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The Inquisitorial Advantage in Removal Proceedings

Won Kidane

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THE INQUISITORIAL ADVANTAGE IN REMOVAL PROCEEDINGS

*Won Kidane**

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I. INTRODUCTION

A thoughtful student once asked an immigration judge during an informal exchange: “If the respondent¹ in your court who has just been found deportable² appears to qualify for cancellation of removal³ but has failed to fill out the form properly,⁴ what would you do?” The judge responded matter-of-factly, “I am not his attorney. If the application is

1. The “respondent” in an immigration deportation proceeding is the “non-citizen” who is brought by the government before an immigration judge to answer charges of deportability. Here, the terms ‘non-citizen,’ ‘immigrant,’ and ‘respondent’ are used interchangeably. For a description of the procedure and the use of terminology, see notes 3-5 *infra*.

2. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 to -724 (codified as amended in scattered sections of 8 U.S.C.), consolidated two separate proceedings, previously called “exclusion” and “deportation” proceedings, into one, called a “removal” proceeding. *See id.* § 306. IIRIRA has made some changes to terminology; it has maintained the term deportation, deportable, and deportability. This article uses the term deportation as signifying the process of removal of ‘noncitizens’ from the United States. The term “deportation” is chosen, not only because it is technically accurate but also because it captures the severity of the measure more appropriately. The term removal is also used where appropriate. The principal body of United States immigration law, the Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), uses the term “alien” to signify the noncitizen status of a person. *See id.* § 101(a)(3). Although this author has used the term ‘alien’ in his previous writings for the sake of accuracy, because of increasing concerns about the pejorative nature of this term and in order to minimize the possibility of confusion for purposes of this article, the term “alien” is replaced with the term “noncitizen” throughout this article. Incidentally, it is interesting to note that among other countries, Australia, Canada, and the United Kingdom have also replaced it with the term noncitizen. *See* Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, The United Kingdom, and the United States: Transporting Best Practices*, 33 *FORDHAM INT’L L.J.* 300, 300 n.3 (2010).

3. Cancellation of removal is one of many forms of affirmative relief that is available for noncitizens who have been found deportable. The requirements for cancellation of removal are set forth under INA sections 240A (a)-(b). The grounds of deportability are set forth under INA section 237(a). The process is elaborated in subsequent sections.

4. There are two forms that could be used to apply for cancellation of removal. Both are made available by the Department of Justice, Executive Office for Immigration Review (EOIR). One of the forms is the EOIR-42A: Application for Cancellation of Removal for Certain Permanent Residents, *available at* <http://www.justice.gov/eoir/eoirforms/eoir42a.pdf>. The second one is called the EOIR-42B: Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, *available at* <http://www.justice.gov/eoir/eoirforms/eoir42b.pdf>. These forms contain detailed instructions on how the applicant must complete the form. The forms are difficult to understand for any person who has not studied immigration law. This point is further elaborated by example below.

not completed properly, I don't have an application to consider."⁵ It goes without saying that the judge would then order the respondent deported for not submitting a properly completed application for relief. The judge's response might have seemed harsh or even insensitive to the student, but wasn't that the right answer under the existing adversarial system? If so, what could be done to avoid such kinds of harsh consequences? This article considers these basic questions through a comparative lens.⁶

5. This incident happened a few years ago in the presence of the author. The exchange and the discussions thereafter provided the impetus for this article. The identities of the parties to this exchange are withheld.

6. Several notable functions are attributed to comparative law research. Understanding one's own system better and looking for inspirations from other systems to improve it are considered to be perhaps the most important functions. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 4, 6-7 (3d ed. 1985). The objectives of this comparative study are primarily seeking inspiration from the civil law inquisitorial legal tradition. The greatest diversity in law seems to be found in the epistemology of determining facts, not substantive notions of right and wrong. Consider the following anecdote. The former President of the World Court, Queen's Counsel (Q.C.), T.O. Elias once asked two Ugandan Customary Law judges what they would do if A were to sue B for cheating A out of his proper share of the spoils of a joint raid on C's banana plantation. He said that the judges looked at each other with astonishment, laughed, and almost spontaneously responded that they would order both A and B arrested and C compensated. The Q.C. was testing the geographic reach and relevance of some fundamental substantive rules of the law of contracts that he had studied at the University of London and the British Inns of Courts, and applied at the Peace Palace in The Hague. (Q.C. or K.C. (King's Counsel when there is a King) is a title given to the very elite of the English barristers. See UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER'S COMPARATIVE LAW: CASES-TEXT-MATERIALS* 644, 646 (7th ed. 2009)). The encounter symbolically confirmed his suspicion that substantive notions of fairness tend to converge notwithstanding profound diversity in human societies. See T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 153 (1956). Procedures are characterized by remarkable diversity. Consider another of Judge Elias's related experiments. This particular instance involved a criminal court proceeding in Nigeria during British colonial rule. The accused appeared before a British judge who was trained in the Common Law legal tradition. The charge was riding a bike at night without a headlight. The judge read the charges and asked the accused: "How do you plead?" Failing to understand the question, the accused asked for clarification. The judge then said: "Are you guilty or not guilty?" The accused grinned at the magistrate, shook his head, and retorted somewhat acidly: "What a question! Is that not what I have been dragging before you to find out?" *Id.* at 299. This Nigerian man sounds a lot like an immigrant in a deportation proceeding in Tacoma, Washington; York, Pennsylvania; Baltimore, Maryland, or any other location in America where deportation proceedings are regularly held. Although the term 'immigrant' has a specific meaning under the INA (defined in relation to the term non-immigrant), it is used here to suggest the noncitizen status of the person. For the technical definition of an immigrant, see INA section 101(a)(15). There are currently fifty-nine immigration courts throughout the country. The Immigration Courts are within the EOIR, itself an agency of the Department of Justice. Comprehensive information is available on the official website of the EOIR at <http://www.justice.gov/eoir/index.html>.

Unrepresented and confused,⁷ the typical immigrant does not know his role in the tripartite adversarial trial.⁸ During a master calendar hearing,⁹ for example, he is likely to understand the first two questions but nothing more. The typical questions are as follows: “You are not a United States citizen. Do you admit or deny?” Fair enough—the immigrant admits it.¹⁰ Second, “You are a national of country X.” Again, the immigrant easily comprehends and admits the charge. But this is typically the limit of his comprehension. The next question may be: “You are removable under INA 237(a)(1)(A) as an alien inadmissible at the time of entry.¹¹ Do you admit or deny?” In most likelihood, this will be incomprehensible to the immigrant. He may request translation into his native language, but the translation of the words alone is not helpful.¹² Thoroughly confused, the immigrant

7. Although the noncitizen has the right to hire counsel, there is currently no right to appointed counsel. *See* INA § 240(b)(4)(A); 8 C.F.R. §§ 1240.3, 1292.1 (2006); *see also* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990). Finding pro bono representation is often very difficult for indigent respondents. According to EOIR 2008 data, approximately 58 percent of all respondents in deportation proceedings were not represented. *See* STEPHEN H. LEGOMSKY AND CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 669 (5th ed. 2009) (citing 85 IR 2445 (Sept. 8, 2008)). The percentage of detained noncitizens in removal proceedings who are not represented is currently 84 percent. *See* ARNOLD PORTER LLP, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSAL TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5-8 (2010) [hereinafter ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM], *available at* http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf.

8. Immigration Court proceedings are adversarial. An immigration judge, who is an employee of the Department of Justice, i.e., EOIR, presides over the hearing. The Government, i.e., the Department of Homeland Security (DHS), is represented by counsel who is an employee of the Immigration and Customs Enforcement (ICE) within the DHS. As indicated above, the noncitizen, who may be represented at his own expense, is called the respondent. For an excellent overview of the process, see Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641-45 (2010).

9. ICE initiates removal proceedings by serving the alien a written notice called the Notice to Appear (NTA) under INA section 239(a)(1). A Master Calendar hearing is a preliminary hearing designed to narrow the issues for a subsequent individual hearing. The proceedings are governed by section 240 of the INA. This section is discussed in detail in subsequent sections.

10. This assumption is fair in most cases, but it is important to note that even this could be a problem because it is possible that the alleged noncitizen is not actually a noncitizen, despite the belief to the contrary, as the citizenship law is complex. *See, e.g.*, INA § 320 (addressing the citizenship status of children born outside of the United States).

11. The grounds of inadmissibility are set forth under INA section 212(a)(1)(A). A person who is inadmissible at the time of entry may be removed under INA section 237(a)(1)(A) as an alien removable as “[i]nadmissible at the time of entry.” This notion is difficult to explain to the typical immigrant in removal proceedings.

12. Approximately 78 percent of all noncitizens in deportation proceedings need interpreters. Legomsky, *supra* note 8, at 1653 (citing TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE

would typically admit this last charge as well. The judge would then say: “On the basis of your admission, I hereby find you removable from the United States.”¹³ He would then ask: “Do you want to apply for an affirmative relief?”¹⁴ Again, the immigrant would typically be at a loss, perhaps thinking the lack of comprehension might be a translation issue. After a lengthy back and forth between the immigrant respondent and the interpreter, an exchange which the judge typically would not understand, the respondent finally answers “no,” whereupon the judge proceeds to order the immigrant removed,¹⁵ and moves onto the next case. Sometimes, if it appears to a sympathetic judge that the respondent is eligible for a form of affirmative relief, she might give the respondent a copy of the relevant application form with instructions to complete it and bring it back on a designated date. Because the form is very technical and complicated, typically the immigrant would bring it back without having answered the questions properly. Frustrated with the perceived incompetence, the judge may give the respondent another opportunity to fill it out, and might suggest that the respondent find an attorney. Very often, the noncitizen would bring it back in exactly the same shape as before or with minimal inconsequential amendments because he could neither find a pro bono counsel nor understand the form any better than he did before. For example, the detailed instructions that EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents, give include the following statement:

Prior to service of the Notice to Appear, or prior to committing a criminal or related offense referred to in sections 212(a)(2) and 237(a)(2) of the INA, or prior to committing a security or related offense referred to in section 237(a)(4) of the INA, you have at least seven (7) years continuous residence in the United States after having been lawfully admitted in any status[.]”¹⁶

(TRAC), CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW, <http://trac.syr.edu/immigration/reports/208/> (last visited Feb. 22, 2012).

13. This is pursuant to INA section 240(c)(1)(A).

14. This is pursuant to INA section 240(c)(4). The types of affirmative relief include Cancellation of Removal under INA section 240A(a)-(b); Adjustment of Status under INA section 245; Registration under INA section 249; Asylum under INA section 208, Withholding of Removal under INA section 241(b)(3); and relief under the United Nations Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85 (incorporated into U.S. Law by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (codified at 8 U.S.C § 1231 Note). For a discussion of the forms of affirmative relief, see LEGOMSKY & RODRIGUEZ, *supra* note 7, at 595-646.

15. This is pursuant to INA section 240(c)(1)(A).

16. See EOIR-42A, *supra* note 4, at 1 (instructions).

Even if the respondent has access to the referenced sections of the INA, the provisions are so technical and complex that the respondent's attempts to decipher them would be in vain. By this time, the judge would proceed to order the non-citizen deported, at the urging of the government's counsel, and due to the judge's patience being exhausted by the noncitizen's inability to fill out this form properly!¹⁷ Typically, the government executes the order forthwith.¹⁸

There is currently no credible opposition to the view that immigration adjudication in the United States is indefensibly flawed as it lacks accuracy, consistency, efficiency, and acceptability.¹⁹ Professor Legomsky describes the manifestations of the problem as "dubious and inconsistent outcomes; a lack of confidence in the results felt by parties, reviewing courts, and commentators; an extraordinary surge of requests for judicial review of the final administrative decisions; substantial duplication of effort; and lengthy delays."²⁰ Informed by several credible studies, Legomsky assessed the available evidence under four basic criteria: accuracy, efficiency, acceptability, and consistency.²¹ He considers the system to have failed its purpose under all four criteria.²² As of April 30, 2009, approximately 201,000 cases were pending for an average of 14.5 months before the nation's approximate ranks of 214 immigration judges.²³ Each immigration law judge completes an estimated 4.3 cases per day.²⁴ The inconsistencies are stark—they range

17. ICE attorneys invariably view their role as the adversary of the noncitizen. *See, e.g.*, ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 1-60 (recommending that DHS should "clarify that the mission of the DHS attorney is to promote justice rather than to defeat the immigrants' claims in every case.").

18. This account is based on the author's own observation of these proceedings for over seven years as a clinical professor supervising law students appearing as representatives in these proceedings. The judge is required to advise the noncitizen that he would have the right to appeal under INA section 505(c)(1)-(2). For the unrepresented noncitizen, this would be of no consequence.

19. *See* Legomsky, *supra* note 8, at 1645.

20. *Id.* at 1645. The average immigration judge completes an average of 4.3 cases a day. *Id.* at 1652.

21. *Id.* at 1645-51.

22. *Id.* at 1651. Professor Legomsky is not alone in his critical result. Several others consider the system to be a failure, including, most notably, the ABA's Commission on Immigration. *See generally* ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7.

23. *See* Legomsky, *supra* note 8, at 1648. This number has fluctuated over time and it also appears that different reports tend to give slightly different figures. For a tabular presentation of the available data and a good analysis of it, see generally Lenni B. Benson, *You Can't get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405 (2007).

24. *See* Legomsky, *supra* note 8, at 1652.

from 5 to 88 percent approval rate within the same court system.²⁵ Represented asylum-seekers are almost three times more likely to prevail than unrepresented ones.²⁶ About 84 percent of detained noncitizens in removal proceedings are unrepresented.²⁷ Each of the fifteen members of the Board of Immigration Appeals (BIA) decides an average of about 2,500 cases annually or more than 50 cases per week.²⁸ The courts of appeals receive about 10,280 petitions for review, or about 17 percent of the combined caseload of all circuit courts of appeals, which is said to be at a crisis level for these courts.²⁹ They remand a significant proportion of these appeals because of inaccuracies and inconsistencies.³⁰ Based on these glaring findings, Professor Legomsky concludes that “the current immigration adjudication system is fundamentally flawed.”³¹

25. See *id.* at 1650 n.71. Several studies have shown these disparities, particularly in asylum adjudications. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (“Colombian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court’s judges and an 88% chance of prevailing before another judge in the same building. Half of the Miami judges deviated by more than 50% from the court’s mean grant rate for Colombian cases.”).

26. See Ramji-Nogales et al., *supra* note 25, at 340.

27. See ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 5-8.

28. See Legomsky, *supra* note 8, at 1654.

29. *Id.* at 1646-47. In 2008, 41 percent of all cases pending before the 2nd Circuit Court of Appeals constituted immigration cases. The corresponding figure for the 9th Circuit was 34 percent.

30. *Id.* at 1647. While the 2nd Circuit remanded 20 percent of the immigration cases, the 7th Circuit remanded 40 percent of all immigration cases. *Id.* A good demonstration of the frustration of the courts of appeals with immigration adjudication is Circuit Judge Posner’s statement in *Benslimane v. Gonzales*:

This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation’s immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.

430 F.3d 828, 829-30 (7th Cir. 2005).

31. See Legomsky, *supra* note 8, at 1651. This problem of inefficiency and costliness is not unique to immigration. It is a part of a more systemic problem across many areas. Consider for example, Chief Justice Warren Burger’s statement about the civil justice system: “Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.” Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?* 42 AM. J. COMP. L. 147, 148 (1994) (quoting Address (Feb. 13, 1984)). For a good discussion of the perceived deficiencies of the adversarial civil litigation and comparative assessment, see generally, Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1188-91 (2005); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985), and responses to this article, including Ronald J. Allen, Stefan Köck, Kurt Riecherberg & D. Toby Rosen, *The German*

In recent years, there has been serious recognition of these sobering facts, which has prompted a remarkable increase in reform proposals.³² Perhaps the two most notable and comprehensive proposals are the proposal by the ABA Commission on Immigration, “Reforming the Immigration System,” and Professor Legomsky’s “Restructuring Immigration Adjudication.” These two works, like most others, focus on the macro-level issues, and seek solutions within the confines of the United States’ adversarial legal tradition. Drawing on these works, this article focuses on the micro-level issues and draws some inspiration from the inquisitorial civil law techniques to suggest solutions that may improve the accuracy, efficiency, fairness, and acceptability of deportation procedures.

Because judicial procedures often reflect society’s fundamental values and sensitivities,³³ this article does not recommend the transplantation of the entire inquisitorial system. However, this article argues that there is no principled reason why the basic tenets of the inquisitorial system cannot be adopted to improve the existing system of deportation proceedings. As stated by Professors Glendon, Carozza, and Picker, “[t]he stimulus for comparative investigation is often a problem that one’s home system does not handle very well.”³⁴ They are, however, careful to add that “when comparatists devote their attention to a vexing or unsolved problem, it is not with the idea that they will find in some foreign land a solution” but they seek the deepening of the

Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship, 82 NW. U. L. REV. 705, 708-10, 12 (1988), and Samuel G. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 734 (1987).

32. One of the most highly developed proposals is Professor Legomsky’s *Restructuring Immigration Adjudication*, *supra* note 8. This article draws extensively from Legomsky’s article, although it focuses on the micro-level issues of adjudication rather than the macro-level issues of decisional independence and structure. This article also draws from the ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM. The Report, prepared by Arnold and Porter for the ABA’s Commission on Immigration, is more than 200 pages long. The full report is available on the ABA Website at http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf. The executive summary, which is 78 pages long, is available at <http://new.abanet.org/Immigration/PublicDocuments/ReformingtheImmigrationSystemExecutiveSummary.pdf>. Other recent proposals include: Ramji-Nogales et al., *supra* note 25 (proposing the conversion of the BIA into an Article I court); Benson, *supra* note 23 (urging a more careful examination of the ailments of the existing system of judicial review of immigration decisions before attempting to craft reforms).

33. See Kevin M. Clermont, *Why Comparative Civil Procedure?*, *Preface* to KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW*, at ix, xi-xix (2003), *reprinted in* THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* 5 (2006).

34. MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS* 7 (3d ed. 2007).

understanding of the problem within their own system.³⁵ They continue stating that “our own way of doing things seems so natural to us that often it is only comparison with another way that establishes that there is something to be explained.”³⁶ More importantly, as Professor Glendon suggests, comparative analysis may be necessary to “disrupt our settled understandings, leading us to new judgments and prompting new decisions, commitments and actions.”³⁷

Judge Walter Schaefer once noted, “The American system puts a premium on skill, adroitness, [and] even trickery, on both sides.”³⁸ Nowhere is this approach as evident as in deportation proceedings, where the combatants are the government’s ‘gladiator-attorneys’ who are “not primarily crusading after the truth, but seeking to win”³⁹ on the one hand, and the unrepresented noncitizen on the other hand. The process is moderated by a judge who the system deliberately keeps “ignorant and unprepared” so that she might neutrally observe the battle and declare the winner.⁴⁰

35. *Id.*

36. *Id.*

37. MARY ANN GLENDON, STORY AND LANGUAGE IN AMERICA (lecture by), in GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS, *supra* note 33, at 23.

38. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1048 n.44 (1975) (quoting Judge Walter V. Schaefer, Remarks). Even Chief Justice Warren Burger praises the skillful lawyer who “tactfully destroys” his opponent in the court room. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 236 (1973). He describes some skillful litigators as:

[I]ntensely individualistic, but each was a lawyer for whom courtroom manners were a key weapon in his arsenal. Whether engaged in the destruction of adverse witnesses or undermining damaging evidence or final argument, the performance was characterized by coolness, poise and graphic clarity, without shouting or ranting, and without baiting witnesses, opponents or the judge. We cannot all be great advocates, but as every lawyer seeks to emulate tactics, he can approach, if not achieve, superior skill as an advocate.

Id.

39. This term is used by Judge Marvin E. Frankel. See Frankel, *supra* note 38, at 1039 (“The litigator’s devices, let be clear, have utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth. But to a considerable degree these devices are like other potent weapons, equally, lethal for heroes and villains. It is worth stressing, therefore, that the gladiator using the weapons in the courtroom is not primarily crusading after the truth, but seeking to win. If this is banal, it is also overlooked too much . . .”).

40. The terms ‘ignorant’ and ‘unprepared’ are used by Judge Frankel. See *id.* at 1042. The whole passage, which is very instructive, reads:

The ignorance and unpreparedness of the judge are intended axioms of the system. The “facts” are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. No one is to have done it for him. The judicial counterpart in civil law countries, with the file of the investigating magistrate before him, is a deeply “alien” conception . . . Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden

An observer familiar with the adjudicatory processes in both the adversarial (accusatorial) common law legal tradition and the investigative (inquisitorial) civil law legal tradition⁴¹ puzzles over this process and the immigration judge's answer to the student's question mentioned above. Thus, the most fundamental question that this article raises would be: Is there any justifiable reason why deportation proceedings should be adversarial when in the great majority of cases the only two lawyers in the courtroom are the government's counsel and the judge? It answers the question in the negative and argues that deportation proceedings combine the worst aspects of the adversarial and inquisitorial legal traditions because of two primary reasons: (1) the judge is neither completely passive-reflective nor neutral as she is statutorily required to probe credibility through cross examination; (2) She is prohibited from assuming an investigative role because her mandate is limited to the adjudication of cases on the record i.e., on the basis of party submission alone.⁴² The article further argues that the system's use of about 950 government attorneys⁴³ as the noncitizens'

flashes of seeming light may lead to mislead him at odd times.

Id. Although this generally holds true in deportation proceedings, there are some peculiarities, which will be elaborated further in Part II *infra*. This 'battle' is also sometimes described as a "duel." See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 86 (2d ed. 2008).

41. On the use of terminology, Professor Glenn writes that in the civil law legal tradition, the legal process is really not called anything, but that common law lawyers often call it, somewhat pejoratively, "inquisitorial." He suggests that it could properly be called "investigative." He also notes that civil law lawyers correspondingly call the common law's adversarial system "accusatorial." See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 144 & n.47 (4th ed. 2010). Despite this suggestion, however, for ease of reference and simplicity, this article uses the terms inquisitorial and investigative, and adversarial and accusatorial interchangeably where appropriate. One of the important notes that Professor Glenn offers is the notion that in the inquisitorial system, the law is written. "Since it exists it must be enforced, and judges have to actively establish the facts which justify its application." *Id.* at 144. This notion will be elaborated throughout this article.

42. Another related reason why the existing system is the worst of two worlds is that fact that it is not considered adversarial in the legal sense while there is no doubt that it is effectively adversarial. In *Ardestani v. INS*, the Supreme Court held that for purposes of recovery of attorney's fees and expenses under the Equal Access to Justice Act (EAJA) deportation proceedings are not considered adversarial. The effect of that ruling is the unlike in other proceedings where a winning party may recover attorney's fees and other expenses from the government if the government had taken a position that is not "substantially justified." See *Ardestani v. INS*, 502 U.S. 129, 132-33, 138-39 (1991), discussed in LEGOMSKY & RODRIGUEZ, *supra* note 7, at 683. For a detailed presentation of the argument that the existing system is in fact the worst of two worlds, see *infra* Part III.

43. There are currently 712 ICE attorneys who represent the DHS in removal proceedings. The Office of Immigration Litigation (OIL) within the DOJ also has 239 attorneys. Currently the total number is 951. See Legomsky, *supra* note 8, at 1701.

adversaries in deportation cases not only adds significant cost and inefficiency but also compromises accuracy in proceedings.⁴⁴ It then asks what would happen if these many government attorneys are converted into administrative law judges with inquisitorial functions.⁴⁵ Wouldn't we save a significant amount of money, increase efficiency, and provide a more accurate result?⁴⁶ The article answers this question in the affirmative and offers the reasons.⁴⁷

With this background, the article is divided into five sections. To help answer the question why different systems adopt different procedural methods for the resolution of legal controversies and why we have the system that we do, the second section traces the origins and development of the common law and civil law legal traditions and outlines the differences in their techniques of adjudication. It also provides a comparative analysis of the advantages and disadvantages of each system, focusing on the roles and responsibilities of judges and party litigants in civil, criminal, and administrative contexts.

The assignment of adjudicative functions to administrative agencies, which was a function of the rise of the administrative state, has not produced a uniform model. While some agencies, like the Social Security Administration, follow what appears to be the inquisitorial model, others, such as the immigration system, follow what is decidedly adversarial model. The third section discusses the default importation of the adversarial system into immigration proceedings and critically examines the effects of the adversarial system and outlines its shortcomings. The fourth section provides a brief but detailed summary of the existing diagnostics and reform proposals. Bringing the discussions in the previous four sections to bear, the fifth section outlines the advantages that the inquisitorial system may have in the deportation context and shows how the replacement of the adversarial system with the inquisitorial system could improve the existing system of adjudication by significantly increasing efficiency, reducing cost, and improving accuracy and acceptability. The sixth section offers a summary of conclusions.

44. For a detailed discussion of this proposition, see *infra* Part IV.

45. Issues of importation of prosecutorial bias could be recognized and addressed. For a fuller discussion, see Section IV *infra*.

46. Bearing the cost of appointed counsel is the most obvious measure that could even the playing field. Although that will be a very welcome development if it happens, which will not be anytime soon, this article argues that even then, the system would face the same kinds of problems that the public defenders system is facing in terms of effectiveness of representation and that the inquisitorial model could be more efficient and fair.

47. For a detailed discussion of this proposition, see *infra* Part IV.

II. THE DIVERSITY OF ADJUDICATORY SYSTEMS: ADVERSARIAL AND INQUISITORIAL JUSTICE

The divergence between the common law and civil law legal traditions is not limited to the procedures of adjudication.⁴⁸ However, this section focuses on the diversity of approaches and techniques of adjudication in these systems. Neither system is uniform across different geographic areas. Recognizing the considerable diversity within each system, this section focuses on the most common features of each system for purposes of comparison.⁴⁹ To provide context, it begins with a brief description of the genesis of each system.

A. *Adversarial Justice*

The origins of the English common law are often traced to the 1066 Norman Conquest of England.⁵⁰ Rooted in the centralized administration of William, Conqueror at Hastings, English common law “grew in rugged exclusiveness, disdaining fellowship with the more polished learning of the civilians.”⁵¹

The common law, which is essentially a system of writs,⁵² is characterized as “a law of procedure; whatever substantive law existed was hidden by it, ‘secreted in its interstices’.”⁵³ Traditionally, to bring a legal action, the plaintiff had to identify the right writ and bring it before a jury which “enjoyed a monopoly on . . . substantive decision making.”⁵⁴ When there was no applicable writ available, there was no action or remedy.⁵⁵ Because the actual decision making on the facts and the applicable law was left to the jury, the judge’s responsibility was

48. Other divergences are related to the theory and sources of law, constitutional and judicial structure, basic assumptions, and values. See MATTEI, *supra* note 6, at 25.

49. “It cannot be doubted that such typical features exist and distinguish civil law procedure from common law (especially American) procedure.” MATTEI, *supra* note 6, at 707.

50. See GLENDON ET AL., *supra* note 34, at 153.

51. *Id.* at 153-54 (quoting [VOL] FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. 1898, reissued in 1968)). For the history of this development, see *id.* at 153-69.

52. A writ is basically an instruction from the Crown to an officer, usually the sheriff, to investigate a legal dispute. See GLENN, *supra* note 41, at 243. According to Professor Glenn, by the middle of the thirteenth century, there were about 50 writs and that number grew by only 25 in the six centuries that followed. *Id.*

53. See *id.*

54. *Id.*

55. *Id.* This notion is usually stated as “where there is no writ there is no right.” GLENDON ET AL., *supra* note 34, at 158.

essentially jurisdictional, i.e., to determine whether the said action fit the chosen writ.⁵⁶

As Professor Glenn neatly describes, the jury was originally supposed to know everything about the case, including the facts and the law, which was essentially a local matter.⁵⁷ Thus, the duty of the parties' advocates was essentially to argue whether the outcome they sought from the jury was authorized and required by the applicable writ.⁵⁸ As the judicial system evolved, even to the point "when witnesses eventually came to be necessary, the lawyer continued to plead to issue, and now brought forth the facts they needed" to prevail under the writ.⁵⁹

The judge had no responsibility of finding 'objective' facts; nor did the lawyers. There was no external law stating with precision the facts to which it applied. Since the members of the jury had day jobs, and were usually illiterate, the argument and proof had to be made orally, in what came to be known as a trial (as in the old trial by ordeal . . .).⁶⁰

In particular, Glenn goes on describing the judge's role in these terms:

The trial is a dramatic event in which the judge plays a commanding, but distant, role, as befitting a source of law. Freed from the burden of finding fact, advised on law and fact by the barristers . . . the judge could concentrate on the general contours of the writs [and] the general contours of the law. Judicial rulings by a very small number of royal judges working out of Westminster on circuit eventually came to define the ambit of the writs⁶¹

Writs gradually developed into substantive common law,⁶² but they originally "reflected, above all, an agrarian, non-commercial, even

56. See GLENN, *supra* note 41, at 243.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 243-44.

61. *Id.* at 244 (footnotes omitted). "The writs were fundamental, however, since they determined when you could get to the jury, and they became the best available indicators of a secreted, substantive, common law." *Id.*

62. *Id.* The most common writs included: writ of ejectment, the writs of debts and covenants, writs for trespass, assault or battery, etc. *Id.* at 245. The historical context that necessitated the development of the common law is interesting. According to Glenn, "[t]he Normans incorporated the local jury into the working of their new, modern, royal courts" because they did not want to appear to be imposing their own laws on the locals, who were defeated militarily but had to be governed by law. Glenn further asks, "How could you get rid of all the local, informal traditions,

chthonic society.”⁶³ Being deeply indigenous and complex, the common law enjoyed an appreciable degree of ‘impermeability’ or even ‘immunity’ from outside influence, particularly the civil law.⁶⁴ Although it has undergone fundamental changes over the centuries, it is still “the same ship.”⁶⁵

The most common Norman method of resolving disputes was a “trial by battle,” which determined who the “better man” was, or who deserved the legal victory.⁶⁶ Trial by ordeal was another common method.⁶⁷ Even after the jury was put to use for purposes of the administration of justice, it was in the context of bringing more witnesses to attest in favor of one or the other party.⁶⁸ At some point, one who could produce twelve jurors to testify on his behalf was considered a winner. Thus, the aim of both parties was to produce more jurors than his adversary.⁶⁹

It was during the reign of King Henry II that the jury system was devised as a tool for the administration of justice.⁷⁰ The use by circuit courts of juries made perfect sense as the judges were outsiders and the jurors were informed commoners.⁷¹ The jury was eventually transformed from a body of informant men to a body of men that would hear information from others and make a decision based on that information.⁷²

nesting here and there in the countryside? And with what?” He goes on to answer his own questions: “The process of insinuating a common law into a vigorous, and not very friendly, society, was a major undertaking, to be pursued on many fronts.” *Id.* at 247.

63. *Id.* at 245.

64. *Id.* Professor Glenn suggests that the claim of immunity is perhaps exaggerated as there have been notable influences and counter-influences of the systems. *Id.*

65. *See id.* at 253-69. The jury is at the center of the adversarial trial. The jury has been described by Pope Innocent III as “a peculiarly English institution.” *See* LORD DEVLIN, TRIAL BY JURY 4 (1966), *excerpted in* GLENDON, *supra* note 34, at 520-21. Its origin is very interesting; historically, it had nothing to do with the administration of justice. The Normans brought the concept with them to England as a means of collecting information from the local people. *Id.* at 520-22. A juror was a man who would take an oath and provide information to the King for administrative purposes. He had to be a member of the community and had to possess some knowledge about the day to day life of the people. If the King was needed to rule on an issue, he would typically rely on the sworn statement of jurors. The jury only came to be associated with the administration of justice as a later development. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Historically, all civil cases in England were tried by jury until the year 1854, at which point the use of the jury began to decline. *See* Ward v. James, [1966] Q.B. 273 [Eng.], *in* GLENDON

The adversarial trial is divided into the pretrial phase and the trial phase, where discovered evidence is presented, was in part necessitated by the need to accommodate the schedules of twelve jurors, the disputing parties, and the judge.⁷³ This division has continued to be the hallmark of the common law legal tradition, including in the United States.⁷⁴ In other words, the drama of adversarial advocacy, originally designed to educate, persuade, and influence illiterate jurors,⁷⁵ has continued to dominate modern adversarial trials, even when a jury is not involved.⁷⁶

Although the system of an adversarial trial, as Chief Justice Burger said, is “a child of the common law, the [American] legal profession has developed in ways that do not parallel England’s.”⁷⁷ For example, England has long abandoned the use of the jury in most civil cases, though America still maintains the option.⁷⁸ Pretrial discovery is now uniquely American,⁷⁹ and the training, licensure, and discipline of American lawyers are also significantly different than those of their English counterparts.⁸⁰

As far as criminal justice is concerned, in England before the 16th century, a person accused of a criminal offense did not have the right to representation if accused of a felony, had no access to the government’s evidence, and did not have the right to present his own evidence.⁸¹

ET AL., *supra* note 34, at 525. In 1933 the British Parliament enacted the Administration of Justice Act, limiting the use of civil jury to limited actions as a matter of right and giving the judge the discretion whether to involve a jury in all other cases. The excepted cases were fraud, libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise to marriage. *Id.* The result was dramatic—the Act effectively killed the civil jury in England. *Id.* at 532. By the time *Ward v. James* was decided in 1966, only 2 percent of civil cases were tried by jury. *Ward* considered issues relating to the exercise of discretion by the judge to involve or not to involve the jury. *See generally id.* at 524-30. *Ward* is considered the principal case that effectively marked the end of the civil jury system in England. *See id.* at 532.

73. *See* MATTEI ET AL., *supra* note 6, at 761.

74. *See* Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1020 (1998).

75. *See* GLENN, *supra* note 41, at 244.

76. *See* Hazard, *supra* note 74, at 1019-20.

77. *See* Burger, *supra* note 38, at 227. According to the Chief Justice, the “turbulent diversity” makes “it impossible to transplant the English system . . .” *See id.* The basic features of the adversarial model remain similar.

78. *See id.* at 228.

79. *See* Hazard, *supra* note 74, at 1018.

80. *See* Burger, *supra* note 38, at 227-30. This citation does not endorse the Chief Justice’s suggestion that English barristers are better trained, better disciplined, and generally better equipped than American lawyers who receive the training differently; the citation is for the difference in the training.

81. *See* GLENDON ET AL., *supra* note 34, at 251-52.

Moreover, he would remain detained throughout the entire trial process.⁸² Although the rights of the accused have improved dramatically since then, particularly since the mid-19th century, “the process nevertheless retains elements of the earlier trial—that notion that it is a form of combat.”⁸³

Be that as it may, “[A]ll the common law systems begin with a concept of the adversary system, which defines the roles of the judge and the parties’ advocates.”⁸⁴ While the role of the judge remains that of judging between competing presentations of evidence, facts and law, the role of the party litigants is to provide such presentation.⁸⁵

The judge is not responsible for there being an adequate development of the evidence during trial and *a fortiori* is not responsible for there being adequate pretrial discovery of evidence. Nor is the judge responsible for getting at “the truth.” The judge simply chooses between the contentions of law and the versions of facts laid before him by the parties.⁸⁶

The objective of all systems of adjudication is presumably to find out the truth and arrive at a just result.⁸⁷ Different systems attempt to accomplish this objective through different means. As a prelude for the comparative analysis that follows, consider the adversarial posture in our system. The lawyers on each side are supposed to be active, responsive, imaginative, and partisan advocates, while the judge is required to be passive, reflective, and neutral.⁸⁸ Asked if zealous advocacy by President Nixon’s counsels would “involve [the] country in confusion,” Dean Monroe Freedman, a renowned legal scholar in the field of legal ethics, said that the adversarial system envisions the same kind of advocacy on both sides.⁸⁹ As support for his argument, he quoted Lord Brougham’s statement given in 1812 in the Trial of Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all

82. *See id.*

83. *Id.*

84. *See Hazard, supra* note 74, at 1019 (footnotes omitted).

85. *Id.*

86. *Id.*

87. This notion and the controversies surrounding it are elaborated further at the end of this section.

88. *See Frankel, supra* note 38, at 1033 (citing DAVID W. PECK, THE COMPLEMENT OF COURT AND COUNSEL 9 (1954) (13th Annual Benjamin N. Cardozo Lecture)).

89. *See id.* at 1036 & n.14 (citing Freedman, *The President’s Advocate and the Public Trust*, N.Y.U. L.J., Mar. 27, 1974, at 1, Col. 1 and 2.)

means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁹⁰

Almost amused by these statements, Human Rights First Founder, former Columbia Law Professor, and pioneer of the Federal Sentencing guidelines, Judge Marvin Frankel,⁹¹ surmised that “[n]either the sentiment nor even the words sound archaic after a century and half.”⁹²

Perhaps no writing has so effectively captured the shortcomings of the adversarial system as Judge Frankel’s University of Pennsylvania Law Review article. Displaying his renowned, unique, and beautiful writing, Judge Frankel’s message is best presented by generous resort to his own words. In response to Dean Freedman’s statement about Nixon’s attorneys’ above, he noted that

[t]his is a topic on which our profession has practiced some self-deception. We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth. Sometimes, less guardedly, we say it is ‘best calculated to getting out all the facts’⁹³

Having acknowledged that the adversarial technique might be useful in ironing out the truth within certain limits, he goes on to state that

[d]espite our untested statements of self-congratulation, we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system. We know that most countries of the world seek justice by different routes. We know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth. We are unlikely ever to know how effectively the adversary technique would work toward truth if that were the objective of the contestants.⁹⁴

90. The story and the quotation are provided in Frankel, *supra* note 38, at 1036 (citing 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)).

91. It is believed that the Sentencing Guidelines substantially deviated from his original proposals.

92. See Frankel, *supra* note 38, at 1036.

93. *Id.* at 1036-37 (quoting PECK, *supra* note 88, at 9).

94. *Id.*

The respective role of the contestants is what concerns him the most. “Employed by interested parties, the process often achieves truth only as a convenience, a byproduct, or an accidental approximation. The business of the advocate, simply stated, is to win if possible without violating the law.”⁹⁵ Judge Frankel summarizes his above analysis with a remarkable conclusion: “[The role of the attorney] is not the search for truth as such. To put that thought more exactly, *the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.*”⁹⁶

Judge Frankel goes on to describe the reason why the system incentivizes victory at the expense of the truth or just result. “The devices are too familiar to warrant more than a fleeting reminder. To begin with, we leave most of the investigatory work to paid partisans, which is scarcely a guarantee of thorough and detached exploration. Our courts wait passively for what the parties will present, almost never knowing—often not suspecting—what the parties have chosen not to present.”⁹⁷ There is also the problem of the rules of professional responsibility.

The ethical standards governing counsel command loyalty and zeal for the client, but no positive obligation at all to the truth. Counsel must not knowingly break the law or commit or countenance fraud. Within these unconfining limits, advocates freely employ time-honored tricks and stratagems to block or distort the truth. The litigator’s devices have utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth.”⁹⁸

But again,

to a considerable degree these devices are like other potent weapons, equally lethal for heroes and villains. It is worth stressing, therefore, that the gladiator using the weapons in the courtroom is not primarily crusading after truth, but seeking to win. If this is banal, it is also overlooked too much⁹⁹

If the parties’ attorneys are warring gladiators, what are the rules of engagement? Circuit Judge Jerome Frank answers this question in his

95. *Id.* at 1037.

96. *Id.* (emphasis added).

97. *Id.* at 1038.

98. *Id.*

99. *Id.* at 1039 (emphasis added).

very successful book, “Courts on Trial,”¹⁰⁰ which devotes some focus to lessons that trial lawyers learn on how to handle witnesses. Permeating this topic is the repeated fact that the attorney’s quest is not for the truth, but for success. First, lawyers choose witnesses very carefully not entirely based on what they know and what they can say, but based on how they will do, or what they will say and how convincingly they will say it, in court.¹⁰¹ Second, if a witness appears to have deficiencies in their story telling, the lawyer works closely with them to make sure that they overcome those deficiencies and present the best demeanor before the court. Third, the lawyer will do the exact opposite to the opposing witnesses; they will try every trick known to man to annoy and discredit an otherwise credible witness.¹⁰² One lesson for lawyers advises them to try to discredit an honest and credible witness “by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.”¹⁰³ Another lesson reads:

An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value.¹⁰⁴

100. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 82-86 (1973).

101. *Id.* at 80.

102. *Id.* at 82-86.

103. *Id.* at 82.

104. *Id.* at 82-83. Judge Frank quotes Anthony Trollope’s dramatic commentary on the nature of this form of adversarial advocacy. The quote is reproduced below, as it is very instructive:

One would naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose position was made easy and whose mind was not harassed; but this is not the fact; to turn a witness to good account he must be badgered this way and that till he nearly mad; he must be made a laughing-stock for the court; his very truth must be turned into falsehoods, so that he may be falsely shamed; he must be accused of all manners of villainy, threatened with all manners of punishment; he must be made to feel that he has no friend near him, the world is all against him; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give evidence. What will fall from his lips when in wretch collapse must be of special value, for the best talents of practiced forensic heroes are daily used to bring it about; and no member of the Human Society interferes to protect the wretch. Some sorts of torture are as it were tacitly allowed even among humane people. Eels are skinned alive, and witnesses are scarified, and no one’s blood curdles at the sight, no soft hear is sickened at the cruelty.

Id. At the end of this quote, Professor Frank notes that, because of this kind of terror of cross-examination, the retention of a counsel who know how to do this well could even force a settlement.

Id.

These and so many other trial and cross-examination techniques are purposefully designed to mislead the trial judge or jury. Judge Frank concludes:

In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interest. Our present trial method is thus *the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.*¹⁰⁵

If litigators, described as fighters by Judge Frank and as gladiators who only care about winning and not crusading after the truth by Judge Frankel, are to engage entirely in devious and cunning advocacy, how may the only other party in the courtroom, i.e., the judge, make sure that the truth is revealed and justice is done? Again, Judge Frankel's analysis of the judge's role in the adversarial system is extremely instructive:

The fact is that our system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study.¹⁰⁶

It is interesting to note that, in this kind of system, the judge's interventions could even have negative repercussions. This is so, according to Judge Frankel, because

[h]e risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions. The ignorance and unpreparedness of the judge are intended axioms of the system. The 'facts' are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. No one

105. *Id.* at 85 (emphasis added). Even those who consider the adversarial system to have more merits than demerits in helping the system arrive at a just result highlight the harmfulness of the usual advice to witnesses and their treatment in court. *See generally*, Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversarial System? A General Theory of Litigation Advice and Its Regulation*, 79 CALIF. L. REV. 313 (1991) (testing different theories on the subject and generally that lawyer advice to clients helps the court to arrive at the right decision, but recognizes the fact that advice to testifying witnesses generally have negative impact on the finding of the truth).

106. *See* Frankel, *supra* note 38, at 1042.

is to have done it for him . . . The judicial counterpart in civil law countries, with the file of the investigating magistrate before him, is a deeply “alien” conception . . . Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times. The ignorant and unprepared judge is the properly bland figurehead in the adversary scheme of things.¹⁰⁷

Judge Frankel then concludes:

In a system that so values winning and deplores losing, where lawyers are trained to fight for, not to judge, their clients, where we learn as advocates not to ‘know’ inconvenient things, moral elegance is not to be expected. *The morals of the arena and the morals of the marketplace . . . tend powerfully to shape our conduct.*¹⁰⁸

Of course, at the center of this discussion is a more fundamental doctrinal dilemma as to the role of the judiciary in a republic. A story recounted by Judge Charles Wyzanski about an interesting encounter between Judge Learned Hand and Mr. Justice Holmes neatly summarizes the basic doctrinal problem. According to Judge Wyzanski, when Learned Hand was still a district court judge, he went to Washington, D.C. to visit Justice Holmes.¹⁰⁹ Among the cases that Justice Holmes was to review were supposedly several cases decided at the trial level by Judge Hand.¹¹⁰ At the end of the visit, Justice Holmes gave Judge Hand a ride on his carriage on his way to the Supreme Court building.¹¹¹ As Judge Hand stepped out of the carriage, he waved goodbye to Justice Holmes and said: “*Do justice, Sir.*” In response,

107. *Id.* He goes on describing the unbalanced system:

[B]ecause the parties and counsel control the gathering and presentation of evidence, we have made no fixed, routine, expected place for the judge’s contributions . . . As a result, [the trial judge’s] interruptions are just that—interruptions: occasional, unexpected, sporadic, unprogrammed, and unduly dramatic because they are dissonant and out of character.

Id.

108. *Id.* at 1051 (emphasis added). This passive role of the judge in the adversarial system has been expressed in many other ways. For example, Mr. Justice Holmes has been quoted as saying:

[T]he judge’s function [is] interstitial; molecular, not molar. Or to put it more dramatic terms, the judge was like the Greek chorus in Greek tragedy, not a principal actor but an interpreter of the actors. His grace was the grace of forbearance and sympathetic understanding; not his share the action and passion of his time except in after dinner speeches.

See Charles E. Wyzanski, Jr., *Equal Justice Through Law*, 47 TUL. L. REV. 951, 954-55 (1973).

109. *Id.* at 955.

110. *Id.*

111. *Id.*

“Holmes beckoned to him and said, ‘Sonny, come back here. You don’t understand my job. *It is to apply the law.*’”¹¹² This anecdote is an excellent demonstration of the conflicting schools of thought on the role of the judiciary, commonly known as the conflict between interpretive judges and activist judges.¹¹³ This fundamental debate manifests itself at the micro level in the courtrooms, and in the attitudes demonstrated by the immigration judge’s response mentioned at the beginning of the introduction and by Justice Holmes in responding to Judge Hand’s seemingly idealistic farewell.

B. *Inquisitorial Justice*

How does the inquisitorial system address some of the same problems differently? A brief historical survey provides context. The literature classifies the origin of the civil law into two families: Romanic and Germanic.¹¹⁴ Owing to centuries of interaction, influence, and counterinfluence, the origins have played a steadily diminishing role in explaining the natures and states of the existing systems. Italian scholar Giuseppe Chiovenda once commented that the contemporary Italian procedure can be said to be “neither more Roman nor less Germanic than the existing procedure of Germany.”¹¹⁵ However, a brief discussion of the origins will be useful in understating the existing peculiarities of the system.

Roman law has a very long history, but Justinian’s sixth century *Corpus Juris Civilis* is considered to be the most natural starting point for purposes of contemporary analysis of the civil law legal tradition.¹¹⁶ The *Corpus Juris Civilis* consisted of four parts: The *Code*, which is the collection of Roman legislation; the *Digest*, which is a treatise of the most important writings; the *Novels*, which is imperial legislation enacted in the years following the compilations of the Code and the Digest; and finally the *Institute*, which is an introductory text for

112. Recounted in *id.*

113. *See id.*

114. The countries that are believed to be within the Romanic family include France, Italy, Spain, Portugal, Belgium, the Netherlands, most countries in Latin America, Africa, and Asia. The countries within the Germanic family include Austria, Switzerland, and Japan. *See* MATTEI ET AL., *supra* note 6, at 710.

115. *Id.* at 709 (quoting Giuseppe Chiovenda, *Roman and Germanic Elements in Continental Civil Procedure*, in ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 875, 833, 912 (1983)).

116. The history stretches as far back as 450 B.C., i.e., the time of the Twelve Tables. *See* GLENDON ET AL., *supra* note 34, at 18-20.

students.¹¹⁷ The *Code* and the *Digest* together are considered to represent an authoritative restatement of Roman law.¹¹⁸

Having remained dormant for centuries following the end of Justinian's reign,¹¹⁹ the *Corpus Juris Civilis* was rediscovered in Italy around the 11th century.¹²⁰ After the rediscovery, the University of Bologna became the center of the study of legal science in Europe.¹²¹ With the benefit of this very reaching and intellectually challenging set of ancient legal materials, legal scholarship flourished and numerous legal thinkers emerged, including Sir Thomas Aquinas in the 13th century.¹²² According to Professor Glendon, thousands of European law students who came to study in Bologna took back home with them not only the laws that they studied but also the methods of their teaching.¹²³ In this organic fashion, Roman law quickly spread throughout Europe and beyond.¹²⁴ Glendon suggests that its perceived intellectual superiority is among those factors to be credited for its widespread appeal and acceptance.¹²⁵

The French Civil Code of 1804, which is commonly known as "Code Napoleon," is now considered to be the pioneer of the modern Civil Code, and consequently the most influential.¹²⁶ The German Civil

117. *Id.* at 20.

118. *Id.*

119. Professor Glenn notes that during this period of about 500 years, which followed the fall of the Roman Empire, various kinds of chthonic laws re-asserted themselves across Europe and elsewhere. See GLENN, *supra* note 41, at 145.

120. See GLENDON ET AL., *supra* note 34, at 24-25. Before that, it had served different rulers through the ages. The Germans used it in ruling what was previously part of the Roman Empire. According to Glendon:

Crude versions of Roman legal rules had become intermingled in varying degrees with the customary rules of the Germanic invaders to the point where historians speak of the laws during this period as either 'Romanized customary laws' or barbarized Roman laws. Thus, though Roman legal science and Classical Roman law disappeared in the welter, diversity and localism of Carbonnier's 'customary thicket', Romanist elements survived and served both as a strand of continuity, and latent, potential universalizing factor in what we now think of as the civil law tradition.

Id. at 22.

121. *Id.* at 24-25.

122. *Id.* at 25.

123. See *id.* at 26.

124. *Id.*

125. *Id.* at 25.

126. *Id.* at 34. The French Code was by no means the first of the modern codes, but it was the most successful. Professor René David attributes the successes to two factors: (1) it was the work of an enlightened sovereign, (2) which was powerful enough to influence its acceptance. See DAVID & BRIERLEY, *supra* note 6, at 64-65. The failed prior codes include the Prussian *Allgemeines Landrecht* of 1794, and the Austrian Civil Code of 1811. See *id.* at 65.

Code of 1896 became perhaps the second most influential.¹²⁷ Although the French and German Civil Codes grew from the same roots, they took divergent approaches and developed individually.¹²⁸ The French Code, drafted by a commission of four prominent jurists within a very short period of time and with a touch of the ideals of the revolution,¹²⁹ was always meant to be flexible, general, and able to be understood by ordinary citizens.¹³⁰ The German Civil Code, on the other hand, was a very detailed project that took ‘legal scientists’ twenty years to complete.¹³¹

It was constructed and worked out with the degree of technical precision that had never been seen before in any legislation. A special language was developed and employed consistently. Legal concepts were defined and then used in the same way throughout. Sentence construction indicated the location of the burden of proof. Through elaborate cross-references, all parts of the Code supposedly interlocked to form a logically closed system.”¹³²

While the French Code was adopted at the beginning of the industrial revolution, the German Code had the benefit of being adopted at the end of that era.¹³³ German legal thought, including legal realism, jurisprudence of interests and sociological schools of thought, came to have far-reaching influence across the world, including in the United States.¹³⁴ This brief discussion of the historical origin and evolution of the civil law system is offered not only to show the divergent roots from the common law discussed in the previous section but also to highlight the reasons behind its intellectual sophistication.

In the 20th century, the civil code in Europe gradually decreased in importance and relevance, due in part to the emergence of the regulatory and bureaucratic state and the ceding of portions of state sovereignty to supranational governing and judicial bodies established by international

127. See GLENDON ET AL., *supra* note 34, at 33.

128. *Id.* at 33-34.

129. The Code is predicated on three ideological foundations: private property, freedom of contract, and patriarchal family. See *id.* at 34-35.

130. *Id.* at 62.

131. *Id.* at 41.

132. *Id.* For a good outline of the system and organization of the two codes, see MATTEI ET AL., *supra* note 6, at 404-19.

133. See GLENDON ET AL., *supra* note 34, at 42-43.

134. The writings of Holmes and Pound are believed to have that influence. Later on, the works of Karl Llewellyn and other jurists who fled Germany to the United States during the National Socialist period are considered to have significant influence in mainstream American legal thought. *Id.* at 43-44.

treaties.¹³⁵ Nonetheless, the fundamental notions of the civilian legal tradition, and its peculiar characteristics, which are themselves the products of its long history, continue to distinguish it from the common law legal tradition. The fairly common and salient features of the civilian system, in particular the distinguishing characteristic of the procedures, are discussed below.

Professor Hazard summarizes the civil law's procedural system in this manner:

Under the civil law procedural systems, the judge is responsible for deciding a case according to the truth of the matter. The judge decides both fact and law because there is no jury or anything like it. It is assumed that the truth of the matter will be revealed by relevant evidence. Under the civil law, it therefore follows that the judge is responsible for eliciting relevant evidence.”¹³⁶

With respect to the role of the party litigants, Hazard provides that the parties are represented by advocates who assist the parties in presenting their case, but that a fundamental difference in the roles of the advocate as between the common law and civil law is that, rather than employing cunning and trickery to skew the presentation of facts and applicability of the law as in the common law, civilian advocates are conceived of as assisting the judge in his or her quest for the truth, the fulfillment of the judicial responsibility.¹³⁷ Conceptually,

the advocates are supposed to provide comment and suggestions to the judge, with a deference which varies from one civil law jurisdiction to another. But at least in theory they have no power of initiative after they have presented the claims and defenses in the pleadings, except with the assent of the judge.¹³⁸

This highlights several important assumptions and functions of the civil law procedure. First, the judge is responsible for deciding all aspects of the case. Second, the judge's only objective and responsibility is to find out the truth of the matter in the case before him. Third, the judge gets no help from a jury in deciding issues of fact or law. Fourth, the judge is responsible for eliciting all relevant evidence from all sources. Fifth, the advocates' responsibility is to assist the judge in collecting and analyzing the evidence. Finally, the advocates

135. *See id.* at 54.

136. *See Hazard, supra* note 74, at 1019.

137. *Id.* at 1019-20.

138. *Id.* at 1020.

can only provide suggestions and comment to the judge, and once the process is set in motion by the submission of the claim or defense they may not perform any activities without the leave of the court.¹³⁹

Although this succinct summary is fairly representative of the most common elements of the civil law system, it does not fully capture the intricacies within each civil law country and the significant variations that exist among the various civil law countries. Before a comparative analysis of the common law and civil law procedures is offered in the next section, some intricacies and variations are worth highlighting by using the most developed models in Europe, i.e., the French and German Codes.

The French system is perhaps the closest to the above description. The French New Code of Civil Procedure enacted in the early 1970s is probably the most currently important and relevant.¹⁴⁰ Several of its characteristics have come to be considered fundamental; two are salient to the present discussion. First, although the judge is responsible for the evidence, the parties share that responsibility under the judge's guidance, including the examination of witnesses, the production of documents and the commissioning of expert witnesses.¹⁴¹ More interestingly, the court is not limited to the application of the law identified by the parties. It may reclassify a case, apply a different provision of the law to the developed facts, and arrive at a conclusion.¹⁴² This reinforces the view that the judge is the seeker of the truth and the guardian of the law, i.e., an honest broker.¹⁴³ It must also be noted that

139. *Id.*

140. *See* BELLET AL., *supra* note 40, at 86.

141. *Id.* at 87. Technically, the claimant bears the burden of proof; however, the opposing party is required to help in adducing evidence. *Id.* (citing a decision by the French Court of Cassation. Cour de cassation [Cass.] [supreme court for judicial matters] civ. I, Mar. 20, 2005, No. 123 (Fr.)).

142. *See id.* at 87-89. Article 12 of the French Civil Procedure Code states that "[The judge] must give or restore the exact classification to the facts transactions [*actes*] which are the subject of the litigation and not stay with the characterization suggested for them by the parties." Quoted in *id.* at 88. Although this seems to be a correct representation of the civil procedure law as it stands today, it is important to note that the whole notion of reclassification of case by the judge without the parties submission is not entirely without controversy. *Id.* The new Civil Procedure Code provides that, where the parties have agreed to keep their legal classification, i.e., if they identify the law and ask the court to be governed by that (some sort of choice of law), the court is required to apply that law alone not reclassify unless the case affects inalienable rights. *Id.* at 89.

143. *Id.* Note, however, that there is a suggestion in the literature that the involvement of the judge may depend on the complexity of the case with more involvement in more complex cases and more reliance on the parties' submissions in less complex cases. *See, e.g.*, CATHERINE ELLIOTT, CATHERINE VERNON & ERIC JEANPIERRE, FRENCH LEGAL SYSTEM 179-80 (2d ed. 2006) (suggesting that in less complex cases, the judge's role is more or less like that of the judge in the adversarial system).

the notion of proof by balance of probabilities, or a preponderance of the evidence, is more or less nonexistent. In the French system, “a fact is either proven or not.”¹⁴⁴ And second, in each case, a file called the dossier is built by the court.¹⁴⁵ The dossier contains the claim, the defense and all pieces of gathered evidence.¹⁴⁶ Each party must have a copy of this expansive record.¹⁴⁷

Although principally inquisitorial, the German laws of civil procedure seem to contain more elements of adversarial justice than the French system.¹⁴⁸ The most important civil procedure law in Germany is the Code of Civil Procedure, more commonly known as the ZPO.¹⁴⁹ There are several reasons why the ZPO is more just than other adversarial systems. First, in all civil actions before the district court in Germany, representation by counsel is mandatory.¹⁵⁰ This fact itself suggests the level of expectation for counsel involvement. Stadler neatly summarizes the remarkable aspect of the court’s power and the parties’ roles:

The Court has an obligation to prepare the trial. It has the power to demand that the parties elaborate fully on all relevant alleged facts. Within the limits inherent in principle of party presentation, the court will provide some guidance for the pleadings, and to some extent, will even assist a party that failed to present all relevant facts through oversight, inadvertence or mistake.¹⁵¹

The same basic principles underpin criminal and administrative procedures in the civil law system. If anything, the procedures in the public law arena demand more active involvement of judges and allow less room for manipulation by counsel. For example, in France, criminal proceedings are characterized by judicial investigation of the crime.¹⁵²

144. See BELL ET AL., *supra* note 40, at 87.

145. *Id.* at 90.

146. *Id.* at 90-91.

147. *Id.* at 90.

148. See, e.g., HOWARD D. FISHER, THE GERMAN LEGAL SYSTEM & LEGAL LANGUAGE 115 (2d ed. 1999). One of the maxims of the German civil procedure is that “it is for the parties to proceedings to introduce facts and applications. The opposite of this principle is the so-called ‘*Inquisitionsprinzip*’ (examination maxim or inquisition principle), which applies, for example, in criminal and administrative proceeding.”

149. INTRODUCTION TO GERMAN LAW 365 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005). This was most recently amended in 2002. *Id.*

150. *Id.* at 367. Indigent plaintiffs and defendants do have a statutory right to counsel. *Id.*

151. *Id.* at 370 (citing ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 1, 2002, § 139).

152. See WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 173 (1995) (citing CODE CIVIL [C. CIV] arts, 92, 97). French criminal procedure is governed by the Code of

The judge *d'instruction* is empowered to collect evidence, including by conducting searches and seizures, interviewing witnesses, and even visiting the crime scene if necessary.¹⁵³ The judge is required to look at not only inculpatory evidence but also exculpatory evidence because the mission of the judiciary is principally to find out the truth.¹⁵⁴ After the judge completes the investigation with the help of the prosecutor and the defendant, she will issue a final report identifying the nature of the crime and the possible charges that the government may pursue and submits the dossier to the office of the procureur de la Republique, who in turn forwards it to a panel of three judges who will decide whether prosecution is warranted.¹⁵⁵ “If they decide there is, then they issue the formal charge. . . and transfer the case to the appropriate trial court.”¹⁵⁶

During the actual trial, the judge remains the principal actor, in charge of conducting the lines of inquiry and the questions, although the opposing parties are involved by suggesting questions they feel may be appropriate or beneficial to their case. As Lerner puts it, “there is a direct line of communication between the fact-finders and the witness.”¹⁵⁷ In fact, the prosecutor and defense council would face disciplinary action, even disbarment, if they were ever to attempt to contact and interview non-party witnesses, because that is the exclusive domain of the judge.¹⁵⁸ According to Professor Learner, who served as an expert witness in a high profile criminal trial in France, the

flexible order of the trial allows witness testimony to resemble a discussion. Witnesses can directly respond to the statements of other witnesses, in a sort of dialogue. They are also allowed to speak in their natural voices, initially in narrative form. Neither party has carefully coached them before trial, the parties’ direct and cross-examination do

Criminal Procedure of 1808, amended many times since its enactment. *Id.* at 169. The procedure is complex, but the entire criminal prosecution and trial process seems to be divided into six distinct stages: reporting of the offense, preliminary investigation by police and referral for judicial investigation, judicial investigation of the crime by a judge and issuance of a report recommending the institution of a criminal prosecution, the main trial, and enforcement of the outcome. *See id.* at 169-76. For a good overview of this process, see Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791 (2001).

153. *See* CAIRNS & MCKEON, *supra* note 152, at 172-74.

154. *See* Lerner, *supra* note 152, at 802.

155. *See id.* at 801-02.

156. *See id.* at 805-806. This particular panel is the Chamber de l’instruction. *Id.* at 806.

157. *See id.* at 807.

158. *See id.* at 802-03 (citing CODE CIVIL [C. CIV] arts. 101-02). He also notes that, as the prosecutor is not technically a member of the bar, disbarment is not exactly the nature of the penalty. *See id.* at 803 n.43 (relying on generally JOHN LEUDSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* (2001)).

not constrain them, and their statements are not interrupted by evidentiary objections. As a result, witnesses are more relaxed and often forthcoming with information.”¹⁵⁹

More interestingly, the French system does not strictly impose the burden of proof on either of the parties. As such, the fact finder is asked whether she is fully convinced that the alleged act occurred and that the defendant is the one who caused it.¹⁶⁰ This suggests that, in keeping with the inquisitorial tradition, the parties and the judge collaboratively establish the facts without allocating any particular burden, which is conceptually different from the Anglo-American burden allocation system. To one with an Anglo-American background, it could even be difficult to understand. In any case, the most important aspect of judicial investigation and active judicial involvement throughout the process is, as Learner puts it, “*An indigent defendant is not placed at such a disadvantage, having to rely on a poorly funded legal aid system,*”¹⁶¹ including for the gathering and use of exculpatory evidence, as the judicial investigator would do that for him.¹⁶²

Although German criminal procedure appears to be relatively more adversarial than the French system, at least during trial, it is still substantially similar. The German Code of Criminal Procedure of 1879 (StPO) still governs criminal prosecution in Germany.¹⁶³ Under the StPO, the criminal prosecution process has three distinct phases: (1) investigation by the state attorney’s office, which looks at both inculpatory and exculpatory evidence;¹⁶⁴ (2) the submission of indictment to the appropriate pretrial court, which determines whether there is sufficient evidence warranting a trial,¹⁶⁵ and if so; (3) the commencing of the actual trial. At trial, in keeping with the inquisitorial

159. See Lerner, *supra* note 152, at 853. He further notes that this system allows the defendant to choose to speak in most cases. *Id.*

160. This might seem like the familiar Anglo-American “beyond a reasonable doubt” standard, but Professor Learner suggests that the French version which reads: “Avez vous une intime conviction?” is difficult to translate, but it could mean “Are you deeply, thoroughly convinced?” See Lerner, *supra* note 152, at 800-01.

161. *Id.* at 801 (emphasis added).

162. *Id.* at 805-06. The judge’s final decision, as well as preliminary rulings throughout the investigation, may be appealed to the next level. The appellate court reviews both questions of law and fact, including new facts as appropriate. See CAIRNS & MCKEON, *supra* note 152, at 172-74.

163. Amended several times since its adoption in 1879, the German Criminal Procedure Code (Strafprozessordnung) is the principal body of law that governs German Criminal Procedure. It is supplemented with the Judicature Act (Gerichtsverfassungsgesetz, or GVG). See REIMANN & ZEKOLL, *supra* note 149, at 421-22.

164. See *id.* at 423 (citing StPO, §§ 158, 160, 162, 163, 167, and 169).

165. See *id.* (citing StPO, §§ 170, 200).

tradition, the judge leads the presentation of evidence and questioning, maintaining a prominent and active role.¹⁶⁶ As in the French system, and depending on the nature and severity of the crime, lay judges participate in making the final decision.¹⁶⁷

Notions of official investigation and party passivity also characterize administrative proceedings in the civil law system. In France, the rules of administrative procedures are contained in *Code de Justice Administrative*.¹⁶⁸ The administrative law system attempts to balance two competing interests: the government's administrative task and the protection of citizens from excesses and governmental abuse of power. With this balance in mind, "judges do not rely on the parties to provide them with those arguments on which they can rely in coming to their decision ('decisive argument'): the case is constructed, the facts unearthed, and the line of reasoning developed through the work of the *judge rapporteur* during the stage of the instruction."¹⁶⁹ Although legal representation is available in most administrative proceedings, according to Bell et al., "*The lack of representation is unlikely to be damaging to a person's chances of success since . . . the case is literally taken over by the court itself from the moment it is introduced.*"¹⁷⁰

In addition, administrative proceedings are also characterized by the following stages: (1) the court appoints an officer, called the *rapporteur*, to create a dossier of each case, which contains the challenges, the administrative decision, and all the evidence; (2) all administrative courts are empowered to seek and obtain relevant documents from administrative agencies; (3) the *rapporteur* then produces a note outlining the facts, the evidence, the law, and a draft judgment, and then forwards it to the *Commissaire du gouvernement*, which prepares a legal opinion, (4) that leads to trial.¹⁷¹ At trial, the *rapporteur* presents the dossier by outlining the parties' arguments. The parties are then invited by the administrative court to comment.¹⁷² The *Commissaire du gouvernement* then reads their conclusions, concluding the public hearing.¹⁷³ The judges then consider all the arguments and evidence in private and reach a decision that must address all points of

166. See *id.* at 424-25 (citing STPO §§ 58, 213-225, 243, 244, 258, 260).

167. See *id.* at 425.

168. Adopted in May 2000, the *Code de justice administrative* consolidates all the rules that apply in all administrative courts. See BELL ET AL., *supra* note 40, at 119 & n.319.

169. *Id.* at 119.

170. *Id.* at 121 (emphasis added).

171. *Id.* at 123-24.

172. *Id.* at 124.

173. *Id.* at 125.

contention.¹⁷⁴ An appeal will lie either to *Cour Administrative d'Appel* or to the *Conseil d'Etat* depending on the nature of the appeal.¹⁷⁵ The appellate tribunals may consider both questions of fact and law.¹⁷⁶

As indicated above, the procedure is essentially inquisitorial in the sense that judicial officials are in charge of the investigation of facts and the application of law, with only limited help from the parties. In relation to this, the role of the judicial officer charged with developing the dossier is captured well in the following passage by French Jurists Mossot and Marimbert: “The *rapporteur* may be faced with applications coming from ordinary citizens little versed in rules of law in which the subject-matter or legal basis remains concealed rather than being made clearly explicit.”¹⁷⁷ In these cases, the *rapporteur* interprets the application in a constructive way, not confined to the letter of the appeal, but also not contradicting what it says. This effort to reclassify applications is most often made for the benefit of the applicant.¹⁷⁸

Although the French immigration system is characterized by a complex set of procedures at different levels, the same fundamental notions of administrative law and procedure discussed above underpin immigration adjudication, which is decidedly a part of the administrative law system.¹⁷⁹

Although German administrative law appears to be more complicated because of German federalism,¹⁸⁰ administrative proceedings are similarly inquisitorial.¹⁸¹ An interesting aspect of this is that, even if a party, which may include a government agency, fails to cooperate, the adjudicating authority is authorized and required, within

174. *See id.* at 125.

175. *See* L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 115 (1992).

176. *Id.* It is important to note here that the duality of the French court system—the regular courts and the administrative courts—has a long history and that judicial review of administrative decisions in the context of the Anglo-American system is unknown. The French administrative system is self contained. For a good discussion of the position of the administrative courts within the French constitutional system of separation of powers, see *id.* at 8-58.

177. *Id.* at 96-97 (quoting J. MASSOT & J. MARIMBERT, LE CONSEIL D'ETAT 153 (1988)).

178. *Id.*

179. *See* Helene Lambert & Janine Silga, *Transnational Refugee law in the French Courts: Deliberate or Compelled Change in Judicial Attitude?*, in THE LIMITS OF TRANSNATIONAL LAW: REFUGEE LAW, POLICY, HARMONIZATION AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION 37-41 (Guy S. Goodwin-Gill & Hélène Lambert eds., 2010). (A detailed discussion of French immigration procedures is outside the scope of this paper as its focus is on the techniques of the inquisitorial system in general whether it is used in the immigration context or otherwise.)

180. For a discussion of the administrative system, see REIMANN & ZEKOLL, *supra* note 149, at 87-103.

181. *See id.* at 103-04.

reasonable limits, to ascertain the merits of the case *ex officio*.¹⁸² The German immigration system is fragmented and complicated because of federalism; however, it is a part of the administrative law system sharing the same characteristics of the inquisitorial model.¹⁸³

C. *A Comparative Look at the Inquisitorial and Adversarial Advantages*

Comparing the merits and demerits of the adversarial and inquisitorial systems outside of a particular context may be difficult to put in perspective. There is also a high risk of over-generalization. Instead, understanding the arguments on both sides in a specific context is essential in assessing the lessons that one can learn from the other. For that reason, before the U.S. immigration deportation proceedings are assessed and the inquisitorial model considered in the next part, this section examines a set of notable scholarly exchanges in the context of civil procedure.¹⁸⁴ Evidently, no system can now be said to be entirely adversarial or entirely inquisitorial. However, some basic differences among each system do exist. In 1985, Professor John Langbein, the preeminent comparatist, published his most provocative article, titled “The German Advantage in Civil Procedure.”¹⁸⁵ This article attracted immense attention and many written responses by prominent scholars. Some questioned the accuracy of the claims while others challenged the underlying assumptions. The two most thoughtful reactions were “The American Advantage: The Value of Inefficient Litigation” by Professor Samuel Gross,¹⁸⁶ and “The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative

182. See *id.* at 105 (citing § 24 of the German Federal Administrative Act, called *Untersuchungsgrundsatz* (or “VwVfG”)).

183. See Paul Tiedemann, *The Use of Foreign Asylum Jurisprudence in the German Administrative Courts*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 179, at 57-62.

184. Although comparing the immigration adjudication systems in the inquisitorial and adversarial legal traditions might seem more relevant, the basic inquisitorial and adversarial approaches share the same basic characteristics across specific areas of law. Because the focus here is on the system of adjudication in general rather than the specific area, the debate in the civil procedure context is equally instructive. It is chosen because it fully captures the merits and demerits of each system of adjudication. Moreover, the purpose of this article is not to provide a comparative study of immigration adjudication systems. Its purpose is limited to showing how the inquisitorial model might be a desirable technique regardless of how it is employed in the immigration context in civil law countries. This article does not endorse any particular immigration adjudication model. It merely purports to show the advantages of using the basic inquisitorial model in U.S. deportation proceedings.

185. Langbein, *supra* note 31.

186. Gross, *supra* note 31, at 734.

Scholarship” by Professor Ronald Allen and others.¹⁸⁷ The discussions in these articles brilliantly capture the perceived advantages and disadvantages of the adversarial and inquisitorial systems in the context of civil procedure with some reference to criminal procedure. Quite interestingly, the discussions which began in the context of civil procedure quickly became adversarial advocacies for one or the other system, making them excellent additions to the literature in this area. The following discussion draws on these sources in evaluating the advantages of the adversarial and inquisitorial systems, setting the stage for the evaluation of the U.S. system for detention and deportation of non-citizens and the recommendation in the next section for the adoption of the inquisitorial model.

Langbein boldly asserts that the German inquisitorial system is fundamentally superior to that of the U.S. adversarial system. His arguments are very instructive and are examined as follows:

1. The adversarial system provides incentives for the distortion of evidence because the system relegates the gathering and presentation of evidence to partisans who choose evidence that is supportive only of their respective positions. He notes that the parties necessarily engage in “truth-defeating distortions.”¹⁸⁸ The inquisitorial system, on the other hand, relies on judicial fact-gathering, which means that a neutral official gathers all the evidence with a view to finding out the truth, not prevailing against an adversary.¹⁸⁹
2. Judicial control of the evidence gathering and analysis brings efficiency and fairness because: (a) it eliminates the bifurcation of the processes into the plaintiff’s case and the defendant’s case, as the entire inquiry is focused on finding out what really happened; and (b) if the judicial inquiry finds that there is a sufficient defense, no time or resources are wasted by proceeding with the plaintiff’s case, which means greater efficiency.¹⁹⁰
3. Unlike the common law system, the culminating event called “the trial” does not have the same meaning as a dramatic show

187. Allen et al., *supra* note 31.

188. See Langbein, *supra* note 31, at 823, 825.

189. *Id.* at 824.

190. See *id.* at 830. One example that he provides relates to a contract dispute. If the judge finds out that the contract is vitiated by illegality, she would require the plaintiff to go through providing evidence as to the formation of the contract etc., she would just focus on the illegality and dispose of the case on that ground alone. *Id.*

where the parties are the sparring opponents and the judge the passive umpire.¹⁹¹ The inquisitorial method “lessens tension and theatrics, and it encourages settlement.” Moreover, “[w]hen the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage,” which potentially equalizes the haves and the have-nots.¹⁹²

4. Witness preparation or coaching in the adversarial system is a guarantee for distortion because “it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth*.”¹⁹³
5. The assumption that cross-examination is the best tool to eliciting the truth and correcting the bias of a prepared witness is fundamentally flawed because it is “too often ineffective to undo the consequences of skillful coaching[] [and] . . . allows so much latitude for bullying and other truth-defeating stratagems [that] it is frequently the source of fresh distortion when brought to bear against truthful testimony.”¹⁹⁴
6. Partisan-hired and presented expert witnesses are even worse because they have perverse incentives.¹⁹⁵ “If the experts do not

191. See BELL, *supra* note 40, at 85 (“There is no ‘trial’ in the common law sense in French civil procedure.”) (quoting J. Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 480 (1986)); see also Astrid Standler & Wolfgang Hau, *The Law of Civil Procedure, in INTRODUCTION TO GERMAN LAW*, *supra* note 149, at 369-70 (“Under German law, the distinction between the trial and pretrial phase of litigation is less sharp than in common law countries. It has even been said that conducting a lawsuit in a civil law system such as Germany consists rather of piecemeal litigation characterized by the predominance of written elements and that there is nothing that could be properly called a trial.”) (citing Hein Kotz, *Civil Justice Systems in Europe and the U.S.*, 13 DUKE J. COMP. & INT’L L. 61, 72 (2003)).

192. Langbein, *supra* note 31, at 831. To this point, he adds the possibility of witness surprise and trickery in cross-examination, etc.

193. *Id.* at 833 (quoting Frankel, *supra* note 38, at 1038) (emphasis in original). Langbein adds that, “If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial.” *Id.*

194. *Id.* Langbein acknowledges Wigmore’s famous saying that cross-examination is “the best legal engine ever invented for the discovery of truth,” citing 5 JOHN H. WIGMORE, EVIDENCE 29 (3d ed. 1940), but counters it by quoting Judge Frankel who said, “The litigator’s devices, let’s be clear, have utility in testing dishonest witnesses, ferreting out falsehood, and thus exposing the truth. But to a considerable degree these devices are like other potent weapons, equally lethal for heroes and villains.” *Id.* at 833 n.31 (quoting Frankel, *supra* note 38, at 1039).

195. *Id.* at 835.

At the American trial bar, those of us who serve as expert witnesses are known as “saxophones.” This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes . . . Nobody wants to disappoint a patron;

cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing.”¹⁹⁶

7. Perhaps Langbein’s most interesting point relates to what he calls in German “*Waffenungleichheit*” or, as he quite literally puts it, “inequality of weapons, or in this instance, inequality of counsel.” He notes that “in a fair fight the pugilists must be well matched.”¹⁹⁷ He gives it context when he notes “you cannot send me into a ring with Mohammed Ali if you expect a fair fight.”¹⁹⁸ Langbein’s main point is that “very little in our adversary system is designed to match the combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation.”¹⁹⁹
8. Langbein also addresses the three most fundamental criticisms of the inquisitorial system corresponding with the advantages of the adversarial system: (a) premature judgment, or the possibility that the investigating judge may arrive at a conclusion before she has had the opportunity to see all the evidence.²⁰⁰ In response, Langbein says that, although the advocates in the inquisitorial system are not as active as those in the adversarial system, they help the judge’s investigation by representing their client’s views and direct the judge to evidence that helps them.²⁰¹ He does not see any advantages in keeping the judge deliberately ignorant until the day of the trial.²⁰² In any case, he suggests that the propensity for making a premature judgment depends on judicial temperament and experience, which could be remedied through careful recruitment and proper training.²⁰³ (b) Individual autonomy. Langbein notes that the celebration of the adversarial system comes from the criminal process, which rests on some very basic foundations: the presumption of innocence, the privilege against self-incrimination, and requiring proof of guilt beyond a reasonable

and beyond this psychological pressure is the financial inducement.

Id.

196. *Id.* at 836.

197. *Id.* at 843.

198. *Id.*

199. *Id.* The rest of the paragraph reads: “Adversary theory thus presupposes a condition that adversary practice achieves only indifferently.” *Id.*

200. *Id.* at 843-44.

201. *Id.* at 844.

202. *Id.* at 848.

203. *See id.* at 848-51.

doubt.²⁰⁴ In other words, the adversarial system protects the accused person's right to gather his own evidence and present it in any way he wishes, rather than relegating that duty to a judicial officer. Lacking a strong argument against this, Langbein brushes it aside by saying that although he does not see the merits of a system that deliberately attempts to err on one side; albeit understandable in the criminal context, he argues that in any case none of this affects his argument in the civil context.²⁰⁵ (c) Bureaucratic inefficacy and abuse. The career judiciary is a large bureaucracy, prone to misuse of judicial power.²⁰⁶ And yet Langbein argues that proper recruitment and retention evaluations coupled with the right incentives and appellate control could meaningfully deter and correct potential abuses. He cites the rarity of complaints about the German judiciary as a case in point.²⁰⁷

One of the first responders to Langbein's arguments was Professor Samuel Gross. In his article, "The American Advantage," Gross reduces Langbein's claim of the German-style inquisitorial advantage to efficiency,²⁰⁸ accepts the proposition as true,²⁰⁹ but argues that efficiency is not necessarily a virtue.²¹⁰ Ironically, in praising American inefficiency, Gross demonstrates the kind of skillful adversarial advocacy with which Langbein was concerned. Gross defends inefficiency and he does it well. The key points of his argument are:

1. Accuracy: The measure of a system is not speed or efficiency, but accuracy. Langbein provides no evidence that German inquisitorial outcomes are more accurate.²¹¹ Gross cites a study which concludes that "adversary presentation of argument was more likely than non-adversarial argument to counteract a bias

204. *Id.* at 842 & n.68 (citing *Garner v. United States*, 424 U.S. 648, 655 (1976) (noting that "the preservation of an adversary system of criminal justice" is "the fundamental purpose of the Fifth Amendment.")).

205. *See id.* at 842-43.

206. *See id.* at 853-55.

207. *See id.* at 854-57.

208. *See* Gross, *supra* note 31, at 734 ("Roughly, Professor Langbein argues that by comparison to the German process, American litigation is overly complex, expensive, slow, and unpredictable—in short, inefficient.")

209. *Id.* ("Professor Langbein is also quite convincing; some may disagree but I, for one, have no basis to dispute his claims, and no impulse to try.")

210. *Id.* ("The point of this paper is different: to question the assumption that efficiency in adjudication is a virtue.")

211. *Id.* at 740.

about the outcome that was deliberately implanted in judges.”²¹² He eventually discounts it, however, convinced that it is impossible to control the experimental environment.²¹³ He eventually concludes that the comparison of accuracy between the German and American systems is not possible to measure.²¹⁴ However, he notes that consistency might be a proxy to measure accuracy.²¹⁵ That means any deviation from the mode might be considered inaccurate.²¹⁶ But even by that measure, Gross is not able to say that the adversarial system is better.²¹⁷ That leaves him to discuss the role and importance of the jury in arriving at a more accurate result in criminal cases.²¹⁸ For that, he has good evidence in his favor. According to a study that he calls solid, “trial judges thought the defendant should be acquitted only half as often as the juries did.”²¹⁹ He recognizes, however, that what the study compares is variations within the same system, i.e., judge versus jury in the adversarial system, and he recognizes that it is possible that the use of juries in criminal trials in the inquisitorial system may contain the same guarantee of minimizing wrongful convictions.²²⁰

2. Intrinsic value: by this term, Gross means the political and cultural arguments in favor of the adversarial system.²²¹ Characteristics of this are distrust of government and respect for individual autonomy.²²² The system protects these values through the use of juries and a provision of representation for the accused in criminal trials.²²³ Related to this, people are more likely to accept a system that gives them autonomy, and Gross notes that the system has “symbolic and ceremonial

212. *See id.* at 740 & n.22 (citing JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE, A PSYCHOLOGICAL ANALYSIS 41-53 (1975)).

213. For example, the study used college students and first-year law students, which means that it did not account for the experiences of judges. *See id.* at 740 n.22.

214. *Id.* at 741.

215. *Id.* at 741-42.

216. *Id.*

217. *See id.* In fact, he comes to the opposite conclusion: “if the mode defines truth, then the variance is error, and the German system has less of it.” *Id.* at 742.

218. *Id.* at 743-44.

219. *See id.* at 744 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58 (1966)). This study analyzed 3,500 jury trials. *Id.*

220. *Id.* at 744.

221. *Id.* at 744-45.

222. *Id.* at 745.

223. *Id.* at 744-46.

importance” as it gives the “appearance of justice.”²²⁴ He concludes these points by saying: “But comparisons are difficult because, on the whole, the cathartic impact of legal ceremonies is culturally bound and culturally determined.”²²⁵ In law as in religion, the ceremonies that affect us most are usually those that are most familiar.”²²⁶

3. Having summarized the comparative advantages and disadvantages under the above two headings and having concluded that neither accuracy nor intrinsic value conclusively support a claim of adversarial superiority, Gross goes on to present his most important argument, i.e., that inefficiency may be beneficial and desirable for several reasons. First, efficiency is a product of specialization, which is necessarily complex.²²⁷ If it is complex, it is harder to set up and almost impossible to fix if it fails.²²⁸ To support this point, he notes that “unless you can operate a word processor or a computer reliably, a typewriter will serve you better.”²²⁹ Second, homogeneity makes the operation of a complex and efficient judicial bureaucracy easier, while American diversity and its fragmented political system make that kind of system almost impossible to set up and successfully manage.²³⁰ He concedes that the adversarial system produces inefficient and uneven justice, but he asks “[c]ould a switch make matters worse?” Answering that question in the affirmative, he goes on stating: “a bad civil-law system would be worse than anything the common law can produce. Incompetent or dishonest judges and investigating prosecutors would be slower, less consistent, and less accurate than any cast of private advocates and lay jurors, and entrenched bureaucracies are notoriously hard to displace.”²³¹ This being Gross’ main and perhaps most convincing argument, he goes on offering more reasons why an inefficient system is better.

224. *Id.* at 745-47.

225. *Id.* at 747.

226. *Id.*

227. *Id.* at 748.

228. *See id.* at 749-50. He emphasizes that when it does not work, it really does not work. As an example, he quotes an Italian jurist as saying: “The Italian legal system is like the German, except that it does not work.” *Id.* at 750.

229. *See id.* at 749.

230. *See id.* at 750-51.

231. *Id.* at 751.

4. Deterrence of litigation: Simply stated, Gross' position is that if the system is inefficient, people don't use it—that reduces caseload, which means less litigation and less resource burden.²³² That is one reason why the great majority of cases settle outside of court in America.²³³ However, he does not convincingly explain away the fact that such a system would favor the more powerful party. This leads to his next point.²³⁴
5. Creation of the “zone of immunity”: By this he means that if all draconian laws that we have enacted are enforced with great efficiency, which could mean a violation ticket for driving 66 miles per hour in a 65 zone, it could impinge upon individual autonomy and privacy in ways that are not familiar to us.²³⁵
6. Virtues of informal interactions and settlements: These kinds of informal private settlements produce rules that are difficult to write in the form of legislation due to “their relative flexibility, and their responsiveness to interests that legal systems are hard pressed to regulate—trust, reputation, civility, etc.”²³⁶ But then, it is important to maintain an inefficient “coercive option . . . that is rarely used . . . to keep the normative system intact.”²³⁷

For all of these reasons, Gross prefers an inefficient adversarial system over an efficient inquisitorial system. Most notable and most relevant for purposes of this article is that our democracy cannot avoid making draconian laws and we are better off without efficient enforcement of these laws.²³⁸ Although it may be a very odd way of seeking immunity in a democratic system, the reality in the immigration context may support Gross' assertion.²³⁹ But this also means that the good laws are not enforced efficiently, and that the less powerful are likely to lose in a system of self-help. Apart from this, a closer reading of Gross' article suggests that in fact, he agrees with all of Langbein's assertions about the superiority of the inquisitorial system, but he thinks that we are culturally incapable of setting up a German-type efficient system and that we like our system just fine and believe that inefficiency serves us well.

232. *Id.* at 752-53.

233. *Id.* at 752.

234. *See id.* at 752-54.

235. *Id.* at 753.

236. *Id.* at 756.

237. *Id.*

238. *Id.* at 755.

239. *Id.*

Allen et al. admit that if what Langbein says about the German system is true, it is a superior system.²⁴⁰ However, they doubt the accuracy of the characterization, hence the title of their article, “A Plea for more details”²⁴¹ They address each of the important points that Langbein makes and express doubts about their accuracy.²⁴² Most interestingly, the preoccupation of the article is not to challenge the claim of superiority of the inquisitorial system as a system of adjudication, but rather to challenge the claim that the system as implemented in Germany is superior.²⁴³ They focus mostly on three aspects of Langbein’s claims: the procedures, the use of experts and the qualifications and incentives of judges.

1. The procedures: At the level of efficiency, Allen et al. note that more than 90 percent of cases in America settle outside of court or through dismissal.²⁴⁴ Langbein’s claim of the excesses of cross-examination and surprise of witnesses are exaggerated, they argue, because the evidentiary rules restrict the perceived excesses.²⁴⁵ Langbein’s claim about witness-coaching is considered speculative and lacking in supporting data.²⁴⁶ In simple terms, they ask why we should believe Langbein when he says that Wigmore’s assertion, that cross-examination is “the greatest legal engine ever invented for the discovery of truth,” is “nothing more than an article of faith.”²⁴⁷
2. Experts: Citing some studies, Allen et al. note that experts cannot be categorically classified and that their professional ethics are more important than the incentives the system provides.²⁴⁸ On the other hand, there is no guarantee that court-paid experts do not experience the same kind of pressure and incentives as party-hired ones. If that is not the case, Langbein

240. See Allen et al., *supra* note 31, at 706. (“Professor Langbein provides his instruction on methods of improving the administration of civil justice at a high level of generality. If the generalities that he invokes are true, then he has made a powerful argument that the American system is decidedly inferior to the German system in certain important respects and we would do well to embrace aspects of that system. If the generalities are false, Professor Langbein’s article reduces to the mere articulation of a preference for the German system with no supporting rationale.”).

241. See *id.* at 707.

242. *Id.*

243. *Id.* at 708.

244. *Id.* at 711.

245. *Id.* at 717-18.

246. *Id.* at 718-19.

247. *Id.* at 720. (quoting WIGMORE, *supra* note 194, at 29).

248. *Id.* at 737.

provides no evidence. To the contrary, German experts are often known as “secret judges.”²⁴⁹

3. The recruitment and training of judges: “[The] judicial career attracts persons ‘who feel in a particular way bound to the traditional norms and structures of society and want to protect them from change.’”²⁵⁰ Citing to some supporting data, they suggest that after all is said and done, judicial recruitment and training in Germany is not as glamorous or as self-contented as Langbein suggests.²⁵¹

Allen’s main point, as indicated above, is that the German system is not superior. The article does nothing to discredit the inquisitorial system, if indeed it is set up the way Langbein says it is. Neither Allen nor Gross find fault inherent in the inquisitorial system. Most interestingly, they focus on issues that are, at best, tangential to Langbein’s argument, but their immediate and decidedly vigorous and negative reaction, along with the content of their writing, tells a more important and coherent story: what sustains the adversarial system is tradition rather than common sense and reason. This assertion is more accurate when it comes to adversarial deportation proceedings, which will be the subject of the next section.

III. THE ADVERSARIAL DISADVANTAGE IN DEPORTATION PROCEEDINGS

A few years ago, two of this writer’s students represented an asylum-seeker from a troubled African country facing removal proceedings in the United States.²⁵² When we first interviewed the client in a detention facility, he told us that friends of his mailed him a package from France, where he had stayed for a while before attempting to enter Canada via the United States. He said that the Immigration and Customs Enforcement (ICE) gave him the package, which had been opened and apparently inspected. We asked ICE if there were any documents that they took out of the package. ICE told us to submit a FOIA request to receive an answer. Recognizing that a FOIA request would entail several additional months of detention for our client, we

249. *See id.* at 738.

250. *See id.* at 746 (quoting WOLFGANG KAUPEN, *DIE HÜTER VON RECHT UND ORDNUNG* 192-93 (1969)).

251. *See id.* at 746-61.

252. The names of the client, the students, the Government’s counsel and the location of the trial are withheld, and on file with the author. (All of the information, including the names and addresses of the students, who are now practicing attorneys, can be provided upon request).

went back to the client, explained the circumstances to him, and asked him if there might have been anything in the package that he would think could be either helpful or damaging to his asylum claim. The client positively assured us that it was impossible that they could find any evidence in that package that could undermine his asylum claim. Confident about the assurance, the students prepared the claim and the court scheduled it for an individual hearing, which in removal proceedings, is the actual trial.

On the day of the trial, the two very young third year law students, who had never had any kind of trial experience before, took their seats next to the Assistant Chief Counsel representing the United State Government. Unfortunately for them, the government's counsel happened to be a very experienced, excellent litigator whose skills are only surpassed by his zeal. The judge appeared by video and the court was called to order. As the written record had already been developed, the judge asked the student-attorneys to present witness testimony. They conducted examination-in-chief of their client and elicited all the relevant information. He consistently and credibly testified about the persecution that he had endured in his home country. At the time, it was uncontested that in that country, about a thousand people were being killed every day. The examination-in-chief took about 45 minutes, after which the judge gave the Government's counsel the opportunity to cross-examine our client. After nearly three hours of cross-examination, which touched upon all aspects of the initial testimony and more, the Government's counsel began its final line of questions. They are reproduced from memory as follows:

1. Government: When you left your country, were you in possession of a passport issued by your home government?
Client: No.
2. Government: When you left your country, did you have any other kind of official document issued by your home government?
Client: Only my driver's license.
3. Government: Let me ask you again: Did you have a passport with you when you left your country.
Client: No.
4. Government: I'll give you a final chance: have you ever had a passport issued to you by your home government at any time?
Client: I already said no, and the answer to that question is again no, I have never had a passport issued under my name by my home government.

At that point, the Government's counsel pulled a passport-looking document out of his briefcase and asked the judge's permission to approach the witness and show it to him. We obviously vigorously objected on many grounds, including unfair surprise, evidence obtained through an egregious violation of the Fourth Amendment, and violation of due process in general. At that point, we disclosed to the judge our suspicion that the Government obtained that document unlawfully from the package that was mailed to our client. Faced with a serious dilemma, the judge came up with a clever compromise: he excluded the admissibility of the evidence but allowed the use of the evidence for impeachment purposes. When the sole source of the evidence is essentially the witness's statement, its impeachment necessarily meant loss or removal where our client was concerned. Seeing the trial lost by this underhanded tactic, in the face of a witness whose testimony was so convincing and so compelling and so consistent with all objective evidence of the country's conditions, including the State Department's own report, seemed to be devastating to everyone involved, except perhaps the Government's Counsel. Finally, after we were given the opportunity to inspect the document first, the government's counsel approached the witness, confronted him with the document and asked, "Isn't this a passport issued to you by your home government?" To everybody's surprise, the witness said "No, this is the driver's license that I told you about." Fortunately for the client and his counsels, that document was indeed a driver's license that only looked like a passport. The confusion was exacerbated because the text was in French and the Government's counsel had never had it translated. That Perry Mason exchange concluded the four-hour ordeal and the judge granted asylum without hesitation.

What if that document was a passport as the government's counsel believed and the client had said "Yes, and sorry, but I did not think you had it." Without a doubt, that would have destroyed his credibility and hence, his asylum claim. It would have been a dramatic win for the government, although there would have been no way to know why the client felt that he had to conceal his passport. It is possible that he might be hiding something of no consequence at all, but it would have been enough to destroy his credibility and his chances for a successful asylum application. The kind of tactic that the Government's counsel employed is a classic adversarial tool. To make matters worse for the non-citizen,

the Federal Rules of Evidence do not apply in deportation proceedings.²⁵³

This section looks at the relevant sources of rules that make this kind of unnecessary confrontation possible. It examines the perceived roles of the judge, the government's counsel, the respondent, and the respondent's counsel under existing rules and custom.

A. *The Nature of Deportation Proceedings under the INA and Regulations*

At its formation, the polity of the United States was predicated on the notions of "limited government, negative freedom, and laissez-faire economics," and did not envision the government's role to be anything more than the protection of life, liberty, and property.²⁵⁴ As society grew in size and complexity, the original three branches of government became incapable of handling the increasing complexity. This led to the creation of the "fourth branch of government," or the administrative state.²⁵⁵ The administrative system was given a broad delegation of power to perform the government's complex tasks in a more efficient and expedited manner than the formal legislative and judicial process could possibly perform.²⁵⁶ The tasks of the administrative system include rulemaking and adjudication, which could be formal adversarial adjudication.²⁵⁷

253. See generally Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93 (2008) (In that article, I argued that the lack of formal rules of evidence might be one of the reasons that make this kind of irregularity and unfairness possible. I still maintain that position in lieu of the more fundamental change that this article proposes).

254. See STEVEN J. CANN, *ADMINISTRATIVE LAW* 9 (4th ed. 2006).

255. See *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (using the "fourth branch" for the first time, stating that the rise of the administrative state is the most significant legal development of the last century). For a good discussion of the place of administrative agencies within the constitutional framework, see generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Administrative rules enacted by the First Congress related only to customs and veterans' benefits. Before the Civil War, around eleven administrative agencies existed, which included the Internal Revenue Service and the Patent Office. By 1941, that number had grown to fifty-one. See William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 836 (2004-2005).

256. Such delegation has never been without controversy. See, e.g., *Ruberoid*, 343 U.S. at 487-89 (Jackson, J., dissenting) ("Administrative Agencies have been called quasi-legislative . . .").

257. See Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudication: A New Approach*, 1991 U. ILL. L. REV. 353, 353. For a comprehensive treatment of the functions of Administrative agencies, see generally WILLIAM F.

The delegation of the judicial function of adjudicating cases and controversies to executive administrative agencies has always faced a serious doctrinal and procedural dilemma. For example, in the 1930s, the American Bar Association noted that “The judicial branch of the federal government is being rapidly and seriously undermined [S]o far as possible, the decision of controversies of a judicial character must be brought back into the judicial system.”²⁵⁸ The choice then became between bringing the resolution of controversies back to the court system and bringing court rules to the administrative system. As the benefits of administrative adjudication had become so well-recognized by then, “[t]he effort later turned from bringing administrative proceedings into a federal court system to bringing court standards into the administrative proceedings.”²⁵⁹

By enacting the Administrative Procedure Act (APA) in 1946, Congress attempted to strike a reasonable compromise between formal judicial rules and informal administrative procedures.²⁶⁰ For example, the APA states:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts of thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence.²⁶¹

Although the numerosity of adjudicative administrative agencies does not allow for a singular conclusion, some are apparently more adversarial than others. In fact, it is suggested that administrative proceedings resemble federal non-jury trials in all aspects.²⁶² According to the Supreme Court, “the role of the modern . . . administrative law judge . . . [is] functionally comparable to that of a judge.”²⁶³ Although

FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE* 5, 32-47 (4th ed. 2010).

258. See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.4, at 12 (4th ed. 2002) (quoting 59 A.B.A.R. 539, 549 (1934)).

259. See Kuehnle, *supra* note 255, at 843-44.

260. See Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C.).

261. APA § 7(c); 5 U.S.C. § 556(d) (2000).

262. See Elliot B. Glicksman, *The Modern Hearsay Rule Should Find Administrative Law Application*, 78 NEB. L. REV. 135, 144 (1999). According to the Supreme Court, a “fundamental . . . purpose [of the APA was] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.” See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

263. See *Butz v. Economou*, 438 U.S. 478, 513 (1978) (quotations omitted).

doctrinally a part of this legacy, deportation proceedings are subject to their own exclusive rules of procedure under the INA and related regulations.²⁶⁴ The following subsections briefly discuss the nature of adversarial deportation proceedings from the perspective of the actors and highlight the shortcomings.

B. *The Role of the Government's Counsel (ICE)*

The enduring debate about whether the government's lawyer represents the interests of the particular agency that hires her, or those of the president, or even those of the public in general, seems to have no reasonable resolution.²⁶⁵ However, perhaps the most important source of federal law that provides guidance on the issue of the role of the government's lawyer is the Citizens' Protection Act of 1998.²⁶⁶ That Act provides that Department of Justice lawyers, which include ICE counsel, are subject to "State laws and rules and local Federal court rules governing attorneys in each State where such attorney engages in that

264. See INA § 240(a)(3) ("Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or . . . removed."). See also 8 C.F.R. § 240 (2007) (providing the details of the procedures). It is important to note, however, that although these rules are similar to the APA rules, the APA rules themselves are not directly applicable in immigration proceedings. This is so because of a set of Supreme Court decisions that were rendered beginning in 1950. The first of these was *Wong Yang Sung*, 339 U.S. 33 (1950). In that case, the Supreme Court held that the APA was applicable in immigration proceedings. *Id.* at 33, 51, 53. This decision was rendered two years before the adoption of the most comprehensive immigration law, i.e., the INA, in 1952. A few years later, in *Marcello v. Bonds*, the Supreme Court held that the INA is the only source of rules for immigration adjudication and as such the APA did not apply. See *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955) ("[W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviation from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive techniques and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings."). The Supreme Court reaffirmed this decision ten years later in *Ardestani v. INS*, 502 U.S. 129, 133-34 (1991) (stating that the INA is the sole and exclusive source of procedural rules in deportation proceedings).

265. See, e.g., FUNK ET AL., *supra* note 257, at 32-47. For example, a Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct has concluded that because the "public interest" and even "the government" are amorphous concepts, the responsibility of the government's lawyer is to the agency that she works for. Excerpts of the Report are reproduced in *id.* at 35-37 ("This analysis inevitably led to the conclusion that the employing agency should normally be regarded as the client of the government lawyer. In most cases, the employing agency will be a discrete entity, clearly definable and the source of identifiable lines of authority. The lawyer's duties typically will be directed by the head of the agency or his delegate; the lawyer's explicit responsibility will be limited to those assigned by the agency; and agency regulations provide a clear benchmark of assessing attorney conduct.").

266. Codified at 28 U.S.C. § 530B(a) (1998).

attorney's duties, to the same extent and in the same manner as other attorneys in that State."²⁶⁷ Accordingly, the important subsidiary sources include state, federal, and local rules of professional conduct. Although there are variations at the state level, the ABA Model Rules may be taken as an example. At the federal level, most agencies do have their own disciplinary rules, which include Immigration Regulations.²⁶⁸ These sources are discussed as follows.

Under the ABA Model Rules of Professional Conduct, which are adopted by many states, a lawyer must represent her client with appropriate competence,²⁶⁹ diligence, and zeal.²⁷⁰ The rules require organization lawyers, which include government lawyers, to act in the best interest of the organization.²⁷¹ They may make any and all non-frivolous claims to advance their client's interest.²⁷² Prosecutors in criminal cases are subject to additional rules, which require them to uphold the rule of law while maintaining their prosecutorial zeal.²⁷³ Zealous advocacy can take many different forms. An often cited example in recent years is John Yoo's "torture memo," which advised President Bush that U.S. law banned extreme acts only, which essentially justified acts such as water boarding.²⁷⁴ Though the government later withdrew it as lacking "care and sobriety,"²⁷⁵ some observers even characterized it as "standard lawyerly fare, routine stuff."²⁷⁶ There is no denying that wherever the mindset is adversarial,

267. 28 U.S.C. § 530B(a).

268. See *infra* notes 269-84 and accompanying text.

269. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

270. See *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.")

271. See *id.* R. 1.13.

272. See *id.* R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.") The comment to this rule states: "The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." *Id.* R. 3.1 cmt.

273. See *id.* R. 3.8.

274. See FUNK ET AL., *supra* note 257, at 32.

275. *Id.* (citing JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT IN THE BUSH ADMINISTRATION* 146, 148, 150, 151 (2007)).

276. *Id.* at 43 (quoting Eric Posner & Adrian Vermeule, *A "Torture" Memo and its Tortuous Critics*, *WALL ST. J.*, Jul. 6, 2004, at A.22 (Eastern edition)).

this might seem “routine stuff” for lawyers, whether they are private or government lawyers.

There are now elaborate disciplinary rules regulating “immigration practitioners.”²⁷⁷ The ethical responsibilities imposed by these rules are more stringent than the ordinary rules of professional conduct.²⁷⁸ While the rules against advancing frivolous claims or defenses apply to all attorneys appearing before an immigration judge,²⁷⁹ some of the more stringent rules on discipline do not apply to the government’s lawyers,²⁸⁰ who are supposedly subject to separate Department of Justice disciplinary procedures, which the regulations do reference.²⁸¹ The referenced provision, however, says only that any complaints of professional misconduct go to the Office of Professional Responsibility (ORP) within the Department of Justice, a department which handles the complaints through its own bureaucratic process.²⁸² For example, in 2009, the OPR received 1,254 complaints of misconduct from various sources, took a look at 245 matters, and selected 100 for a full investigation.²⁸³ The full investigations found that twelve government attorneys were responsible for violations of the rules of professional

277. See 8 C.F.R. § 1003.101-108 (2009).

278. See 8 C.F.R. § 1003.102 (2009).

279. See 8 C.F.R. § 292.3(a)(1) (2011) (referring to both private lawyers and government lawyers).

280. See 8 C.F.R. § 1003.101(b) (2009):

(b) *Persons subject to sanctions.* Persons subject to sanctions include any practitioner. A practitioner is any attorney as defined in §1001.1(f) of this chapter who does not represent the federal government, or any representative as defined in §1001.1(j) of this chapter. Attorneys employed by the Department of Justice shall be subject to discipline pursuant to §1003.109. Nothing in this regulation shall be construed as authorizing persons who do not meet the definition of practitioner to represent individuals before the Board and the Immigration Courts or DHS.

Id. See also 8 C.F.R. § 292.3(b) (2011) (creating two different disciplinary processes—one for respondents attorneys which is immediate and tangible as the immigration judge would hear the disciplinary case and one for government attorneys handled through the DOJ’s internal process).

281. See 8 C.F.R. § 1003.109 (“Complaints regarding the conduct or behavior of Department attorneys, Immigration Judges, or Board Members shall be directed to the Office of Professional Responsibility, United States Department of Justice. If disciplinary action is warranted, it shall be administered pursuant to the Department’s attorney discipline procedures.”). For a brief discussion and further citation of this bifurcated disciplinary system, see 1 NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 7:1 (3d ed. 2010).

282. See procedures at U.S. DEP’T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, <http://www.justice.gov/opr/proc-hdl.htm> (last visited Mar. 10, 2012). Presumably, the government attorneys are also subject to the United States Attorneys’ Manual, which consist of nine different titles, including criminal law, which covers immigration. UNITED STATES ATTORNEYS’ MANUAL (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html.

283. See ORP ANNUAL REPORT 6 (2009), available at <http://www.justice.gov/opr/annualreport2009.pdf>.

conduct, and only seven of these were found to have done so willfully.²⁸⁴

It is under this regime of rules and sanctions that the ICE attorneys represent the government in deportation proceedings. Under section 239 of the INA, they are authorized to issue a Notice to Appear (NTA),²⁸⁵ which is a charging document that outlines, among other things,²⁸⁶ the grounds of inadmissibility²⁸⁷ or deportability of the noncitizen.²⁸⁸ They then proceed to prove the charges by presenting evidence.²⁸⁹ The INA places the burden of proving deportability of an already-admitted noncitizen on the government. It states in relevant part that the government “has the burden of establishing by clear and convincing evidence that . . . the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”²⁹⁰ To carry its burden of proof, the government may rely on all sorts of evidence, including the respondent’s admission of alienage, which is perhaps the most common source of evidence.²⁹¹ A respondent’s statement of alienage to inquiring law enforcement is admissible at trial, even if it is obtained in violation of the Fourth Amendment.²⁹²

If the court finds the respondent deportable, he will have the opportunity to seek affirmative relief.²⁹³ The government’s attorney, as the respondent’s adversary, is tasked with the duty of making sure that affirmative relief is not granted by presenting evidence to counter the respondent’s claim.²⁹⁴ This issue is discussed in the next section in connection with the respondent’s role. However, it is important to

284. *See id.* at 9.

285. The Regulations authorize forty-one different categories of employees of the Department of Homeland Security to issue NTAs. *See* 8 C.F.R. § 239.1(a)(1)-(41) (2005).

286. Including the nature of the proceeding, the authority under which it is issued, and the act that is alleged to be a violation of law. *See* INA § 239(a)(1)(A)-(C) (2006).

287. *See* INA § 240(a)(2) (2006). The Grounds of inadmissibility are set forth under INA § 212(a)(1)(A) (2010).

288. The grounds of deportability, incorporating grounds of inadmissibility by reference, are found in INA § 237 (a) (2008).

289. For the details of the procedure, *see* 8 C.F.R. § 1240.2(b).

290. INA § 240(c)(3)(A) (2006).

291. *See generally* INA § 240(c)(3).

292. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040-46, 1050 (1984) (holding that the exclusionary rule does not apply in an immigration deportation proceeding as it is civil—not criminal—in character). For a recent commentary on the exclusionary rule in immigration, *see generally* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth Amendment and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010).

293. Legomsky, *supra* note 8, at 1641-42.

294. *Id.*

emphasize here that, apart from the expectations under the rules of professional conduct, the government attorneys themselves, because of training, orientation, and tradition, see their role as more adversarial than in the criminal process. For example, they are not required to produce exculpatory evidence,²⁹⁵ although a due process argument could be made to that effect in outrageous cases.²⁹⁶

Professor Deborah Anker's study suggests that the government attorneys "took an oppositional stance" in each of the 193 cases that researchers attended.²⁹⁷ For instance, in one case described in this study, the government's counsel detected a substantial error of law that favored his client, the government, and failed to inform the court as he felt it was not his responsibility to make that correction in the adversarial process.²⁹⁸ In another case, defense counsel arrived late and the judge ruled against the non-citizen for that reason.²⁹⁹ When the defense lawyer asked for a reopening, the court said it would grant it only if the government agreed.³⁰⁰ Of course, the government's attorney did not agree to reopen the case, which remained closed in favor of the government.³⁰¹ Recall that this charade happened knowingly in the presence of researchers. When asked by the researchers for a comment, the government's attorney said: "My client [the government] wants a deportation order. We could not have done better."³⁰² Anker's research further revealed that the government attorneys'

manner frequently was hostile, sarcastic, or disbelieving . . . [they] also raised repeated and vigorous objections during direct examinations. Although there are no formal rules of evidence in immigration proceedings, the trial attorneys made numerous objections to testimony and evidence including narrative answer, hearsay, lack of foundation, and leading question. In many cases, this use of objections made it

295. See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 489-90 (1992).

296. See, e.g., *Diric v. INS*, 400 F.2d 658, 661 (9th Cir. 1968) (Ely, J., concurring) ("It distresses me that an alien must depart our country with justified impression that the U.S. Government, through an over-zealous advocate, has been unnecessarily unkind, if not abusive.").

297. See Anker, *supra* note 295, at 436, 492.

298. See *id.* at 491.

299. See *id.*

300. See *id.*

301. See *id.*

302. See *id.*

difficult for applicants to communicate fear and other feelings they had experienced³⁰³

At the most practical level, recent studies have also found that practitioners believe that ICE attorneys “invariably seek the worst outcome possible for the immigrant and unnecessarily drag out cases by litigating every issue, thereby undermining both the legitimacy and efficiency of Immigration Courts.”³⁰⁴

C. *The Role of the Respondent*

Represented or not, as a party litigant in this tripartite adversarial process, the respondent has many responsibilities. First, answering the charges of deportability, a typical NTA reads “you are removable under INA 237(a)(1)(A) as an alien inadmissible at the time of entry.”³⁰⁵ If the noncitizen admits this charge, knowingly or unknowingly, the judge would summarily find him deportable as charged.³⁰⁶ Unlike in criminal proceedings, apart from the duty to provide appropriate translation, no one has the responsibility to make sure that the respondent understands the charges, or that she admits or denies them knowingly and voluntarily. The government’s responsibility is rather interesting—it is only to prevail, and the judge’s responsibility is only to declare the winner.³⁰⁷ It is important to reiterate that, although the respondent has the right to be represented by counsel, such will not be appointed or provided to her; she must retain and pay for legal representation,³⁰⁸ which is why the vast majority of them appear without counsel.³⁰⁹

Second, consistent with the adversarial tradition, the INA allows the respondent the opportunity to “examine the evidence against [her], to present evidence on [her own] behalf, and to cross-examine witnesses presented by the Government”³¹⁰ Third, if the charge is based on a lack of legal status and the respondent has a lawful status, she has the

303. *Id.* at 493, 495.

304. See ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 1-29 (quoting CHICAGO APPLESEED FUND FOR JUSTICE, ASSEMBLY LINE INJUSTICE, BLUEPRINT TO REFORMING AMERICA’S IMMIGRATION COURTS 16 (2009) [hereinafter Appleseed], available at <http://appleseednetwork.org/Portals/0/Documents/Publications/Chapter%204.pdf>).

305. See generally INA § 237(a).

306. See generally 8 C.F.R. § 1240.8.

307. See generally INA § 240(c)(3).

308. See INA § 240(b)(4)(A) (“the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”).

309. See ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 5-8.

310. INA § 240(b)(4)(B).

burden of proving the existence of that legal status “by clear and convincing evidence.”³¹¹ Although it might at times be as simple as providing a copy of her documentation of lawful permanent resident status, colloquially called a ‘Green Card,’ it often demands some serious legal maneuvering. Fourth, as indicated in the previous section, if the government prevails in obtaining the court’s ruling on the charge of deportability, the respondent may be allowed to seek one of the many forms of affirmative relief, which include asylum,³¹² adjustment of status,³¹³ cancellation of removal,³¹⁴ and voluntary departure.³¹⁵ The respondent bears the burden of proving, not only that he meets the statutory requirements, but also that he deserves the favorable exercise of discretion, as all of these forms of relief are discretionary.³¹⁶ The most relevant provision to this effect reads:

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant’s application for relief or protection as provided by law or regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant’s burden of proof.³¹⁷

The government’s responsibility remains to be making the contrary argument with a view to prevailing over the noncitizen. The respondent has the right to cross-examine the government’s witnesses,³¹⁸ though in most cases he has no idea how to do this. The next section provides a detailed discussion of the judge’s role in removal proceedings.

311. See INA § 240(c)(2)(B).

312. See INA § 208. A related form of relief called withholding of removal may also be sought as a defense from removal under INA § 241(b)(3). The jurisprudence in this area is rich, but is beyond the scope of this discussion.

313. See INA § 245.

314. See INA § 240A(a)-(b).

315. See INA § 240B. Other forms of affirmative relief might include Registry under INA § 249 and Relief from Deportation under the CAT, *supra* note 14.

316. See INA §§ 208, 240A, 240B, 245(a).

317. INA § 240(c)(4)(B).

318. See INA § 240(b)(4)(B).

D. *The Role of the Judge*

Writing in a related context, Professor Legomsky notes that judges' perception of their role, which includes "their own expectations concerning the functions, duties, and powers that courts ought to assume—are one of the central factors influencing judicial decision-making."³¹⁹ Under existing rules, the immigration judge presides over the dispute between the government and the respondent.³²⁰

The role of the immigration judge has undergone significant changes over the years. For much of the history of the U.S. immigration law, immigration judges were a part of the enforcement process, acting as senior immigration officers.³²¹ Called "special inquiry officers" prior to 1996, their duties were not limited to adjudication of cases.³²² Due process concerns over the merger of law enforcement and adjudicative functions in one official led to the Supreme Court's 1950 decision in *Wong Yang Sung v. McGrath*,³²³ which disallowed such merger on statutory grounds.³²⁴ After that decision, however, some uncertainty lingered because the Court's decision, which predated the enactment of the INA, rested on the APA and not constitutional due process.³²⁵ In any case, the INA exempted the immigration processes from the separation of functions requirement of the APA for many practical and political reasons.³²⁶

The beginning of the adversarial process could be traced to the enactment of the INA in 1952. According to Professors Aleinikoff, Martin, and Motomura, "The seeds of this evolution were sown in the statute itself, which authorized the Attorney General to assign another immigration officer to present the evidence on behalf of the government

319. STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 235 (1987) (relying on numerous sources). Although he says this in the judicial decision-making context, the underlying proposition probably holds true in the context of administrative adjudication.

320. See 8 C.F.R. § 1001.1(i) ("The term *immigration judge* means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review, qualified to conduct specific classes of proceedings including a hearing under section 240 of the [Immigration and Nationality] Act.") (emphasis in original). Although the immigration judge also adjudicates cases in proceedings other than those under section 240, the focus here is on section 240 proceedings. The other proceedings include expedited proceedings under INA §§ 235, 238.

321. See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 249 (5th ed. 2003).

322. *Id.*

323. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950).

324. See ALEINIKOFF ET AL., *supra* note 321, at 249.

325. *See id.*

326. *Id.*

and to carry cross-examination. This freed the special inquiry officer for a more passive, judge-like decision making role.³²⁷ Regulatory reforms in 1956 and 1962 created a specialized cadre of government attorneys to represent the government in deportation proceedings. “Today, in practice, trial attorneys appear for the government in all proceedings before immigration judges.”³²⁸ The roles and status of the immigration judges also changed during the same time. Beginning from 1956, a law degree became a required qualification.³²⁹ In 1973, the name changed from “special inquiry officers” to “immigration judges” and the officials became required to wear black robes during hearings in the courtroom.³³⁰

However, it was not until 1983 that the immigration judges were formally separated from the enforcement branch, then called the INS, to be organized under the EOIR within the Department of Justice. That move was to ensure some independence as their previous position under the INS subjected them to direct supervision by the district director.³³¹ Although this appeared to be a move toward functional independence, immigration judges still remained part of the Department of Justice under the Attorney General, the nation’s chief law enforcement officer.³³² The most recent restructuring occurred in 2003 as a result of the Homeland Security Act.³³³ It separated the INS, which was the enforcement branch, and the immigration judges into two departments, the Department of Homeland Security and the Department of Justice, respectively.³³⁴ For greater clarity, under the existing statutory and regulatory structure, immigration judges are within the EOIR under the

327. *See id.* This evolution in the text refers to the evolution from combining enforcement and adjudicative functions in one person to separating them. It is used to suggest that that was perhaps the beginning of the adversarial procedures as the government started to rely on a second official, leaving the first as a neutral decision maker, which, with the addition of the respondent as a party litigant, effectively converted the system into the traditional adversarial process.

328. *Id.* at 249-50.

329. *Id.* at 250.

330. *See id.* (citing Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 *Interpreter Releases* 453 (1988)). *See also* James P. Vandello, *Perspectives of an Immigration Judge*, 80 *DENV. U. L. REV.* 770, 771 (2003) (noting the requirement to wear robes).

331. *See* ALEINIKOFF ET AL., *supra* note 321, at 250-51.

332. *Id.* at 250. *See also* Vandello, *supra* note 330, at 771 (noting that the concern was “judges being paid by the same agency that prepared and prosecuted cases.”).

333. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

334. *See* ALEINIKOFF ET AL., *supra* note 321, at 251.

DOJ.³³⁵ The functions of the former INS were divided into three agencies called the United States Citizenship and Immigration Services (USCIS),³³⁶ Customs and Border Protection (CBP),³³⁷ and Immigration and Customs Enforcement (ICE),³³⁸ all within the Department of Homeland Security.³³⁹

Under existing rules, as indicated in the previous section, while ICE is responsible for representing the government, immigration judges are supposed to be neutral adjudicators. This neutral role has several characteristics. The pertinent statutory provision describes the general role as: “An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”³⁴⁰ The statute states the specific functions as: “The immigration judge shall administer oaths, receive evidence, and *interrogate, examine, and cross-examine the alien and any witnesses.*”³⁴¹ Other powers include the issuance of subpoenas sanctioning of practitioners by civil money penalty for contempt of court.³⁴² A related provision states: “At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.”³⁴³ More particularly, it provides that “The determination of the immigration judge shall be based only on the evidence *produced* at the hearing.”³⁴⁴

335. Comprehensive information on the structure is available at U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.usdoj.gov/eoir> (last visited Mar. 10, 2012).

336. Comprehensive information about USCIS is available at U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis> (last visited Mar. 10, 2012).

337. Comprehensive information about the CBP is available at U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov> (last visited Mar. 10, 2012).

338. Comprehensive information about ICE is available at U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov> (last visited Mar. 10, 2012).

339. Comprehensive information about DHS in general is available at U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov> (last visited Mar. 10, 2012).

340. INA § 240(a)(1).

341. INS § 240(b)(1) (emphasis added).

342. *Id.*

343. *See* INA § 240(c)(1)(A).

344. *Id.* The functions of the immigration judge are elaborated under the relevant regulations. *See* 8 C.F.R. 1240.1, which reads in its entirety:

(a) Authority. (1) In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to: (i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act; (ii) To determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub. L. 105100, section 902 of Pub. L. 105277, and former section 212(c) of the Act (as it existed prior to April 1, 1997); (iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the

As discussed above, the statute allocates the burden of proof between the respondent and the government,³⁴⁵ which means that it is their joint responsibility to produce the evidence. The judge's responsibility is limited to keeping the record and ruling on the record as developed by the parties. In the process of the development of the record, however, the judge is authorized to subpoena, examine, and cross-examine witnesses presented by the party litigants as needed.³⁴⁶

E. A Closer Look at the Roles of Three Parties:

The above discussion shows that there is no confusion about the roles of the party-litigants: they are there to win, the government to deport, and the noncitizen to stay, by all legal means necessary. The role of the judge, however, is not without confusion. It is characterized by three distinct functions: First, the immigration judge is supposed to

Convention Against Torture; and (iv) To take any other action consistent with applicable law and regulations as may be appropriate. (2) In determining cases referred for further inquiry, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter. Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases. An immigration judge may certify his or her decision in any case under section 240 of the Act to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under sections 101(b)(4) and 103 of the Act. (b) Withdrawal and substitution of immigration judges. The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so. (c) Conduct of hearing. The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing. (d) Withdrawal of application for admission. An immigration judge may allow only an arriving alien to withdraw an application for admission. Once the issue of inadmissibility has been resolved, permission to withdraw an application for admission should ordinarily be granted only with the concurrence of the Service. An immigration judge shall not allow an alien to withdraw an application for admission unless the alien, in addition to demonstrating that he or she possesses both the intent and the means to depart immediately from the United States, establishes that factors directly relating to the issue of inadmissibility indicate that the granting of the withdrawal would be in the interest of justice. During the pendency of an appeal from the order of removal, permission to withdraw an application for admission must be obtained from the immigration judge or the Board.

8 C.F.R. § 1240.1.

345. See, e.g., INA § 240(c)(2), (3)(A).

346. INA § 240(b)(1).

“conduct proceedings”³⁴⁷ presumably as a neutral adjudicator. Second, she is supposed to “interrogate, examine and cross-examine”³⁴⁸ witnesses, supposedly to discover the truth. Third, she is given the discretion to grant or deny relief when she deems necessary.³⁴⁹

While she must make her decisions based on the record as developed by the parties and as tested by the judge herself, ultimately she has no responsibility to add to the record or to independently verify the truth.³⁵⁰ Whereas her role as a cross-examiner makes her look like a civil law inquisitorial judge, her mandate’s restriction to the record produced by the parties makes her look like a traditional common law oriented adversarial judge. But then, she also has this power to grant or deny relief in the exercise of discretion, which actually makes her look more like an executive official than a judicial one. In fact, her boss is the nation’s chief law enforcement officer, who delegates this discretion to her.³⁵¹ That means he could reward her if he likes her or fire her if he does not.³⁵² She is supposed to be independent, but she has to be respectful of her law enforcement colleagues, who appear before her as prosecutors even though they are in a different department of the same agency. When an indigent respondent appears before her who knows nothing about the process, she often can’t help him. She presides over an average of 4.3 deportation cases a day.³⁵³ She shares her only assistant with four other judges.³⁵⁴ The majority of the respondents who appear before her do not speak her language.³⁵⁵ Her computer is old and her voice recorder malfunctioning, yet she is expected to render detailed, intelligible, and thoughtful oral decisions. Her stress level is often

347. See INA § 240(a)(1).

348. See INA § 240(b)(1).

349. See, e.g., INA § 208 (asylum); § 240A(a)-(b) (cancellation of removal).

350. *Id.*

351. See 8 C.F.R. § 1003.1 (2009); see also *Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge*, 72 Fed. Reg. 53, 673 (Sept. 20, 2007) (to be codified at 8 C.F.R. pt. 1003.).

352. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 374-75, 389 (2006).

353. See Legomsky, *supra* note 8, at 1652 (citing Appleseed, *supra* note 304, at 10).

354. *Id.*

355. About 78 percent of respondents have a language other than English as their first or primary language. *Id.* at 1653.

higher than an emergency room physician.³⁵⁶ She wears so many hats. She has so many identities. Is she “schizophrenic?”³⁵⁷

The ordinary respondent who appears before this judge faces the worst of both the adversarial and inquisitorial systems because: (1) He is subjected to cross examination and other forms of testing, not only by the opposing counsel, but also by the judge, who may appear to him to be “on his side.”³⁵⁸ (2) If he cannot present his own evidence and he otherwise fails to carry his burden of proof, he gets no help from the judge, except one or two continuations so that he can find counsel who could help him. In other words, unlike the inquisitorial judge who could rely on judicially-discovered evidence, the immigration judge has to rely exclusively on evidence presented by the parties. Unlike the common law judge who should maintain “cold neutrality,”³⁵⁹ the immigration judge is required to cross-examine and test the credibility of the respondent.³⁶⁰ Unlike the inquisitorial judge, she is not authorized to help the respondent find and/or produce evidence that could help his

356. This seems to be true. *See id.* at 1655-56 (citing a web-based survey summarized in Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 59-60 (2008)).

357. This term is borrowed from the following paragraph by Jeffrey S. Wolfe and Lisa B. Proszek's article on the role of Administrative Law Judges in the social security context, which has some similarities, as will be discussed in Part VI *infra*. The passage reads:

The problem, of course, is that the Commissioner is *unrepresented* by counsel in the administrative hearing. The task of eliciting such evidence befalls the Administrative Law Judge, who must cull from the evidentiary record pertinent facts upon which to base his or her inquiry of the vocational expert, who must then opine regarding the existence of other work within the national or regional economies. The inquiry is undertaken by the judge, subject to cross-examination by the claimant's lawyer. The courts have described this process as a sort of judicial schizophrenia, *i.e.*, Social Security Administration Administrative Law Judge wears the “dual hats” of investigator and adjudicator.

Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 298 (1997) (emphasis in original) (citing *Pastrana v. Chater*, 917 F. Supp. 103, 106-07 (D.P.R. 1996)). The role that is considered schizophrenic in the social security context is the coupling of investigative and decision making roles, which was historically the case in immigration as described above. However, the existing system is more schizophrenic than the previous system because of the lack of clarity of the role, which is characterized by one sided investigation and decision-making without adversarial neutrality. It is a combination of irreconcilable aspects of two systems.

358. *See, e.g.*, Anker, *supra* note 295, at 489 (“Instead of an independent adjudicator and an opposing counsel, the perception arose in many cases that applicants faced two, instead of one, opposing counsels.”).

359. *See* Wolfe & Proszek, *supra* note 357, at 300-01 (quoting *United States v. Orbiz*, 366 F. Supp. 628, 629 (D.P.R. 1973) (“A defendant is entitled to the cold neutrality of an impartial judge and the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent.”)).

360. *Id.* at 303.

case.³⁶¹ This arrangement is a lose-lose arrangement, not only for the respondent, but also for the government and the judge. It is a liability for the government's counsel when the respondent is unrepresented because, apart from the match being uninteresting and hopelessly one-sided, the judge cannot test the strength and propriety of the government's case against the respondent. It is a liability for the judge because the information she gets is one-sided and she can never be certain about its accuracy or completeness. As she cannot collect her own evidence, she has to make a decision based on one-sided information. At a more practical level, even when the respondent is represented and the duel is matched, what the judge gets is selected bits of evidence, twisted facts, and coached fact and expert witnesses. To the extent this kind of adversarial process is believed to be instrumental to arriving at an accurate result, the most fundamental aspect of it is missing in the deportation context—the judge is not supposed to maintain “cold neutrality.”³⁶² Considered holistically, it is clear that the existing system picks and chooses the worst aspects of the adversarial and inquisitorial systems. The end result, not surprisingly, is a system that does not work well for anyone, least of all the respondent, who is the least-equipped of the three to navigate the process. There is no disagreement as to this conclusion, although there is diversity of opinion concerning the diagnosis. The next section looks at current diagnostic opinions and proposals for reform as a prelude to the proposals outlined in the section that follows.

IV. CURRENT DIAGNOSIS AND PROPOSALS FOR REFORM

Increased appreciation of the failings of the system of immigration adjudication has in recent times created an upsurge of diagnostic studies³⁶³ and reform proposals by organizations,³⁶⁴ and prominent

361. *Id.* at 303-04.

362. *See* INA § 240 (b)(1). For example, take the following passage from Professor's Anker's study: “In general, the judges' activism was not directed at assisting the applicant in developing the substance of her claim . . . the judges' basic conception of the hearing and their role was to ‘test’—not to help establish—the applicant's credibility.” *See* Anker, *supra* note 295, at 497-98. *But see* Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002) (quoting Jacinto v. INS, 208 F.3d 725, 733-34 (9th Cir. 2000) (holding that the IJ should “scrupulously and conscientiously probe into inquire of, and explore for all the relevant facts[.]” but then adding “We emphasize that our holding today will not transform IJs into attorneys for aliens appearing pro se in deportation proceedings. . .”) The confusion is clearly enduring.

363. The most notable ones are the ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7; Appleseed, *supra* note 304; and Ramji-Nogales et al., *supra* note 25.

scholars.³⁶⁵ From this, two sets of coherent narratives have emerged—one set relating to the diagnosis and another relating to reform. Each set is briefly described below.

A. *Diagnosis*

All studies and scholarly commentary agree that the system suffers from inefficiency, inaccuracy, and unacceptable levels of lack of fairness.³⁶⁶ To avoid unnecessary repetition, the ABA study, which is the most recent and most comprehensive of all studies, may be used as a guide to highlighting the perceived causes of the problem. This study lists several substantive and procedural factors that burden the system unnecessarily. The substantive factors include the statutory bars to reentry³⁶⁷ and the breadth of the definitions of aggravated felony and crimes of moral turpitude.³⁶⁸ At the procedural level, shortcomings include: large caseloads; inadequate staffing and facilities; inappropriate recruitment and training; bias; and lack of clarity of ethical standards and problems of decisional independence.³⁶⁹ On the prosecution side, shortcomings include inefficient use of prosecutorial discretion, inconsistent positions on issues within the department, and unnecessary detentions.³⁷⁰ Lack of representation of respondents in these proceedings is also identified as a major problem.³⁷¹

B. *Reform Proposals*

The problem that attracted the most attention is the lack of decisional independence, which is perceived to be inherent in the

364. Most notably, ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at Part 6.

365. Most notably, Legomsky, *Restructuring Immigration Adjudication*, *supra* note 8.

366. *See id.* at 1651; *see also* Chacón, *supra* note 292, at 1628-30; ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 6-4; Appleseed, *supra* note 304, at 6 (all discussing these problems in detail).

367. *See* ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 1-65.

368. *Id.* at 1-65 to -66.

369. *See id.* at 2-16 to -27; *see also* Jill Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 541-42 (2011) (appreciating the problem of decisional independence but identifying related problems and advocating a holistic approach to solving the crisis).

370. *See* ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 1-25 to -59.

371. *See id.* at 5-1 to -10. Professor Legomsky classifies the shortcoming into four categories: severe underfunding, reckless procedural shortcuts, inappropriate politicization of the process, and some unsuitable adjudicators. *See* Legomsky, *supra* note 8, at 1639.

structure. As such, most reform proposals focus on that issue.³⁷² The pioneer of this reform movement is Professor Legomsky. In his 2006 Cornell article, he argued convincingly that law enforcement supervision diminishes the independence of immigration adjudicators.³⁷³ He took that discussion a step further in his 2010 Duke article and provided a more complete picture of the reform that he envisions.³⁷⁴ A closer look at his proposal is very instructive.

Professor Legomsky's proposed reform would convert immigration judges into ordinary administrative law judges with all the accompanying benefits and protections; this would take them out of the DOJ and put them under a new independent executive department.³⁷⁵ His proposal then merges the existing two levels of appellate review, i.e., the BIA and the Federal Circuit Courts of Appeals into a one-level specialized Article III court for immigration review, staffed with experienced district and circuit court judges on a two-year rotation assignment.³⁷⁶ He argues rather convincingly that this would be constitutional³⁷⁷ and provides the policy and cost benefits of this system.³⁷⁸ At the policy level, it maintains the specialization that is required of the administrative system while preserving a generalist review through the Article III court.³⁷⁹ He calls this court generalist because of its being staffed by rotating generalist judges.³⁸⁰ The benefits of this court system seem clear: it merges two levels of review into one, simultaneously lowering judicial costs and providing due process by a neutral judiciary not subject to the supervision of law

372. Several studies and writings proposed an article I court to replace the existing system of immigration adjudication. See ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at Part 6 (analyzing various options); see also Ramji-Nogales et al., *supra* note 25, at 386 (endorsing the Article I option). For an older proposal, see Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651-54 (1981). But see generally Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010) (expressing uncertainty about the outcome of a specialized court system).

373. See Legomsky, *Deportation and the War on Independence*, *supra* note 352, at 376-77. Ashcroft's restructuring of the BIA seems to have provoked a significant part of the increased interest on the issue of decisional independence. For Professor Legomsky's earlier reaction, see LEGOMSKY & RODRIGUEZ, *supra* note 7, at 744-51. One interesting note is the following: "When the axe finally fell, it fell almost entirely on those Board members whose decisions had most frequently favored the noncitizens; credentials and seniority clearly played little, if any, role." *Id.* at 750. The earlier edition of this book also contained the same note.

374. See Legomsky, *supra* note 8, at 1636.

375. *Id.* at 1640.

376. See *id.* at 1686-88.

377. See *id.*

378. See *id.* at 1688-1710.

379. See *id.* at 1694-96.

380. See *id.* at 1692.

enforcement officials of the executive branch.³⁸¹ Professor Legomsky would preserve the specialization at the trial level because this specialization is useful and important. He notes that one of the benefits of specialization is the ability of the ALJ to help the unrepresented respondent.³⁸² This aspect of the proposal is quite interesting.

This knowledge [legal knowledge and expertise] lessens their dependency on counsel and staff for basic information and mitigates the risk that a party will win or lose because of an imbalance in the skills or efforts of the opposing attorneys. When parties appear pro se, the expertise of the adjudicator can be at least a partial substitute for counsel.³⁸³

He does not, however, define the exact responsibilities of the ALJ, nor does he address the issue of the conduct of proceedings before the ALJs. It could be assumed that he would probably maintain the existing adjudicatory environment while freeing the judges from political control. While endorsing Professor Legomsky's macro-level restructuring proposal for the reasons that he presents so well, the following section focuses on the micro-level issues, the actual conduct of the proceedings before the ALJ, and that section recommends that ALJs be assigned an inquisitorial role, minimizing the need for representation, saving a significant amount of resources, and improving the fairness of the system. The following proposed micro-level changes are useful in addressing some of the existing problems, even if the existing macro-level structure remains unchanged.

V. THE INQUISITORIAL ADVANTAGE

As Professor Taylor notes, "structural reform by itself will not necessarily improve the judicial demeanor of the intemperate, or make the slipshod judge more careful."³⁸⁴ She attributes the problem in part to "too many people who should not be in a position of judging others, especially those with no power serving as immigration judges."³⁸⁵

381. *See id.* at 1689-1710. Interestingly, he notes that BIA review is actually more expensive than court of appeals review. *See id.* at 1698.

382. *Id.* at 1692-93.

383. *Id.*

384. *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 500 (2007).

385. *Id.* (quoting Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 275 (1994)).

Other scholars offer other explanations,³⁸⁶ but surprisingly, no close attention has been given to the benefits, drawbacks, and effects of the adversarial nature of the proceedings. This section brings the insinuations of the discussions in the previous sections to bear by focusing on the comparative advantages of the inquisitorial system.

At the risk of over-simplification, the basic considerations could be reduced into four basic categories: (1) cost and efficiency, (2) accuracy, (3) fairness, and (4) political acceptability. The advantages an inquisitorial system would bring to the trial level are discussed under these four categories.

A. *Cost and Efficiency*

The noncitizen's adversaries in deportation proceedings, the Immigration and Customs Enforcement (ICE) of the Department of Homeland Security and the Office of Immigration Litigation (OIL) of the Department of Justice, jointly employ 951 attorneys.³⁸⁷ 712 of those attorneys are ICE attorneys, and the remaining 239 are OIL attorneys.³⁸⁸ Most notably, the total number of attorneys who represent the government is more than quadruple the number of immigration judges. All of these attorneys are tasked with the responsibility of making sure that the immigrants in deportation proceedings are deported. As such, they almost always take a position inconsistent with that of the immigrant as the immigrant's adversary.³⁸⁹ In this adversarial system, they can, and are expected to, make all non-frivolous arguments that might help their client, the government, win. To use Judge Marvin Frankel's words once again, they are gladiators who use their lethal weapons in the courtroom not to crusade after the truth, but to win.³⁹⁰ Although Judge Frankel said this in the civil litigation context, it is just as true, if not more so, in the context of deportation proceedings. As he declares, "if this is banal, it is also overlooked too much . . ."³⁹¹

386. See, e.g., ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 2-25 to -26; see also sources cited in Section II.b *supra*.

387. See Legomsky, *supra* note 8, at 1701, relying on data he collected through phone interviews and e-mail messages from DHS and DOJ contacts. Of the total number, 712 are ICE attorneys. *Id.*

388. *Id.* ICE attorneys earn anywhere from \$49,544 to \$127,604 per year. OIL attorneys earn an average of \$123,000 per year. *Id.*

389. Studies support this conclusion. See, e.g., ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 1-28 to -29.

390. Frankel, *supra* note 38, at 1039.

391. *Id.*

Imagine the amount of taxpayers' money we would save and the kind of order and civility we would bring to the courtroom if we did not have 951 attorneys representing the same client. It might sound simplistic, but consider for a moment why the United States government would ever need this many skillful attorneys to deport immigrants, most of whom are unrepresented. If this organization under the current system were to be defended, if there were a simple reason why this setup is the ideal one, how would that defense be presented? What might that simple reason be? One thing is certain, the answer could not include cost-saving and efficiency, two traits no one seriously associates with the adversarial system.³⁹² As to cost and efficiency, the inquisitorial model is clearly preferable because it would ask the 951 attorneys to leave the courtroom, or, if they remain in the courtroom, each would be the sole lawyer in the courtroom adjudicating cases, and not fighting tooth and nail against an unarmed adversary.

Of course, the non-frivolous argument for the preservation of the adversarial system relates to the next three points: accuracy, fairness, and political acceptability of the adjudicatory system. The merits of these claims in the deportation context are considered in turn below.

B. Accuracy

If we must spend money on lawyers to ensure the accuracy of the outcome of immigration litigation, imagine what accuracy might result if we were to add 712 more judges. This would require converting all of the 712 ICE attorney positions into immigration judge positions, and preserving the 239 OIL attorney positions for various immigration-related prosecutorial type work that even an inquisitorial system might require. The immediately apparent effect of this conversion would be that the existing 4.3 caseload per day per immigration judge would go down to about 1 a day. Give any immigration judge one case per day,

392. For example, in an older piece, Professor David Martin suggested that affirmative asylum adjudication by asylum officers in a non-adversarial setting costs less than half of the adjudication of an asylum claim by an immigration judge in an adversarial setting. See David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 746 (1995) (back then, while affirmative asylum cost \$600, defensive asylum before an immigration judge cost \$1,300). For a comprehensive review of the asylum system that existed before the reform that Professor Martin discusses in the above cited article, and his proposal, which led to the current non-adversarial model of the existing affirmative asylum system, see generally David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990).

remove the attempts by the attorneys to “spray pepper in her eyes”³⁹³ and measure the accuracy of the outcome. Even to equalize the existing caseload of immigration judges with that of the Social Security Administrative Law Judges, we would need 97 more immigration judges.³⁹⁴ Note, however, that the SSA proceedings are not adversarial, which is why they have 1,006 judges³⁹⁵ on the same side, doing the same thing, and not confusing one another. If we were to add 941 lawyers to the existing pool of 214 immigration judges, we would have 1,155 judges, significantly more than the SSA ALJs.³⁹⁶

To be sure, as discussed in Section II.c above, in relation to the debate between Langbein and Gross, there are three fundamental arguments against the inquisitorial system which relate to accuracy. The first of these perceived disadvantages is the possibility of a premature judgment by an inquisitorial judge who is also serving as an investigator. The response to this is that the claimant is a part of the investigation from start to finish and thus will be able to direct the investigating judge to evidence that favors him. In the deportation context, where the majority of the immigrants are not represented, the alternative is allowing the judge to make a decision based on one-sided evidence. A premature decision based on one’s own investigation is probably better than a decision based on incomplete evidence carefully selected and presented by one persuasive party. As Langbein suggests, the benefits of deliberately keeping a judge ignorant are not very impressive.³⁹⁷ In any case, the effects of it depend on judicial temperament and experience that could perhaps be remedied through careful recruitment and proper training.³⁹⁸ A related, perceived advantage of the adversarial system is the educational role that counsels may play in terms of

393. For this suggestion in the context of civil trial, see FRANK, *supra* note 100, at 85 (“Our present trial method is thus the equivalent of throwing pepper in the eye of a surgeon when he is performing an operation.”).

394. According to the ABA, the caseload of each one of the approximately 214 immigration judge in FY 2008 was 1500 matters, including all motions and bond hearings, about 1000 requiring a decision. By comparison, the caseload for each one of the 1006 SSA ALJs in 2007 was an average of 544 cases. According to the study, to match that number, we would need 97 more immigration judges. See ABA REPORT ON REFORMING THE IMMIGRATION SYSTEM, *supra* note 7, at 2-37.

395. *See id.* at 2-37.

396. Converting ICE trial attorneys into ALJs for immigration could raise issues of prosecutorial bias; however, the bias is often functional, not inherent. A change in role ordinarily changes the bias. To the extent that bias is a concern, however, some balance might be sought in the hiring, training, and retention process.

397. *See* Langbein, *supra* note 31, at 830.

398. *See id.* at 848-51.

bringing cases and authority to the attention of the court. Apart from that being counterbalanced by the inevitable deliberate selectiveness which could lead to misinformation, whatever benefit there is, it is even less in the immigration context as immigration judges are specialists in the area and that most cases involve factual rather than legal disputes.

The second, and perhaps more important, argument relates to individual autonomy. As Langbein notes, the celebration of the adversarial system comes from the criminal justice system. This system has some very basic principles, such as the presumption of innocence, the privilege against self-incrimination, and requiring proof of guilt beyond a reasonable doubt.³⁹⁹ The adversarial system in the criminal context protects the accused person's right to gather his own evidence and present it in a way he wishes.⁴⁰⁰ If that responsibility were given over to a judicial officer, the defendant would lose his autonomy. This loss of autonomy is not necessarily linked to accuracy, but the argument is that the truth emerges in the courtroom through selective presentation of the evidence.⁴⁰¹ Whatever merits this may have in the context of the criminal justice system—which is doubtful as the criminal justice system also has its own problems—it does not necessarily hold true in the immigration context. First, there is no presumption of “innocence” as such in the immigration context and the standards of proof are different. In the removal process, the government has the burden of proving alienage by clear and convincing evidence.⁴⁰² What would the noncitizen lose if a judicial officer, who does not have to win a case, investigates the claim of alienage? Particularly, if the noncitizen is without counsel, he would have everything to gain if the only official is a person who is interested in finding out the truth, not deporting him as a matter of duty.

Once alienage is established, the noncitizen bears the burden of proving that he is in the country lawfully.⁴⁰³ There are a limited number of documents in the government's possession that could help him prove that.⁴⁰⁴ The noncitizen loses absolutely nothing if the judge were to investigate the government's records to find out what status the noncitizen has. If he is found to have a status of lawful presence, the

399. *Id.* at 842 & n.68 (citing *Garner v. United States*, 424 U.S. 648, 655 (1976) (noting that “the preservation of an adversary system of criminal justice” is “the fundamental purpose of the Fifth Amendment.”)).

400. *See id.* at 842.

401. *See id.* at 842-43.

402. INA § 240 (c)(3)(A).

403. *Id.* § 240 (c)(2)(B).

404. *Id.*

government bears the burden of proving that he is deportable—again by clear and convincing evidence.⁴⁰⁵ This evidence is almost always found in the possession of government bodies, whether state or federal. The issue of deportability often revolves around whether certain facts, such as convictions, fit the statutory grounds of deportation. In a situation where both the government and the noncitizen are represented, interesting arguments could be heard. Even then, though, there is no guarantee that the judge gets candid presentation. She has to make her judgment based on unabashedly partisan presentation. If she were to be the investigator with sufficient resources, she could make her own decisions without confusion.

If the noncitizen is unrepresented, which is more likely than not the case, it is a totally different story. The judge then makes her decision based on a completely one-sided presentation. If the noncitizen is found deportable, the onus shifts to him to prove his eligibility for a form of affirmative relief. In this context, the judge has full discretion to grant it or not. Allowing her to investigate the facts and the law would only facilitate her decision-making. If the noncitizen is unrepresented, however, there is no meaningful presentation of evidence. The judge can only rely on the government's presentation, which is always negative toward the noncitizen, as it is the function of the adversarial system. Obviously, in that situation, the noncitizen would be well served if the judge were empowered to do the investigation of the evidence. Recall the response by the immigration judge at the beginning of this article, which laconically sums up the adversarial system in the situation presented by the student. An inquisitorial judge would make sure that the non-citizen's forms are completed properly, would investigate the facts on her own and would rule as she deems appropriate. If she passively waits for submissions before declaring a winner, her decisions are necessarily inaccurate every time there is an imbalance in representation. This is more likely than not in most immigration cases.

The third issue is the potential for bureaucratic abuse when the duty of investigation is merged with that of decision-making. It is an old dilemma in the administrative law arena, which has been tolerated by the Supreme Court.⁴⁰⁶ It is undeniable that the career judiciary could be a large bureaucracy prone to misuse of power, but in the context of

405. *Id.*

406. *See* Richardson v. Perales, 402 U.S. 389, 410 (1971) (“Neither are we persuaded by the advocate-judge-multiple-hat suggestion . . . [The Administrative Law Judge] . . . does not act as counsel. He acts as an examiner charged with developing facts.”).

deportation, the alternative is many times worse. It typically involves on one side a governmental interest represented by vigorous counsel seeking to make sure that the non-citizen is deported at all costs, an unrepresented non-citizen who does not understand the chaotic swirling of events around him, and a judge who needs to make a decision based on an intentionally incomplete record developed through the parties' adversarial exchange. How accurate could that be? How often does that system get the decision right?

C. *Fairness*

The complexity of the immigration law does not need repeating. We also know that the overwhelming majority of non-citizens in deportation proceedings are not represented by counsel. The best they could expect to get in the way of assistance is forms, checklists, and templates, which some courts reject for not meeting formal requirements.⁴⁰⁷ The government, on the other hand, is always represented by attorneys who have the advantage of being repeat players and who have access to government data that the noncitizen does not have. If the noncitizen wants to see the records, he would have to file a FOIA request, which takes an inordinate amount of time. When the government's attorney appears in the courtroom, it is often in a suit and tie or some other formal attire. When the noncitizen appears, it is often in a neon orange jumpsuit. Instead of a tie, some wear shackles.⁴⁰⁸ While the court makes no mention of the low dress code of the noncitizen, his decorum triggers a prejudgment response in the judge's mind, instantly making the noncitizen fight up an even steeper hill.

The fairness argument relates to the fact that the adversarial system provides both parties the opportunity to be heard. To use Langbein's words, it presumes *Waffenungleichheit*, or the inequality of weapons.⁴⁰⁹ If the weapons are not matched, there is no denying that there is no fair duel. So, in the majority of the cases in deportation proceedings where the government is well-represented and the noncitizen unrepresented, it is fair to assume that the adversarial system yields unfair results as a matter of common sense. When the noncitizen is represented, it might seem like the system could be fair. But even then, it is not. Going back to Professor Anker's study, because of the judge's responsibility under

407. See, e.g., Appleseed, *supra* note 304, at 30-31.

408. I have had clients who appeared before immigration judges in shackles because of alleged disciplinary violations in the detention facility.

409. See Langbein, *supra* note 31, at 843.

the statute to test the credibility of the respondent, but not to help him, it almost always appears that the respondent faces two well-trained government attorneys against him. The judge examines and cross-examines witnesses as a matter of statutory obligation. Often, the only witness in these proceedings is the noncitizen. Refusing to testify is not an option because that usually means no case at all for the immigrant. The judge's position is awkward: it is actively investigative when testing the credibility of the respondent if he presents evidence, whether through an attorney or otherwise, but passively neutral if no evidence is presented by the respondent. So, Anker's conclusion that the respondent faces two government attorneys under the existing system seems accurate.⁴¹⁰

However, under the investigative model, the judge would treat both parties equally and attempt to find both inculpatory as well as exculpatory evidence and would then decide the case based on her own investigation through the help of the parties. In this instance, the system would be fair for both parties, as there would not be a representational advantage. Instead of the appearance of facing two governmental attorneys, the noncitizen would face only one, who would be tasked with the duty of finding the truth and applying the law impartially. It is reasonable to expect that most would do so fairly and appropriately.⁴¹¹ For exactly this reason, despite many complaints, it appears that the affirmative asylum system is fairer than the adversarial immigration court system.⁴¹²

410. See, e.g., Anker, *supra* note 295, at 489 ("Instead of an independent adjudicator and an opposing counsel, the perception arose in many cases that applicants faced two, instead of one, opposing counsels.")

411. As Professor Legomsky noted in an e-mail to this author, in such a system, the decisional independence of the Judges would be even more important than in the existing system. Indeed, that is an issue that needs to be properly addressed at the macro level.

412. See, e.g., Taylor, *supra* note 384, at 500 (citing Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253 (1992)); Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455 (1992); Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. INT'L L. REV. 9, 43-78 (1994); David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (1995); see also Ming H. Chen, *Explaining Disparities in Asylum Claims*, 12 GEO. PUB. POL'Y REV. 29 (2007) (suggesting, based on social science data, that the non-adversarial affirmative asylum system has significant benefits). In her own words:

It is important to highlight social scientific concepts in the framing of the problem and the formulation of explanatory hypotheses so that social science can also inform policy reforms. Notably, this study of asylum adjudication reveals that social science intuitions and explanations differ from the shared wisdom of lawyers. Immigration attorneys implicitly assume that their clients will benefit from increased formalism and legalism. As a result, they struggle mightily to obtain increased substantive rights and enhanced procedural protections for asylum applicants. However, social science challenges that

D. *Political Acceptability*

Presumably a fair, efficient, and less costly system would have better political acceptability. The inquisitorial system is cheaper, as it gets rid of the needless adversity and the resulting complexity. If 712 ICE attorneys are taken outside of the courtroom, not only would that free up a lot of space and time, but they could also be used for a more productive and useful activity, such as serving as immigration judges. This might seem a strange proposal, given that merging investigative and decision-making authorities into one person is considered harmful to the vulnerable party.⁴¹³ That might be true if the weapons in the duel are matched. But the reality in deportation proceedings is that the adversarial system costs the government more money, causes more suffering to the noncitizen, and brings serious confusion to the judge. The end result is a needlessly complicated, less forgiving, and more expensive adjudicatory system. Such a system is less politically acceptable than the alternative, at which nobody seems to be currently looking—a system whereby the judge investigates the facts and decides the case—a system where errors could be corrected through appeals, which could take many different forms, including Professor Legomsky’s Article III Court proposal.

VI. CONCLUSION

When Stefan Riesenfeld, who later became a distinguished international scholar, arrived in America in January 1935, the renowned legal realist Karl Llewellyn reportedly told him: if you want to give your idea a “kiss of death,” say that it has originated in a foreign country.⁴¹⁴ But, to quote a foreign jurist in this domestic proposal, “Why don’t [we] take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human

assumption. Under certain circumstances, the more informal and less adversarial climate of asylum interviews benefits asylum applicants, whereas the adversarial character of Immigration Court acts to their detriment.

Id. at 44-45.

413. See generally Milton M. Carrow, *A Tortuous Road to Bureaucratic Fairness: Righting the Social Security Disability Claims Process*, 46 ADMIN. L. REV. 297 (1994) (arguing that the merging of these two functions in one person in the context of the social security system is a bad idea. He certainly has not considered the problems with that system which this article did in some detail).

414. Stiefel & Maxeiner, *supra* note 31, at 162 (citing Riesenfeld, Statement at the Association of American Law Schools Annual Meeting (1987)).

experience?”⁴¹⁵ In fact, introducing the inquisitorial model is not such a revolutionary idea. The affirmative asylum system is one example, and many administrative agencies already use the system with varying degrees of success.⁴¹⁶

This article does not recommend any specific inquisitorial model, but it looks at the problem presented by the adversarial system from inside the courtroom and tries to call attention to a neglected factor in the debate. The debate is decidedly at the macro level, focusing mainly on administrative and judicial structure and decisional independence. The question is almost never asked how well the adversarial system at the micro level is serving immigration adjudication. This article raises that question and finds that the answer is not promising. What sustains the adversarial system is the unwarranted association between civil liberties and the adversarial system,⁴¹⁷ and the unsupported conclusion that it leads to a more accurate, politically acceptable, and fair result. Whatever its merits in the criminal justice system, it does not hold true in the immigration system.

This article has attempted to show that the adversarial system in the deportation context does not work well for anyone—not for the prosecutor, not for the judge, and most of all not for the respondent. It is a political and cultural imaginary with no real benefits, but with significant drawbacks. Put simply, it is a due process issue. As the Supreme Court has noted, “considerations of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”⁴¹⁸ What works in one context may not work in another. In a situation where only one party is represented, a claim of adversarial fairness or ‘cold neutrality’ of the adjudicator is a mockery of justice. The call for the provision of representation to indigent respondents in deportation proceedings has so far yielded no result, and a favorable result is unlikely any time soon. If one of the parties in an adversarial proceeding is unrepresented, elementary notions of fairness

415. *Id.* at 147 n.1. This statement is attributed to French Jurist Pierre LePaulle.

416. The Social Security Administration is another example. For a brief comparison between the asylum adjudication process and the social security adjudication process, see Taylor, *supra* note 384, at 485-95. The standard citation on the fundamentals of the Social Security Adjudication cited in *id.* is JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

417. Kessler, *supra* note 31, at 1273.

418. *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *see also Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

require that the other be not represented as well. That leaves two people in the courtroom: the respondent and the judge. Perhaps, in such situation, the judge should investigate the case and make a decision on her own. That is much better than the alternative, which has been tolerated for far too long. Needless to say, we know that such an inquisitorial model in the administrative arena is perfectly constitutional.⁴¹⁹ Until we are able to match the weapons in the duel, maybe we ought to think about settling the dispute differently.

419. See, e.g., *Richardson v. Perales*, 402 U.S. 389, 403 (1971).