# ARTICLES

# ELIMINATING THE FUGITIVE DISENTITLEMENT DOCTRINE IN IMMIGRATION MATTERS

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*Federal courts of appeals have declared that they may dismiss immigration appeals filed by noncitizens who are deemed "fugitives." The fugitive disentitlement doctrine emerged in the criminal context with respect to defendants who had escaped from physical custody. Although the doctrine originated out of concerns that court orders could not be enforced against criminal fugitives, the doctrine has since crept into civil contexts, including immigration. But rather than invoking the doctrine for its originally intended purpose of ensuring that court orders could be enforced, courts now primarily invoke it for the purposes of punishment, deterrence, and protecting the dignity of the courts.*

*This Article makes three primary contributions to existing literature. First, it describes how the fugitive disentitlement doctrine migrated from criminal proceedings to civil immigration proceedings, analyzing the circuit courts' explanations for the doctrine's expansion. Second, this Article explains why the courts' justifications do not actually translate as directly to immigration cases as it may seem. Moreover, the courts have failed to adequately consider that their inherent powers are limited, including by noncitizens' constitutional rights and the principle of reasonableness. Third, this Article argues that courts have not adequately considered the unique nature of immigration proceedings, most saliently the importance of judicial review of agency action in this context. Further, the doctrine is a lens through which judicial power, the*

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*balance between the courts and the agencies, and U.S. legal institutions' view on immigration can be examined.*

## INTRODUCTION

The fugitive disentitlement doctrine is a judicially created procedure by which a court can dismiss a case without considering the merits. The early cases invoking this doctrine, which developed in the criminal appellate context, explained the Supreme Court's concern that orders could not be enforced against people convicted of crimes who had escaped the physical custody of the state during the pendency of their appeals.[1]

Proponents of fugitive disentitlement, including the federal courts, justify its use through several rationales. The main reasons are: enforceability of court orders when the individual cannot be located; that a person should not be able to avail themselves of access to the courts if the person is a fugitive; deterring others from escaping and encouraging voluntary surrenders; and promoting the efficient, dignified operation of the courts.[2] The fugitive disentitlement doctrine was later expanded to civil cases, including review of immigration appeals.[3] A basic Westlaw search reveals that there are seventy-two circuit court cases discussing fugitive disentitlement in immigration matters.[4] Although the number of cases dismissed pursuant to the doctrine is currently small, its impact is far-reaching. The doctrine has been used to dismiss petitions filed by longtime lawful permanent residents of the United States,[5] asylum-seekers,[6] and parents of U.S. citizens,[7] among numerous others. Fugitive disentitlement has been acknowledged as a doctrine applicable to immigration cases by nine of the federal courts of appeals.[8]

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1 *See* Smith v. United States, 94 U.S. 97 (1876); Allen v. Georgia, 166 U.S. 138 (1897).

2 Degen v. United States, 517 U.S. 820, 824 (1996).

3 Technically, the process of raising a challenge of a BIA order to the circuit courts is not called an "appeal," but rather a "petition for review." Nonetheless, this Article occasionally uses the word "appeal" as shorthand.

4 This is based on a Westlaw search on March 1, 2021, of the phrase "fugitive disentitlement doctrine," limiting jurisdiction to "federal courts of appeals," and selecting the "immigration" practice area.

5 Bright v. Holder, 649 F.3d 397 (5th Cir. 2011).

6 Qian Gao v. Gonzales, 481 F.3d 173 (2d Cir. 2007); Dembele v. Gonzales, 168 F. App'x 106 (7th Cir. 2006).

7 Chang Bin Guo v. U.S. Dep't of Just., 276 F. App'x 27 (2d Cir. 2008).

8 *See Gao*, 481 F.3d at 176; Arana v. INS, 673 F.2d 75, 77 (3d Cir. 1982); *Bright*, 649 F.3d at 399–400; Shigui Dong v. Holder, 426 F. App'x 418, 419–20 (6th Cir. 2011); Sapoundjiev v. Ashcroft, 376 F.3d 727, 730 (7th Cir. 2004); Hassan v. Gonzales, 484 F.3d 513, 516 (8th Cir. 2007); Wenqin Sun v. Mukasey, 555 F.3d 802, 804 (9th Cir. 2009); Martin v. Mukasey, 517 F.3d 1201, 1203–04 (10th Cir. 2008); Xiang Feng Zhou v. U.S. Att'y Gen., 290 F. App'x 278, 280–81 (11th Cir. 2008).

To bring this topic to life, let us consider a real case where the government sought dismissal based on the fugitive disentitlement doctrine.[9] Mr. A came to the United States more than ten years ago as a lawful permanent resident. He has been diagnosed with paranoid schizophrenia, a severe mental illness. During a mental health crisis, he was arrested and criminally charged. In criminal court, Mr. A was found incompetent and could not continue with his case for months, until his competency was restored enough to work with his public defender. Soon after he pled guilty and was credited with time served, Mr. A was transferred directly to immigration custody and placed into removal proceedings. The immigration judge found him competent to represent himself. Proceeding pro se, Mr. A lost his lawful permanent resident status and was denied every form of relief for which he applied.

After losing his appeal to the Board of Immigration Appeals (BIA), he filed a petition for review with a federal court of appeals. Mr. A also filed a motion for a stay of removal with the circuit court, based on his fear of being tortured due to his mental illness and the lack of availability of his psychotropic medication in his country of origin. The circuit court denied the motion for a stay. Still fearing deportation, Mr. A refused to sign the travel paperwork presented by his deportation officer. Due to his refusal, and regardless of the fact that he had been diagnosed with a serious mental illness and remained in immigration custody where he had been for two years, the government filed a motion to dismiss Mr. A's entire case before the circuit court, on the grounds that he—while in ICE's physical custody—was a "fugitive."[10]

This case raises serious questions about the fugitive disentitlement doctrine. How should "fugitive" be defined? How much discretion should adjudicatory bodies have to "control their dockets" in the name of dignity of the court? Does dismissal of a case based on the fugitive disentitlement doctrine comport with even the minimal constitutional protections that apply in removal proceedings? Should the fact that Mr. A was mentally ill and feared persecution and torture in his country of origin have affected the government's decision to file the motion to dismiss, or the court's decision to entertain it? Was entertaining the motion to dismiss "efficient" in terms of controlling the circuit court's docket, where it delayed the briefing schedule and

9 This case is currently being litigated by the author. The journal's editors have verified this case's information with documents on file with the author, but the case information is not included here to protect Mr. A's anonymity.

10 The Tenth Circuit Court of Appeals never ruled on the motion to dismiss. It remained pending for several months until the government filed a motion to withdraw, as Mr. A had been deported.

likely pushed oral argument back by six months? Was such "efficiency" fair to Mr. A, where the government succeeded in delaying proceedings enough for Mr. A to be deported (to the country where he feared persecution) while his case remained pending?

This Article tracks the doctrinal creep of fugitive disentitlement into immigration matters and exposes the shortcomings of federal courts' justifications for doing so.[11] There is somewhat sparse scholarship on the specific topic of fugitive disentitlement in immigration cases. Scholars have largely embraced the doctrine, although to varying degrees. One scholar has argued that fugitive disentitlement was appropriately extended from criminal proceedings to the civil immigration context and is operating sufficiently as it exists now.[12] Another posits that fugitive disentitlement should only apply to noncitizens who actively evade capture and custody, as opposed to noncitizens who merely remain in the United States in defiance of a removal order.[13] And one scholar advocates that the circuit split regarding the definition of "fugitive" should be resolved through a legislative fix that enshrines fugitive disentitlement in the immigration statute.[14]

Other scholars have briefly criticized the doctrine in discussions of immigration-adjacent topics. Margaret B. Kwoka has pointed out problems with the application of the doctrine in various circumstances related to noncitizens' access to information through Freedom of Information Act (FOIA) requests.[15] And Michael J. Wishnie critiqued the fugitive disentitlement doctrine in the context of policies intended to deter noncitizens from reporting crimes to law enforcement, arguing that such law enforcement policies interfere with the First Amendment right to petition.[16] Additionally, Geoffrey A. Hoffman and Susham M. Modi described the fugitive disentitlement doctrine as part of the war on terror's attacks on immigration. They raised that there are potential constitutional problems, and other fairness

11 *See infra* Parts I and II. It is beyond the scope of this Article to analyze the efficacy of fugitive disentitlement in criminal and general civil proceedings.

12 *See* Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEO. IMMIGR. L.J. 749, 787 (2013).

13 Lawrence Serkin Winsor, *Runaway Usance: Limiting the Exercise of the Fugitive Disentitlement Doctrine in the Context of* Wenqin Sun v. Mukasey *and* Bright v. Holder, 47 GA. L. REV. 273, 277 (2012).

14 Kiran H. Griffith, Comment, *Fugitives in Immigration: A Call for Legislative Guidelines on Disentitlement*, 36 SEATTLE U. L. REV. 209, 234–42 (2012).

15 As discussed *infra* Section I.B., the Department of Homeland Security had applied the fugitive disentitlement doctrine to FOIA requests. Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2248 (2018).

16 *See* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 744–46 (2003).

concerns, with using fugitive disentitlement outside of the criminal context.[17] Hoffman and Modi also discussed the infirmity of labeling people who fail to report to immigration authorities—as opposed to those who "abscond[]"—as "fugitives," as well as identifying flaws in applying the doctrine to asylum seekers in particular.[18]

This Article argues that Article III courts have failed to recognize the essential nature of judicial review in this unique civil context of immigration law.[19] Courts have not considered the high stakes at issue in removal proceedings or the lack of available procedural protections for noncitizens. They have also given short shrift to the question of whether the courts' own "inherent powers" truly include the power to dismiss noncitizens' cases in this manner. In fact, the rationales provided in criminal cases do not naturally extend to civil immigration cases. This Article argues that proper consideration of each of these arguments should lead courts to eliminate usage of fugitive disentitlement in immigration matters.

Part I explains how the fugitive disentitlement doctrine, traditionally applied to people convicted of crimes who had escaped from jail, was contorted to apply to civil matters, including immigration. Part I includes an explanation of this doctrinal creep, including the federal courts' reasoning for extending the doctrine.

Part II begins by highlighting the practical realities for noncitizens, most saliently that surrendering to immigration authorities can result in immediate deportation, even if their court of appeals case is still pending. This Part also describes the shortcomings of judicial rationales for applying fugitive disentitlement to immigration cases. Courts do not have unlimited "inherent power" to control their dockets. Rather, such powers are limited by principles of necessity and reasonableness. Dismissal without consideration of the merits of the case is a disproportionately harsh sanction considering the high stakes in removal cases, particularly considering that other sanctions are available to the courts. It is also unreasonable to apply the doctrine in the removal context because the proffered rationales do not support it. Moreover, courts' concerns about upholding their

17 *See* Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER, RACE & JUST. 449, 479–87 (2012).

18 *See id.* at 482–83 (quoting Giri v. Keisler, 507 F.3d 833, 834–35 (5th Cir. 2007)).

19 The Supreme Court has consistently reaffirmed the "civil" nature of deportation and removal proceedings. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime." (citing 8 U.S.C. §§ 1302, 1306, 1325 (1976))); Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010) (affirming civil nature of removal proceedings, but commenting on how criminal convictions and the penalty of deportation are "enmeshed").

own dignity should not lead them to abdicate their responsibility to decide the issues before them. Part II further questions the balance between the judiciary and legislature in setting the boundaries of fugitive disentitlement and identifies potential constitutional problems with applying the fugitive disentitlement doctrine in removal proceedings.

Lastly, Part III sets forth several policy reasons why fugitive disentitlement should not be applied in immigration cases. First, it explains that judicial review of these cases must be preserved. The federal courts of appeals have a crucial role in reviewing agency decisions because decisional independence is lacking in the agencies. Moreover, the courts have a unique role in statutory interpretation and constitutional issues, serve an oversight function, and ensure compliance with international human rights obligations. Thus, judicial review heightens fairness and enhances the legitimacy of immigration adjudications in the eyes of the general public as well as litigants. Moreover, eradicating fugitive disentitlement would avoid potential abuse of power by the agency as well as the courts themselves.

## I. MIGRATION OF THE DOCTRINE TO IMMIGRATION LAW

Fugitive disentitlement is a judicially created doctrine.[20] It is a discretionary tool that may be applied to "dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive."[21] Courts have continued to extend this doctrine's reach into other realms, including civil proceedings.[22] The idea underlying the fugitive disentitlement doctrine is that a person's flight during the pendency of their case is "tantamount to waiver or abandonment" of their claims; therefore, the reasoning goes, the case should be dismissed without consideration of the merits of the claims.[23]

The Supreme Court has expressed some hesitance in extending the doctrine to civil matters. In *Degen v. United States*, a civil forfeiture matter, the Supreme Court recognized, "the sanction of

20 Fugitive disentitlement is at times referred to as a common-law doctrine, in the sense that it developed through judicial opinions. *See, e.g.*, Collazos v. United States, 368 F.3d 190, 206 (2d Cir. 2004) (Katzmann, J., concurring); Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 156 (2019). To avoid confusion with "common law" in the sense of law carried over from England, the doctrine will be referred to as "judicially created" or similar descriptors throughout this Article.

21 Degen v. United States, 517 U.S. 820, 823 (1996) (first citing Ortega-Rodriguez v. United States, 507 U.S. 234, 239 (1993); and then citing Smith v. United States, 94 U.S. 97, 97 (1876)).

22 *See, e.g.*, Bar-Levy v. U.S. Dep't of Just., INS, 990 F.2d 33, 35 (2d Cir. 1993).

23 Martin v. Mukasey, 517 F.3d 1201, 1204 (10th Cir. 2008) (quoting *Ortega-Rodriguez*, 507 U.S. at 240); *see also Giri*, 507 F.3d at 835.

disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked."[24] Regardless of the Court's admonition, the doctrine has continued its migration into various types of civil matters. This Part sets forth the various contexts in which the fugitive disentitlement doctrine has been employed and limited by federal courts, beginning with the Supreme Court. It also tracks the expansion of the doctrine into immigration law, a process this Article refers to as "creep."[25]

### *A. Fugitive Disentitlement as a Criminal Doctrine*

Supreme Court jurisprudence regarding the fugitive disentitlement doctrine extends back to an 1876 case called *Smith v. United States*.[26] In a two-paragraph opinion, the Supreme Court declared its discretion to refuse to hear a criminal case where the defendant has absconded and therefore may not "be made to respond to any judgment we may render."[27] The Court therefore ordered that the person turn himself in prior to the first day of the following term, or his case would be left off of the docket.[28] Thus, the Supreme Court demonstrated its concern over the enforceability of its decisions, indicating that a case may be "moot" if the defendant never plans to turn himself in.[29]

Since *Smith*, the Supreme Court has announced other rationales justifying the use of the fugitive disentitlement doctrine to eliminate cases from court dockets. In 1897, the Supreme Court decided *Allen v. Georgia*, which upheld the Georgia Supreme Court's dismissal of an appeal of a plaintiff who had escaped from jail after he was sentenced

24 *Degen*, 517 U.S. at 828.

25 "Creep" is a useful concept for describing how doctrines developed in one context can later be incorporated into other contexts without adequate justification. *See, e.g.*, Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1280 (2019) (describing how doctrine created in a specialized area of contract law became generalized to law outside of the specialized context). As one other example of an article discussing this concept regarding immigration law, *see* Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 WASHBURN L.J. 173, 174 (2015) (critiquing DACA and DAPA's inclusion of a new "significant misdemeanor" bar, which expands immigration consequences for criminal convictions and creates inconsistencies across immigration law).

26 Smith v. United States, 94 U.S. 97, 97 (1876) ("If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.").

27 *Id.*

28 *Id.* at 97–98.

29 *Id.* at 97.

to death.[30] The Court echoed the enforceability concerns raised in *Smith*, but muddied the waters by articulating additional reasons for dismissing a case: escape meant there was no longer an actual case or controversy, the plaintiff should be punished for affronting the dignity of the court, and the plaintiff had abandoned the appeal.[31] The Court also noted that, by escaping criminal custody, a person has likely committed a new criminal offense.[32] Thus, the Court reasoned, dismissal of the case constituted "a light punishment" compared to commencing a new criminal prosecution against the escapee; moreover, the escapee seeking to pursue claims after escaping from jail (and continuing to evade authorities) offended the dignity of the court.[33] The idea of the court's dignity continued as a theme in later cases.[34]

About seventy years passed before the Supreme Court next spoke on fugitive disentitlement. In *Molinaro v. New Jersey*, a 1970 case, the Court authorized immediate dismissal of an appeal,[35] departing from the earlier practice of giving appellants a set period of time to appear before facing dismissal of their case.[36] This constituted an acceptance of fugitive disentitlement serving as a punishment—as there was no way to undo the past wrong of escaping restraint—rather than addressing practical concerns about whether a court's orders would be enforceable. The Court also clarified that fugitive status does not affect the "case or controversy" requirement, but rather that an appellant's failure to surrender to state authorities while out on bail "disentitles the defendant to call upon the resources of the Court for determination of his claims."[37]

Another shift in fugitive disentitlement in criminal cases came in 1975 with *Estelle v. Dorrough*.[38] The *Estelle* Court considered the constitutionality of a fugitive disentitlement statute enacted by a state legislature, which permitted automatic dismissal of cases where prisoners had escaped during the appellate process unless they

30 *See* Allen v. Georgia, 166 U.S. 138, 139 (1897). The Georgia Supreme Court had given the appellant "sixty days, or until the last day of the term," to turn himself in before dismissing the case. *Id.* at 142.

31 *See id.* at 140–41.

32 *Id.* at 141.

33 *See id.*

34 *See, e.g.*, Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam).

35 Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam) ("The dismissal need not await the end of the Term or the expiration of a fixed period of time, but should take place at this time.").

36 *See, e.g.*, *Allen*, 166 U.S. at 142 (stating that state court had authority to determine the appropriate period of time to give appellant to appear).

37 *Molinaro*, 396 at 366.

38 *See Estelle*, 420 U.S. at 543 (Stewart, J., dissenting).

voluntarily surrendered within ten days of escape.[39] The novel issue in *Estelle* was that the appellant had been recaptured after two days and was back in custody at the time of the dismissal.[40] The Court held that the state court statute withstood equal protection challenges because deterrence, punishing escape, and protecting the efficiency and dignity of appellate courts were sufficiently rational reasons to disentitle an appellant, even when they were back in custody.[41]

In 1993, *Ortega-Rodriguez v. United States* introduced a limitation on disentitlement. The criminal defendant had fled during his district court proceedings, but remained in custody during his appellate process.[42] The Eleventh Circuit Court of Appeals dismissed the case without reaching the merits, due to his fugitivity during the district court proceedings.[43] The Supreme Court reversed, stating that the dismissal of the appeal was not warranted because the defendant—who had been in custody throughout the appellate process—would have been more appropriately sanctioned by the district court whose process actually was thwarted by the escape.[44] Thus, there must be a nexus between the appellate process and the appellant's fugitive status in order for disentitlement to be appropriate.[45]

To summarize the Supreme Court's jurisprudence in the criminal context, the Court has authorized itself, the federal courts of appeals, as well as state courts, to set their own rules—with some limitations—in dismissing appeals of people who are considered fugitives. The acceptable rationales include concern over enforceability of orders where a person has escaped physical custody, deterring escape and encouraging surrender, punishing escape, and preserving efficiency and dignity of the appellate process. However, there must be a nexus between fugitivity and the appellate process in order for the dismissal to be appropriate.

### *B. Doctrinal Creep to Civil Contexts*

The fugitive disentitlement doctrine has since been extended to both state and federal civil cases, including actions under the International Child Abduction Remedies Act,[46] tax courts' rulings on

39 *Id.* at 535 (majority opinion).

40 *See id.* at 534–35.

41 *See id.* at 537, 541.

42 Ortega-Rodriguez v. United States, 507 U.S. 234, 237–39 (1993).

43 *Id.* at 239.

44 *See id.* at 251.

45 *See id.* ("In short, when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal.").

46 Pesin v. Rodriguez, 244 F.3d 1250, 1251 (11th Cir. 2001).

tax deficiencies and penalties,[47] family court proceedings,[48] and a variety of other federal civil actions.[49] Courts have gone so far as to say that "the rule should apply with greater force in civil cases where an individual's liberty is not at stake."[50]

Two areas are particularly informative in considering how the doctrine should be conceptualized in the immigration context: civil forfeiture and immigration-related Freedom of Information Act (FOIA) requests. Civil forfeiture has been a particularly important extension because the Supreme Court made clear declarations about the propriety of the doctrine in these civil matters and then declined to apply it, which spurred congressional action. Immigration-related FOIA requests involve administrative agency action, and fugitive disentitlement in that context has become largely obsolete.

### 1. Civil Forfeiture

*Degen v. United States* was the first case in which the Supreme Court considered the expansion of fugitive disentitlement into civil forfeiture proceedings.[51] Specifically, the Court examined whether the doctrine was properly applied in those civil proceedings when the claimant was avoiding criminal prosecution.[52] Under the specific circumstances present in that case, the Court declined to permit a district court to apply the doctrine in a civil forfeiture action.[53] Yet, what the *Degen* Court did not do was state outright that fugitive disentitlement would never be appropriate in civil forfeiture cases. Nor did the Court address Degen's challenge to the constitutionality of the doctrine.[54]

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47 Conforte v. Comm'r, 692 F.2d 587, 588 (9th Cir. 1982).

48 D.T. v. P.B., 106 N.Y.S.3d 733, 738 (N.Y. Fam. Ct. 2019) (dismissing motion to vacate sequestration order based on fugitive disentitlement).

49 *See* Mitchell Waldman, Annotation, *Application of "Fugitive Disentitlement Doctrine" in Federal Civil Actions*, 176 A.L.R. Fed. 333 (2002) (commenting on doctrine's application in, *inter alia*, civil rights, civil forfeiture, copyright infringement, parental rights, tax liability, bankruptcy, and other types of cases). Civil forfeiture is a legal action intended, "at least in part, to punish the owner of property used for criminal purposes." Leonard v. Texas, 137 S. Ct. 847, 847 (2017) (Mem.) (Thomas, J., respecting the denial of certiorari) (citing Austin v. United States, 509 U.S. 602, 618–19 (1993)). Justice Clarence Thomas has noted that "[t]his system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses." *Id.* at 848.

50 Conforte v. Comm'r, 692 F.2d 587, 589 (9th Cir. 1982); *see also* Martha B. Stolley, Note, *Supreme Court Review—Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 755–56 (1997).

51 *See* Degen v. United States, 517 U.S. 820 (1996).

52 *Id.* at 823.

53 *See id.* at 829.

54 *Id.* at 828 ("We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process . . . .") (citing Blackmer v. United States, 284 U.S. 421 (1932)).

The facts of *Degen* are important in understanding the Supreme Court's ruling. Degen was indicted by a federal grand jury for running a massive drug trafficking operation and laundering money, among other crimes.[55] Before the indictment was unsealed, Degen moved to Switzerland, and he could not be extradited to face criminal prosecution.[56] The government brought a civil forfeiture action to attempt to seize Degen's property that was allegedly related to his drug sales.[57] Degen sought to challenge the civil forfeiture action from abroad.[58] However, the government filed a motion for summary judgment based on the fugitive disentitlement doctrine.[59] The district court granted the motion, finding that Degen was a fugitive because he remained outside of the reach of criminal prosecution.[60] The Ninth Circuit affirmed the dismissal.[61]

Yet the Supreme Court went on to signal a shift in how the Court perceived the efficacy of the doctrine. While recognizing the general power of courts to manage their proceedings, the Supreme Court cautioned against overzealous use of the doctrine, in part to avoid overreach of courts' power.[62] The Court reasoned that Degen's fugitive status would not hinder enforcement of the judgment because the property at issue was already under the court's control.[63] Moreover, the majority noted that there were other ways for the district court to manage its proceedings (imposing protective orders and other limits to discovery, and possibly normal dismissal of the case if he fails to comply with the district court's orders during the civil proceedings), which would prevent Degen from "exploiting the asymmetries he creates by participating in one suit but not the other."[64] The high Court cautioned that outright dismissal of a case is "too blunt an instrument for advancing" either the interests of preserving the dignity of the court or deterrence.[65] The Court went on to say that disentitlement is a sanction "most severe and so could disserve the dignitary purposes for which it is invoked," warning that freely dismissing cases may actually erode the court's dignity.[66]

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55 *See id.* at 821.
56 *Id.* at 821–22.
57 *Id.* at 821.
58 *Id.* at 822.
59 *See id.*
60 *See id.*
61 *Id.*
62 *See id.* at 823.
63 *Id.* at 825.
64 *Id.* at 826–27.
65 *Id.* at 828.
66 *Id.*

In response to *Degen*, Congress passed the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).[67] CAFRA codified the fugitive disentitlement doctrine in the limited context of civil forfeiture actions or third-party claims in related criminal forfeiture actions.[68] The statute contains some specific parameters, yet also makes clear that courts may choose *not* to impose the penalty.[69] Judges may disentitle a person's claim where the person had "notice or knowledge of the fact that a warrant or process has been issued for his apprehension" and fled the jurisdiction "in order to avoid criminal prosecution."[70]

CAFRA demonstrates the legislature's desire to limit judicial power to dismiss cases in civil forfeiture matters. CAFRA authorizes courts to sanction fugitivity in civil forfeiture cases, but courts may only do so where (1) there was an impending criminal prosecution, (2) that the individual had sufficient notice of that fact, and (3) they had fled specifically to avoid the prosecution. This differs starkly from how the doctrine is applied in immigration cases, as will be explained in Section I.C.

### 2. Immigration-Related FOIA

The fugitive disentitlement doctrine also has played a role, to a decreasing extent, in immigration-related requests under the FOIA.[71] Professor Margaret B. Kwoka has noted that, in 2015, the Department of Homeland Security (DHS) applied the doctrine to deny FOIA requests to allegedly "fugitive" requestors more than 4,000 times.[72] Professor Kwoka also remarked that, because FOIA denials are infrequently challenged in court, "DHS's interpretation acts as a practical barrier for a nontrivial number of requesters."[73]

Yet, it appears there has been a significant downward trend in the use of the fugitive disentitlement doctrine in immigration-related FOIA requests during recent years. This trend might be explained, at least in part, by a lawsuit filed in the U.S. District Court for the District of Colorado challenging ICE's practice of denying FOIA requests

67 Gary P. Naftalis & Alan R. Friedman, *Fugitive Disentitlement in Civil Forfeiture Proceedings*, N.Y.L.J., Dec. 19, 2002.

68 Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185 § 14 (codified as amended at 28 U.S.C. § 2466 (2018)).

69 See *id.*

70 *Id.*

71 While this subsection examines immigration-related FOIA requests, fugitive disentitlement has also been discussed regarding nonimmigration FOIA requests. *See* EMILY CREIGHTON, AM. IMMIGR. COUNCIL, THE FUGITIVE DISENTITLEMENT DOCTRINE: FOIA AND PETITIONS FOR REVIEW 5–6 (2013) (discussing three nonimmigration FOIA lawsuits).

72 Kwoka, *supra* note 15, at 2248.

73 *Id.*

based on the fugitive disentitlement doctrine.[74] As the court noted in *Smith v. U.S. Immigration and Customs Enforcement*, ICE promulgated its Standard Operating Procedure (SOP) related to fugitive disentitlement in July 2017, on the date that ICE's discovery responses were due to the plaintiff's counsel.[75] The SOP provided that a "fugitive" was someone who failed to depart the country, report to ICE, comply with any conditions placed on them, or who is wanted for certain criminal violations.[76] On those grounds, ICE declared that a person's records would be categorically withheld if the records were held in a particular place, rather than withholding them based on the type of record.[77] In December 2019, the federal district court ruled that the blanket withholding enabled by the SOP—basing categorical withholdings on where the files were located—was an improper basis to exempt ICE from releasing documents.[78] The court then enjoined ICE from "withholding its records pursuant to the SOP or any other policy or practice not materially different from the SOP."[79] The *Smith* court did not reach the broader issue of whether fugitive disentitlement could be applied in FOIA cases.[80]

In 2018, DHS reported that it only used the doctrine eight times in FOIA cases, and in 2019, DHS reported it was not invoked at all.[81] While there may have been other forces at play,[82] it is possible that the *Smith* litigation had some impact on the agency's invocation of fugitive disentitlement in FOIA requests.[83]

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74 Smith v. U.S. Immigr. & Customs Enf't, 429 F. Supp. 3d 742, 745 (D. Colo. 2019).

75 *Id.* at 758.

76 *Id.* at 751.

77 *Id.* at 764. However, the court did not explicitly address the application of the fugitive disentitlement doctrine with respect to the SOP because it noted that ICE did not rely on the fugitive disentitlement doctrine in its briefing. Rather, the court only needed to address ICE's argument that the documents were properly withheld pursuant to a FOIA exemption. *Id.* at 763–64.

78 *Id.* at 766–67.

79 *Id.* at 768.

80 For an analysis on whether fugitive disentitlement is properly applied in FOIA cases, see Bernard Bell, *"The Fugitive:" ICE, Fugitives, and FOIA (Part II)*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 20, 2020), https://www.yalejreg.com/nc/the-fugitive-ice-fugitives-and-foia-part-ii [https://perma.cc/9BYV-WRTT].

81 *See* U.S. DEP'T OF HOMELAND SEC., 2018 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES AND THE DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES 7 (2019); *see also* U.S. DEP'T OF HOMELAND SEC., 2019 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES AND THE DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES 16 (2020).

82 The author has submitted a FOIA request to ICE seeking information related to the use of the fugitive disentitlement doctrine to deny requests.

83 For other perspectives on why fugitive disentitlement is not appropriate in FOIA requests to the immigration agencies, *see* CREIGHTON, *supra* note 71, at 3–5 (suggesting advocates raise arguments that "any person" may request information under FOIA, that

### *C. Extension to Immigration Appeals*

Since at least the 1980s, the federal courts of appeals have employed the fugitive disentitlement doctrine to dismiss immigration-related matters.[84] Those appellate cases have included habeas corpus denials,[85] Board of Immigration Appeals denials of motions to reopen and reconsider,[86] and petitions for review of removal orders.[87] Some cases pertain to fugitive disentitlement during the circuit court process, and others consider the BIA's dismissal of a matter on those grounds. Contrary to what some courts have stated, fugitive disentitlement does not raise jurisdictional issues but rather is purely discretionary.[88]

It is not immediately apparent why or how the concept of "fugitivity"—which so obviously evokes images of criminal proceedings—was shoehorned into civil immigration proceedings. Noncitizens who are in civil immigration proceedings do not readily appear to be similarly situated to people convicted of crimes who are on the lam (in some circumstances, after physically escaping from jail). A description of immigration administrative and appellate processes, followed by an exploration of the courts' reasoning for extending the doctrine into this context, is therefore warranted.

#### 1. Immigration Administrative and Appellate Processes

Noncitizens first encounter immigration enforcement through a variety of mechanisms. First, noncitizens might be stopped at ports of

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equitable principles do not apply, and that the agency responding to FOIA requests is not the court that would rule on the litigation).

84 *See e.g.*, Arana v. INS, 673 F.2d 75, 76 (3d Cir. 1982) (dismissal of appeal challenging district court's denial of petition for habeas corpus because noncitizen "has hidden his whereabouts from immigration authorities and this Court and has failed to comply with an order and a bench warrant issued by the district court").

85 *See generally id.*

86 Bright v. Holder, 649 F.3d 397, 399 (5th Cir. 2011).

87 Antonio-Martinez v. INS, 317 F.3d 1089, 1093 (9th Cir. 2003). Removal orders are those that determine whether a person is removable or ordering removal. Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020) (citing 8 U.S.C. § 1101(a)(47)(A) (2018), the definition of "order of deportation").

88 *See* Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam) (dismissing appeal). For example, in *Bright*, the Fifth Circuit seemed to interpret the fugitive disentitlement doctrine as a question of justiciability, as it concluded the court was "barred from further review." *Bright*, 649 F.3d at 400. The Fifth Circuit's interpretation is likely to be found erroneous, as *Molinaro* makes clear that fugitive disentitlement is a discretionary doctrine and does not constitute a bar to hearing a case. *See Molinaro*, 396 U.S. at 366. This issue was raised in Bright's petition for writ of certiorari to the Supreme Court, which the Court declined to hear. Petition for Writ of Certiorari at i, *Bright*, 649 F.3d 397 (No. 11-890); *Bright*, 649 F.3d 397, *cert. denied*, 566 U.S. 1021 (2012).

entry, in the instance of lawful permanent residents returning from abroad or people presenting themselves at the border to seek asylum.[89] Second, noncitizens might apply affirmatively for immigration benefits with U.S. Citizenship and Immigration Services (USCIS) and be denied, which results in referral to immigration court for removal proceedings.[90] Third, noncitizens may encounter immigration enforcement officials in the interior of the country, due to activities such as raids or surveillance, for example, or through interactions with the criminal legal system.[91]

Once the Department of Homeland Security receives information regarding a noncitizen, it will determine what enforcement action to take: (1) issue an "expedited" removal order, (2) enforce a prior removal order, or (3) initiate removal proceedings.[92] Expedited removal applies to noncitizens who arrive at the border or ports of entry, as well as those who are apprehended within 100 miles of the U.S. borders within two weeks of arriving in the country.[93] In 2019, former President Trump issued an executive order directing DHS to expand expedited removal, extending it to people who are undocumented, have committed fraud or misrepresentation, and cannot prove their presence in the United States for at least two years prior to apprehension.[94] In those cases, immigration officers may order the noncitizen removed without a hearing and without opportunity for review, unless the person expresses an intent to seek asylum

89 *See* 8 U.S.C. § 1158(a)(1) (2018) (stating that noncitizens physically present in the U.S. or who arrive in the U.S., whether or not at a designated port of arrival, may apply for asylum).

90 For more information on USCIS's current policy regarding the issuance of NTAs, see Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't & Tracey Renaud, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs. (Jan. 20, 2021) (titled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities").

91 Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1573–79 (2010) (discussing trends in interior immigration enforcement).

92 For DHS's description of these processes, see MIKE GUO, U.S. DEP'T OF HOMELAND SEC., OFF. IMMIGR. STAT., IMMIGRATION ENFORCEMENT ACTIONS: 2019, at 3 (2020).

93 Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48879-80 (Aug. 11, 2004).

94 *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, 35410 (July 23, 2019); HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 2, 41 (2019); Vanessa Romo, *Trump Administration Moves to Speed Up Deportations with Expedited Removal Expansion*, NPR (July 22, 2019), https://www.npr.org/2019/07/22/744177726/trump-administration-moves-to-speed-up-deportations-with-expedited-removal-expan [https://perma.cc/3JZ2-J2LA].

or fear of persecution.[95] If they express fear, the noncitizen is entitled to an interview with an asylum officer (a "credible fear interview") and then will have their asylum application considered further.[96]

Where an individual has a prior removal order, the order can be reinstated and the noncitizen will be deported immediately, unless the individual expresses fear of persecution or torture in their country of origin.[97] If they do state such a fear, they will have an opportunity to present their case to an asylum officer (a "reasonable fear interview") and then through the immigration court process.[98]

To initiate immigration court proceedings, DHS files a Notice to Appear (NTA) with the Executive Office for Immigration Review (EOIR).[99] EOIR will then set the noncitizen for a master calendar hearing. The time noncitizens wait for a first hearing may vary widely. If the noncitizen is detained by DHS because DHS has decided not to release them, there may also be a bond redetermination hearing set by the immigration court at any time at the noncitizen's request.[100]

DHS may seek to remove noncitizens who it alleges are either inadmissible or deportable.[101] Inadmissibility includes noncitizens who are present in the U.S. without being properly admitted.[102] Deportability means that the government is alleging the noncitizen has violated conditions of their status or has committed crimes that subject them to removal.[103] The government initially bears the burden of proving that the individual is an "alien," meaning that they were born in another country and have no claim to U.S. citizenship.[104] Additionally, if the noncitizen has lawful status, then DHS will bear the burden of proving that they are deportable.[105] If DHS does not meet its burden of proving alienage or deportability, the proceedings will be terminated.

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95 8 U.S.C. § 1225(b)(1)(A)(i) (2018).

96 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B) (2018); U.S. Citizenship & Immigr. Servs. https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening [https://perma.cc/5F5N-FTXS] (last updated July 15, 2015).

97 *See* 8 C.F.R. § 1241.8(a), (e) (2020).

98 AM. IMMIG. COUNCIL & NAT'L LAWYERS GUILD, NAT'L IMMIGR. PROJECT, REINSTATEMENT OF REMOVAL 3 (2019); *see* 8 C.F.R. § 1241.8(a), (e) (2020); 8 C.F.R. § 1208.31(e).

99 8 C.F.R. §§ 1003.14–1003.15 (2020). In 2019, DHS issued 790,000 NTAs. Memorandum from David Pekoske, *supra* note 90, at 7.

100 *See* 8 C.F.R. § 1003.19.

101 8 U.S.C. § 1229a(a).

102 8 U.S.C. § 1182(a)(6)(A).

103 8 U.S.C. § 1227.

104 8 C.F.R. § 1240.8(c) (2020).

105 8 C.F.R. § 1240.8(a) (2020).

Even if DHS meets its burden of proving a person is present without admission or parole, or that they are deportable, the noncitizen will still have the opportunity to apply for relief from removal to try to remain in the U.S. Such remedies could include: asylum, withholding of removal, protection under the Convention Against Torture, various forms of cancellation of removal, or adjustment of status.[106] Noncitizens bear the burden of proving eligibility for relief from removal.[107] In addition to applying for relief from removal, noncitizens may also wish to challenge any statutory, regulatory, or constitutional violations that led to their being placed in removal proceedings. Such challenges may be brought via a motion to suppress evidence, or a motion to terminate removal proceedings, or both.

In terms of adjudicatory procedures, the Federal Rules of Evidence and Federal Rules of Civil Procedure do not strictly apply in removal proceedings, although they are often used as guidance.[108] Rather, immigration courts and the BIA are bound by the Immigration and Nationality Act, agency regulations, legal precedent set by the Board of Immigration Appeals, as well as precedent from the circuit court in which the case arose and the Supreme Court.

The losing party in immigration court may appeal to the Board of Immigration Appeals.[109] Bond decisions and the immigration judges' final rulings are appealable. Other issues may also be appealed, but the rules around interlocutory decisionmaking are unclear. Once the BIA renders a decision, the administrative removal order is considered to be final. The losing party at the BIA may then petition for review to the federal circuit where the immigration court that initially decided the case sits.[110] The last opportunity to appeal is then to the Supreme Court of the United States.

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106 U.S. DEP'T JUST., FACT SHEET: FORMS OF RELIEF FROM REMOVAL (Aug. 3, 2004). Noncitizens may also qualify for other relief adjudicated by USCIS, such as U visas or T visas. However, because that relief is granted by USCIS and not by the immigration courts, it is not discussed here.

107 8 C.F.R. § 1240.8(d) (2020).

108 *Matter of* Findley, 2017 WL 1130670, at *3 (BIA Jan. 31, 2017) (noting that "the Federal Rules of Evidence do not apply in immigration proceedings, and hearsay is admissible"). *But see Matter of* D-R-, 25 I&N Dec. 445, 458–59 (BIA 2011) (analyzing the sufficiency of authentication of documents using Federal Rule of Evidence 901(a)–(b)(1), even though not strictly binding). Editor's note: in this Article, citations to immigration cases reflect industry and court conventions that are slightly different from the Bluebook's guidance.

109 8 C.F.R. § 1003.1(b) (2020).

110 *See* 8 U.S.C. § 1252(a)(2)(D) (2018) (providing that constitutional claims and questions of law may be raised on a petition for review filed with a federal court of appeals).

Petitions for review by the courts of appeals are the only vehicle to obtain judicial review of a removal order.[111] Congress has limited judicial review in certain aspects of immigration cases. In 1996, Congress passed jurisdiction-stripping measures through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[112] AEDPA barred judicial review of cases where noncitizens had been convicted of certain crimes and curtailed habeas corpus review of removal orders.[113] Noncitizens applying for admission at the border can be denied entry through the mechanism of expedited removal "without further hearing or review," unless the noncitizen states that they are seeking asylum.[114] Judicial review is also limited for people who have committed certain crimes and those who have applied for discretionary relief from removal.[115]

Also in 1996, Congress modified the law surrounding judicial review of immigration matters through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[116] The Immigration and Nationality Act (INA) provides that courts do not have "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."[117] The jurisdiction of the federal courts of appeals is limited to reviewing "constitutional claims or questions of law."[118]

Some of the provisions around what issues are reviewable are quite complex. For example, even though a respondent in immigration court can apply for relief under the Convention Against Torture (CAT), a CAT order is not the same as a "removal order" because relief

111 8 U.S.C. § 1252(a)(5) (2018).

112 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

113 David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2487 (1998). The Supreme Court threw the issue of whether removal orders could be challenged via habeas corpus actions in the district courts into question. *See* INS v. St. Cyr, 533 U.S. 289, 303–14 (2001). The REAL ID Act of 2005 struck back, clarifying that final orders of removal can only be reviewed by the circuit courts, and cannot be reviewed through habeas petitions to the district courts. REAL ID Act of 2005, Pub. L. No. 109-113, div. B, 119 Stat. 302, 313.

114 8 U.S.C. § 1225(b)(1)(A)(i) (2018).

115 8 U.S.C. § 1252(a)(2)(B)–(C) (2018). For further discussion of these statutes and the extent to which the immigration agencies may exercise discretionary authority, *see* Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 99–100 (2017).

116 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, §§ 303, 306, 372, 374, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. 1103, 1226, 1229a–29c, 1252 (2018)).

117 8 U.S.C. § 1252(g) (2018).

118 8 U.S.C. § 1252(a)(2)(D) (2018).

under CAT—meaning, the noncitizen is permitted to stay in the United States—can be granted even if a removal order remains in place.[119] Nonetheless, CAT orders are reviewed in petitions for review along with any challenge regarding a removal order.[120] This led to a circuit split regarding the judicial review of CAT claims, especially where the INA bars judicial review for noncitizens who have been convicted of certain crimes. In 2020, the Supreme Court resolved the circuit split in favor of judicial review.[121]

2. Overview of Courts' Rationales

Despite the complex interplay of administrative and judicial processes in immigration matters, including the fact that there is limited judicial review, federal courts have largely embraced the fugitive disentitlement doctrine. *Arana v. INS* was an early case where fugitive disentitlement was applied to an immigration-related appeal. In this 1982 case, the Third Circuit found that the appellant "has hidden his whereabouts from immigration authorities and this Court and has failed to comply with an order and a bench warrant issued by the district court."[122] The court focused on enforceability concerns and also stated that hiding from immigration authorities disentitled the appellant from calling on the court's resources.[123]

Yet, the *Arana* court gave a cursory explanation for why fugitive disentitlement should apply in the immigration context at all:

> [N]othing in the Supreme Court's opinion [in *Molinaro*] suggests that the rule announced there is applicable only in the criminal-law context. If anything—given the plethora of constitutional and statutory procedural protections that are afforded to criminal defendants but not made available to individuals subjected to administrative deportation proceedings . . .—a court might exercise greater caution in dismissing the appeal of a convicted party who has escaped than of a potential deportee who has absconded.[124]

Said another way, the fact that criminal defendants are entitled to greater statutory and constitutional protections than people in

119 A CAT grant simply means that the United States will not remove someone to the specific country where they fear torture. The noncitizen may be removed to another country where they have citizenship or may stay detained until a country will accept them (with some limits). 8 C.F.R. § 208.17(b)(2).

120 8 U.S.C. § 1252(a)(4) (2018).

121 Nasrallah v. Barr, 140 S. Ct. 1683, 1694 (2020) (holding jurisdiction-stripping 8 U.S.C. §§ 1252(a)(2)(C) and (D) inapplicable to CAT challenges).

122 Arana v. INS, 673 F.2d 75, 76 (3d Cir. 1982).

123 *Id.* at 77.

124 *Id.* at 77 n.2.

deportation proceedings indicates that criminal defendants are more entitled to appeals than immigration respondents. Thus, the Third Circuit reasoned, courts should be even *less* cautious in dismissing immigration-related matters than criminal-related matters.

This same rationale was quoted a decade later by the often-cited Second Circuit case *Bar-Levy v. U.S. Department of Justice*.[125] There, the court dismissed a noncitizen's appeal on fugitivity grounds because he did not surrender to the then-Immigration and Naturalization Service (INS) after the court denied his request for a stay of deportation.[126] The *Bar-Levy* court stated that a noncitizen who fails to surrender to immigration authorities for deportation is a "fugitive from justice," even though they are not a fugitive in a criminal matter.[127] However, even in *Bar-Levy*, the court did not rely on any authority on point for such a broad statement, merely citing two cases: one where the person had physically escaped from federal custody, and *Arana*, in which the person refused to surrender where a bench warrant had been issued by a district court.[128] Nor did the *Bar-Levy* court mention whether the petitioner had changed addresses or otherwise was hiding from the law; the only fact the court considered was that he failed to turn himself in to the INS.

Despite these unsatisfactory justifications for doctrinal creep, the federal courts of appeals have continued to invoke fugitive disentitlement in immigration matters based on several rationales. *Bar-Levy* highlighted four justifications for fugitive disentitlement: enforceability, sanction for flouting the judicial process, promoting efficiency, and avoiding prejudice to the government.[129] These factors continued to serve as the basis for the Second Circuit's future applications of the fugitive disentitlement doctrine.[130] Notably, in *Gao v. Gonzales*, the court chastised Mr. Gao for showing "disdain[]" for the authority of the court, explaining that he had continued living in the United States and failed to comply with the immigration agency's order to surrender for ten years.[131]

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125 Bar-Levy v. U.S. Dep't of Just., INS, 990 F.2d 33, 35 (2d Cir. 1993) (citing *Arana*, 673 F.2d at 77 n.2).

126 *Id.* at 34.

127 *Id.* (first citing Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam); and then quoting United States v. Eng, 951 F.2d 461, 465 (2d Cir. 1991)).

128 *Id.* at 35 (citing Hussein v. INS, 817 F.2d 63 (9th Cir. 1986); Arana v. INS, 673 F.2d 75, 77 (3d Cir. 1982)). It is unclear whether the district court in *Arana* properly entered a bench warrant in a case reviewing a deportation order.

129 *Id.* (citing United States v. Persico, 853 F.2d 134, 137 (2d Cir. 1988)).

130 *See, e.g.*, Qian Gao v. Gonzales, 481 F.3d 173, 176 (2d Cir. 2007); Yi Ying Chen v. Mukasey, 275 F. App'x 79, 81 (2d Cir. 2008); Nen Di Wu v. Holder, 617 F.3d 97, 100 (2d Cir. 2010).

131 *Gao*, 481 F.3d at 174, 177.

But even within circuits, at times, the lines around fugitivity are not clearly drawn. A few years after issuing its decision in *Gao*, the Second Circuit issued *Wu v. Holder*, in which it declined to apply fugitive disentitlement where the petitioner disobeyed two DHS commands to report for removal.[132] The *Wu* court distinguished *Gao* in several ways. First, it stated that DHS knew where to locate Mr. Wu.[133] Second, the court distinguished the amount of time that had passed since the dates the petitioners were ordered to surrender; Mr. Wu had been a fugitive for fourteen months, while Mr. Gao had let seven years lapse.[134] The *Wu* court also stated it was not clear that Mr. Wu had the same level of "disdain[]" for court authority, because the two stays of removal issued by the court itself had likely made DHS' orders to report for deportation confusing.[135] Another interesting point raised by the court was that invoking the doctrine in Mr. Wu's case "would conflate disobedience of an executive command with that of a court order."[136] This statement was a sharp contrast to *Gao*, where the court had in part dismissed the case because of Mr. Gao's refusal to follow the immigration agency's orders to surrender.[137]

Moreover, the *Wu* court raised concerns for the first time that "broad reliance on the doctrine by the government would probably require a significantly greater use of our time and resources than occurs when we consider such cases on the merits."[138] In essence, the court noted that waiting for briefing and then ruling on motions to dismiss regarding fugitivity, particularly because the court has discretion whether to apply the doctrine, would increase the time spent per case. Lastly, the *Wu* court changed the analysis of prejudice to the government. Rather than asking if DHS would have to expend resources *in the future* to apprehend Mr. Wu in the event he lost his case, as it had done in *Gao*, the court noted that "the government has presented no evidence" that fugitivity had *already* prejudiced the case.[139]

Thus, in *Wu*, the Second Circuit seemed to go out of its way to distinguish from *Gao* and narrow the scope of fugitive disentitlement. For the first time in the Second Circuit, *Wu* implied that DHS' knowledge of the petitioner's whereabouts was a factor that weighed against dismissal, considered the short duration of fugitivity, and took

132 Nen Di Wu v. Holder, 646 F.3d 133, 133–35 (2d Cir. 2011).
133 *Id.* at 136.
134 *Id.*
135 *Id.*
136 *Id.* at 137.
137 *Gao*, 481 F.3d at 177.
138 *Wu*, 646 at 137.
139 *Id.*

into account that the government had not yet experienced prejudice due to fugitive status.[140] It also raised new concerns about the resources the court would expend in ruling on motions to dismiss pursuant to the fugitive disentitlement doctrine, as well as questioned whether the court was conflating disobedience of executive branch orders with court orders.

These circuits' cases demonstrate the wide range of factors that courts might take into account, and the accompanying lack of clarity, when they consider whether to invoke the doctrine in immigration cases.

### 3. Two Circuit Splits Regarding Definitions of Fugitivity

One of the key issues in fugitive disentitlement cases is the definition of fugitivity. In general, courts of appeals have found fugitive status where a noncitizen "fails to comply with a notice to surrender for deportation."[141] However, just like the courts draw different lines around what factors they consider as a whole, they also have different definitions of "fugitive." A look at the cases reveals that the distinctions revolve less around the facts of each case and depend more on the courts' attitudes regarding respect for authority, as well as concerns regarding prejudice to the government.

The Supreme Court has not yet spoken on whether fugitive disentitlement is appropriately applied in immigration law. One petitioner sought Supreme Court review in *Bright v. Holder*, a case arising out of the Fifth Circuit. The petitioner asked the high court to weigh in on two aspects—each constituting a circuit split—of the definition of "fugitive": (1) whether noncitizens who fail to follow agency orders are "fugitives" under the doctrine when their whereabouts are known, and (2) whether a noncitizen is a "fugitive" for purposes of the doctrine when they are currently in custody.[142] However, the Supreme Court declined to take up the case,[143] so these issues remain unresolved.

The most heavily contested legal issue on which circuits are split is whether a person constitutes a "fugitive" when they have not presented to DHS for removal, but their whereabouts are known to DHS, counsel, and the court.[144]

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140 *Id.* at 136–37.

141 *Gao*, 481 F.3d at 176 (citing Bar-Levy v. U.S. Dep't of Just., INS, 990 F.2d 33, 35 (2d Cir. 1993)).

142 Petition for Writ of Certiorari, *supra* note 95, at i, 11–12. The Petition also asked the court to conclude that the Fifth Circuit was incorrect in its categorization of the doctrine as a *per se* jurisdictional bar to appellate review. *Id.*

143 Bright v. Holder, 566 U.S. 1021 (2012) (denying certiorari).

144 *See* Winsor, *supra* note 13, at 283–86 (describing nature of circuit split).

The Fifth Circuit is on one side of the circuit split, along with the Second, Sixth, and Seventh Circuits, who all liberally apply the fugitive disentitlement doctrine.[145] In *Bright*, the Fifth Circuit noted that the petitioner "has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien following his failure to report for removal."[146] Nonetheless, the Fifth Circuit dismissed the petition for review, citing the fugitive disentitlement doctrine.[147] The court emphasized the function of fugitive disentitlement as "encourag[ing] voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law."[148] Moreover, the court referenced the Second Circuit's decision in *Gao*, saying: "Everyone understands that the government is overwhelmed with petitioners and procedures, and that it heavily relies on the word and voluntary compliance of numerous aliens within our borders. It is easy to game this system, but we should not treat disregard of government directives as a norm."[149] Thus, on this side of the split, enforceability of court orders is not the most salient rationale for invoking the fugitive disentitlement doctrine. Rather, the justifications highlight deterrence, punishment, and the need to respect the authority of the government and judiciary. Using language designed to arouse feelings of righteousness, like "gaming the system," also exposes attitudes normally buried under more neutral judicial prose.

Another interesting aspect of these courts' perspective is how they discuss the question of prejudice, or inconvenience, to the government. The Second, Fifth, and Seventh Circuits have strongly

145 *See, e.g.*, Qian Gao v. Gonzales, 481 F.3d at 176; Giri v. Keisler, 507 F.3d 833, 835 (5th Cir. 2007); Garcia-Flores v. Gonzales, 477 F.3d 439, 442 (6th Cir. 2007); Sapoundjiev v. Ashcroft, 376 F.3d 727, 729 (7th Cir. 2004).

146 Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011), *cert. denied*, 566 U.S. 1021 (2012). The facts in Mr. Bright's case as presented in the petition for a writ of certiorari are particularly compelling. He had been a lawful permanent resident since 1985, had a U.S. citizen son who is a U.S. Marine, owned a home, and lived his life until 2007 when he misplaced his green card and applied for a replacement. At the immigration office, he was told that he would be deported based on a conviction from two decades prior, for which he had never spent a day in prison, and he was never found guilty because the adjudication was deferred. Moreover, Mr. Bright's legal argument was undoubtedly meritorious following the Supreme Court's decision in *Judulang v. Holder*, 132 S. Ct. 476, 480 (2011). Yet, Mr. Bright failed to report for deportation, so the BIA dismissed his motion to reopen on those grounds. Mr. Bright remained at the same address the government had on file. Yet, the Fifth Circuit agreed with the agency that he was a "fugitive" and dismissed his case. He was then arrested at his home and detained, so he sought rehearing en banc, which the Fifth Circuit denied. Petition for Writ of Certiorari, *supra* note 95, at i, 5-6, 9-10, 34.

147 *Bright*, 649 F.3d at 400.

148 *Id.* (citing Giri v. Keisler, 507 F.3d 833, 834–35 (5th Cir. 2007))

149 *Id.* (quoting *Gao*, 481 F.3d at 176).

expressed such a concern. For example, the Second Circuit found prejudice to the government where a petitioner had married and had two children, which he argued warranted reopening his immigration case.[150] The Second Circuit stated that it would create a perverse incentive to allow noncitizens to "contrive through their own efforts a new basis for challenging deportation," referring to the petitioner's marriage and new fatherhood, and dismissed the case.[151] All three of these circuits have also assumed the responsibility to guard DHS from prejudice in the sense that the government would have to expend resources to go to noncitizens' homes to arrest them, even when the noncitizens' whereabouts are known.[152]

On the other side of the split, the Third, Eighth, Ninth, Tenth, and Eleventh Circuits hold that petitioners are not fugitives when their whereabouts are known.[153] As opposed to sanctioning bad behavior or preventing expenditure of government resources, these circuits appear more concerned with enforceability. For example, in *Sun v. Mukasey*, the Ninth Circuit declined to dismiss the case of a noncitizen who did not surrender herself for removal, but filed change-of-address forms with DHS and maintained contact with her counsel as well as the court during the appellate process.[154] In the court's discussion of justifications for fugitive disentitlement, it appears most concerned with the practical concern of enforceability, since the court simply said that the petitioner's whereabouts were known and she was therefore not a fugitive.[155]

Similarly, the Tenth Circuit in *Martin v. Mukasey* found that the noncitizen petitioner was a fugitive because DHS had made attempts to contact him, but he could not be located.[156] The noncitizen "not only failed to appear for his scheduled appointment, he also failed to provide DHS with his current address."[157] It then expressed concern about the enforceability of any decision it would render, due to the physical absence of the petitioner: "Because Mr. Martin is nowhere to be found, the decision to deport him would mean nothing unless and

150 *Gao*, 481 F.3d at 177–78.

151 *Id.* at 178.

152 *See Bright*, 649 F.3d at 400 (citing *Gao*, 481 F.3d at 176; Sapoundjiev v. Ashcroft, 376 F.3d 727, 729 (7th Cir. 2004)).

153 *See* Arana v. INS, 673 F.2d 75, 77 (3d Cir. 1982); Nnebedum v. Gonzales, 205 F. App'x 479, 480–81 (8th Cir. 2006); Antonio-Martinez v. INS, 317 F.3d 1089, 1093 (9th Cir. 2003); Martin v. Mukasey, 517 F.3d 1201, 1204 (10th Cir. 2008); Xiang Feng Zhou v. Att'y Gen., 290 F. App'x 278, 281 (11th Cir. 2008).

154 *See* Wenqin Sun v. Mukasey, 555 F.3d 802 (9th Cir. 2009).

155 *Id.* at 804–05.

156 517 F.3d 1201, 1202–04 (10th Cir. 2008).

157 *Id.* at 1203.

until he turned himself in or was found."[158] The other circuits that decline to dismiss cases where a person's whereabouts are known also typically identify enforceability as a primary concern.[159] These enforceability concerns relate back to the issue of mootness, which was the rationale the Supreme Court initially proffered when it created fugitive disentitlement.[160]

The second circuit split raised in the *Bright* petition to the Supreme Court was whether the fugitive disentitlement doctrine should apply when the petitioner, who earlier absconded, is now in the government's physical custody.[161] The Fifth and Sixth Circuits—on the harsher side of this issue—have held that a past failure to obey a government order is evidence of future intent to evade future court orders; in their view, wholesale dismissal of the case is therefore justified, even for people who are in custody or whose whereabouts are known to DHS.[162]

This discussion warrants returning to the case discussed above in the Introduction. Similar to Mr. Bright's situation where the government continued asserting that he was a fugitive even after he was detained by immigration authorities,[163] the government argued in Mr. A's case that he was a "fugitive" even though he was physically in ICE custody.[164] This is incongruous with ICE's own statements in the FOIA context, where ICE defined fugitive as "any subject, not in ICE custody."[165] And particularly as opposed to people who have fled and cannot be physically located, detained noncitizens' refusal to act are not "tantamount to waiver or abandonment" of their claims.[166] There also should be no concern over the enforceability of decisions against noncitizens who are physically in custody.

158 *Id.* at 1204–05 ("Without the fugitive present to accept the decision of this court, there is no guarantee that our judgment could be executed.").

159 Arana v. INS, 673 F.2d 75, 77 (3d Cir. 1982) (highlighting that petitioner may not make himself available to immigration appeals if he lost); *See* Nnebedum v. Gonzales, 205 F. App'x 479, 480–81 (8th Cir. 2006) (emphasizing absence of evidence that petitioner could not be located); *Martin*, 517 F.3d at 1204 ("First and foremost is our concern for the enforceability of our decisions."); Xiang Feng Zhou v. U.S. Att'y Gen., 290 F. App'x 278, 281 (11th Cir. 2008) (11th Cir. 2008) (declining to apply the doctrine even though petitioner failed to update his address with DHS because he otherwise did not show unwillingness to submit to court's authority).

160 *See, e.g.*, Smith v. United States, 94 U.S. 97 (1876).

161 Petition for Writ of Certiorari, *supra* note 95, at 17–19.

162 Garcia-Flores v. Gonzales, 477 F.3d 439, 441–42 (6th Cir. 2007); Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011).

163 *See supra* note 146.

164 *See supra* note 9.

165 Smith v. U.S. Immigr. & Customs Enf't, 429 F. Supp. 3d 742, 751 (D. Colo. 2019).

166 Martin v. Mukasey, 517 F.3d 1201, 1204 (quoting Ortega-Rodriguez v. United States, 507 U.S. 234, 240 (1993)).

Both of the circuit splits discussed here demonstrate that some courts are more concerned with practical concerns around the enforceability of their orders, while others care more about respect for the government and seek to impose a sanction on those who are viewed as flouting authority.

## II. SHORTCOMINGS OF JUDICIAL RATIONALES

This Part highlights several problems with applying the fugitive disentitlement doctrine in the immigration context. First, federal courts have asserted that the source of their ability to dismiss cases pursuant to the fugitive disentitlement doctrine is their "inherent authority" to take actions necessary to carry out their duties.[167] This inherent authority, courts say, includes "protect[ing] their proceedings and judgments."[168]

However, there are limits to judicial power to dismiss cases, and this Article posits that federal courts have exceeded those limits with respect to fugitive disentitlement in immigration cases. Specifically, exercise of judicial power that has not been explicitly granted by the Constitution or Congress must be both necessary and reasonable, and the rationale the courts rely on for disentitlement do not extend to immigration as directly as the courts have said. And as a starting place, courts must understand the realities that noncitizens face when considering whether to surrender to immigration authorities.

### *A. Practical Consequences of Surrendering to Immigration Authorities*

Some courts have proclaimed that civil litigants should be *more* stringently subject to the doctrine than criminal defendants, because civil litigants' liberty is not at stake.[169] However, this rationale does not apply in the immigration context because significant liberty concerns are implicated for noncitizens in removal proceedings. Noncitizens face the possibility of detention during removal proceedings, as well as after a removal order has issued. Moreover, noncitizens can be deported while their petition for review is pending at the court of appeals. Deportation itself deprives a noncitizen of their liberty and "may result also in loss of both property and life; or of all that makes

167 Degen v. United States, 517 U.S. 820, 823–24 (1996).

168 *Id.* at 823 (first citing Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991); then citing Link v. Wabash R.R. Co., 370 U.S. 626, 630–631 (1962); and then citing United States v. Hudson, 11 U.S. 32, 34 (1812)).

169 Stolley, *supra* note 50, at 755–56.

life worth living."[170] This is only one way that courts have failed to recognize the practical realities of immigration cases.

Additionally, in applying the doctrine, courts have largely focused on definitions of "fugitivity" completely isolated from the reasons why noncitizens may not voluntarily turn themselves in to immigration authorities in the first place. Moreover, courts typically have not acknowledged the impact of deportation while a petition for review is pending.

Examining these circumstances is critical to understanding the fuller picture of immigration enforcement and courts' power in this arena. Some courts have treated failing to surrender as sheer flouting of authority and disrespect for the government.[171] Yet, there are a multitude of reasons why noncitizens may not surrender that courts should at least take into account. As discussed above, differing values among courts of appeals partially explain the radically different approaches that they take in applying the doctrine. Thus, examining the realities of enforcement and outcomes for noncitizens could lead to—if not outright abolition of the doctrine—more thoughtful consideration by the courts of whether to apply the doctrine in individual cases.

### 1. Immediate Deportation

A critical reality noncitizens face is that they can be deported immediately once the BIA has dismissed the appeal.[172] Without a guarantee that they can remain in the United States while waiting for judicial review, surrendering may not seem like a wise option. Asylum seekers in particular—fearing persecution, torture, or death in their countries of origin—want to exhaust every possible option and may be terrified that they will never be able to see their case through if they are deported. Yet, the existence of fugitive disentitlement means that failing to surrender could result in the court dismissing their petition for review, leaving them with no chance at prevailing on their case.

A key problem for noncitizens is that there is no automatic stay of removal while their petition for review is pending.[173] While

170 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deporting a person claiming to be a citizen "obviously deprives him of liberty" (citing Chin Yow v. United States, 208 U.S. 8, 13 (1908))); *see also* Bridges v. Wixon, 326 U.S. 135, 154 (1945) (noting a resident's liberty was at stake because, "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom").

171 *See supra* subsection I.C.3.

172 8 U.S.C. § 1252(b)(3)(B) (2018).

173 8 U.S.C. § 1252(b)(3)(B) (2018) (providing no automatic stay, unless the court orders otherwise).

noncitizens are generally entitled to an automatic stay of removal when appealing an immigration judge's decision to the BIA,[174] there is no automatic stay of removal after the BIA issues a final removal order. Therefore, when noncitizens file petitions for review with the federal courts of appeals, they must also file a motion to stay removal.[175] Yet stays of removal are not routinely granted by the courts. According to one study conducted by Fatma Marouf, Michael Kagan, and Rebecca Gill, stays are granted as rarely as 4–14% of the time across five circuits.[176] The same study found that the Sixth and Ninth Circuits had the highest rate of granting stays, granting 48% and 63% of the motions filed, respectively.[177]

The difficult standard noncitizens must meet explains, in part, the low grant rates. In *Nken v. Holder*, the Supreme Court held that the test for preliminary injunctions was applicable to motions for stays of removal as well.[178] Thus, pursuant to *Nken*, the noncitizen must prove: (1) they are likely to succeed on the merits of their case, (2) they face irreparable harm if a stay is not granted, (3) the government will not be unduly prejudiced by a stay, and (4) that the stay of removal is in the public interest.[179]

A serious problem identified by the study on stays of removal was that the circuit courts in the study were quite inaccurate when trying to assess "likelihood of success."[180] For example, 44% of the asylum applicants who ultimately won their cases had been denied stays of removal.[181] Thus, due to the low grant rate of the motions in the first place, plus the fact that courts so often wrongly assess the likelihood of success, the availability of stays of removal is not an appropriate stopgap in preventing wrongful removals.

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174 8 CFR § 1003.6(a) (2020).

175 *See generally* Nken v. Holder, 556 U.S. 418 (2009).

176 Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 364 (2014) [hereinafter Marouf et al., *Justice on the Fly*] ("Overall, five of the circuits granted fewer than 15% of stay requests: the Fifth (4%), Tenth (6%), Eleventh (6%), Eighth (10%), and Fourth (14%).").

177 *Id.* at 364–65.

178 556 U.S. at 426.

179 *Id.* at 434. Advocates have called for a revisiting of the standard articulated in *Nken*. As pointed out by scholars, the decision in *Nken* rested in large part on a government misstatement. Marouf et al., *Justice on the Fly*, *supra* note 176, at 340. Specifically, the government represented that it assists noncitizens in returning to the United States after a favorable decision. *Id.* at 348 n.52. Yet, the government had no such policy or practice at the time. *Id.* at 348. The Supreme Court relied on that statement in finding that deportation alone was not sufficient to rise to the level of "irreparable harm." *Nken*, 556 U.S. at 435, 438. Thus there may be cause for the Court to revisit at least the "irreparable harm" prong of the *Nken* test.

180 *See* Marouf et al., *Justice on the Fly*, *supra* note 176, at 385.

181 *Id.*

Deportation while a petition for review is pending at a circuit court may have disastrous effects for any noncitizen, but especially for those who fear returning to their countries of origin. Returning to our real-life example of Mr. A, he desperately wanted to stay in immigration detention—even after years of being detained—rather than be deported because the only medication that helps control the symptoms of his mental illness is not available in his country of origin. Nonetheless, the Tenth Circuit denied his motion for a stay of removal in a boilerplate denial that said he did not meet the *Nken* standard.[182] Mr. A was deported several months before oral argument. And, just as he feared, he now lacks access to medication and is being persecuted due to his mental illness. If Mr. A prevails in his Tenth Circuit case, hopefully there will be a way to get him safely back to the United States—but this remains an open question due to his deteriorating mental health.

Moreover, it can become difficult for any noncitizen to pursue their appeal from abroad. Some countries lack the infrastructure to have reliable access to internet or receive and send mail.[183] It may even be difficult to maintain contact with retained counsel, or to earn sufficient money to continue paying retained counsel. Additionally, if the noncitizen ultimately prevails in their petition for review, returning to the United States may be impossible, particularly because the U.S. government's policies for return are notoriously inadequate.[184]

### 2. Detention

Whether a person is a noncitizen who is being asked to surrender to immigration authorities, or a criminal appellant, both face the possibility of imprisonment on surrender. Thus, the purpose of this subsection is not to say that immigration imprisonment is worse than criminal imprisonment, although these two systems do differ in certain ways. Rather, this subsection highlights the realities of immigration detention that courts have not yet weighed in their decisionmaking with respect to the doctrine.

Surrendering to immigration authorities at any point during a case entails much more than simply showing up for an appointment. Rather, noncitizens may be taken into custody. The INA authorizes

182 *See supra* note 9.

183 *See, e.g.*, Leo Holtz & Chris Heitzig, *Figures of the Week: Africa's Infrastructure Paradox*, BROOKINGS: AFR. FOCUS (Feb. 24, 2021), https://www.brookings.edu/blog/africa-in-focus/2021/02/24/figures-of-the-week-africas-infrastructure-paradox/ [https://perma.cc/2QJR-YAG6].

184 Tianyin Luo & Sean Lai McMahon, *Victory Denied: After Winning on Appeal, an Inadequate Return Policy Leaves Immigrants Stranded Abroad*, 19 BENDER'S IMMIGR. BULL. 1061 (2014).

the Attorney General to arrest and detain noncitizens while a case is pending before the immigration courts and BIA.[185] Even when a bond or parole has been granted, the Attorney General may revoke it "at any time."[186] Moreover, noncitizens who have committed or been convicted of certain crimes (including misdemeanors) may be subject to mandatory detention during their removal proceedings.[187] This results in people being detained for months or years while their immigration cases are pending.[188] There is no definite sentence or guarantee of how long a person will be detained.

If a noncitizen timely appeals an immigration judge's removal order to the BIA,[189] then the removal order generally becomes "final" when the BIA dismisses the appeal.[190] At that point, the statute provides that the Attorney General "shall remove the alien from the United States within a period of 90 days."[191] Moreover, the statute requires mandatory detention during the 90-day removal period.[192] If the noncitizen is not removed during the 90-day period, they may remain detained if they fail to fully cooperate in their removal,[193] or if they have committed or been convicted of certain crimes.[194] Thus, particularly when the BIA has already dismissed an appeal, the noncitizen faces the likelihood of immediate, and potentially lengthy, detention.

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185 8 U.S.C. § 1226(a) (2018).

186 8 U.S.C. § 1226(b) (2018).

187 8 U.S.C. § 1226(c) (2018); *see also* Jorge A. Solis, Note, *Detained Without Relief*, 10 ALA. C.R. & C.L. L. REV. 357, 371, 383 n.165 (2019).

188 In a dissenting opinion, Justice Breyer noted that detained class members had spent from 274 days up to four years in ICE custody before ultimately winning their cases. Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting). Members of the relevant classes in the lawsuit numbered in the thousands. *Id.*

189 8 C.F.R. § 1003.39 provides that an immigration judge's decision becomes final if the noncitizen waives their right to appeal or missed the deadline to appeal to the BIA. 8 C.F.R. § 1003.39 (2020). In such cases, the noncitizen is subject to removal immediately. *See* 8 C.F.R. § 1003.39 (2020). A circuit court would not be able to hear the petition for review because the noncitizen would not have exhausted administrative remedies. 8 U.S.C. § 1252(d) (2018).

190 8 C.F.R. §§ 1003.1(d)(7), 1241.1. A case might be reviewed by the Attorney General first before an order becomes final. 8 C.F.R. § 1003.1(d)(7).

191 8 U.S.C. § 1231(a)(1)(A) (2018).

192 8 U.S.C. § 1231(a)(2) (2018) ("During the removal period, the Attorney General *shall detain* the alien." (emphasis added)).

193 8 U.S.C. § 1231(a)(1)(C) (2018) (providing that noncitizen may remain detained beyond the 90-day removal period if the person "fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal").

194 These crimes essentially mirror the pre-removal order mandatory detention requirements. *Compare* 8 U.S.C. § 1226(c) (2018) *and* 8 U.S.C. § 1231(a)(2) (2018).

Immigration detention—supposedly part of the civil immigration enforcement system—looks a lot like prison. Noncitizens (and sometimes U.S. citizens who are incorrectly alleged to be noncitizens)[195] are held in a jail-like setting, separated from their families and communities.[196] Practically speaking, noncitizens are often detained unexpectedly, giving them no opportunity to figure out childcare, replace lost income, or pay their bills.[197] Professor César Cuauhtémoc García Hernández's description of the physical characteristics at the Port Isabel Detention Center in Texas paints a picture that includes

> chain-link fencing, concertina razor wire, layer after layer of security screenings, and steel doors. Inside, migrants are handed jumpsuits color-coded to reflect their security classification . . . . Walking through metal detectors, with the heavy doors clanking shut behind me, accompanied by a guard and constantly watched through surveillance cameras, even I—an attorney waiting to meet a client—seem to pose a risk.[198]

Abuse of detainees is rampant in these facilities. In the past two years, major news stories have broken concerning sexual assault of detainees by ICE guards,[199] sexual assault of thousands of children in immigration detention,[200] and horrifying nonconsensual medical

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195 Between 2007 and 2015, more than 1,500 U.S. citizens were detained in immigration detention. Cassandra Burke Robertson & Irina D. Manta, *A Long-Running Immigration Problem: The Government Sometimes Detains and Deports US Citizens*, CONVERSATION (July 8, 2019), https://theconversation.com/a-long-running-immigration-problem-the-government-sometimes-detains-and-deports-us-citizens-119702 [https://perma.cc/ET3E-A6RR].

196 *Policy Brief: 5 Reasons to End Immigrant Detention*, NAT'L IMMIGR. JUST. CTR. (Sept. 14, 2020), https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention [https://perma.cc/N2AB-76WH].

197 *See, e.g.*, SAMANTHA ARTIGA & BARBARA LYONS, KAISER FAM. FOUND., FAMILY CONSEQUENCES OF DETENTION/DEPORTATION: EFFECTS ON FINANCES, HEALTH, AND WELL-BEING 10–12 (2018); Jennifer Baum, Tips for Safety Planning for Children of Undocumented Parents, A.B.A. (July 12, 2017), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/safety-planning-for-children-of-undocumented-parents/ [https://perma.cc/928L-98LC]. These are common experiences reported by the author's clients.

198 CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 2–3 (2019). This description is similar to detention facilities the author has visited in Colorado and California.

199 Lomi Kriel, *ICE Guards "Systematically" Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 14, 2020), https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say [https://perma.cc/HVP4-EU73] (stating that federal data showed "14,700 complaints alleging sexual and physical abuse were lodged against ICE between 2010 and 2016").

200 Richard Gonzales, *Sexual Assault of Detained Migrant Children Reported in the Thousands Since 2015*, NPR (Feb. 26, 2019), https://www.npr.org/2019/02/26/698397631

procedures including the forced sterilization of women held at a detention facility in Georgia.[201]

In addition to outright abuse, medical care in ICE facilities is notoriously subpar. A 2018 report by the Human Rights Watch and other organizations analyzed reviews of detainee deaths and found that unreasonable delays in medical care, poor levels of care by facility nurses and doctors, and botched emergency responses due to lack of appropriate medical equipment or failure to provide adequate care contributed to the deaths.[202]

Moreover, during the COVID-19 pandemic, all of these immigration detention conditions have been aggravated. Detainees have reported that they are given insufficient allotments of soap and therefore must pay for soap at the commissary with their own money if they need more.[203] Detained people around the country have resorted to hunger strikes and pooling their own resources to provide for fellow detainees who cannot afford to buy soap or food.[204] Especially for the first several months of the pandemic, detainees and staff alike were not provided adequate personal protective equipment (PPE) and did not or could not adhere to social distancing, putting detainees in constant fear of contracting COVID and entirely powerless to protect themselves.[205] A report by Physicians for Human Rights noted: "Symptomatic people were largely kept in the general population, where they might have potentially exposed others, were rarely tested, and were threatened with solitary confinement instead of being provided adequate medical care."[206] And, in fact, these appalling conditions have led to disastrous COVID outbreaks in the detention centers that have spread to the wider community when individuals are released.[207]

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/sexual-assault-of-detained-migrant-children-reported-in-the-thousands-since-2015 [https://perma.cc/Q2SL-ZXDK].

201 Kenya Evelyn, *At Least 19 Women Allege Medical Abuse at ICE Detention Center in Georgia*, GUARDIAN (Oct. 23, 2020), https://www.theguardian.com/us-news/2020/oct/23/georgia-ice-detention-center-women-allege-abuse [https://perma.cc/3EF9-CD29].

202 HUM. RTS. WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 45–50 (2018).

203 Jack Herrera, *In ICE Detention, Forced to Pay for Soap*, NATION (Apr. 30, 2020), https://www.thenation.com/article/politics/coronavirus-ice-detention-soap [https://perma.cc/6RHV-FQ4A].

204 *Id.*

205 *Id.*; *see also* PHYSICIANS FOR HUM. RTS., PRAYING FOR HAND SOAP AND MASKS: HEALTH AND HUMAN RIGHTS VIOLATIONS IN U.S. IMMIGRATION DETENTION DURING THE COVID-19 PANDEMIC 16–21 (2021).

206 PHYSICIANS FOR HUM. RTS., *supra* note 205, at 28.

207 A report linked over 245,000 COVID-19 cases back to ICE detention. *See generally* DET. WATCH NETWORK, HOTBEDS OF INFECTION: HOW ICE DETENTION CONTRIBUTED TO THE SPREAD OF COVID-19 IN THE UNITED STATES 9 (2020).

The pandemic has had other effects on detention conditions. Aside from outright suspensions of family visits,[208] visits from loved ones are more limited as more people elect to stay home for safety.[209] Some lawyers have been completely unable to see their clients in person during the pandemic.[210] Detainees also reported that food crews were severely short-staffed, which for a time meant that detainees were given oatmeal for breakfast and bologna sandwiches for lunch and dinner.[211] While detrimental to any human being, the diet posed serious problems for people who had health conditions. Imagine being told by the detention center doctor that you must eat and avoid certain foods to control the high blood pressure and pre-diabetes conditions that showed up in your last medical examination, yet having no control whatsoever over your diet and being forced to eat unhealthy foods or starve.[212]

It is well-documented that immigration detention is a traumatic experience.[213] Studies on immigration detention have found that detainees suffer from "high levels of anxiety, depression and post-traumatic stress disorder. Suicidal ideation and deliberate self-harm were also common."[214] Noncitizens also experience depression and anxiety due to the uncertainty of their position, which is aggravated by incarceration.[215] Suicides have been reported in ICE facilities.[216] The

208 Camilo Montoya-Galvez, *ICE Suspends Family Visits in Detention Centers Amid Coronavirus Concerns*, CBS NEWS (Mar. 13, 2020), https://www.cbsnews.com/news/ice-bans-family-visits-in-detention-centers-amid-coronavirus-concerns [https://perma.cc/XS36-JG82].

209 This is consistent with the experiences of the author's clients.

210 Justine N. Stefanelli, *Detained During a Pandemic: Human Rights Behind Locked Doors*, SOC. SCIS., July 2021, art. 276 at 7–8.

211 These conditions were reported by multiple clients of the author. A detainee who died of COVID-19 at Otay Mesa Detention Center in California also was reportedly "living on bologna sandwiches and crackers, the only meal detainees were given for breakfast, lunch, and dinner," even though he had "diabetes, high blood pressure, and heart problems." Ryan Devereaux, *ICE Detainee Who Died of COVID-19 Suffered Horrifying Neglect*, INTERCEPT (May 24, 2020), https://theintercept.com/2020/05/24/ice-detention-coronavirus-death [https://perma.cc/J3ZU-FE59].

212 This scenario is based on one of the author's current clients.

213 *See, e.g.*, Hannah R. Lustman, Note, *Paroling for "Public Benefit": Amending 8 U.S.C. § 1182 to Achieve the Benefits of Discretionary Parole for Asylum Seekers*, 29 KAN. J.L. & PUB. POL'Y. 221, 234–37 (2020) (summarizing various studies addressing effects of detention on asylum seekers' mental health).

214 M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY, Dec. 6, 2018, art. 382 at 2.

215 *See id.*

216 Maria Sacchetti, *ICE Detainee Hanged Himself After Being Taken off Suicide Watch*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/local/immigration/ice-detainee-hanged-himself-after-being-taken-off-suicide-watch/2018/11/28/67a62e74-edb8-

potential for trauma associated with detention could be heightened for asylum seekers, who in many cases have suffered traumatic events in the past. As stated in the von Werthern study, being an asylum seeker or having greater trauma exposure of any kind (whether torture or other exposure) prior to detention seems to be associated with higher rates of anxiety, depression and PTSD in the context of such detention.[217]

One can imagine that immigration detention would be especially traumatic for asylum seekers who have been previously incarcerated, especially where incarceration was part of the persecution they experienced.

Aside from impact on the detained person themselves, detention of a family member also has traumatic effects on the rest of the family. Children whose parents have been detained or deported experience "higher levels of PTSD symptoms" than children whose parents were undocumented or legal permanent residents with no contact with immigration enforcement.[218] Where the detained person was the primary earner, detention creates massive instability in the family unit.[219] Thus, when noncitizens receive orders to voluntarily report to immigration authorities, these are among the considerations that run through their minds.

Now having considered the realities noncitizens face when they turn themselves in to immigration authorities, and the many reasons that may influence their decision not to, we turn to examining the circuit courts' justifications for dismissing cases under the fugitive disentitlement doctrine.

### *B. Limits to Courts' Inherent Powers*

The Supreme Court has proclaimed the existence of powers inherent to courts that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to

11e8-baac-2a674e91502b_story.html [https://perma.cc/XD8Q-U4KS]; Erin Donaghue, *ICE Review Found Failures in Care of Mentally Ill Detainee Who Died by Suicide*, CBS News (Aug. 22, 2019), https://www.cbsnews.com/news/jean-carlos-jimenez-joseph-ice-review-documented-failures-in-care-of-mentally-ill-detainee-who-died-by-suicide/ [https://perma.cc/5QBM-ADA8].

217 Von Werthern et al., *supra* note 214, at 14.

218 *Id.* at 13 (citing Lisseth Rojas-Flores, Mari L. Clements, J. Hwang Koo & Judy London, *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCH. TRAUMA: THEORY RSCH. PRACT. POL'Y 352 (2017)); *see also* Kalina M. Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCIS. 341, 354–55 (2010).

219 *See* Schuyler Ctr. for Analysis & Advocacy, Supporting Immigrant Families Impacted by Immigration Detention or Deportation 1 (2017).

achieve the orderly and expeditious disposition of cases."[220] The Court has further stated that fugitive disentitlement falls within these inherent powers—meaning powers that are not expressly granted by the Constitution or by Congress—necessary to carry out their work.[221] However, it bears examining whether fugitive disentitlement is truly justified by the courts' exercise of inherent powers in the immigration context, particularly where those powers are limited by two main principles: necessity and reasonableness.

1. Necessity

Inherent powers are those "[c]ertain implied powers . . . which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[222] Meaning, the powers must be necessary for the courts' performance of their adjudicatory function.[223] These powers include tools of control such as docket management and imposition of sanctions.[224]

Fugitive disentitlement is not necessary for the courts to perform their functions in immigration cases. Necessity is only a justification where the court is managing its own affairs, and not the affairs of other actors, even other federal courts. For example, in *Ortega-Rodriguez*, the Supreme Court rejected applying the fugitive disentitlement doctrine where the appellant had fled during the underlying district court proceedings but was back in custody during the appeal.[225] The Court clarified that it is only permissible to dismiss a case when the escape holds consequences for the appellate process, stating,

> Until that time, however, the district court is quite capable of defending its own jurisdiction. . . . Most obviously, because flight is a separate offense punishable under the Criminal Code, . . . the district court can impose a separate sentence that adequately vindicates the public interest in deterring escape and safeguards the dignity of the court.[226]

220 Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

221 Degen v. United States, 517 U.S. 820, 824 (1996).

222 *Chambers*, 501 U.S. at 43 (first alteration in original) (quoting United States v. Hudson, 11 U.S. 32, 34 (1812)).

223 "A court's inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829.

224 Stolley, *supra* note 50, at 752–53 (describing courts' inherent powers as including contempt and other sanctions, striking pleadings or evidence, ordering payment of costs, and default judgment).

225 Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993).

226 *Id.* at 247–48.

Similar to the situation in *Ortega-Rodriguez*, in circumstances where the noncitizen petitioner has not failed to comply with any court orders, the failure to obey orders from the immigration agencies is not directly related to the appellate process. The agency can impose fines and imprisonment on a noncitizen under 8 U.S.C. § 1253 for failure to make arrangements to depart the United States.[227] Under the reasoning in *Ortega-Rodriguez*, it is not necessary for the courts of appeals to dismiss the case to preserve their dignity because the noncitizen has not flouted the appellate process itself. Moreover, the agency has means of defending itself where alternate sanctions exist.

2. Reasonableness

In addition to the limitation that the exercise of inherent powers requires necessity, it also requires reasonableness. As Justice Kennedy wrote in *Degen*, courts must exercise self-restraint because wielding judicial power must be a "reasonable response to the problems and needs that provoke it."[228] There are several reasonableness problems with fugitive disentitlement in immigration cases.

First, as scholars have noted, a fundamental "problem with the application of the [fugitive disentitlement] rule in the immigration context is that the definition of a fugitive is a person who commits a crime and flees the jurisdiction or hides within the jurisdiction so as not to be brought to justice."[229] The Supreme Court has continued to hold that immigration is a civil system and that "[t]he order of deportation is not a punishment for crime."[230] Thus, applying this doctrine in the immigration context further blurs the line between criminal and immigration proceedings.[231] The lack of adequate justification demonstrates the unreasonableness of this doctrinal creep.

Second, as discussed above in Section I.C, the circuit courts have not rigorously considered the propriety of expanding a criminal

227 *See infra* subsection II.B.2.

228 *Degen*, 517 U.S. at 823–24 (first citing *Ortega-Rodriguez*, 507 U.S. at 244; and then citing Thomas v. Arn, 474 U.S. 140, 146–48 (1985)).

229 Hoffman & Modi, *supra* note 17, at 481 (citing United States v. Barnette, 129 F.3d 1179, 1183 (11th Cir. 1997)); *see also* Wishnie, *supra* note 16, at 744–45 (pointing out the disconnect in extending the term "fugitive" from people convicted of crimes to violators of civil immigration law).

230 Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); *see* Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)) (recognizing the enmeshment of deportation and criminal proceedings but maintaining that "removal proceedings are civil in nature").

231 The increasing overlaps between criminal and immigration law has been referred to as "crimmigration." *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV 367 (2006).

doctrine into immigration law, nor have they adequately defended it. The courts have reasoned that heightened statutory and constitutional protections in criminal proceedings indicate that civil immigration violators should be entitled to *less* protection, and that fugitive disentitlement therefore should apply more liberally in civil cases.[232] The flip side of these courts' reasoning is: where criminal defendants are afforded greater constitutional and statutory protections, shouldn't noncitizens in removal proceedings be afforded a minimum protection of having their appeal heard at all? Isn't it that much more important that noncitizens have this one opportunity for judicial review, where noncitizens also face deprivations of liberty (immigration detention) and even permanent separation from communities and families (deportation)? These questions have not been sufficiently examined by the courts in deciding to extend fugitive disentitlement to immigration cases. For that reason, the phrase "doctrinal creep" is appropriate because disentitlement truly crept in without adequate consideration.

Furthermore, application of fugitive disentitlement is not defensible because the rationales from the criminal context do not apply. *Degen* summarized the justifications for fugitive disentitlement laid out in the prior criminal cases: (1) When a person cannot be located, there is no means of enforcing the court's ruling; (2) Escape from justice should rightfully disentitle someone from calling upon the resources of the court to seek justice; (3) Discourages escape and encourages voluntary surrenders; and (4) Promotes the efficient, dignified operation of the courts.[233] These justifications largely overlap with the rationale given in the most frequently cited immigration fugitive disentitlement cases. Thus, the following sections are divided into those rationales to discuss each in turn.

a. Enforceability

A common justification courts give for dismissing cases pursuant to the doctrine is concern over the enforceability of court orders if the noncitizen is beyond the control of the court.[234] As an initial matter, it bears repeating that some courts find fugitivity even where the person's whereabouts are known.[235] Thus, those courts appear less concerned with enforceability, since there is no concern in those cases

232 *See, e.g.*, Bar-Levy v. U.S. Dep't of Just., INS, 990 F.2d 33, 35 (2d Cir. 1993); Arana v. INS, 673 F.2d 75, 77 n.2 (3d Cir. 1982).

233 *Degen*, 517 U.S. at 824.

234 *See, e.g.*, *Arana*, 673 F.2d at 77.

235 *See supra* subsection I.C.2.

that the order will not be enforced because the person cannot be located.

The more difficult question is whether enforceability justifies dismissal when the person's whereabouts are unknown to the court and immigration authorities. But, similar to the question of whether fugitive disentitlement is necessary for the courts to manage *their own affairs*, we also must ask whether fugitive disentitlement is a reasonable way to manage *the courts'* work.[236] As the Second Circuit pointed out, it is DHS, not the courts, that actually carries out the removal process.[237] Thus, dismissing a case pursuant to the fugitive disentitlement doctrine to sanction a noncitizen's failure to comply with DHS "conflate[s] disobedience of an executive command with that of a court order."[238]

Moreover, failure to surrender to immigration authorities while an appeal is pending does not necessarily indicate an intent to ignore future *court* orders. Rather, if the noncitizen ultimately lost their case, perhaps they would surrender. There are a number of plausible reasons why a person has a greater incentive to surrender after exhausting their appellate options: (1) they only failed to surrender because they feared being removed during the pendency of appeal, as they could lose the ability to pursue their claims from abroad, (2) they would understand that their claims had been fully considered by an Article III court and therefore would accept the final resolution because they have exhausted all levels of review, (3) knowing that they would be subject to removal at any time with no other hope for review, they might rather have more control over their departure by voluntarily surrendering, and (4) they may perceive the court's decision as more legitimate—as the first level of judicial review—than the agency's rulings and therefore comply with it.

For these reasons, enforceability is not a reasonable basis on which courts may hang their hats in applying the fugitive disentitlement doctrine in immigration cases.

b. Punishment

Precluding a noncitizen from agency or judicial review of their case is unreasonably harsh because other sanctions are already provided through immigration statutes, as well as by courts' other

236 Ortega-Rodriguez v. United States, 507 U.S. 234, 246–47 (1993) (refusing to dismiss the case pursuant to the doctrine because there were no *appellate* consequences from flight during district court proceedings, and "the district court is quite capable of defending its own jurisdiction").

237 *See* Nen Di Wu v. Holder, 646 F.3d 133, 137 (2d Cir. 2011).

238 *Id.*

procedural rules. Moreover, blocking a noncitizen's only opportunity for judicial review is disproportionate punishment because of the high stakes in immigration matters. In light of the other available sanctions that are explicitly provided by statute and regulation, it is improper for federal courts to impose the "most severe" sanction of disentitlement.[239]

As an initial matter, noncitizens are already sufficiently punished for any failures to comply with immigration authorities. Noncitizens' failure to comply is already accounted for—with explicit punishments included—in the statutory and regulatory scheme. Section 1253(a) of Title 8 provides, under the heading "Penalty for failure to depart," the following:

> Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who . . . willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure, . . . shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.[240]

In addition to this broad statutory penalty that applies to any noncitizen who fails to depart following a final order of removal, the regulations impose additional punishments for detained noncitizens. Detained noncitizens may continue to be held in ICE custody beyond the 90-day removal period if they "fail[ ] or refuse[ ] to make timely application in good faith for travel or other documents necessary to the alien's departure."[241] Moreover, as opposed to people who are not in custody and therefore can continue living their lives in the event of an adverse decision, noncitizens who are detained are directly under the control of the government at all times.

Taking Mr. A's case as an example, if he did not prevail in his petition for review and continued not complying, he would have either (1) been deported anyways if his home country accepted him regardless of his signing the documents; (2) stayed in detention indefinitely under 8 C.F.R. § 241.4(g); and/or (3) been prosecuted under 8 U.S.C. § 1253. Because the immigration statutory and regulatory scheme does not contemplate application of the fugitive disentitlement doctrine, and instead provides other penalties for

239 *See* Degen v. United States, 517 U.S. 820, 828 (1996).

240 8 U.S.C. § 1253(a)(1) (2018).

241 8 C.F.R. § 241.4(g)(ii) (2020).

failure to comply, the Court should not refuse to hear noncitizens' claims on this basis.[242]

And courts themselves have demonstrated that there are other ways to sanction parties who act in ways that affect the court's ability to adjudicate a case. Under the Federal Rules of Appellate Procedure, if briefing deadlines are missed, the case may be dismissed for failure to prosecute the case.[243] Alternatively, the party may not be permitted to argue at oral argument.[244] Moreover, courts might only preliminarily dismiss an appeal and give the party thirty days to surrender to the custody of the United States Marshal to have the appeal reinstated.[245]

Additionally, the INA contains no express "duty to surrender,"[246] as opposed to a warrant or summons issued in a criminal case. Absent a "bag-and-baggage" letter telling the noncitizen when to report to immigration authorities, no actual deadline has been established.[247] Thus, particularly in matters where DHS has not issued a bag and baggage letter, it is unclear what "order" would have been violated and sanctions make even less sense.

Furthermore, dismissal is a disproportionately harsh sanction in immigration cases because it results in deportation. Proportionality is a longstanding legal principle dating back to at least the Magna Carta and is "deeply rooted and frequently repeated in common-law jurisprudence."[248] As described by Vicki C. Jackson, "[a]ttraction to proportionality in both the courts and the academy is no surprise, since an aspiration to proportionate government, as an important aspect of justice, is implicit in the constitutional design."[249] In American law, proportionality functions both as a substantive consideration in individual cases as well as a tool of statutory interpretation. Even though deportation is not categorized as criminal "punishment,"

242 *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 424 (2011) ("The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." (alterations in original) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978))).

243 FED. R. APP. P. 31(c) (providing consequences for failure to file a brief).

244 *Id.*

245 *See* United States v. Swigart, 490 F.2d 914, 915 (10th Cir. 1973).

246 Hoffman & Modi, *supra* note 17, at 482–85.

247 *See* 8 U.S.C. § 1231 (2018) (articulating a 90-day period during which the Attorney General "shall remove" the noncitizen but containing no duty for the noncitizen to surrender). The Second Circuit has articulated that the issuance of a bag and baggage letter may trigger the duty to surrender. Qian Gao v. Gonzales, 481 F.3d 173, 176 (2d Cir. 2007) ("Thus, for an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with that letter.").

248 Solem v. Helm, 463 U.S. 277, 284 (1983) (finding that a life sentence for passing a bad check was constitutionally disproportionate and overturning the life sentence).

249 Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3105–06 (2015).

it is still recognized as a severe penalty by the Supreme Court.[250] And penalties must be proportionate to the wrongdoing.

The principle of proportionality has been accepted by the Supreme Court in the context of the Eighth Amendment.[251] The principle serves multiple functions, as "the proportionality principle is one of the most essential limitations in preserving a sense of fairness in and the integrity of the criminal justice system, and in protecting the individual from overreaching by the coercive state."[252] Fatma Marouf advocates for proportionality in asylum-related cases, arguing:

> In the criminal context, the proportionality principle protects a defendant from being sentenced to a disproportionately long period of incarceration or receiving the death penalty; in the refugee context, the proportionality principle would help protect someone from receiving the disproportionate penalty of being deported to a country where there is a serious risk of persecution or death.[253]

People who fear persecution and torture in their countries of origin are especially likely to want to ensure that they have exhausted all avenues for appeal and judicial review possible. And while outcomes for asylum-seekers are particularly disastrous, deportation is a harsh penalty for any noncitizen. For noncitizens who were lawful permanent residents, they stand to lose lawful status and everything they have attained in the United States, including family, community, and property. As Justice Brandeis famously commented, deportation deprives a person of liberty and "may result also in loss of both property and life; or of all that makes life worth living."[254]

These are extremely harsh consequences, perhaps beyond what the federal courts initially intended for this doctrine. Moreover, these punishments are disproportionate to the act of not voluntarily surrendering to immigration authorities. Especially when considering proportionality, the fugitive disentitlement doctrine is not appropriate as a sanction in removal cases.

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250 Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting)) (using the term "penalty"). Supreme Court Justices Brewer, Field, and Fuller have also expressed their belief that deportation constitutes punishment. *Fong Yue Ting*, 149 U.S. at 733, 759, 763 (Brewer, J., dissenting).

251 Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 13 (2011).

252 *Id.*

253 Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1464–65 (2017).

254 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

c. Deterrence

Much like many other aspects of fugitive disentitlement in immigration law, the courts do not clearly delineate what they mean by "deterrence." One approach would be specific deterrence,[255] meaning that the courts threaten fugitive disentitlement to get someone to turn themselves in or not repeat the action themselves. Specific deterrence, in addition to enforceability, was at play in the early criminal cases where the Supreme Court gave appellants a certain number of days to surrender or face dismissal.[256] In immigration cases, however, it appears the courts more often consider general deterrence,[257] since outright dismissal gives no opportunity for the individual to turn themselves in. Thus, dismissal is largely to make an example of a noncitizen who does not obey the orders of immigration authorities as a warning to others.

General deterrence is unlikely to work for certain noncitizens, most notably asylum seekers. Deterrence is simply not effective where the consequences of surrendering to immigration authorities (near-certain detention and deportation) are worse than having a case dismissed and taking your chances on being caught. This is especially true for asylum seekers. As stated by Peter Acker,

> The torture and persecution that the asylee would face in many countries is far worse than anything else imaginable, so why under any circumstances would an alien return to custody to take the chance (and given the likelihood of pre-decision deportation, the near certainty) of being returned to these circumstances? No rule a court could constitutionally come up with could deter flight when such flight is necessary to prevent imminent persecution and torture.[258]

Moreover, returning to the principle of proportionality, the goal of deterrence should not outweigh the fact that dismissal is an extremely harsh sanction that can result in severe losses.[259] For these reasons, deterrence does not constitute a reasonable justification for extension of the fugitive disentitlement doctrine into immigration cases.

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255 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5(4) (1986).

256 Smith v. United States, 94 U.S. 97, 98 (1876) (ordering that the petitioner turn himself in by the first day of the following term, or his case would be dismissed); Allen v. Georgia, 166 U.S. 138, 142 (1897) (stating the court below had given appellant "sixty days, or until the last day of the term," to turn himself in before dismissal).

257 LAFAVE & SCOTT, *supra* note 255, at § 1.5(4).

258 Peter H. Acker, *A Critique of the Fugitive Disentitlement Doctrine and Why It Should Not Apply in Certain Immigration Proceedings*, ACKER IMMIGRATION, http://www.acker-immigration.com/articles/A_Critique_of_the_Fugitive_Disentitlement_Doctrine_in_Immigration_Proceedings.pdf [https://perma.cc/27G4-7YZJ].

259 *See supra* sub-subsection II.B.2.b.

d. Dignity

Courts have stated that dismissing cases based on the fugitive disentitlement doctrine is appropriate because there is a "need for a sanction to redress the fugitive's affront to the dignity of the judicial process."[260] Yet, the appellate process normally does not involve any participation on the part of the noncitizen. Cases are often submitted on the briefs, and even when oral argument is permitted, the noncitizen typically does not need to be present. Additionally, where individuals are pro se, if they have completely absconded, courts can dismiss a case through the normal procedures when parties have missed deadlines or otherwise failed to follow orders.[261]

Moreover, arbitrary dismissal of cases also chips away at the dignity of the judiciary. In *Degen*, writing for the majority, Justice Kennedy said the following:

> [T]he sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.[262]

Stated in the context of a civil case where the Supreme Court struck down an application of the fugitive disentitlement doctrine, this message carries important meaning for immigration cases as well.

Moreover, as the Second Circuit has pointed out, a noncitizen failing to surrender to immigration authorities does not constitute flouting the authority *of the court*.[263] Rather, it constitutes the court punishing a person for failing to comply with an order of the executive branch.[264] Such use of fugitive disentitlement as punishment in that context "would conflate disobedience of an executive command with that of a court order. Doing that ultimately weakens rather than protects the court's unique dignity, which is, after all, the doctrine's focus."[265]

Additionally, courts have stated their concerns in terms of desiring respect for their own decisions, but we should also be concerned about the dignity of individuals seeking the assistance of the courts. Dignity is a fundamental aspect of democratic societies because it "constitutes

260 Martin v. Mukasey, 517 F.3d 1201, 1205 (10th Cir. 2008) (quoting Qian Gao v. Gonzales, 481 F.3d 173, 176 (2d Cir. 2007)).

261 *See, e.g.*, FED. R. APP. P. 31(c) (providing consequences for failure to file a brief).

262 Degen v. United States, 517 U.S. 820, 828 (1996). The Court also concluded that "the justice would be too rough" in striking Degen's filings and granting judgment against him for his failure to participate in all proceedings. *Id.* at 829.

263 *See* Nen Di Wu v. Holder, 646 F.3d 133, 137 (2d Cir. 2011).

264 *Id.*

265 *Id.*

the first cornerstone in [sic] the edifice of . . . human rights."[266] The tone of some fugitive disentitlement cases indicates the courts' disdain toward noncitizens who they perceive to be fugitives, particularly in the use of criminalizing language and accusing them of "gam[ing] the system."[267] In reality, noncitizens might be terrified, believe the agency committed severe injustices, or have any number of other motivations for not surrendering for detention and deportation that cannot be reduced to simple malintent.

Punitive invocation of fugitive disentitlement risks stripping people of meaningful access to a system that is already racialized and otherwise can be deeply unfair.[268] Ensuring that people are afforded the basic dignity of having their claims heard does not mean that they would be beyond consequence. Rather, it ensures access to a venue intended to provide redress of rights, a cornerstone of democratic societies.[269]

The fugitive disentitlement doctrine as applied in removal proceedings interferes with fairness in the proceedings as well as the dignity of the individual. Fuller consideration regarding the principle of dignity demonstrates that this rationale does not reasonably justify criminal doctrinal creep into the immigration context.

### *C. Legislative Intent*

Legislation regarding fugitive disentitlement in another area of law may be instructive in considering the scope of the doctrine that Congress might find appropriate in the immigration context. In 2000, Congress passed a fugitive disentitlement statute called the Civil Asset Forfeiture Reform Act (CAFRA), which specifically permits use of the fugitive disentitlement doctrine in civil forfeiture cases.[270] However, CAFRA only permits disentitlement where the individual is subject to related criminal proceedings. The section is titled "Fugitive disentitlement" and states that "[a] judicial officer may disallow a person from using the resources of the courts of the United States in

266 Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 68–69 (2011) (alteration in original) (quoting Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law,* 97 AM. J. INT'L. L. 38, 46 (2003)).

267 *See, e.g.*, Qian Gao v. Gonzales, 481 F.3d 173, 176 (2d Cir. 2007) ("Like the criminal defendant fleeing after his conviction, an alien who fails to comply with an outstanding notice to surrender is a fugitive from justice." (citing Bar-Levy v. U.S. Dep't of Just., INS, 990 F.2d 33, 35 (2d Cir. 1993))).

268 Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM L. REV. 263, 271–72 (1997).

269 *See* Glensy, *supra* note 266, at 68–69 (citing Carozza, *supra* note 266, at 46).

270 Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 14(a), 114 Stat. 202, 219 (codified as amended at 28 U.S.C. § 2466(a) (2018)).

furtherance of a claim . . . upon a finding that such person" purposefully evades arrest "in order to avoid criminal prosecution."[271]

A potential lesson to draw from the forfeiture statute is that fugitive disentitlement is truly meant to apply to people who are attempting to avoid criminal prosecution, not simply civil enforcement. CAFRA specifically states that courts may only dismiss cases where the person has notice and flees specifically to avoid criminal prosecution.[272] This indicates that Congress may impose similar limitations on use of the doctrine for noncitizens in removal proceedings, at least where there is no related criminal prosecution.

### *D. Violation of Constitutional Rights*

Another gap in courts' decisions considering whether to apply the fugitive disentitlement doctrine is whether constitutional rights are implicated by such a dismissal. As discussed above, the courts' power to control their dockets is limited not only by general reasonableness, but also to the extent that they must not violate constitutional or statutory rights.[273] Both procedural due process and the right to petition bear discussion. While the Supreme Court explicitly declined to consider the due process argument raised by the petitioner in the civil forfeiture context in *Degen*,[274] it is unclear whether these constitutional concerns have been raised in immigration cases with respect to fugitive disentitlement. These constitutional concerns should be raised by advocates and examined by the courts moving forward.

#### 1. Procedural Due Process

Allowing the circuit courts to dismiss an immigration petition for review without considering the merits raises due process concerns. Due to the categorization of immigration violations as "civil" in nature, a host of constitutional protections have been deemed not to apply in removal proceedings.[275] However, due process is a fundamental

271 *Id.*

272 *Id.*

273 Ortega-Rodriguez v. United States, 507 U.S. 234, 253 (1993) (Rehnquist, C.J., dissenting) (citing Thomas v. Arn, 474 U.S. 140, 146–48 (1985)).

274 Degen v. United States, 517 U.S. 820, 828 (1996) ("We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process . . . .").

275 INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) (explaining that "various protections that apply in the context of a criminal trial do not apply in a deportation hearingE," including that the Fourth, Fifth, and Eighth Amendments apply to a lesser extent in immigration proceedings).

constitutional principle that certainly applies to these proceedings.[276] Due process essentially requires that the proceedings must be fundamentally fair,[277] including that noncitizens have the right to "a full and fair hearing."[278] Noncitizens must have "the opportunity to be heard at a meaningful time and in a meaningful manner."[279] Dismissal of a case by a circuit court interferes with noncitizens' ability to be heard.

While the Supreme Court has not recognized a substantive constitutional right to seek judicial review of an administrative decision, noncitizens have a *statutory* right to appeal an immigration judge decision to the Board of Immigration Appeals.[280] Noncitizens must be advised of their right to appeal to the BIA at the end of a removal hearing with an immigration judge.[281] Further, noncitizens have a *statutory* right to petition the circuit courts for review of certain issues arising from a final administrative order.[282] Specifically, Article III courts have jurisdiction to review constitutional claims and questions of law.[283] Additionally, in *United States v. Mendoza-Lopez*, the Supreme Court recognized "that where a determination made in an administrative proceeding is to play a critical role in the subsequent

276 Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 633–34 (1990) ("There is no question that aliens in deportation proceedings are entitled to due process, and the touchstone in this setting is 'fundamental fairness.'" (citing Yamataya v. Fisher, 189 U.S. 86 (1903))); *see also* Mathews v. Diaz, 426 U.S. 67, 77–78 (1976)).

277 Tashnizi v. INS, 585 F.2d 781, 782–83 (5th Cir. 1978) (quoting Marlowe v. INS, 457 F.2d 1314, 1315 (9th Cir. 1972)); *Matter of* Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of* Lam, 14 I&N Dec. 168, 170 (BIA 1972); *see also* Kanstroom, *supra* note 276, at 633–34.

278 *Matter of* M-A-M-, 25 I&N Dec. 474, 479 (BIA 2011) (citing *Matter of* M-D-, 23 I&N Dec. 540, 542 (BIA 2002)).

279 Brue v. Gonzales, 464 F.3d 1227, 1233 (10th Cir. 2006) (quoting Schroeck v. Gonzales, 429 F.3d 947, 952 (10th Cir. 2005)).

280 *See* Martin S. Krezalek, *How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA's Ability to Affirm Without Opinion*, 21 GEO. IMMIGR. L.J. 277, 294–95 (2007).

281 United States v. Mendoza-Martinez, No. 96-50247, 1997 WL 377986, at *1 (9th Cir. 1997) (noting that 8 C.F.R. § 242.19(b) and § 242.21 require immigration judges to advise noncitizens of right to appeal to the BIA); *see also* 8 U.S.C. § 1229a(c)(5) (2018) (providing that immigration judges, when issuing an order of removal, shall inform noncitizens of the right to appeal).

282 8 U.S.C. § 1252(a)(2)(D) (2018) (providing that "constitutional claims or questions of law" are judicially reviewable). It should be noted, however, that while there is a statutory right to judicial review, the circuits are split regarding whether the government is required to give a noncitizen *notice* of that fact. Darlene C. Goring, *A False Sense of Security: Due Process Failures in Removal Proceedings*, 56 S. TEX. L. REV. 91, 94–95 (2014) (first quoting United States v. Lopez-Solis, 503 F. App'x 942, 945–46 (11th Cir. 2013); and then quoting United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990)).

283 *Id.*

imposition of a criminal sanction, there must be *some* meaningful [judicial] review of the administrative proceeding."[284] Thus, the Court said that there must be some judicial review of decisions from deportation proceedings available, because the deportation order can later be used to establish an element of a criminal offense, such as illegal reentry under 8 U.S.C. § 1326.[285]

In fact, Congress responded to the *Mendoza-Lopez* concerns by adding subsection (d) to § 1326, which provides that noncitizens can challenge the underlying removal order by showing that: "(1) the alien exhausted any administrative remedies that may have been available to [challenge] the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."[286] Accordingly, the government is obligated to ensure noncitizens are not deprived of the opportunity for judicial review if it wishes to be able to successfully prosecute noncitizens for illegal reentry in the future.

This shows that the Supreme Court, as well as Congress, understand that the opportunity of judicial review of a removal order is critical to the validity of the order. Thus, blocking noncitizens from judicial review, a procedure to which they have a statutory right, deprives them of their due process rights to a full and fair hearing and the right to be heard by a court of law.[287] At the very least, the right to judicial review of administrative decisions is tied to due process concerns because any removal order may serve as an element of a future criminal prosecution.

One other aspect of the Due Process clause is that it includes a right to defend.[288] Martha B. Stolley argues, "[w]here a person can be sued, he is entitled to defend himself against that suit."[289] Because removal proceedings are brought by the government against noncitizens in order to "regulate the relationship between the state and the individual," noncitizens are certainly in the defensive position.[290] Thus, dismissal pursuant to the fugitive disentitlement doctrine

284 United States v. Mendoza-Lopez, 481 U.S. 828, 837–38 (1987) (first citing Estep v. United States, 327 U.S. 114, 121–22 (1946); and then citing Yakus v. United States, 321 U.S. 414, 444 (1944), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214).

285 *Id.* at 837–39.

286 Goring, *supra* note 282, at 94 (alteration in original) (quoting 8 U.S.C. § 1326(d) (2012)).

287 *See* Brue v. Gonzales, 464 F.3d 1227, 1233 (10th Cir. 2006) (citing Schroeck v. Gonzales, 429 F.3d 947, 952 (10th Cir. 2005)).

288 Stolley, *supra* note 50, at 770.

289 *Id.* (citing McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870)).

290 Stumpf, *supra* note 231, at 380.

interferes with noncitizens' right to defend themselves from loss of lawful status or deportation. Courts should consider these potential due process concerns that counsel against dismissing cases pursuant to the fugitive disentitlement doctrine.

2. First Amendment Right to Petition

The First Amendment right to petition is an additional constitutional right that is potentially at issue when courts dismiss a case based on the fugitive disentitlement doctrine. The First Amendment provides that "the people" have a right "to petition the Government for a redress of grievances."[291] This provision, often referred to as the Petition Clause, largely has been understood to include the right to file a lawsuit.[292] The Supreme Court has also clarified that the right to petition includes access to the courts.[293]

One possible objection to this theory is that, even if there is a right of access to the courts, there is no similar right to the appellate process. There are three primary arguments advocates can raise in defense of the right to petition. First, drawing such a hard line between trial and appellate proceedings does not promote fairness, as appeals are the only manner by which certain errors can be corrected. As noted by one scholar, "[t]he right to petition for the redress of grievances may well require access to the appellate level where it is necessary to obtain relief."[294] Second, as discussed below in Part III, petitions for review filed with the circuit courts are the first level of judicial—as opposed to executive administrative agency—review. Assuming that the right to petition extends to all three branches of government, the petition for review filed with a circuit court is a noncitizen's first chance to have their case reviewed by the judicial branch. Third, the circuit courts—and only the circuit courts—are explicitly permitted by statute to rule on constitutional issues.[295] How can we say that the right to petition is not violated if the courts explicitly tasked with reviewing constitutional violations can simply choose to dismiss a case without considering the merits?

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291 U.S. CONST. amend. I.

292 Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1745–46 (2017).

293 Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." (first citing Johnson v. Avery, 393 U.S. 483, 485 (1969); and then citing *Ex parte* Hull, 312 U.S. 546, 549 (1941))).

294 *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1064 n.61 (1973).

295 8 U.S.C. § 1252(a)(2)(D) (2018) (providing that judicial review is permitted with respect to "constitutional claims or questions of law").

The U.S. Supreme Court has raised a potential barrier with respect to noncitizens' First Amendment rights. Yet, this subject deserves inspection and is a potential area for further litigation. In *United States v. Verdugo-Urquidez*, the Supreme Court considered whether the Fourth Amendment applied to a warrantless search of a Mexican citizen's home in Mexico while he was in custody in the United States.[296] Although the case dealt with Fourth Amendment rights, the Supreme Court, in dicta, called into question the extent to which noncitizens enjoy First Amendment rights as well.[297] The majority opinion, authored by Chief Justice Rehnquist, stated that the phrase "the people" in the First, Second, and Fourth Amendments only refers to those "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[298]

Justice Brennan dissented, criticizing the majority's approach by noting: "Bestowing rights and delineating protected groups would have been inconsistent with the Drafters' fundamental conception of a Bill of Rights as a limitation on the Government's conduct with respect to all whom it seeks to govern."[299] Justice Brennan saw Verdugo-Urquidez as one of "the governed," as the United States chose to investigate and prosecute him.[300] Justice Brennan's dissent is instructive for how the government has a duty to restrain itself and protect noncitizens' right to petition, which in turn should counsel courts not to dismiss cases pursuant to the fugitive disentitlement doctrine.

The majority's analysis in *Verdugo-Urquidez* is also outdated and, in some ways, plainly incorrect. As Michael J. Wishnie has noted, the Court's originalist approach to construing who was intended to be protected by these Amendments "recalls some of the most shameful moments of American legal history," such as slavery.[301] Moreover, Wishnie persuasively argues that there is a plethora of historical evidence that the Petition Clause does in fact protect people in the United States, whether they are citizens or noncitizens, and whether they are present lawfully or not.[302]

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296 United States v. Verdugo-Urquidez, 494 U.S. 259, 261–62 (1990).

297 *Id.* at 265 (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)).

298 *Id.*

299 *Id.* at 288 (Brennan, J., dissenting).

300 *Id.* at 292.

301 Wishnie, *supra* note 16, at 681. Other scholars have noted this lurking shameful history as well. *See, e.g.*, Elizabeth M. Iglesias, *Against Fascism: Toward a Latcritical Legal Genealogy*, 23 HARV. LATINX L. REV. 233, 252–53 (2020) (discussing Dred Scott's lawsuit challenging his enslavement and his subsequent loss because the Supreme Court concluded he was not one of the people).

302 Wishnie, *supra* note 16, at 680–711.

Lastly, the Court's statement in *Verdugo-Urquidez* limiting "the people" to those who have significant connections to the U.S. is quite vague, which leaves room for interpretation. For example, perhaps a lawful permanent resident has "sufficient connection" for First Amendment purposes.[303] Or one could imagine a court finding that a person who happens to be undocumented, but has lived in the United States for thirty years, owns a home, and has a U.S. citizen spouse and children, demonstrates sufficient voluntary connection with this country.

For all of these reasons, First Amendment rights are potentially implicated by the fugitive disentitlement doctrine's reach into immigration law and should be taken into account by courts considering whether to apply the doctrine.

## III. POLICY REASONS TO ELIMINATE FUGITIVE DISENTITLEMENT IN IMMIGRATION CASES

Aside from courts having exceeded their power by applying the doctrine to immigration cases as discussed in Part II, there are also policy reasons why this doctrinal creep should not be permitted.

Critically, circuit courts have not given due consideration to the unique nature of immigration law when deciding to apply the fugitive disentitlement doctrine. Courts have ignored the necessity of judicial review of immigration matters, particularly because of the importance of independent review, and that Article III courts are specially positioned to oversee administrative action, rule on constitutional issues, and ensure compliance with international human rights obligations. Moreover, as a doctrine entirely created by and administered by the courts, abolishing the doctrine is the only way to check the power of courts that might carry out a miscarriage of justice in the name of "efficiency." Proper analysis should lead courts to eliminate fugitive disentitlement in this context.

### *A. Preserve Judicial Review of Removal Orders*

Judicial review of agency action serves numerous purposes. Among them are correcting errors, legitimizing agency adjudications, regulating administrative officers through fear of reversal or through binding precedent, providing information about agency function to the public, and providing feedback to the agencies regarding their

303 *See, e.g.*, Ragbir v. Homan, 923 F.3d 53, 69 (2d Cir. 2019) (stating that the speech of a lawful permanent resident advocating for immigration reform "implicates the apex of protection under the First Amendment"), *cert. granted, vacated on other grounds, sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020).

operation.[304] Scholars have also noted the importance of problem-solving oversight functions, meaning that courts provide feedback from their unique perspective of reviewing large numbers of agency decisions across the country.[305]

The functions that judicial review serves in the immigration context are paramount. An obviously useful function is that the circuit courts catch and correct errors in agency decisions. Other functions of judicial review of removal orders are considered in greater depth here.

First, the immigration judges and BIA members lack decisional independence due to the structure of the agencies, so the federal courts provide the first opportunity for independent review. Courts ensure the immigration agencies are following statutory and constitutional authority and thereby also preserve the legitimacy of the system. Second, the agencies were not designed to address constitutional issues that arise in individual cases, and in fact cannot rule on constitutional issues with respect to the statutes and regulations that it interprets. Moreover, Congress has statutorily charged federal courts with the task of reviewing constitutional issues that arise in agency proceedings. Third, Article III courts can provide agency oversight by observing patterns that emerge, whether in that individual circuit or nationwide. Fourth, courts are in a better position than the immigration agencies to consider whether the United States is complying with international human rights obligations pertaining to claims raised by asylum-seekers.

### 1. Independent Adjudicators Ensure Fairness and Preserve Legitimacy of the System

Courts have not adequately considered that they are the first independent adjudicators that will examine an immigration case. Decisional independence—the ability for individual adjudicators to make decisions while not influenced by outside pressures—is key to procedural fairness. Where adjudicators are subjected to influence, general procedural protections are insufficient to guarantee fairness. As one article regarding adjudicatory independence explained,

> if the adjudicator is himself an integral part of the governmental body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed

304 Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1107 (2018).

305 *See generally id.*

> by the evidence. The government would, in effect, be the judge of its own case.[306]

Although they appear and act like judicial bodies, both the immigration courts and the BIA are bureaucratic sub-agencies within the executive branch. Beginning with immigration courts, immigration judges are attorneys appointed by the Attorney General of the United States (AG) to serve as "administrative judge[s]" in the Executive Office for Immigration Review (EOIR).[307] Moreover, when cases reach the circuit courts, the attorneys representing the government are in the Office of Immigration Litigation, which is also under the AG's control.[308] Thus, immigration judges, BIA members, and the "prosecuting" attorneys on appeal to federal courts all serve at the pleasure of the same boss. The fact that EOIR operates in the executive branch, within a prosecuting agency, has been widely criticized.[309]

Now we turn to consider the BIA, the appellate body that reviews appeals of removal orders issued by immigration judges, which is also part of EOIR.[310] The BIA's decisions are normally issued by one member. It also has the option to decide cases in three-member panels. However, single-member decisions are the norm. For a case to be heard by a three-member panel, a case must meet one of the following needs: settle inconsistencies among immigration judges; establish precedent in construing laws, regulations, or procedures; review a decision that is not in conformity with the law; resolve a "major" case or controversy; review immigration judges' clearly erroneous factual determinations; reverse a decision; or resolve a "complex, novel, unusual, or recurring issue of law or fact."[311] However broad these regulations appear, in practice, three-member decisions are rare.[312]

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306 Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986).

307 8 U.S.C. § 1101(b)(4) (2018).

308 *Appellate Section*, U.S. DEP'T OF JUST. (Jan. 12, 2017), https://www.justice.gov/civil/appellate-section [https://perma.cc/T6RE-YSUL].

309 *See, e.g.*, Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261 (2019); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3 (2008).

310 8 C.F.R. §§ 1003.1(a)(1), (b) (2020).

311 8 C.F.R. §§ 1003.1(e)(6) (2020).

312 *See, e.g.*, RICHARD M. STANA, U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 56 (2008) (noting that, for example, in Fiscal Years 2004, 2005, and 2006 91%, 93%, and 92% of all BIA asylum decisions were made by single member panels, and 9%, 7%, and 8% of all BIA asylum decisions were made by three-member panels). Interestingly, "a three-member panel of the BIA is seven times more likely to decide in favor of an immigrant-appellee than a single member is." David Giza, *The Dangers*

Immigration judges are subject to discipline for misconduct and can be fired. Moreover, the Department of Justice has stated that "attorneys" (which includes immigration judges) within the Department are subject to removal or transferring to other assignments as needed, even without any allegations of misconduct.[313] Thus, there is a pervasive fear that immigration judges can lose their jobs for ruling against the government.[314] This has led to movement from the National Association of Immigration Judges (NAIJ) to create an Article I court that would be independent from the executive branch of the government.[315] It is to be seen whether the proposal will gain traction.

The Attorney General can hire and fire the attorneys who serve as BIA adjudicators as well. Like immigration judges, BIA members' employment is subject to the will of the AG.[316] In 2003, for example, Attorney General John Ashcroft announced the removal of five members of the BIA who had some of the highest percentages of rulings in favor of noncitizens.[317] The outcome was that BIA members began ruling in favor of the government with greater frequency,[318] and to this day, the BIA is viewed by many advocates as simply a hurdle in getting a case to a federal court of appeals where a just outcome might actually be obtained.

Another indicator of the lack of independence of immigration adjudicators is that the Attorney General can certify cases to themselves to issue precedential BIA decisions that are binding on the BIA and immigration courts.[319] One scholar has noted that Attorneys General issued a total of fifteen decisions during the eight years of the George W. Bush administration, whereas the Attorneys General in the Trump administration published eleven decisions just within the first three years.[320] As an example of how this referral power can be used, the Attorney General in the Obama administration had issued a precedential case, *Matter of A-R-C-G-*, which recognized domestic violence as

*of "Streamlining" Immigration: Why Federal Courts of Appeal Should Have Jurisdiction to Review BIA Streamlining Decisions*, 36 B.U. INT'L L.J. 375, 410 (2018) (citing STANA, *supra*, at 10).

313 *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt.3).

314 Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006) [hereinafter Legomsky, *War on Independence*].

315 Marks, *supra* note 309, at 1, 15.

316 8 C.F.R. § 1003.1(a)(1) (2020).

317 Legomsky, *War on Independence*, *supra* note 314, at 376.

318 *Id.* at 377.

319 8 C.F.R. §§ 1003.1(g), (h)(i) (2020).

320 Karen M. Sams, Comment, *Out of the Hands of One: Toward Independence in Immigration Adjudication*, 5 ADMIN. L. REV. ACCORD 85, 98 n.77 (2019).

potential grounds for asylum.[321] Then, in 2018, former Attorney General Sessions referred a case called *Matter of A-B-* to himself, in which determined that *A-R-C-G-* was wrongly decided and vacated it, which had a devastating legal effect for survivors of domestic violence.[322]

A federal district court ruled that the AG's ruling in *Matter of A-B-* was arbitrary and capricious because "there is no legal basis for an effective categorical ban on domestic violence and gang-related claims."[323] The district court found the case inconsistent with the United Nations Protocol Relating to the Status of Refugees as well as the INA. Two circuit courts also declined to follow *A-B-*.[324] None of these courts' rejections of the *A-B-* invalidated the decision nationwide.[325] But, it shows the power of judicial review. Additionally, because immigration judges and the BIA are bound by rulings in the jurisdiction in which the case arose, these decisions have an impact for the many people whose cases arise there.

There have also been examples of misconduct within the agencies. For example, Stephen H. Legomsky discusses an instance where a prosecuting attorney who disagreed with an immigration judge's ruling called the Chief Immigration Judge *ex parte* and asked him to force the immigration judge to rule the other way.[326] Such examples provide more of a reason why judicial review serves an important purpose.

Judicial review is necessary to protect against the volatility and potential arbitrariness of agency actions in the immigration context. Erwin Chemerinsky spoke generally of the importance of judicial review for "litigants who have nowhere to turn but the courts—litigants who are, by definition, unable t[o] harness 'popular' authority for

321 *See Matter of* A-R-C-G-, 26 I&N Dec. 388, 388 (BIA 2014).

322 *Matter of* A-B-, 27 I&N Dec. 316, 319 (A.G. 2018). *Matter of A-B-* has since been vacated by Attorney General Merrick Garland. *Matter of* A-B-, 28 I&N Dec. 307, 307 (A.G. 2021).

323 Grace v. Whitaker, 344 F. Supp. 3d 96, 126 (D.D.C. 2018), *aff'd in part, vacated in part on other grounds sub. nom.* Grace v. Barr, 965 F.3d 883, 900 (D.C. Cir. 2020)).

324 *See* Antonio v. Barr, 959 F.3d 778 (6th Cir. 2020) (declining to follow *Matter of A-B-*); De Pena-Paniagua v. Barr, 957 F.3d 88, 93 (1st Cir. 2020) (holding that *Matter of A-B-* did not categorically preclude the granting of domestic violence-based asylum claims).

325 Where a circuit court vacates or declines or follow a BIA decision, immigration judges and the BIA are only bound within that circuit. *Matter of* Anselmo, 20 I&N Dec. 25, 31–32 (BIA 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit.").

326 Legomsky, *War on Independence*, *supra* note 314, at 373.

their own constitutional interests."[327] This certainly applies to noncitizens, who are often villainized in the public eye and lack the right to vote.

Some scholars argue that even federal judges, who go through a rigorous vetting and appointment process, each bring their own political leanings and personal values onto the bench and are not insulated from political influence.[328] While judges are human beings with ideological leanings, that is partly why circuit court panels—as opposed to single-member decisions by immigration judges and the BIA—provide an opportunity for more balanced decisions. Panel decisions require more collegiality and dialogue between members and allow for error correction there as well as accounting for some level of individual bias.[329] Comparatively, individual immigration judges decide a case at the trial level. By agency design, most BIA appeals are only heard by one member. Being heard by a panel of circuit judges is the first opportunity not just for greater adjudicatory independence of the decisionmakers, but also generally the first opportunity for review by more than one adjudicator.

Lastly, the appearance of a fair and just system is critical to the system's perceived legitimacy. The lack of independence of immigration judges and BIA members means that many noncitizens will be deported without ever having their case examined by an independent adjudicator.[330] Yet, as procedural justice theorists explain, both society and participants in a case must regard a system as having procedures that sufficiently allow the parties to seek enforcement, or defense of, their rights in order for the outcome of a legal matter to be considered legitimate.[331] Studies have shown that, when noncitizens believe the system is procedurally fair, it increases their perception that immigration policy is legitimate.[332] This held true in studies concerning unlawful migration to the United States as well as the legal attitudes of detainees regarding their perceived obligation to obey immigration

327 Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1014 (2004) (responding to another scholar's advancement of a theory of "popular constitutionalism," which counsels against judicial review).

328 Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 272, 308–20 (2005) (describing theories of judicial constraint where courts take other branches' views into account to maintain legitimacy, avoid backlash such as jurisdiction stripping or budget cuts, etc.).

329 *See id.* at 280–90.

330 *See* Legomsky, *War on Independnece*, *supra* note 314, at 384–85.

331 Lawrence B. Solum, *Procedural Justice*, 78 S. CALIF. L. REV. 181, 183 (2004).

332 Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOCIO. REV. 574, 592 (2013) [hereinafter Ryo, *Deciding to Cross*]; Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 L. & SOC'Y REV. 99, 120 (2017) [hereinafter Ryo, *Legal Attitudes*].

authorities.[333] Thus, if courts wish for their orders to be obeyed, enhancing procedural fairness, including ensuring that cases are reviewed by independent adjudicators, is extremely important.

Petitions for review filed with the circuit courts are the first opportunity for independent review available to noncitizens in removal proceedings. Because judicial independence is a critical piece of a fair and just legal system, judicial review enhances public perception of legitimacy of the immigration system.

2. Article III Courts Are Specially Equipped to Decide Constitutional and Statutory Interpretation Issues

The federal courts play a special role in construing statutes and regulations and determining whether constitutional rights have been violated. Congress affirmed the importance of these aspects of judicial review by preserving the jurisdiction of courts to consider constitutional issues and questions of law.[334]

Regulations promulgated by a federal agency are binding on that agency.[335] Thus, it is fairly settled that immigration courts can consider whether there have been violations of agency regulations, and remedies might include suppression of evidence or termination of the proceedings.[336] Immigration judges also rule on limited constitutional issues, including whether the Fourth or Fifth Amendment was violated by immigration officials.

However, as the Supreme Court commented in *INS v. Lopez-Mendoza*, the invocation of such constitutional rights frequently complicates removal proceedings beyond the issues that normally arise and may be beyond the expertise of the judges or even the arguing attorneys.[337] Agencies are designed to provide speedy administrative review of immigration matters, and litigating constitutional issues consumes time and resources. The Supreme Court said as much, commenting:

> The INS currently operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very

333 *See* Ryo, *Deciding to Cross*, *supra* note 332, at 574; Ryo, *Legal Attitudes*, *supra* note 332, at 99.

334 8 U.S.C. § 1252(a)(2)(D) (2018).

335 *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) (stating that the BIA and AG are bound by agency regulations).

336 *Matter of* Garcia-Flores, 17 I&N Dec. 325, 327–28 (BIA 1980) (noting that agencies must follow their own procedures and considering whether immigration officer violated a regulation).

337 INS v. Lopez-Mendoza, 468 U.S. 1032, 1048 (1984) (declining to extend the exclusionary rule to removal proceedings without certain aggravating factors).

> large numbers of deportation actions, and it is against this backdrop that the costs of the exclusionary rule must be assessed.[338]

Moreover, the immigration adjudicatory agencies simply are not designed to address constitutional violations committed by criminal or immigration enforcement officials.[339] The agencies do not have authority to rule on the constitutionality of the statutes and regulations they administer.[340] The limited expertise and hurried nature of removal proceedings tend to show that the agencies are not adequately protecting noncitizens' rights. And the need for rigorous protection of individuals' rights should outweigh efficiency concerns.

Article III courts, on the other hand, have the expertise to consider complex constitutional issues.[341] Although courts frequently resort to issues of statutory interpretation to construe statutes, courts occasionally address the constitutionality of certain provisions.[342] One example is an equal protection challenge to provisions of citizenship law that discriminate on the basis of gender.[343] Courts also hear challenges to prolonged detention arising from the mandatory detention provisions of the immigration statute.[344]

Additionally, the judicial branch is tasked with determining whether administrative agencies have properly interpreted statutes.[345] The Supreme Court has declared that, even where Congress has plenary power,

> the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and—seemingly also—that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.[346]

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338 *Id.*

339 For a thorough examination of heightened immigration enforcement and failure of procedural deficiencies in the immigration courts to address it, see Chacón, *supra* note 91.

340 *Matter of* Cruz de Ortiz, 25 I&N Dec. 601, 605 (BIA 2011).

341 Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1210 (1988) [hereinafter Legomsky, *Political Asylum*].

342 Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 498 (2018).

343 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017).

344 *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (interpreting immigration statute pertaining to mandatory detention; remanding for lower court to consider, *inter alia*, argument that statute violates due process).

345 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

346 Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953) (citing Yamataya v. Fisher, 189 U.S. 86 (1903), as the turning point in Supreme Court jurisprudence regarding review of

Moreover, as will be discussed further below in subsection III.B.4, Article III courts also must ensure that statutes are construed in ways that do not violate international law.[347] That role is especially important for asylum seekers.

3. Oversight Function

Article III courts have the opportunity to witness patterns country-wide and solve problems. Judge Richard A. Posner of the Seventh Circuit has called out the immigration court for being the "least competent federal agency,"[348] which he declared has repeatedly "fallen below the minimum standards of legal justice."[349] Scholars have described the calling-out function of judicial review as part of the "problem-oriented oversight" that may push administrative agencies to fix widespread problems.[350] Judge Posner's criticism makes obvious the need for oversight, as judicial review not only corrects bad decisions but gives immigration judges and BIA members incentive to consider their decisions carefully.

Furthermore, judicial review of the cases that reach the circuit courts is important because there are so few cases that even make it that far in the appellate process. Most cases are resolved at the immigration court level and are never appealed. In 2014–2017, only 9–11% of immigration court cases were appealed to the BIA.[351] There was a small spike in 2018, where about 17% of cases were appealed to the BIA.[352] Far fewer matters are appealed to the federal court of appeals.[353] Rates of legal representation may be a factor in whether noncitizens appeal. The majority of detained noncitizens go without legal representation, and most nondetained noncitizens have representation and are five times more likely to win their cases than

deportation cases). While the author does not condone Hart's troubling use of a racial slur for Mexicans in his law review article, the author nonetheless wishes to properly credit Hart's discussion on this topic.

347 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

348 Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting).

349 Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) (citing Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2003)) (collecting remands to the immigration agency).

350 Gelbach & Marcus, *supra* note 304, at 1145–48.

351 EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., STATISTICS YEARBOOK FISCAL YEAR 2018, at 40 (2019).

352 *Id.*

353 Das, *supra* note 342, at 491–92.

those who do not.[354] When a case is dismissed without consideration of the merits, this deprives not only the *particular* noncitizen of judicial review of possible agency error in that matter, but also others whose cases may have been affected by the outcome.

Federal judges' broad subject matter expertise also has significant benefits when reviewing immigration cases. Unlike the immigration adjudication agencies, federal judges hear a broad range of cases and grapple with issues of statutory interpretation and constitutional law regularly, which can be used to analogize and take a wider view of immigration issues.[355] Moreover, whereas immigration judges hear tragic stories day after day, and therefore may become desensitized to them, federal judges are positioned to appreciate the seriousness of the issues at stake.[356]

Moreover, the courts also engage the other branches of government in conversation that has led to a deeper understanding of procedures that ensure fundamental fairness. This inter-branch conversation has been critical for due process developments in immigration matters.[357] Without judicial review, the immigration agencies in the enforcement branch of the government would have the sole law-making authority. While congressional oversight functions are certainly important, generalist federal judges—who have extensive legal training and expertise analyzing constitutional issues—add substantially to oversight of the agencies.

Lastly, it also bears mentioning that courts have a duty to carry out this oversight function by deciding legal issues presented to them. As Justice Murphy said in *Eisler v. United States*,

> Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties.[358]

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354 *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) (finding that, between 2007 and 2012, 14% of detained noncitizens, as opposed to 66% of nondetained noncitizens, were represented by counsel); *see also* INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 3 (2016) (finding that detained noncitizens were twice as likely to win their cases if they were represented by counsel, and nondetained noncitizens were nearly five times as likely to win their cases if they had representation).

355 Legomsky, *Political Asylum*, *supra* note 341, at 1210.

356 *Id.*

357 *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992); T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 258 (1983).

358 Eisler v. United States, 338 U.S. 189, 194–95 (1949) (per curiam) (Murphy, J., dissenting).

Courts should not be permitted to avoid the duties assigned by the Constitution in the name of docket control or efficiency. The issues raised in immigration petitions for review do not simply affect the noncitizen in that one case. Rather, the courts are charged with deciding legal issues, decisions that can clarify the law for all noncitizens, not simply with respect to the two parties before them.[359]

4. Ensure Compliance with International Human Rights Obligations

Asylum seekers may be granted relief if they meet the definition of a "refugee" provided in the INA, that they are unable or unwilling to return to their countries of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[360] Asylum is a discretionary form of relief. However, there are also mandatory forms of relief, called withholding of removal and relief under the Convention Against Torture (CAT),[361] in a separate part of the INA that prohibit returning someone to their country of origin (the principle of *nonrefoulement*[362]) if certain conditions are met.

Both withholding of removal and CAT relief are rooted in international obligations that the United States has agreed to follow by incorporating them into our immigration laws.[363] Federal courts ensure that the agencies are interpreting the statutory protections consistently with congressional intent.[364] Moreover, federal courts ensure that ambiguous statutes are construed in a way that "would not violate either U.S. treaty obligations or customary international law."[365] Thus, dismissal of cases pursuant to the fugitive disentitlement doctrine contradicts the statute that provides for judicial review of asylum denials and might violate the international treaty obligation of nonrefoulement.[366]

359 *See id.* at 195 (Jackson, J., dissenting) (expressing concern about dismissal where legal issues could be repeated because they raised questions about congressional procedures).

360 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2018).

361 8 U.S.C. § 1252(a)(4) (2018).

362 *See* Glossary: Non-refoulement, Eur. Comm'n, https://ec.europa.eu/home-affairs/pages/glossary/non-refoulement_en [https://perma.cc/MF95-93RC].

363 *See* Aleinikoff, *supra* note 357, at 257–58.

364 INS v. Cardoza-Fonseca, 480 U.S. 421, 446–450 (1987) (rejecting agency's interpretation of the asylum standards set by Congress based on the plain language of the Refugee Act of 1980, the United Nations Protocol, and legislative history).

365 Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 660 (2007) (describing the modern *Charming Betsy* canon articulated in Weinberger v. Rossi, 456 U.S. 25, 32 (1982)).

366 Hoffman & Modi, *supra* note 17, at 482–85.

Moreover, the very nature of asylum means that improper denial of claims can lead to persecution, torture, and even death. And asylum seekers cannot vote, which is to say that the courts provide a critical forum for redress of rights.[367] Issues that arise in asylum cases are not simply of a discretionary, one-off nature. Rather, potential issues may affect large numbers of asylum seekers by establishing precedent. For example, these include: whether the agency applied the correct legal standard,[368] whether adjudicators adequately considered the evidence submitted,[369] whether the facts rise to the level of past persecution required,[370] whether the applicant established membership in a protected group,[371] as well as issues related to due process.[372] Additionally, challenges to credibility determinations are another common issue, as evidence of persecution may not be readily available to asylees, who may not have had time to gather proof.[373]

Because cases involving noncitizens who apply for asylum, withholding of removal, and protection under the Convention Against Torture may literally mean the difference between life and death, the principles discussed in the previous sections are paramount. Asylees, the people who likely have the most to fear from surrendering themselves and being deported before the circuit courts hear their cases, are entitled to have their claims adjudicated by federal courts, independent decisionmakers that are not subject to the will of the Attorney General.[374]

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367 Legomsky, *Political Asylum*, *supra* note 341, at 1208.

368 *See, e.g.*, Singh v. Ilchert, 63 F.3d 1501, 1509–10 (9th Cir. 1995) (stating that "BIA failed to recognize that persecutory conduct may have more than one motive"), *superseded by statute on other grounds*, Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302, *as recognized in* Parussimova v. Mukasey, 555 F.3d 734 (9th Cir. 2009).

369 *See, e.g.*, Wu Biao Chen v. INS, 344 F.3d 272, 275 (2d Cir. 2003) ("[W]e will not disturb a factual finding if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole.") (quoting Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000)); Uanreroro v. Gonzales, 443 F.3d 1197, 1204 (10th Cir. 2006) ("[O]ur duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole.") (alteration in original) (quoting Elzour v. Ashcroft, 378 F.3d 1143, 1150 (10th Cir. 2004)).

370 *See, e.g.*, Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007).

371 *See, e.g.*, Canales-Rivera v. Barr, 948 F.3d 649, 659 (4th Cir. 2020).

372 *See, e.g.*, Camishi v. Holder, 616 F.3d 883, 886 (8th Cir. 2010).

373 *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (2018) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

374 Legomsky, *Political Asylum*, *supra* note 341, at 1209 ("Both actual justice and the appearance of justice assume paramount importance when, as is true in asylum cases, the individual interests are great. Our legal system can tolerate occasional unfairness when the stakes are trivial, but claims that affect truly significant interests demand a more meticulous brand of justice.").

### *B. Avoid Governmental and Judicial Abuse of Power*

Eliminating the fugitive disentitlement doctrine lessens the potential for governmental abuse of power, both from the agencies as well as the courts. The simple fact of dismissing a petition for review of a removal order without considering the merits means that no Article III court will review the immigration agencies' decisions. This heightens the possibility of agency overreach and abuse of power. As discussed above, the immigration agencies have been singled out as falling "below the minimum standards of legal justice" and have been accused of being the least competent agencies.[375] The courts make "[e]fficient and [e]ffective [m]onitors of [g]overnment [c]onduct."[376]

Judicial review must be preserved to ensure the agency—which is subject to executive control—is not acting in illegal or unconstitutional ways. Judicial independence has been described as a mechanism designed to "protect individuals and minorities from government persecution and tyrannous majorities alike."[377] The ability to seek judicial review may be the only way that a noncitizen facing deportation gets a fair shake. Because immigration judges and the BIA lack decisional independence, there is high potential for governmental abuse of power within the immigration enforcement agency.[378] The federal courts of appeals therefore provide the only meaningful review of immigration enforcement that is separate from that branch of government.

The fugitive disentitlement doctrine itself opens the door to governmental abuse of power. As discussed above, if noncitizens surrender to immigration authorities and the circuit court denies a stay of removal, they can be deported while their case is being considered. For some noncitizens, it becomes excessively difficult to maintain contact with courts and their counsel due to international mail delays and lack of infrastructure in some countries. For other noncitizens, they may not ever be able to return to the United States, even if they prevail in their case, due to the government's refusal to assure successful return.[379] Thus, the DHS has an incentive to remove people during the pendency of the appeal, and then move to dismiss the case if the person fails to maintain contact. On the other hand, DHS can threaten that if the person does not surrender, it will file a motion to dismiss based on the fugitive disentitlement doctrine.

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375 *See supra* notes 346–47 and accompanying text.

376 David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 747–78 (2009).

377 *Id.* at 786.

378 *See supra* subsection III.A.1.

379 Luo & McMahon, *supra* note 184, at 1062.

Moreover, the problem with this judicially created, discretionary doctrine is that there is very little opportunity for oversight of the courts' own actions. The only possibilities for review are to file a motion to reconsider with the same circuit court or petition the U.S. Supreme Court. As discussed above, the Supreme Court considered in *Degen* whether a district court could enter judgment in a civil forfeiture action based on the fugitive disentitlement doctrine.[380] Writing for a unanimous Court, Justice Kennedy expressed concern over the amount of power courts can wield. The Justice warned: "[T]here is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[381] Similarly, as noted by Judge Richard Posner, "Whether judicially made doctrines and decisions are good or bad may depend . . . on the judges' cognition and psychology, on how persons are selected (including self-selected) to be judges, and on the terms and conditions of judicial employment."[382] Allowing courts to define their own authority has created problems in that it has yielded quite disparate outcomes in different jurisdictions. Abolishing the fugitive disentitlement doctrine serves the policy objective of checking the power of the agencies and courts who might execute a miscarriage of justice in the name of "efficiency."

A potential challenge to the solution articulated in this Article—that courts should exercise self-restraint and eliminate their own exercise of this doctrine—is that courts already have had the opportunity to fix this problem and have not. This viewpoint was represented in an article by Kiran H. Griffith, who argued that Congress should step in to regulate this issue. Griffith argued that a legislative fix is appropriate because of Congress's plenary authority over immigration matters, and because the Supreme Court has indicated its unwillingness to engage with this issue by declining to hear *Bright v. Holder*.[383] Griffith notes that the Court's refusal to take up the issue could have been because the Court agreed with such expansion of the fugitive disentitlement doctrine, or because the high court is unwilling to interfere with Congress's power.[384]

It is a fair point that courts have created the problem and therefore might not be willing to solve it. However, as laid out in this Article, fugitive disentitlement simply is not defensible in immigration cases. Thus, while Congress passing legislation eliminating fugitive

380 Degen v. United States, 517 U.S. 820, 829 (1996).

381 *Id.* at 823 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

382 RICHARD A. POSNER, HOW JUDGES THINK 5 (2008).

383 Griffith, *supra* note 14, at 234–35 (discussing Bright v. Holder, 566 U.S. 1021 (2012) (denying certiorari)).

384 *Id.*

disentitlement in immigration cases would be a welcome solution, it also seems that courts could confront the issues raised in this Article and come to the same conclusion on their own.

## CONCLUSION

Fugitive disentitlement is but one small piece of the puzzle of immigration enforcement. Nonetheless, it is an important piece because it is emblematic of the enmeshment of criminal and immigration law and raises questions of governmental power and the role of judicial review in immigration cases. This doctrine also highlights the deep unfairness that can result when judicial decisionmaking is not grounded in the everyday lived experiences of human beings.

The doctrinal creep of fugitive disentitlement from the criminal context into immigration law is unjustified. Docket management should not outweigh individuals' procedural rights, particularly because removal proceedings—with the ultimate possible outcome of separating a noncitizen from their family and loved ones, home, and their property—are a high-stakes process. Moreover, federal courts are abdicating their responsibility to exercise the jurisdiction assigned to their tribunal when appeals are dismissed based on this doctrine. Although courts often owe some level of deference to administrative agencies, the actions of agencies should still be subject to judicial review. All of these concerns should counsel the Supreme Court to eliminate the application of fugitive disentitlement in immigration cases. Short of that, the circuit courts should act with self-restraint and halt their practice of wielding judicial power to dismiss noncitizens' cases based on fugitivity.