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THE NEW WORLD OF PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LESSONS FROM CRIMINAL JUSTICE

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I. INTRODUCTION

A few years ago, the Obama Administration introduced a new policy of prosecutorial discretion in immigration deportation proceedings.[1] From now on, Department of Homeland Security attorneys are empowered with the ability to not prosecute deportation cases where the alien does not meet the government's enforcement priorities.[2] Students, veterans, and long-time lawful residents, among others, are a part of the group that stands a good chance of not being deported even when deportation is available.[3] Immigration advocates pursued this policy change for years and saw it as a major victory when it was announced.[4] They continue to support it today wholeheartedly, with the major grievance that the policy is underutilized.[5]

In this article, the author argues the near universal position now taken by the immigration bar and immigration advocates—that this policy of discretion is shortsighted and ultimately counterproductive. The lessons that has been learned from other areas of law in which prosecutorial discretion exists, particularly criminal law, is that policies such as this actually hurt those who are subject to the system.[6] Criminal defendants, for example, now face swifter, harsher and more certain punishment in large part due to the plea bargaining revolution and empowerment of prosecutors.[7]

There is every reason to expect that a similarly robust prosecutorial discretion policy in deportation would have the same results. The incentives and pressures in the criminal system that led to the expansion and eventual dominance of bureaucratic discretion over judicial trials are

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1. Peter Wallsten, *President Obama Bristles When He is the Target of Activist Tactics He Once Used*, WASH. POST (June 10, 2012), http://www.washingtonpost.com/politics/president-obama-bristles-when-he-is-the-target-of-activist-tactics-he-once-used/2012/06/09/gJQA0i7JRV_story.html.

2. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) ("Prosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.").

3. *Id.* at 263–64 ("[F]ederal legislation . . . would regularize the immigration status of select immigrant students who have graduated from a United States high school, have a record of 'good moral character,' have been continuously present in the United States, and entered the United States at a tender age.").

4. Wallsten, *supra* note 1.

5. *Id.*

6. *See generally* Wadhia, *supra* note 2, at 268–72 (comparing criminal prosecutorial with prosecutorial discretion in the immigration context).

7. *Id.* at 265–67 (analyzing the history and rise of discretionary practices of prosecutors and most importantly their control of plea bargain acceptance and the fate of the defendant).

equally present in immigration.[8] Just as in criminal law, the dominant actors in the system—legislators and prosecutors—will find it in their interest to replace trials with executive discretion; the other actors in the systems—judges and immigrants—will be helpless to stop it.

The replacement of judicial discretion with prosecutorial discretion will have negative repercussions for aliens.[9] As in criminal law, they can expect to receive harsher punishments with less recourse for equitable relief. The procedural protections incident to a trial will disappear, marking an unfortunate return to the era before the administrative law revolution when unchecked bureaucratic power was the norm in immigration law.[10] Prosecutorial discretion will heighten the power of the government to impose both criminal punishment and deportation on aliens and utilize them against each other for law enforcement purposes. These problems are foreseeable and preventable because we have seen how similar policies play out in other areas of law, but they will only be prevented if we look past short-term advantages of this policy and look into the deeper implications.

This body of this article is divided into five parts. Part II describes how this new policy transpired and the current alignment of the interest groups. In Part III, the author illustrates what a system dominated by prosecutorial discretion would look like, and concludes the current system would look very similar to how deportation was conducted before the development of modern norms of administrative law. In Part IV, the author makes a direct comparison between a prosecutorial discretion immigration policy and the policy of prosecutorial discretion in the legal context where it is most prominent and well-researched, criminal law. In Part V, the author examines why the results from prosecutorial discretion faced by criminal law can be expected to be the same in the immigration system. Finally, in Part VI, before concluding the article, the author looks at some solutions to the problems. Specifically, the author suggests that either enhanced judicial discretion or a much more controlled version of prosecutorial discretion would be preferable to the current system.

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8. *See, e.g.*, Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109 (1996) (illustrating the difficulties of bureaucracy in immigration).

9. *See generally* Wadhia, *supra* note 2, at 268–72 (describing the application of "criminal prosecutorial discretion to immigration context").

10. *See generally* Sutherland, *supra* note 8 (discussing the problems with immigration bureaucracy).

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II. A New Policy and New Coalitions

On June 17, 2011, the Department of Homeland Security (DHS) significantly altered immigration enforcement.[11] Responding to calls from immigration advocates and frustrated with lack of movement by Congress in reforming the system, the Obama Administration presented its new policy of prosecutorial discretion.[12] The government always had discretion to not remove a particular alien, even if they were removable.[13] However, this power was used rarely, in special cases or in specific, limited circumstances.[14] DHS trial attorneys—who seek orders of removal against aliens who are undocumented, out of status or in violation of their status—were not given broad latitude or authority to dismiss cases on their own discretion or in a regular, systematic way.[15] That all changed on June 17, 2011.[16]

On that day, John Morton, director of Immigration and Customs Enforcement (ICE) issued what came to be known as the "June Memo" or the "Morton Memo."[17] In that memo, he announced his agency was now encouraging its employees, including the Chief Counsel's office, to exercise prosecutorial discretion to "ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities."[18] Director Morton explained:

> ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens

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11. *See* Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

12. *Id.*

13. *See* Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 San Diego L. Rev. 99, 100–06 (1979) (defining the concept of nonpriority instruction through the history of the Immigration Service). *See generally* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 San Diego L. Rev. 42, 44 (1976) (discussing the government's discretionary decisions not to pursue certain deportations under the "nonpriority program," which came to public light in a famous case he handled involving John Lennon and Yoko Ono). John Lennon overstayed his visitor visa but was ultimately allowed to stay under this program. *Id.*

14. *See* Wildes, *supra* note 13 (exploring opinions from various courts regarding use of nonpriority status).

15. *See generally* Wadhia, *supra* note 2, at 272 (examining the limitations of the DHS to defer cases).

16. Memorandum from John Morton, *supra* note 11.

17. *Id.*

18. *Id.*

> it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.[19]

The way ICE wanted to now prioritize its resources is through the regular use of administrative discretion not to prosecute removal cases "[b]ecause the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise 'prosecutorial discretion' if it is to prioritize its efforts."[20]

The June Memo provides guidance to DHS attorneys as to what factors are relevant to a favorable exercise of discretion.[21] Many of these factors are familiar to immigration advocates who have been pushing for a more humane immigration policy. For example, the memo mentions:

> [T]he circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child; the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States; [and] whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat.[22]

These criteria—entry as a young child, pursuit of higher education, or military service—are familiar to any advocate for the DREAM Act, which was endorsed by the Obama Administration but has not been passed by Congress.[23] The memo also includes: "the person's length of presence in the United States, with particular consideration given to presence while in lawful status; . . . the person's ties and contributions to the community, including family relationships; . . . the person's age, with particular consideration given to minors and the elderly."[24]

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19. *Id.*

20. *Id.*

21. *See id.* (explaining a list of important factors ranging from enforcement priorities to a person's criminal history).

22. *Id.*

23. Development, Relief, and Education for Alien Minors Act of 2012, S. 952, 112th Cong. (2011). The DREAM Act was most recently defeated when it failed to overcome a filibuster on December 9, 2010; *Bill Summary & Status*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03992:@@@X (last visited January 28, 2014).

24. Memorandum from John Morton, *supra* note 11.

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In short, the new policy of prosecutorial discretion provided a path for the Obama Administration to get around congressional resistance to their immigration reform agenda and please their allies in the politically important Hispanic community before re-election. The first two-and-a-half years of the Obama Administration was devoted to the policy of stricter enforcement, with record numbers of border patrol agents and deportations, under the belief a strong record of enforcement would soften opposition to comprehensive immigration reform.[25] When that policy demonstrably failed, President Obama came under withering criticism from the pro-immigrant community because he had not only failed to deliver on his promise of reform ("La Promesa"), but had in fact ramped up enforcement beyond Bush-era levels.[26] Prosecutorial discretion became a course correction, acknowledging that legislative reform was not going to happen in the foreseeable future and that, therefore, the best approach was aggressive use of administrative powers to soften the immigration system.[27] Prosecutorial discretion formed the cornerstone of this new approach toward a kinder, gentler immigration enforcement system.

Prosecutorial discretion in immigration enforcement is not an idea from the Obama Administration that the advocate community has warily embraced as a temporary measure in response to congressional intransigence. To the contrary, the advocate community pushed and prodded the Obama Administration to adopt prosecutorial discretion as a primary feature of its immigration policy.[28] Daniel Altschuler in Dissent Magazine explains:

> Thursday's policy shift follows months of vocal criticism and protest from youth-led organizations and other immigrant advocacy groups,

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25. *See* U.S. GOV'T ACCOUNTABILITY OFF., BORDER SECURITY: DHS PROGRESS AND CHALLENGES IN SECURING THE U.S. SOUTHWEST AND NORTHERN BORDERS 4 (2011), *available at* http://www.gao.gov/new.items/d11508t.pdf (showing CBP has increased its personnel by 17% since 2004)*see also* Brian Bennett, *Obama Administration Reports Record Number of Deportations*, L.A. TIMES (Oct. 18, 2011), http://articles.latimes.com/2011/oct/18/news/la-pn-deportation-ice-20111018 (pointing out the number of deportations under the Obama Administration hit record levels of almost 400,000 per year.

26. *See* GOV'T ACCOUNTABILITY OFF., BORDER SECURITY, *supra* note 25 (explaining "La Promesa" is shorthand in the Hispanic community for Obama's broken promise, made to Jorge Ramos of Univision on May 28, 2008, to bring up comprehensive immigration reform for a vote in Congress within the first year of his presidency. It is symptomatic of disillusionment with Obama's failure to change immigration policy).

27. Julia Preston, *While Seeking Support, Obama Faces a Frustrated Hispanic Electorate*, N.Y. TIMES (June 11, 2012), http://www.nytimes.com/2012/06/11/us/politics/obama-faces-a-frustrated-hispanic-electorate.html (referencing how the United States "[A]dministration has tried to soften the impact of deportations . . . ").

28. *See* Wallsten, *supra* note 1 (exemplifying the efforts of advocates to convince President Obama that he needs to do more for immigration).

> who have been a thorn in the president's side and demonstrated his vulnerability among the Latino electorate. Protest has taken many forms. Organizations of undocumented youth publicized and fought deportation cases of individual Dreamers under the mantle of their Education Not Deportation (END) campaigns. Activists have embarrassed the president at public events, like last month's National Council of La Raza (NCLR) annual conference, with interruptions and uncomfortable questions about deporting Dreamers. Representative Luis Gutierrez (D-IL) got himself arrested in front of the White House to protest current enforcement policies. . . . Without all this protest and the media attention it has garnered, it's hard to imagine that Thursday's memo would have materialized.[29]

The advocate community had given up hope for legislative reform and saw the greater use of administrative discretion as the best step forward for their cause.[30]

The Washington Post described how immigration advocates pushed the Obama Administration to use prosecutorial discretion in response to a failed legislative agenda.[31] The Post described a meeting in March 2010 in the White House:

> The meeting had been scheduled to talk about potential paths to passing a comprehensive immigration bill. Activists felt that Obama had not thrown himself fully into the fight. . . . The advocates decided that Deepak Bhargava, head of the nonprofit Center for Community Change, would lead off the meeting with a sharp critique of the president's leadership. . . . [I]t was an uncomfortable moment when Bhargava looked in Obama's eyes and told him that he was presiding over a "moral catastrophe" in immigrant communities. He asked Obama to use executive powers to stop many deportations.[32]

This pressure succeeded in convincing the Obama Administration to implement prosecutorial discretion after the Republicans took over Congress and legislative reform seemed unlikely to occur any time soon.[33] The Post described a meeting between the President and congressional allies such as Congressman Luis Gutierrez and Senator Robert Menen-

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29. Daniel Altschuler, *Cautious Optimism in Response to President's Immigration Announcement,* DISSENT MAG. BLOG (Aug. 23, 2011), http://www.dissentmagazine.org/blog/cautious-optimism-in-response-to-presidents-immigration-announcement.

30. *See* Wallsten, *supra* note 1 (exemplifying the efforts of advocates to convince President Obama that he needs to do more for immigration).

31. *Id.*

32. *Id.*

33. *Id.*

dez, in which Obama seemed to come around to their argument for greater use of bureaucratic discretion:

> Gutierrez was hopeful. For the first time, he thought that Obama seemed open to asserting his executive powers. He and Menendez laid out a series of specific executive actions Obama could take, including one to help those eligible for the Dream Act.... Eventually, the administration would enact a policy of "prosecutorial discretion," calling on immigration officials to focus on deporting serious criminals, repeat border-crossers and others considered security threats rather than students, veterans or seniors.[34]

The Obama Administration now considers prosecutorial discretion a cornerstone of its new, more liberal immigration policy, in contrast to the "enforcement through attrition" or "self-deportation" strategy of its political opponents.[35] The latter approach focuses on maximum enforcement of the immigration laws and ancillary efforts to make life unsustainable for undocumented aliens, such as preventing illegal aliens from working, obtaining a driver's license, or renting an apartment.[36] The Obama Administration presents its alternative as trying to balance the goal of enforcing restrictions against illegal entry and presence against other objectives of the immigration system, such as diplomatic and humanitarian concerns.[37] The way to balance these competing demands, according to the Obama Administration, is through the use of administrative discretion.[38]

In the most prominent legal clash of these competing policies, *Arizona v. U.S.*,[39] the Obama Administration highlighted the importance of federal executive discretion in regulating immigration.[40] In its Brief, it wrote:

> Whenever Congress vests enforcement authority in an Executive Department, the Department presumptively possesses the responsibility to exercise discretion, "balancing a number of factors which are pe-

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34. *Id.*

35. *See generally* MARK KRIKORIAN, DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT (2005), *available at* http://www.cis.org/ReducingIllegalImmigration-Attrition-Enforcement (explaining the strategy of attrition); Wallsten, *supra* note 1 (exploring the impact of immigration advocates on President Obama).

36. KRIKORIAN, *supra* note 35 (summarizing the mechanisms for creating a firewall by requiring proof of legal status).

37. Altschuler, *supra* note 29.

38. *Id.*

39. Arizona v. United States, 567 U.S. __ (2012), 132 S. Ct. 2492 (2012).

40. Brief for the United States, 18, 21, *Arizona*, 567 U.S. __, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 939048, at *18, *21.

> culiarly within its expertise." That is especially so in the context of immigration, where "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program . . . ." The Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.[41]

According to this argument, the proper functioning of the immigration system depends on the federal government's expertise in wisely exercising discretion in the enforcement of the laws.[42] In this way, administrative discretion, which was pushed on the Obama Administration by grassroots activists and crucial to differentiating its policies from those of Arizona, has become a central feature of the administration's more lenient immigration policy.[43]

After the June Memo was issued, immigration advocates reacted with enthusiasm to the new changes, while proponents of stricter enforcement were dismayed.[44] On February 9, 2012, a "who's-who" of immigrant advocacy organizations, from the ACLU and the American Friends Service Committee to People for the American Way and the National Council of La Raza, wrote a letter to Homeland Security Secretary Janet Napolitano praising the increased use of prosecutorial discretion, and advocating for even more.[45] It read:

> The undersigned organizations are encouraged by the recent prosecutorial discretion initiatives undertaken by the Department of Homeland Security (DHS). A robust prosecutorial discretion policy is essential to the smart enforcement of immigration law and to the fair adjudication of immigration cases. The memos and announcements that DHS issued last fall are important steps toward achieving these aims.[46]

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41. *Id.*

42. *Arizona*, 567 U.S. __, 132 S. Ct. at 2506–07.

43. *See* Wallsten, *supra* note 1 (reporting the pressure placed on the President to reform immigration).

44. *See, e.g.*, Editorial, *Toward Immigration Sanity*, N.Y. Times, Aug. 11, 2011, http://www.nytimes.com/2011/08/20/opinion/toward-immigration-sanity.html (advocating for the approach taken by the Obama Administration); Julián Aguilar, *U.S. Rep. Smith: Obama Plotting "Backdoor Amnesty,"* THE TEXAS TRIBUNE, July 14, 2011, http://www.texastribune.org/2011/07/14/us-rep-smith-obama-plotting-backdoor-amnesty (reporting the HALT Act was promulgated to counter the "Morton Memo").

45. Letter from AIDS Foundation of Chicago et al, to Janet Napolitano, Secretary, U.S. Dep' of Homeland Sec. (Feb. 9, 2012), *available at* http://www.aila.org/content/default.aspx?bc=6714/6866/38626.

46. *Id.*

Their only complaint was the policy change did not go far enough. For example, they were concerned detained aliens and those without attorneys would not benefit from the new policy.[47] Another concern was that a more limited set of criteria announced in a later memo[48] would overtake the broader discretionary factors in the June Memo.[49] They were also concerned that Customs and Border Protection did not seem to be using enough discretion.[50] In short, they argued that the only problem with prosecutorial discretion was that there was not enough of it.

The American Immigration Lawyers Association, the major professional organization of immigration attorneys, was equally enthused.[51] For its 2012 National Day of Action, it issued *Talking Points*, in which its members were encouraged to tell lawmakers "[p]rosecutorial discretion is about prioritizing resources and ensuring fair and just outcomes" and "[i]t allows DHS and DOJ to stop wasting taxpayer resources trying to deport hard-working parents, veterans, and children brought to the U.S. by no fault of their own."[52] The only problem they had with prosecutorial discretion is there is not enough of it.[53] According to *Talking Point*s, "ICE's implementation of the prosecutorial discretion initiative announced in November has fallen short. This month, ICE Director Morton testified that only 1,500 of the 150,000 cases (1%) reviewed so far had been administratively closed, i.e., put on hold. This is a *very* low number."[54]

On December 15, 2011, the American Bar Association joined the fray, writing a letter to Director Morton to "commend the Department of Homeland Security's announcement that the Department will exercise its prosecutorial discretion with respect to deportation and removal cases in a more robust manner."[55] The letter announced, "The ABA strongly supports the agency's decision to exercise its prosecutorial discretion to close low priority cases."[56] It pointed out that the ABA had recently is-

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47. *Id.*

48. *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, ALIA INFONET, http://www.aila.org/content/default.aspx?bc=1016—/715/8412/38207/37681 (last visited Jan. 12, 2015).

49. Letter from AIDS Foundation of Chicago et al, to Janet Napolitano, *supra* note 45.

50. *Id.*

51. American Immigration Lawyers Association, *Talking Points*, AILA.COM, http://www.aila.org/content/default.aspx?bc=6755/25667/39071 (last visited Jan. 19, 2015).

52. *Id.*

53. *Id.*

54. *Id.*

55. Thomas M. Susman, *Letter to Director John Morton* (Dec. 15, 2011), *available at*: http://www.aila.org/content/default.aspx?bc=1016/12191/12190/38733/38021.

56. *Id.*

sued a report calling on DHS "to increase use of prosecutorial discretion by both DHS officers and attorneys . . . ."[57]

Likewise, for people on the other side of the debate—the proponents of stricter enforcement—this policy reeked of back-door amnesty and refusal to enforce the law as it should be enforced.[58] The New York Times explains:

> Republicans in Congress have denounced the new deportations policy, accusing the Obama Administration of trying an end-run around Congress by granting de facto amnesty to illegal immigrants. Representative Lamar Smith, a Republican from Texas who is chairman of the House Judiciary Committee, said the prosecutorial discretion policy had the "specific purpose of overruling or preventing orders of removal for illegal immigrants."[59]

Nineteen conservative senators wrote a letter to the president, arguing:

> [T]hese new policies send a message that your Administration is turning a blind eye to those who have broken our immigration laws. We are also concerned that these policies . . . allow undocumented individuals to remain in violation of the law without fear of apprehension or deportation. The security of our country depends on our ability to prevent unlawful entry and to respond when such criminals have overstayed their visa or avoided inspection. These policies have the potential to undermine the rule of law and threaten our nation's security.[60]

A conservative member of the House offered an amendment to defund the implementation of the policy.[61]

In addition to congressional opposition, the new policy garnered opposition from groups that typically oppose any softening of immigration enforcement.[62] The Center for Immigration Studies (CIS), one of the most prominent advocacy organizations for less immigration and stricter en-

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57. *Id.*

58. Aguilar, *supra* note 44.

59. Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES (Nov. 17, 2011), http://www.nytimes.com/2011/11/17/us/deportation-cases-of-illegal-immigrants-to-be-reviewed.html.

60. Letter from Chuck E. Grassley, U.S. Senator, to Barack Obama, President of the United States (Sept. 26, 2011), *available at* http://www.risch.senate.gov/public/index.cfm/files/serve?File_id=57cc8059-c744-49a2-860f-ba3612ab0536.

61. Mr. King of Iowa, *Amendment to H.R. 5855*, *available at* http://www.aila.org/content/fileviewer.aspx?docid=40085&linkid=248088 (last visited Jan. 28, 2014).

62. *See* Janice Kephart, CTR. FOR IMMIGR. STUD., *Amnesty by Any Means: Memos Trace Evolution of Obama Administration Policy* (2011), *available at* http://www.cis.org/amnesty-by-any-means-memos (opining the Obama Administration's new immigration policy is merely an attempt to circumvent Congress).

forcement, issued a memorandum, arguing, "Current Obama Administration immigration and enforcement standards are a purposeful subversion of the law in an effort to gain Latino voters [and] provide a 'get out of jail free' card to many illegal immigrants in our criminal justice system."[63] CIS was alarmed:

> [The] memos reflect an open strategy to undermine federal immigration law and its enforcement in order to legalize large swathes of the illegal population, including those about whom we know little and are in detention pending court appearances, potentially granting legality to arrested terrorists and violent criminals. Thus, nearly the entire illegal population could gain amnesty, including many who may pose a threat to public safety.[64]

Even the union for employees of Immigration and Customs Enforcement issued a no-confidence vote in their leaders, citing "efforts within ICE to create backdoor amnesty through agency policy."[65]

The press release quoted the union chief:

> "Any American concerned about immigration needs to brace themselves for what's coming," said Chris Crane, President of the National ICE Council which represents approximately 7,000 ICE agents, officers and employees, "this is just one of many new ICE policies in queue aimed at stopping the enforcement of U.S. immigration laws in the United States."[66]

It is easy understand why immigration attorneys and advocates support this new policy. When this policy was announced, attorneys across the country immediately started identifying cases in their offices that would make good candidates for prosecutorial discretion. From that perspective, this new policy is unambiguously a good thing because a form of relief now exists that before was nonexistent. Clients whose only option for relief was asylum, now instantly doubled their options by having their attorney attempt to get their case dismissed through discretion, and if that does not work, continue to pursue their asylum case. Moreover, prosecutorial discretion is easier to obtain than asylum or other kinds of more formal relief. It merely requires a convincing letter to a DHS attorney, and not the more difficult levels of proof and argumentation expected in a formal adjudication. It also creates a new option for someone

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63. *Id.*

64. Kephart, *supra* note 62.

65. *ICE Agent's Union Speaks Out On Director's "Discretionary Memo" Calls On The Public To Take Action*, AILA INFONET, http://www.aila.org/content/default.aspx?bc=1016/12191/12190/38733/35985 (last visited Jan. 20, 2015).

66. *Id.*

who may have had no options before, and was staring down the near-certain prospect of deportation and all the horrors it entails.

However, long-term ramifications must be considered before rushing headlong into a complete embrace of this new policy. What other areas of law have taught—particularly the area of criminal justice—is that prosecutorial discretion ends up being bad for the people who are subject to the policy, even though it seems like a good thing initially. We need to have a clear idea of why and how we think those lessons do not apply in this case and why we think things will work out differently this time. And, if we cannot do that, we need to reconsider this embrace of prosecutorial discretion.

III. The Struggle Begins: Creating an Unintended Parallel System for Relief

As long as prosecutorial discretion is seen as a free shot at staying in the country, it does not matter what kinds of procedural protections are in place in order to decide its value. It is a form of relief that simply did not exist before, and theoretically has no downside. Anyone who is helped by prosecutorial discretion is a beneficiary of this new policy, and victims do not exist because all the previous forms of relief are still in place. Even if an alien is unsuccessful in having his case dismissed as a discretionary matter, he is still entitled to pursue the other avenues that exist for potential relief. While this sounds like a good thing, the devil is in the details.

If lessons from criminal law and other areas of law hold true, and there is no reason to believe they will not, the process of prosecutorial discretion will be more dynamic. The growth of prosecutorial discretion will impact the development of other forms of relief. Specifically, the ease and convenience of adjudicating claims through administrative discretion will create an incentive to whittle away the more formal process that is currently in place, and could eventually replace established procedures as the primary form of relief from deportation. There are indications this has already begun to happen. But, before examining that argument, one must first examine why the replacement of today's system by a system focused on prosecutorial discretion would be a bad thing from the alien's perspective.

Deportation (now called "removal")[67] proceedings are administrative hearings conducted fully within the Executive Branch,[68] but they are endowed with substantial due process protections for the alien.[69] Aliens are entitled to a trial in front of a neutral arbiter (someone different than the person handling his deportation file).[70] They are allowed to present witnesses and evidence, and to respond to the government's evidence and cross-examine their witnesses.[71] They are entitled to an attorney to represent them and notice of the charges against them.[72] They can appeal an unfavorable ruling.[73] If they win, they are entitled to a legal status (ordinarily, permanent residency) with work authorization.[74]

A dismissal of a removal case through prosecutorial discretion does not grant these same benefits. An undocumented alien whose case is dismissed remains undocumented, unable to work and under constant fear of being placed in proceedings again. Unlike a successful cancellation or asylum application, he is not granted LPR status. He is not granted employment authorization. He avoids physical removal from the country, but he is not provided any legal status in the country. Moreover, the case is dismissed without prejudice, or just administratively closed, meaning the government can reinitiate the case at any time, possibly even without new service.[75]

Additionally, the process is much less structured than a removal hearing, with far fewer protections to ensure the alien is given a fair opportu-

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67. *See* Calcano-Martinez v. Immigration and Naturalization Serv's, 533 U.S. 348, 348 (2001) ("The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expressly precludes courts of appeals from exercising jurisdiction to review a final removal order against an alien removable by reason of a conviction for, inter alia, an aggravate felony.").

68. *See* 8 U.S.C. § 1103 (2012 & Supp. 2014) (conferring the powers of administration and enforcement of immigration and naturalization of foreign people to the Secretary of Homeland Security, President, Attorney General, and Secretary of State).

69. *See, e.g.*, 8 U.S.C. § 1229a(b)(4)(B) (2006) (providing an alien with substantial due process rights).

70. *See* Aguilar-Solis v. Immigration and Naturalization Serv's., 168 F.3d 565, 569 (1st Cir. 1999) (finding that immigration judges have a "responsibility to function as neutral and impartial arbiters" and "must assiduously refrain from becoming advocates for either party").

71. 8 U.S.C. § 1229a(b)(1) (2006); 8 U.S.C. § 1229a(b)(4)(B) (2006).

72. 8 C.F.R. § 292.5(a)–(b) (1997).

73. 8 C.F.R. § 1003.1(b) (2003).

74. Immigration and Nationality Act, Pub. L. No. 414, § 245(a), 66 Stat. 208, 217 (1952).

75. JOAN FRIEDLAND, IMMIGR. POL'Y CTR., FALLING THROUGH THE CRACKS: HOW GAPS IN ICE'S PROSECUTORIAL DISCRETION POLICIES AFFECT IMMIGRANTS WITHOUT LEGAL REPRESENTATION 4 (2012), *available at* http://www.immigrationpolicy.org/perspectives/falling-through-cracks.

nity to present his case.[76] He is not entitled to a lawyer to present his case for prosecutorial discretion.[77] He is not even entitled to notice this relief exists, unlike in removal proceedings, where the immigration judge is obligated to inform aliens of relief which might be available to them.[78] He is not entitled to present evidence or witnesses, or see the evidence against him and confront any witnesses.[79] He is not entitled to be present in front of the decision-maker, who is the same person "prosecuting" the case and not an independent third-party.[80] There is no appeal process, and while there are standards that DHS attorneys are instructed to use, these standards are not judicially enforceable because it is entirely based on internal memoranda and unofficial relief.[81]

Finally, prosecutorial discretion is more subject to political or ideological influence.[82] Immigration judges are civil servants, not political appointees, and their careers are not dependent on maintaining the favor of those in power.[83] They make decisions on discretionary relief based on their personal assessment of the equities of the case.[84] While these assessments certainly can vary from judge to judge,[85] they are not based on

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76. *See generally id.* (discussing the potential pitfalls and consequences of uninformed immigrants "accepting or foregoing an offer of prosecutorial discretion from ICE").

77. *Id.* at 2.

78. *Compare id.* ("[M]ost pro se immigrants do not have access to information about what relief might be available to them. . . .") *with* 8 C.F.R. 1240.11(a) (requiring a judge in a removal proceeding to inform the alien of any potential relief available to him).

79. *See id.* at 7 ("[P]ro se immigrants whose immigration files have been deemed to provide an insufficient basis for administrative closure might not have the opportunity to present evidence of compelling factors . . . .").

80. *See id.* at 5 (recognizing that immigrants are sometimes unaware that their cases are even being considered).

81. Memorandum from John Morton, *supra* note 11.

82. *See, e.g.*, Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/10/AR2007061001229.html (reporting allegations of political appointees hiring immigration judges from 2004 to 2006).

83. *See id.* (reporting allegations of political appointees hiring immigration judges from 2004 to 2006). *See generally* U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., SPECIAL REPORT: AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 12 (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf ("It is improper to consider political affiliations when hiring for political positions.").

84. Goldstein & Eggen, *supra* note 82.

85. *See, e.g.* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 300, 303 (2007) (claiming immigration judge decisions have been criticized for lack of consistency from one judge to another). Though this article applies to asylum adjudication specifically, it can be expected that similar if not greater disparities exist in the more discretionary relief available under the cancellation provisions. *Id.*

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directives from political appointees.[86] Prosecutorial discretion, on the other hand, is based on memos issued by the Department of Homeland Security, which is run by a political appointee.[87] The Obama Administration appears to be pursuing prosecutorial discretion for political and ideological reasons, and arguably has even chosen certain discretionary criteria to please political constituencies.[88] The Obama Administration appears to be pursuing prosecutorial discretion for political and ideological reasons, and arguably has even chosen certain discretionary criteria to please political constituencies.[89] A new administration with different priorities, or completely opposed to using discretion in immigration enforcement, could radically alter the criteria by changing the degree of leniency, or eliminating the process altogether. Immigration relief will go from being relatively well-insulated from political influence to being at the mercy of whoever is elected President.[90]

Prosecutorial discretion essentially creates a second, parallel system for relief from removal, but one without the procedural protections that accompany the established, formal process.[91] In a way, a system based on prosecutorial discretion would be a throwback to how deportation decisions were made fifty years ago, before the administrative law revolution and the development of due process in administrative decision-making.[92] These developments are one of the triumphs of immigration law in the last half-century, and it would be a shame to see them thrown away in an ill-advised return to discretionary bureaucratic decision-making.

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86. *Id.* at 369.

87. *See* Memorandum from John Morton, *supra* note 11 (referring to several memoranda regarding prosecutorial discretion).

88. *See* Kephart, *supra* note 62 (accusing the Obama Administration of pandering to Latino Voters).

89. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013) (noting how the Obama Administration uses prosecutorial discretion as a tool to enforce matters beneficial to their interests).

90. *See* Mitt Romney, *Obama's Failure*, ARCHIVE.ORG/MITTROMNEY.COM, https://web.archive.org/web/20120920054945/http://www.mittromney.com/issues/immigration (highlighting Mitt Romney's opposition to prosecutorial discretion and his intention to abandon the policy if elected. "[I]nstead of taking a strong stand on illegal immigration, [President Obama] has ordered immigration officials to enforce immigration laws 'selectively,' leading to the dismissal of many deportation cases.").

91. *See generally* KATE MANUEL & TODD GARVEY, CONGRESSIONAL RES. SERV., PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013) (explaining how prosecutorial discretion is used in the immigration context).

92. *See id.* at 8 (noting the historical roots of prosecutorial discretion and how it was applied to cases years ago).

A. *The Struggle for Impartial Administrative Hearings: Wong Yang Sung*

Immigration attorneys and advocates fought a hard, and ultimately successful, battle to get the standards of the Administrative Procedure Act (APA) to apply to removal hearings.[93] The APA, passed in 1946, called for relative independence of hearing officers and judicial oversight of agency decisions.[94] Deportation hearings at that time, in which the deciding officer worked in the same office as the prosecuting officer, clearly did not comply with the standard of the APA, but questions arose as to whether the APA applied to deportation hearings.[95] This question was tested before the Supreme Court in *Wong Yang Sung v. McGrath*.[96]

In *Wong Yang Sung*, the petitioner appealed his order of deportation, arguing his hearing failed to comply with the APA.[97] The Supreme Court described the way in which the roles of prosecutor and judge were essentially combined in one officer.[98] A hearing in a proceeding for the deportation of an alien was presided over by a "presiding inspector" of the Immigration Service, who had not investigated that particular case but whose general duties included the investigation of similar cases.[99] There being no "examining inspector" present to conduct the prosecution, it was the duty of the "presiding inspector" to conduct the interrogation of the alien and the Government's witnesses, cross-examine the alien's witnesses, and "present such evidence as is necessary to support the charges in the warrant of arrest."[100] It might become his duty to lodge an additional charge against the alien and hear the evidence on that charge.[101] After the hearing, he was required to prepare a summary of the evidence,

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93. *See generally* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (explaining the purpose of the act is "[t]o improve the administration of justice by prescribing fair administrative procedure").

94. *See id.* ("[A]gency action is by law committed to agency discretion.").

95. *See id.* (reemphasizing the standard of the APA that explains, "[n]o officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, . . . participate or advise in the decision . . .").

96. *See* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), *superseded by statute as stated in* Ardestani v. Immigration and Naturalization Serv's., 502 U.S. 129 (1991) ("[A]dministrative hearings . . . must conform to the requirements of the Administrative Procedure Act . . . .").

97. *See id.* (explaining that, "[petitioner] sought release from custody by *habeas corpus* . . . upon the sole ground that the administrative hearing was not conducted in conformity with §§ 5 and 11 of the Administrative Procedure Act").

98. *Id.* at 45–48 (exemplifying the role of the presiding inspector).

99. *Id.* at 45–46.

100. *Id.*

101. *Id.* at 46.

proposed findings of fact, conclusions of law, and a proposed order, for the consideration of the Commissioner of Immigration.[102]

The Court cited a number of government studies criticizing the practice of combining the prosecutorial and judicial functions in agency decision-making, and found Wong Yang Sung's deportation hearing "a perfect exemplification of the practices so unanimously condemned."[103] The Court explained the APA was designed precisely for these kinds of decisions, writing:

> [T]he safeguards it did set up were intended to ameliorate the evils from the commingling of functions . . . [a]nd this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceedings, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved, and who often do not even understand the tongue in which they are accused.[104]

The government argued that the APA only applied to administrative hearings in which "adjudication [is] required by statute," and deportation hearing are required by court precedent but not by statute.[105] The Court, however, found that any administrative hearing required by law should be fair and meet the minimum standards of constitutional due process.[106] It wrote:

> When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.[107]

The Court found that the APA therefore should apply to deportation proceedings.[108]

The battle did not end there, however.[109] Shortly after the *Wong Yang Sung* decision, Congress passed the Immigration and Nationality Act

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102. *Id.*

103. *Id.* at 45.

104. *Id.* at 45.

105. *Id.* at 48.

106. *See id.* at 50 ("When the Constitution requires a hearing, it requires a fair one . . . .").

107. *Id.*

108. *See id.* at 51 ("We hold that the Administrative Procedure Act, . . . does cover deportation proceedings . . . .").

109. *See generally* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (establishing a new comprehensive immigration statute).

(INA), a comprehensive immigration statute that remains the statutory foundation of immigration law today.[110] The Act established a statutory hearing procedure that was less restrictive than what would be required under the APA.[111] A hearing officer could not conduct a hearing in which he was also the prosecutor, but those two functions could exist in the same office and under the same departmental supervision.[112] Additionally, the INA was made "the sole and exclusive" deportation procedure, specifically excluding it from coverage under the APA.[113] The continued applicability of the APA and its due process protections to deportation proceedings was thrown into question.[114]

B. *The Struggle Continues: Carlos Marcello*

This question ultimately was resolved in the case of Carlos Marcello, one of the most notorious organized crime figures in U.S. history.[115] After being brought to New Orleans at an early age by his Sicilian parents, "Marcello came of age in the 1920s in a city known for corruption, widespread lawlessness, open prostitution and gambling, as well as an entrenched, Sicilian-led organized crime operation."[116] After a string of childhood robberies, Marcello was sent to prison.[117]

> Upon his release from prison, Carlos was poised to begin what ultimately became one of the most successful criminal careers in U.S. history. He accomplished this by combining shrewd tactical and strategic sense, a deep appreciation for secrecy, ruthlessness, a deceptive demeanor, good luck, and—perhaps most importantly—the wisdom to hire a brilliant and energetic immigration lawyer named Jack Wasserman.[118]

While the federal government initiated deportation proceedings against him in 1953, based on a marijuana conviction, he successfully fought his deportation until he died peacefully in his home at an old age thirty years later.[119]

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110. *Id.* § 208.

111. *Id.*

112. *Id.*

113. *See id.* § 1252.

114. *See id.* (explaining how the finality of the decision of the Attorney General contradicts due process).

115. Daniel Kanstroom, *Deportation Saga of Carlos Marcello*, *in* IMMIGRATION STORIES (David A. Martin & Peter H. Schuck eds., 2005).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

One of the many legal tactics used by Marcello's attorney was to attack the constitutionality of the deportation procedure, an issue that ultimately ended up in the Supreme Court.[120] In *Marcello v. Bonds*,[121] the Supreme Court ruled that the APA did not apply to deportation hearings because of the detailed procedures for conducting such hearings set forth in the INA as well as the express statement by Congress in the INA that the procedures set forth in that Act were the "sole and exclusive means" of conducting deportation proceedings.[122] Justice Black, joined by Justice Frankfurter, dissented, arguing it is a violation of due process not to have impartial judges in these kinds of proceedings: "The idea of letting a prosecutor judge the very case he prosecutes or supervise and control the job of the judge before whom his case is presented is wholly inconsistent with our concepts of justice. It was this principle on which Congress presumably acted in passing the Procedure Act."[123] Because Marcello's hearing officer worked in the same office, and under the same supervisors, as the officer who brought the charges, he did not receive a fair hearing.[124]

Even though Marcello lost this particular legal battle, the ideas put forward by his lawyers and by the dissenting justices ultimately prevailed.[125] Though still not technically under the APA, deportation proceedings today comply with those standards in every essential respect.[126] Regulations issued in 1956 clearly separated the functions of prosecutor and judge in different officers.[127] In 1983, a new agency called the Executive Office for Immigration Review was created in the Department of Justice. The office included all hearing officers, now designated immigration judges, as well as the appellate Board of Immigration Appeals.[128] The prosecuting function was placed in the hands of licensed attorneys, first at the Immigration and Naturalization Service, and in 2005, in Immigration and Customs Enforcement in the Department of Homeland Security.[129]

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120. *See* Marcello v. Bonds, 349 U.S. 302, 302 (1955) ("The validity of the deportation order was challenged by petitioner in a habeas corpus proceeding.").

121. *Id.*

122. *See id.* at 309 ("The procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section. That this clear and categorical direction was meant to exclude the application of the Administrative Procedure Act . . . ").

123. *Id.* at 318 (Black, J., dissenting).

124. *Id.* at 302.

125. *See* Note, *The Special Inquiry Officer in Deportation Proceedings*, 42 VA. L. REV. 803, 809–10 (1956) (illustrating how regulations separated the functions of prosecutor and judge).

126. *Id.* at 809.

127. *See id.* at 809–10 (providing an overview of steps taken to separate different functions in Immigration Services).

128. Immigration and Naturalization Service, 48 Fed. Reg. 8038-40 (Feb. 25, 1983).

129. *Id.*

The separation of prosecutor and judge, in addition to the other key provisions of the APA, are present in deportation proceedings.

The separation of these two functions is seen as essential to checking the growing power of the administrative state. After the modern administrative state began to develop in the New Deal, the Attorney General established a Committee on Administrative Procedure charged with generating ideas, which would later be codified in the APA, about avoiding the dangers of overreaching executive power through administrative rulemaking and enforcement.[130] A key concept was the establishment of independent administrative judges or hearing officers any time an agency wanted to impose a penalty or withdraw benefits because an individual violated a statute or regulations.[131] This was seen as essential for two reasons. First, "investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal."[132] Second, "[a] man who has buried himself on one side of an issue is disabled from bringing to [his] decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."[133]

A deportation system based on prosecutorial discretion re-creates the very evil the APA and decades of hard-fought reform in administrative and immigration law were designed to erase. Much like in today's criminal justice system, prosecutorial discretion would create a second, parallel process for relief, but one without the protections provided by the more established, "official" process. DHS attorneys, much like criminal prosecutors, are not subject to the provisions of the APA, including the separation of investigative and decision-making functions, when using prosecutorial discretion.

> Contrast the largely stealth accumulation of adjudicative and executive powers in the prosecutor's office with the outward and obsessive concern about the consolidation of power in administrative agencies. Because the problem of combined powers was obvious from the birth of modern administrative agencies, administrative law devotes significant attention to the dangers of combining prosecutorial and adjudicative power.[134]

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130. *See generally*, U.S. DEP'T OF JUS., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) (reporting the findings of the committee).

131. *Id.* at 56.

132. *Id.*

133. *Id.*

134. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 887 (2009).

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None of this matters if prosecutorial discretion is merely an additional form of relief that in no way diminishes the power or effectiveness of the formal removal process. Even an arbitrary and unfair prosecutorial discretion is better than none at all as long as the formal process remains untouched.

In the criminal context, of course, that is not what happened. As administrative discretion became more powerful and prevalent, the jury trial became rarer and much more difficult for the accused.[135] As a result, administrative discretion and plea bargaining essentially replaced judicial trials as the means of adjudication in the vast majority of criminal proceedings. In theory, the terms of plea bargains are set by the expected outcome of trials, but the reality is that changes in substantive and procedural criminal law were made in order to facilitate plea bargains as the primary feature of the criminal justice system. The unintended, or arguably intended, effect was to diminish the role of due process trials in favor of administrative decision-making untouched by the standards of the APA.

IV. Lessons From the Legacy of Prosecutorial Discretion in the Criminal Justice System

The rise of prosecutorial discretion and plea bargaining in the criminal justice system has coincided with fewer trials and stricter punishment.[136] It has accomplished the precise opposite of what criminal defendants would want. Would the rise of prosecutorial discretion in immigration have the same effect, or, as advocates hope, would this time be different? To answer this question, we must look at whether and how prosecutorial discretion was the cause of these ill effects in the criminal justice system, and then look at whether those same features are in place in immigration law today.

A. *Prosecutors Have Taken Over the Criminal Justice System*

Prosecutors have gained tremendous power in the American criminal justice system, to the point where they have largely displaced judges and juries as the final arbiters in the great majority of criminal cases.[137] About 95% of convictions are obtained by plea bargain, without a judge

135. *Id.* at 871 ("In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies.").

136. Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399, 1407 (2012).

137. *See*, Lindsey Devers, Research Summary: Plea and Charge Bargaining 2 (2011), *available at* https://www.bja.gov/Publications/PleaBargainingResearchSummary

or jury determining guilt or punishment.[138] Under such a system, the prosecutor's decision about how to charge a particular defendant and under what terms to accept a guilty plea becomes the final adjudication for the vast majority of criminal defendants.[139]

The development of mandatory sentencing guidelines is an important part of this power shift from judges to prosecutors. Judges have little discretion to move sentences up or down since they are governed by mandatory minimums and sentencing guidelines.[140] Though the sentencing guidelines are technically not mandatory anymore, the large majority of judges still sentence according to the guidelines or only depart on a government motion.[141] Most government motions to depart downward are based on substantial assistance to the government or a government-approved plea bargain, and thus are also in the hands of prosecutors.[142]

Prosecutors have found it much easier to secure convictions at trial because crimes are defined more broadly. One example of this broadening is the intent requirement. Previous interpretations of criminal law required an intent to do something wrong; the person had to have a "guilty mind."[143] Now, intent is typically defined as "general intent" or the intent to do the thing that you did, excluding only accidental conduct.[144] The elimination of mens rea to find guilt in the large majority of criminal conduct has made it much easier for prosecutors to obtain convictions. As long as the prosecutor can prove certain specific acts, a jury is obligated to find guilt.[145]

.pdf (outlining the dangers of allowing prosecutors too much discretion as compared to judges).

138. *Id.* at 3.

139. *See Missouri*, 566 U.S. __, 132 S. Ct. at 1407 (discussing the importance of plea bargaining in the criminal justice system).

140. U.S. SENTENCING COMM'N, TABLE N: NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE, FISCAL YEAR 2011 1 (2011), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/TableN.pdf.

141. *See id.* (showing over 50% of sentences are either within the guidelines range or based on a government-approved departure, such as for substantial assistance or based on a plea bargain).

142. *Id.*

143. *See generally* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932) (analyzing the criminal element of a "guilty mind").

144. *See* Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 789 (2012) ("Federal and state courts often have said that what the presumption of mens rea really presumes is that the legislature meant to require "general criminal intent," as opposed to 'specific intent.'").

145. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 260–62 (2011).

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Additionally, juries may no longer decide on the correct level of punishment or engage officially in jury nullification. They may only decide facts, while leaving sentencing to judges and mandatory minimums. William Stuntz explains:

> Jurors at the time of the Founding were not the mere lie detectors that they have since become. They were moral arbiters; their job was to decide both what the defendant did and whether his conduct merited punishment. Criminal law meant whatever jurors said it meant; their will triumphed over even Blackstone's text.[146]

Juries served as a useful check on overzealous prosecutions because they were empowered to make moral judgments. Today, juries are confined to factual findings, and cannot stand in the way of a prosecutor, as long as he can prove the factual elements of a crime.

Not having to show wrongful intent or to worry about moral judgment of juries, the prosecutor needs to merely be able to prove the factual elements of a crime to ensure a conviction. That showing has become easier because a prosecutor often has a variety of overlapping criminal statutes to choose from with variations of proof requirements.[147] In today's criminal justice system, a single criminal incident can lead to multiple criminal charges, as long as each charge requires proof of at least one fact distinct from the others.[148] By picking and choosing how many and which particular crimes to charge, the prosecutor can define the level of punishment the defendant will receive, and by stacking multiple charges on each other for one incident, the prosecutor can make the severity of potential punishment so great the risk of trial will be too much for any rational defendant to take.[149] This is sometimes analogized to a menu:

> The bodies of law, state, and federal, that claim to define crimes and sentences do not really do what they claim. Instead, those bodies of law define a menu—a set of options law enforcers may exercise, or a list of threats prosecutors may use to induce the plea bargains they want. . . . The real law of crimes and sentences is the sum of those prosecutorial choices.[150]

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146. *Id.* at 84.

147. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 707–08 (2005).

148. *See* Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (finding an individual may be prosecuted under two statutes that prohibit the same criminal conduct so long as the legislature authorizes cumulative punishment under both statutes).

149. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520 (2001) (acknowledging how prosecutors will stack charges to raise the threatened sentencing thus increasing the chance of a plea bargain).

150. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004).

According to William Stuntz, a good example is the law of rape.[151] In the past, the government had to prove physical force, the absence of consent, and that the victim resisted to the limits of her ability.[152] Today, the resistance requirement is eliminated and the force requirement is substantially lower.[153] Moreover, the traditional, common law crime of rape is not really prosecuted anymore.[154]

> It has been replaced with a much broader law of sexual assault, with state codes defining a series of different types of coercive sexual contact. California's penal code defines seven forms of rape, three versions of statutory rape, . . . and six versions of what the code calls 'sexual battery': sixteen offenses in all.[155]

This trend is common across types of crimes.[156] With a menu of crimes to choose from, broadly defined, and with constrained juries, the prosecutor can largely be assured of guilt with sufficient factual proof, and thus can set the terms of punishment.[157]

The prosecutor can choose the punishment he wants by selecting the statute or statutes under which he conducts the prosecution, with varying mandatory sentences.[158] James Vorenberg explains:

> The decision whether to charge multiple offenses also enables the prosecutor to influence what penalties will be invoked. If the prosecutor believes the conduct was not serious, he can determine that the full sanctions of the law will not be imposed by filing only one of several possible charges.[159]

Likewise, there is often a felony version and misdemeanor version of the same crime, giving the prosecutor the choice of substantially different

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151. *See* STUNTZ, *supra* note 145, at 263 ("By substituting a list of overlapping offenses for a single crime, legislators offer prosecutors two ways to induce defendants to plead guilty.").

152. *Id.*

153. *Id.*

154. *See id.* at 263–64 (stating the law of rape has been replaced with a broader law of sexual assault).

155. *Id.*

156. *See id.* at 264 (describing how criminal litigation is doing a worse job at determining who committed a crime and those who did not).

157. *See id.* (stating Americans have decided to punish millions more criminal defendants with less justification than in previous years).

158. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981) (stating prosecutors choose which statutes deserve vigorous enforcement and therefore how plea bargaining should be used).

159. *Id.* at 1526 n.14.

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punishment for the same crime.[160] Sentence enhancements for "aggravated" versions of crimes and special statutes for repeat or professional offenders such as "three strikes" laws and RICO serve much the same purpose.[161] With assured convictions and a multitude of options, prosecutors wield tremendous discretion.[162]

This rise in prosecutorial power and discretion has not led to a wave of leniency.[163] To the contrary, as plea bargaining has become the norm, sentences have become harsher and the prison population has increased.[164] In the United States today, more than 2.3 million people—or greater than 1% of the adult population—are incarcerated.[165] These figures are very high in comparison to other countries[166] or previous periods in American history.[167] According to William Stuntz, "Imprisonment rates did not just rise sharply in the late twentieth century; those rates quintupled.[168] African American imprisonment rates came to exceed the rate at which Stalin's Soviet Union incarcerated its citizens."[169]

Of course, it could be a coincidence the rise of prosecutorial discretion in criminal justice coincided with more convictions and harsher punishment. But, history tells a different story. What we have seen is that the rise of prosecutorial discretion and plea bargaining in criminal law leads to lighter sentences on an individual basis but more and harsher sentencing at a systemic level.[170] In any individual case, a person takes a plea deal because he is receiving less punishment than he expects to get at

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160. *See id.* at 1529 ("[A] prosecutor can, by his choice of whether to charge a misdemeanor or a felony for the latest event, decide whether to invoke enhancement.").

161. *Id.* at 1529–30.

162. *Id.* at 1521 (arguing decisions prosecutors make "determine in large part who will be convicted and what punishment will be imposed").

163. *See id.* at 1551–52 (arguing however forceful the argument that prosecutorial discretion leads to leniency is, "it is unpersuasive when used to support prosecutorial discretion in general").

164. *See id.* at 1529, 1555 (describing how prosecutors can decide to give the harshest punishments based on ad hoc personal judgments, which results in longer prison sentences).

165. *See* Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds*, N.Y. TIMES (Feb. 29, 2008), http://www.nytimes.com/2008/02/29/us/29prison.html (stating "more than one in 100 American adults are behind bars").

166. *See id.* ("[T]he U.S. has less than 5 percent of the world's population, but it has almost a quarter of the world's prisoners.").

167. JUSTICE RESEARCH AND STATISTICS ASS'N, CRIME AND JUSTICE ATLAS 2000 (2000), *available at* http://www.jrsa.org/projects/Crime_Atlas_2000.pdf (illustrating the history of imprisonment in the United States).

168. STUNTZ, *supra* note 145, at 253.

169. *Id.*

170. *See generally* Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 4 (1979) (providing a history of plea bargaining in the U.S.).

trial.[171] However, convictions have become so easy for prosecutors in the vast majority of cases that many plea bargains consist of the proverbial "offer you can't refuse." Once the defendant is essentially forced to take a plea offer, it is simply a matter of adjusting threatened punishment (formal sentencing guidelines) sufficient to obtain "compromises" at the point the government actually wants. While the result may be the same in an individual case as if the government obtained a conviction and sentence at the desired level, the process is a whole lot easier for the government if the person confesses and agrees to be punished rather than challenges the accusations.

For example, if the government wants to punish armed robbers with five years of imprisonment, they can go about it two ways. They can set the punishment at that level and try to convict everybody they believe has committed that crime. Of course, those kinds of trials are expensive, time-consuming, and risk failure.[172] Or they can make the process of obtaining a conviction so easy it is almost assured for the prosecutor, set the punishment level at twenty years of imprisonment, and "offer" a defendant five years of imprisonment. The result may be the same, but the process was much easier and quicker and more certain, which enables a greater number of prosecutions with a near-perfect success rate.[173] By reducing the cost of prosecution and increasing the conviction rate to near 100% (because 95% confess and most of the rest are convicted at trial), the government can convict many more people. It is no wonder the explosion in plea bargaining has led to an explosion in incarceration in the United States criminal justice system.[174] So, does our experience in criminal law have anything to teach us about the effect of prosecutorial discretion on immigration law?

B. *Prosecutorial Discretion Was Central to the Growth of Prosecutorial Power*

The key lesson from criminal justice is that prosecutorial discretion tends to grow, expand, and eventually dominate the system. This domination results from prosecutorial discretion being a lot easier and more efficient than conducting trials and because it suits the interests of the

171. *See id.* at 31–32 (recognizing a guilty plea might result in lighter sentencing for defendants).

172. *See id.* at 41 (noting the "fact-finding mechanism has become so cumbersome and expensive that our society refuses to provide it").

173. *See* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 188 (2007) (writing "[p]lea bargaining may present an easy route to an impressive win rate . . . ").

174. *See* Liptak, *supra* note 165 (reporting the high rate of adult incarcerations in the U.S.).

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powers in the system—prosecutors, judges, and legislators.[175] Thus, in the criminal justice system prosecutorial discretion has grown from being an accidental power used occasionally by prosecutors and looked on warily by judges and legislators, to something embraced by judges and legislators (and, unfortunately, criminal defendants and their lawyers, much like immigrant advocates are doing today). It has finally been made central to the system such that the structure of the system itself was adapted to the needs of prosecutors in the exercise of their discretion.[176] The explanation behind this, and why deportation law will likely follow the same path, forms the heart of this article.

Just as in immigration law today, criminal law did not have plea bargaining—at least officially recognized—until well into the nineteenth century.[177] In describing the history of plea bargaining, Albert W. Alschuler concluded that, "plea bargaining was essentially unknown during most of the history of the common law."[178] The discretionary power of prosecutors lay in the power to charge.[179] This power became so useful that it expanded into plea bargaining, which became so useful that it overtook the system.[180] When prosecutors are given the discretion to bring charges or withhold charges, they are also given the power to punish and reward.[181]

George Fisher explains how charge bargaining worked in the case of Josiah Stevens in a Massachusetts court in 1808.[182] Mr. Stevens was charged with four counts of violating the liquor laws.[183] The records state:

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175. *See* Vorenberg, *supra* note 158, at 1522 ("There is a broad and casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials.").

176. *See id.* (pointing out the leading case invalidating the use of prosecutorial discretion is nearly a century old).

177. *See* Alschuler, *supra* note 170, at 5 (stating while it is hard to prove conclusively that plea bargaining in criminal law did not exist prior to the nineteenth century, most evidence points to the fact that it did not).

178. *See generally id.* at 4 (providing a history of plea bargaining in the U.S.).

179. *See* Vorenberg, *supra* note 158, at 1524 (stating the power to charge is at the core of prosecutors' power).

180. *See id.* at 1523 (examining why prosecutorial power in "its present expanded form is both inconsistent with the fair and effective administration of justice and unnecessary to serve the purposes offered to justify it").

181. *See id.* at 1525 (laying out three ways discretionary power affects prospective defendants).

182. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 21 (2003) (detailing Josiah Stevens' 1808 prosecution over a liquor license law).

183. *Id.*

> [T]he said Josiah [Stevens] says he will not contend with the Commonwealth.[184] And Samuel Dana Esquire Atty. for the Commonwealth in this behalf says that in consequence of the defts. Plea aforesaid he will not prosecute the first third and fourth counts against him any further.[185]

At a time when plea bargaining was not officially recognized, the prosecutor achieved the same end by charging multiple counts and dropping some in exchange for a guilty plea to the other.[186]

A de facto plea bargain occurred because the power existed and it was in both parties' best interests.[187] The prosecutor could win a conviction and clear his docket, the defendant could mitigate his risk, and the judge was either forced to go along (because he cannot force the prosecutor to pursue certain charges and cannot force a defendant to plead not guilty) or perhaps found it useful to clear his docket as well.[188] The point is, this event occurred in the absence of actual plea bargaining simply through the prosecutor's discretion to charge. The even more important point—a theme throughout modern criminal law and, soon, in immigration law as well—is that legal bargaining frequently occurs because it is often in the interests of both parties to do so.[189] Moreover, when the parties can find a legal mechanism by which they can engage in bargaining, such as prosecutorial discretion, they will quickly grab the opportunity and adapt that legal mechanism to their desire to deal.

In fact, at the time of Josiah Stevens' "charge bargain," plea bargaining was not permitted and any guilty plea was looked at suspiciously.[190] Albert Alschuler writes about another case in Massachusetts from the same era, this one from 1804.[191] A man was accused of raping and killing a child and pleaded guilty to rape and murder.[192] The court told him that he was under no obligation to plead guilty and could force the govern-

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184. *Id.*

185. *Id.*

186. *See id.* at 112–13 (exemplifying one instance of prosecutorial multiple charging in which prosecutors promised "to withhold a motion to sentence in exchange for the defendant's plea").

187. *See* Vorenberg, *supra* note 158, at 1553 (explaining how incentives to reduce guilty pleas are mutually advantageous).

188. *See id.* at 1532 (explaining plea bargaining helps the prosecutor deal with the obstacles of docket congestion and the risk of acquittal).

189. *See id.* at 1553 (explaining how incentives to reduce guilty pleas are mutually advantageous).

190. *See* FISHER, *supra* note 182, at 22 (stating there were only three cases around the time of the Stevens case that were clear plea bargains).

191. *See* Alschuler, *supra* note 170, at 9 (detailing a case in which "a twenty-year-old black man was accused of raping a thirteen-year-old white girl" and later killing her).

192. *Id.*

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ment to prove its charges, but he insisted on pleading guilty.[193] The judge then gave him time to consider the issue and ordered the clerk not to record the plea.[194] When he again pleaded guilty upon his return, the judge inquired into his sanity, and then examined "under oath, the sheriff, the gaoler [sic], and the justice . . . as to . . . whether there had been tampering with him, either by promises, persuasions, or hopes of pardon."[195] Only after satisfied on these counts did he accept the plea.[196] Even in the face of this attitude towards guilty pleas, bargaining occurred between prosecutor and defendant when to do so was in their mutual interest.[197]

This pattern of de facto plea bargaining, though officially prohibited, continued throughout the nineteenth and into the twentieth centuries, apparently because it was found to be useful and convenient.[198] Officially, during this period, guilty pleas were supposed to be free of the taint of deal-making: "the courts affirmed guilty plea convictions only in cases in which there had been no bargains (or at least no explicit bargains) and in which the defendants' alleged expectations of leniency seemed to lack a plausible basis."[199]

This official condemnation of bargaining for guilty pleas contrasted with the "flourishing practice" of plea bargaining that existed in fact.[200] Alschuler concludes, "The gap between this judicial denunciation of plea bargaining and the practice of many urban courts at the turn of the century and thereafter was apparently extreme."[201] The plea bargain system survived and grew at this time, not through any official encouragement, but rather in the face of official resistance, apparently because it worked in the same way any successful bargain works: both sides preferred the deal over the cost and risk of not making the deal (e.g., going to trial).[202] As long as such win-win deals can be found, and the prosecutorial power

193. *See id.* (informing the defendant of the consequences of his plea).

194. *See id.* (stating the court gave the defendant a reasonable time to consider his plea).

195. *Id.*

196. *See id.* (stating only after a full inquiry into whether the prisoner had been tampered with was the plea allowed).

197. *See* Vorenberg, *supra* note 158, at 1553 (explaining how incentives to reduce guilty pleas are mutually advantageous).

198. *See* Alschuler, *supra* note 170, at 6 (describing a time when even though plea bargaining was met with disapproval, plea bargaining still became the dominant method of resolving criminal cases).

199. *Id.* at 22.

200. *Id.* at 24.

201. *Id.*

202. *See id.* at 26 (describing the mutual benefits and corrupt atmosphere of urban criminal justice as the factors that led to the growth of plea negotiations).

and discretion exists to make it happen (as it now will in deportation law), such deals can be expected.

Despite the fact plea bargaining undoubtedly has worked in favor of tougher and more certain criminal punishment, it aroused opposition from law-and-order types in its early days and was eagerly sought after by criminal defendants.[203] This pattern is much the same as prosecutorial discretion in immigration law today, which is in its infancy, with immigration advocates wholeheartedly in favor while opponents see back-door amnesty.

Thus, the Illinois Crime Survey lamented that plea bargains "give notice to the criminal population of Chicago that the criminal law and the instrumentalities for its enforcement do not really mean business."[204] Compare this statement with that of the nineteen Republican senators who argued that prosecutorial discretion in removal proceedings "send a message that your Administration is turning a blind eye to those who have broken our immigration laws."[205] Likewise, Roscoe Pound denounced plea bargains as "the cheapest way out, and amounting in effect to license to violate the law."[206] Compare this statement to the Center for Immigration Studies argument that prosecutorial discretion in immigration will "undermine federal immigration law and its enforcement."[207]

Plea bargaining was a natural outgrowth of prosecutorial discretion, and was in fact, merely the official recognition of something that already could and did happen.[208] While it was opposed by law-and-order types early on, it did not take long for prosecutors and legislators to see how it could be turned to their advantage.[209] Once prosecutors and legislators recognized the power of plea bargaining and prosecutorial discretion, the substantive criminal law transformed in light of these new possibilities.[210]

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203. *See id.*

204. *Id.* at 30.

205. Letter from Chuck E. Grassley, *supra* note 60.

206. Alschuler, *supra* note 170, at 30 (quoting ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 184 (1930)).

207. Kephart, *supra* note 62. Prosecutorial discretion is driven by "political agendas that run contrary to both economic and national . . . invit[ing] illegality and insecurity." *Id.*

208. *See* Alschuler, *supra* note 170, at 9 (finding judges would use their discretion to bargain with defendants to change their plea).

209. *See id.* at 21 (contrasting that prosecutors were able to conserve resources and gain information from plea bargains, while the courts saw the practice as exerting unnecessary power over defendants).

210. *See* Barkow, *supra* note 134, at 877 (showing how broad laws have given prosecutors ample discretion to bargain with defendants).

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C. *Prosecutorial Power and Discretion Expand Because They Suit the Interests of those in Power*

Prosecutors have taken over the criminal justice system because they have been given so much discretion.[211] The reason their power and discretion continually grows, to the point where it has taken over the system, is that it suits the interests of those who control the system—specifically, legislators and prosecutors.[212] By giving prosecutors significant leeway in determining when to bring criminal charges, legislators relieve themselves of having to make tough choices as to what conduct should be punishable.[213] A legislature free of responsibility for the consequences of the laws it passes will enact laws which are the most politically expedient. In criminal law, this means tougher and tougher laws on crimes or vices such as drug dealing, drunk driving, physical abuse and it also means the rise of three-strike repeat offender.[214] It is rare to see Congress lighten a punishment or remove a criminal statute from the books; criminal law only seems to move in one direction.[215] Stuntz explains, "[l]egislators thus have little reason to focus carefully on the consequences of the prohibitions they write. That makes criminal legislation more a bidding war than an exercise in horse-trading."[216]

A classic modern example is crack cocaine, commonly known as crack, possession of which was punished, until recently, at the same level as possession of one hundred times the equivalent of powder cocaine.[217] Crack constituted a vice which became a national obsession because it was associated with criminality and racial minorities, and therefore provoked fear among white America.[218] David Sklansky explains, "[w]hites strongly associated crack with the same minority group with which they associated heroin—inner city blacks—and there was widespread fear that use of the drug was expanding beyond the ghetto into suburbia."[219] Rather than a discussion of how to punish this crime without punishing too many people

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211. *See id.* at 921 (concluding prosecutors have been given more power and they are to control the entire trial process).

212. *Id.*

213. *Id.* at 872–73.

214. *Id.* at 880.

215. *Id.*

216. STUNTZ, *supra* note 145, at173.

217. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995).

218. *See generally id.* (discussing the sentencing disparity for trafficking crack cocaine compared to other federally mandated drug trafficking maximum sentences, which may be a result of racial bias and "unconscious racism on the part of Congress.").

219. *Id.* at 1293.

or punishing them too harshly, the congressional debate was a contest of one-upsmanship.[220]

Excessive punishment could be dealt with through plea bargains and overbreadth could be dealt with through prosecutorial discretion.[221] With the responsibility for those tough choices passed on to prosecutors, congressmen only had to worry about demonstrating their tough-on-crime bona fides to their constituents.[222] Stuntz explains what happened: "In congressional debates preceding passage of the bill, one member proposed a weight/sentencing ratio of twenty to one; another suggested fifty to one. One hundred to one, the ratio finally enacted, was the highest anyone proposed. Crack-powder legislation was the product of an auction, not a political compromise."[223]

Likewise, immigration law only gets tougher, and this trend can be expected to continue as Congress is further relieved from responsibility through prosecutorial discretion.[224] Without having to worry about the potential negative headline of the deported grandmother or veteran or honors student, Congress is free to pass tougher laws with a broader sweep. It will now be up to DHS attorneys to make those kinds of tough decisions, and blame for individual unpopular decisions will lay with the actor seen to be most directly responsible, the DHS attorney failing to exercise leniency, rather than the legislators who enacted the overbroad legislation.[225] As Stuntz points out, when the public turned against the impeachment proceedings against President Clinton, they blamed the prosecutor for overzealous enforcement, not the legislators who created overbroad perjury and obstruction of justice laws.[226] If this dynamic holds, immigration will follow the pattern of criminal law a century ago in the early phase of its shift toward a system centered on prosecutorial dis-

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220. *See generally id.* at 1283 (detailing the ebb and flow of Congressional measures which attempted to either treat people equally through drug sentencing that is result oriented and efforts to create processes to make people equal through laws that address these racial disparities).

221. *See* Albert W. Alschuler, *The Changing Plea Bargaining*, 69 CAL. L. REV. 652, 689 (1981) (identifying how plea bargaining can potentially cause excessive sentencing).

222. *See* STUNTZ, *supra* note 145, at 173 (writing how legislators usually ignore trade-offs and compromises because only a few well-funded interest groups take an interest in criminal legislation leaving defendants' interests largely unrecognized).

223. *Id.*

224. *See* Memorandum from John Morton, *supra* note 11 (granting prosecutorial discretion and relieving Congress of some of its immigration enforcement abilities).

225. *See id.* (authorizing DHS attorneys to make the tough decisions of whether to prosecute). *See generally* KATE M. MANUAL & TODD GARVEY, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013), *available at* https://fas.org/sgp/crs/misc/R42924.pdf (discussing the wide latitude given to DHS attorneys and Congress' ability to limit such authority).

226. Stuntz, *supra* note 149, at 548.

cretion, with "laws that criminalized far more conduct and authorized punishment of far more people than Congress's purposes could plausibly justify."[227]

This point is crucial, because Congress sets the terms of both federal criminal law and deportation law. If their incentive is to pass harsher and harsher laws, prosecutorial discretion as a way of softening immigration enforcement will backfire. Our experience in criminal law tells us that prosecutorial discretion had precisely that effect. The rise of prosecutorial discretion changed the calculation made by legislators in enacting new criminal provisions and expanding existing ones.[228] This expansion of the criminal code and broader sweep of criminal provisions, in turn, only made prosecutorial discretion that much more important, to handle the increased number of people going through the system. In this way, it became a self-reinforcing system. Stuntz concludes, "[e]nforcement discretion dramatically changes the trade-offs legislators face when defining crimes. Indeed, it almost eliminates trade-offs. Where prosecutors can be selective, legislators will tend to see criminal law as a one-way ratchet."[229]

Likewise, prosecutors and judges shaped courtroom rules and practices to accommodate the convenience and necessity of increased plea bargaining.[230] Once plea bargaining became an option, and prosecutors and judges saw how useful it was in controlling outcomes and clearing cases, the practices and procedures of the court system adapted themselves to the perpetuation and growth of plea bargaining.[231] George Fisher explains,

> Though plea bargaining has no power of its own, the judge and prosecutors who dictate what goes on in our criminal courtroom do have power—and they have strong interests in seeing plea bargaining thrive. I do not suggest that they act in concert or even that they always know the consequences of their actions, but only that they try to make plea bargains happen. And in so doing, they raise up those procedural institutions that help plea bargaining and beat down those that threaten it.[232]

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227. STUNTZ, *supra* note 145, at 174.

228. *See generally* MANUAL & GARVEY, *supra* note 225 (identifying how prosecutorial discretion has changed Congress' approach to enacting immigration laws).

229. Stuntz, *supra* note 149, at 547.

230. *See generally id.* at 505 (identifying how judges and prosecutors attempt to make plea bargaining easier).

231. *See* DEVERS, *supra* note 137 (showing the overwhelming majority of cases result in plea bargaining).

232. FISHER, *supra* note 182, at 180.

Fisher gives the example of probation, which originated in Massachusetts as a way of getting around a legislative prohibition on plea bargaining.[233] Prosecutors wanted to enter pleas for the large number of liquor law violations they prosecuted in the mid-1800s.[234] However, the legislature banned unilateral prosecutorial dismissals in 1852, thus preventing charge bargaining.[235] Prosecutors got around this ban by using the "on file" system.[236] They were allowed to put a case "on file," which meant that the case was not closed or dismissed but was also not brought for final disposition in front of the judge; the cases were merely postponed indefinitely.[237] Prosecutors would ask the defendant to plead guilty and his case was placed "on file."[238] This was the precursor to probation because no formal conviction would lie as long as the defendant complied with the terms of the deal, yet the prosecutor was entitled to obtain a conviction if the terms were not met.[239] Thus, probation was established and flourished because it accommodated the desire to use prosecutorial discretion and to make deals on cases.[240]

Under this view, there is an ever-present desire from all parties to find ways to plea bargain because there is always the possibility of a mutually beneficial deal: an outcome each party can live with, no risk of an unacceptable outcome and fewer transaction costs for everybody. Plea bargaining is a constant will just looking for a way. When that way is not explicitly provided for, it adapts existing institutions like overlapping charges and on-file probation to suit its needs. When it is explicitly allowed, it flourishes because it suits everybody's interests. The lessons for immigration law are clear: the introduction of robust prosecutorial discretion invites plea bargaining (whether officially recognized or not), and if the criminal law is any guide, once plea bargaining takes hold it will grow and come to dominate the system at the expense of the existing, formal process of adjudication in immigration courts.

D. *The Laws Changed in Order to Promote Plea Bargaining*

Since both prosecutors and legislatures find it in their interests to have plea bargaining, the system changes to make it more likely, even inevitable, that criminal defendants will take an offered plea over the risk of

233. *Id.* at 62–90.
234. *Id.*
235. *Id.* at 62.
236. *Id.* at 69–77.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 62–90.

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going to trial.[241] Perhaps the most important way this happens is by making the official sentence so onerous that no rational person would take the risk of going to trial. In this way, the official sentence becomes less an expression of what the legislature considers appropriate punishment for an offense than an instrument to be wielded by prosecutors in order to strengthen their hand in "bargaining" the defendant to the actual desired outcome. The official sentence becomes a threat used to coerce the defendant into pleading guilty and voluntarily accepting the punishment.[242]

Indeed, federal prosecutors lobby Congress for tougher laws for the explicit purpose of increasing their negotiating power for plea bargains.[243] Rachel Barkow found that "prosecutors consistently lobby for harsher sentences to enhance their position during plea negotiations," citing a string of examples from congressional testimony.[244] Congress knowingly passes laws with punishment beyond what they actually think is fair with the intention of promoting plea bargains that will result in what they would consider to be fair punishments.[245] "Congress therefore routinely passes laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips and to obtain what prosecutors and Congress would view as the more appropriate sentence via a plea instead of trial."[246]

Plea bargaining and prosecutorial discretion do not exist in a vacuum. It simply becomes a way for the government to obtain the same results, but quicker and more efficiently, and without the bother of due process and judicial interference.[247] The system adjusts to the new reality, because the government controls the system and is thus able to still achieve the desired results. However, they are able to do so by making an end-run around the burdensome process established in the latter half of the twentieth century to protect individuals' rights against government overreach.

Just as legislatures overcame initial resistance to plea bargaining once they realized how it could suit their interests, judges moved from skepticism to a full embrace and accommodation of plea bargaining once they

241. *See* DEVERS, *supra* note 137, at 3 (reporting about 95% of convictions are a result of plea bargaining).

242. Barkow, *supra* note 134, at 881.

243. Rachel E. Barkow, *Administering Justice*, 52 UCLA L. REV. 715, 728 (2005).

244. *Id.*

245. Barkow, *supra* note 134, at 880.

246. *Id.*

247. *See generally id.* (detailing the recent trends of prosecutorial overreaching and the freedom they enjoy to enter cooperation agreements, accept pleas, and recommend sentences for criminal defendants).

realized how it made their jobs easier.[248] No case better exemplified this than *Bordenkircher v. Hayes* in which the Supreme Court sanctioned the process described above of creating official punishments that are actually harsher than desired in order to coerce defendants into pleading guilty.[249]

In that case, the defendant, Paul Hayes, forged a check from a local business to buy groceries for $88.30.[250] Despite the seemingly minor nature of the crime, the prosecutor offered him only a five-year sentence because Hayes had two previous felony convictions.[251] The prosecutor further threatened that if Hayes did not take the deal, he would be prosecuted under Kentucky's habitual offender ("three strikes") law, which would lead to a life sentence.[252] Hayes rejected the deal, went to trial, was convicted and received a life sentence.[253] He appealed to the Supreme Court for a federal writ of habeas corpus on the grounds he was punished vindictively by the prosecutor for exercising his constitutional right to a jury trial.[254] The Supreme Court upheld the conviction, finding that plea bargaining is an essential part of the system and in the interests of all parties: "The guilty plea and the often concomitant plea bargain . . . are important components of the country's criminal justice system. Properly administered, they can benefit all concerned."[255] The fact that the punishment was excessive to the actual crime did not make it unconstitutional. Prosecutors need to be able to threaten harsh punishment in order to make the plea bargaining system work.

Plea bargaining is a transaction that, like any other transaction, should suit the interests of both parties involved. The defendant gets a lighter sentence, and the prosecutor gets a certain result at lower cost. Because each party calculates that he gains from entering the deal, they search for ways to make it happen. When criminal prosecutors only had discretion in regard to bringing charges, the bargaining took the form of charge bargaining. When prosecutors gained other powers, such as the "on-file" system in nineteenth century Massachusetts, it was adapted to provide a new way of plea bargaining. When plea bargaining was officially endorsed by the law, in the late twentieth century, it took off like a rocket

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248. *See id.* ("Indeed, it is precisely because of a heavy workload that judges have been complicit in the development of plea bargaining in the first place.").

249. *See* Bordenkircher v. Hayes, 434 U.S. 357, 372 (1978) ("The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. . . . Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion.").

250. *Id.* at 365.

251. *Id.* at 358.

252. *Id.*

253. *Id.* at 359.

254. *Id.* at 360.

255. *Id.* at 361–62.

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ship. Finally, when lawmakers decided it was in their interest as well, the laws themselves changed to facilitate even more plea bargaining.

The end result of all this plea bargaining in criminal law was quite different than what a single plea bargain—looked at in isolation—would indicate. Rather than an aggregation of sentence reductions, leading to less punishment over all, the plea bargaining regime in modern American criminal justice has ended in greater punishment, more punishment, swifter punishment, and more certain punishment.

Scholars used to theorize that plea bargaining was unambiguously good for criminal defendants because it gave them the opportunity to reduce their sentence, and if they did not like the offer, they could still invoke their right to trial. Rachel Barkow explains,

> If a defendant could costlessly take his or her case to trial, the prosecutor's role in charging and accepting pleas would be less remarkable. After all, if a defendant could exercise his or her jury trial rights without penalty, then all the charging and bargaining would take place in the shadow of that trial regime, and presumably the prosecutor's freedom would be bounded by the expected outcome at trial.[256]

That is not what happened.[257] By ratcheting up sentences, making convictions easier through broad and overlapping charges, and taking discretion away from judges, legislatures changed the trial system in order to promote plea bargaining.[258] As other scholars have pointed out, "[w]e now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas."[259] The system of administrative discretion, with far fewer protections for criminal defendants, effectively replaced rather than supplemented the judicial process.[260]

E. *Prosecutorial Discretion and Plea Bargaining Grow Wherever they Can*

The growth of prosecutorial discretion to overtake formal adjudication, and the warping of the formal system in the process, is not specific to the

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256. Barkow, *supra* note 134, at 878.

257. *Id.*

258. *Id.*

259. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003); *see also* Barkow, *supra* note 134, at 881 (showing prosecutors frequently use Congressional expansion of prosecutorial discretion to acquire more guilty pleas than trials).

260. Barkow, *supra* note 134, at 880–83 (outlining factors that allow prosecutorial overreaching).

American criminal justice system.[261] When prosecutorial discretion is introduced in any legal system, it tends to expand and thrive.[262] This is probably because it is a way of resolving cases that, at least at the micro level, suits the interest of all parties involved, even if at the systemic level it works against the interests of those being prosecuted.[263] The government actors—legislators and prosecutors—running the system quickly recognize how prosecutorial discretion and plea bargaining can get them better and more certain results with less hassle and expense.[264] Before we go too far down this path in immigration law, we ought to look at other legal systems to see where it is heading.

European criminal justice systems, for example, make extensive use of prosecutorial discretion.[265] Traditionally, many scholars believed that plea bargaining and prosecutorial discretion were unique to American criminal law and not a feature of European systems.[266] European criminal proceedings were structured as official inquiries with the goal of finding correct outcomes, while American proceedings were structured as contests with the goal of achieving conflict resolution.[267] The nature of the proceedings and the role of prosecutorial discretion in those proceedings, therefore, was supposedly a function of the ideological and structural features of the respective systems.[268]

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261. *See, e.g., id.* at 892 (imposing strict requirements for agencies even though it may be prone to "prosecutorial overreaching."); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1551–58 (1978) (explaining that in France, very few cases are investigated and most are sent straight to court for judgment).

262. *See, e.g.*, Langbein & Weinreb, *supra* note 261, at 1556–57 (comparing a defendant's ability to present her case at trial in French legal system to the American legal system which tends to favor the prosecutorial interests).

263. *See* Barkow, *supra* note 134, at 879 (describing the benefits and disadvantages of trying to maximize judicial efficiency by creating disincentives for risking trial); *cf.* Langbein & Weinreb, *supra* note 261, at 1557 (showing even though the prosecuting official has some power over the accused, the accused is not bound by the official's decision).

264. *See* Barkow, *supra* note 134, at 879 (recognizing Constitutional protections have enabled prosecutors to use those laws to avoid the trial process).

265. *See, e.g.*, Langbein & Weinreb, *supra* note 261, at 1552 (describing the "correctionalization" process in France that gives the prosecuting official the ability to screen cases effectively reducing the number of cases that go to trial).

266. *Cf. id.* at 1566 (showing although Germany allows some prosecutorial discretion, it is more often used by police for investigations). The authors show ways in France that similar mechanisms for plea bargaining, but also emphasizes that the practice of plea bargaining is strongly disfavored in France. *Id.* at 1556.

267. *Compare* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1491–92 (2010) *with* Vorenberg, *supra* note 158, at 1525 (implying prosecutors must weigh the possible sentences in the best interest of the system).

268. *See generally* Langbein & Weinreb, *supra* note 261.

However, it is increasingly clear that prosecutorial discretion has found its way into European criminal justice systems.[269] Erik Luna and Marianne Wade found, "[a]ll told, prosecutorial discretion is extensive and robust throughout Europe, where cases can be effectively, if not legally, adjudicated by prosecutors. In contrast to the continental assumption that case-ending discretion only applies to minor cases, prosecutorial adjudication is occurring in virtually every category of crime."[270] Contrary to the prior assumption that European criminal justice still maintained a system in which the judge was central to adjudication, these authors found that European prosecutors increasingly resemble their American counterparts in their power to adjudicate cases outside the trial process.[271] "In many [European] countries, prosecutors have an array of case-ending options (sometimes shared with the police) coupled with powers to control investigations, sway court decisions, and even obtain conviction with a great degree of independence."[272]

Even in international war crimes prosecutions, an area of law where prosecutors would seem to be especially intent on obtaining the correct and fair punishment, plea bargaining plays a major role.[273] Nancy Combs recounts the story of Dražen Erdemović, a former soldier in the Bosnian Serb army who participated in the massacre of approximately 1,200 unarmed Muslim men at Branjevo Farm in Pilica.[274] He reported himself to international authorities and agreed to plead guilty and provide information to the prosecutors in exchange for a lenient sentence recommendation.[275] In exchange, the prosecutors agreed to only pursue the charge of war crimes and not the charge of crimes against humanity and recommend a seven-year sentence.[276] The court took this plea and recommendation into account in adjudicating the case, noting that the admission of guilt saved the court "the time and effort of a lengthy investigation and trial."[277]

Both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda independently set-

269. *See generally id.*

270. Luna & Wade, *supra* note 267, at 1487.

271. *See id.* at 1488, 1491–92 (arguing prosecutors are even better situated to achieve fairness and consistency in judicial proceedings).

272. *Id.* at 1442.

273. *See, e.g.*, Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 109–14 (2002) (describing the trial of Dra_en Erdemovic in Belgrade where Erdemovic's cooperation in the prosecution of war crimes resulted in the dismissal of an alternate war crime charge).

274. *Id.*

275. *Id.*

276. *Id.* at 113.

277. *Id.* at 114.

tled on plea bargaining as a way of handling their dockets, even though these were not systems set up to be American-style courts and they started out looking at plea bargaining with suspicion.[278]

> Thus, both Tribunals came to endorse plea bargaining. Flush with the success of obtaining custody over more and more important defendants, the Tribunals now must also succeed in managing their dockets effectively. With that need in mind, they turned to plea bargaining. In this way, the Tribunals' functional need for expeditious alternatives to necessarily lengthy trials trumped the structural and ideological features that seemed to militate against plea bargaining.[279]

Even in a system that was not comfortable with plea bargaining and was clearly established for normative reasons, plea bargaining took hold because it was found to be necessary to a well-functioning system.[280]

F. *The Same Conditions Prevail in Immigration Law*

Would the same thing happen in immigration? For plea bargaining to thrive, there would need to be a will and a way. The parties would have to express a desire to enter into such bargains and there must be a legal mechanism by which to do so.[281] There is every reason to believe there is an equal desire among immigration litigants as among criminal litigants to bargain because the pressures and incentives are essentially the same.[282] Immigrants in removal proceedings want the lightest penalty possible just as criminal defendants.[283] DHS attorneys, like criminal prosecutors, want to enforce the laws fairly and correctly, as they see it,

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278. *Id.* at 145.

279. *Id.* One of the main reasons Tribunals disfavor plea bargaining is that it distorts the factual basis for the conviction by allowing the accused to plead to lesser crime which they believe fundamentally alters the criminal conduct itself. *Id.*

280. *Id.* at 147–48. Specifically, prosecutors appreciate that plea bargains are made voluntarily by defendants thereby benefiting both parties. The prosecutors gain valuable information for convicting more serious offenders, and defendants are able to get a lower sentence. *Id.*

281. *See generally* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).

282. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 494–95 (2007) (showing that prosecutors gain valuable information on more serious offenders while offering immigrants the opportunity to stay in the country); *see also* Barkow, *supra* note 134, at 880 (implying prosecutors benefit by the defendant's information while defendant's wish to get a lower sentence).

283. *See, e.g.*, Symposium, *Association of the Bar of the City of New York Symposium on Immigration and Criminal Law*, 4 N.Y. CITY L. REV. 9, 22 (2001) (illustrating a case where a West Indian woman plead to a lesser charge in order to avoid jail).

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while processing their caseload efficiently.[284] Judges want to achieve fair results, while also mindful of their large dockets.[285] Congressmen and senators want to be tough on both criminals and immigration violators, while avoiding the kinds of excesses that could backfire on them.[286] The same or equivalent actors are in place, with the same incentives and pressures.[287]

Actors in the criminal system have found that plea bargaining, properly structured, helped all of them achieve their goals, especially the actors with the real power: prosecutors and legislators.[288] Prosecutors got the results they wanted and did it more efficiently, while legislators got to be tough on crime while deflecting blame for potential excesses.[289] Judges may not have been thrilled, but they had little power to change the system because legislators and prosecutors worked together to take matters out of their hands.[290] Criminal defendants were the big losers, but the system was well-established before they realized this; in any event, they are not an organized lobby with the ability to influence the system.[291] They are forced to act individually, and no matter how bad plea bargaining as a system is for them, the individual pleas are almost impossible to refuse, by design.[292] Therefore, both prosecutors and defendants have the will to enter bargains, and judges and legislators either cannot stand in the way or do not want to.[293] The will is there and the law provides a way, leading to the prevalence of plea bargaining in criminal justice.[294]

There is every reason to expect the same dynamics to play out in deportation hearings.[295] All of the actors are similarly postured and incen-

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284. *See* Wadhia, *supra* note 2, at 42 (emphasizing DHS prosecutors focus on achieving outcomes that help manage their resources).

285. *See id.* at 45 (emphasizing DHS judges use administrative procedures to save government resources).

286. *See id.* at 49 (arguing Congress has placed the burden on enforcing laws onto federal agencies).

287. *See* Legomsky, *supra* note 282, at 476 (explaining the similarities between criminal and immigration punishments).

288. Barkow, *supra* note 134, at 880.

289. *See generally id.*

290. *Id.* at 881.

291. *See id.* at 882 (criticizing the system the way lawyers have greater incentive for their clients to plead, than to take the case to trial).

292. *See id.* at 881 (explaining the cost-benefit to lawyers with other client options versus lawyers and public defenders who rely on CJA wages as a result of legislative enactments).

293. *See, e.g., id.* at 880.

294. *See id.* at 879 (stating Congress continues to enact laws that promote the use of plea bargaining).

295. *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (stating the state and immigrants have the desire to enter plea bargains that are the best interest of both parties).

tivized, and they can be expected to behave the same.[296] DHS attorneys will want to enter pleas for the same reason as criminal prosecutors, because immigrants can be coerced in the same fashion as criminal defendants. Legislators will find it in their interest to encourage such pleas, and judges can be rendered powerless to stop it. The will to bargain will certainly be there. Up to now, however, there has largely been no way to do it in the deportation context. But, that will change with the advent of prosecutorial discretion.

Just like charge bargaining was the opening round in the triumph of plea bargaining in the criminal system, prosecutorial discretion in immigration will open the door to such bargaining in immigration.[297] But, how will it play out in practical terms? There are a number of ways prosecutorial discretion could facilitate a shift towards administrative decision-making in deportation decisions and create the kind of system we see in criminal law.[298]

V. FORECAST FOR THE IMMIGRATION SYSTEM

Prosecutorial discretion in deportation proceedings will open the door to the kind of bargaining that exists in criminal law and for much the same reason.[299] The actors are similarly positioned and will have similar incentives.[300] How will each actor react to this change?

Congress wants to be seen as tough on illegal immigrants and criminal aliens just as they want to be seen as tough on criminals.[301] Free of having to balance this impulse against the danger of overzealous enforcement, congressmen can be expected to enter bidding wars to outdo each other on making the system harsher.[302] Indeed, there is evidence that this process already started even before the policy of heightened prosecutorial discretion began last year.[303]

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296. *See id.* (showing prosecutors and defendants are faced with the same pressures and incentives as citizen defendants).

297. *See* Legomsky, *supra* note 282, at 495 (suggesting hallmarks of criminal law practice, such as plea bargaining, are likely to be used in immigration proceedings).

298. *See, e.g., id.* (recognizing immigration judges offer immigrants the opportunity in the country if they will withdraw their asylum application).

299. *See, e.g., id.*

300. *See Padilla*, 559 U.S. at 373 (showing that prosecutors and defendants are faced with the same pressures and incentives as citizen defendants).

301. Barkow, *supra* note 134, at 880.

302. *See, e.g.*, Legomsky, *supra* note 282, at 497 (enacting a sequence of laws that each take a step further making punishments harsher).

303. *See id.* at 496 (discussing authority given to local and state officials to arrest anyone whom they believe to "deportable" thereby giving them full discretion in that area).

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In 1996, Congress passed two laws, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), to significantly increase deportations.[304] These laws strengthened immigration enforcement and streamlined the deportation process in several ways.[305] They expanded the list of deportable offenses, particularly those deemed "aggravated felonies" and, thus, not subject to equitable relief.[306] They limited eligibility for discretionary relief, particularly for non-permanent residents.[307] They created expedited removal procedures for newly arriving aliens without proper documents.[308] They limited judicial review by eliminating habeas review for removal decisions, limiting motions to reopen and reconsider, and eliminating other forms of judicial review for certain kinds of procedures.[309] Finally, they vastly expanded the use of mandatory detention, to include most aliens with criminal convictions.[310]

When these laws proved to be excessive in ways that were politically harmful, congressmen criticized the INS for enforcing the laws too strictly and not using their discretion correctly.[311] INS General Counsel Bo Cooper explains,

> I should just mention that it was quite interesting when the 1996 laws began to take effect, and there began to emerge these spectacular

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304. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1890–91 (2000) (arguing the IIRIRA and the AEDPA have made deportation an "automatic consequence of criminal conviction"); *see also* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214 (including charges for alien terrorists). *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (mandating new regulations for deportation of illegal immigrants).

305. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1948 (2000) (criticizing the new laws for adopting a "take-no-prisoners approach with regard to the deportation of criminal aliens").

306. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1278; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 242A, 110 Stat. 3009-546, 723.

307. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 504(k), 110 Stat. 1214, 1263; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240(b)(7), 110 Stat. 3009-546, 591.

308. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 503, 110 Stat. 1214, 1259-60; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 589.

309. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240, 110 Stat. 3009-546, 593.

310. *See, e.g.*, *id.* § 302, 110 Stat. 3009-546, 581.

311. *See* Symposium, *supra* note 283, at 28 (criticizing the INS for not enforcing the laws correctly, even when INS does not have the power to act).

> examples of removal orders of people—someone who may have come here at a very young age, who may not even speak the language or have any other significant links with the country of nationality, who may be a lawful permanent resident, who may have developed all kinds of ties in the community . . . . There'd be people interviewed on the news who none of us watching would think of as the kind of person that's subject to removal—the criminal alien. So many in Congress began to say, "Well, it's not that the laws are too harsh, it's just that the INS is not making careful decisions about how to enforce them."[312]

Note that this impulse, to blame the executive branch for not using its discretion to alleviate the harshness of the law, was present even before the new policy of using prosecutorial discretion systematically took hold.[313] This was when it was just assumed that the INS had some inherent level of discretion, and it was despite the fact that one purpose of the law was to reduce the use of this discretion.[314] Congressman Barney Frank explains,

> What Congress said was, "We are going to take away all of your discretion." The bill as passed purported to take away prosecutorial discretion. The purpose of the bill was to say to the INS, "Deport them all." It is none of your business to say, "Stay here, or not stay here. Get rid of all of them." . . . Next, the horror stories came out. The first reaction, as Mr. Cooper said, was that some of the members of Congress who supported a bill which had the very purpose of telling the INS not to use any discretion, then criticized the INS for not using the discretion which they had taken away. I went and said, "We've got to pass the bill." The first response of the Republicans who passed the bill, Lamar Smith of Texas in particular, was, "Oh no, it's the INS's fault. They should have exercised discretion."[315]

Congress was looking to blame the INS for the failure to exercise discretion even before it was clear how much discretion they had.[316] Now that prosecutorial discretion is prominently established as a policy of systematic relief, Congress' ability to foist responsibility on INS is even greater.[317] And, criminal law teaches us that when Congress can relieve

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312. *Id.* at 27–28.

313. *Id.* at 28.

314. *See id.* (specifying the INS had no discretion on who to grant benefits to or who to release from detention).

315. *Id.* at 32–33.

316. *Id.* at 33.

317. *See id.* (stating INS has a signed from Congress to exercise their discretion in immigration proceedings).

itself of the consequences of excessive punishment, those punishments become a lot harsher.[318]

Indeed, with some relatively minor adjustments to the rules, it would be quite easy for the immigration system to make deportation mandatory for any undocumented or criminal alien, eliminate all judicial discretion, and rely exclusively on prosecutorial discretion to weed out undeserving cases. As a result of the 1996 changes, many more undocumented and criminal aliens face mandatory removal and fewer removable aliens are eligible for equitable relief.[319] It would simply be a matter of taking these changes further in the same direction. By expanding those categories of removable offenses that are mandatory (i.e., eliminating the current distinction between aggravated felonies and other removable offenses)[320] and eliminating the last vestiges of formal equitable relief (cancellation),[321] Congress could easily create a system in which judges are out of the business of making discretionary decisions and all discretion is in the hands of prosecutors. In one fell swoop, all of the hard-fought progress in administrative decision-making since the 1950s will be gone, and we would return to the days of the immigration officer with the file acting as prosecutor and judge.

DHS attorneys can be expected to react like their criminal prosecutor counterparts. They will quickly see the advantages of a system that puts them in control. They can largely dictate the outcome they want, and are saved the burden of having to win a trial and prove their case in front of a neutral judge. This process has already started. Under the new prosecutorial discretion policy, DHS attorneys are offering administrative closure to some aliens in removal proceedings.[322] Administrative closure simply closes a case without prejudice, thus taking it off the docket but

318. *See* Barkow, *supra* note 134, at 880 (expressing when Congress passes new sentencing laws, prosecutors then have wide discretion to decide punishments).

319. Morawetz, *supra* note 305, at 1939.

320. *See* 8 U.S.C. § 1229b(a)(3) (2006) (noting how the current system distinguishes between an alien convicted of an aggravated felony who is ineligible for discretionary relief, as opposed to an alien with a removable offense that may be eligible for discretionary relief).

321. *See id.* § 1229b (identifying ways an alien can seek equitable relief permitting cancellation of their removal).

322. *See generally* 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?pagewanted=all (indicating a trend in DHS policy to keep immigrants with families and no criminal record, outside of removal proceedings for the time being). *Id.* ("As of May 29, immigration prosecutors had examined 288,361 cases, according to new official figures.").

allowing DHS to re-initiate proceedings at any time.[323] This is essentially the same as the "on-file" system used by criminal prosecutors in Massachusetts in the nineteenth century.[324] That system was the forerunner of the modern probation system and facilitated plea bargains in an era when they were otherwise not permitted.[325] Administrative closure could easily be adapted to become a form of probation for undocumented or criminal aliens.[326] They would be asked to concede removability, and their file is administratively closed, meaning DHS will not pursue deportation at that time but retains the right to do so in the future.[327] In this way, the alien is "on probation" and any misstep can lead to automatic deportation.

To the outside observer, it may appear that there is less to negotiate over in a deportation hearing than a criminal setting. Deportation would seem to be an all-or-nothing decision as opposed to the gradations of punishment available in criminal law. But the reality is more complicated.[328] A good example is the existing practice of voluntary departure. Under this law, certain aliens are given the option of voluntarily leaving the country instead of being deported.[329] Many people take this option because it is better than deportation in several ways.[330] It happens quickly, and therefore saves the alien from having to wait several months, often in detention, for his trial.[331] There is no formal bar to re-entering the country, as there would be with a final order of removal.[332] It is

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323. *See Matter of* Amico, 19 I. & N. Dec. 652, 654 n.1 (BIA 1988) ("The administrative closing of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations.").

324. *See generally* FISHER, *supra* note 182 (examining the on-file plea bargaining and the trend towards increased probation).

325. *See id.* ("For putting cases on file *was* probation . . . probation grew more advanced over time as probation officers came into being, but *procedurally*, the on-file mechanism was the same practice Massachusetts later exported to the nation and the world under the label 'probation.'").

326. *See Matter of* Amico, 19 I. & N. Dec. 652, 654 n.1 (BIA 1988) (noting how administrative closure does not result in a final order, similar to that of a probation procedure).

327. *See id.*

328. *See* Padilla v. Kentucky, 559 U.S. 356, 379–81 (2010) (detailing examples of issues that arise in the context of a criminal immigration case, suggesting how the entire field is complex and challenging by stating, "[C]itizens are not deportable, but '[q]uestions of citizenship are not always simple.'").

329. 8 U.S.C. § 1229c(a)(1) (2006).

330. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 478–79 (2013) (noting the increase in the number of people who have chosen the voluntary departure option).

331. *Id.* at 479.

332. *See* Immigration and Nationality Act, 8 U.S.C. § 1182 (2012) (distinguishing between a final order of removal where the bar to re-entry is ten years (or twenty years if it is

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therefore already an attractive option to take voluntary departure rather than pursue equitable relief for many aliens, and can be made even more attractive, if necessary, by creating more separation between it and deportation.[333] For example, the government could make it easier for a voluntarily departed alien to re-apply for admission, or increase the time or obstacles for a deported alien to apply to re-enter the country.[334]

In fact, in much the same way criminal defendants are often given offers they cannot refuse, voluntary departure could essentially be imposed on aliens by making it the only real option.[335] If Congress expands mandatory removal to include all undocumented and criminal aliens, and places equitable relief fully in the hands of DHS attorneys, aliens can be forced to take voluntary departure. The DHS attorney would simply tell the alien that he can either take voluntary departure or DHS will get an order of removal from a judge. Since removal is mandatory, the threat is certain, and since an order of removal has worse consequences than voluntary departure, no rational defendant will turn down the offer. Under such a system, deportations become much more efficient. DHS can essentially order someone to leave the country voluntarily or else face the certain consequence that an immigration judge will "order" DHS to remove him involuntarily. With prosecutorial discretion, and a few adjustments to current law, such a system could easily be established.

Just as criminal law has accurately been described as a "menu of options" for prosecutors rather than an actual description of intended consequences,[336] immigration law would provide DHS attorneys a menu of options for handling aliens with criminal or immigration violations. The most lenient option is to simply dismiss the case. Next down the spectrum, DHS attorneys could administratively close the case, akin to plac-

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a second or subsequent deportation) as opposed to a voluntary departure where this rule does not apply); Lee Koh, *supra* note 330, at 479.

333. *See* Lee Koh, *supra* note 330, at 509 (finding at least 160,000 stipulated orders of removal were entered through May 2010, with steady increases since 2004, indicating this option is not only attractive to aliens, but to judges as well by reducing workloads and clearing dockets).

334. *See* Immigration and Nationality Act, 8 U.S.C. § 1182 (2012) (illustrating the current re-entry bar for a deported alien is ten years).

335. *See* HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 1 (2013), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf (discussing how the United States' plea bargaining system can force criminal defendants to feel pressured into taking unfavorable offers to avoid other alternatives). "[I]f [criminal defendants] go to trial . . . [sentences] can be 'so excessively severe, they take your breath away.'" *Id.* at 1–2.

336. *See* Stuntz, *supra* note 150 (noting the wide variety of procedural options available to prosecutors in criminal law).

ing someone on probation.[337] Next, they could "offer" a form of voluntary departure, forcing the alien to leave the country but with the possibility of return in the foreseeable future.[338] Finally, he could seek a final order of removal from an immigration judge,[339] the equivalent of going for the death penalty or the long prison term. Immigration law then becomes the sum of DHS decisions on how to penalize conduct rather than the decisions made by Congress and immigration courts. Decisions as to appropriate punishment are still being made, but without the trouble of procedural due process and democratic decision-making.

The roles of the other two actors in the system—judges and immigrants—are easiest to describe because they will largely become passive observers of a system dominated by Congress and DHS.[340] Judges will likely lose their discretionary power to DHS attorneys.[341] They have already lost a lot of their discretionary power, and that loss can be expected to continue, possibly until all discretion is taken away from them.[342] They will still be empowered to resolve disputes over administrative law, but, if Congress does its job right in making deportation broadly applicable to undocumented and criminal aliens, such disputes will be rare. Even under today's system, questions of removability are rarely in dispute and are typically conceded by the alien.[343] In the vast majority of cases, the real power of the judge is deciding on equitable relief.[344] Once that

337. *See Matter of* Amico, 19 I. & N. Dec. 652, 654 n.1 (BIA 1988) ("The administrative closing of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations.").

338. *See* 8 U.S.C. § 1229c(a)(1) (2006) (defining the certain conditions of voluntary departure, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense . . . ").

339. 8 U.S.C. § 1231(a)(1)A (2006).

340. *See generally* Vorenberg, *supra* note 158 (demonstrating in the criminal law system, how the discretion of the judges are being limited, causing them to play more of a passive role).

341. *See* Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 334 (1978) (discussing the effect of agencies having discretionary power and the limited role judges play in such situations).

342. *See* Vorenberg, *supra* note 158, at 1522, 1525 (recognizing the increase of prosecutor control and the decrease of judicial control).

343. *See, e.g.*, *Matter of* Amico, 19 I. & N. Dec. 652, 659 (BIA 1988) (providing an example of an alien conceding to removability).

344. *See* Morawetz, *supra* note 305, at 1938–39 (noting the factors judges consider when balancing the equities, such as "whether the person had shown rehabilitation, whether deportation would hurt family members, and whether the person had strong ties to his or her country of origin").

power is removed, he will have little role other than to issue orders of removal at the request of DHS attorneys.[345]

On a collective basis, immigrants are somewhat better positioned to act as a lobby than criminal defendants because the group is more defined and there are more established organizations who advocate on their behalf.[346] Hispanics are reported to have growing political power.[347] There is some question, however, as to how effective such lobbying would be and in what shape it may take form.[348]

Based on past experience, their legislative advocacy has not proven effective.[349] These groups have not been successful at passing even the DREAM Act, which would protect a narrowly defined group of the most sympathetic aliens, much less their real goal of comprehensive immigration reform. In addition, they would have to advocate, not for immigrants generally or for a sympathetic class of immigrants, but for immigrants who have committed crimes or broken immigration law, a much less sympathetic subset of the immigrant population. Naturally, their efforts would be opposed by the very strong instincts in Congress and among the public to punish criminals and illegal immigrants. Reforms to the criminal justice system have not happened even though we all are potentially subject to it, making it seem unlikely that the public would be moved to reform the deportation system, which most of us know with certainty we will never be caught up in. Moreover, these advocates would have to contend with the same arguments used against criminal defendants—that the pleas are voluntary and they are free to challenge them in court.[350] In any event, if criminal law is any guide,

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345. *See id.* (noting how this power has already been removed after implementation of the 1996 reforms by "[V]irtually eliminating . . . the individualized assessm ent of the appropriateness of deportation. . . .").

346. *See* IMMIGRATION ADVOCATES NETWORK, http://www.immigrationadvocates.org (last visited Jan. 19, 2014) (listing multiple established organizations in place providing advice on legal advocacy concerning immigration).

347. *See* David S. Broder, *Soaring Hispanic Population Will Have a Political Impact*, WASH. POST (Apr. 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/02/AR2010040201935.html (explaining increased political power can be attributed to facts such as the appointment of Justice Sotomayor and the Hispanic Community being the largest and fastest-growing minority group).

348. *Id.*

349. *See* Ashley Feasley, *The Dream Act and the Right to Equal Educational Opportunity: An Analysis of U.S. and International Human Rights Frameworks as They Relate to Education Rights*, 24 ST. THOMAS L. REV. 68, 72–75 (2012) (highlighting the legislative history of the DREAM ACT and the decade long struggle to pass the act through Congress).

350. *See generally* Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV.

Congress will deflect the blame onto DHS attorneys for not using their discretion rather than their own decisions to create overbroad laws.

Even if all these obstacles were overcome, there are two additional issues that will severely weaken the power of aliens to affect the system. First, the system will largely be established by a series of individual decisions by aliens in removal proceedings. On an individual basis, aliens will formally have the option of taking an offer of administrative closure, voluntary departure or the like, or going to trial. Unfortunately, like criminal defendants, an illegal alien will have only one rational option.[351] These aliens will take the plea, just as criminals do, and the system will reflect that.[352]

Second, immigrants and their advocates are unlikely to change the system because, at least now, they enthusiastically support the robust expansion of prosecutorial discretion.[353] But, just as in criminal law, the changes will be gradual and imperceptible, and none will be explicitly tied to prosecutorial discretion. Prosecutorial discretion simply changes the incentives and pressures of the various actors, and those actors will respond to those incentives and pressures, but the hand of prosecutorial discretion will be hidden and indirect.[354] Just as in criminal law, once the role of prosecutorial discretion in these changes is understood, the system will be so well-established, it will be very difficult, if not impossible, to change it.[355]

To be clear, this scenario is not far-fetched and is entirely foreseeable—legislatively, politically, and historically.[356] The legislative changes would not have to be significant and could easily be accomplished within the current legal structure.[357] It would simply be a matter of moving further down the road in the direction we are already heading after the 1996

3599, 3615 (2013) (noting after a defendant accepts a plea bargain, they do have the ability to challenge it in court).

351. *See generally* Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, *supra* note 150, at 2553 (discussing plea bargaining and the limited options available for criminal defendants).

352. *Id.* (explaining how self-interested criminals would much rather take a plea bargain than risk a strict sentencing at trial).

353. *See generally* Vorenberg, *supra* note 158 (noting how prosecutorial discretion is "unjustifiably broad" and casually accepted).

354. *Id.* at 1522.

355. *See id.* at 1573 (explaining how a change in the current prosecutorial discretion in criminal law would require reform from outside the prosecutorial ranks).

356. *See generally id.* (explaining reforms in the criminal law system have already been imposed to limit the exercise of discretionary power).

357. *See generally* Morawetz, *supra* note 305 (illustrating how the 1996 reforms are an example of a legislative change already accomplished).

reforms.[358] We have already been moving towards more grounds of removability, less eligibility for equitable relief, less judicial review, and stricter enforcement.[359] A continuation of these trends to their logical conclusion, combined with prosecutorial discretion, will lead to a system of broad, mandatory removability, with discretionary relief fully in the hands of DHS. Moreover, these changes are entirely consistent with the political and institutional pressures on the various actors.[360] Congress will want to look tough and deflect hard choices, prosecutors will want to aggregate power and avoid trials, aliens will seek relief wherever they can find it, and judges will have no choice but to go along for the ride.[361] Historically, these changes would not be unprecedented.[362] Indeed, they would constitute a return to the system as it was half a century ago.[363]

These changes are therefore not a nightmare scenario of things that could happen. They are a foreseeable consequence of prosecutorial discretion in light of our experience in other areas of law.[364] Before moving on to alternatives to prosecutorial discretion, however, other possible ways in which the government could use prosecutorial discretion to their advantage in ways that may not necessarily be in the interest of immigrants need to be explored.

One possibility is the increased merger of criminal and immigration law.[365] Criminal offenses are increasingly punished through the immigration laws and immigration violations are increasingly punished through the criminal laws.[366] This merger of the two areas of law from both directions, so-called "crimmigration," is much remarked upon.[367] If

358. *See id.* at 1938–39 (explaining the 1996 deportation provisions).

359. *Id.* at 1939.

360. *See* Vorenberg, *supra* note 158, at 1522 ("Large federal subsidies from the Law Enforcement Assistance Administration during the 1970s encouraged the nation's police agencies to impose greater centralized direction and more civilized standards of conduct on individual officers.").

361. *See id.* at 1522, 1525 (proving how this has already taken affect in the criminal law context regarding prosecutors and judges).

362. *Id.*

363. *Id.*

364. *See generally id.* at 1521 (examining the change of prosecutorial discretion and its effects on criminal law).

365. *See* Aaron Haas, *Profiling and Immigration*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 4 (2011) ("Today, immigration enforcement is mediated through the criminal justice system, and local and state police are encouraged to actively participate in finding and detaining undocumented aliens.").

366. *Id.* at 23.

367. *See generally*, Jennifer M. Chacon, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Legomsky, *supra* note 282; Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011) (demonstrating the common usage of the term in modern-day immigration vernacular).

prosecutorial discretion develops predictably, and deportation decisions are effectively placed in the hands of federal government attorneys, it is easy to see how the decision to prosecute becomes fully merged with criminal sentencing. At the level of federal criminal trials, whether or not to deport a criminal alien becomes part of the bargain that a criminal defendant strikes with the government in resolution of his criminal case.[368] For example, an alien defendant subject to removal could agree to a guilty plea and a harsher sentence in exchange for the government's agreement not to seek removal, or could agree to removal in exchange for a lighter prison sentence.[369] In this way, prosecutorial discretion in removal proceedings gives the government one more carrot or stick to use in plea negotiations.[370] It empowers the federal government further by giving it more leverage against a criminal alien through a more integrated merger of the two areas of law, with power over both placed in the hands of federal government attorneys.[371]

The increasing prosecutions of illegal entry and illegal re-entry offenders, particularly in the border areas, is one area of criminal law where this would seem to be particularly useful.[372] There has been an explosion of federal prosecutions in the Southwest due to the use of illegal entry and re-entry criminal laws to prosecute immigration violators.[373] Due to these huge caseloads, the federal government created "fast-track" or "early disposition" programs.[374] Under this policy, federal prosecutors decline to charge illegal entrants with a crime that carries a five to fifteen year sentence in exchange for a plea to a lesser crime with a two-year

368. *See* Padilla v. Kentucky, 559 U.S. 356, 356 (2010) (noting how deportation is a part of the penalty that may be imposed on a noncitizen criminal defendant).

369. *See* Immigration and Nationality Act, 8 U.S.C. § 1228(c)(5) (2012) (displaying such a merger of criminal and immigration sentencing is already provided for under the law and is as follows: "The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both.").

370. Rebecca Schendel Norris, *Fast-Track Disparities in the Post-Booker World: Re-examining Illegal Reentry Sentencing Policies*, 84 WASH. U. L. REV. 747, 750 (2006).

371. *Id.*

372. Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT'G REP. 311, 312 (2009) (describing the praise judges in the border districts have given the program).

373. *Id.* at 311–12.

374. *See* Sarah C. White, *The Good, the Bad, and the Disparate: Analyzing Federal Sentencing in the Border Districts, 1996–2008*, 76 BROOK. L. REV. 867, 876 (2011) (referring to the congestion of dockets in border areas created by immigration offenders).

sentence along with a waiver of certain rights and procedures.[375] He must waive indictment, enter a guilty plea at the first hearing, waive all appeals of sentencing issues, stipulate to the sentencing guideline range and the actual sentence of two years, and agree not to seek any downward adjustments and departures.[376] This policy started in California in the 1990s, and was formally endorsed by the Ninth Circuit.[377] Congress sanctioned the expansion of the program to other border districts in the PROTECT Act of 2003, and it quickly became the predominant way of conducting such prosecutions.[378] These programs are, therefore, like plea bargaining on steroids, with all of the problems of plea bargaining but in greater force.[379] Given the government's success at efficiently coercing immigration violators through these programs, it is easy to see how an agreed deportation could be made a part of the bargain, upon the merger of decision-making power in both criminal and immigration law in the hands of federal prosecutors.[380]

This possibility may seem to be less applicable at the state level, where the vast majority of crimes are prosecuted.[381] After all, unlike at the federal level, state prosecutors belong to a different government than DHS attorneys.[382] Nevertheless, the federal government has been successful at achieving state and local cooperation in immigration enforcement.[383] State and local law enforcement officers and jails now routinely serve the interests of immigration enforcement, even sometimes against their will.[384] There is no reason to believe this policy approach could not be extended to state and local prosecutors and district attorneys as well.

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375. Norris, *supra* note 370, at 751.

376. *Id.*

377. United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995) (affirming the court "find[s] absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice").

378. *See generally* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 667–76 (2003) (amending the federal sentencing guidelines manual).

379. *See generally* Haas, *supra* note 365, at 18 (describing the effects of localization of immigration enforcement on local governments).

380. Norris, *supra* note 370, at 750.

381. *Contra* Alschuler, *supra* note 170, at 27 (reporting 90% of federal convictions were guilty pleas in 1926, which is about the same percentage as today).

382. *See* DEP'T OF HOMELAND SEC., CREATION OF THE DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/creation-department-homeland-security (last visited Jan. 27, 2015) (describing how the Department of Homeland Security is a federal, Cabinet-level department).

383. *See* Haas, *supra* note 365, at 9 (expounding on this success by stating that the size of local law enforcement places them on the front lines of immigration enforcement).

384. *See id.* at 17–18 (discussing the significantly greater role local officials are asked to take in immigration enforcement).

Many state and local prosecutors will voluntarily cooperate with immigration enforcement. They may believe in stronger immigration enforcement or state laws may force such cooperation. Additionally, they may see it as a way of removing a criminal from their community, or at least see the usefulness of having an extra bargaining chip for plea bargains.[385] If voluntary cooperation is not forthcoming, the federal government could try to force the issue legally or use the power of the purse to compel cooperation.[386]

Moreover, such a merger of state criminal enforcement and federal immigration enforcement would not be unprecedented.[387] For decades, state courts were authorized to make "judicial recommendations against deportation" (JRADs), which despite the name, were considered binding on the federal government.[388] That is, the decision to deport was merged with the criminal sentence in the hands of the state criminal judge.[389] Some modified version of this policy could put the power in the hands of state and local prosecutors, thus giving them greater leverage to exact tougher criminal sentences and orders of removal.[390] A more fully integrated merger of criminal and immigration law in the hands of prosecutors, therefore, strengthens the hand of prosecutors to control outcomes in both systems.[391]

With the power to dictate outcomes and bargain with removable aliens, DHS attorneys can start to use such power in the ways that prosecutors do.[392] Specifically, they may find it useful to use one alien against another.[393] Prosecutors "flip" witnesses, using plea bargaining with a lower-level criminal defendant to obtain information and cooperation against a higher-level defendant.[394] Such "flipping" is a feature of conspiracy and organized crime prosecutions.[395] The temptation to do the same thing in

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385. Norris, *supra* note 370, at 750.

386. *See generally* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (depicting the government's ability to amend acts to require cooperation with its initiatives).

387. *Padilla*, 559 U.S. 356, 356, 362 (2010) (describing the effects of judicial recommendations against deportation).

388. *Id.* at 362 ("JRAD[s] had the effect of binding the Executive to prevent deportation . . . ").

389. *See id.* (indicating the interpretation of the statute was to consistently give judges "the conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.").

390. Norris, *supra* note 370, at 750.

391. *Id.*

392. *Id.*

393. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1328 (2003) (describing the benefits of flipping multiple defendants against each other).

394. *Id.*

395. *Id.*

immigration prosecutions will be great. Immigration violations, by their nature, tend to involve networks of people, whether human trafficking, drug and weapons smuggling, or document and identification fraud. Immigrants rely on networks of support within their ethnic communities, and therefore a typical immigrant will know other immigrants, including undocumented and out-of-status immigrants. They will also know how he was smuggled into the country, how he received false papers, and who in his community provides these and other illegal services.

Once prosecutors have coercive power over aliens, they can be expected to use it in ways that help them in their jobs.[396] ICE will want to go after the smuggling networks, criminal gangs, and other networks of support upon which immigrant communities rely, and they will see obtaining cooperation from individual aliens as useful in this endeavor.[397] The June Memo specifically allows for this kind of coerced cooperation, including on its list of discretionary factors: "whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the US Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others."[398] DHS uses other immigration benefits, such as visas, to reward cooperation with law enforcement, so use of prosecutorial discretion in this way would simply be an extension of this existing practice.[399] Greater discretion in the hands of the Department of Homeland Security could lead to DHS using its newfound power to achieve its objectives, such as using aliens against one another to combat organized immigration violations and crimes.[400]

Prosecutorial discretion is unlikely to be the unmitigated positive that it is perceived to be by most grassroots activists and immigrant groups.[401] One likely outcome is the transfer of discretionary authority away from

396. *See id.* (describing the benefits of flipping multiple defendants against each other).

397. *See id.* (describing a 1998 study that shows that flipping multiple defendants against each other is beneficial).

398. Memorandum from John Morton, *supra* note 11.

399. An alien who has been a victim of certain crimes and cooperates with authorities in the investigation or prosecution of the crime may be eligible for a U visa. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U) (2012). A person in possession of critical reliable information concerning a criminal organization or enterprise who is willing to supply such information to law enforcement may be eligible for an S visa. *Id.* at § 1101(a)(15)(S) (2012). Victims of trafficking who cooperating with law enforcement in investigating and prosecuting the offenders may be eligible for a T visa. *Id.* § 1101(a)(15)(T).

400. Kumar Katyal, *supra* note 393, at 1328.

401. *See* White, *supra* note 374, at 892 (claiming scholars have criticized prosecutorial discretion).

judges to the Department of Homeland Security. This consequence is not far-fetched conjecture, but rather is what would be expected based on what we have learned from other areas of law. The political and institutional pressures will push the important players, particularly Congress and DHS attorneys, in that direction. The legislative changes would not need to be substantial to make it happen, and it would not be without historical precedent. Such a transfer of power will lead to more, swifter and more certain deportations, and will be disastrous for immigrants. Additionally, it could have other consequences, such as the increased merger of criminal and immigration law and the turning of immigrants against each other through prosecutorial coercion.

VI. SOLUTIONS AND CONCLUSIONS

Prosecutorial discretion is enthusiastically supported by the immigration bar and advocacy organizations because it is seen as the solution, at least temporarily and perhaps permanently, to the problem of harsh immigration enforcement and the inability to convince Congress to reform the system.[402] They pushed the Obama Administration to adopt this policy as a cornerstone of a more lenient enforcement system.[403] However, other attorneys recognize that such a policy will create more problems over the long run, and advocates will rue the day they supported, and even pressed for, these changes. A reader who accepts what is in this article may still wonder what the author proposes to fix the problem. The current system is clearly broken and leads to unjust results, and legislative reform seems impossible for the foreseeable future.[404]

The author proposes two better alternatives. First, we should appreciate the system of judicial discretion that currently exists, and push for its expansion rather than policies that will almost certainly lead to its further retraction. Second, if we are forced to accept prosecutorial discretion, we should add substantial procedural protections to avoid a situation where administrative discretion becomes simply an inferior substitute to judicial discretion.

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402. *See* Luis Gutierrez, *Floor Speech Supporting Prosecutorial Discretion for DREAM Act-eligible Immigrants*, CONGRESSMAN LUIS V. GUTIERREZMEDIA CENTER, (July 19, 2012), https://gutierrez.house.gov/floor-speech-supporting-prosecutorial-discretion-dream-act-eligible-immigrants (displaying CongressmanSenator Luis Gutierrez and 100 other CongressmenSenators support prosecutorial discretion).

403. *See* CONGRESSMAN LUIS V. GUTIERREZ, *supra* note 402 (stating Luis Gutierrez and his supporters wrote to President Obama to thank him for his action on prosecutorial discretion).

404. *See* White, *supra* note 374, at 883 (detailing the disparities in fast-track use and how these disparities prevent the program from reaching its goals).

A. *Protect and Promote Judicial Discretion*

Despite the criticism surrounding the current system, particularly that from immigration advocates, cancellation—the primary process for judicial equitable relief—actually works pretty well for aliens in removal proceedings. In fact, its main liability is that not enough aliens are eligible for the relief. If a lawful permanent resident with a criminal conviction applies for cancellation of removal, he is given an individual hearing in front of an immigration judge, known as a LPR cancellation.[405] Likewise, other aliens with US citizen relatives and at least ten years of continuous presence in the U.S. are also given an individual hearing, known as a non-LPR cancellation.[406]

The judge is instructed to look at a series of equitable factors, such as length of presence, family ties, rehabilitation, work history, criminal history, immigration record, and other factors.[407] For LPR cancellation, the judge then makes a totality of the circumstances decision as to whether each alien should have removal "canceled" and be allowed to stay in the country.[408] For non-LPR cancellation, removal is canceled if the judge determines that it would cause an extreme hardship to a U.S. citizen immediate relative.[409] The alien can present evidence and witnesses on his behalf, and examine the witnesses and evidence on the other side.[410] He may have an attorney to represent him and present an opening and closing statement.[411] The judge will weigh the evidence and make a decision, typically that same day or even right after the close of the hearing.

There are several features of this process that are commendable, particularly in contrast to criminal trials in the United States. First, they actually happen on a regular basis. An eligible alien who seeks a hearing will get an individual hearing, at which he will be able to present evidence and argumentation in front of a neutral third party and will be entitled to plead his case to stay in the country.[412] An alien in removal proceedings is much more likely to have his "day in court" than a criminal defendant.

Second, at this individual hearing, the alien is not obligated to meet strict or unusual legal requirements that serve little purpose. The standards are broad and not technical or legalistic, thus allowing for the equi-

405. Immigration and Nationality Act, 8 U.S.C. § 1229(a) (2012).
406. *Id.* § 1229(b).
407. In re C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998).
408. Immigration and Nationality Act, Pub. L. No. 82-414, § 241, 66 Stat. 208 (1952).
409. *Id.* § 240(b).
410. *Id.*
411. *Id.*
412. IMMIGR. POL'Y CTR., PROSECUTORIAL DISCRETION: A STATISTICAL ASSESSMENT 2 (2012), *available at* http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-statistical-analysis.

ties to emerge. The procedure is fairly streamlined and sensible. In short, aliens in removal proceedings are routinely given trials with a reasonable process and a focus on achieving fair outcomes.[413] Compare this situation to infrequent criminal trials with complex rules of procedure and no concern with what the decision-maker believes is actually just or fair. Before the plea bargaining revolution caused their decline, removal hearings are where criminal trials used to be a century ago.[414]

The biggest problem with the cancellation process is that not enough people are eligible for it. LPR cancellation is only available to LPRs who have been continuously present for at least seven years, have been LPRs for at least five years, and do not have a conviction for an aggravated felony.[415] These additional requirements are unnecessary because they are already factored into the discretionary decision. The judge is already asked to factor in length of presence, immigration violations, and criminal record.[416] For example, if someone had a severe aggravated felony, such as murder, it is very unlikely he would be granted cancellation anyway.[417] But there may be some people with less serious crimes, still classified as aggravated felons, who are good candidates for cancellation but are not permitted to apply due to this categorical ineligibility. LPR cancellation should be more broadly available, allowing judges to weigh all the factors and make individual determinations.

The same principle holds for non-LPR cancellation. A person may have a compelling case for relief despite presence of less than ten years or based on extreme hardship to himself or a non-immediate relative. Arbitrary rules of ineligibility should be eliminated, and judges should be empowered to grant or deny equitable relief to a broader range of removable aliens.[418] Likewise, other forms of relief, such as asylum, could be made more broadly available to recipients found to deserve it after an evidentiary hearing, by eliminating arbitrary standards of eligibility and unnecessary or duplicative grounds of exclusion.

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413. In fact, early results indicate that, just as in criminal law, aliens in removal proceedings fare better from judicial discretion than prosecutorial discretion. *Id.* at 5 ("Relative to the number of immigrants who ordinarily prevail in removal proceedings, the number likely to avoid removal as a result of the case-by-case [prosecutorial discretion] review process is comparatively small.").

414. *See generally* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (arguing for a return to this kind of adjudication in criminal law as a solution to the evils of a system dominated by plea bargaining).

415. Immigration and Nationality Act, Pub. L. No. 82-414, § 244, 66 Stat. 214 (1952).

416. Memorandum from John Morton, *supra* note 11.

417. *Id.*

418. Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 214 (1952).

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Some scholars have even toyed with inventive ways of creating a jury style system in immigration law. Though arguably unrealistic, such a system would be far preferable from the alien's perspective than increased bureaucratic discretion. For example, Daniel Morales has written that a policy of citizen panels in deportation hearings is feasible and would have a number of positive benefits, finding that:

> [A] procedure which requires citizens to hear a migrant's story and then look that migrant in the eye and impose punishment—or confer grace—is desirable because it would create a form of knowledge and provide a kind of representation for citizens and migrants that would lead to more legitimate and measured immigration policies over time.[419]

Though there are a number of practical hurdles to overcome before such a policy could be implemented, it is certainly preferable than moving toward a system without judicial or juridical decision-making, where power resides in the hands of the prosecutor.

One may object that these proposals require legislative change and therefore are difficult to achieve. That is fair. However, even the current system is far preferable to a criminal-style plea bargaining system. Moreover, it will be much harder to achieve these kinds of legislative changes under a regime of prosecutorial discretion, where every incentive of Congress will be in the direction of more prosecutorial discretion and less judicial discretion. Such a policy almost guarantees that cancellation will not be expanded and in fact probably will be contracted in favor of placing that discretion in the hands of DHS attorneys. The push should be to preserve the judicial discretion that exists, and, if possible, find ways to expand it.

B. *Checking Prosecutorial Power*

If we are forced to accept prosecutorial discretion, it is important that it is well controlled and held accountable. These controls would be the same kinds of controls that have been proposed for prosecutorial discretion and plea bargaining in the criminal sphere. There is a large body of scholarship on these issues that does not need to be repeated in-depth here.[420] There are a handful of proposals that are most prominent and

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419. Daniel Morales, Citizen Participation in Immigration Adjudication: Theory and Practice 7 (unpublished manuscript) (on file with the author).

420. *See generally* Vorenberg, *supra* note 158; Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997); Beck, *supra* note 341.

would be preferable to the current system of largely unchecked prosecutorial discretion in deportation hearings today.

Probably the best check on prosecutorial discretion is the use of specific guidelines issued by DHS on how it will charge and prosecute different categories of removable aliens. To a certain extent, this is precisely the intent behind the June Memo. However, it includes a laundry list of factors to consider with the instruction that "this list is not exhaustive and no one factor is determinative" and decisions must be made "on a case-by-case basis . . . based on the totality of the circumstances."[421] In short, the guidance is vague. More specific guidance is in order. For example, DHS could announce that it will not remove DREAM Act-eligible aliens, or aliens without criminal records who have been in the country for a certain length of time, or aliens with US citizen children with medical disabilities.

In a similar vein, prosecutors can be expected to issue written decisions reflecting the factual basis for discretionary decisions and the reasons those decisions were made. A formal procedural setting, such as a screening conference, would ensure that decisions are based on correct and comprehensive information and an adequate process of discussion and consideration. Rachel Barkow argues for the importance of internal separation in the exercise of prosecutorial discretion, much like administrative decision-making.[422] Other scholars have argued for judicial review of prosecutorial discretion.[423] Such reforms will provide some accountability and consistency to the system. The question of what procedural protections are best suited to controlling prosecutorial discretion is far beyond the scope of this paper, but immigration advocates and scholars who have embraced prosecutorial discretion should be thinking carefully about what mechanisms should be put in place to address the dangers of a move towards greater prosecutorial discretion.

VII. CONCLUSION

Prosecutorial discretion in immigration enforcement is a response of frustration to the lack legislative reforms to the system. While arguably suitable as a temporary solution, sometimes policies intended as temporary measures become a permanent and prominent part of the system. Without proper scrutiny and oversight, this policy could have far-reaching and long-lasting implications for the way in which deportations are con-

421. Memorandum from John Morton, *supra* note 11.

422. Barkow, *supra* note 134, at 895–96.

423. Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 48 (2013).

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ducted. Such repercussions will likely be harmful to aliens, based on what we have seen in criminal adjudication. The best way to prevent such an outcome is to be aware of the possibility and intentionally prevent such an outcome. Prosecutorial discretion is dangerously alluring because it holds out the promise of quick resolution of cases with seemingly no down side. It is time to move past that illusion and take a hard look at the true meaning of this policy.