond hearing, a more detailed accounting of the circumstances surrounding her conviction was necessary to argue that Claudia’s single conviction was not sufficient evidence to render her a dangerous criminal.

³⁰ Trafficking Victims Protection Reauthorization Act, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464, 1470 (codified at 22 U.S.C. § 7102(9)(A) (2012)).

³¹ When Claudia was initially arrested in 2010, she offered to cooperate with the State in its investigation and prosecution of the managers of the sex trafficking enterprise. However, the State declined to speak with her and instead proceeded with its prosecution against her.

³² *Human Trafficking*, ICE, <http://www.ice.gov/human-trafficking/> (last visited Mar. 8, 2014) (click on “Support for Victims”).

³³ 8 C.F.R. § 214.11(d)(9) (2009) (“If the Service grants an application for T nonimmigrant status, the final order shall be deemed canceled by operation of law as of the date of the approval.”).

victim of trafficking and eventually granted her a T visa, while ICE conceived of Claudia as a criminal and aggressively prosecuted her deportation case for two and a half years. How could the two agencies come to such drastically different conclusions about the same individual? As the foregoing account makes clear, the ICE agents handling Claudia's case—the front-line trial attorneys and the deportation officers in charge of her removal proceedings—were unable to calibrate their methods based on humanitarian considerations. The agency's culture of criminalization was so pervasive that they prosecuted her case with relentless intensity based on nothing other than the fact of her conviction.

In this part, I endeavor to understand what drove the front-line officers to respond to Claudia's case as they did by drawing on the analytical framework of political scientist James Q. Wilson. In his pioneering work, *Bureaucracy: What Government Agencies Do and Why They Do It*, Wilson discusses key factors that shape a bureaucracy's behavior.³⁴ I apply principles from Wilson's analysis to ICE, in order to consider how the agency's culture shaped its response to Claudia's case specifically and to the prosecutorial discretion effort by the Obama administration more generally. I begin with a brief overview of key points in Wilson's analysis of bureaucratic culture, and then consider how this analytical framework applies to ICE.

A. BUREAUCRATIC CULTURE

According to Wilson, a bureaucratic organization can best be understood from the "bottom up" rather than the "top down."³⁵ The front line workers in a bureaucracy—whom he calls "operators"—crucially define the agency's day-to-day activities and the extent to which an agency effectively implements its stated goals from the top.³⁶

In Wilson's account, operators do what they do because of organizational culture, which he describes as "a distinctive way of viewing

³⁴ JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 27–28 (1989). Wilson takes pains to emphasize that he is not offering a unifying theory of bureaucracy. *Id.* at ix. Thus, I do not purport to present all the considerations he discusses in the book, but instead, highlight those that seem of particular relevance to the ways in which ICE functions.

³⁵ *Id.* at 11–12.

³⁶ *Id.* at 27.

and reacting to the bureaucratic world.”³⁷ Among the key factors that shape an organization’s culture are its historic formation, the critical tasks operators handle, and the extent to which the agency’s work can be measured in terms of quantitative metrics.³⁸

With regard to historic formation, Wilson writes, “the formative years of a policy-making agency are of crucial importance in determining its behavior. As with people, so with organizations: childhood experiences affect adult conduct.”³⁹ As an example, he describes the formative years of the Forest Service, in which Gifford Pinchot established the bureau’s purpose as the professional management forests with a focus on timber production.⁴⁰ Pinchot hired personnel and set policies to further this vision. As a result, for many decades, the agency had an orientation toward timber production that shaped its decisions about land management in ways that are clearly distinct from the cultural orientation of the National Park Service.⁴¹

In terms of critical tasks, Wilson refers to “those behaviors which, if successfully performed by key organization members, would enable the organization to manage its critical environmental problem.”⁴² He argues that, often, tasks are defined not by lofty goals, but by situational imperatives. Operators are faced with an immediate situation and must figure out how best to address it. The response may relate to the agency’s goals, but is not necessarily defined by them, particularly if the agency’s goals are vague or inconsistent.⁴³

As a result, an agency’s critical tasks often will be skewed toward activities that are easily achievable and/or quantifiable. For example, Wilson describes the tendency of the Occupational Safety and Health Administration (OSHA) to focus on safety rather than health concerns.⁴⁴ Safety hazards are far easier to address through regulations. They present a

³⁷ *Id.*

³⁸ *Id.* at 25–28, 68.

³⁹ *Id.* at 68.

⁴⁰ *Id.* at 63–64, 96.

⁴¹ *Id.*; see also Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T L. REV. 1, 17–30 (2009) (discussing the historical roots of the Forest Service’s tendency to prioritize timber production).

⁴² WILSON, *supra* note 34, at 25–26.

⁴³ *Id.*

⁴⁴ *Id.* at 42–43.

clear cause, effect, and cost that can be addressed through an agency directive (for example, require safety railings to prevent broken limbs). In contrast, many health hazards are more complex and difficult to address through regulation (for example, linking cancer to exposure to workplace chemicals as opposed to other causes). As a result, the agency has focused less on health than safety as a “critical task.”⁴⁵

As a corollary, once critical tasks are well established in an agency, they become part of the agency’s culture and sense of mission. Wilson points out that this can make it difficult for the agency to take on new tasks. Often, it will resist taking on tasks that are not central to its culture, and as a result, such tasks will not receive the same amount of attention or resources.⁴⁶

Finally, there is the crucial role of quantitative metrics in shaping agency culture. Here, Wilson’s focus shifts from an agency’s operators to its managers. He describes how agencies with measurable outcomes will “by plan or inadvertence . . . give most of their attention to the more easily measured outcomes at the expense of those less easily observed or counted.”⁴⁷ Managers may seek to ensure that the agency can document its success by placing pressure on operators to meet certain quantitative measures. As an example, Wilson describes the FBI during J. Edgar Hoover’s tenure as director. The agents were under enormous pressure to produce high numbers of arrests, recoveries, and apprehended fugitives. To meet these numbers, the agents often focused efforts on trivial cases that were easy and would ensure they met their “stats.”⁴⁸ For example, the number of fugitives apprehended could be maximized by concentrating on deserters from the armed forces (most of whom were found at home) rather than on major felons who had gone underground to escape punishment.⁴⁹

With this overview in mind, the next three sections consider how these factors—historic formation, critical tasks, and quantitative metrics—shape ICE’s agency culture. In particular, the agency’s pervasive focus on criminal convictions can be viewed as a product of these factors.

⁴⁵ *Id.* at 43.

⁴⁶ *Id.* at 101.

⁴⁷ *Id.* at 161.

⁴⁸ *Id.* at 162.

⁴⁹ *Id.*

B. HISTORIC FORMATION

The executive agency ICE has only been in existence since 2003. Understanding the agency's current culture, however, and particularly its focus on criminal convictions, requires a longer historical trajectory. Dating back to the nineteenth century origins of its predecessor, the Immigration and Naturalization Service (INS), the executive immigration agency has always had a law enforcement orientation. The INS was created in 1891 "to provide for the exclusion of certain categories of undesirables [including] lunatics, criminals, paupers, and so forth."⁵⁰ As one long-term government official working closely with the INS has described, "From its founding in 1891 until the early 1920s, the Service's functions were few and they were overwhelmingly enforcement-oriented. . . . The general predominance of enforcement [had] been strengthened over the years by the fact that the enforcement function has generally had the lion's share of the budget and attention."⁵¹ He concludes that the agency's enforcement function has "generally overshadowed its adjudications function. It has also tended to distort it by instilling in the staff the concept that the task of adjudications is primarily to screen out the unqualified and that, in order to do so effectively, every applicant must be seen as suspect."⁵² Similarly, Grover Joseph Rees, III, INS general counsel during the Bush administration, stated that "[f]or too many INS officials, the answer is easy: we are the Anti-Immigration and Naturalization Service, and we are about keeping people out."⁵³

While the law enforcement mentality in the agency has deep historic roots, the link between immigrants and crime was crucially formalized in 1996, when amendments to the immigration statute vastly expanded the linkages between criminal convictions and immigration determinations.⁵⁴

⁵⁰ CONG. RESEARCH SERV., 96TH CONG., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE I (Comm. Print 1980).

⁵¹ Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 INTERPRETER RELEASES 937, 939, 941 (1998).

⁵² *Id.*

⁵³ Grover Joseph Rees, III, *Advice for the New INS Commissioner*, 70 INTERPRETER RELEASES 1533, 1534 (1993), quoted in Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 119 (1996) (describing the "law enforcement mentality adopted throughout the agency").

⁵⁴ Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 631-32 (2003).

Many scholars have recounted how, in the wake of this legislation, crime became the central organizing principle of immigration policy and practice.⁵⁵ This came about due to three key aspects of the 1996 legislation. First, the statute expanded the criminal grounds for deportation of noncitizens, so that many minor offenses became sufficient to trigger removal proceedings.⁵⁶ Second, the statute narrowed the circumstances under which an immigrant with a criminal conviction can apply for relief from deportation.⁵⁷ Prior to 1996, immigration judges could exercise discretion to waive certain criminal grounds if they felt the equities of the case warranted relief from deportation.⁵⁸ The 1996 laws eliminated such discretionary waivers so that, for many immigrants with criminal convictions, no amount of positive equities can outweigh the fact of a conviction.⁵⁹ Even for those immigrants not subject to a categorical bar, many cannot meet the “good moral character” standard currently necessary for most forms of relief due to statutory expansion of the criminal bars to a finding of good moral character.⁶⁰

Finally, the 1996 legislation made detention mandatory for most noncitizens with criminal convictions, pending their removal proceedings.⁶¹ Since then, numerous reports have documented the extraordinary growth of the immigration detention system, and the lengthy periods of time immigrants with convictions remain detained if they

⁵⁵ *Id.* at 614–20; see also Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936–38 (2000); Stumpf, *supra* note 9.

⁵⁶ See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(e), 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 25, 28, 40, 42, 49 U.S.C.) (expanding the definition of an aggravated felony); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321, 110 Stat. 3009–3546 (codified as amended in scattered sections of 3, 6, 7, 8, 13, 16, 26, 29, 30, 31, 32, 33, 40, 41, 42, 43, 44, 45, 46, 47, 48 U.S.C.) (adding crimes and lowering the sentence requirement of removable violent crimes to one year); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843–45 (2007) [hereinafter Chacón, *Unsecured Borders*] (summarizing and discussing these statutory provisions).

⁵⁷ Chacón, *Unsecured Borders*, *supra* note 56, at 1845–46.

⁵⁸ *Id.* at 1845.

⁵⁹ *Id.* at 1845–47.

⁶⁰ Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1592–53 (2012).

⁶¹ 8 U.S.C. § 1226(c) (2012).

attempt to challenge their deportation.⁶² In theory, immigration detention facilities do not serve explicit punitive purposes. They are not part of the criminal justice system, but rather part of immigration's administrative system to hold immigrants pending their final deportation from the country. However, in practice, detention facilities are indistinguishable from prisons and jails, and indeed, many facilities also house prisoners in the criminal justice system.⁶³

There is a growing literature that analyzes how these legislative changes have resulted in enforcement measures by the immigration agency that blur the line between civil and criminal proceedings.⁶⁴ Whereas removal proceedings have traditionally been understood as "civil" measures that are importantly distinguishable from criminal proceedings,⁶⁵ the two are increasingly intertwined.⁶⁶

This blurring of the line between civil and criminal has inevitably shaped the culture of the agency in charge of implementing the statute. The fact that criminal grounds became a central aspect of the statutory framework shaped the agency's conception of the population it was designed to address. As Professor Juliet Stumpf describes:

[W]hen noncitizens are classified as criminals, expulsion presents itself as the natural solution. The individual's stake in the U.S. community, such as family ties, employment, contribution to the community, and whether the noncitizen has spent a majority of his lifetime in the United States, becomes secondary to the perceived need to protect the

⁶² See, e.g., AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 3, 18 (2009), available at <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>; Kalhan, *supra* note 21.

⁶³ SCHRIRO REPORT, *supra* note 21, at 2 (noting that "[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons").

⁶⁴ For a sampling of this literature, see *supra* note 9. See also Chacón, *Unsecured Borders*, *supra* note 56, at 1843–48.

⁶⁵ Professor Ingrid Eagly describes this traditional understanding as consisting of two parts. First, there is an assumption of "doctrinal equality: that noncitizen defendants occupy the same playing field as other defendants in the federal criminal system." Eagly, *supra* note 9, at 1286. Second, there is an assumption of "institutional autonomy: that the immigration and criminal systems operate as independent institutions with distinct adjudicatory models, sanctioning regimes, and actors—reinforcing the 'criminal-civil' divide." *Id.* Eagly goes on to demonstrate that neither assumption holds up when one examines the functioning of today's intertwined immigration and criminal justice systems.

⁶⁶ See, e.g., Chacón, *Unsecured Borders*, *supra* note 56, at 1843–48; *supra* note 9.

community.⁶⁷

This historical context makes clear that when ICE was created in 2003, its focus on criminal convictions was certainly not a novel direction. On the contrary, as other scholars have noted, the War on Terror gave a unifying mission to a pre-existing focus on crime control.⁶⁸ Reforms in the wake of September 11 created a highly concentrated version of this focus by virtue of the reorganization of the administrative bureaucracy. Whereas the INS had been an agency within the Department of Justice, in 2002, Congress relocated ICE within the new DHS, which had an explicit focus on combating terrorism.⁶⁹

In addition, Congress split the unitary INS into several separate agencies, each handling distinct aspects of immigration policy. Of particular relevance to this discussion, the legislation created separate agencies to handle “enforcement” and “services.”⁷⁰ Two of these agencies, U.S. Customs and Border Protection (CBP) and ICE, were tasked with “enforcement” at the border and in the interior, respectively.⁷¹ ICE’s responsibilities included investigations, detention, removal, and intelligence.⁷² In this way, ICE’s enforcement mission since its inception has been essentially based on an oppositional relationship with the immigrant population: the agency exists to fight legal violations by immigrants.

⁶⁷ Stumpf, *supra* note 9, at 419; *see also* Sklansky, *supra* note 9, at 196 (“It is hard not to see . . . in crimmigration . . . the ‘criminal alien’ replacing the ‘freeloading foreigner’ as the central, overriding concern of immigration authorities, and the concern invoked most heavily in nativist rhetoric.”).

⁶⁸ *See* Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of A Distorted Debate*, 15 J. GENDER RACE & JUST. 449, 449 (2012); Miller, *Blurring the Boundaries*, *supra* note 9, at 81–82.

⁶⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291 (2012)); 6 U.S.C. § 111 (2012) (delineating “prevent[ing] terrorist attacks within the United States” and “reduc[ing] the vulnerability of the United States to terrorism” as the first two components of the Department’s primary mission).

⁷⁰ DAVID A. MARTIN, MIGRATION POLICY INST., IMMIGRATION POLICY AND THE HOMELAND SECURITY ACT REORGANIZATION: AN EARLY AGENDA FOR PRACTICAL IMPROVEMENTS 1–2 (2003), *available at* http://www.migrationpolicy.org/insight/insight_4-2003.pdf (providing an early assessment of the reorganization and the potential consequences of separating these functions).

⁷¹ President Bush ordered this aspect of the reorganization pursuant to statutory authority permitting him to reallocate functions so long as he did not undo the basic enforcement/services dichotomy. *Id.* at 5–6.

⁷² *Id.* at 6–7.

The reorganization created another new agency, CIS, tasked with the second set of functions, “services,” which includes adjudication of applications for visas and other immigration benefits.⁷³ In contrast to ICE’s focus on law enforcement, CIS’s mission entails an affirmative relationship with the immigrant population; the agency literally “serves” this population rather than combating it.

The degree to which ICE conceived of itself as a law enforcement agency and immigrants as criminal threats comes through in the agency’s public statements in its early years. In 2003, its vision statement was

To be the nation’s preeminent law enforcement agency, dedicated to detecting vulnerabilities and preventing violations that threaten national security. Established to combat the criminal and national security threats emergent in a post 9/11 environment, ICE combines a new investigative approach with new resources to provide unparalleled investigation, interdiction, and security services to the public and to our law enforcement partners in the federal and local sectors.⁷⁴

The first head of ICE to be appointed, Assistant Secretary Michael J. Garcia, stated in a press release in 2003, “As a new agency under the Department of Homeland Security, ICE is committed to ensuring the safety of the American public. Reducing the number of dangerous criminal aliens hiding in this country is a crucial part of that mission.”⁷⁵

Thus, in the creation of ICE, the immigration agency’s historic focus on exclusion and crime became purified and concentrated to become the agency’s sole reason for being. As the next section demonstrates, the agency’s public statements about its mission were not simply rhetoric. They translated into decisions about the actual tasks that would consume ICE agents’ time, and in this way, became a potent driving force of institutional culture.

C. CRITICAL TASKS

Wilson emphasizes that to understand why bureaucracies function as

⁷³ *Id.* at 3.

⁷⁴ *About ICE: ICE Vision*, ICE (Sept. 23, 2003), <http://web.archive.org/web/20031012113011/http://www.ice.gov/graphics/about/index.htm>.

⁷⁵ Press Release, U.S. Dep’t of Homeland Sec., Bureau of Customs and Immigr. Enforcement, Local ICE Officers Arrest ‘Most Wanted Criminal Alien’ ¶ 3 (May 14, 2003), *quoted in* Miller, *Blurring the Boundaries*, *supra* note 9, at 121.

they do, one must look beyond publicly stated agency goals to the actual tasks that consume the time of its operators.⁷⁶ In the case of ICE, the agency's mission statement about law enforcement and criminal threats at the time of its formation became the lived reality of the agency's operators. After September 11, 2001, there was a marked expansion of resources in the immigration system to support interior enforcement efforts.⁷⁷ Up through the 1990s, immigration enforcement focused on the border.⁷⁸ At the turn of the century, while border enforcement continued to receive high levels of resources, enforcement efforts in the interior of the country vastly increased.⁷⁹ In interior enforcement, ICE adopted many of the techniques and mechanisms of traditional criminal law enforcement.⁸⁰ A brief survey of several operations and programs adopted by ICE in the interior over the past decade illustrates the critical tasks that occupy the agency's time.

1. Cooperation with State and Local Law Enforcement

After September 11, ICE began to initiate efforts to cooperate with state and local law enforcement entities to accomplish immigration enforcement goals. Through programs such as 287(g) agreements,⁸¹

⁷⁶ WILSON, *supra* note 34, at 25–26.

⁷⁷ Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1572 (2010).

⁷⁸ *Id.*

⁷⁹ As one indication of this shift, Chacón notes that before September 11th, the INS had fewer than 2000 agents to enforce immigration laws in the interior, whereas in 2010, ICE was projected to have 20,000 employees, many of whom were dedicated to internal enforcement efforts. *Id.*

⁸⁰ *Id.*; see also Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 233–34 (“[T]he civil immigration system now mimics the criminal justice system in its aggressive importation of criminal categories (e.g., ‘aggravated felons,’ ‘criminal aliens,’ ICE ‘Most Wanted’ list), criminal law enforcement mechanisms (e.g., ‘Operation Predator,’ ‘Operation Community Shield’), institutions of criminal punishment (e.g., incarceration in county jails and immigration detention facilities), and crime control rationales.”).

⁸¹ “287(g)” refers to the section of the INA that permits cooperative agreements between ICE and state and local entities. 8 U.S.C. § 1357(g) (2012). Under the program, state and local officials can perform a variety of immigration-related enforcement duties after receiving training by and under the supervision of the federal government. RANDY CAPPS ET AL., *MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT* 8–9 (2011) [hereinafter MPI: DELEGATION AND DIVERGENCE], available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>. The first 287(g)

Secure Communities,⁸² and the Criminal Alien Program (CAP),⁸³ ICE has worked with state and local law enforcement to apprehend, detain, and deport immigrants. Each program facilitates communication between local law enforcement systems and ICE so that immigrants who are arrested for state or local law violations are immediately flagged for purposes of immigration enforcement and removal.

Professor Hiroshi Motomura has described how these cooperative efforts with state and local law enforcement are intertwined with the criminalization of immigration enforcement.⁸⁴ As he concludes, the involvement of state and local law enforcement “generally assume[s] an arrest for a state or local crime. These premises label unauthorized migrants not only as in the United States unlawfully, but also as criminals.”⁸⁵

2. Fugitive Aliens

In 2002, the INS initiated the National Fugitive Operations Program (NFOP), which created teams of agents to track down immigrants who

agreement was signed by the State of Florida in 2002. *Id.* at 9. The program rapidly spread to seventy-two state and local jurisdictions in 2011. *Id.* at 1. Recently, ICE announced its intention to reduce the program because it considers the Secure Communities program to be “more consistent, efficient and cost effective.” DEP’T HOMELAND SEC., FY 2013 BUDGET IN BRIEF 16 (2012) [hereinafter DHS 2013 BUDGET IN BRIEF], available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf>.

⁸² Secure Communities, launched in 2008, aims to “provide immigration screening for all people arrested by local law enforcement.” Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93–95 (2013). Through the program, anyone arrested and booked through a local law enforcement agency in which the program is activated will automatically have his or her fingerprints run through a DHS database to flag immigration violations. *Id.* at 94. ICE can then choose whether to place a “detainer” on the person and commence removal proceedings. *Id.* at 95. For further discussion and analysis of the program, see *id.* at 93 (describing Secure Communities as “the largest expansion of local involvement in immigration enforcement in the nation’s history”).

⁸³ The Criminal Alien Program (CAP) is a jail enforcement program “that includes several different systems for identifying, detaining, and initiating removal proceedings against criminal aliens within federal, state, and local prisons and jails.” MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 14–15 (2012) [hereinafter CRS INTERIOR ENFORCEMENT REPORT], available at <http://www.fas.org/sgp/crs/homsec/R42057.pdf>.

⁸⁴ Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1857 (2011).

⁸⁵ *Id.*

have prior deportation orders and fail to leave.⁸⁶ ICE absorbed the NFOP in 2003.⁸⁷ The NFOP's stated focus is on "fugitive aliens" with prior criminal convictions, but in practice, the majority of immigrants apprehended under the program have had either no criminal history whatsoever or no serious criminal convictions.⁸⁸ Still, the NFOP characterizes all immigrants with prior deportation orders as criminals.⁸⁹ In some cases, as detailed next, these immigrants are "turned into" criminals when ICE refers them for federal prosecution of immigration violations prior to their deportation.⁹⁰

3. Increased Federal Prosecutions of Immigration Crime

Over the past decade, the DHS and the Department of Justice (DOJ) have worked jointly to enforce criminal penalties for immigration violations.⁹¹ This departs from a long historical practice of allowing most illegal entrants and reentrants to return to their countries of origin without a criminal prosecution.⁹² Consequently, prosecutions for immigration violations have reached unprecedented levels.⁹³ Specifically, between 2002 and 2012, prosecutions for illegal entry⁹⁴ grew from 3192 to 48,032

⁸⁶ OFFICE INSPECTOR GEN., DEP'T HOMELAND SEC., OIG-07-34, AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 6 (2007), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_07-34_Mar07.pdf.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 5; MARGOT MENDELSON ET AL., MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 3, 11–15 (2009) [hereinafter MPI: COLLATERAL DAMAGE], available at http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

⁸⁹ See MPI: COLLATERAL DAMAGE, *supra* note 88, at 21.

⁹⁰ HUM. RTS. WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 2–4 (2013) [hereinafter TURNING MIGRANTS INTO CRIMINALS], available at http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf.

⁹¹ See Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 125–27 (2012).

⁹² See *id.* at 104. Although mere physical presence in the country without lawful documents is a civil rather than a criminal violation, the act of crossing the border without authorization is a misdemeanor. 8 U.S.C. § 1325 (2012). Criminal penalties for reentry after a previous deportation have been greatly expanded. Currently, immigrants who return can face two to twenty years in prison, depending on whether they have other convictions. *Id.* § 1326; Keller, *supra* note 91, at 101.

⁹³ TURNING MIGRANTS INTO CRIMINALS, *supra* note 90, at 2–3.

⁹⁴ Illegal entry is a federal misdemeanor offense and refers to entering or attempting to enter the United States "at a place other than a port of entry, or by fraud or false documents." *Id.* at 11.

per year, a fifteen-fold increase.⁹⁵ During the same period, prosecutions for illegal reentry⁹⁶ grew from 9337 per year to 37,196, more than a four-fold increase.⁹⁷

Although the CBP is responsible for the majority of referrals for immigration prosecutions,⁹⁸ ICE plays an important contributing role. First, in some cases, ICE officials actually assume the role of the prosecutor in the criminal proceedings, through work as “special assistant U.S. attorneys” employed by the DHS rather than the DOJ.⁹⁹ Second, even when ICE officials are not actually prosecuting cases, they affect the number of prosecutions through their decisions about which immigrants to refer to the DOJ for criminal prosecution. Since prosecutors have a low “declination rate” in immigration cases, they are highly likely to prosecute cases referred to them by ICE.¹⁰⁰ As a result, ICE’s decision to refer individuals to criminal court prior to immigration proceedings is one of the key driving forces behind the increasing number of immigration violations and prosecutions.¹⁰¹

Professor Jennifer Chacón summarizes the effects of these prosecutions, writing that “the increased prosecution of immigration offenses has created a whole new class of immigrants legally constructed as criminals. Non-citizens whose only legal violation is unauthorized presence are increasingly caught in the web of immigration enforcement initiatives styled as anti-crime measures.”¹⁰²

⁹⁵ *Id.* at 13.

⁹⁶ Illegal reentry is a federal felony offense and refers to “reentering or being found in the United States without authorization after deportation.” *Id.* at 11.

⁹⁷ *Id.* at 13; Chacón, *Unsecured Borders*, *supra* note 56, at 1846 (noting a 125 percent increase in federal immigration criminal prosecutions between 2000 and 2004).

⁹⁸ CBP referred 86 percent of illegal entry cases and 46 percent of illegal reentry cases; ICE referred 1 percent of illegal entry cases and 25 percent of illegal reentry cases. TURNING MIGRANTS INTO CRIMINALS, *supra* note 90, at 19.

⁹⁹ Eagly, *supra* note 9, at 1332.

¹⁰⁰ *Id.* at 1334.

¹⁰¹ In 2005, the DHS announced the initiation of “Operation Streamline,” which it touted as a “multi-agency law enforcement” zero-tolerance approach to border crossing. Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 493 (2010). The program’s stated goal is the criminal prosecution of all migrants caught attempting to cross certain stretches of the U.S.–Mexico border. *Id.* at 495. In practice, only a fraction of the unlawful border crossers can possibly be processed through the federal district court system, but the number of these prosecutions has skyrocketed. *Id.* at 501–04.

¹⁰² Chacón, *Unsecured Borders*, *supra* note 56, at 1848.

D. QUANTITATIVE METRICS

In addition to historic formation and critical tasks, Wilson describes how organizations with work that involves measurable outputs and/or outcomes tend to have management structures that use these metrics to promote compliance with agency priorities. In this way, statistics can be a key driving force in creating and maintaining institutional culture.

For ICE, the number of apprehensions, arrests, and deportations of immigrants are readily measurable aspects of the agency's work.¹⁰³ It is also relatively easy to measure what proportion of those apprehensions, arrests, and deportations are of "criminal aliens"—that is, immigrants with a criminal record.¹⁰⁴

Since its inception, ICE has been shaped by the pressure to document its success by demonstrating high numbers of criminal alien removals. Its predecessor, the INS, had been repeatedly faulted by Congress for its failure to deport criminal aliens.¹⁰⁵ Even before ICE was created, the INS pointed to the increasing number of criminal aliens deported as evidence of its improved performance.¹⁰⁶ And the difference in the number of criminal alien removals pre- and post-1996 is startling, reflecting just how much the 1996 legislation transformed the enforcement practices of the agency. In 1986, the INS removed 1978 noncitizens possessing criminal convictions, which accounted for approximately 3 percent of its total removals.¹⁰⁷ Ten years later, in 1996, the INS removed 36,909 noncitizens

¹⁰³ See Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 151 (2012).

¹⁰⁴ Professor McLeod notes how this focus on benchmarks naturally emerges from a criminal law enforcement culture. *Id.* at 151–52 (2012) ("A criminal law enforcement culture in the immigration context focuses attention on meeting numerical benchmarks of apprehensions, arrests, and deportations in a manner that mirrors a criminal law enforcement agenda. ICE policy defines a regime within which officers are to focus on the bottom line of numbers of deported criminal aliens. Enforcement initiatives center on hitting numerical targets rather than a more carefully calibrated regime engaged in subtly shaping incentives and migration flows.").

¹⁰⁵ See Morawetz, *supra* note 55, at 1948–50, 1948 n.65 (citing to repeated audits of the INS between 1997 and 1999 and discussing congressional claims that failure to expeditiously deport anyone labeled a "criminal alien" reflected agency failure).

¹⁰⁶ See *id.* at 1950 n.78 (quoting statements of INS Commissioner Doris Meissner to Congress regarding the increased removals of criminal aliens in 1998 and 1999).

¹⁰⁷ MARY DOUGHERTY ET AL., U.S. DEP'T HOMELAND SEC., OFFICE IMMIGR. STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 6 (2005) [hereinafter DHS ANNUAL REPORT 2004], available at www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf, cited in Yolanda Vázquez, *Realizing Padilla's Promise:*

possessing criminal convictions, which accounted for over 50 percent of its total removals.¹⁰⁸

The creation of ICE and the development of the criminally oriented programs described above brought a shift and expansion of congressional appropriations to the new agency.¹⁰⁹ ICE's budget is vast compared to its historic predecessor, the INS. In 1998, the INS was given a budget of just over \$3.6 billion for enforcement and adjudication.¹¹⁰ In 2012, ICE's budget for enforcement alone was \$5.8 billion.¹¹¹ Further, within ICE's budget, funding for the programs specifically designed to target criminal aliens, such as CAP, Secure Communities, § 287(g), and NFOP, grew from \$23.3 million in 2004 to \$690.2 million in 2011.¹¹²

With funding comes pressure to document results.¹¹³ After ICE was formed in 2003, the number of total removals escalated dramatically. Specifically, in the decade before 2001, there were 1.6 million removals.¹¹⁴ Over the next ten years, there were 2.3 million removals.¹¹⁵ The agency continued to describe these numbers in terms of criminal threats and national security concerns.¹¹⁶ For example, in a Senate hearing on ICE's performance in 2005, Victor X. Cerda, Acting Director of ICE's Detention and Removal Operations (DRO), provided statistical data on how ICE is carrying out its mission, and specifically reported on the

Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction, 39 FORDHAM URB. L.J. 169, 176 n.37 (2011).

¹⁰⁸ OFFICE IMMIGR. STATISTICS, U.S. DEP'T HOMELAND SEC., 1996 STATISTICAL YEARBOOK 171 (1996); Vázquez, *supra* note 107, at 176–77.

¹⁰⁹ See Morawetz, *supra* note 55, at 1948.

¹¹⁰ BUDGET STAFF, JUSTICE MGMT. DIV., U.S. DEP'T JUSTICE, BUDGET TREND DATA: FROM 1975 THROUGH THE PRESIDENT'S 2003 REQUEST TO THE CONGRESS 104, 104–08 (2002), available at http://www.justice.gov/archive/jmd/1975_2002/2002/pdf/BudgetTrend.pdf.

¹¹¹ DHS 2013 BUDGET IN BRIEF, *supra* note 81, at 25. The budget for the CIS was an additional three billion dollars. *Id.*

¹¹² CRS INTERIOR ENFORCEMENT REPORT, *supra* note 83, at 24 tbl.5.

¹¹³ See WILSON, *supra* note 34, at 161–62, 196–97.

¹¹⁴ These figures have been calculated by TRAC based on government data. *Immigration Enforcement Since 9/11: A Reality Check*, TRAC (Sept. 9, 2011), available at <http://trac.syr.edu/immigration/reports/260/> [hereinafter TRAC: *Reality Check*].

¹¹⁵ *Id.*

¹¹⁶ See Strengthening Interior Enforcement: Deportation and Related Issues, Joint Hearing Before the Subcomm. on Immigr., Border Sec., and Citizenship and the Subcomm. on Terrorism, Tech., and Homeland Sec. of the S. Committee on the Judiciary, 109th Cong. at 63 (2005), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg22332/pdf/CHRG-109shrg22332.pdf>.

number of criminal aliens removed as a subset of total removals (84,000 out of 160,000).¹¹⁷ By 2012, ICE boasted on its website that it had again nearly doubled the number of criminal alien removals, reporting that 55 percent, or 225,390 of the total removals in the year were convicted criminal aliens, the largest number of criminal alien removals in agency history.¹¹⁸

The focus on numbers is not simply a matter of talking points for agency heads or headlines for the website. As Wilson predicts, the readily quantifiable aspects of the agency's work appear to be an increasingly prominent part of ICE's managerial monitoring of its agents' performance.¹¹⁹ Internal documents obtained by the Washington Post in 2010 revealed that ICE employed specific quotas to ensure that the agency could document high levels of both overall removals and criminal alien removals.¹²⁰ In one email message from the head of ICE's detention and removal operations, James M. Chaparro, to all of ICE's field office directors, he congratulated the agency for the high numbers of criminal alien removals, writing, "We asked you to step up to the plate on criminal aliens and you have."¹²¹ He noted that the agency was on pace to meet its goal of 150,000 criminal alien removals in the fiscal year.¹²²

In the same message, Chaparro expressed concern that the number of non-criminal alien removals¹²³ was "falling short of our goal" of

¹¹⁷ *Id.* The total removals in Mr. Cerda's testimony did not include expedited removals, which would bring the total to 202,842. DHS ANNUAL REPORT 2004, *supra* note 107, at 1, 5–6.

¹¹⁸ Press Release, U.S. Immigr. & Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (December 21, 2012), *available at* <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm>.

¹¹⁹ See WILSON, *supra* note 34, at 160–63.

¹²⁰ Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, March 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html> (exposing findings derived from internal documents).

¹²¹ Email from James M. Chaparro, Dir., ICE, to Field Office Dirs. and Deputy Field Office Dirs. (Feb. 22, 2010, 8:05 AM) [hereinafter Chaparro 2010 Email], *available at* <http://www.media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf?sid=ST2010032700037>.

¹²² *Id.*

¹²³ Non-criminal alien removals are removals of immigrants with no criminal history and no criminal prosecution regarding their immigration violation. See CRS INTERIOR ENFORCEMENT REPORT, *supra* note 83, at 2–4 (defining "criminal aliens" as those whose convictions for certain crimes renders them removable).

400,000.¹²⁴ Additional ICE memoranda and emails specify performance metrics for ICE detention and deportation offices that are keyed to specific numbers of cases processed and/or charging documents. Clearly, the pressure to hit these metrics pervasively shaped the work of the agency's front-line operators. These numbers are central to the creation of an agency culture in which capturing and deporting criminals is its defining mission.

In sum, the historic formation of ICE in the aftermath of September 11, the critical tasks that have required ICE agents to conceptualize immigrants as criminal threats, and the allure of quantitative metrics, which have been used by ICE managers to encourage a focus on criminal alien removals, have all combined to create a powerful law enforcement culture within ICE. In fact, the pervasiveness of the focus on law enforcement throughout ICE's ranks suggests that the culture could best be characterized as a sense of mission. Wilson suggests that an agency has a sense of mission when its institutional culture is "a source of pride and commitment,"¹²⁵ which is "warmly endorsed by operators and managers alike."¹²⁶ The degree to which criminal enforcement has been embraced as a unifying focus of the agency by personnel at all levels within ICE reflects just this sense of mission.

IV. PROSECUTORIAL DISCRETION AND ICE CULTURE

While an agency's strong sense of mission has benefits, it also comes at a price.¹²⁷ Wilson explains, "tasks that are not part of the [agency's] culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it."¹²⁸ In addition, "organizations will resist taking on new tasks that seem incompatible with its dominant culture."¹²⁹

This resistance is precisely what has emerged over the past several years as the Obama administration has attempted to shift ICE's enforcement practices to focus specifically on immigrants with serious

¹²⁴ Chaparro 2010 Email, *supra* note 121.

¹²⁵ WILSON, *supra* note 34, at 27.

¹²⁶ *Id.* at 95.

¹²⁷ *Id.* at 101.

¹²⁸ *Id.*

¹²⁹ *Id.*

criminal convictions, rather than pursuing enforcement against immigrants with any conviction (or in some cases, with no conviction whatsoever but simply the civil violation of unauthorized presence) as though they are all criminal threats. As detailed below, this effort has taken the form of a series of directives to ICE agents to exercise prosecutorial discretion. The goal is for the agency to focus its resources on immigrants with serious convictions, and not expend resources on detention and deportation of all immigrants, without regard to humanitarian factors.

This part examines the conflict that has emerged between this effort by the executive branch to encourage the use of prosecutorial discretion and the agency's culture, with its pervasive focus on criminality. It begins with historical context regarding the INS's use of prosecutorial discretion, which requires a brief discussion of different types of discretion within the agency. It then describes the recent efforts by the Obama administration to encourage the use of prosecutorial discretion and the agency's hostile response.

A. HISTORICAL CONTEXT

Throughout the history of the INS, the daily work of the immigration agency's "operators" required them to make decisions about the proper subjects of enforcement efforts in order to comply with agency priorities.¹³⁰ In this broad sense, INS agents were expected to exercise discretion. On the whole, however, agents have undertaken these discretionary determinations at the level of broad policy directives about the proper targets of enforcement efforts. This is typified by Professor Kitty Calavita's historical account of the INS's implementation of the bracero program.¹³¹ This program, which ran from 1942 to 1964, was created to bring Mexican guest workers to U.S. agricultural employers.¹³² Throughout her book, Calavita describes the elaborate enforcement measures the INS commissioner instructed his agents to undertake in order to regulate migrant flows to maximize the success of the bracero program.

¹³⁰ For a description of the historic role of discretion within the immigration agency, see David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 182–84 (2012).

¹³¹ KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 3–4 (1992).

¹³² *Id.* at 43–45.

In one particularly brash example of agency discretion, Calavita describes the INS practice of deporting undocumented workers and then immediately turning them around at the border with a grant of legal status to reenter the country as *braceros*.¹³³ These measures were discretionary in the sense that they were not directly based on legislative text nor explicit executive directives. Rather, the agents adopted these measures to comply with agency directives that sought to ensure the success of the immigration policies the agency was charged to implement.¹³⁴

To an extent, this type of agency discretion, based on broad policy directives, is cut from the same cloth as the individualized, case-by-case assessments that prosecutorial discretion requires. Both types of discretion require agents to make decisions in accordance with agency priorities.¹³⁵ In fact, Professor Edward Rubin questions whether discretion is even an accurate term for decisions made within an administrative hierarchy, because such decisions do not require agents to exercise personal judgment.¹³⁶ In his view, when “street level” bureaucrats are permitted to make choices, it is not because they are encouraged to exercise their own judgment. Rather, he argues, it is because their superiors are confident that they will make the “right” choice—meaning the choice that best effectuates the agency’s policies and goals.¹³⁷

At the same time, however, prosecutorial discretion can be contrasted with discretion based on broad policy directives because prosecutorial discretion involves individualized assessments that may not be as readily addressed through explicit policy guidance. The INS agent exercising discretion in the context of the *bracero* program had explicit orders to turn around the undocumented worker at the border. The agent considering a request for prosecutorial discretion based on humanitarian factors, on the other hand, must undertake a more individualized analysis. While agency guidance is indisputably central to the decision-making process in the case of the latter, it may be more nuanced and less explicit than in the context

¹³³ *Id.* at 40–41.

¹³⁴ *Id.*

¹³⁵ See Martin, *supra* note 130, at 183 (“It is the agency, not each individual enforcement officer, that has the responsibility to make these decisions about resource allocation and overall policy.”).

¹³⁶ Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1305–07 (1997).

¹³⁷ *Id.*

of the former.

The factors that shape the use of prosecutorial discretion in the criminal justice system are instructive. Professors Marc Miller and Ronald Wright have documented how prosecutors in the criminal system draw on a variety of internal regulatory mechanisms to guide their decisions.¹³⁸ Their research documents prosecutors “responding to social norms and living up to group expectations about what it means to be a prosecutor in that particular office.”¹³⁹ While these decisions are certainly not based on unfettered personal choices, they also do not rely solely on explicit policy criteria or factors.

To the extent such individualized assessments occurred historically in the immigration system, they were part of the INS’s low-visibility “deferred action” program, in which the agency could grant a form of protected status to certain individuals that would prevent their deportation.¹⁴⁰ Few people were even aware of the deferred action program until 1975, when litigation regarding John Lennon’s efforts to avoid deportation uncovered internal documents outlining the factors that INS officials were to consider in deciding whether to confer deferred action to individuals who were otherwise deportable.¹⁴¹ The INS appeared to confer this status on individuals with compelling humanitarian factors, such as family separation, age, or mental disabilities.¹⁴² This was a small scale affair, with 1843 constituting the entire body of approved cases in 1974.¹⁴³ The low-profile nature of the program reflected its lack of centrality to the efforts that consumed the bulk of the agency’s time and efforts.

With the passage of the 1996 amendments to the Immigration and Naturalization Act, the INS was forced to take a more public and robust position on prosecutorial discretion of the type that requires individualized

¹³⁸ Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 131 (2008).

¹³⁹ *Id.*

¹⁴⁰ Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 820–24 (2004) [hereinafter Wildes, *The Deferred Action Program*]; Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99 (1979).

¹⁴¹ Wildes, *The Deferred Action Program*, *supra* note 140. At that time, “deferred action” was called “non-priority status.” *Id.*

¹⁴² *Id.* at 830–34.

¹⁴³ *Id.* at 826.

analysis. Advocates and some legislators who were unhappy with the harsh effects of the new laws on certain individuals—particularly long term legal permanent residents with minor convictions—criticized the INS for its failure to exercise discretion in these types of cases.¹⁴⁴ In response, in 2000, INS Commissioner Meissner issued a memo to all INS directors in which she emphasized the importance of prosecutorial discretion “at all stages of the enforcement process,” and outlined specific factors to consider before pursuing enforcement in individual cases.¹⁴⁵

With the reorganization of the INS and creation of ICE after September 11, the DHS continued to cite the Meissner memorandum, indicating that it applied with equal force to ICE enforcement activities.¹⁴⁶ The number of requests for deferred action that were actually approved appears to have remained very modest, however, both before and after the Meissner memo.¹⁴⁷

¹⁴⁴ In 1999, twenty-eight members of Congress signed a letter to Attorney General Reno and Commissioner Meissner raising concerns about the INS’s failure to exercise discretion to prevent removal in the face of “extreme” and “unjustifiable” hardship. Letter from Rep. Henry J. Hyde, et al., to Janet Reno, U.S. Att’y Gen., and Doris Meissner, Comm’r of the U.S. Immigr. & Naturalization Serv. 1730 (November 4, 1999), available at <http://www.aila.org/content/default.aspx?bc=6755|37861|25667|44701|40344> (stating, “[w]e must ask why the INS pursued removal in such cases when so many other more serious cases existed,” and requesting the development of written guidelines on the use of discretion); see also Neha Lall & Jen Murray, *Transcript of Panel Presentation on Immigration and Criminal Law: Hosted by the Association of the Bar of the City of New York*, 4 N.Y. CITY L. REV. 36–38 (2001) (containing heated exchanges between Congressman Barney Frank and INS General Counsel Bo Cooper regarding INS’s failure to exercise discretion).

¹⁴⁵ Memorandum from Doris Meissner, Comm’r of the U.S. Immigr. & Naturalization Serv., to All INS Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg’l and Dist. Counsel 1 (Nov. 17, 2000), available at <http://shusterman.com/pdf/prosecutorialdiscretionimmigration111700.pdf>. For further discussion of the history of the Meissner memorandum. See generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

¹⁴⁶ See Memorandum from Johnny N. Williams, Exec. Assoc. Comm’r of the Office of Field Operations of the U.S. Immigr. & Naturalization Serv., to the Deputy Exec. Assoc. Comm’r of Immigr. Servs. and All INS Reg’l Dirs. and Gen. Counsel 1 (Jan. 27, 2003); Memorandum from William J. Howard, Principal Legal Advisor for U.S. Immigr. & Customs Enforcement, to All Chief Counsel 2 (October 24, 2005), available at <http://shusterman.com/pdf/prosecutorialdiscretionimmigration1005.pdf>; Memorandum from Julie L. Myers, Assistant Sec’y of Homeland Sec. for U.S. Immigr. & Customs Enforcement, to All Field Office Dirs. and All Special Agents in Charge 1 (Nov. 7, 2007), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myers-Memo-Custody-Discretion-11-7-07.pdf/view> (including the Meissner memorandum as an attachment).

¹⁴⁷ Wildes, *The Deferred Action Program*, *supra* note 140, at 827 (reporting Wildes’ FOIA

B. PRESIDENT OBAMA'S PROSECUTORIAL DISCRETION INITIATIVE

As the number of annual removals escalated and the interior enforcement tactics became more severe post-September 11, advocates and Congress began to demand further information about who, precisely, ICE was deporting. The resulting information revealed that, in fact, "criminal aliens" by no means made up the majority of removals. For example, in 2008, criminal aliens made up only 31 percent of total removals.¹⁴⁸ Furthermore, if those convicted solely of immigration violations (illegal entry and reentry) are removed from the category of criminal aliens, the number of criminal aliens deported drops more precipitously, to just 15.2 percent of all removals during the decade between 2002 and 2011.¹⁴⁹

In the early years of the Obama administration, advocates and researchers published numerous reports documenting the failure of ICE programs to effectively target serious criminals for deportation.¹⁵⁰ Complaints about the 287(g) program beginning in 2007 led to critical reviews of the program by the Government Accountability Office and the DHS Inspector General.¹⁵¹ Similar complaints about Secure Communities

request for deferred action cases since 1974, for which he received 499 cases through April 2003).

¹⁴⁸ According to government data, of the 369,221 removals in 2008, 114,415 were criminal aliens. *ICE Total Removals*, ICE, <https://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf> (last visited Mar. 8, 2014).

¹⁴⁹ TRAC: *Reality Check*, *supra* note 114.

¹⁵⁰ See, e.g., MPI: COLLATERAL DAMAGE, *supra* note 88, at 3; MPI: DELEGATION AND DIVERGENCE, *supra* note 81, at 18–20; Lydgate, *supra* note 101, at 543. For example, in 2009, under the Secure Communities program, 26 percent of all removals were non-criminals, 40 percent were criminals with "Level 3" misdemeanor offenses, 11 percent were of "Level 2" non-aggravated felony or misdemeanor offenses, and only 24 percent were "Level 1" aggravated felony offenses. CRS INTERIOR ENFORCEMENT REPORT, *supra* note 83, at 32. Further, under the 287(g) program, in 2011, over half of the removals were non-criminals, and only 16 percent were criminals with Level 1 offenses. *Id.* Note that, according to the DHS classification scheme, Level 1 offenders are aliens convicted of "aggravated felonies," as defined in § 101(a)(43) of the INA, or of two or more crimes each punishable by more than one year (for example, two or more felonies); Level 2 offenders are aliens convicted of any felony or three or more crimes each punishable by less than one year (for example, three or more misdemeanors); and Level 3 offenders are aliens convicted of two or fewer misdemeanors. *Id.*

¹⁵¹ U.S. Gov't Accountability Office, GAO-09-109, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws (2009), available at <http://www.gao.gov/new.items/d09109.pdf>; Dep't Homeland Sec., Office Inspector Gen., OIG-10-63, The Performance of 287(g) Agreements, (2010), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

came to a head in 2011, when the governors of Illinois, New York, and Massachusetts all took steps to rescind their states' participation in the program.¹⁵²

Meanwhile, Congress failed to pass the Development, Relief, and Education for Alien Minors (DREAM) Act in 2010, which would have granted legal status to young people who were brought illegally to the country as children.¹⁵³ As a result, pressure increased on ICE to halt the deportation of those who would have been DREAM-eligible students.¹⁵⁴

The cumulative effect of the reports, public statements, and protests finally yielded a response from ICE. In an effort to justify its enforcement programs, in 2010 and 2011, ICE rolled out a series of statements and guidance memos on agency priorities that emphasized the agency's focus on serious criminals, and underscored the important role of prosecutorial discretion in the agency's work.¹⁵⁵

The most thorough explanation of the agency's approach to prosecutorial discretion is contained in the memo released by ICE Director John Morton on June 17, 2011. The memo, entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," emphasizes the resource limitations ICE faces, and then provides a list of largely humanitarian factors that ICE may consider in deciding whether or not to assert the full scope of its enforcement authority.¹⁵⁶ Of particular relevance to Claudia's case, among

¹⁵² See Edgar Aguila-socho, David Rodwin & Sameer Ashar, Immigrant Rights Clinic, Univ. Cal., Irvine Sch. of Law, *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County* 6 (2012), available at http://www.law.uci.edu/academics/real-life-learning/clinics/MisplacedPriorities_aguilasocho-rodwin-ashar.pdf.

¹⁵³ Olivas, *supra* note 5 (describing the politics surrounding the DREAM Act and the resulting pressure on the Obama administration).

¹⁵⁴ *Id.* In June 2012, President Obama announced that his Administration would no longer deport young noncitizens who would have been eligible under the DREAM Act. *Id.* at 541–42.

¹⁵⁵ *Id.* at 498 (summarizing the "Morton Memoranda" in chronological order).

¹⁵⁶ Morton Memo A June 2011, *supra* note 25, at 4–5. This memorandum lists the humanitarian factors ICE may consider in determining whether or not to deport an individual: length of presence in the United States, giving greater weight to lawful presence; circumstances of arrival and manner of entry into the United States, giving greater weight to entry as a young child; pursuit of education in the United States, giving greater weight to U.S. high school, college, or advanced degree graduates; immediate relatives who have served in the U.S. military, reserves, or national guard, giving greater weight to those who served in combat; criminal history, including arrests, prior convictions, or outstanding arrest warrants; immigration history,

the factors the memo specifies is “whether the person is the primary caretaker of . . . a minor,” and included in the specific classes of individuals that warrant “particular care” are “victims of domestic violence [and] trafficking.”¹⁵⁷

In addition, of central importance to this analysis, the Morton memos do not reserve prosecutorial discretion exclusively for those with no criminal record whatsoever. While criminal history is listed as one factor to be considered, it is clearly not intended to be dispositive. On the contrary, the June Morton memo expressly limits the negative categories that should trigger “particular care and consideration” to serious felons, national security threats, repeated offenders, known gang members, and individuals with an egregious record of immigration violations.¹⁵⁸

ICE followed these memos with an announcement in November 2011 that it would conduct a case-by-case review of all incoming cases in the immigration court system to ensure that they met its enforcement priorities, as outlined in the Morton memorandum. ICE agents were instructed to close cases that did not meet the enforcement criteria.¹⁵⁹ It also announced plans to implement prosecutorial discretion trainings for

including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud; national security or public safety concerns; personal ties and contributions to the community, including family relationships; ties to the noncitizen’s home country and condition in that country; age, giving greater weight to minors and the elderly; U.S. citizen or permanent resident spouses, children, or parents; primary caretaking of a person with a mental or physical disability, a minor, or a seriously ill relative; a pregnant or nursing spouse; a spouse suffering from a severe mental or physical illness; whether nationality renders removal unlikely; whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident; whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and whether the person is currently cooperating and has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or the DOJ, the Department of Labor, and the National Labor Relations Board.

¹⁵⁷ *Id.* at 5. The other groups that warrant particular care and consideration according to Morton’s memorandum are veterans and members of the U.S. armed forces, long-time lawful permanent residents, minors and elderly individuals, individuals present in the United States since childhood, pregnant and nursing women, individuals who suffer from a serious mental or physical disability, and individuals with serious health conditions. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Memorandum from Peter S. Vincent, Principal Legal Advisor of U.S. Immigr. & Customs Enforcement, to All Chief Counsel 1–3 (Nov. 17, 2011), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>.

all officers to ensure that enforcement efforts focused on ICE priorities.¹⁶⁰

The agency's statements regarding prosecutorial discretion stand in striking contrast to its vision and mission statements, discussed above, emphasizing its role in protecting the community from criminal threats and equating immigrants with criminals. There is nothing directly irreconcilable about a focus on the enforcement of immigration law against criminal threats, on the one hand, and the exercise of discretion to prevent certain deportations on humanitarian grounds, on the other. In practice, however, pursuing both goals at the same time presented internal contradictions. ICE agents, steeped in a culture in which all immigrants are viewed as criminal threats, were suddenly expected to view immigrants in a far more nuanced framework.

The tension this created became vividly apparent when the National ICE Council, the union that represents ICE agents, reacted to the prosecutorial discretion initiative with overt hostility. In one illustrative incident, an officer faced suspension when he picked up and charged an immigrant who had no criminal history other than ten traffic violations, and supervisors had to intervene to secure the immigrants' release.¹⁶¹ The comments about the incident by the president of the National ICE Council, Chris Crane, reflect the perspective of at least some ICE agents regarding their proper role in the enforcement process. "The officer made the determination using prosecutorial discretion that he would charge (the suspect) as being in the United States illegally and let the judge sort it out," Crane said. "That's our place in the universe. We're supposed to make arrests and let the judges and the legal system sort through the details."¹⁶²

The agency's failure to embrace the prosecutorial discretion initiative

¹⁶⁰ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES 1-2 (2011), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>; Julia Preston, *Agents' Union Delays Training on Deportation Rules*, N.Y. TIMES, January 8, 2012, <http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html?pagewanted=all> [hereinafter, Preston, *Agents' Union*].

¹⁶¹ Todd Starnes, *ICE Agents: Obama Won't Let Us Arrest Illegals*, FOX NEWS RADIO, <http://radio.foxnews.com/toddstarnes/top-stories/exclusive-ice-agent-faces-suspension-for-arresting-illegal-alien.html> (last visited Mar. 9, 2014).

¹⁶² *Id.* The ICE Union also refused to allow its members to participate in the training on prosecutorial discretion policies. *Id.*

comes through not just in these public statements and positions, but also in the statistics reflecting the program's tepid implementation. In June 2012, seven months into the review, ICE released data indicating that less than 2 percent of all pending deportation cases had been closed due to prosecutorial discretion.¹⁶³ A survey of immigration attorneys around the country reported widespread instances of ICE agents claiming that the memorandum would not change their enforcement and prosecution practices.¹⁶⁴

When the prosecutorial discretion program is considered in the context of the agency culture of ICE, it is unsurprising that the agency balked at devoting significant energy and resources to these new tasks. They were, in Wilson's words, "incompatible with [ICE's] dominant culture," and thus, greeted with resistance.¹⁶⁵ The program's basic premise—that ICE agents were to look at individual circumstances rather than enforce the law against all immigrants without legal status—cut against a long history in which agents were steeped in an aggressive enforcement mentality directly at odds with this individualized, adjudicatory approach.

Part II of this Article described how these dynamics played out in Claudia's case. Her story vividly illustrates the extent to which a single conviction overpowered all other factors in shaping ICE agents' decisions about how to use its prosecutorial discretion. Data on the cases that have received prosecutorial discretion under the Morton memos confirm that Claudia's experience is consistent with the agency's general approach. Of the 21,648 cases that ICE has closed pursuant to prosecutorial discretion between December 2011 and June 2013, only 249 cases (roughly 1 percent) involved an individual charged by ICE with criminal activity.¹⁶⁶

¹⁶³ N.Y. IMMIGR. COAL. & N.Y. CNTY. LAWYERS' ASS'N, PROSECUTORIAL INDISCRETION: HOW THE PROSECUTORIAL DISCRETION POLICY FAILED TO KEEP ITS PROMISE 11 (2013), available at <http://www.thenyic.org/sites/default/files/Prosecutorial%20Indiscretion%201-10-Final.pdf> (indicating that by October 2012, nearly one year after DHS officially launched the policy, only 10,998 cases of the 411,000 cases reviewed—or 2.7 percent—had been closed); Preston, *Agents' Union*, *supra* note 160.

¹⁶⁴ AILA/AIC REPORT, *supra* note 3, at 4.

¹⁶⁵ WILSON, *supra* note 34, at 101.

¹⁶⁶ These figures are from TRAC, which receives regular data from the EOIR pursuant to a request under the FOIA for all immigration cases closed due to prosecutorial discretion. The data provides information about the charges on the "Notice to Appear"—the equivalent to an indictment for immigration purposes—for each case that is closed. This data demonstrates that of the 21,648 total cases ICE closed pursuant to prosecutorial discretion, 31 had charges for an

Assuming that there are more than 249 immigrants with minor, non-serious convictions on their record with equities that merit an exercise of discretion, these numbers suggest that ICE's processing of immigrants with criminal convictions has been fundamentally incompatible with the use of prosecutorial discretion.

V. LESSONS LEARNED

In this final part, I discuss three lessons to be drawn from using Claudia's case study as a lens through which to understand ICE's failure to exercise prosecutorial discretion. First, ICE's handling of Claudia's case underscores the crucial role of agency culture, and particularly the fact that in ICE's current culture, a criminal conviction is the relevant metric in case processing above all else. Second, it highlights the structural dimensions of the interplay between the Obama administration and ICE, and suggests that there has not been sufficient attention paid to the ways in which the President's capacity to establish immigration policy is crucially shaped by the bureaucracy. Finally, the struggle to implement prosecutorial discretion raises foundational questions about where, institutionally, discretion is located in the immigration system.

A. THE CRUCIAL ROLE OF CONVICTIONS IN ICE'S AGENCY CULTURE

Claudia's story captures the degree to which ICE's culture, with its institutionalized focus on the removal of all immigrants with convictions, made it futile to request that the agency exercise discretion, even in the face of specific agency directives counseling discretion in cases like hers. The statistics and discussion in Part IV make clear that the ICE agents' approach to Claudia's case was in keeping with a broader rejection of prosecutorial discretion by the agency. In particular, her story and the data reveal that criminal convictions are a key sorting mechanism for ICE that nearly always trumps other considerations when it comes to requests for prosecutorial discretion.

aggravated felony, 218 had other criminal charges, 14,813 (68 percent) were charged with the immigration violation "Entry Without Inspection," 6,479 (30 percent) were charged with another immigration charge, 103 were charged with a miscellaneous other charge, and 4 had national security/terrorism charges. This data is on file with the author. Data for the first year of the program, through June 2012, which reflects similar trends, is available on TRAC's website. *ICE Prosecutorial Discretion Program: Latest Details as of June 28, 2012*, TRAC (July 23, 2012), <http://trac.syr.edu/immigration/reports/287/>.

The explicit directives regarding prosecutorial discretion did not dictate this result. As discussed in Part IV.B, the Morton memoranda do not reserve prosecutorial discretion exclusively for those with no criminal record whatsoever.¹⁶⁷ However, neither did any of the Morton memoranda directly state that cases with minor criminal convictions merit careful consideration for a favorable exercise of prosecutorial discretion.¹⁶⁸ This is a striking omission, given that the memoranda were issued in response to concerns about ICE's aggressive pursuit of low-level, non-serious criminal cases. Silence on the issue of low-level criminal offenses in the prosecutorial discretion memos reflects the political balancing act of the Obama administration. On the one hand, the Administration was attempting to placate the outcry over its excessive enforcement policies. At the same time, it was guarding against charges of a "backdoor amnesty" by opponents of immigration reform.¹⁶⁹

Without explicit directives from the Obama administration detailing how to handle cases with criminal convictions, ICE agents naturally elided references to "serious criminals" with a focus on immigrants with any conviction whatsoever. This approach is entirely in keeping with the agency's culture, particularly its use of quantitative metrics. During the rollout of the prosecutorial discretion initiative, ICE was under especially intense pressure to demonstrate that it was removing criminals. In response to political outcry from congressional Republicans that "criminal aliens [were] being set loose" by DHS, one spokesperson for the Department responded by pointing to the ICE record: 216,000 criminal alien removals in 2011.¹⁷⁰ The Department did not bother distinguishing

¹⁶⁷ See Morton Memo A June 2011, *supra* note 25; Morton Memo B June 2011, *supra* note 25.

¹⁶⁸ See Morton Memo A June 2011, *supra* note 25; Morton Memo B June 2011, *supra* note 25.

¹⁶⁹ This political dynamic is discussed at length in Olivas, *supra* note 5, at 496–97. The political calculus was also reflected in the fact that the prosecutorial discretion initiative simply offered immigrants administrative closure of their deportation cases; it did not offer any form of legal status or work authorization. See Preston, *Deportations Continue*, *supra* note 3. As a result, of the cases in which ICE offered closure, nearly half of the offers were declined. *Id.* Many of the immigrants who were eligible for administrative closure opted to pursue their claims for relief in court in the hope that they could obtain legal permanent residency, a more desirable outcome than administrative closure. *Id.*

¹⁷⁰ Julian Aguilar, *DHS Refutes Immigration "Stonewalling" Allegations*, TEX. TRIBUNE, November 22, 2011, <http://www.texastribune.org/2011/11/22/smithdhs-stonewalling-committee-information/>.

within these statistics between “serious” and “non-serious” criminals; the message had to be clear and unequivocal, and that counseled in favor of maximizing the overall number of criminal aliens deported.

In addition, there is the matter of simple versus complex tasks. Wilson suggests that, “[e]ven when the goals are relatively clear, the situation can define the tasks if one way of doing the job seems easier or more attractive.”¹⁷¹ Here, identifying and verifying grounds for deportation is far more straightforward than identifying humanitarian factors that counsel in favor of relief. The former relies on clear, usually well-documented evidence regarding an individual’s criminal or immigration history. The latter involves a more searching and sensitive inquiry into highly personal questions about the individual’s life. This is not the type of inquiry ICE agents are acculturated to undertake. They are far more comfortable in the role of law enforcer, and conceive of their role vis-à-vis immigrants as one of protecting the public from risk.

The power of agency culture becomes especially clear when ICE is contrasted with CIS. The divergence between the two agencies’ approaches to Claudia’s case is mirrored on a macro scale in their respective approaches to the implementation of prosecutorial discretion and another presidential effort to implement reform in the immigration system, the Deferred Action for Childhood Arrivals program (DACA).¹⁷² Under DACA, people under the age of thirty-one can apply to the government for a form of immigration status called deferred action, which grants them temporary protection from deportation and provides them with work authorization.¹⁷³ President Obama tasked the implementation of DACA to CIS rather than to ICE. And unlike the resistance and tepid implementation of the prosecutorial discretion effort, DACA is widely considered to be a successfully implemented program, with over 400,000

¹⁷¹ WILSON, *supra* note 34, at 42. OSHA’s preference for safety rather than health regulations, discussed in notes 44–45, *supra*, is another example of this dynamic.

¹⁷² *Consideration of Deferred Action for Childhood Arrivals Process*, USCIS (Jan. 18, 2013), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process>.

¹⁷³ *Id.* To be eligible for DACA, an applicant must be under the age of thirty-one as of June 15, 2012; have come to the United States before the age of sixteen; have continuously resided in the United States since June 15, 2007; have been physically present in the United States on June 15, 2012, and at the time of the request; have entered the United States without inspection before June 15, 2012; be currently in school, a high school graduate, have a GED, or be an honorably discharged veteran; and not have been convicted of a felony, significant misdemeanor, three or more other misdemeanors, or otherwise pose a threat to national security or public safety. *Id.*

cases approved less than one year into the program.¹⁷⁴

This difference is not surprising when considered through the lens of agency culture. DACA requires CIS to perform tasks that are central to its mission: review applications for an immigration benefit, weigh equities, and grant the benefit in accordance with established criteria.¹⁷⁵ In contrast, prosecutorial discretion, as administered by ICE, requires the agency to perform an equitable analysis that directly conflicts with the agency's law enforcement mission.

Thus, the ICE agent faced with a case like Claudia's, a criminal alien who also presents humanitarian factors, can pursue one of two options. On one hand, the agent can pursue deportation—a determination the agent is acculturated to undertake, and one which would unquestionably be considered an agency “win” and a job well done. On the other hand, the agent can exercise prosecutorial discretion and dismiss the case, which would require a messier and unfamiliar adjudication of conflicting factors, and could place the agent and/or the agency under fire. In Claudia's case, like countless others, the decision in favor of enforcement was pre-ordained by virtue of this calculus.

B. BUREAUCRATIC STRUCTURALISM

In addition to bringing into sharp focus the powerful role of criminal convictions in ICE's agency culture, Claudia's case provides insight into an important structural dimension of immigration law; namely, the relationship between the executive branch and the administrative agency when it comes to setting policy. In recent years, the question of who has the power and authority to establish immigration law and policy has been the topic of widespread commentary amongst immigration scholars, policy-makers, and advocates. Professors Adam Cox and Cristina Rodríguez wrote a groundbreaking article on the topic in 2009, in which they argued that, throughout U.S. immigration history, the President has repeatedly been involved in establishing immigration policy—not merely

¹⁷⁴ CIS posts monthly reports on DACA on its website. As of June 30, 2013, it reported 537,662 DACA applications accepted for processing, 400,562 cases approved, and 5383 denials. *Deferred Action for Childhood Arrivals Process (July 2013)*, USCIS (July 10, 2013), <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-7-12.pdf>.

¹⁷⁵ *Id.*

implementing it—despite the common conception that immigration policies originate in Congress.¹⁷⁶

The issue recently took on immediate relevance in the wake of President Obama's announcement in June 2012 of DACA, which many viewed as a particularly muscular assertion of the President's power to set immigration policy. Indeed, it was challenged in court on the ground that Obama surpassed his executive power in establishing the policy without congressional authorization.¹⁷⁷

In the weeks preceding President Obama's DACA announcement, over ninety law professors wrote the President a letter asserting that he had presidential power to exercise discretion over deportation policies.¹⁷⁸ The letter points to historic examples, some of which are discussed more extensively by Cox and Rodríguez, in which the President has asserted executive authority to decide substantial matters of immigration policy. In particular, Cox and Rodríguez write that the enactment of the 1996 laws, which could be seen as a prime example of congressional authority over immigration, in fact created what they call a system of "de facto delegation" of power to the President. As they describe,

This de facto delegation is driven by legal rules that make a huge fraction of resident noncitizens deportable at the option of the Executive.

This significant population of formally deportable people gives the

¹⁷⁶ Cox & Rodríguez, *supra* note 10, at 461. Professor Eric Posner has similarly emphasized the robust power the executive branch wields in the immigration arena. Eric Posner, *The Imperial President of Arizona*, SLATE MAGAZINE 2 (June 26, 2012, 12:04 PM), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency.html. Posner interprets the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), as an affirmation of this role, an acknowledgement that "the President calls the shots and the other parts of government acquiesce." Posner, *supra*. He argues that this robust presidential power is characteristic of our current government structure above and beyond immigration. What is remarkable about the immigration context is how explicit the President has been about his power to exercise enforcement discretion. *Id.*

¹⁷⁷ *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. July 31, 2013), available at <http://www.law.uh.edu/iheg/documents/Crane207-31-13.pdf> (dismissing for lack of jurisdiction after issuing a memorandum opinion and an order on April 23, 2013, in which the court found the plaintiffs likely to succeed in their claim that DACA was unlawful).

¹⁷⁸ Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law at UCLA Sch. of Law, et al., to President Barack Obama (May 28, 2012), available at <http://www.nilc.org/document.html?id=754>; see also Julia Preston, *Students Press for Action on Immigration*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/05/31/us/students-press-for-action-on-immigration.html> (describing student leaders' presentation of the Motomura letter to White House officials).

President vast discretion to shape immigration policy by deciding how¹⁷⁹
(and over which types of immigrants) to exercise the option to deport.

Cox and Rodríguez argue that as a result, somewhat counter-intuitively, the 1996 laws may have actually increased the executive branch's role in setting immigration policy. Previously, discretion was largely exercised in the immigration court system, where adjudicatory officials considered applications for discretionary relief from deportation pursuant to statutorily defined criteria.¹⁸⁰ When the 1996 legislation placed severe limitations on the availability of these forms of relief, the model shifted.¹⁸¹ Now, "[t]he Executive exercises this authority through its prosecutorial discretion," unconstrained by a statutory framework that demands that certain factors be considered.¹⁸²

Cox and Rodríguez write that the current structure permits the executive to make "fine-grained adjustments" at the stage of removal, selecting who to remove from amongst the pool of removable immigrants with far greater control than at the front end, or admissions, stage of immigration policy.¹⁸³ They acknowledge that this can result in "bad incentives and poor sorting" by "providing too much power to immigration officials, particularly lower level officers who make the day-to-day charging decisions."¹⁸⁴

Claudia's story and the foregoing analysis underscore that the extent to which the executive can make these "fine-grained adjustments" depends on another dimension of structural analysis: the bureaucracy. The President's capacity to set an agenda with regard to immigration policy is crucially shaped by the bureaucratic cultures of the administrative agencies charged with implementing his agenda.

In this way, the discussion of the President's role in immigration policy is importantly linked to one of the central foci of administrative law scholarship: the challenges the executive branch faces in implementing the President's policy agenda through the administrative bureaucracy. In her

¹⁷⁹ Cox & Rodríguez, *supra* note 10, at 511.

¹⁸⁰ For a discussion of the historic role of the immigration court system in providing for discretion, see Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621 (2006).

¹⁸¹ Cox & Rodríguez, *supra* note 10, at 517–18.

¹⁸² *Id.*

¹⁸³ *Id.* at 523–27.

¹⁸⁴ *Id.* at 530.

landmark article addressing this subject, then Professor Elena Kagan notes that the consistent frustration that presidents express toward the federal bureaucracy is partly attributable to the “typical principal-agent dilemma”:

[The dilemma] is how to ensure against slippage between the behavior the principal desires from the agent and the behavior the principal actually receives, given the agent’s own norms, interests, and informational advantages. In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy.¹⁸⁵

In the context of immigration policy, scholars have repeatedly described the extent to which ICE’s focus on criminal convictions blocks the implementation of more nuanced policies.¹⁸⁶ Professor Allegra McLeod has provided an extensive analysis of ICE’s criminal law enforcement mentality, and describes the failed efforts to reform the detention system as one example of the limitations created by this culture.¹⁸⁷ Professor Stephen Lee has described how ICE’s traditional focus on deportation and enforcement has prevented it from pursuing its secondary goal of enforcing the law against employers who hire undocumented workers.¹⁸⁸ Professor Jennifer Chacón has written about the tensions between ICE’s law enforcement policies and anti-trafficking efforts.¹⁸⁹ Professor Bill Ong Hing has recently described how ICE culture shaped its rejection of prosecutorial discretion in a case with similarly

¹⁸⁵ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2273 (2001). Wilson, too, noted the fraught relationship between the executive and the bureaucracy. He wrote, “Executives who want to influence policy but who define “policy” largely in terms of what outside constituencies want (or will not denounce) are in an awkward position—more awkward than they sometimes realize. To change their agency, these officials need to understand its workings, know its people, and appreciate its constraints. But the external, constituency-serving orientation of such executives, combined with their short tenure in office, reduce the time and energy they can devote to this learning process. As a result the policy changes they make are likely to be ill-considered and inadequately managed.” WILSON, *supra* note 34, at 206.

¹⁸⁶ See, e.g., McLeod, *supra* note 103, at 151–52.

¹⁸⁷ *Id.*

¹⁸⁸ Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1120 (2011) (discussing how historically “the task of implementing an employer-centric, interior enforcement strategy would require INS officials to expand the boundaries of their traditional mission orientation”).

¹⁸⁹ Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1625–26 (2010).

sympathetic factors as Claudia's.¹⁹⁰

All these examples suggest that the executive branch's efforts to implement immigration reform through ICE are unlikely to succeed if they require the pursuit of multiple goals above and beyond the agency's singular focus on law enforcement. The pursuit of multiple goals within the same administrative agency is a common challenge for bureaucracies. In fact, Professor Eric Biber describes this as a "fundamental problem in government," because agencies faced with conflicting tasks will "systematically overperform on the tasks that are easier to measure and have higher incentives, and underperform on the tasks that are harder to measure and have lower incentives."¹⁹¹

A common solution to the problem of multiple goals within an agency is agency splitting.¹⁹² The INS's split into ICE, CIS, and CBP after September 11 is a classic example of agency splitting.¹⁹³ Since the INS was tasked with too many conflicting goals, its reorganization was an attempt to reduce conflict and increase efficiency.¹⁹⁴

To some extent, Claudia's experiences with CIS and the ICE victim assistant could be viewed as success stories for agency splitting. Claudia's T visa application was handled by the Crime Victims Unit, a specialized unit within CIS that trains its staff in the dynamics of domestic violence and trauma.¹⁹⁵ Agents in this unit likely develop a distinct agency culture that encouraged their sensitivity to the facts in Claudia's story that established her victimization by the trafficking organization. Further, the ICE victim assistant who handled Claudia's T visa application worked in a separate ICE task force created to address trafficking investigations. His approach to Claudia's case reflected a different orientation toward immigrants than the rest of ICE.

Despite these instances of success, however, the broader contours of

¹⁹⁰ Hing, *supra* note 4, at 440–41.

¹⁹¹ Biber, *supra* note 41, at 9.

¹⁹² *Id.* at 33–34.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T HOMELAND SEC., REPORT ON THE OPERATIONS OF THE VIOLENCE AGAINST WOMEN ACT UNIT AT THE USCIS VERMONT SERVICE CENTER 3 (2010), available at <http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf>, discussed in 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, 215 n.24 (2012).

Claudia's experience indicate that agency splitting is not a solution for the implementation of prosecutorial discretion. It is unrealistic to think that in most cases an immigrant prosecuted by ICE will receive review by multiple agencies or sub-agencies beyond ICE's main prosecutorial arm. Claudia herself very nearly slipped through the cracks; even with representation, the Clinic did not see a means to seek out review by other agencies until far into the removal process, and this was nearly too late. In most cases, immigrants with factors that warrant discretion from removal will be processed through ICE's prosecutorial arm exclusively. As Biber suggests, splitting in this instance does not work because the agency's multiple goals are fundamentally "interdependent and interrelated."¹⁹⁶ It would be impracticable to create a separate task force or agency to consider the humanitarian factors involved in decisions to detain and deport. These considerations are intertwined with the agency's enforcement operations and must be pursued in tandem.

When splitting conflicting goals is not viable, another option is "to change the internal culture of the agency."¹⁹⁷ This can be undertaken in many ways, such as changing the agency's structure to increase the incentives for less measurable or secondary goals, imposing procedures that require the agency to consider secondary goals in the decision making process, and hiring personnel who are professionally committed to advancing the secondary goals.¹⁹⁸

The Obama administration has attempted to implement some of these ideas within ICE, but its efforts have been tentative and largely ineffectual. As described in Part IV, the prosecutorial discretion rollout included a plan for trainings of ICE officers, which was subsequently blocked by the ICE union.¹⁹⁹ Another example is the announcement, in December 2012, that ICE decisions about who would be subject to "detainers"—holds in state and local jails and prisons to permit ICE to take immigrants into immigration custody—would distinguish amongst serious and minor convictions.²⁰⁰ Yet, even if this memo were to be

¹⁹⁶ Biber, *supra* note 41, at 34.

¹⁹⁷ *Id.* at 35.

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* notes 161–62 and accompanying text.

²⁰⁰ Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enforcement to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel re: Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal

implemented more successfully than the previous directives, its explicit terms still encompass many non-serious criminals.²⁰¹

The fact is that the Administration has failed to energetically pursue cultural change within ICE because the agency's law enforcement goal clearly overshadows the discretionary goal in this institutional context. This leads to the final lesson drawn from this account, which involves the location of discretion in the immigration system.

C. LOCATING DISCRETION IN THE IMMIGRATION SYSTEM

In their account of the President's role in modern immigration law, Cox and Rodríguez argue that the 1996 reforms, with their drastic reduction in the avenues of relief from removal available to noncitizens, did not spell the demise of discretion in immigration law.²⁰² Although the immigration court system now has far less capacity to grant discretionary relief from removal, the overall capacity of the system for discretion has simply "shift[ed] . . . to the charging stage of the deportation process."²⁰³ Thus, they argue that "rather than reducing discretion, the principal effect of changes to the relief provisions has been to reallocate discretion to a different set of institutional actors within the executive branch."²⁰⁴

Cox and Rodríguez suggest that because the decisions regarding prosecutorial discretion are "no longer guided by the INA's statutory framework for discretionary relief, the changes may actually have increased the Executive's authority."²⁰⁵ In terms of the President's capacity to enact broad reforms, this may be true. For example, President Obama's most robust effort to establish his priorities, DACA, is a brighter story of the executive branch's capacity to undertake reform. As described above, the program has been implemented by CIS with far greater alacrity and results, demonstrating the extent to which agency culture shapes the

Justice Systems (Dec. 21, 2012), *available at* <https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>.

²⁰¹ See Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 281, 306 (2013) (noting that ICE's current guidance authorizes a detainer under many circumstances in which a prisoner is charged with or has been convicted of a misdemeanor).

²⁰² Cox & Rodríguez, *supra* note 10, at 517.

²⁰³ *Id.*

²⁰⁴ *Id.* at 517–18.

²⁰⁵ *Id.* at 518.

viability of reform implementation.

However, when DACA is considered alongside prosecutorial discretion, it reflects another, less hopeful lesson for reform efforts. DACA is premised on a conception of the immigrant as victim that relies on the immigrant as criminal as its foil. Indeed, as noted in this Article's introduction, in the very speech in which he announced DACA, President Obama contrasted DACA recipients with the criminal aliens that were the proper focus of enforcement efforts. He boasted that his enforcement had resulted in an eighty percent increase in criminal alien removals. This was politically savvy, given the constant pressure his Administration is under to demonstrate that it is "tough" on immigration enforcement. Yet, it raises troubling questions about the potential of the enforcement arm of the immigration bureaucracy to play a key role in preserving discretion in the system. The victim-criminal dichotomy that is so central to the immigration system's approach is particularly foundational to the culture of ICE, which defines itself in terms of the criminal side of that dichotomy. As described, this culture clashes directly with reform based on an individualized, holistic view of an individual's circumstances.

Thus, rather than a reallocation, the shifting of discretion to the enforcement arm of the executive branch may in fact amount to a constriction of the availability of discretion. This is the case at least as long as the culture of immigration enforcement remains as it is, divorced from a more adjudicatory, nuanced framework. While the President may have gained a degree of control by the shift in discretion to the charging phase, system-wide, the availability of discretionary determinations surely has lessened.

This analysis underscores that where discretion is located in the immigration system matters. Locating it within the enforcement arm situates it in a bureaucratic culture not well-suited for discretionary determinations. This has been noted in the criminal justice system,²⁰⁶ and seems to apply with equal if not greater force in the immigration context. Locating discretion, instead, within the adjudication system—which notably, is housed within the DOJ rather than the DHS, suggesting a different cultural orientation—would place discretionary decisions in the hands of institutional actors who may be better situated to undertake a

²⁰⁶ See, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010).

discretionary analysis.²⁰⁷

In the current moment, at least, locating discretion in the adjudicatory arm rather than the enforcement arm of the immigration system, and thereby distancing it from the President's direct line of authority, may have a political advantage in addition to the cultural and institutional advantages just described. Thus far, my account of the failure of prosecutorial discretion suggests a disconnect between the Administration's intention and the agency's culture. There is, however, an alternative, more cynical view of the policy's failure. Perhaps the Administration has known all along that the only way to maintain high numbers of criminal alien removals is to elide the concept of serious criminals with the fact of any conviction whatsoever. In this telling, the Administration spoke publicly about the need to focus enforcement on "serious criminals," all the while relying on ICE to keep appearing tough on enforcement by quietly pursuing all immigrants with convictions, regardless of seriousness. To put it another way: when Obama spoke of the eighty percent increase in criminal alien removals, did he know that stories like Claudia's were a crucial means of achieving that increase?

This Article does not attempt to answer that question. Regardless of the Administration's actual intent, it is clear that locating discretion within ICE is inherently limited by the agency's institutional context. The legislative framework, administrative culture, and political context undergirding efforts by ICE to implement prosecutorial discretion all cut against its ability to successfully carry out this mandate.

VI. CONCLUSION

This Article has described the current immigration bureaucracy as a system designed to sort between victims and criminals, and convictions

²⁰⁷ It would also provide for greater transparency, since adjudicatory bodies need to provide reasoning for their opinions. Cristina Rodríguez has emphasized the concerning lack of transparency that arises in the current system's heavy reliance on prosecutorial discretion. Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1801 (2010).

A full discussion of the consequences of increasing the discretion of adjudicatory bodies is beyond the scope of this Article. For a discussion of some of the downsides of this location, see Neuman, *supra* note 180, (highlighting concerns when discretion in the immigration system is located within bureaucratic adjudicatory bodies without significant mechanisms for judicial review or procedural due process).

are the key sorting mechanism. Claudia's story reveals how, in fact, convictions fail to draw a meaningful line between these two populations. The fact that convictions are a crude metric for sorting between deserving and undeserving immigrants is hardly a novel insight. Many scholars and advocates have highlighted the lack of proportionality between crime and punishment—if deportation is to be understood as punishment—in the current immigration system.²⁰⁸ In particular, Professor Gerald Neuman has described the important role discretion plays in compensating for this “lack of nuance” in modern statutory deportability determinations.²⁰⁹

This Article has endeavored to show how the immigration bureaucracy is poorly situated to address concerns about proportionality. ICE's deep-seated law enforcement culture makes it highly unlikely that the agency will energetically undertake individualized, case-by-case assessments that carefully consider humanitarian factors. Clearly, such an individualized assessment is sorely needed, but its location within the enforcement arm seems an effort destined to fail.

²⁰⁸ See, e.g., Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1660–62 (2009); Legomsky, *supra* note 9, at 519–20; Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722–25 (2009); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 435–36 (2012).

²⁰⁹ Neuman, *supra* note 180, at 621. Neuman's focus is on the discretion of adjudicators, but he notes that it operates at the level of enforcement choices as well. *Id.*