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## Technological Triage of Immigration Cases

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## TECHNOLOGICAL TRIAGE OF IMMIGRATION CASES

*Fatma Marouf and Luz Herrera* \*

### Abstract

In the medical profession, triage refers to sorting medical resources in emergency situations based on the greatest need for immediate attention. Similarly, legal service providers talk about “triaging” cases to prioritize individuals with the most serious problems. But in the immigration field, the concept of triage is turned on its head. Noncitizens with the riskiest cases—those facing deportation—have the least access to legal assistance, especially if they are detained.

Technology has the potential to help with triage but is not yet being used effectively to assist with deportation defense. This Article argues that utilizing technology to facilitate access to representation for detained noncitizens would help address that gap. It examines not only how legal service providers can use technology such as automated online assistance, mobile apps, and specialized websites that facilitate collaborative representation and complex legal analyses to triage immigration cases, but also how technology in detention centers and immigration courts can facilitate access to representation.

Simple things such as access to tablets and email for detained individuals to communicate with counsel; attorney access to laptops and cell phones in detention centers and courtrooms; a supplementary option of remote video visitation and appearances for representatives; and electronic access to immigration files (A-files) would all facilitate representation. Additionally, the Executive Office for Immigration Review (EOIR), which is the agency within the Department of Justice that includes the immigration courts, could create online platforms to implement a nationwide pro bono program and, more ambitiously, to establish a National Database of Detained Noncitizens that would help connect detained individuals with representatives.

This Article contends that Immigration and Customs Enforcement, which prosecutes immigration cases, and EOIR have every incentive to adopt these technologies in detention centers and immigration courts

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because increased representation helps them triage their own enormous caseloads.

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## INTRODUCTION

Across the United States, access to lawyer services remains elusive.<sup>1</sup> Although one in five Americans qualifies for free legal assistance based

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1. Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

on low income,<sup>2</sup> federally funded legal aid organizations lack the resources to fully serve the civil legal problems of low-income individuals.<sup>3</sup> Additionally, there are millions of Americans whose income is too high to qualify for free legal aid, or who are excluded from federally funded legal services for reasons such as immigration status, but who cannot afford an attorney.<sup>4</sup> In communities with high rates of poverty, minimal English proficiency, low educational attainment, and significant constraints on travel, access to legal services is even more limited.<sup>5</sup>

To help address these issues, the American Bar Association (ABA)'s 2016 report on the Future of Legal Services recommends that the legal profession "leverage technology and other innovations to meet the public's legal needs, especially for the underserved."<sup>6</sup> The report stresses the impact of technology on transforming "how, why, and by whom legal services are accessed and delivered."<sup>7</sup> It also acknowledges that lawyers alone cannot address the great demand for affordable legal services.<sup>8</sup>

Yet, despite the ABA's call to use technology and legal experts to assist underserved populations, most of the discussion among lawyers remains focused on using technology to increase the efficiency and earnings of law firms.<sup>9</sup> For example, law firms are using technology for document assembly and incorporating mobile applications into their law

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2. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6, 16 (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/D74D-QHYE>] (citing U.S. Census Bureau data that indicates 60 million Americans have incomes below 125% of the federal poverty threshold).

3. *Id.* at 42 (explaining that 41% of civil legal needs are not addressed and only 28% are fully addressed). These federally funded programs are also threatened with financial cutbacks. Debra Cassens Weiss, *ABA President Says Trump's Plan to Defund the Legal Services Corp. 'Should Be Dead on Arrival,'* A.B.A. J. (Feb. 13, 2018), [http://www.abajournal.com/news/article/trumps\\_budget\\_plan\\_would\\_once\\_again\\_eliminate\\_funding\\_for\\_the\\_legal\\_service](http://www.abajournal.com/news/article/trumps_budget_plan_would_once_again_eliminate_funding_for_the_legal_service) [<https://perma.cc/L8LS-QKX2>].

4. Paul Buchheit, *Yes, Half of Americans Are in or Near Poverty: Here's More Evidence*, COMMON DREAMS (Oct. 16, 2017), <https://www.commondreams.org/views/2017/10/16/yes-half-americans-are-or-near-poverty-heres-more-evidence> [<https://perma.cc/44QH-SYLA>] (suggesting that outdated definitions of poverty, the rising costs of essential goods, and the number of Americans living paycheck to paycheck are often overlooked by poverty skeptics).

5. Rhode, *supra* note 1, at 535.

6. COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 9 (2016), [www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf) [<https://perma.cc/FYQ5-DS3R>].

7. *Id.* at 8.

8. *Id.* For example, Limited License Legal Technicians (LLLT), court navigators, and federal-agency-authorized agents all play a critical role in helping people sort through legal issues. *Id.* at 20–24.

9. See, e.g., William E. Foster & Andrew L. Lawson, *When to Praise the Machine: The Promise and Perils of Automated Transactional Drafting*, 69 S.C. L. REV. 597, 597 (2018) ("Prominent law firms' recent adoption of artificial intelligence technology has scholars and practitioners engaged in wide-ranging speculation about a new era of automated lawyering.").

practices.<sup>10</sup> Lawyers, particularly from solo and small firms, also capitalize on technology by participating in online lawyer referral platforms to increase business leads.<sup>11</sup> All lawyers also benefit from online case management system platforms that are accessible to them through apps on their phones.<sup>12</sup>

The legal profession has paid far less attention to questions about how to use technology to expand access to legal services for underserved populations.<sup>13</sup> A growing body of scholarship does, however, explore the use of technology to improve access to justice.<sup>14</sup> Some commentators have focused specifically on court technology,<sup>15</sup> while others have examined access to technology for incarcerated individuals,<sup>16</sup> or the use

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10. For a fuller discussion of these efforts, see *infra* Section III.

11. Companies such as Avvo and RocketLawyer are amongst the best-known lead-generator companies for lawyers. While accepting these forms of technology, the legal profession has resisted other types of technological innovations due to fear of displacement and concerns about lower quality legal services. See COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 6, at 8–9.

12. Louie Andre, *20 Best Legal Case Management Software Programs for Small and Medium Law Firms*, FINS. ONLINE, <https://financesonline.com/top-20-legal-case-management-software-programs-small-medium-law-firms/> [<https://perma.cc/EDX5-4VZV>] (discussing Clio, MyCase, PracticePanther, and other case management software that have apps).

13. For examples of practitioners tackling this topic in bar journal articles, see Daniel W. Linna Jr., *Leveraging Technology to Improve Legal Services*, 96 MICH. B.J. 20, 21–23 (2017); Melissa A. Moss, *Can Technology Bridge the Justice Gap?*, 90 FLA. B.J. 83, 86 (2016). Judges have also addressed this topic. See, e.g., Judge Herbert B. Dixon Jr., *Technology and the Future of Legal Services*, JUDGES' J., Summer 2015, at 41–42.

14. See, e.g., Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 601–05 (2015) (discussing the creation of an interactive, web-based application to assist homeowners facing foreclosure in New York State); James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 245 (2012) (presenting six papers prepared for the Summit on the Use of Technology to Expand Access to Justice); Elinor R. Jordan, *Point, Click, Green Card: Can Technology Close the Gap in Immigrant Access to Justice?*, 31 GEO. IMMIGR. L.J. 287, 338–45 (2017) (arguing that prudent use of technology can enhance access to legal services for immigration benefits); Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 759, 773–85 (2012) (discussing online dispute resolution systems, online document assembly services, technology for unbundling legal services, and online workspaces as ways to improve access to justice).

15. See David Colarusso & Erika J. Rickard, *Speaking the Same Language: Data Standards and Disruptive Technologies in the Administration of Justice*, 50 SUFFOLK U. L. REV. 387, 392, 398, 408, 412 (2017) (arguing that open data standards improve access to justice in the state courts, especially for low and moderate-income individuals); J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2031–44 (2017) (arguing that use of platform technology by state courts improves access to justice).

16. See, e.g., Mirko Bagaric et al., *The Hardship that Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON L. REV. 261, 306 (2017); Brennen J. Johnson, *Jail (E)Mail: Free Speech Implications of Granting Inmates Access to Electronic Messaging Services*, 11 WASH. J.L. TECH. & ARTS 285,

of technology to reach rural populations.<sup>17</sup> Scholars have also criticized certain technologies, such as the use of videoconferencing by courts, as impeding access to justice.<sup>18</sup> None discuss the use of technology to triage legal cases.

This Article contributes to that conversation by exploring how to harness technology to triage immigration cases from the perspectives of legal service providers, the Department of Homeland Security, and the immigration courts. In the medical profession, triage refers to sorting of medical resources in emergency situations based on the greatest need for immediate attention. Those who have more complex and riskier medical conditions receive treatment before those with less severe medical conditions. Similarly, we must think about how to use the limited legal resources available to provide advice and representation to those with more severe legal problems. The oddity of the current immigration system is that noncitizens with the riskiest (and often the most complex) cases—detained immigrants facing deportation—have the least access to legal services. Between 2007 and 2012, only 14% of individuals in immigration detention had representation, compared to 66% of non-detained individuals in removal proceedings.<sup>19</sup> In some locations, the rate of representation was even lower. For example, in Tucson, Arizona, only .002% of detained immigrants had counsel.<sup>20</sup>

Triage is a concept that originally emerged as a way to prioritize immediate, urgent, and non-urgent injuries in times of war or mass casualties.<sup>21</sup> In that context, individuals who no longer had life were not considered a priority, those with serious injuries that could be treated with the proper attention were attended to first, and those without life-

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299 (2016); J. William Snyder, Jr., *Inmate Access to Prison Computers for Legal Work and the Right of Access to the Courts*: Bryant v. Muth, 72 N.C. L. REV. 1692, 1693, 1705, 1711–12 (1994).

17. See, e.g., Van Dang et al., “Can You See Me Now?”—Bringing Technology to the World of Pro Bono, 40 RUTGERS COMPUTER & TECH. L.J. 137, 139–40 (2014) (discussing the use of Virtual Legal Clinics to reach rural and isolated populations).

18. See, e.g., Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 N.W. U. L. REV. 933, 965–66 (2015) (presenting empirical evidence that video appearances by respondents in removal proceedings is associated with lower rates of submitting applications for relief and finding lawyers, and also associated with higher rates of deportation); *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1182 (2009); Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 62, 64–76 (2006); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108–11 (2004); Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 268–72 (2008).

19. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015).

20. *Id.* at 38 fig.10a.

21. Iain Robertson-Steel, *Evolution of Triage Systems*, 23 EMERGENCY MED. J. 154, 154–55 (2006).

threatening situations were not prioritized.<sup>22</sup> In the early 1900s, the triage practice made its way into hospital emergency rooms and other urgent care facilities.<sup>23</sup> In those settings, instead of immediate treatment, the triage practice was transformed into “a brief clinical assessment that determined the time and sequence in which the patient should then be seen by the limited resources.”<sup>24</sup> In this new scenario, the availability of transportation and the opportunity for treatment were key considerations in the initial assessment.<sup>25</sup>

Today’s medical triage is more broadly applicable than when it was originally conceived. More people seek emergency assistance as a substitute for ongoing medical care.<sup>26</sup> Access to health care is difficult for many as a result of lack of medical insurance coverage. As of 2017, 28 million people in the United States lack medical insurance, and they tend to have lower levels of education and income than the insured.<sup>27</sup> There are also millions of people who live in rural or remote communities where health care services are limited or unavailable.<sup>28</sup> As a result, urgent care units and emergency rooms now have long waits since heart attack victims and infants with high fevers are as common as individuals who broke a leg or injured a finger. Regardless of its breadth, medical professionals continue to use triage to sort the degree of care that each patient requires.<sup>29</sup> Some of this sorting requires that patients be given just enough medical treatment to await future examinations and procedures, while others can be easily disposed of by minor interventions.<sup>30</sup> This means giving patients what they need, not what they request. The role of triage has become a gatekeeper for the services that doctors provide.

This Article applies the concept of triage to the immigration context. In Part I, we argue that legal service providers can utilize a triage model to determine who gets a lawyer and on what timeline. Since there are several types of immigration service providers, including attorneys, two levels of accredited representatives, law students working in law school

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22. *See id.*

23. *Id.* at 154.

24. *Id.*

25. *Id.*

26. *See* NEW ENGLAND HEALTHCARE INST., A MATTER OF URGENCY: REDUCING EMERGENCY DEPARTMENT OVERUSE 1–2 (2010), [https://www.nehi.net/writable/publication\\_files/file/nehi\\_ed\\_overuse\\_issue\\_brief\\_032610final edits.pdf](https://www.nehi.net/writable/publication_files/file/nehi_ed_overuse_issue_brief_032610final edits.pdf) [<https://perma.cc/YMN3-KZBE>].

27. Edward Berchick, *Most Uninsured Were Working-Age Adults*, U.S. CENSUS BUREAU (Sept. 12, 2018), <https://www.census.gov/library/stories/2018/09/who-are-the-uninsured.html> [<https://perma.cc/6KG9-5JWV>].

28. *See* Julia Foutz et al., *The Role of Medicaid in Rural America*, KAISER FAMILY FOUND. (Apr. 25, 2017), <https://www.kff.org/medicaid/issue-brief/the-role-of-medicaid-in-rural-america/> [<https://perma.cc/8YHY-R9JS>].

29. *See* Robertson-Steel, *supra* note 21, at 154–55.

30. *Id.*

clinics, and paralegals; triage will require that these different providers collaborate to provide immigrants the best solution available. It will also require providers to sort which matters require immediate, urgent, and non-urgent attention. We discuss various technologies that can assist with these tasks, including automated online assistance, mobile apps, and platforms that facilitate collaborative representation, offering a more efficient and effective legal service delivery model. An excellent example of collaborative representation is the Innovation Law Lab, a project that involves advocates from around the country in representing detained families.<sup>31</sup> This project has been highly successful in securing the release of tens of thousands of women and children seeking asylum.

In Part II, we examine how Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS), can use the concept of triage to address the overwhelming volume of cases handled by its own attorneys, who prosecute deportation cases. Prioritizing cases and exercising prosecutorial discretion is an important part of the triage process that has been discussed elsewhere by scholars.<sup>32</sup> However, this Article emphasizes how facilitating access to representation through detention-center technology would help ICE attorneys triage their own workload while fulfilling their obligation as government attorneys to seek justice. Specifically, ICE should require detention centers to make tablets with limited email and website access available so that detained individuals can communicate with representatives and review legal resources. An even simpler change to detention center rules that would facilitate representation is to allow legal service providers to bring their own technology, including laptops, phones, and printers, into detention centers. Additionally, establishing a system of remote video visitation for representatives that maintains privacy and confidentiality, as a supplement to in-person visits, would facilitate access to counsel, especially for individuals detained in isolated areas. Lastly, providing electronic discovery in the form of a copy of the “A-file” (Alien file) to respondents and representatives would greatly facilitate representation.

Finally, in Part III, we turn to the immigration courts, which are part of an agency called the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ), and desperately need to triage a

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31. See Stephen Manning and Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407, 421 (2018) (coining the term “big immigration law” to describe a reconceptualized model of legal representation involving “massive collaborative representation—that is, direct representation that has coherently scaled to contest a particular legal rule at a particular physical place”).

32. See *infra* note 138 (citing scholarship on prosecutorial discretion in immigration law).



backlog of over 975,000 removal cases.<sup>33</sup> Although removal cases are inherently high-stakes because they involve the threat of deportation, many of the matters that judges handle through in-person hearings are simple and routine. We therefore propose an innovative approach that utilizes an Online Case Resolution (OCR) system to allow judges to triage certain simple, routine matters without in-person hearings. For example, instead of scheduling hearings to file documents and set future hearing dates, those matters could be handled through the OCR system. Similarly, matters to which the parties stipulate, such as bond amounts, termination, or administrative closure, could be resolved with OCR instead of in-person hearings. Other matters, such as voluntary departure requests, may be appropriate for OCR only if the respondent is represented. Allowing these types of issues to be handled through OCR would free up judges to devote more time and energy to complex cases requiring difficult factual and legal determinations.

In addition, we propose several ways that the immigration courts could use technology to facilitate access to counsel, which would help resolve complex cases more efficiently, accurately, and fairly. These include establishing a nationwide Pro Bono Program through EOIR and, more ambitiously, creating a National Database of Detained Noncitizens with the goal of connecting detained immigrants with pro bono counsel all over the country and allowing them to work collaboratively on representation. Finally, establishing a reliable and efficient system for remote video appearances by representatives in limited types of proceedings would facilitate providing representation to individuals detained in isolated areas and support collaborative representation. Currently, judges have the discretion to allow a representative to appear telephonically, but this is more impersonal than video and does not allow a representative to read non-verbal cues by the client or the judge.<sup>34</sup>

This Article concludes that harnessing technology to facilitate access to counsel benefits not only immigrants and legal service providers, but also ICE and the immigration courts, by helping all of them triage their caseloads. This creates an incentive for these private and public parties to work together to triage immigration cases in an efficient, accurate, and fair manner.

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33. See *Immigration Court Backlog Tool*, TRAC IMMIGR., [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) [<https://perma.cc/K3JE-ZXTQ>] (showing 1,071,036 cases pending within the immigration courts as of November 2019).

34. OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL, CHAPTER 4.15(n) (2016), <https://www.justice.gov/eoir/page/file/1258536/download> [<https://perma.cc/G5HX-7JT9>].

## I. TECHNOLOGICAL TRIAGE BY IMMIGRATION LEGAL SERVICE PROVIDERS

Immigration provides an ideal practice area to explore the concept of triage in legal service delivery for several reasons. First, immigration matters are vitally important for the livelihood and well-being of individuals and families.<sup>35</sup> Second, there is no right to appointed counsel in immigration cases.<sup>36</sup> Federally funded legal aid organizations are generally prohibited from serving undocumented immigrants, which places this population at a severe disadvantage in accessing legal services.<sup>37</sup> A majority of noncitizens do not access lawyers to represent them even in situations where removal from the United States is a likely scenario. Between 2007 and 2012, 63% of all immigrants who appeared in 1.2 million deportation cases were unrepresented.<sup>38</sup> Among detained immigrants facing deportation, 86% were unrepresented.<sup>39</sup> Access to counsel is a critical issue in deportation cases because represented immigrants are far more likely to apply for some form of relief from removal, as well as to win their cases.<sup>40</sup>

In addition to the well-documented need for more lawyers to assist noncitizens, immigration law is a good area to propose a triage model for legal services because there is already a wide variety of players involved in advocating for immigrant legal rights.<sup>41</sup> These providers include lawyers, accredited representatives, law students, and paralegals.<sup>42</sup> While

35. See, e.g., Sofia Gómez & Anna O. O’Leary, “On Edge All the Time”: *Mixed-Status Households Navigating Health Care Post Arizona’s Most Stringent Anti-Immigrant Law*, 6 FRONTIERS PUB. HEALTH, Jan. 2019, at 2, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6340969/pdf/fpubh-06-00383.pdf> [<https://perma.cc/E23V-K59J>] (noting the effect of immigration policy on immigrants); Heide Castañeda & Milena Andrea Melo, *Health Care Access for Latino Mixed-Status Families: Barriers, Strategies, and Implications for Reform*, 58 AM. BEHAV. SCIENTIST 1891, 1892–93 (2014) (same).

36. See 8 U.S.C. § 1229a(b)(4)(A) (2012).

37. See 45 C.F.R. §§ 1626.1–.12 (2019); see also Laura K. Abel & Risa E. Kaufman, *Preserving Aliens’ and Migrant Workers’ Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 491–92 (2003); Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 FORDHAM URB. L.J. 687, 703–04 (2009).

38. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 23 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) [<https://perma.cc/Q7YY-RUAK>].

39. *Id.*

40. *Id.* at 18, 20, 21; see also Eagly & Shafer, *supra* note 19, at 9 (finding that represented immigrants were fifteen times more likely to seek relief available to them under the law and that those who had attorneys were five-and-a-half times more likely to obtain the proper relief).

41. See generally JEANNE CHARN & RICHARD ZORZA, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS (2005), <http://www.courts.ca.gov/partners/documents/bellow-sacks.pdf> [<https://perma.cc/4BEM-E45Z>] (introducing a mixed-model legal services delivery framework of full access to civil legal services for low- and moderate-income Americans).

42. See 8 C.F.R. § 292.1(a)(1), (2), (4) (2020).

this broader range of players permits more noncitizens to receive assistance, there is often insufficient coordination among providers to ensure the efficient use of resources. This can result in substandard service delivery if the provider who handles a case is not properly equipped based on education, experience, and training. Compounding this problem is the prevalence of predators who defraud immigrant communities.<sup>43</sup>

Applying the triage model to immigration legal services requires determining who can be “treated” (i.e., identifying who is eligible to apply for some type of legal status and would benefit from representation), separating urgent cases from non-urgent ones, and sorting cases based on risk and complexity to determine what type of provider is best suited to assist. In prioritizing cases, providers may also decide not to take certain types of cases at all, because the person has a simple case that can be handled pro se, or because there is little or nothing that can be done to fix someone’s status. Furthermore, technology can assist representatives triage cases. This Article begins by examining how technology can help providers screen for an immigration “cure,” and then examines how technology can help decide whether to provide representation and what type of provider is best suited for the case.

### A. Screening for an Immigration “Cure”

In the triage model, the initial assessment of a noncitizen should occur before an emergency arises. In the medical field, the situation is screened by a non-medical expert before emergency services are dispatched.<sup>44</sup> The dispatcher, most commonly available by phone, is trained to ask

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43. See, e.g., Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 5–8 (2004) (discussing the various types of fraud committed against noncitizens); Monica Schurtman & Monique C. Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 TEX. HISP. J.L. & POL’Y 47, 49–56 (2014) (categorizing the various harms that fraud can have on noncitizens, their families, and the broader legal system); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 621 (2009) (describing issues of service-provider fraud in the immigrant community); Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425, 427–35 (2011) (noting the prevalence of immigration fraud throughout the nation); ABA Comm. on Immigration, *Avoiding the Unauthorized Practice of Immigration Law* 1–6, <https://www.americanbar.org/content/dam/aba/administrative/immigration/fightnotariofraud/uplmemojune2017.authcheckdam.pdf> [<https://perma.cc/DQ9G-6N6J>] (last updated June 13, 2017) (illustrating common scenarios of immigration legal services being defrauded by non-attorney individuals). In the immigration context, unauthorized practice of law includes any “practice” or “preparation” activity, 8 C.F.R. § 1001.1(i), (k), by an individual not authorized to provide “representation,” 8 C.F.R. § 1292.1.

44. *How to Become a Police, Fire, or Ambulance Dispatcher*, BUREAU OF LAB. STAT. (Sept. 4, 2019), <https://www.bls.gov/ooh/office-and-administrative-support/police-fire-and-ambulance-dispatchers.htm#tab-4> [<https://perma.cc/WG72-RE55>].

questions that help medical professionals determine the degree of risk and level of care needed.<sup>45</sup> This gatekeeper role is crucial to an effective triage system and requires a good screening tool developed by experts. Intake specialists for immigration matters can be legal secretaries or nonprofit employees who are adequately trained to use the screening tool. The gatekeepers should be able to refer noncitizens to legal forms or information on websites that help them address basic issues. They should also be familiar with recurring deadlines that accompany renewals or extensions of permanent residence cards, visas, and other common immigration processes.

Technology can help by providing quality screening tools that are easy to use. For example, mobile apps, like *immi.org*, exist to help immigrants screen various options for legalizing their status and provide referrals to nonprofit immigration legal-services providers.<sup>46</sup> Users begin the process by completing an online interview that is designed to take ten to thirty minutes.<sup>47</sup> At the end, the user receives personalized results that explain his or her immigration options and potential risks.<sup>48</sup> While this app is designed for immigrants to use themselves, a more sophisticated version could be developed specifically for providers to screen potential clients to determine if they are eligible to apply for various forms of legal status. If an individual qualifies for multiple types of legal status, a sophisticated screening tool could help select the best option. An attorney would still need to review these results before advising a client to satisfy professional obligations and ensure effective representation, but the app could help streamline options.

If someone is undocumented and does not qualify for any type of legal status, the provider could refer the person to other technological self-help tools that simply help immigrants avoid and handle encounters with ICE, as well as prepare for possible detention or deportation.<sup>49</sup> For example, there are apps that alert people about immigration raids and allow them to notify family members and friends if they have been detained by ICE.

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45. *Id.*

46. *See About Immi*, IMMI, <https://www.immi.org/en/Info/About> [<https://perma.cc/3L43-EZB3>].

47. *Id.*

48. *Id.*

49. *See* Aura Bogado, *Undocumented Living? There's an App for That*, COLORLINES (Jan. 6, 2014), <https://www.colorlines.com/articles/undocumented-living-theres-app> [<https://perma.cc/3H7Z-5GKP>]; *see also* El Random Hero, *Useful Droid Apps for the Undocumented*, JUST A RANDOM HERO (Jan. 3, 2014, 4:01 PM), <http://www.elrandomhero.com/2014/01/useful-droid-apps-for-undocumented.html> [<https://perma.cc/82Q6-KH3E>] (detailing several Droid apps that have practical uses for undocumented persons).

These include apps such as “Notifica,”<sup>50</sup> “Cell 411,”<sup>51</sup> “MigraCam,”<sup>52</sup> “I’m Getting Arrested,”<sup>53</sup> “Arrived,”<sup>54</sup> and “RedadAlertas.”<sup>55</sup> Additionally, there are educational apps available in different languages that teach people about their rights when interacting with ICE.<sup>56</sup> Finally, there are online platforms that help immigrants plan for deportation by making family safety plans that include documents pertaining to guardianship of children, power of attorney, or caregiver authorization.<sup>57</sup> These apps also provide a way for users to input all of the contacts, phone numbers, bills, and accounts that would be important for family members or a guardian to have if they were detained or deported.<sup>58</sup>

### B. Deciding Whether to Provide Representation

After the screening stage, providers will need to determine if they want to take the case. Although some legal service providers embrace a model of “universal representation,” where every person seeking

50. See NOTIFICA, <https://notifica.us> [<https://perma.cc/TLM8-A82J>]; see also Janelle Harris, *Inside the New Emergency App for Undocumented Immigrants*, ROLLING STONE (Mar. 21, 2017), <https://www.rollingstone.com/culture/culture-news/inside-the-new-emergency-app-for-undocumented-immigrants-112928/> [<https://perma.cc/247Q-VSG5>].

51. See GET CELL 411, <https://getcell411.com> [<https://perma.cc/H8G9-MVWP>].

52. See Adriana Candelaria, *MigraCam App Records Interactions with Law Enforcement*, CBS 4 NEWS (Apr. 18, 2018), <https://cbs4local.com/news/local/migracam-app-records-interactions-with-law-enforcement> [<https://perma.cc/8F4G-8UG8>]; *MigraCam*, ACLU TEX., <https://www.aclutx.org/en/migracam> [<https://perma.cc/J5V8-7JCJ>].

53. See Amelia Marzec, *“I’m Getting Arrested” App Creators Slammed with Feature Requests*, HUFFPOST (Nov. 17, 2011), [https://www.huffpost.com/entry/occupy-wall-street-app-arrested\\_b\\_1098792](https://www.huffpost.com/entry/occupy-wall-street-app-arrested_b_1098792) [<https://perma.cc/73AX-TNAY>].

54. See Olivia P. Tallet, *Undocumented Immigrants Turn to Technology to Avoid Arrests*, HOUS. CHRON. (Apr. 16, 2018), <https://www.houstonchronicle.com/news/article/New-mobile-app-helps-immigrants-at-risk-12833276.php> [<https://perma.cc/693Y-3K5Y>].

55. See REDADALERTAS, <http://redadalertas.com> [<https://perma.cc/7TX9-7MHA>]; see also Shanice Davis, *New App to Alert Undocumented Immigrants About ICE Raids*, VIBE (Mar. 3, 2017), <https://www.vibe.com/2017/03/app-alerts-undocumented-immigrants/> [<https://perma.cc/W2PC-PCZG>]; Patrick Howell O’Neill, *‘Raid Alerts’ Wants to Warn Undocumented Immigrants with an App*, VICE (Feb. 18, 2017), [https://motherboard.vice.com/en\\_us/article/xy7yzn/raid-alerts-wants-to-warn-undocumented-immigrants-with-an-app](https://motherboard.vice.com/en_us/article/xy7yzn/raid-alerts-wants-to-warn-undocumented-immigrants-with-an-app) [<https://perma.cc/S6ZU-9APA>]; Charlie Sorrel, *This App Warns Undocumented Immigrants When Raids Are Coming*, FAST COMPANY (Feb. 22, 2017), <https://www.fastcompany.com/3068357/this-app-warns-undocumented-immigrants-when-raids-are-coming> [<https://perma.cc/2D5C-L6QL>].

56. Bogado, *supra* note 49; Cristina Constantini, *Immigration? There’s an App for That*, ABC NEWS (Feb. 15, 2013), [https://abcnews.go.com/ABC\\_Univision/immigration-related-smartphone-apps/story?id=18511818](https://abcnews.go.com/ABC_Univision/immigration-related-smartphone-apps/story?id=18511818) [<https://perma.cc/JQP6-325V>].

57. For example, Notifica helps immigrants prepare family members, manage their property, and make arrangements for their debts in the event that they are deported. See Harris, *supra* note 50; *Notifica*, UNITED WE DREAM, <https://notifica.us> [<https://perma.cc/L2QV-MU4P>].

58. See Constantini, *supra* note 56.

assistance is represented, most need to provide selective representation to use limited resources in the most effective way possible.<sup>59</sup>

In deciding whether to take a case, an important consideration may be whether the person actually needs representation or can complete an application on their own. If the case is relatively straightforward, with no complicating factors or significant risks (such as a criminal record), the provider may wish to refer the individual to automated assistance platforms that are available online to help individuals complete applications *pro se*. Automated assistance exists for some, but not all, types of affirmative applications (i.e., applications filed when a person is *not* in deportation proceedings) and is much more affordable than hiring a private attorney. This technology allows the user to answer simple questions online and then generates the appropriate immigration forms.<sup>60</sup> Some of the services also involve attorney review or flag potential problems with the application and connect the user to an expert that can help online or in person.<sup>61</sup> While an ongoing debate exists about whether these types of automated services constitute “legal services,” raising thorny questions about the unauthorized practice of law, many argue that they are better than no services at all.<sup>62</sup>

Most of the automated technologies that currently exist focus on applications at the high-status end of the legal status spectrum, such as assisting people with naturalization applications to become U.S. citizens and adjustment of status applications to become legal permanent residents.<sup>63</sup> These applications tend to be relatively low complexity and low risk, which are two reasons they lend themselves to automation. They are also very high volume, making them an attractive business for online service providers. In 2017, over 700,000 people applied to become U.S. citizens, and over 1,000,000 applied to become permanent residents.<sup>64</sup>

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59. See Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 84 (2017) (arguing that “recent move[s] toward ‘universal representation’ models . . . such as the SAFE Cities Network, which expanded the New York Immigrant Family Unity Project’s proven model—are promising steps toward a rights-based approach to legal services”); Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 503 (2018).

60. S. 638, 2017 Leg., Reg. Sess. (Cal. 2018).

61. See, e.g., *Find Legal Help*, CITIZENSHIPWORKS, <https://www.citizenshipworks.org/findlegalhelp> [<https://perma.cc/BZB9-HZNU>].

62. Brescia et al., *supra* note 15, at 579.

63. Some well-known online service providers include Citizenship Works, BorderWise, and FileRight. See, e.g., BORDERWISE, [www.borderwise.com](http://www.borderwise.com) [<https://perma.cc/QE7M-P9K9>].

64. U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF SERVICE-WIDE FORMS BY FISCAL YEAR TO-DATE 1 (2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly\\_All\\_Forms\\_FY17Q4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY17Q4.pdf) [<https://perma.cc/8AT4-N3XQ>] (showing nearly a million naturalization applications submitted and over 700,000 naturalization applications approved in FY 2017).

Automated-form-preparation services also exist for certain individuals at the low-status end of the immigration spectrum, including undocumented individuals seeking Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS). Like family-based adjustment of status and citizenship applications, these are generally low complexity. However, they are much higher risk, since DACA applicants must have no legal status to qualify, and TPS applicants are also often undocumented, which means an error in applying could trigger removal proceedings.<sup>65</sup> These are also high-volume applications and therefore attractive to businesses that provide automated services. Over 1.14 million individuals have been granted DACA since it went into effect in 2012,<sup>66</sup> and approximately 690,000 individuals were enrolled as of March 31, 2018.<sup>67</sup> A smaller number of individuals, around 437,000, currently have TPS.<sup>68</sup> Although most providers charge a relatively small fee for automated preparation of these applications, some have chosen to offer their services for free, at least for DACA.<sup>69</sup>

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Although the number of naturalization applicants is large, nearly nine million eligible individuals have not applied for naturalization. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *Naturalization Rate Among U.S. Immigrants Up Since 2005, with India Among the Biggest Gainers*, PEW RES. CTR. (Jan. 18, 2018), <https://www.pewresearch.org/fact-tank/2018/01/18/naturalization-rate-among-u-s-immigrants-up-since-2005-with-india-among-the-biggest-gainers/> [<https://perma.cc/E3TH-QT88>]. The leading reasons given for not applying are the English language test and the civics test as well as the substantial filing fee. Brittany Blizzard & Jeanne Batalova, *Naturalization Trends in the United States*, MIGRATION POLICY INST. (July 11, 2019), <https://www.migrationpolicy.org/article/naturalization-trends-united-states> [<https://perma.cc/ZF9R-U6X6>].

65. See *Insider Alert: No More Room for Error in Visa Applications?*, BOUNDLESS (Nov. 27, 2019), <https://www.boundless.com/blog/insider-alert-no-room-error-visa-applications/> [<https://perma.cc/DVG9-QDXA>].

66. *Number of Form i-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVICES (2018), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_Quarterly\\_Report\\_4.2.18.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Quarterly_Report_4.2.18.pdf) [<https://perma.cc/9BCY-PTZ8>].

67. *Approximate Active DACA Recipients*, U.S. CITIZENSHIP & IMMIGR. SERVICES (2018), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_Population\\_Data\\_Mar\\_31\\_2018.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Data_Mar_31_2018.pdf) [<https://perma.cc/K7FZ-67E3>].

68. See CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES 13 (2018).

69. See *Free and Low-Cost Legal Assistance for DACA Applicants*, LAWLOGIX (Sept. 12, 2012), <https://www.lawlogix.com/free-and-low-cost-legal-assistance-for-daca-applicants/> [<https://perma.cc/6N5V-HSGR>]. For those who already had DACA and whose work permits expired between September 5, 2017, and March 5, 2018, USCIS allowed them to submit renewal applications until October 5, 2017. *Deadline to Submit DACA Renewal Requests Approaching on Oct. 5*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/deadline-submit-daca-rSuggestedrenewal-requests-approaching-oct-5> [<https://perma.cc/PM9K->

One area where online platforms are not yet available to help prepare applications is for humanitarian relief, including affirmative asylum applications, U and T visas for victims of crimes and human trafficking, and Violence Against Women Act (VAWA) self-petitions for abused spouses and children.<sup>70</sup> The immigrants submitting these types of applications are low status and especially vulnerable, placing them in a higher risk category. Additionally, the lower volume and medium-to-high complexity of these applications help explain why automated technologies have not been developed for them.<sup>71</sup> They all require a detailed declaration that is usually the most important document submitted.<sup>72</sup> It is hard to imagine how an online platform would help an unsophisticated user prepare such a declaration. These types of cases also have more complex legal requirements than those discussed above and require substantial amounts of supporting documents that vary depending on the nature of the case, although some general guidelines could certainly be provided. In the case of U and T visas, some of the forms must be prepared and signed by third parties (law enforcement agencies), which adds another wrinkle for self-help document preparation services.<sup>73</sup>

Individuals applying for U and T visas also often need to submit an application for a waiver of inadmissibility, for example if they entered the United States unlawfully or are currently out of status.<sup>74</sup> Only an accredited representative or attorney is well-suited to examine which, if any, of the Immigration and Nationality Act (INA)'s numerous

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C94L] (last updated Sept. 28, 2017). However, due to injunctions issued by federal courts in California and New York, USCIS resumed accepting renewal applications in January 2018. *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 17, 2019), <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<https://perma.cc/H35Q-UN6J>].

70. CAPGEMINI CONSULTING, TECHNOLOGICAL INNOVATION FOR HUMANITARIAN AID AND ASSISTANCE 11 (2019), [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634411/EPRS\\_STU\(2019\)634411\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634411/EPRS_STU(2019)634411_EN.pdf) [<https://perma.cc/8REP-ZBNC>].

71. Congress has mandated a limit of 5,000 T visas issued per year and 10,000 U visas. See 8 U.S.C. § 1184(o)(2) (2012) (T visa cap); *id.* § 1184(p)(2)(A) (U visa cap). While there is a waitlist for U visas, the T visa cap has never been reached. Melissa Gira Grant, *It Is Now Even Harder for Trafficking Survivors to Get Visas*, APPEAL (Aug. 22, 2018), <https://theappeal.org/it-is-now-even-harder-for-trafficking-survivors-to-get-visas/> [<https://perma.cc/8EZW-6WEM>]. USCIS received 139,801 affirmative asylum applications in 2017. NADWA MOSSAAD, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2017, at 7 (2019), [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asytees\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asytees_2017.pdf) [<https://perma.cc/M3YR-YPV6>].

72. See U.S. DEP'T OF HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE 10–11, 25 (2019).

73. See *id.* at 3.

74. See *id.* at 9.



inadmissibility grounds might apply to request that it be waived.<sup>75</sup> If an inadmissibility ground is overlooked at this stage, the individual may be denied a visa or deemed ineligible to adjust status to a permanent resident down the road, which means the person could fall out of status and become deportable.

Despite these challenges, one can contemplate a mobile app that could provide valuable assistance in applying for a U or T visa. As with all types of apps, it would be easiest to limit the users to individuals without any criminal history. The app could walk the applicant through the questions needed to generate the forms, provide a guide to writing a declaration with the relevant information, and give instructions about what other documents to attach. If the police department is familiar with the U visa process, it should be able to handle preparing and signing the law enforcement certificate. Alternatively, if a pro bono lawyer is needed only to help with the law enforcement certificate part of the application or only to handle the waiver of inadmissibility, that would significantly cut down on the time needed to provide legal assistance and make it easier for more lawyers to provide this type of limited help.

### C. *Choosing the Appropriate Type of Provider*

In the context of medical triage, after the initial screening occurs, the patient is usually referred to an emergency medical technician (EMT) whose primary goal is to administer first aid to assess the patient's needs.<sup>76</sup> There are three types of EMTs that offer different levels of care.<sup>77</sup> Paramedics are at the top of the list and are certified after intensive training and education that includes college courses.<sup>78</sup> If the patient is taken to the hospital, a nurse or nurse's aide is often involved in examining the patient and will call for a doctor if the issue is something that he or she cannot address. When the situation requires a doctor's assistance, the doctor will generally prioritize the sickest in an emergency room and refer the rest to future appointments for medical care.

Similarly, in the immigration-legal-assistance context, there are several different types of providers with varying levels of education and experience. In addition to attorneys, who are comparable to doctors in the

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75. See David Weissbrodt & Laura Danielson, *Chapter 8: Grounds for Inadmissibility and Removal*, U. MINN. HUM. RTS. LIBR. (2004).

76. THE NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., NATIONAL EMS SCOPE OF PRACTICE MODEL 18 (2007), <https://www.ems.gov/education/EMSScope.pdf> [<https://perma.cc/WB6V-S3AL>].

77. *The Difference Between EMT Certification Levels*, UNITEK EMT (Sept. 13, 2013), <https://www.unitekemt.com/articles/the-difference-between-emt-certification-levels/> [<https://perma.cc/NA2H-UBU4>].

78. *Id.*

analogy, there are two types of “accredited representatives.”<sup>79</sup> These accredited representatives are individuals who receive special training and are authorized by the EOIR, an agency within the U.S. Department of Justice, to represent immigrants on behalf of recognized nonprofit organizations.<sup>80</sup> To become an accredited representative, an individual must be sponsored by a recognized organization, undergo special training, and demonstrate “broad knowledge and adequate experience in immigration law and procedure.”<sup>81</sup>

Fully accredited representatives are allowed to provide representation on affirmative applications filed with U.S. Citizenship and Immigration Services (USCIS) as well as represent individuals in deportation cases before the immigration courts and Board of Immigration Appeals (BIA).<sup>82</sup> Partially accredited representatives, on the other hand, can provide representation only on affirmative applications; they are not allowed to provide representation in deportation cases.<sup>83</sup> Thus, it makes sense for partially accredited representatives to focus on the affirmative humanitarian cases mentioned above (U and T visas, affirmative asylum, and VAWA self-petitions). Partially accredited representatives can also assist with the more complicated or higher risk adjustment of status or naturalization applications where using automated assistance is not advisable.

As of August 2018, the BIA had recognized 1,978 organizations and accredited more than 2,000 representatives to assist immigrants.<sup>84</sup> While this number may seem large, it does not come close to meeting the need for free or low-cost immigration assistance.<sup>85</sup> Furthermore, the vast majority of currently accredited representatives are only partially accredited, and therefore cannot assist with deportation defense.<sup>86</sup>

Because attorneys and fully accredited representatives are the only providers allowed to handle deportation cases, and those tend to be the most complex and high-risk matters, it makes sense for them to focus on this area. Law students working under their supervision can assist them.<sup>87</sup> Removal proceedings are the immigration counterpart of an emergency

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79. BD. OF IMMIGRATION APPEALS, FREQUENTLY ASKED QUESTIONS (FAQS) ABOUT THE RECOGNITION AND ACCREDITATION (R&A) PROGRAM 2 (2015), <https://www.justice.gov/eoir/recognition-and-accreditation-faqs/download> [<https://perma.cc/EWH3-BZUP>].

80. 8 C.F.R. §§ 292.1(a)(4), 1292.1(a)(4) (2020).

81. *Id.* § 1292.12(a)(6), (c).

82. *Id.* § 1292.1(a)(4).

83. *Id.*

84. *Accredited Representative Roster*, U.S. DEP’T JUSTICE, <https://www.justice.gov/eoir/page/file/942311/download> [<https://perma.cc/5DKM-522Z>] (last updated Feb. 3, 2020).

85. See EAGLY & SHAFER, *supra* note 38, at 5–6.

86. About two-thirds of accredited representatives listed are limited to practice only before DHS. See *Accredited Representative Roster*, *supra* note 84.

87. 8 C.F.R. §§ 292.1(a)(2), 1292.1(a)(2).

room with the sickest patients who have the most urgent needs. Many deportation cases involve applications for asylum, withholding of removal, or protection under the Convention Against Torture, where the risk is not only being deported from the United States, but also being persecuted or tortured in the country of origin.<sup>88</sup> These matters require careful review by an attorney or fully accredited representative to decide which cases have merit and to ensure proper preparation and documentation.

Unfortunately, the biggest technological gap is in this urgent area of deportation defense, where there is the greatest need for assistance and the fewest legal service providers. Designing an app or online tool to help immigrants represent themselves in deportation proceedings is extremely challenging for many reasons, including the complex and dynamic nature of immigration law in addition to the fact that many individuals in removal proceedings are detained and do not have access to their own information or to technology. While it is possible to imagine an online platform that could help prepare some of the less complicated applications submitted in removal proceedings, such as cancellation-of-removal applications, especially in cases where the individual does not have a serious criminal record, even these applications are not simple and require substantial documentation.<sup>89</sup> Automated assistance could provide information about the kind of supporting evidence that should be submitted, but obviously could not help gather and submit the evidence. Furthermore, cancellation-of-removal cases represent a very small percentage of the applications filed in immigration court, so automating those would not have a major impact on triaging deportation cases.<sup>90</sup> The lion's share currently involve asylum, which would be the hardest application to try to automate, due to the factual and legal complexities involved.<sup>91</sup>

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88. See *Withholding of Removal and CAT*, IMMIGR. EQUALITY, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/withholding-of-removal-and-cat/#.XiH-wXdFweU> [<https://perma.cc/43ES-4W87>].

89. Cancellation of removal for lawful permanent residents requires showing seven years of continuous physical presence in the United States, five years as a lawful permanent resident, and no "aggravated felony" conviction, which is a term of art in immigration law. 8 U.S.C. § 1229b(a) (2012). Cancellation of removal for non-lawful permanent residents is generally more challenging and complex because it requires showing "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or permanent resident, in addition to ten years of continuous physical presence and good moral character, and it has a broader range of criminal bars. 8 U.S.C. § 1229b(b).

90. U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK: FISCAL YEAR 2017, at 32 tbl.18 (2018), <https://www.justice.gov/eoir/page/file/1107056/download> [<https://perma.cc/VJX9-BZ77>].

91. *Id.* at 24 fig.17 (showing 142,961 asylum applications received by the immigration courts in FY 2017).

One of the technological innovations that has proved most useful in assisting with pro bono deportation defense are platforms that facilitate collaborative representation. A groundbreaking project in this area is the Innovation Law Lab, directed by immigration attorney Stephen Manning.<sup>92</sup> The Innovation Law Lab employs a crowdsourcing strategy to help attorneys address the power asymmetry, proportionality problem, and lack of time in deportation-defense cases.<sup>93</sup> The core contribution of the Innovation Law Lab is a technology platform that supports a collaborative system of pro bono representation for asylum seekers, involving representatives and volunteers from all over the country.

One of Manning's key insights was that most attorneys and volunteers cannot drop everything to go to a detention center in a different state for an indefinite amount of time to help with a case, but many people can volunteer for several days or a week. He therefore created a system where representatives and volunteers essentially tag-team on cases, rotating on a weekly basis. In his Tedx talk, Manning calls this "the power of the [hive]."<sup>94</sup> The cloud-based technology platform, LawLab, supports this process by centralizing all of the information and documents for a client's case.<sup>95</sup> The Innovation Law Lab also employs an active case-management approach that utilizes three strategies: client-involved outcome setting; workflow standardization through lists and protocols; and data analysis for perpetual, dynamic adaptation.<sup>96</sup>

The Innovation Law Lab has focused on helping detained women and children in family detention centers with credible fear interviews. In 2014, when the first family detention facility opened in Artesia, New Mexico, nearly all the women and children detained there were deported.<sup>97</sup> By 2016, the Innovation Law Lab had successfully advocated for the release of 30,000 women and children, with a 99% success rate.<sup>98</sup> Since then, representatives and law students from all around the United States have continued to use Innovation Law Lab to help women asylum

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92. See *Radical & Inspiring: Coders & Lawyers & Activists*, INNOVATION L. LAB, <https://innovationlawlab.org/who/> [<https://perma.cc/J3KD-PT5S>].

93. Stephen W. Manning, *The Ride that Changed My Life*, TEDxMTHOOD (Apr. 12, 2016), <http://tedxmthood.com/stephen-manning/> [<https://perma.cc/3Z57-AA5D>].

94. Tedx Talks, *How to Crowdfund a Refugee Rights Strategy | Stephen Manning | TEDxMtHood*, YOUTUBE (June 29, 2016), <https://www.youtube.com/watch?v=iX9fizsJfuU> [<https://perma.cc/PGG7-MP93>].

95. STEPHEN MANNING, INNOVATION LAW LAB, ACTIVE CASE MANAGEMENT FOR SUCCESSFUL IMMIGRATION CASE OUTCOMES 4 (2016), <https://innovationlawlab.org/wp-content/uploads/2016/03/Active-Case-Management.pdf> [<https://perma.cc/32DU-YFUC>].

96. *Id.*

97. Manning, *supra* note 93.

98. Michael Skapinker, *FT Top 10 Legal Innovators for North America*, FIN. TIMES (Dec. 12, 2017), <https://www.ft.com/content/acb41cb6-cb94-11e7-ab18-7a9fb7d6163e> [<https://perma.cc/V27J-2PEZ>].

seekers in family detention centers in Texas and Pennsylvania pass credible fear interviews.<sup>99</sup>

In the summer of 2018, immigration service providers also relied on various types of technologies to coordinate and organize volunteers to interview immigrant parents and children who had been separated.<sup>100</sup> The Center for Human Rights and Constitutional Law created Project Reunify to deploy volunteer attorneys, social workers, mental health specialists, pediatricians, and interpreters to interview separated children in government custody.<sup>101</sup> The purpose of these interviews was to provide assessments that would assist the court overseeing the *Flores* settlement that governs the rights of detained children, which the Department of Justice has repeatedly tried to modify.<sup>102</sup> Interested volunteers can login to an online platform available at [reunify.org](https://reunify.org), upload their identity documents, and provide information about their professional background, languages, skills, dates of availability, location, and ability to travel.<sup>103</sup> After the children are interviewed, their cases are referred to volunteer lawyers for representation in removal proceedings.<sup>104</sup>

The Center for Human Rights and Constitutional Law is also using technology to collaborate with Human Rights Watch, other non-governmental organizations, and the governments of Mexico, Guatemala, El Salvador, and Honduras to locate deported parents whose children remain in custody in the United States.<sup>105</sup> This requires matching the identities of parents and children and determining everyone's location.<sup>106</sup> Once these matches are made, the organizations establish communication between parents and children and then help the parents apply for humanitarian parole so that they can return to the United States and be reunited with their children.<sup>107</sup>

Technology is also being used to assist practitioners with complex legal analyses at the intersection of criminal and immigration law, often

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99. See *2018 Impact Report*, INNOVATION L. LAB, <https://innovationlawlab.org/report-models-of-the-resistance/> [<https://perma.cc/UYD2-3U5Z>].

100. See, e.g., *id.* (noting how Innovation Law Lab, Al Otro Lado, and the Catholic Legal Immigration Network worked together to design systems to provide legal support to asylum seekers).

101. See *Project Reunify*, CTR. FOR HUM. RTS. & CONST. L., <https://www.reunify.org> [<https://perma.cc/HX9Y-LSNK>].

102. See *id.*

103. See *id.*

104. See *id.* To supplement its online efforts, the Center for Human Rights and Constitutional Law is developing a national panel of lawyers willing to provide telephonic consultations to detained minors and their parents using a toll-free number. *Id.* Trained paralegals will screen the calls and conference in attorneys for difficult legal questions. *Id.*

105. See *id.*

106. See *id.*

107. *Id.*

called “cimmigration.”<sup>108</sup> For example, immigration and criminal defense attorneys frequently need to determine whether a given state conviction constitutes an “aggravated felony,” a “crime involving moral turpitude,” or a “particularly serious crime” under the INA, triggering important immigration consequences.<sup>109</sup> Organizations such as the Immigrant Legal Resource Center (ILRC) and the Immigrant Defense Project (IDP) have pioneered the development of centralized, online charts to help immigration and criminal defense attorneys analyze the immigration consequences of state convictions.<sup>110</sup> These organizations and others are now building on those incredible achievements to make it easier for practitioners on the ground to access this complex information quickly. For example, ILRC recently developed a new website that is responsive to the user’s device,<sup>111</sup> has endnotes that are easy to access, and allows subscribers to receive email alerts that provide updates on immigration consequences. ILRC materials are only available to criminal defense and immigration advocates, not to government attorneys.<sup>112</sup> Unfortunately, it is common for immigration courts, particularly those

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108. A large body of scholarship has developed addressing “cimmigration” issues. *See, e.g.*, César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1458 (explaining that “the dominant distinguishing characteristic between prospective immigrants who have been welcomed and those who have been shunned has turned on criminal activity”); Jennifer Lee Koh, *Cimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1132 (arguing that the void-for-vagueness doctrine should be applied to various statutory provisions that lie at the crossroads of immigration and criminal law); Christopher N. Lasch, “*Cimmigration*” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131, 2132–33 (2014) (questioning whether the *Padilla v. Kentucky* decision that cemented the cimmigration field supports the constitutional values it recognizes); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 370–71 (2006) (arguing that the growth of cimmigration is rooted in membership theory which justifies state exclusion of noncitizens by criminalizing their activities).

109. 8 U.S.C. § 1101(a)(43) (2012) (aggravated felony); *id.* § 1158(b)(2)(B)(ii) (particularly serious crime bar to asylum); *id.* § 1231(b)(3)(B) (particularly serious crime bar to withholding of removal).

110. *See Resources: Criminal Defense Attorneys*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/defender-resources/> [<https://perma.cc/J55T-UHAV>]; IMMIGRANT LEGAL RESEARCH CTR., QUICK REFERENCE CHART: FOR DETERMINING KEY IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES 5–43 (2016), [https://www.ilrc.org/sites/default/files/resources/california\\_chart\\_jan\\_2016-v2.pdf](https://www.ilrc.org/sites/default/files/resources/california_chart_jan_2016-v2.pdf) [<https://perma.cc/U33N-FJVV>] (referencing an annotated chart of potential immigration consequences of certain offenses, written by Katherine Brady). One of the challenges for criminal defense attorneys in using these charts is in interpreting what the classification of an offense on the chart means for a client in terms of immigration consequences. For example, a criminal defense attorney can find out from the chart that a certain offense is a “crime involving moral turpitude” or an “aggravated felony” under immigration law but may not understand the immigration ramifications of those classifications for the client.

111. Responsive websites are designed to adapt to a variety of users and therefore enhance their use regardless of whether the user is using a computer, a tablet, or a phone.

112. When registering for the site, users must certify that they are not government attorneys.

located inside detention centers, to prohibit representatives for respondents from bringing laptops and cell phones into the courtroom, even though ICE attorneys are allowed to do so. These rules impede the ability of representatives for respondents to access valuable technological resources in court.

Another way technology is being used to help practitioners navigate the complex area of crimmigration is by facilitating collaboration between criminal defense attorneys and immigration attorneys. For example, Julie Wimmer, an immigration attorney in Texas, established a nonprofit called myPadilla that operates an innovative website to help criminal defense attorneys in Texas draw on the expertise of immigration attorneys to advise clients about the immigration consequences of a conviction, as required by *Padilla v. Kentucky*.<sup>113</sup> Defense attorneys submit requests for assistance through the website and experienced immigration attorneys respond with detailed advice.<sup>114</sup> This collaboration helps criminal defense attorneys fulfill their professional obligations to provide effective representation.

In addition to technology that facilitates collaboration among legal service providers and the complex legal analyses involved in crimmigration, this Article contends that the adoption of relatively simple technologies by detention centers and the immigration courts can play a huge role in expanding access to counsel for detained noncitizens. Those technologies, and how they would serve the interests of the DHS and the immigration courts by helping them triage their own caseloads, are discussed in Parts II and III below.

## II. TECHNOLOGICAL TRIAGE BY THE DEPARTMENT OF HOMELAND SECURITY

Employing the triage model in the immigration context is helpful not just for noncitizens but also for the federal agencies most impacted by the high volume of noncitizen legal needs. This Part discusses how adopting detention center technology that expands access to counsel can assist the DHS in coping with its own workload.

### A. *The Need for Triage*

The DHS, which is responsible for the apprehension, detention, prosecution, and removal of noncitizens, must also engage in triage.

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113. See *Padilla v. Kentucky*, 599 U.S. 356, 374 (2010) (holding that the failure of criminal defense counsel to advise a client about the immigration consequences of a conviction can constitute ineffective assistance); Jordan Burnham, *County to Enable Pilot Padilla Program*, SAN MARCOS DAILY REC. (Sept. 24, 2019), <https://www.sanmarcosrecord.com/news/county-enable-pilot-padilla-program> [https://perma.cc/PXY5-DYG6].

114. See MYPADILLA, <https://mypadilla.com/> (last visited May 3, 2020) [https://perma.cc/773D-67QU].

There are approximately 10.5 million undocumented individuals in the United States,<sup>115</sup> as well as about a million more who are lawfully present but removable based on criminal convictions.<sup>116</sup> Yet current funding levels permit the removal of “only” around 400,000 people per year.<sup>117</sup> Because not everyone who is removable can be deported, the government must engage in some type of triage to decide how best to utilize its resources. Such triage can happen at a very high level by the President or the Secretary of the DHS, who have the power to establish immigration enforcement priorities, as well as by ICE attorneys who can exercise discretion in individual removal cases. ICE attorneys can exercise discretion in many ways, including by deciding whether to pursue removal, what charges to bring under the INA, how to present the case, whether to negotiate with the other side, and whether to appeal.<sup>118</sup>

ICE’s Office of the Principal Legal Advisor describes the obligations of ICE attorneys as “protect[ing] the homeland by diligently litigating cases while adhering to the highest standards of professional conduct . . . and optimizing resources to advance DHS and ICE missions.”<sup>119</sup> This statement captures several duties. The need to diligently litigate cases while adhering to the highest standards of professional conduct emphasizes that ICE attorneys have a dual role. On the one hand, they are responsible for enforcing immigration laws and protecting national security. On the other hand, as government attorneys working to serve the public interest, they have a professional obligation to “seek justice rather than victory.”<sup>120</sup> They have no legitimate interest

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115. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/X3LY-4LX5>].

116. Michelle Ye Hee Lee, *Trump’s Fuzzy Math on Undocumented Immigrants Convicted of Crimes*, WASH. POST (Sept. 2, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/09/02/trumps-fuzzy-math-on-undocumented-immigrants-convicted-of-crimes/> [<https://perma.cc/NEJ8-484L>] (indicating that out of 1.9 million “removable criminal aliens,” approximately 820,000 are undocumented, leaving just over a million with legal status).

117. See Memorandum from John Morton, Dir., ICE, to All ICE Employees (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/UD6Z-SXDK>] (stating that the immigration system can process only about 400,000 of the estimated 11 million undocumented persons in the United States per year).

118. Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 5 (2014).

119. *Office of the Principal Legal Advisor (OPLA)*, ICE, <https://www.ice.gov/opla> [<https://perma.cc/F22N-3RYY>] (last updated Jan. 6, 2020).

120. *Kang v. Attorney Gen.*, 611 F.3d 157, 167 (3d Cir. 2010); see also *Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) (commending the INS’s attorney for admitting error in light of the principle that “[c]ounsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation”); *In re S-M-J-*, 21 I&N Dec. 722, 727 (B.I.A. 1997) (“[I]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done.”).



in “barring from discretionary relief those who are eligible.”<sup>121</sup> Additionally, as courts, scholars, and the agency itself have recognized, ICE attorneys have obligations to promote procedural justice<sup>122</sup> and to exercise equitable prosecutorial discretion.<sup>123</sup> Honoring these duties is critical not only to comply with the highest standards of professional conduct, but also to optimize the agency’s scarce resources.

ICE attorneys, like criminal prosecutors, are officers of the court and therefore have a professional duty to “seek justice within the bounds of the law,” not just to deport.<sup>124</sup> They serve the public interest and, like criminal prosecutors, “should act with integrity and balanced judgment to increase public safety both by pursuing appropriate . . . charges of appropriate severity, and by exercising discretion not to pursue . . . charges in appropriate circumstances.”<sup>125</sup> To fulfill these obligations, they “should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations.”<sup>126</sup>

Yet ICE attorneys carry an overwhelming caseload that undermines their ability to fulfill their professional obligations. According to a study conducted by the Government Accountability Office, in 2005, ICE attorneys’ caseloads allowed them to spend, on average, only twenty minutes to prepare for each case.<sup>127</sup> At that time, there were 579 ICE

121. Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 191–92 (2010).

122. *Kang*, 611 F.3d at 167 (explaining that an ICE attorney is “the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to [his adversary]” (alteration in original) (quoting *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1958))).

123. Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All Office of the Principal Legal Advisor Chief Counsel 3–4 (Oct. 24, 2005), <https://asistahelp.org/wp-content/uploads/2018/11/DHS-OPLA-NTA-memo-Prosecutorial-Discretion.pdf> [<https://perma.cc/B3P5-QF9D>]; see also Cade, *supra* note 118, at 24–25.

124. *Criminal Justice Standards for the Prosecution Function*, A.B.A. (2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/535B-7HN2>]; see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“It is as much [the government attorney’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2131 (1998) (discussing the prosecutor’s pursuit of “‘justice’ or ‘the public interest’” in plea bargains); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 240, 241 n.173 (2000) (explaining that federal prosecutors have higher professional obligations than private attorneys).

125. *Criminal Justice Standards for the Prosecution Function*, *supra* note 124.

126. *Id.*

127. BETSY CAVENDISH & STEVEN SCHULMAN, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE 39 (2012).

attorneys responsible<sup>128</sup> for 184,000 pending cases.<sup>129</sup> Since then, the number of pending immigration court cases has doubled, and the total number of ICE attorneys has decreased, leaving them with even less time per case.<sup>130</sup> Consequently, ICE attorneys feel “woefully unprepared” for hearings.<sup>131</sup> Even if Congress allocates money for DHS to hire more ICE attorneys, the supply of potential cases is so vast that the heavy workload is unlikely to change.<sup>132</sup>

One way for the DHS to triage cases is by categorizing them as high, medium, or low priority. This would allow the DHS attorneys to focus on high-priority cases, while encouraging ICE attorneys to exercise their discretion with respect to low-priority cases. Under the Obama Administration, the DHS ranked specific categories of noncitizens as first, second, and third priorities, or not a priority at all.<sup>133</sup> Individuals who fell outside those priorities were generally not placed in removal proceedings or had their proceedings administratively closed, which means the case was removed from the immigration judge’s active docket.<sup>134</sup> Under the Trump Administration, however, deportation priorities have been much less clear.<sup>135</sup> In fact, everyone appears to be a priority, even noncitizens who have been in the United States for a long time and have no criminal record.<sup>136</sup> Future administrations could try to establish clearer immigration enforcement priorities to guide ICE attorneys about how to exercise discretion in individual cases.<sup>137</sup>

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128. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-206, DHS IMMIGRATION ATTORNEYS: WORKLOAD ANALYSIS AND WORKFORCE PLANNING EFFORTS LACK DATA AND DOCUMENTATION 10 (2007) (documenting that, in 2006, the largest division of ICE’s legal office had 579 attorneys located in 51 field offices throughout the United States).

129. See *Immigration Court Backlog Tool*, *supra* note 33 (click “Entire US”; hover mouse over bar representing 2006 on the graph).

130. *Id.* (click “Entire US”; compare bar graph results).

131. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1654 (2010) (stating that ICE attorneys feel “woefully unprepared”); see also CAVENDISH & SCHULMAN, *supra* note 127, at 40 (noting that one Chief Council of an ICE regional office remarked that he often “feels like we are dodging bullets”).

132. See Cade, *supra* note 118, at 53 (explaining that the current supply of potentially deportable noncitizens is inexhaustible, so even adding a large number of ICE attorneys is unlikely to change their active caseload).

133. Memorandum from John Morton, Dir., ICE, to All ICE Employees, *supra* note 117.

134. A decision by then-Attorney General Sessions now makes it much harder for immigration judges to administratively close cases. See *In re Castro-Tum*, 27 I&N Dec. 271, 272 (A.G. 2018) (holding that immigration judges and the BIA do not have general authority to suspend immigration proceedings indefinitely by administrative closure).

135. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

136. See *id.*

137. In the past, ICE has provided at least two reasons for exercising discretion: conserving resources and taking humanitarian concerns into consideration. See Memorandum from John Morton, Dir., ICE, to All ICE Employees, *supra* note 117; Memorandum from William J. Howard,

The need for prosecutorial discretion, and obstacles to achieving it, have received substantial attention from immigration scholars.<sup>138</sup> For example, Jason Cade has argued that although ICE attorneys have obligations to ensure procedural justice and exercise equitable discretion, the removal system currently lacks structural features to ensure that these obligations are met.<sup>139</sup> He identifies several reforms that would encourage ICE attorneys to exercise discretion with the goal of seeking justice in mind: vertical prosecution (where prosecutors stick with their cases), prehearing conferences, enhanced power to screen and decline cases, and heightened disclosure obligations.<sup>140</sup>

Another way for ICE attorneys to triage their workload, which is distinct from the exercise of discretion but can facilitate it, is to facilitate access to counsel for immigrants. It may initially seem counterintuitive that helping the opposing party in an adversarial system would serve the interests of ICE. But having a representative on the other side would help ICE attorneys better manage their caseloads and comply with their duty to seek justice. To begin with, representatives often submit briefs and other documents that would help DHS decide more quickly which cases are meritorious and therefore deserving of discretion or stipulations. Second, having a representative on the other side creates opportunities for communication and negotiation about different options for resolving the case. Third, a representative can help catch factual or legal errors early on, which saves everyone time. For example, factual errors about someone's legal status or about a criminal conviction may result in someone who is not actually deportable being placed in removal proceedings. If these issues are brought to ICE's attention, the case could quickly be terminated. In short, having a representative on the other side promotes accuracy, fairness, and efficiency, which not only helps

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Principal Legal Advisor, ICE, to All Office of the Principal Legal Advisor Chief Counsel, *supra* note 123; see also *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, ICE, <https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf> [<https://perma.cc/VC8P-EXMH>] (noting that cases involving humanitarian concerns are less of a priority where prosecution would result in an unnecessary diversion of resources).

138. See, e.g., Erin B. Concoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119, 124 (2014); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 118 (2014); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1191 (2015); Shoba Sivaprasad Wahdia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1285 (2015); Shoba Sivaprasad Wahdia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 245 (2010); Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666, 666–67 (2014).

139. Cade, *supra* note 118, at 8.

140. See *id.*

noncitizens, but also helps ICE attorneys satisfy their professional obligations.

Embracing technological changes that facilitate access to counsel is a modest step, far short of appointing representation in removal proceedings at government expense, and much simpler to execute than various structural reforms that would encourage the exercise of discretion. Facilitating access to counsel is also a far preferable means of triage than other tactics utilized by the DHS to reduce caseloads that have been found illegal or raise serious statutory and constitutional concerns.<sup>141</sup> Such tactics include using detention, family separation, and criminal prosecution to deter noncitizens from applying for asylum in the United States;<sup>142</sup> expanding expedited removal to deport noncitizens quickly with minimal procedural protections;<sup>143</sup> and making asylum seekers wait in Mexico for weeks or months before allowing them to apply.<sup>144</sup> While these policies and practices may help reduce caseloads, they do so in ways that undercut legal processes and protections, thereby undermining the interests of justice.

### B. Triage by Facilitating Representation

There are several relatively simple ways that the DHS could use technology to facilitate access to counsel, which, as described above, would help ICE attorneys triage their own caseloads and satisfy their professional obligation to seek justice. First, the DHS could allow representatives to bring their own technology (i.e., laptops and cell phones) into detention centers when meeting with clients, which is currently prohibited at many facilities. Second, DHS could ensure that detention centers provide detained individuals with access to tablets and email for legal communications. Third, DHS could ensure that detention centers are equipped with video teleconferencing technology that allows

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141. See *Aracely v. Nielsen*, 319 F. Supp. 3d 110, 149, 153–54 (D.D.C. 2018) (holding that asylum seekers were entitled to a preliminary injunction prohibiting the Government from considering deterrence as a factor in parole requests); *R.I.L.–R v. Johnson*, 80 F. Supp. 3d 164, 186–88, 191 (D.D.C. 2015) (granting a preliminary injunction based on the plaintiff’s likelihood of succeeding on statutory and constitutional claims challenging ICE’s policy of taking deterrence of mass migration into account in making custody determinations).

142. See *Cade*, *supra* note 118, at 77; Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 760–76 (2019) (discussing the DHS’s use of illegal turn-backs of asylum seekers at ports of entry, criminal prosecution, and family separation to deter individuals from applying for asylum in the United States).

143. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019) (expanding expedited removal to include individuals who entered illegally or through fraud or misrepresentation and were apprehended within *two years* of entry *anywhere* in the United States).

144. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 5–6 (2018) (explaining the DHS’s policy of “metering” asylum seekers by making them wait in Mexico until there is space at a port of entry to apply); Marouf, *supra* note 142, at 763–68.

representatives to have confidential and private communications with clients as a supplement to in-person visits. Lastly, DHS could provide representatives and detained individuals with electronic copies of the A-file, which is a way to share basic information about the case needed to assess deportability and eligibility for relief from removal, thereby opening the door to narrowing the issues or negotiating a resolution.

These detention-center technologies are critical to bridging the gap in access to legal services for detained immigrants facing deportation. As explained in Part I, this group tends to have the most complex and high-risk cases, yet the least access to legal services. Finding ways to use technology more effectively to level the playing field in their cases must therefore be a high priority. The United States currently detains approximately 35,000 immigrants a day.<sup>145</sup> Some of these detained individuals are in facilities owned by ICE, but far more are in state and local jails or privately owned detention facilities that have contracts with ICE, or in facilities contracted by the U.S. Marshals.<sup>146</sup> We include all of these detention centers in this discussion because ICE is ultimately responsible for what technology it makes available to the immigrants in its custody. Greater integration of technology in detention centers is a critical component of expanding access to legal services.

### 1. Representatives' Access to Phones and Laptops

Additionally, the DHS could facilitate access to counsel by allowing representatives to bring technologies with them into detention centers, including phones, laptops, and printers. Currently, variations exist among immigration detention centers regarding what, if any, technology a representative can bring to a client meeting. Some immigration detention centers, like the large T. Don Hutto facility in Texas, prohibit representatives from bringing any electronic devices, even though they allow other groups to bring laptops to use during Know Your Rights presentations to detained noncitizens.<sup>147</sup> On the other hand, two family detention centers in Texas allow representatives to bring laptops, and

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145. See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMATIC IMPROVEMENTS 1 tbl.1 (2018) (including a chart of the types of detention centers and numbers of detained individuals at each type of facility); see also *Detention Facility Locator*, ICE, <https://www.ice.gov/detention-facilities> [<https://perma.cc/XD6S-P8QY>] (click on a facility marked on the interactive map; then click on the blue marker) (describing the facility and how many people are currently located at that facility).

146. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 145, at 1 tbl.1.

147. UNIVERSITY OF TEXAS SCHOOL OF LAW HUMAN RIGHTS & IMMIGRATION CLINICS, LOCKING UP JUSTICE: A REPORT ON ACCESS TO JUSTICE FOR MIGRANTS IN IMMIGRATION DETENTION IN TEXAS FOR CONSIDERATION BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS 51 (2018) [hereinafter LOCKING UP JUSTICE].

some detention centers permit cell phones.<sup>148</sup> These inconsistencies suggest that there is no genuine security justification for banning attorneys from access to technology during legal visits.<sup>149</sup>

Some might argue that there is nothing unusual in prohibiting attorneys from bringing electronic devices into detention centers. After all, the Federal Bureau of Prisons also prohibits attorneys from bringing cell phones or personal digital assistants to legal visits with inmates.<sup>150</sup> However, federal prisons have computers available for attorneys to use in the attorneys' visiting area.<sup>151</sup> Attorneys regularly use those computers to review electronic discovery and other materials with their clients.<sup>152</sup> Similarly, immigration detention centers could provide an area with computers and printers that attorneys can use while visiting clients to help them work more efficiently. That way attorneys could prepare and print out forms and declarations for clients to sign during a single visit.<sup>153</sup>

Ideally, however, attorneys would be allowed to bring their own laptops, printers, and wireless hotspots to provide support and representation. This would allow attorneys to use their own case management systems and information stored on their own laptops. Hotspots would also allow attorneys to do legal research on the spot, look up any necessary information online, and communicate by email with staff, colleagues, supervisors, and mentors.

## 2. Access to Tablets and Email for Detained Noncitizens

Providing individuals in immigration detention with access to special tablets for detained populations would also facilitate communication with counsel and provide access to information that promotes the fairness, accuracy, and efficiency of the proceedings. At least a dozen companies currently make tablets for incarcerated populations.<sup>154</sup> These tablets are designed so that no other operating system can be installed and have clear, tamper-proof covers to prevent anyone from smuggling things

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148. *Id.*

149. *Id.*

150. Memorandum from D.J. Harmon, Warden, U.S. Dep't of Justice, Bureau of Prisons on Visiting Regulation to All Departments 9 (July 6, 2016), [https://www.bop.gov/locations/institutions/sea/SEA\\_visit\\_hours.pdf](https://www.bop.gov/locations/institutions/sea/SEA_visit_hours.pdf) [<https://perma.cc/SU72-CTD4>].

151. *Id.*

152. *Id.*

153. LOCKING UP JUSTICE, *supra* note 147, at 51.

154. Examples of companies that manufacture tablets for inmates include GTL, JPay, and Telmate. See *GTL Tablet Solutions*, GTL, <http://www.gtl.net/gtl-tablet-solutions/> [<https://perma.cc/WMG8-TKT5>]; *Meet the New JP5s and JP5mini*, JPAY, <http://offers.jpays.com/jp5-tablets/> [<https://perma.cc/CK72-XM9F>]; *Busy Inmates Are Well-Behaved Inmates*, TELMATE, <https://www.telmate.com/access-tablets/#> [<https://perma.cc/JM2Z-VGB4>].

inside them.<sup>155</sup> In many facilities, inmates use the tablets at shared “kiosks” in public recreational areas.<sup>156</sup> The tablets provide users with access to email, preloaded educational materials and programs, and restricted access to the internet.<sup>157</sup>

The email system, which detained individuals could use to communicate with representatives, is specially designed to be accessible only through the provider’s own web platform.<sup>158</sup> Thus, someone outside the correctional facility who is communicating with a detained individual cannot access the email through a cell phone or another device but must log into the provider’s website. Another security feature is that correctional facilities can create their own guidelines for screening and filtering email messages.<sup>159</sup> For example, they can flag certain words like “escape” or gang names.<sup>160</sup> They can also screen the messages of high-risk individuals manually.<sup>161</sup> Existing systems also limit the length of emails to a certain number of characters and do not allow attachments to increase security.<sup>162</sup>

If this email system were to be used for the purpose of facilitating access to counsel, some changes would obviously have to be made. First, the confidentiality of attorney–client communications would need to be protected. Detention facility staff could not review, screen, download, or store legal emails. A private space (similar to an attorney visitation room) would also need to be made available for detained individuals to use the tablets to communicate with legal providers, rather than shared kiosks in public recreational areas.

One challenge is that some companies, like JPay, have refused to protect attorney–client privilege for any messages sent on their

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155. Lorenzo Ligato, *New Tablet Will Connect Prison Inmates to Outside World*, HUFFPOST (July 10, 2015), [https://www.huffingtonpost.com/2015/07/10/jp5mini-tablet-jpay-prison\\_n\\_7763640.html](https://www.huffingtonpost.com/2015/07/10/jp5mini-tablet-jpay-prison_n_7763640.html) [<https://perma.cc/4G2S-PWSK>]; Rebecca McCray, *Computers for Cons: The Debate over Tablets in Prisons Heats Up*, TAKEPART (Oct. 2, 2015), <http://www.takepart.com/article/2015/09/30/tablets-inmates> [<https://perma.cc/WPR5-SZQD>].

156. *See, e.g., Buy Media*, JPAY, <https://www.jpay.com/PMusic.aspx> [<https://perma.cc/TR6P-U5JV>] (“All JP5 tablets work in conjunction with the JPay kiosks installed in common spaces or living units.”).

157. *See id.*

158. *See* Ananya Bhattacharya, *This Is the Tablet Prisoners Use*, CNN (July 23, 2015), <https://money.cnn.com/2015/07/23/technology/jpay-prison-tablet/index.html> [<https://perma.cc/72EQ-RXL5>] (explaining that “[e]verything is run on the JPay platform” and that the tablets have wireless capability only “if a correction facility chooses to enable it”).

159. *Id.*

160. *Id.*

161. *Id.*

162. Stephen Raher, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POLICY INITIATIVE (Jan. 21, 2016), <https://www.prisonpolicy.org/messaging/report.html> [<https://perma.cc/US35-RFUN>].

systems.<sup>163</sup> The federal prison email system, called Trust Fund Limited Inmate Computer System (TRULINCS), specifically requires inmates to acknowledge that their emails are monitored.<sup>164</sup> In this situation, where a system requires consent to monitoring of emails, courts have found that attorney–client privilege does not apply.<sup>165</sup> It would therefore be very risky for detained individuals and attorneys to communicate using these types of systems.

However, there are other companies that say they honor attorney–client privilege.<sup>166</sup> Of course, even then, security breaches can occur. For example, in November 2015, Securus Technologies, a company that provides phone services to prisons and claims to protect attorney–client privilege, suffered an enormous breach of nearly 70 million phone-call records, which included the release of some call recordings.<sup>167</sup> The Director of the ACLU’s National Prison Project called this “the most massive breach of the attorney–client privilege in modern U.S. history.”<sup>168</sup> These types of breaches could be major deterrents for

163. See *JPay Terms of Service*, JPAY, <https://static.prisonpolicy.org/messaging/Exhibit21L.pdf> [<https://perma.cc/N3HQ-L9P6>] (last updated Dec. 16, 2015).

164. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, TRUST FUND LIMITED INMATE COMPUTER SYSTEM (TRULINCS) – ELECTRONIC MESSAGING 2 (2009); Christopher J. Milazzo, Note, *When It Comes to Privilege, You’re Better Off Dead: Protecting Attorney–Client Communications Sent Through Prison Email Systems*, 25 CORNELL J.L. & PUB. POL’Y 269, 276 (2015).

165. See, e.g., *United States v. Walia*, 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at \*50–51 (E.D.N.Y. July 25, 2014) (noting that inmates’ use of prison e-mail system is conditioned on consent to monitoring); *FTC v. Nat’l Urological Grp., Inc.*, No. 1:04–CV–3294–CAP, 2012 WL 171621, at \*1 (N.D. Ga. Jan. 20, 2012) (holding that defendants waived the attorney–client privilege with respect to e-mail communications because the prison’s e-mail system required users to consent to monitoring and warned that communications with attorneys were not privileged); *Curto v. Med. World Commc’ns, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at \*6–8 (E.D.N.Y. May 15, 2006) (using Fourth Amendment privacy analysis to determine whether attorney–client privilege applies); see also Amelia H. Barry, *Inmates’ E-mails with Their Attorneys: Off-Limits for the Government?*, 64 CATH. U. L. REV. 753, 756–57 (2015) (noting that while attorney–client communication is generally privileged, inmates may waive the privilege when using a prison e-mail system).

166. “Smart Communications directs attorney users to apply for a designated attorney account, although it does not provide specific policies for how it will protect privileged communications.” Raheer, *supra* note 162, at 29 n.105. JailATM allows users to apply for status as a “confidential visitor,” which appears to allow for privileged communications. See *JailATM – Privacy Policy*, PRISON POLICY INITIATIVE (Mar. 22, 2012), <https://static.prisonpolicy.org/messaging/Exhibit21J.pdf> [<https://perma.cc/9LLV-PZ5H>].

167. Jordan Smith & Micah Lee, *Not So Securus*, INTERCEPT (Nov. 11, 2015), <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/> [<https://perma.cc/X62W-PTUM>].

168. Jeff Goldman, *Breach at Securus Technologies Exposes 70 Million Prison Phone Calls*, ESECURITY PLANET (Nov. 13, 2015), <https://www.esecurityplanet.com/network-security/breach-at-securus-technologies-exposes-70-million-prison-phone-calls.html> [<https://perma.cc/5VWD-DY5W>].



attorneys to use the email system offered by a detention center, even if the system purports to protect attorney–client privilege.

Another change to existing email systems that would facilitate the use of tablets for attorney–client communication is removing the character limit per email, or at least substantially increasing it. Attorneys must be allowed to communicate everything thoroughly and clearly to their clients. In addition, attachments should be permitted for attorney–client communications, so that attorneys can send their clients copies of forms, declarations, pleadings, evidence, and other information relevant to the case.

Cost must also be taken into consideration when it comes to using tablets and email. In the correctional facilities where these tablets are currently used, detained individuals (or their families) must purchase the tablets themselves and pay for each email message.<sup>169</sup> JPay, for example, sells these tablets for around \$70<sup>170</sup> and charges \$0.35 per email.<sup>171</sup> To put this cost into context, inmates typically earn \$0.20 to \$0.95 per hour.<sup>172</sup> “In 2014, JPay had electronic messaging contracts with seventeen prison systems, covering 500,000 incarcerated users.”<sup>173</sup> That year, JPay’s electronic messaging income was \$8.5 million (12% of its total corporate revenue).<sup>174</sup> These figures show that the email services offered to incarcerated populations are designed primarily to profit companies, not to promote access to justice in any way.

However, some corrections departments have negotiated deals with companies like JPay to receive at least the tablets for free. For example, the New York Department of Corrections and Community Supervision entered into a deal with JPay that will provide all 51,000 prisoners in the state with tablets.<sup>175</sup> That number exceeds the daily population of people in immigration detention, which is currently around 35,000.<sup>176</sup> JPay

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169. See, e.g., Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018), <https://www.wired.com/story/jpay-securus-prison-email-charging-millions/> [<https://perma.cc/5EB4-YJUT>].

170. Bhattacharya, *supra* note 158.

171. Law, *supra* note 169.

172. *Id.*

173. Raheer, *supra* note 162.

174. Max Lewontin, *US Prisons Now Offer Inmates ‘Electronic Messaging,’ But It’s Not Really E-mail*, CHRISTIAN SCI. MONITOR (Jan. 22, 2016), <https://www.csmonitor.com/Technology/2016/0122/US-prisons-now-offer-inmates-electronic-messaging-but-it-s-not-really-e-mail> [<https://perma.cc/59BR-8DYS>].

175. Ellie Kaufman, *In New York, All 51,000 State Prisoners Will Get Their Own Tablet Computers*, CNN (Feb. 1, 2018), <https://www.cnn.com/2018/02/01/us/new-york-inmates-tablet-trnd/index.html> [<https://perma.cc/2EG3-6D25>].

176. *Detention Management*, ICE, <https://www.ice.gov/detention-management> [<https://perma.cc/JD9B-8FAJ>] (last updated Jan. 16, 2020) (select “Detention Statistics” from the tab options, then select the dropdown option labelled “Currently Detained Population by Arresting Agency as of [date]”).

agreed to provide the tablets for free as part of a contract to start a pilot electronic financial system designed to let people send money to people in prison more easily.<sup>177</sup> Such contracts that include free tablets as part of a broader package may be a good way for agencies like ICE to make tablets widely available without charging detained individuals the cost of purchasing one.

For detained noncitizens who are pro se, access to tablets can also help promote the accuracy, efficiency, and fairness of proceedings by providing information about legal services and access to websites that will help them prepare their own cases. Preloaded materials on tablets could include lists of pro bono and low-cost immigration legal service providers, information about *notario* fraud, and referrals to social service organizations. Tablets could also include materials to help educate detained individuals about their rights in immigration court, the nature of the proceedings, different types of applications for relief from removal, and other legal resources, such as pro se packets with sample motions, practice advisories, “Know Your Rights” presentations,<sup>178</sup> and charts that help explain the immigration consequences of various crimes. These materials would need to be made available in multiple languages, but particularly in English and Spanish, given the profile of the U.S. immigrant population.<sup>179</sup>

Because law libraries in immigration detention centers tend to be very limited, providing educational materials on tablets as additional legal resources would be extremely useful for unrepresented individuals. The law libraries in immigration detention centers consist primarily of computers with basic legal research databases.<sup>180</sup> An empirical study by Professor Emily Ryo found that 39% of the 448 individuals in immigration detention included in the study’s sample experienced difficulty accessing electronic materials through computers.<sup>181</sup> They reported being allowed only one hour a day to access the library, which

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177. Kaufman, *supra* note 175.

178. Not all detention centers have contracts with organizations that provide “Know Your Rights” presentations, and detained individuals may miss the presentation or want to review it multiple times or in a difficult language. See LENNI B. BENSON & RUSSEL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATIONS 59–60, 65 (2012).

179. In 2016, 78% of U.S. households reported speaking only English at home. The second most commonly spoken language in the United States is Spanish. Jeanne Batalova et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INST. (Feb. 14, 2020), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [https://perma.cc/VR7R-URP].

180. Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1040 (2017).

181. *Id.* at 1038 tbl.4.

was “woefully inadequate in gathering useful information.”<sup>182</sup> Preloaded educational materials on tablets would be much easier to access, although training detained immigrants on how to use the technology is still crucial.

In addition, tablets can offer access to pre-approved websites that would help pro se individuals in immigration detention access relevant case law and research country conditions reports.<sup>183</sup> For example, ICE could pre-approve the websites of legal search engines, immigration courts and the BIA, legal news, and organizations that publish country conditions reports, which are essential in asylum cases. For example, ICE could pre-approve the Department of State website that includes human rights reports on every country in the world, as well as the websites of organizations like Amnesty International, Human Rights Watch, and the UN High Commissioner for Refugees.

An alternative to “pre-approving” websites is restricting certain websites through “black-list filtering,” which involves installing software to block certain categories of content, like pornography.<sup>184</sup> Although black-list filtering could result in unintentionally blocking access to useful resources,<sup>185</sup> it would be less restrictive than allowing access only to preapproved websites and give detained individuals more flexibility in finding documentary support for their cases.

In short, providing detained noncitizens with access to tablets and email would facilitate access to counsel and also assist those who are pro se. Both types of assistance would promote the accuracy, fairness, and efficiency of proceedings, thereby helping ICE attorneys fulfill their professional obligations and manage their caseload.

### 3. Remote Video Visitation to Detention Centers for Representatives

One of the reasons so many detained noncitizens are unrepresented is because communicating with them is so difficult, and the average amount of time required to provide competent representation is often much higher

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182. *Id.* at 1040.

183. Most bans on inmates using internet are administrative decisions by prison administrators. But some states have enacted statutes prohibiting or restricting prisoners from having internet access. Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 882, 888 (2002) (explaining that Arizona prohibits any person incarcerated in the state from directly or indirectly accessing the internet, while Ohio law prohibits internet access, but does have an exception for educational programs); see also COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER’S MANUAL 591 (11th ed. 2017) (noting that other states, including Minnesota, California, Kansas, and Wisconsin, have enacted similar statutes).

184. Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819, 837 (2008).

185. See, e.g., BENJAMIN EDELMAN, EXPERT REPORT OF BENJAMIN EDELMAN 3, 25 (2001) [https://cyber.harvard.edu/archived\\_content/people/edelman/pubs/aclu-101501.pdf](https://cyber.harvard.edu/archived_content/people/edelman/pubs/aclu-101501.pdf) [<https://perma.cc/SE6R-4Y28>].

than in a non-detained case. Detention centers tend to be “in remote locations at considerable distances from counsel.”<sup>186</sup> Nearly 40% of ICE’s total bed space is over sixty miles from an urban center, and some facilities are much further.<sup>187</sup> For example, the LaSalle detention center in Jena, Louisiana, is 220 miles from New Orleans and 138 miles from Baton Rouge, while the detention center in Port Isabel, Texas, is 155 miles from Corpus Christi. In-person visits to detention centers therefore tend to involve a long journey that is also potentially costly. More time is often lost upon reaching the detention center, due to long lines, security checks, waiting for a visitation room, and unanticipated headcounts. When the legal representative is finally able to meet with the client and obtain the information needed, she will likely need to write everything down by hand, then type up the documents after she leaves, and come back later for the client’s signature, since laptops and printers are not allowed.<sup>188</sup> This results in unnecessary duplication of effort and more lost time.

Telephonic communication with detained individuals is also difficult, as many detention centers do not allow legal representatives to call their clients; rather, the client must call. If the client does not have money to call, then communication tends to break down. According to a 2010 study by the National Immigrant Justice Center, 78% of detained immigrants are in facilities that forbid attorneys from scheduling private calls with their clients.<sup>189</sup> Further, a legal representative cannot generally email detained clients, because, as explained above, most detention centers do not provide detained individuals access to email. Not surprisingly, many legal service providers and private immigration attorneys decide to limit their practice to non-detained clients.

Offering remote video visitation with legal service providers, as a supplement to in-person visits, would go a long way toward addressing these issues. One challenge is that most of the current remote visitation systems do not provide a confidential line, as required to protect attorney–

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186. DORA SCHIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/84RA-YR8R>].

187. HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO YEAR REVIEW 31 (2011), <https://www.humanrightsfirst.org/resource/jails-jumpsuits-transforming-us-immigration-detention-system> [<https://perma.cc/R4MC-VNHP>].

188. LOCKING UP JUSTICE, *supra* note 147, at 51.

189. NAT’L IMMIGRATION JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 4 (2010), [https://www.immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023\\_0.pdf](https://www.immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf) [<https://perma.cc/JE5B-MDJT>].

client communications.<sup>190</sup> Some companies claim that their system is secure and that it does not provide jail staff with a means for recording or monitoring the video call.<sup>191</sup> This type of security must be guaranteed for video visitation to become a feasible option for representatives in immigration cases.

The experience with remote family visitation, which currently exists in correctional facilities across the United States,<sup>192</sup> raises other concerns as well. A major criticism of remote family visitation is that it has become a *replacement* for in-person visits at hundreds of jails.<sup>193</sup> If detention centers adopt technology for remote attorney visitation, they must ensure that in-person visits remain available. Even if a private, confidential video conference is provided, it is not the same as an in-person visit. Remote visitation does not allow attorneys to establish the same level of rapport and trust as an in-person visit.<sup>194</sup> Additionally, families using remote visitation have complained that it often fails to provide a clear image of the person's face, interferes with eye contact, and results in audio lags and freezes, all of which could obstruct the attorney–client relationship.<sup>195</sup> Among other things, an attorney needs to see and hear a client clearly to assess the client's overall condition, prepare the client to testify, and evaluate the client's demeanor for purposes of credibility determinations.<sup>196</sup> For individuals in detention who lack computer

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190. See Dave Bendinger, *Dept. of Corrections Confirms Inadvertent Recording of Attorney-Client Calls*, KDLG PUB. RADIO (Feb. 3, 2014), <http://kdlg.org/post/dept-corrections-confirms-inadvertent-recording-attorney-client-calls#stream/0> [<https://perma.cc/F3BV-3F9Z>] (finding that despite an automated recording system being set up to exclude recording of calls from inmates to attorneys in Alaska's correctional system, calls were still being recorded and stored by the state's Department of Corrections).

191. See, e.g., Nathan Skipper, *Video Visitation Benefits for the Attorney-Inmate Visit*, MONTGOMERY TECH., INC. (Aug. 4, 2017), <http://www.montgomerytechnology.com/index.php/2017/08/04/video-visitacion-benefits-for-the-attorney-inmate-visit/> [<https://perma.cc/H22H-H9EQ>] (claiming video visitation for attorneys is secure).

192. Melissa Mann, *Understanding the Pros and Cons of Video Visitation Systems in Corrections*, CORRECTIONSONE.COM (Jan. 24, 2017), <https://www.correctionsone.com/products/facility-products/inmate-visitacion/articles/283087187-Understanding-the-pros-and-cons-of-video-visitacion-systems-in-corrections/> [<https://perma.cc/8UNP-BQ94>].

193. The Prison Policy Institute has done extensive research on video visitation and found that it has become common for video visits to replace in-person family visits at jails around the country, instead of providing another option. See BERNADETTE RABUY & PETER WAGNER, PRISON POL'Y INITIATIVE, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITACION INDUSTRY IN PRISONS AND JAILS (Jan. 2015), <http://www.prisonpolicy.org/visitacion/report.html> [<https://perma.cc/GMQ4-PVYW>]; see also GRASSROOTS LEADERSHIP, VIDEO VISITACION: HOW PRIVATE COMPANIES PUSH FOR VISITS BY VIDEO AND FAMILIES PAY THE PRICE (Oct. 2014), <https://grassrootsleadership.org/sites/default/files/uploads/Video%20Visitacion%20%28web%29.pdf> [<https://perma.cc/4QN6-R283>].

194. RABUY & WAGNER, *supra* note 193, at 7.

195. *Id.* at 7–10.

196. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2012) (stating that the relevant factors for credibility

literacy or face linguistic obstacles in utilizing video technology, the challenges of remote visitation are even greater.<sup>197</sup> Maintaining in-person attorney visits is therefore essential to fully protect the right to counsel.

Another major criticism of remote visitation in the family visitation context is the cost. Companies that operate video visitation systems are private, for-profit companies that charge exorbitantly high rates for their services. For example, a company called Securus, based in Dallas, charges detained individuals \$20 for twenty minutes of video visitation.<sup>198</sup> Despite these high rates, the system does not always work properly, and many families have complained about being charged even when the video did not function properly.<sup>199</sup> Keeping down costs would be necessary for remote attorney visitation to be a viable option, especially for pro bono providers.

One possible model for immigration detention may be the Remote Attorney Visitation (RAV) System that some counties use for criminal defense attorneys. In Bexar County, Texas, for instance, criminal defense attorneys call the Criminal District Court Administration (CDCA) to request a remote visit.<sup>200</sup> CDCA then schedules an appointment for the attorney to come back and visit with the client remotely, requiring only a one-hour lead time.<sup>201</sup> At the scheduled time, the attorney goes to CDCA's remote attorney visitation room to have the video call with the client.<sup>202</sup> An attorney can schedule up to three thirty-minute, consecutive appointments, thereby remotely meeting with a few clients in a single session.<sup>203</sup>

A similar system could be implemented for immigration cases. Immigration courts could provide remote attorney visitation rooms and establish a system for attorneys to schedule confidential video visits with detained clients. Since not every state has an immigration court, some attorneys may be located quite far from the nearest immigration court.

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determinations in asylum cases include “the demeanor, candor, or responsiveness of the applicant or witness).

197. GRASSROOTS LEADERSHIP, *supra* note 193, at 2.

198. Rebecca Larsen, *Hump Day Hall of Shame: Securus Video Service Replaces in Person Visits, Violates Attorney-Client Privilege in Travis County*, GRASSROOTS LEADERSHIP (Feb. 5, 2014), <https://grassrootsleadership.org/blog/2014/02/hump-day-hall-shame-securus-video-service-replaces-person-visits-violates-attorney> [<https://perma.cc/LZ9A-RN7Z>].

199. *Id.*; see *Securus Technologies Review and Complaints*, PISSED CONSUMER, <https://securus-technologies.pissedconsumer.com/review.html> [<https://perma.cc/63KN-5W2Z>] (documenting the customer reviews that claim that the system does not always work properly and that they are still charged when the video visitation does not function properly).

200. *Remote Attorney Visitation*, BEXAR, <https://www.bexar.org/1242/Remote-Attorney-Visitation> [<https://perma.cc/7NCD-DG79>] (explaining the Remote Attorney Visitation System procedures).

201. *Id.*

202. *Id.*

203. *Id.*

This issue could be addressed by partnering with state and local courts that use the same Remote Attorney Visitation technology. The key challenges in this situation would be protecting privacy and confidentiality during the video conference. The detained individual must be in a private area, such as the type of room used for attorney–client contact visits. Additionally, some type of firewall must be in place to protect confidentiality if the remote visitation occurred in a court or third-party office. Alternatively, attorneys may be able to appear remotely from their own home or office using a video conference system like Zoom if appropriate privacy, security, and confidentiality protections are in place.

In Silicon Valley, the Pro Bono Project has used “Virtual Legal Clinics” for several years to pair volunteer attorneys with clients in rural or isolated areas.<sup>204</sup> The volunteer attorneys communicate with the clients by video using WebEx.<sup>205</sup> The cost of such a platform is approximately \$30 per user per month.<sup>206</sup> WebEx allows chat messaging, which allows communicating with multi-lingual clients, and also allows screen sharing.<sup>207</sup> Attorneys who have just half an hour to spare can participate as a volunteer with these Virtual Legal Clinics.<sup>208</sup> Video conferencing allows them to provide pro bono assistance that would not be possible if they had to travel to meet the client in person.

While there will surely be hurdles in making remote attorney visitation available, the number of examples to draw on and the ever-growing number of systems available make it an achievable goal. Critically, however, remote attorney visitation should not become a *substitute* for in-person visitation. Rather, it should be a *supplement* to in-person visits.<sup>209</sup>

#### 4. Electronic “Discovery”: Access to A-Files

Another simple way that DHS could facilitate representation is simply by sharing the noncitizen’s A-file with the other side. The A-file contains an individual’s entire immigration history, including copies of any previous applications filed, the charging documents, as well as forms and

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204. See Dang et al., *supra* note 17, at 140–42.

205. *Id.* at 142.

206. 2019 Update: *The Real Cost/Pricing for Cisco Webex Enterprise*, VYOPTA (Nov. 22, 2018), <https://www.vyopta.com/blog/business-collaboration/real-cost-cisco-webex/> [<https://perma.cc/7L6G-9NWD>].

207. Dang et al., *supra* note 17, at 142.

208. *Id.* at 146.

209. Cf. AM. BAR ASS’N, STANDARDS ON TREATMENT OF PRISONERS 23-8.5(e) (3d ed. 2011), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoners.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.pdf) [<https://perma.cc/48YP-A93B>] (encouraging correctional officials to “develop and promote other forms of communication between prisoners and their families, including video visitation, *provided that such options are not a replacement for opportunities for in-person contact*”) (emphasis added).

interviews completed by DHS officers after someone is apprehended.<sup>210</sup> Currently, representatives must submit a FOIA request to obtain a copy of the A-file,<sup>211</sup> a process that can take months and may not ultimately succeed.<sup>212</sup> As far back as 1995, the Chief Immigration Judge recognized that “there must be a more efficient mechanism than the use of FOIA that would provide reasonable access to information contained in A-files.”<sup>213</sup> In 2010, the Ninth Circuit held in *Dent v. Holder*<sup>214</sup> that access to the A-file is crucial to an immigrant’s ability to fully and fairly litigate his own removal, but that decision has not been applied in other circuits.<sup>215</sup> By contrast, in criminal cases, discovery rules require prosecutors to turn over a variety of relevant information, including any exculpatory evidence.<sup>216</sup>

The A-file contains information essential to making decisions about whether to contest removability and what types of relief to seek, as well as evidence relevant to assessing the strength of a case. Not having the A-file therefore delays and impedes decisions critical to providing competent representation, including the threshold decision about whether to take a case. Requiring ICE attorneys to turn over the A-file promptly would therefore greatly facilitate representation. Such a rule would also promote efficiency by forcing ICE attorneys to review the A-file earlier, since they would need to screen out confidential information.<sup>217</sup> Currently, it is not uncommon for ICE attorneys to delay looking at the A-file carefully until shortly before the merits hearing, which is similar to a trial.<sup>218</sup> Early review would help make ICE aware of any errors in the charging document, request termination of cases that should never have been filed, take stock of the merits of a case, and potentially narrow the issues or determine if an exercise of discretion is warranted toward the beginning of the proceedings.<sup>219</sup>

While providing either a physical or electronic copy of the A-file would be a vast improvement over the current system, where no copy is

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210. *What Is an Alien File (A-File)?*, CITIZENPATH, <https://citizenpath.com/faq/alien-file/> [<https://perma.cc/NH74-A399>].

211. *Id.*

212. See Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1592 (2014). In *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), the Ninth Circuit held that due process requires DHS to provide noncitizens facing removal copies of their A-files, but so far it is the only circuit to reach this conclusion. See *id.* at 374–75.

213. Michael John Creppy, *The Quest for Enhanced Efficiency in Immigration Courts*, 72 No. 6 INTERPRETER RELEASES 193, 195 (1995).

214. 627 F.3d 365 (9th Cir. 2010).

215. *Id.* at 374.

216. See Cade, *supra* note 118, at 39–41 (discussing the limited amount of formal discovery in immigration courts); Heeren, *supra* note 212, at 1576.

217. Cade, *supra* note 118, at 64.

218. *Id.* at 50–51.

219. *Id.* at 64.



provided, an electronic version is much more practical given the large volume of immigration cases. Electronic access would make the A-files available much more quickly and conserve significant resources in terms of the paper, time, and labor involved in making hard copies.

Equity requires that if electronic access to the A-file is made available to representatives, it must also be made available to pro se individuals, including those in detention. That way, pro se individuals would have the same opportunity as representatives to use the contents of the A-file to advocate for themselves. Furthermore, even represented noncitizens should be able to review their own A-files, just as represented individuals in pretrial detention have a right to review discovery themselves to participate in their own defense and confront the evidence against them.<sup>220</sup> Allowing detained noncitizens to review their own A-files can also help identify relevant issues and create more meaningful meetings with representatives, resulting in more timely decisions.<sup>221</sup>

Incorporating tablets into detention centers, in the manner described above, provides one way to make the A-file available electronically to all detained noncitizens through a special, pre-approved website. Detained individuals could be given a secure login to the website that allows them to access only their own A-file. Alternatively, detention centers could have special computers made available exclusively for the purpose of reviewing A-files. This would be similar to “discovery review computers” that were first made available by the Bureau of Prisons in 2015.<sup>222</sup>

In the federal criminal context, the issue of providing electronic discovery to defendants in pretrial detention was addressed in guidance published by the Joint Electronic Technology Working Group in October 2016.<sup>223</sup> The Working Group recognized the need to minimize the time and costs involved in lengthy legal visits by defense counsel for detained defendants to review materials on the attorney’s own laptop.<sup>224</sup> The Working Group also acknowledged the government’s concerns with technical and security challenges, as well as the numerous concerns raised by detention facilities related to both security and staffing.<sup>225</sup> Ultimately, however, the Working Group recognized the need for incremental improvement over time, with both the government and defense attorneys working with detention facilities to increase their

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220. SEAN BRODERICK ET AL., *CRIMINAL E-DISCOVERY: A POCKET GUIDE FOR JUDGES* 17 (2015).

221. *Id.* at 18 (explaining the benefits of allowing detained pretrial defendants to review electronic discovery themselves).

222. John McEnany & Donna Lee Elm, *Delivering E-Discovery to Federal Pretrial Detainees*, *CRIM. JUST.*, Summer 2017, at 60.

223. *Id.* at 49.

224. *Id.*

225. *Id.*

acceptance of e-discovery review devices.<sup>226</sup> The DHS could take a similar, progressive approach with immigration detention centers.

### III. TECHNOLOGICAL TRIAGE BY THE IMMIGRATION COURTS

Like the DHS, the immigration courts also must figure out ways to triage an enormous backlog of removal cases. After explaining the immigration courts' need for triage, this Part explores several possible technological interventions. These interventions range from an innovative Online Case Resolution system to help triage simple matters to court technologies that would expand access to representation to triage more complex cases. We conclude with a proposal for EOIR to create a National Database of Detained Noncitizens that would facilitate collaborative representation at a much larger scale than is currently possible.

#### A. *The Need for Triage*

The volume of removal cases pending with the immigration courts has received widespread attention. In June 2019, the backlog was over 975,000 cases.<sup>227</sup> While the backlog has increased every year since 2010, the greatest increases have occurred in the last three years under the Trump Administration.<sup>228</sup> This growing backlog of cases is due to increased immigration enforcement, without a commensurate increase in funding for the immigration courts, combined with less frequent use of discretion by ICE attorneys.<sup>229</sup>

The EOIR has made various changes to try to reduce this backlog. Some of these decisions have been uncontroversial, such as hiring more immigration judges (except for allegations of political bias in hiring).<sup>230</sup> Others have been highly controversial, like the decision to impose case completion quotas on immigration judges and evaluate their performance

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226. *Id.* at 60.

227. *Immigration Court Backlog Tool*, *supra* note 33.

228. *Id.*; see COMM'N ON IMMIGRATION, AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 2–25 (2019) [hereinafter ABA REPORT], [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_2.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf) [https://perma.cc/9FHM-Y367].

229. ABA REPORT, *supra* note 228, at 2–26; Molly O'Toole, *Trump Plan Fails to Cut Immigration Backlog, as Caseload Soars More Than 26%*, L.A. TIMES (Feb. 21, 2019), <https://www.latimes.com/politics/la-na-pol-immigration-court-backlog-worsens-20190221-story.html> [https://perma.cc/V9QM-RSLM].

230. See Press Release, Comm. on Oversight & Reform, Top Dems Request IG Investigation of Illegal Hiring Allegations at Justice Department (May 8, 2018), <https://oversight.house.gov/news/press-releases/top-dems-request-ig-investigation-of-illegal-hiring-allegations-at-justice> [https://perma.cc/V3L4-EYRZ].

on that basis.<sup>231</sup> Decisions by then-Attorney General Sessions that prioritize rapid deportation orders over accuracy or fairness in the adjudication of individual immigration cases have also received much criticism.<sup>232</sup> The National Association of Immigration Judges complained that these attempts to use the immigration courts as a “law enforcement tool” have contributed to inefficiencies in adjudication.<sup>233</sup>

In March 2019, the ABA issued a 176-page report warning that the immigration court system is on the brink of collapse.<sup>234</sup> Among many other problems, the report stressed that immigration judges are overworked, lack adequate support resources, and suffer from lagging technology that creates work rather than reducing it.<sup>235</sup> The following Sections explore how the immigration courts can better use technology to help triage cases. First, we examine Online Case Resolution systems as a way to handle simple, routine matters that do not require a hearing.<sup>236</sup> Such systems can increase not just efficiency, but also accuracy and fairness in adjudication.<sup>237</sup> Second, we explore technologies that immigration courts can adopt to increase access to representation, which would help triage more complex cases.<sup>238</sup>

### B. *Online Case Resolution to Triage Simple Matters*

Currently, immigration courts lag far beyond many other courts in technology. Most immigration courts still do not have an electronic case management and filing system, although EOIR is committed to implementing one and has made significant strides in that direction.<sup>239</sup> In July 2018, EOIR introduced a pilot e-filing and document storage program in the San Diego Immigration Court, which then expanded to several other courts.<sup>240</sup> The EOIR Courts & Appeals System (ECAS)

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231. See Yeganeh Torbati, *Head of U.S. Immigration Judges' Union Denounces Trump Quota Plan*, REUTERS (Sept. 21, 2018), <https://www.reuters.com/article/us-usa-immigration-judges/head-of-u-s-immigration-judges-union-denounces-trump-quota-plan-idUSKCN1M12LZ> [<https://perma.cc/R6CA-5J6Y>].

232. Marouf, *supra* note 142, at 744–57.

233. O'Toole, *supra* note 229 (quoting Ashley Tabaddor, President of the Nat'l Ass'n of Immigration Judges).

234. See ABA REPORT, *supra* note 228.

235. *Id.* at 2-25 to -28.

236. See *infra* Section III.B.

237. See Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 211, 215 (2016) (proposing the use of OCR systems for civil infractions, minor warrants, and low-level misdemeanors).

238. See *infra* Section III.C.

239. ABA REPORT, *supra* note 228, at 2-28.

240. Press Release, U.S. Dep't of Justice, EOIR Launches Electronic Filing Pilot Program (July 19, 2018), <https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program> [<https://perma.cc/DT35-3PB4>].

aims to eventually phase out paper filing and retain documents in electronic format in call cases, but, at the time of this writing, it is available in only thirteen immigration courts and adjudication centers.<sup>241</sup> In those locations, attorneys and accredited representatives can upload initiating and supporting documents electronically, as well as download an electronic record of proceedings (eROP).<sup>242</sup> Additionally, the ECAS allows judges to review and annotate documents in the eROP, view the docket, and create orders and decisions.<sup>243</sup> Given the limited availability of electronic filing in immigration courts, more sophisticated forms of technology, like online case resolution (OCR) systems, may seem out of reach, at least for now. However, it is important to look ahead and think broadly about ways technology can help courts triage cases, especially since courts are inevitably moving in this direction.

While immigration courts handle high-stakes cases involving the potentially severe penalty of deportation, many court hearings involve matters that are simple and routine. For example, court hearings are regularly set simply to deal with administrative tasks, such as scheduling future hearings and submitting documents. There are also cases where the parties have stipulated to certain issues, such as a bond amount, administrative closure, or termination, which tend to be easy for judges to decide since the parties reach an agreement.

Some forms of relief, such as voluntary departure, also tend to be uncontested and are usually simple for judges to rule on based on very few facts that can be established through documents.<sup>244</sup> However, an in-person hearing may still be needed for voluntary departure requests to ensure that the request is made on a voluntary, intelligent and knowing basis. Evidence of due process violations in the government's stipulated removal program, for example, caution against dispensing with in-person hearings for voluntary departure requests, at least for unrepresented individuals.<sup>245</sup> The use of OCR for voluntary departure requests could

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241. See *EOIR Courts & Appeal System (ECAS) Information Page*, DEP'T OF JUSTICE (last accessed April 8, 2020), <https://www.justice.gov/eoir/ECAS> [<https://perma.cc/3SJS-E54P>] (stating that ECAS is available in eleven immigration courts and two adjudication centers).

242. See *Executive Office for Immigration Review: What is the EOIR Courts & Appeals System (ECAS)?*, DEP'T OF JUSTICE (last accessed Apr. 8, 2020), <https://www.justice.gov/eoir/file/1076641/download> [<https://perma.cc/72Y9-7Y5Y>].

243. *Id.*

244. See U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 4–5 (2017).

245. See generally JENNIFER LEE KOH, JAYASHRI SRIKANTIAH, & KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS: THE U.S. HAS USED ITS “STIPULATED REMOVAL” PROGRAM TO DEPORT MORE THAN 160,000 NONCITIZENS WITHOUT HEARINGS BEFORE IMMIGRATION JUDGES (2011), <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf> [<https://perma.cc/HS93-NDQH>] (discussing abuses of the

therefore be limited to represented individuals, if it is made available at all.

Out of the 149,581 cases completed by immigration courts in FY2017, 18,551 involved termination and 13,603 involved voluntary departure.<sup>246</sup> An additional 32,394 cases were administratively closed that year.<sup>247</sup> Thus, while these relatively simple matters do not comprise a majority of the court's docket, they still represent a significant percentage of cases that could potentially be resolved through an OCR system. OCR systems make the most sense for high-volume matters that tend to vary on a few well-defined dimensions and can be resolved efficiently without face-to-face interactions with the judge.<sup>248</sup> Although OCR systems are still a relatively new technology, some state courts have already started using them.<sup>249</sup>

We propose an OCR system that would supplement, not replace, traditional court hearings. Immigrants who lack the technology to use the OCR system, or who are uncomfortable using it, would still have the option of going to court. However, it is important to recognize the drawbacks of in-person hearings. Judges spend many hours repeating the same basic information to dozens of respondents, while respondents and representatives often spend hours in a crowded courtroom waiting to be called for a five-minute hearing. Furthermore, many immigrants are afraid or anxious to go to immigration court because they fear being apprehended by ICE and possibly detained.<sup>250</sup> It can also be difficult for immigrants to travel to immigration court, especially since the court may be located far away, even in a different state. Taking time off from work and figuring out child-care further complicates attending hearings in person. Because OCR systems eliminate these barriers to accessing courts, they "disproportionately benefit the poor and disenfranchised."<sup>251</sup> The consequence of missing an immigration court hearing is particularly

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stipulated removal program and recommending that EOIR require immigration judges to hold brief, in-person hearings before signing off on stipulated removal orders for unrepresented noncitizens).

246. U.S. DEP'T OF JUSTICE, *supra* note 90, at 14 fig.7.

247. *Id.* at 15 fig.9.

248. Bulinski & Prescott, *supra* note 237, at 208.

249. For example, Los Angeles courts have developed an in-house system to deal with traffic tickets online. See *Online Services*, L.A. COURT, <http://www.lacourt.org/online/traffic> [<https://perma.cc/L5VN-PV9Q>]. In addition, several district courts in Michigan use the OCR systems developed by Court Innovations. See MATTERHORN, [www.getmatterhorn.com](http://www.getmatterhorn.com) [<https://perma.cc/S8AP-XEYU>].

250. See Betsy Swan, *Legal Immigrants Fear Getting Arrested in Court by ICE*, DAILY BEAST (Apr. 10, 2017), <https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice> [<https://perma.cc/M6BR-7DTA>].

251. Bulinski & Prescott, *supra* note 237, at 239–40.

serious, resulting in an *in absentia* removal order.<sup>252</sup> Thus, being able to resolve certain matters through OCR offers certain advantages.

There are many possible forms that an OCR system could take. A simple version would allow a respondent or representative to log into a court's portal using personally identifying information (such as name, A-number, and EOIR registration number for representatives), view the case, submit certain information, and answer certain questions. There could be a drop-down menu of the types of matters that can be resolved by OCR, with specific questions that must be answered, or documents uploaded for each matter. Certain matters, such as voluntary departure requests, could be limited to represented individuals. OCR systems can provide onscreen translations of everything into Spanish and other common languages, so they can be used by individuals who are not proficient in English.<sup>253</sup>

For example, a representative requesting voluntary departure could select this option on a drop-down menu. The representative could then be asked to upload travel documents and answer certain questions to determine whether the respondent qualifies for voluntary departure.<sup>254</sup> In addition, the representative would have to agree that the respondent is removable, withdraws any requests for other relief, and waives appeal rights, since these are requirements for receiving voluntary departure.<sup>255</sup> Providing these waivers in written form, instead of orally, as traditionally done during a court hearing, would give representatives (and their clients) more time to review and understand them without slowing down the process.

An OCR system would also allow judges to enter their own, personalized rules and preferences for deciding cases. For example, a judge could decide to grant stipulated bond amounts only if they fall within a specified range using the OCR system; or to grant requests for termination through OCR only based on certain facts, such as an approved visa petition that provides an immediate route to legalizing status; or to grant administrative closure for humanitarian reasons to certain categories of people, such as unaccompanied minors with serious health problems. A judge could also adopt rules that make cases involving certain facts, such as a criminal conviction, automatically ineligible for OCR to keep the cases decided through that process as simple as possible. Computer programmers would work with judges to create algorithms that

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252. 8 U.S.C. § 1229a(b)(5)(A) (2012).

253. Bulinski & Prescott, *supra* note 237, at 233.

254. See ELIZABETH DALLAM, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, INC., HOW TO APPLY FOR VOLUNTARY DEPARTURE 11, 13 (2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/01/22/Voluntary%20Departure%20-%20English%20%2813%29.pdf> [<https://perma.cc/UJ7U-Z26J>].

255. See *id.*

reflect legal requirements, court practices, and individual preferences in decision-making.<sup>256</sup>

Decisions made through the OCR system would not be less accurate or fair just because judges could make them more efficiently. In fact, “well-designed OCR systems can provide judges with better and more digestible information than traditional in-person proceedings.”<sup>257</sup> Additionally, OCR systems have the capacity to enhance accuracy and fairness in adjudication by filtering out irrelevant information that contributes to implicit biases, such as race, gender, and appearance.<sup>258</sup> Various aspects of immigration hearings, including their speed, repetitive nature, and reliance on oral decisions have the potential to heighten implicit biases, so a system that helps counter them would be valuable.<sup>259</sup>

Furthermore, by reducing the time spent on routine or minor issues, OCR systems would allow judges to focus their energy and expertise on the more complex matters.<sup>260</sup> Having that extra bandwidth, in turn, would allow judges to address complex cases more accurately and fairly. Using technology to facilitate representation in those complex cases would further assist the courts with triage, as discussed below.

### C. Facilitating Representation to Triage Complex Cases

As the ABA has recognized, representation “creates efficiencies for the immigration courts.”<sup>261</sup> Because self-representation in removal cases is so challenging, it often delays court proceedings.<sup>262</sup> Immigration judges have confirmed that competent representation helps them adjudicate cases “more efficiently and quickly.”<sup>263</sup> When respondents are pro se, immigration judges must explain all court processes and procedures and read respondents all of their rights, which “slows down the hearing, introducing inefficiencies that could be easily handled by an attorney outside of court hours, and hinders the court from operating at

256. *Id.* at 241–42 (“[S]uccessful OCR systems would be carefully tailored to the substance and procedure of the relevant law, to the practices of the court, and even to an individual judge’s idiosyncratic way of exercising discretion in particular categories of cases at issue.”).

257. *Id.* at 240.

258. *Id.* at 240, 247–49. *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (detailing statistics regarding the improper effect of implicit biases).

259. *See* Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431 (2011).

260. Bulinski & Prescott, *supra* note 237, at 240.

261. ABA REPORT, *supra* note 228, at 5-3.

262. *Id.*; *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, LEGAL CASE STUDY: SUMMARY REPORT 24–25 (2017) (recommending expansion of informational programs and further investigation into “the effect of representation on case processing, including public defender programs like in criminal proceedings”).

263. BENSON & WHEELER, *supra* note 178, at 56 (quoting a survey given to immigration judges).

its full potential.”<sup>264</sup> In addition, representatives help the immigration judges focus on the meritorious cases and weed out the ones with no possible relief.<sup>265</sup>

Not only does representation increase efficiency, but it also promotes fairness and accuracy. The ABA reports that “[i]mmigration judges and commentators also agree that the presence of counsel helps courts adjudicate cases more fairly.”<sup>266</sup> For example, the New York Immigrant Family Unity Project, which provides free counsel to financially eligible individuals in immigration detention, has helped ensure due process and improve case outcomes for detained noncitizens.<sup>267</sup> Even ICE attorneys acknowledged that this Project “allows for easier communication about issues that can be resolved with agreement.”<sup>268</sup> Similarly, the class action lawsuit in *Franco-Gonzales v. Holder*<sup>269</sup> led to a policy of appointing a representative at government expense for mentally incompetent individuals in immigration detention, which protects due process and promotes the accuracy and fairness of the proceedings.<sup>270</sup> Providing

264. JENNIFER STAVE ET AL., VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 34 (2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> [<https://perma.cc/QYD3-6BC9>] (citing interviews with Immigration Judges); see also *Hearing on Strengthening and Reforming America’s Immigration Court System Before the Border Sec. and Immigration Subcomm., S. Judiciary Comm.*, 115th Cong. 6 (2018) (statement of Judge A. Ashley Tabaddor, President, Nat’l Ass’n of Immigration Judges), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> [<https://perma.cc/2E66-BULL>] (“Competent counsel, when available, can assist the Court in efficiently adjudicating cases before it.”).

265. JENNIFER STAVE ET AL., *supra* note 264, at 37–38, 61.

266. ABA REPORT, *supra* note 228, at 5–4.

267. JENNIFER STAVE ET AL., *supra* note 264, at 5–6.

268. *Id.* at 34–35 (quoting Khalilah Taylor, ICE’s Deputy Chief Counsel at Varick Street Immigration Courthouse in New York City).

269. No. CV 10-02211, 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013).

270. *Id.* at \*1 (barring further immigration proceedings against certain plaintiffs unless they were provided with Qualified Representatives within sixty days of the order); see Press Release, U.S. Dep’t of Justice, Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented> [<https://perma.cc/4PF7-58YY>]; see also EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 1 (Dec. 31, 2013), <https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf> [<https://perma.cc/7JLS-4VQK>] (providing background on the Office of the Chief Immigration Judge’s “Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions”); *National Qualified Representative Program (NQRP)*, DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp> [<https://perma.cc/NTB6-KRW4>] (noting the National



representation to noncitizens in removal proceedings also “bestow[s] more legitimacy to the immigration system as a whole.”<sup>271</sup>

Like detention center technology, immigration court technology can be used to facilitate access to representation, thereby helping courts adjudicate complex cases more efficiently, accurately, and fairly. The first subsection below discusses the Legal Orientation Program (LOP) and Immigration Court Helpdesks (ICHs), two programs created by EOIR to provide legal resources to noncitizens in removal proceedings, explaining their utility as well as their limitations. The following subsections propose ways to further expand access to representation. These ways include: establishing a nationwide EOIR Pro Bono program; creating a national detainee database that facilitates collaborative representation; and allowing remote video appearances by representatives in limited types of proceedings to further support representation of individuals in remote locations.

### 1. Limitations of the Legal Orientation Program and Immigration Court Helpdesks

Recognizing the benefits of high-quality legal information and access to representation, in 2010, EOIR funded a Legal Orientation Program (LOP) that is administered by the Vera Institute of Justice.<sup>272</sup> The LOP educates detained noncitizens and asylum seekers about their rights, immigration law, and court procedures.<sup>273</sup> It does this through four levels of services: group orientations; one-on-one sessions; self-help workshops; and, depending on capacity and an individual’s eligibility for relief, placement with pro bono counsel.<sup>274</sup>

Immigration judges who preside over cases in detention centers have reported that the LOP is “a very effective tool in making sure the cases are handled in a fair manner and that there is due process for the immigrant.”<sup>275</sup> Furthermore, a 2012 study by EOIR found that

Qualified Representative Program); Gregory Pleasants, *National Qualified Representative Program*, VERA INST. JUSTICE, <https://www.vera.org/projects/national-qualified-representative-program> [<https://perma.cc/ZZ7G-WTJB>] (same).

271. ABA REPORT, *supra* note 228, at 5-17.

272. See Bettina Rodriguez Schlegel, *Legal Orientation Program, Overview*, VERA INST. JUSTICE, <https://www.vera.org/projects/legal-orientation-program/overview> [<https://perma.cc/3BCJ-YS38>].

273. *Id.*

274. Bettina Rodriguez Schlegel, *Legal Orientation Program, Learn More*, VERA INST. OF JUSTICE, <https://www.vera.org/projects/legal-orientation-program/learn-more> [<https://perma.cc/8DRQ-SXAH>].

275. Massoud Hayoun, *Immigration Judges Are Bewildered by the DOJ’s Decision to Slash Legal Guidance for Detainees*, PAC. STANDARD (Apr. 18, 2018), <https://psmag.com/social-justice/immigration-judges-are-bewildered-by-the-dojs-decision-to-slash-legal-guidance-for->

participation in the LOP significantly reduced the length of immigration court proceedings by eleven days; was associated with an average of six fewer days in detention; and resulted in net savings to the government of over \$17.8 million.<sup>276</sup> An empirical study by the Vera Institute published in 2018 concluded that LOP participation is associated not only with faster case completions, but also with fewer *in absentia* orders of deportation.<sup>277</sup> Thus, the LOP appears to have significant benefits, and by 2018, it had expanded to thirty-eight detention centers.<sup>278</sup> However, the LOP still is not available to the vast majority of people in immigration detention.

In 2016, the government also funded ICHs in five of the nation's busiest immigration courts to provide legal education and resources to non-detained individuals in removal proceedings.<sup>279</sup> This program grew out of a pilot program in Chicago and expanded to Los Angeles, New York, Miami, and San Antonio.<sup>280</sup> The ICHs educate non-detained immigrants about the removal process and available forms of relief through group sessions, individual sessions, self-help resources, and information on pro bono assistance.<sup>281</sup>

Both the LOP and ICHs are currently under threat of termination.<sup>282</sup> In April 2018, the DOJ challenged the results of studies showing the

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detainees [<https://perma.cc/7XUF-E7MR>] (quoting Judge Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges).

276. Exec. Office for Immigration Review, *Cost Savings Analysis: The EOIR Legal Orientation Program 2–3*, 2 n.8, [https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP\\_Cost\\_Savings\\_Analysis\\_4-04-12.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf) [<https://perma.cc/9B8W-3XGE>] (last updated Apr. 4, 2012).

277. VERA INST. OF JUSTICE, LOP CASE TIME ANALYSIS, FISCAL YEARS 2013–2017, at 3–4 (2018), <https://www.tahirih.org/wp-content/uploads/2018/10/2018-51777-Doc-02-21-pgs.pdf> [<https://perma.cc/BT2D-D9RT>]; Memorandum from Nina Siulc, Vera Inst. of Justice, to Steven Lang, Exec. Office for Immigration Review, regarding Update on Performance Indicators: LOP Case Time Analysis 1 (Apr. 1, 2018), <https://www.tahirih.org/wp-content/uploads/2018/09/Vera-LOP-2018-Reports-combined-8-pgs-FINAL.pdf> [<https://perma.cc/Q3GA-NPDU>].

278. Schlegel, *supra* note 272.

279. Notice from Exec. Office for Immigration Review, EOIR Announces Creation of Information Helpdesks (Aug. 26, 2016), [https://www.justice.gov/sites/default/files/pages/attachments/2016/08/26/eoirannouncescreationofinformationhelpdesks082616\\_0.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2016/08/26/eoirannouncescreationofinformationhelpdesks082616_0.pdf) [<https://perma.cc/YS4G-UUZ5>]; Press Release, Nat'l Immigrant Justice Ctr., NIJC Celebrates Expansion of Chicago Immigration Court Helpdesk (Aug. 30, 2016), <https://www.immigrantjustice.org/press-releases/nijc-celebrates-expansion-chicago-immigration-court-helpdesk> [<https://perma.cc/GT4R-M8DQ>]; Bettina Rodriguez Schlegel, *Immigration Court Helpdesk, Overview*, VERA INST. OF JUSTICE, <https://www.vera.org/projects/immigration-court-helpdesk/overview> [<https://perma.cc/HX35-FPM4>].

280. Press Release, Nat'l Immigrant Justice Ctr., *supra* note 279.

281. *Id.*

282. Press Release, Vera Inst. of Justice, Statement on DOJ's Decision to Halt Legal Orientation Program (Apr. 11, 2018), <https://www.vera.org/newsroom/press-releases/statement-regarding-legal-orientation-program> [<https://perma.cc/2YU2-QRV4>].

benefits of the LOP and announced that it was halting both the LOP and the ICH program.<sup>283</sup> Just as abruptly, two weeks later, the DOJ reversed course and stated that it would keep the programs going while undertaking its own study of both initiatives.<sup>284</sup> On September 5, 2018, the DOJ released its Phase I analysis, which concluded that LOP participants remained longer in detention, were less likely to receive representation, did not have significantly different case outcomes or case completion rates than non-LOP respondents, and consumed more judicial resources in terms of the number and length of hearings.<sup>285</sup> Although these results and the methodology used have been disputed, the future of the LOP and ICH programs remains uncertain.

Even if these programs continue, there is a need to explore other ways that the immigration courts can facilitate access to representation. Indeed, the ABA's 2019 report "underscores the need to stabilize, standardize, and expand initiatives designed to ensure higher quality and increased access to representation for noncitizens in removal proceedings."<sup>286</sup> Below we explore three ways that immigration courts can use technology to accomplish this goal: by establishing an EOIR Pro Bono Program; by creating a National Database of Detained Noncitizens that facilitates collaborative representation; and by allowing remote video appearances by representatives in limited types of proceedings.

## 2. Creating an EOIR Pro Bono Program

EOIR could expand access to representation by establishing a uniform pro bono program for all immigration courts. Many federal and state courts have created such pro bono programs to help match unrepresented litigants with volunteer attorneys.<sup>287</sup> The technology required to implement a pro bono program is quite basic, and it would promote the administration of justice. The administrative process involved in "matching" clients with pro bono representatives is often the most

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283. *See id.*

284. Jeff Sessions, U.S. Attorney Gen., Opening Statement before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies (Apr. 25, 2018), <https://www.justice.gov/opa/speech/opening-statement-attorney-general-jeff-sessions-senate-appropriations-subcommittee> [<https://perma.cc/B982-864N>].

285. EXEC. OFFICE FOR IMMIGRATION REVIEW, LOP COHORT ANALYSIS 4 (2018), <https://www.justice.gov/eoir/file/1091801/download> [<https://perma.cc/BCX4-R9WS>].

286. ABA REPORT, *supra* note 228, at 5-7.

287. COUNCIL OF APPELLATE LAWYERS, AM. BAR ASS'N, MANUAL ON PRO BONO APPEALS PROGRAMS FOR STATE COURT APPEALS 1, 22, 27 (2d ed. 2017), [https://www.americanbar.org/content/dam/aba/administrative/appellate\\_lawyers/cal\\_probonomanual.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/cal_probonomanual.authcheckdam.pdf) [<https://perma.cc/RJL3-AX2X>].

complicated piece.<sup>288</sup> For this process to work effectively, the court should be involved in designing and promoting the program.

While chapters of the American Immigration Lawyers Association (AILA), bar associations, and individual attorneys or organizations have established or tried to establish pro bono programs at various immigration courts, many immigration courts still do not have one.<sup>289</sup> EOIR could help expand access to legal services for immigrants by establishing a single, uniform pro bono program for all immigration courts. Involving EOIR in the design and implementation of such a program is critical to its success.

In federal court pro bono programs, it is usually the judges who *sua sponte* select and refer cases for assignment of counsel, although some courts also allow litigants to file motions for appointment of counsel.<sup>290</sup> Some courts, like the Ninth Circuit, use staff attorneys or a panel of judges to help screen cases for referral.<sup>291</sup> These programs also normally have a pro bono administrator who maintains the list of attorneys and law firms willing to volunteer as well as the list of cases that have been referred for representation.<sup>292</sup> Volunteers may periodically receive emails summarizing available cases, which they can choose or reject.<sup>293</sup>

Courts use different criteria for selecting cases to refer to the pro bono program. The Ninth Circuit's pro bono program, for example, selects cases that "present an issue of first impression or some complexity, or [that] 'otherwise [warrant] further briefing and oral argument.'"<sup>294</sup> Other federal courts consider factors such as the nature and complexity of the case, the potential merit of the claim, the inability of the client to retain counsel by other means, the degree to which the interests of justice will be served by appointing counsel, and any other factors deemed appropriate.<sup>295</sup>

EOIR, in collaboration with AILA, could establish an immigration court pro bono program modeled after some of these federal court programs to expand access to legal services. For this to work, judges and clerks could assist with screening of cases. AILA members could also help conduct screening to ensure that the cases assigned to volunteer

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288. See AM. BAR ASS'N, HOW TO BEGIN A PRO BONO PROGRAM IN YOUR BANKRUPTCY COURT: A STARTER KIT FOR LAWYERS AND JUDGES 2 (James L. Ballie ed., 2d ed. 1999).

289. See COUNCIL OF APPELLATE LAWYERS, *supra* note 287, at 3.

290. See *id.* at 5; *Court Programs*, AM. BAR. ASS'N (Aug. 4, 2016), [https://www.americanbar.org/groups/probono\\_public\\_service/policy/judicial-participation/court-programs.html](https://www.americanbar.org/groups/probono_public_service/policy/judicial-participation/court-programs.html) [<https://perma.cc/9B5Y-ZLQR>]; *Federal Pro Bono Project*, BAR ASS'N OF S.F., <https://www.sfbar.org/jdc/jdc-legal-services-programs/federal-pro-bono-project/> [<https://perma.cc/CRW9-B47R>].

291. This is true of the Ninth Circuit's pro bono program, established in 1993. *Court Programs*, *supra* note 290.

292. *Id.*

293. *Id.*

294. *Id.* (quoting the Ninth Circuit Court of Appeals' revised Pro Bono Program plan).

295. *Id.*

representatives have merit. To help match cases with representatives, EOIR could also establish a database with brief summaries of the cases that have been referred for representation. Volunteer representatives could then search those cases and decide whether to accept one. Additionally, EOIR could create a website where attorneys login to indicate when they are available to take a pro bono case, what types of case(s) they are competent to handle, and any geographic or other restrictions. EOIR could then directly refer them cases that meet their requirements. These are simple technologies that could go a long way toward expanding access to legal services. A more ambitious proposal for expanding detained immigrants' access to counsel by creating a National Database of Detained Noncitizens is discussed below.

### 3. Creating a National Database of Detained Noncitizens

Triage in medicine involves tackling the most severe cases first. But in the immigration world, the most severe cases—detained immigrants facing deportation—currently receive the least assistance. As explained in Parts II and III, neither private nor public sector technologies are designed to assist this especially vulnerable population. This Section outlines an innovative triage model facilitated by creating a National Database of Detained Noncitizens (Platform) that uses technology to match unrepresented individuals in detention with legal counsel across the country and facilitates collaborative representation on a larger scale. While we propose that EOIR create this Platform, the DHS, representatives, and immigrants would also all have important roles to play in making it a functional and effective way to triage the most serious and complex immigration cases.<sup>296</sup> These roles are discussed below, along with the practical and ethical challenges involved in this proposal.

EOIR is best positioned to create this Platform because it has all of the records of noncitizens in removal proceedings, knows which immigrants lack representation and are detained, and also has a strong interest in the efficient, fair, and accurate adjudication of cases. A significant way that immigration judges could contribute to the Platform is by inputting their basic assessment of eligibility for relief, which would help representatives decide which cases to take.<sup>297</sup> Immigration judges

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296. See Colarusso & Rickard, *supra* note 15, at 408 (“In order for an automated triage tool to reflect the input of legal aid, the private bar, the judiciary, and administrative and social service agencies must be able to share data with one another. The courts are well positioned to facilitate these conversations.”).

297. Involving immigration judges in triaging cases is not unprecedented. Canada's Immigration and Refugee Board separates out stronger claims and decides them quickly, while allocating more time and resources to complicated and contested cases. David C. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity, and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 764 (2011).

have an obligation to advise noncitizens about “apparent eligibility for relief,” which means they are already required to go through a series of questions with pro se immigrants to determine if they may be eligible to apply for various forms of relief from removal.<sup>298</sup> Even if an immigrant appears eligible for some type of relief, without a representative to help prepare the application and supporting evidence, the application is unlikely to be granted.<sup>299</sup> Representatives may therefore prefer cases where the judge has identified potential relief and they believe they can make a difference, as opposed to cases where there does not appear to be anything that can be done to help the noncitizen avoid deportation.

A second way that EOIR could facilitate representation through the Platform is by allowing representatives to provide unbundled services. As discussed above, currently only bond proceedings and removal proceedings are unbundled. Once an attorney enters an appearance in removal proceedings, the attorney is stuck with the entire case. Because collaborative representation, as modeled by the Innovation Law Lab discussed above, is one of the biggest benefits of this type of database, allowing representatives to handle just one piece of the representation, instead of being on the hook for the entire case, is critical.

A third step that EOIR could take to ensure noncitizens receive accurate information and reduce the likelihood of fraud is to limit Platform access to representatives registered with EOIR. This would not require creating a new system, as EOIR established a mandatory electronic registry for attorneys and fully accredited representatives in 2013 and currently allows only registered individuals to appear before the immigration courts.<sup>300</sup> To allow partially accredited representatives working under the supervision of an attorney or fully accredited representative to assist in the selection and preparation of cases, EOIR could register them separately solely to access the Platform, not to appear in court.

The Platform would provide the information that representatives need to select and prioritize cases. Factors that may be relevant to prioritizing or selecting cases include apparent eligibility for relief (as identified by immigration judges), complexity of the case, immigration status, criminal

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298. *See, e.g.*, *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013) (“[F]ailure to advise an alien of ‘apparent eligibility’ to apply for relief is a due process violation . . . .”); *United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (en banc) (explaining the court has repeatedly held that an IJ’s failure to advise the noncitizen of apparent eligibility for relief violates due process and can serve as the basis to collaterally attack a deportation order).

299. *See* Eagly & Shafer, *supra* note 19, at 47–72 (comparing the success rates of immigrants with and without representation).

300. *Frequently Asked Questions (FAQs) Internet Immigration Information (I<sup>3</sup>)*, U.S. DEP’T OF JUSTICE 2, <https://www.justice.gov/eoir/i-cubed-faqs/download> [<https://perma.cc/CZ8T-T4G4>] (last updated Nov. 2016).

history, and age, as well as practical concerns such as location, nationality, and language. The legal service providers that utilize the Platform would not need to agree on the same priorities. The goal would be to create a searchable database with enough information to allow representatives to find the cases that fit their own specific parameters and priorities. This would remove the need for a third party to match volunteer attorneys with unrepresented immigrants.

Critically, the Platform would promote collaborative representation, using the Innovation Law Lab as a model. Attorneys in different parts of the country could work together on a case and prepare different parts of an application. For example, one representative could prepare a client's declaration in an asylum case, another representative could put together supporting country conditions documents, and a third representative could attend the individual hearing—all benefiting one detained client.

The Platform could be linked to a case management system accessible only to representatives (not to the government), so that they can share work product, review communications with each other and with the client, and keep track of deadlines. Linking the database to the case management system may raise concerns about protecting attorney–client privilege, confidentiality, and work product, so there would need to be a secure firewall to ensure that the DHS and EOIR could not access the system through the Platform.

Detained immigrants also could contribute to the Platform if allowed access to their own profiles and permitted to use tablets or computers while in detention. They could enter information about their individual situations to give representatives a better idea of the facts and legal issues involved. They could also upload relevant documents, like declarations, corroborative evidence, and criminal records. Additionally, immigrants should be allowed to opt into the Platform at the time they are placed in removal proceedings or at their first master calendar hearing in immigration court, to ensure their consent to making their information available to potential representatives. They should be allowed to opt out at any time if they no longer wish to be included in the Platform. This would help preserve their autonomy to make decisions about representation, as well as help protect their privacy.

While creating this Platform could dramatically expand access to counsel in removal cases, it also presents various ethical and practical challenges. First, there is the issue of making a detained individual's private information available to others. One way to address this is to anonymize the detained noncitizens. EOIR could withhold the noncitizen's name and A-number until a representative agrees to take the case. However, anonymizing cases would also require the DHS to redact identifying information from the Notice to Appear and any other documents it uploads. Another approach would be for ICE officers to

obtain written consent from noncitizens to have their information in the Platform at the time they are placed in removal proceedings. Because there may be concerns about ICE officers consistently asking about participation in the Platform and accurately recording responses, immigration judges could double check whether a noncitizen wants to participate in the Platform at the first master calendar hearing. Judges already hand out lists of pro bono representatives at the first master calendar hearing, and asking whether the noncitizen wants to be included in the Platform to help find representation would be a logical follow up.

Second, there are practical concerns about how the Platform would be designed and funded. EOIR could issue a request for proposals and accept bids from companies in the private sector to create the Platform. Given the large amounts of money that some tech companies have donated to help immigrants,<sup>301</sup> there may be companies willing to do the project pro bono or at a discounted cost. Foundations, consulates, the private bar, and the business community may also be willing to donate money to help fund the Platform and expand access to counsel for detained immigrants. Crowdfunding is another option. When the Trump Administration was separating children from their parents in the summer of 2018, crowdfunding on Facebook raised over \$20 million for RAICES, a nonprofit organization that provides free immigration legal services, in a matter of days.<sup>302</sup> The potential for crowdfunding campaigns therefore should not be underestimated.

Third, the collaborative representation approach raises ethical questions related to actual and potential conflicts. While these issues are surmountable, processes must be in place to ensure that the limited representatives available do not conflict each other out. Specifically, there would need to be a system to check conflicts of interest in cases where the relief depends on the status of the noncitizen as victim. Organizations who work collaboratively to represent one client would need to check conflicts between their organizations and law firms. The Platform can facilitate the conflict check by including it as part of the checklist required as a condition to formalizing any collaborative representation.

In addition to these ethical considerations, there may be strong political barriers. EOIR, or the Attorney General as head of the DOJ, may

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301. See, e.g., Diana Beth Solomon, *Mark Zuckerberg Donates \$5 Million to Help Undocumented Immigrants Attend College*, L.A. TIMES (June 17, 2015), <https://www.latimes.com/business/technology/la-fi-tn-zuckerberg-donation-20150617-story.html> [<https://perma.cc/FKJ3-4BYP>].

302. Teo Armus, *A Nonprofit Received \$20 Million to Reunite Families. It Wants DHS to Use That Money.*, WASH. POST (July 10, 2018), [https://www.washingtonpost.com/local/immigration/texas-nonprofit-raices-now-has-20-million-to-help-separated-families/2018/07/10/bdc083e6-8444-11e8-8553-a3ce89036c78\\_story.html?utm\\_term=.037f930108f5](https://www.washingtonpost.com/local/immigration/texas-nonprofit-raices-now-has-20-million-to-help-separated-families/2018/07/10/bdc083e6-8444-11e8-8553-a3ce89036c78_story.html?utm_term=.037f930108f5) [<https://perma.cc/3V6M-8HYL>].



resist creating the Platform. This could be due to entrenched notions about how things are done, insufficient resources to devote to the project, or simply lack of political will. Overcoming psychological barriers to new technologies and the restrictions of traditional approaches is therefore part of the challenge. Taking time to get the buy-in of EOIR and DHS at the beginning of the process and explaining how the investment of resources will pay off and increase the efficiency of these agencies in the long term is a crucial step for implementing the Platform.

In addition, there may be public resistance to the project if the Platform is perceived as prioritizing detained immigrants, many of whom have criminal convictions, over non-detained immigrants without a criminal record. The project would therefore benefit from a public relations piece to help people understand the unique risks associated with detention, the importance of representation for all noncitizens, and the need for a triage system to help the most vulnerable populations first. The public relations campaign could also stress that many asylum seekers with no criminal record are detained for the duration of their removal proceedings. Over time, the Platform could be expanded to include non-detained, as well as detained, individuals facing deportation.

#### 4. Remote Video Appearances by Representatives

Facilitating remote video appearances by representatives would allow attorneys all over the country to represent immigrants in deportation proceedings, regardless of where the immigrants are located. Because many immigration courts are located within or next to detention centers in isolated areas, allowing remote court appearances would especially benefit detained immigrants.

Immigration courts already use video conferencing (VTC) for a third of all detained immigrants' court hearings.<sup>303</sup> The detained individual appears on video in the courtroom, broadcast from the detention center, while the attorney, if there is one, is typically physically present in the courtroom with the judge.<sup>304</sup> DOJ claims that remote adjudication expedites case processing, facilitates judicial case management, reduces transportation costs, and improves safety.<sup>305</sup> DOJ also asserts that VTC increases access to representation by enabling attorneys who are unable or unwilling to travel to the courtroom to participate in the hearing from the detention center.<sup>306</sup> Thus far, however,

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303. Eagly, *supra* note 18, at 934.

304. *Id.* at 944–45.

305. *Id.* at 935.

306. BENSON & WHEELER, *supra* note 178, at 93; *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, THE IMMIGRATION JUDGE BENCHBOOK 3 (2014) (claiming that remote adjudication can improve “the ability of counsel to represent detained aliens”).

VTC technology has not been used effectively to facilitate attorney representation.

As explained in Part II above, going to a detention center is not convenient for most attorneys. An option that would truly facilitate representation, especially pro bono representation, is using VTC to allow attorneys to appear by video from their own offices so that they do not have to travel to either the detention center or the immigration court. Many master calendar hearings (i.e., status hearings) in immigration court last only a few minutes, but by the time the attorney drives to the court or detention center, waits for the case to be called, and then drives back, hours are lost. Technology that allows attorneys to monitor the progress of the docket remotely and then appear by video when a case is called would encourage more attorneys to accept pro bono cases because they would not lose so much time. Even more critically, allowing remote appearance through VTC would open the door for attorneys to represent detained and non-detained immigrants in geographic locations that are difficult to reach and where there is a dearth of attorneys. For example, an immigration attorney in Dallas could appear by VTC for master calendar hearings at the court in Port Isabel and drive or fly there only for the merits hearing.

Currently, the only option an attorney has to represent someone without being physically present in the courtroom or the detention center is to file a motion for telephonic appearance.<sup>307</sup> In the motion, the attorney must provide a land line for the court to call; cell phones are generally not accepted.<sup>308</sup> If the motion is granted, the attorney must wait by the phone for an indefinite period of time until the court calls.<sup>309</sup> Usually attorneys who appear telephonically are placed at the very end of the docket and called only after the judge finishes all of the other cases. VTC technology is better than a telephonic appearance, since it allows the representative to see his or her client, the DHS attorney, and the judge, making the interaction more personal and allowing the representative to read non-verbal cues.<sup>310</sup> Creating a simple, streamlined process for requesting a video appearance and a system for scheduling hearings within narrower time periods would therefore be significant improvements over the existing process.

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307. See EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (2018), <https://www.justice.gov/eoir/page/file/1084851/download> [<https://perma.cc/TAY9-PDV7>].

308. *Id.* at 84 (“Unless expressly permitted by the Immigration Judge, cellular telephones should not be used for telephonic appearances.”).

309. See *id.* (“A representative . . . appearing by telephone must be available during the entire master calendar hearing.”).

310. OFFICE OF THE CHIEF IMMIGRATION JUDGE, *supra* note 34.

Remote appearance does, however, have some potential drawbacks. A recent empirical study by Professor Ingrid Eagly on remote adjudication found that detained litigants who appeared by video for their hearings were less engaged with the adversarial process, less likely to retain counsel, and less likely to submit applications for relief or request voluntary departure.<sup>311</sup> Allowing attorneys to appear remotely may similarly have a negative effect on client engagement and morale. The process may seem less real, more confusing, or more discouraging to a client whose attorney appears by video. Social science research has shown that criminal defendants feel aggrieved not only by physical separation from the judge, but also by physical separation from their attorneys.<sup>312</sup> For the attorney, technical problems with the visual feed, difficulty hearing or following what is happening in the courtroom, and challenges communicating with a client who is located elsewhere could also affect the quality of representation.<sup>313</sup>

Nevertheless, if the choice is between no representation at all and remote representation, most immigrants would choose the latter. Because having representation is one of the most important factors in winning an immigration case,<sup>314</sup> allowing remote appearances is still likely to have an overall beneficial effect for noncitizens. EOIR could establish rules for remote appearances to ensure that the technology is not abused. For example, remote appearances could be limited to master calendar hearings since allowing remote appearance at a trial-like merits hearing or bond hearing, where testimony is taken, evidence presented, and arguments made, raises heightened concerns. Remote appearance could also be limited to attorneys who live a certain distance from the court, to detained cases, or to both, so that attorneys will use it only when necessary, not just for convenience.

Given that video technology has been used in immigration courts since the 1990s to serve the interests of ICE and EOIR by not physically bringing detained immigrants to the courthouse,<sup>315</sup> it is high time to explore ways to use video to also facilitate access to representation for immigrants. Professor Eagly points out that a “missing link” in the argument that video technology encourages legal representation is that

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311. Eagly, *supra* note 18, at 937–38.

312. *Id.* at 982 (citing Warner A. Eliot, *The Video Telephone in Criminal Justice: The Phoenix Project*, 55 U. DET. J. URB. L. 721, 749 (1978)).

313. *See id.* at 972, 979–80, 985.

314. *See* Eagly & Shafer, *supra* note 19, at 47–72, 50 fig.14, 51 fig.14, 53 tbl.3, 65 tbl.6, 67 tbl.7, 70 fig.19 (discussing greater efficacy and efficiency in immigration court when immigrants were represented by counsel).

315. Eagly, *supra* note 18, at 945; *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589 (codified as amended at 8 U.S.C. § 1229a(b)(2)(A)(iii) (2012)) (authorizing the use of televideo in all immigration removal proceedings).

“attorneys must travel to consult with their remote clients—often many more times than is necessary for in-person adjudication,” since attorneys cannot meet with their clients in court.<sup>316</sup> But, as discussed above, we propose that allowing remote video visitation with detained clients is also an important piece of this puzzle, which makes those consultations easier. Furthermore, although many immigration attorneys file documents with the court in person, they can submit most, if not all, documents by mail.<sup>317</sup> As EOIR continues to roll out its electronic filing system, this will further help minimize the number of necessary in-person appearances for attorneys, thereby facilitating remote representation.<sup>318</sup>

Remote representation can never be the equivalent of appearing physically in court with a client. However, in a system where 86% of detained immigrants are unrepresented, it provides a way to help counter the power imbalance between the parties and potentially improve case outcomes for a large number of people. There is a risk that allowing respondents’ attorneys to appear by video will reinforce and validate remote adjudication by immigration judges, but these two practices are distinct. One can challenge the practice of remote adjudication, where judges located far from respondents rule on their cases by video, while still supporting remote video representation as a supplement to in-person representation to expand access to counsel. In other words, ICE should be required to transport detained immigrants to appear before an immigration court while still allowing respondents’ counsel to appear by video for certain types of proceedings. An efficient system of remote video appearances would support the types of collaborative representation discussed above.

## CONCLUSION

Numerous technologies exist to assist immigrants and legal service providers, but there remains a major gap when it comes to assistance with deportation defense, the most urgent type of immigration case that should be prioritized in a triage model. Technologies that facilitate access to counsel therefore play a critical role in filling that gap. This Article shows that harnessing technology to facilitate access to representation in immigration cases not only helps legal service providers triage cases, but also assists the DHS and immigration courts triage their own enormous caseloads. Highlighting this common interest in expanding access to representation should motivate the DHS to equip detention centers with technologies that facilitate representation, as well as encourage EOIR to explore innovative ways of connecting pro bono representatives with the

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316. Eagly, *supra* note 18, at 986.

317. See OFFICE OF THE CHIEF IMMIGRATION JUDGE, *supra* note 34, at 3.1.

318. See *supra* notes 240–43.

noncitizens who most urgently need assistance. Collaboration among legal service providers, as well as between these providers and the public agencies involved in immigration detention and adjudication, is critical to making these technological triage tactics as effective as possible.