Bringing "Civil"ity into Immigration Law: Using the Federal Rules of Civil Procedure to Fix Immigration Adjudication

*Richard Frankel**

Government lawyers frequently argue, and courts have frequently held, that noncitizens in removal proceedings do not have the same rights as defendants in criminal proceedings. A common argument made to support this position is that removal proceedings are civil matters. Accordingly, a noncitizen facing deportation has fewer due process protections than a criminal defendant, and deportation proceedings similarly provide fewer protections than criminal proceedings.

In many ways, however, the rules governing immigration proceedings differ markedly from those governing civil actions in court. Immigration proceedings suffer from arcane and hypertechnical procedures that impede immigrants from having their claims reviewed on the merits. Notably, similar problems plagued the civil justice system back in the early twentieth century. The response was to create the Federal Rules of Civil Procedure, which emphasized a preference for deciding cases on their merits rather than on procedural technicalities. The modern Federal Rules have substantially simplified pleading requirements and emphasized flexibility in order to foster the goals of fairness, efficiency, and decisions on the merits.

This Article argues that the process that spawned the Federal Rules can offer valuable lessons for reforming immigration proceedings. The Article identifies several examples where immigration rules differ from the Federal Rules in ways that inhibit decisions on the merits. It then proposes a fundamental reexamination of immigration rules with an eye toward promoting decisions based on substance rather than procedure, as well as a structure for

* Professor of Law, Drexel University Thomas R. Kline School of Law. I would like to thank Kim Thomas, John Giammatteo, Nicole Iannarone, Susan Brooks, Alex Geisinger, Amy Landers, Elizabeth Kukura, Peter Joy, Jayesh Rathod, Rebecca Sharpless, Naomi Mann, Lenni Benson, and Jaya Ramji-Nogales for their thoughtful feedback and suggestions. I am extremely grateful for the excellent research assistance provided by Michael Jannuzzi and Kayla Rubin and for the tremendous editorial work by the staff of the *Vanderbilt Law Review*.

ongoing reform. Given the high stakes in removal proceedings, if society continues to treat immigration proceedings as civil matters, the least it can do is incorporate those aspects of the Federal Rules that best promote access to justice for noncitizens.

INTRODUCTION

An injured creditor who incorrectly labeled the damages resulting from an unpaid debt was thrown out of court because the damages proved at trial were a half cent greater than the damages he

pled in the complaint.[1] A noncitizen fleeing life-threatening violence lost his asylum claim and may end up deported, even if the underlying facts supported granting asylum, because he categorized himself as a former gang member rather than a former gang leader when pleading his claim.[2] The injured creditor can now bring his claim because the federal judiciary adopted the Federal Rules of Civil Procedure to stop cases like his from failing due to technical errors that do not affect the merits.[3] The asylum seeker, however, remains subject to rigid pleading constraints notwithstanding the fact that he faces far more severe consequences than the creditor.[4] This Article asserts that this distinction is incongruous and that the changes implemented by the Federal Rules of Civil Procedure should serve as a guide for reforming the immigration court system toward deciding cases on the merits rather than on procedural technicalities.[5]

The stakes in deportation proceedings are high. Deportation can mean the difference between life and death for individuals fleeing harm and persecution in their home countries.[6] It can mean separation from one's family and permanent exile from one's home.[7] It can mean forced return to a country one does not know and has little connection to other than the fact of citizenship.[8] The Supreme Court has recognized that deportation can deprive an individual of "all that makes life worth living."[9]

Despite deportation's severe and lasting consequences, noncitizens in removal proceedings do not receive the protections afforded to defendants in criminal proceedings. The Supreme Court has determined that because a "deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . various protections that apply in the context of a criminal trial do not apply in a deportation hearing."[10] Government lawyers, judges, and anti-

1. *See* JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 424 (4th ed. 2021) (describing such a case).

2. *See* W-G-R-, 26 I. & N. Dec. 208, 221 (B.I.A. 2014) (rejecting asylum claim for describing the claimant's status as a former gang member in an insufficiently particular manner).

3. *See infra* Part II and Section III.A.

4. *See infra* Section III.A.

5. For ease of reference, this Article refers to the Federal Rules of Civil Procedure as the "Federal Rules" or the "Rules."

6. *See infra* notes 31–34 and accompanying text.

7. *See infra* notes 31–34 and accompanying text.

8. *See infra* notes 31–34 and accompanying text.

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

10. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

immigrant activists frequently invoke this principle to argue against granting protections to noncitizens in removal hearings.[11]

Given the "civil action" label affixed to immigration proceedings, one might imagine that deportation hearings resemble hearings in the civil justice system and that they follow rules similar to the Federal Rules of Civil Procedure. Those Rules were developed to reform a system known for its procedural traps and complex requirements and to replace it with a more simplified and orderly procedural regime that promoted decisions on substance rather than technicality.[12] The drafters were unafraid to jettison longstanding rules of practice that they found antiquated, counterproductive, or overly technical. In their view, "[P]rocedure was to step aside and let the substance through."[13]

By contrast, the civil immigration court system is neither simplified nor focused on reaching decisions on the merits. Immigration court is famously described as a space in which "death penalty cases [are] heard in traffic court settings."[14] Others describe the laws and rules governing deportation cases as a "labyrinth,"[15] "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion,"[16] or as just plain harsh.[17]

Immigration statutes, regulations, and court procedures often erect unnecessarily high procedural hurdles that impede claimants from having their cases resolved on their merits. In addition to the asylum seeker described above, noncitizens may find themselves with a mandatory in absentia deportation order—the immigration court equivalent of a default judgment—with limited ability to reopen their case, simply because car troubles, language barriers, or life emergencies caused them to miss a scheduled court date. Other noncitizens may find themselves facing deportation even when they have claims for relief

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11. *See, e.g.*, Hussain v. Rosen, 985 F.3d 634, 642–43 (9th Cir. 2021) (applying lower due process standard for civil proceedings to find that noncitizen's due process rights were not violated when evaluating the way that the immigration judge explained options to the noncitizen or minimally developed the record).

12. *See infra* Part II.

13. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944 (1987).

14. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html [https://perma.cc/S4J6-N2UQ].

15. Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.").

16. Drax v. Reno, 338 F.3d 98, 99–100 (2d Cir. 2003).

17. *See* Jennifer M. Chacón, *The Dehumanizing Work of Immigration Law*, BRENNAN CTR. FOR JUST. (July 12, 2021), https://www.brennancenter.org/our-work/analysis-opinion/dehumanizing-work-immigration-law [https://perma.cc/N8JJ-LLEJ] ("[O]ur immigration laws are exceptionally harsh in ways that frequently defy common sense.").

pending before other agencies because the immigration judge did not stay or continue the case to allow the agencies to resolve those claims. Still others may fail to prove their case because they did not receive discovery materials in the government's possession that could help them prepare their case. In each of these situations, a person with a potentially valid case may lose for reasons that have nothing to do with the substance of their claims.

If courts are going to continue applying the "civil" label to immigration proceedings, then they should look to the foundational features of the civil litigation system to guide the conduct of immigration proceedings. This Article argues that the Federal Rules of Civil Procedure, and the process that gave rise to them, can offer valuable lessons for reforming immigration proceedings to promote decisions on the merits. This Article identifies several immigration rules that make it harder for courts to decide noncitizens' cases on the substance of their claims and explains how adopting principles from the Federal Rules could provide a solution without creating undue administrative burdens. It then proposes an overarching reexamination of immigration rules—inspired by the Federal Rules supporters' ambitious investigation and overhaul of the civil justice system—and offers a model for ongoing reform and review of immigration proceedings. Drawing on the flexibility of the Federal Rules to replace the rigidity of some immigration rules may help ensure that noncitizens with valid claims are able to remain in the United States while also allowing the government to discharge its enforcement responsibilities.

The Federal Rules of Civil Procedure provide a useful lens for guiding immigration court reform for several reasons. First, the civil justice system already went through the process of reforming its rules to promote substance over form when the Federal Rules were adopted.[18] That process can shed light on how to promote merits-based decisionmaking in immigration court as well. Both the federal judiciary and the immigration courts espouse similar goals of resolving disputes in a fair and expeditious way.[19] While immigration courts are administrative tribunals rather than judicial courts, administrative agencies and agency advisory bodies often look to the Federal Rules as

18. *See infra* Part II.

19. *Compare* FED. R. CIV. P. 1 (stating that the goal of the Federal Rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding"), *with About the Office*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/about-office (last updated Apr. 25, 2023) [https://perma.cc/2T94-LPNY] (stating that the purpose of immigration courts "is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws").

a model.[20] Taking guidance from the Federal Rules could promote greater procedural consistency, as many immigration rules change across different presidential administrations, with one administration altering or overruling the prior administration's policies.[21] Finally, all adjudication systems should strive to prioritize decisions on substance rather than procedure because of the due process guarantee of having "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[22]

That is not to say that every Federal Rule of Civil Procedure should automatically be imported into immigration court. As this Article discusses, some Federal Rules, such as the civil discovery rules, may be a poor fit for immigration proceedings or may be inapplicable. Additionally, there may be situations in which other rules better serve the goal of promoting decisions on the merits. But if the government continues to treat immigration proceedings as civil matters, the least it can do is incorporate those aspects of the Federal Rules that are most applicable and strive to fulfill the Rules' overarching purpose of fostering merits-based decisions, especially given the high stakes in removal proceedings.

This Article proceeds in five parts. Part I explains how immigration hearings came to be classified as civil proceedings and describes the essential features of the immigration court system. Part II examines the early twentieth century reforms that led to the creation of the Federal Rules of Civil Procedure and describes how the Federal Rules displayed a preference for deciding cases based on the substance of a claim rather than on procedural failings. Part III focuses on certain Federal Rules, including those related to pleading, default judgment,

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20. For example, the Administrative Conference has published a set of Model Adjudication Rules for administrative agencies. Those model rules specifically recommend consulting the Federal Rules of Civil Procedure (as well as the Federal Rules of Appellate Procedure) as guidance for developing their own rules or in filling gaps not currently covered by an agency's rules and note that "several agencies use [the Federal Rules] for that purpose." *See, e.g.*, MODEL ADJUDICATION RULES § 101 cmt. 2 (ADMIN. CONF. OF THE U.S. 2018).

21. Take the example of whether victims of intimate partner violence should qualify as eligible for asylum. During the Clinton Administration, Attorney General Janet Reno proposed that the administration initiate notice-and-comment rulemaking to determine when such victims could receive asylum. *See* R-A-, 22 I. & N. Dec. 906, 906 (Att'y Gen. 2001; B.I.A. 1999). Subsequently, during the Obama Administration, the BIA issued a precedent decision explaining that victims of intimate partner violence may qualify for asylum in certain circumstances. *See* A-R-C-G-, 26 I. & N. Dec. 388, 388 (B.I.A. 2014). Following Donald Trump's election in 2016, new Attorney General Jeff Sessions overruled *A-R-C-G-* and issued a decision severely curtailing avenues for asylum for victims of intimate partner violence. *See* A-B- (*A-B- I*), 27 I. & N. Dec. 316, 316 (Att'y Gen. 2018). Soon after President Biden's election in 2020, Attorney General Merrick Garland overruled *A-B- I* and restored the BIA's 2014 *A-R-C-G-* decision as valid precedent. A-B- (*A-B- III*), 28 I. & N. Dec. 307, 307 (Att'y Gen. 2021).

22. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

and joinder, and explains how they function to promote decisions on the merits. It then compares those Federal Rules to specific immigration rules that create strict procedural requirements and explains how amending the immigration rules to track the Federal Rules of Civil Procedure more closely could better advance the goal of deciding cases fairly. It also identifies some limitations of using the Federal Rules as a model and highlights situations where the Federal Rules might not be a good fit for immigration court.

Part IV proposes a path for applying the lessons from Part III to build a framework for broader reform. This could include, as was done for the federal civil justice system, undertaking a comprehensive review of immigration rules with an eye toward addressing which promote, and which impede, decisions on the merits. Additional reforms could include creating a rules advisory committee comprised of judges, practitioners, and academics that would operate similarly to the advisory committees for the Federal Rules and have authority to propose and assess rule changes on an ongoing basis. Finally, Part V discusses potential objections to using the Federal Rules of Civil Procedure in an administrative adjudication system, such as immigration court.

It also is important to not overlook the increasing criminalization of immigration law. As Congress has tightened immigration protections and expanded the grounds for deportation, many scholars argue that noncitizens deserve many of the protections provided to criminal defendants—including the right to counsel, equivalent Fourth Amendment rights, protection against ex post facto application of newly enacted law, and limits on indefinite detention.[23] This Article does not disagree with those proposals. Instead, it makes a different point: Even if courts continue to treat immigration hearings as civil matters, it is worth looking at the rules of the civil justice system in assessing whether immigration courts could be deciding cases more fairly. Aspiring to decide cases based on substantive law and evidence should not be a controversial proposition. Looking to the Federal Rules of Civil Procedure can further this goal.

23. *See, e.g.*, Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 49–64 (2003); Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 115–16 (1999); *see also* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1305 (2011) ("[S]cholars have been calling for a reexamination of the nature of deportation for some time and with increasing frequency since the dramatic expansion of criminal deportation grounds in 1996.").

I. IMMIGRATION AS A CIVIL MATTER

A. The Origin of Immigration Hearings as Civil Proceedings

Dating back to the late nineteenth century, immigration matters, including deportation hearings, have been treated as civil proceedings. In the nation's early years, deportation was not expressly characterized as either civil or criminal, though it appeared to act more as a criminal punishment than as a civil remedy. As Peter Markowitz explains, "[T]he American colonies never utilized any civil method to expel noncitizens and the only method by which citizens or noncitizens were removed from the colonies was through the criminal punishment of banishment."[24] During that period, states oversaw most immigration regulation and treated deportation as a punitive sanction for serious criminal offenses.[25]

However, toward the end of the nineteenth century, the Supreme Court determined that immigration proceedings are civil rather than criminal matters. These Supreme Court decisions cannot be disentangled from the fact that the cases concerned Chinese nationals during a time of virulent anti-Chinese sentiment across the United States.[26] In an 1893 decision, the Court held that deportation was not punitive, but rather an administrative sanction.[27] Treating citizenship or immigration status as a public benefit conferred by the government, the Court reasoned that deportation was akin to a loss of benefits for failing to comply with the rules required for maintaining one's immigration status:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.[28]

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24. Markowitz, *supra* note 23, at 1309.

25. *Id.* at 1309–10.

26. For a more detailed discussion of the intersection of anti-Chinese ideology and the Supreme Court's immigration jurisprudence of that period, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1120–22 (1998).

27. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

28. *Id.*

The Court also relied on the "inherent powers" doctrine, a principle indicating that the government had inherent authority to deport noncitizens without providing criminal process or protections.[29]

The Court has since repudiated the inherent powers doctrine and has at times expressed uneasiness with affixing the civil label to deportation hearings, given the severe impact of deportation on one's life.[30] In particular, deportation exacts a toll that often is more severe than incarceration. It can mean the difference between life and death for one fleeing persecution in their home country.[31] It can mean permanent exile from one's family and community in the United States.[32] It can mean returning to a country that one hardly knows, especially for noncitizens who came to the United States as children.[33] The punishment is often permanent, as compared to prison sentences, which are term limited except for the most serious crimes.[34] Scholars have increasingly criticized the Court's labeling of immigration matters as civil for being outdated, artificial, and inattentive to how Congress has increasingly imposed deportation as a penalty for criminal conduct.[35] Treating immigration matters as civil also means that

29. Markowitz, *supra* note 23, at 1311–12; *see* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

30. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (holding that the federal government lacks any inherent power to revoke citizenship beyond those powers specifically enumerated in the U.S. Constitution); *see also* Markowitz, *supra* note 23, at 1312 (stating that the Supreme Court "re-examined the 'inherent powers theory,' which [underlay] the civil label and resoundingly repudiated it").

31. *See, e.g.*, Sarah Stillman, *No Refuge: For Some Immigrants, Deportation from the U.S. Is a Death Sentence*, NEW YORKER, Jan. 15, 2018, at 32 (documenting how failed asylum seekers who are deported back to the countries they fled often face harm and how some are killed by the very persecutors they fled).

32. *See* Padilla v. Kentucky, 559 U.S. 356, 360, 364 (2010) (concluding that deportation may be "the most important" consequence of a noncitizen's criminal conviction and that deportation is a "drastic measure" (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (internal quotation marks omitted))).

33. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("[Deportation] may result also in loss of both property and life, or of all that makes life worth living."); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338, 346 (2008).

34. AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 3 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/J779-V5V5] ("For many immigrants, the prospect of deportation is much more daunting than imprisonment. The notion that deportation is not punishment ignores its wrenching impact on longtime immigrants, particularly those with immediate family members in the United States.").

35. *See supra* note 23 and accompanying text. For example, the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA") of 1996 expanded the range of criminal convictions that subject noncitizens to deportation. *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) (listing criminal convictions that render a noncitizen inadmissible). It also expanded the range of criminal convictions that bar noncitizens from seeking various forms of relief from deportation, including asylum, cancellation of removal, and withholding of removal. *See e.g.*, 8 U.S.C. § 1229b(a)(3)

noncitizens do not receive protections given to criminal defendants, including limits on detention, ex post facto protections, and the right to appointed counsel, among others.[36] Nonetheless, the Court has never revisited its holding and has instead reaffirmed that immigration matters are civil rather than criminal.[37]

B. Immigration Court Process

Deportation proceedings are adversarial. They occur in immigration court, an administrative adjudication body housed within an executive branch agency, the U.S. Department of Justice.[38] The Immigration and Nationality Act ("INA") provides the basic procedural framework for hearings.[39] Proceedings start when the Department of Homeland Security ("DHS"), which acts as the prosecutor in deportation matters, issues a "notice to appear" charging a noncitizen as removable.[40] The notice is "[l]ike an indictment in a criminal case [or] a complaint in a civil case."[41] Under the INA, the noncitizen may receive a hearing before an immigration judge in which the noncitizen may present evidence and challenge evidence presented by DHS.[42] In the hearing, the immigration judge can consider whether the noncitizen is deportable and also whether the noncitizen is entitled to any relief from removal, such as asylum. The immigration judge must consider the evidence presented and issue a ruling as to whether the individual should be removed from the United States.[43] Beyond this basic

(stating that lawful permanent residents convicted of an aggravated felony are ineligible for cancellation of removal); 8 U.S.C. § 1229b(b)(1)(C) (establishing criminal bars for cancellation of removal); 8 U.S.C. § 1158(b)(2) (making noncitizens who have been convicted of aggravated felonies or anything determined to be a particular serious crime ineligible for asylum); 8 U.S.C. § 1231(b)(3) (making noncitizens convicted of a "particularly serious crime" ineligible for withholding of removal).

36. Galvan v. Press, 347 U.S. 522, 531 (1954) (holding that the Constitution's Ex Post Facto Clause does not apply to deportation proceedings); Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004) (stating that it "is well-settled" that "there is no Sixth Amendment right to counsel" in immigration proceedings); Demore v. Kim, 538 U.S. 510, 531 (2003) (upholding constitutionality of short-term mandatory detention for noncitizens with criminal convictions).

37. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

38. *See* U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., *supra* note 19 (describing the immigration court system).

39. Immigration and Nationality Act of 1990 § 1, 8 U.S.C. §§ 1101-1537.

40. 8 U.S.C. § 1229(a).

41. Niz-Chavez v. Garland, 141 S. Ct. 1474, 1482 (2021) (internal quotation marks omitted).

42. 8 U.S.C. § 1229a(b)(4).

43. *Id.* § 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing."). There are certain types of cases, however, that do not even receive these basic protections. For example, immigration law provides for expedited removal in certain circumstances. *See id.* § 1225(b). The government

framework, other rules governing immigration hearings may arise from statutes, regulations, precedential adjudication decisions, agency guidance, or immigration court rules.

Following the immigration judge's decision, either party can appeal to the Board of Immigration Appeals ("BIA").[44] The BIA handles appeals from all of the nation's immigration courts. Noncitizens who receive an adverse BIA decision can seek review in the federal courts of appeal, subject to a few jurisdictional limitations.[45]

This adjudication system is vast. There are an estimated 13 million noncitizens in the United States, both documented and undocumented, who could be placed in removal proceedings.[46] The number of pending cases across the nation's immigration courts now exceeds 1.9 million.[47] Thus, establishing which rules govern immigration court proceedings will have enormous consequences.

But despite both the system's size and the seriousness of the proceedings occurring within its purview, the immigration adjudication structure has developed as much by chance as it has by design. The Federal Rules of Civil Procedure, as will be discussed below, were created after detailed review with the goal of establishing a comprehensive, integrated, and unified structure to govern all civil proceedings.[48] By contrast, responsibility for immigration policy has bounced around various agencies over time. Immigration functions, including issuing immigration decisions, were originally performed by a subsection of the Department of Labor that included the Immigration and Naturalization Service ("INS").[49] At that time, the agency's focus was on enforcing labor violations by noncitizens rather than fairly

typically utilizes expedited removal procedures for noncitizens apprehended at the U.S. border and noncitizens apprehended within one hundred miles of the U.S. border if they have been in the United States for less than fourteen days and were not lawfully admitted or paroled into the United States. *See* CONG. RSCH. SERV., EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION 1 (Mar. 25, 2022), https://crsreports.congress.gov/product/pdf/IF/IF11357 [https://perma.cc/W9F9-4CWT]. Those truncated hearings do not utilize procedures that even approach the Federal Rules. Addressing the nature and scope of expedited removal falls outside the scope of this paper.

44. 8 C.F.R. § 1003.1 (2020).

45. 8 U.S.C. § 1252. Judicial review is unavailable for decisions related to expedited removal, discretionary decisions, and agency findings of fact in cases involving noncitizens with certain criminal convictions. *Id.* § 1252(a)(2).

46. *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 3 (2018).

47. Exec. Off. for Immigr. Rev., *Pending Cases, New Cases, and Total Completions*, U.S. DEP'T OF JUST. (Apr. 21, 2023), https://www.justice.gov/eoir/page/file/1242166/download [https://perma.cc/698N-U3GW].

48. *See infra* Section II.B.

49. *See* ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION 52–53 (2021); Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 849 (2016).

adjudicating cases.[50] Motivated by the desire to uncover German spies, immigration functions were transferred to the Department of Justice during World War II.[51] The focus was not on reforming or modernizing adjudication procedures.[52] The 1952 INA then created the precursor for the modern immigration court system. INS employees known as "special inquiry officers" made immigration and deportation decisions.[53] Following investigations and reports that immigration officers lacked independence and were pressured to increase deportations of noncitizens, Congress created the current immigration court structure in 1983.[54] In each of these formats, the agency was performing both enforcement and adjudication functions, raising questions about whether its true goal was to decide cases fairly on the merits of substantive law or to remove as many noncitizens as possible.

Because immigration courts' rules and procedures reflect an amalgam of historical periods and agency influences, they have rarely been comprehensively examined. Because of the government's dual role as immigration adjudicator and law enforcer, these rules also reflect differing and competing priorities. Moreover, immigration rules can come from various sources: some statutory, some via notice-and-comment rules, some from precedent handed down by the BIA, and some from informal processes.[55] This accretion of different rules from

50. *See* PECK, *supra* note 49, at 52–53.

51. *See id.* at 88–102.

52. *See id.* at 118–21 (describing the post–World War II history of the immigration system).

53. *See id.*

54. *See id.* at 121.

55. One example illustrating this variety of legal sources involves the issue of whether immigration judges have authority to administratively close (pause) cases as part of their docket management practices, which is discussed in more detail *infra* Section III.B. The INA sets out certain requirements governing how deportation matters can proceed in immigration court. *See, e.g.*, 8 U.S.C. § 1229a. However, it does not expressly state whether immigration judges are permitted to stay certain cases as part of their overall authority to manage their dockets. Certain regulations either require or authorize administrative closure for specific subgroups of noncitizens. *See infra* note 204 (citing specific regulations). A 1984 interpretive memo from the Chief Immigration Judge and subsequent BIA precedent decisions treated administrative closure as a permissible practice. *See* Memorandum from William R. Robie, Chief Immigr. J., Exec. Off. for Immigr. Rev., to All Immigration Judges 1–2 (Mar. 7, 1984), https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/84-2.pdf [https://perma.cc/K4YV-MHC7]; Avetisyan, 25 I. & N. Dec. 688, 688 (B.I.A. 2012) ("[T]he Immigration Judges and the Board may administratively close removal proceedings, even if a party opposes, if it is otherwise appropriate under the circumstances."); W-Y-U-, 27 I. & N. Dec. 17, 17 (B.I.A. 2017) (clarifying the *Avetisyan* standard). Subsequently, an Attorney General precedent case decision established that administrative closure was not permissible, Castro-Tum, 27 I. &. N. Dec. 271, 271 (Att'y Gen. 2018), and the Trump administration issued a notice-and-comment rule to further clarify that administrative closure was not authorized by existing regulations or by statute. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588, 81598 (Dec. 16, 2020). A new administration and Attorney General subsequently overturned

different sources may have benefits, but it may also result in procedures that have outlived their usefulness, that lack a strong foundation, or that conflict with other rules. As discussed in the next Part, this history differs from the origin and development of the Federal Rules of Civil Procedure. The Federal Rules, drafted with intention and after years of study, focused specifically on creating a cohesive body of procedures that would promote substantive justice and decisions on the merits.

II. THE FEDERAL RULES OF CIVIL PROCEDURE

In the federal judicial system, the rules governing civil matters reflect the goal of allowing cases to be heard on their merits and decided on their substance. The Federal Rules of Civil Procedure apply to civil proceedings in federal court.[56] While each state has its own rules of procedure, many have either adopted the Federal Rules or modeled their procedures on the Federal Rules.[57]

A. The Pre–Federal Rules Civil Action Framework

Many scholars have documented the origin of the Federal Rules of Civil Procedure,[58] and this Article provides just a brief overview. The Federal Rules were the outgrowth of a multidecade call for reform.[59] In the late 1800s and early 1900s, reformers complained that the civil legal system had evolved into one marked by excessive formalism, technicality, and rigidity.[60] Cases were often decided on grounds that were completely separate from the merits of the dispute or governing substantive law. Parties could have their case thrown out because they used the wrong form or an improper phrase.[61] Because many civil procedure rules were statutory and enacted by legislators, judges had little to no flexibility to ignore technical errors that did not affect

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Castro-Tum and signaled that it would consider issuing new proposed regulations to address administrative closure. Cruz-Valdez, 28 I. & N. Dec. 326, 328–29 (Att'y Gen. 2021).

56. *See* FED. R. CIV. P. 1 (stating that subject to very limited exceptions, the rules "govern the procedure in all civil actions and proceedings in the United States district courts").

57. *See* GLANNON ET AL., *supra* note 1, at 37 ("Many states, however, have modeled their civil procedure rules on the Federal Rules . . . . As of 1986, twenty-three states had copied them almost verbatim, and two-thirds of the states base their rules substantially on the federal model."); *see also* Subrin, *supra* note 13, at 910 (asserting that most states either adopted rules identical to the Federal Rules or rules that "bear their influence").

58. *See infra* notes 59–84 and accompanying text.

59. Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 290 (2010).

60. *See infra* notes 65–84 and accompanying text.

61. Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1942–43 (2014).

substantive rights. In effect, procedure became untethered from substantive law and acted as the primary driver in many disputes.[62] According to Judge Alexander Holtzoff, who was involved with the early application of the Federal Rules, the prior system displayed "a high regard for technicalities and conformity to procedural requirements" and "stress[ed] procedure at the expense and sometimes in disregard of the real merits of a controversy."[63] It also fostered—in the words of Roscoe Pound, one of the principal architects of what became the Federal Rules—"[t]he sporting theory of justice" in which lawsuits operated as a battle where the lawyer who could best game the governing rules had the best chance of victory.[64] According to Pound, the "science of statement" had taken priority over "the substance of rights."[65]

Reformers identified various aspects of the civil system that impeded decisionmaking on the merits. They especially criticized the "hypertechnical" nature of the common-law pleading system.[66] The rules for pleading a case developed out of the common-law writ system, which Pound described as embodying "rigid and inflexible procedural steps."[67] In medieval England, when individuals wanted to file suit, they had to obtain a writ from the monarch.[68] A writ became associated with a particular claim. For example, there was a specialized writ for trespass and another writ for assumpsit or contract.[69] Because there were only a specified number of writs that covered specified causes of action, parties had to plead their case to fall within a particular writ. Rather than plead the facts of what happened and allow for any cause of action that arose out of those facts, parties who wanted to bring suit had to tailor their case to a particular preexisting writ.[70] Several consequences resulted: First, parties had to recast their facts to fit within the box of a prescribed writ—whether or not it was the right fit—which prioritized pleading to the writ rather than finding the proper

62. Subrin, *supra* note 13, at 928–31.

63. Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059 (1955).

64. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 404 (1906).

65. Subrin, *supra* note 13, at 940 (quoting *Report of the Committee on Code Revision (1898)*, 22 N.Y. ST. BAR ASS'N REP. 170, 191 (1899)).

66. GLANNON ET AL., *supra* note 1, at 425.

67. Subrin, *supra* note 13, at 945 (citing Roscoe Pound, *The Etiquette of Justice*, 3 PROC. NEB. ST. BAR ASS'N 231, 247–48 (1908)).

68. GLANNON ET AL., *supra* note 1, at 424.

69. *See id.*

70. *See id.*

remedy for a particular set of facts.[71] Second, this process gave rise to prescribed forms and formulaic requirements for pleading a specific cause of action.[72] Failure to properly recite the exact way to plead the cause of action could result in the case being dismissed.[73]

A second problem with common-law pleading was the concept of "variance." If the facts proven at trial varied in any way from what was originally pleaded in the form of action, that variance "was fatal to the lawsuit."[74] In one case, the plaintiff lost because he "pleaded a debt of $2,579.57 in his declaration, but proved a debt of $2,579.57½ at trial."[75] No reasonable opportunity existed to amend the pleadings during the course of the case.[76] Relatedly, because plaintiffs had to choose and plead to a particular writ, there was limited ability to join multiple related claims into a single suit, leading to waste, inefficiency, and disharmony.[77] According to Thomas Shelton—the head of the American Bar Association at the time and another major driver in the development of the Federal Rules—pleading, "normally a mere means to an end, became more important than the merits of the case."[78]

Even when reforms were enacted to create more flexibility, they could be undermined by excessive legislative interference. For example, New York adopted a series of reforms in 1848, creating what was known as the "Field Code," named for its primary drafter, David Dudley Field.[79] The Field Code was enacted because of the view that common-law pleading "obscured facts and legal issues rather than distilling and

71. *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291, 1301 (1935).

72. *See* GLANNON ET AL., *supra* note 1, at 424–25; Holtzoff, *supra* note 63, at 1065–66 (complaining that the common law's excessive focus on whether a pleading "sets forth all the technical requirements of a cause of action" prevented many cases from being heard on the merits); Subrin, *supra* note 13, at 940 (describing the insistence that "pleadings comply with common law technicalities," including that "complaint[s] clearly state a single theory of recovery, binding on the pleader at trial").

73. *See* Aragaki, *supra* note 61, at 1942 ("Meritorious cases were often tossed out because the wrong form had been filed or a precise turn of phrase had been omitted[.]"); GLANNON ET AL., *supra* note 1, at 424.

74. GLANNON ET AL., *supra* note 1, at 424.

75. *Id.*; *see also* Pound, *supra* note 64, at 413 (arguing that doctrines like variance resulted in meaningless dismissals and undermined substantive justice and merits-based decisionmaking).

76. *See* Clark & Moore, *supra* note 71, at 1299–1300.

77. *See* Subrin, *supra* note 13, at 933 (describing how common-law procedural rules, including restrictions on joining parties and claims, meant that "frequently an entire controversy could not be decided in one suit").

78. Thomas W. Shelton, *Greater Efficacy of the Trial of Civil Cases*, 136 AM. ACAD. POL. & SOC. SCI. 95, 100 (1928).

79. *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Version*, 6 LAW & HIST. REV. 311, 327–33 (1988) (discussing the development of the Field Code).

clarifying them."[80] It attempted to simplify the process by creating a code pleading system that focused on facts rather than forms of action and became a forerunner to the notice pleading framework enshrined in the Federal Rules.[81] However, as the legislature increasingly added new provisions over time, the Code ballooned in size and recreated many of the rigidities and technicalities that the Field Code had been designed to eliminate. As a result, the Field Code expanded from 392 provisions to 3,441 by 1897.[82] This expansion constrained judges' discretion and led to specific procedural rules for specific areas of law, creating additional complexity and technicality.[83]

Another criticism of the pre–Federal Rules regime concerned limited rights to discovery. In the eyes of reformers, minimal discovery made it harder to decide cases based on the relevant facts.[84] As a whole, the rules for civil actions elevated procedure over substance and prevented cases from being decided on the merits.

B. The Federal Rules of Civil Procedure and Their Goals

Against this backdrop, the Federal Rules were adopted in 1938 with the understanding that "procedure was to step aside and let the substance through."[85] For the architects of these new Rules, the overarching purpose was to move away "from rigid adherence to a prescribed procedure" and "to bring about the disposition of every case on the merits without regard" to technical errors that did not "affect the substantive rights of the parties."[86]

The Federal Rules were modeled on rules of equity practice, which embodied greater flexibility and contained fewer technical constraints than common-law practice.[87] Among the Federal Rules'

80. Subrin, *supra* note 13, at 932–33.

81. GLANNON ET AL., *supra* note 1, at 426–27.

82. *See* Subrin, *supra* note 13, at 940; Aragaki, *supra* note 61, at 1965 & n.127 (citing S. Rep. No. 64-892, at 2 (1917) (describing similar behavior by other state legislatures)); *see also* Charles E. Clark & James Wm. Moore, *A New Civil Procedure: I. The Background*, 44 YALE L.J. 387, 393 (1935) (asserting that the multiple enactments by the New York legislature undermined the original aims of the Field Code and recreated overly formalistic rules).

83. *See* Aragaki, *supra* note 61, at 1964–65 (explaining how the addition of procedural statutes and rules left judges "powerless to bend or disregard rules to avoid miscarriages of justice").

84. *See* Holtzoff, *supra* note 63, at 1071–73.

85. Subrin, *supra* note 13, at 944.

86. Holtzoff, *supra* note 63, at 1059; *see* Bone, *supra* note 59, at 290 (stating that the fundamental goal of the Federal Rules was to "eliminate wasteful decisions based on technicalities and require trial judges to apply procedural rules with the sole aim of deciding cases on the substantive merits according to the facts and the evidence").

87. *See* Subrin, *supra* note 13, at 912–13 (identifying equity's influence on the Federal Rules of Civil Procedure).

major reforms were the abolition of technical pleading rules in favor of a more informal notice pleading standard, greater authority for joinder of claims and parties, and expanded rights of discovery.[88] Rule 8 promoted the "simplicity of pleading" and moved away from technical formalities.[89] The focus of pleading was setting forth the basic facts of the case, with the primary purpose of putting the defendant on notice of what the lawsuit was about rather than identifying specific forms or causes of action.[90] Relatedly, Rule 15 provided liberal opportunity to amend pleadings as new facts or causes of action came to light.[91]

Through the Federal Rules' expanded joinder provisions, a single case could now provide for the "[c]omplete [d]isposition of the [e]ntire [c]ontroversy between the [p]arties."[92] The Federal Rules also reformed the process for discovery. The new discovery rules reflected the view that "a trial should be, not a contest, but an endeavor to ascertain the truth and an effort to attain justice."[93] The new rules broadened discovery to allow parties to obtain relevant evidence while also striving to limit frivolous or vexatious requests.[94] Other rules included strict processes for instituting a default judgment when a party fails to appear or meet a pleading deadline and flexible standards for vacating defaults so that disputes can be addressed on the merits.[95]

The Federal Rules were judge empowering, giving judges more authority to exercise discretion and manage cases. The Federal Rules freed judges from the shackles of legislative directives; gave them discretion to overlook errors they deemed trivial; and authorized them to allow amendments to pleadings, to manage discovery, to allow or disallow joinder, and to allow parties to cure defaults.[96] The drafters of the Federal Rules trusted judges to exercise discretion in a way that

88. *See* Holtzoff, *supra* note 63, at 1079–80.

89. *See id.* at 1065–66.

90. *See* FED. R. CIV. P. 8(a); Holtzoff, *supra* note 63, at 1065–66; Subrin, *supra* note 13, at 976 (discussing development of the Rules' pleading requirements).

91. *See* FED. R. CIV. P. 15.

92. Roscoe Pound, *Appendix E: Principles of Practice Reform*, 33 ANN. REP. A.B.A. 635, 642 (1910); *see* Subrin, *supra* note 13, at 964 (starting that Clark wanted the rules to allow "all interested parties to be in court at once and to adjudicate all aspects of their combined grievances at one time").

93. Holtzoff, *supra* note 63, at 1060.

94. *See id.* at 1072; *see also* Subrin, *supra* note 13, at 978–80 (acknowledging the purpose of the drafters' broad discovery rules while also questioning whether the rules succeeded in constraining abusive discovery requests).

95. *See* FED. R. CIV. P. 55; *see also infra* notes 159–168 and accompanying text.

96. *See* Bone, *supra* note 59, at 292 ("[T]he Federal Rules were designed as general rules that delegated broad discretion to trial judges.").

promoted justice.[97] They were less concerned about the risk that discretion could create greater opportunities for arbitrary and inconsistent decisions.[98]

Through these groundbreaking reforms, the Federal Rules of Civil Procedure prioritized substance over procedure and merits over technicalities. The emphasis on promoting substantive justice while avoiding unnecessary waste and delay is captured in Rule 1's mandate that the Federal Rules be applied "to secure the just, speedy, and inexpensive determination of every action and proceeding."[99] And while this may be subject to some debate, the Federal Rules are largely successful. Although they have been amended over time, the Federal Rules have endured for nearly eighty-five years in largely the same form as originally enacted. As stated above, many states adopted or modeled their rules on the Federal Rules. And while the specifics of various rules have been questioned and reevaluated over time as the nature of litigation has changed, the goal of promoting decisions on the merits continues to be one of the Federal Rules' fundamental aspirations.

III. CIVIL IMMIGRATION RULES AND THE TRIUMPH OF PROCEDURE OVER SUBSTANCE

Given that deportation hearings are treated as civil proceedings,[100] it is worth examining whether immigration rules effectively meet the civil justice system's goal of making procedure subservient to substance rather than an end in itself. In light of the reform movement that created the Federal Rules to eliminate the excessive technicality that impeded merits-based decisions, it is useful to analyze whether the civil immigration system embodies procedures that impede merits-based decisions and whether the Federal Rules could provide a model for reform. Both the immigration courts and the Federal Rules espouse a goal of promoting just, fair, and expeditious decisions.[101] Similarly, administrative agencies often look to the Federal Rules as a guide for their own procedural rules.[102] Constitutional due process principles protect an individual's right to be

97. *See id.* (stating that the drafters of the Federal Rules were comfortable giving discretion to judges "because of the assumption that trial judges, as skilled procedure technicians, could tailor procedures to the specific needs of each individual case").

98. *See, e.g.*, Subrin, *supra* note 13, at 992 (expressing concern about "whether empowering judges rather than trusting juries should be a primary feature of a procedural system").

99. FED. R. CIV. P. 1.

100. *See supra* notes 24–37 and accompanying text.

101. *See supra* note 19 and accompanying text.

102. *See supra* note 20 and accompanying text.

heard at a meaningful time in a meaningful manner.[103] The rules governing any civil justice system, whether judicial or administrative, should strive to maximize opportunities for individuals to have their cases heard on the merits. This principle resonates even more strongly in immigration court, especially given the high stakes in deportation proceedings.

This Part identifies several areas in which immigration rules deviate from the Federal Rules in a way that undermines the goal of deciding cases on the merits. It suggests that reforming immigration practice to be more consistent with the Federal Rules would be beneficial. But this does not mean that the Federal Rules should be imported wholesale. Just as some Federal Rules could help improve immigration practice, others may not be the best fit for immigration court or may not promote decisions on the merits as effectively as in the civil justice system. This Part also identifies some areas where it might not be appropriate to adopt the Federal Rules and where other frameworks might be more appropriate.[104] Overall, it focuses on five areas: (1) asylum claims, (2) in absentia removal orders, (3) joinder of related claims for immigration relief, (4) discovery in immigration court, and (5) curing defective notices to appear issued by the government.

A. Asylum Claims

The manner in which immigration courts approach certain categories of asylum claims can prevent them from being heard on the merits. This could be corrected by utilizing the fact and notice pleading approach of the Federal Rules. For example, some asylum claims fail not because the facts fail to support asylum, but because the claimant does not articulate the claim using the correct phrasing or does not

103. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).

104. It may seem uncertain whether a noncitizen should be analogized to a civil plaintiff or a civil defendant. On the one hand, the government initiates a removal hearing against the noncitizen by filing a charging document. This makes the government look more like a plaintiff and the noncitizen look more like a defendant. On the other hand, many immigration cases involve noncitizens raising affirmative claims for relief, such as asylum, for which they bear the burden of proof. In that way, the noncitizen seems more like a plaintiff and the government more like a defendant. But that is not surprising, nor does it really affect the discussion that follows. In civil cases, parties can be both plaintiffs and defendants at the same time, such as when there are counterclaims, crossclaims, or third-party claims. *See* FED. R. CIV. P. 13–14. Whether a noncitizen is viewed as a plaintiff or defendant (or both) should not bear on how the rules discussed below could promote merits-based decisionmaking.

provide the proper semantic formulation.[105] In this way, the current process is reminiscent of the technical and formulaic common-law pleading standards that the Federal Rules intended to abolish.

A noncitizen can qualify for asylum if that person faces a "well-founded fear of persecution" in their home country on the basis of one of five statutorily enumerated categories.[106] Specifically, the noncitizen must show that the risk of persecution is on account of their race, religion, political opinion, nationality, or—of specific relevance here—membership in a "particular social group."[107] The legal framework for determining whether a claimant is a member of a particular social group ("PSG") for asylum purposes is one of the most confounding questions in asylum law.[108] Yet it is also one of the most important. People fleeing the risk of harm or death in their home countries can lose their asylum claims if they do not qualify as a member of a PSG.[109] For many of the most pressing reasons for seeking asylum—including experiencing intimate-partner violence, being targeted by criminal gangs, and facing threats on account of one's sexual orientation—membership in a PSG is the only enumerated ground that potentially supports an asylum claim.[110]

Establishing membership in a PSG requires noncitizens to identify and describe the group to which they claim to belong. Akin to identifying a cause of action or basis for a claim, the PSG formulation is essentially a legal category or label that applies to the specific facts

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105. *See generally* Nicholas R. Bednar, Note, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Applications*, 100 MINN. L. REV. 355 (2015).

106. 8 U.S.C. § 1101(a)(42) (defining the term "refugee"). Additionally, noncitizens may qualify for a more stringent form of relief called "withholding of removal" if they can show a clear likelihood of persecution on the basis of one of those same five enumerated categories. 8 C.F.R. § 208.16(b) (2022) (defining the standard for obtaining withholding of removal).

107. *See* 8 U.S.C. § 1101(a)(42).

108. *See, e.g.*, Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021) (describing the PSG standard as "a highly technical legal issue" and explaining that "[e]ven experienced immigration attorneys have difficulties articulating the contours of a [cognizable social group]" (alteration in original) (internal quotation marks omitted) (quoting Cantarero-Lagos v. Barr, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., concurring))); Rios v. Lynch, 807 F.3d 1123, 1126 (9th Cir. 2015) (describing membership in a PSG as "an enigmatic and difficult-to-define term"); Fatma Marouf, *Becoming Unconventional: Constricting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. INT'L L. 487, 490–91 (2019) (describing the PSG standard as "confusing even for attorneys" and "almost impossible for unrepresented asylum seekers to understand").

109. *See, e.g.*, *Quintero*, 998 F.3d at 632 (stating that "a particular social group's cognizability often makes or breaks an asylum" claim).

110. *See, e.g.*, HILLEL R. SMITH, CONG. RSCH. SERV., LSB10617, ASYLUM ELIGIBILITY FOR APPLICANTS FLEEING GANG AND DOMESTIC VIOLENCE: RECENT DEVELOPMENTS 1 (2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10617 [https://perma.cc/V836-6VWV] ("Non-U.S. nationals (aliens, as the term is used in the Immigration and Nationality Act) from Central America have increasingly pursued asylum and related protections in the United States because of gang and domestic violence in their home countries.").

underlying the asylum claim.[111] Originally, the BIA held that a claimant could demonstrate a PSG's existence by showing that members of the proposed group shared an "immutable characteristic," which is one that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[112]

But in a series of decisions starting in 2008, the BIA added two new elements to the PSG inquiry.[113] The first new element is "particularity," which means that the group "can accurately be described" in a way that is "sufficiently distinct" such that the group would be recognized as a "discrete class of persons."[114] Thus, a party defining their PSG must do so in appropriately discrete terms. Terms that are "amorphous" will fail to satisfy the particularity requirement.[115] The second element the BIA added is "social distinction," which requires a showing that the proposed group would "be perceived as a group by society."[116]

Importantly, in its decisions creating these standards and rejecting various proposed PSGs, the BIA did not say that the underlying facts could not support the asylum seeker's claim. Rather, it held, in essence, that the noncitizen used the wrong legal terms—terms that were amorphous or insufficiently precise—when proposing the PSG in question.[117] For example, in *In re W-G-R-*, the BIA rejected a proposed PSG comprised of former gang members because the group could include long-serving gang members as well as those who only joined the gang for a short time.[118] But there was no dispute that the asylum seeker in *W-G-R-* was a former gang member whose life was threatened based on their membership in that group.[119] Instead, the problem was the way the group was defined.

These standards create a situation where the asylum seeker's chances of success turn on whether they use the correct terms of art to

111. *See* Marouf, *supra* note 108, at 500 ("[T]he question of whether a PSG is cognizable is a legal question . . . .").

112. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

113. S-E-G-, 24 I. & N. Dec. 579, 581–84 (B.I.A. 2008).

114. *Id.* at 584.

115. *Id.*

116. M-E-V-G-, 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014).

117. *See, e.g.*, W-G-R-, 26 I. & N. Dec. 208, 221 (B.I.A. 2014) (rejecting the claimant's proposed PSG "[a]s described" and concluding that the claimant would need to articulate the proposed group with "further specificity" to be valid).

118. *Id.* at 221–22.

119. *Id.* at 209 (describing the underlying facts of the case).

describe the PSG rather than on the underlying facts of the claim.[120] Using a word like "young" may be too nonspecific to satisfy particularity because it fails to indicate when youth starts and ends, but using a particular age range like "aged 10–16" might suffice.[121] Using a term like "wealthy" or "affluent" might fail because it does not specify how wealthy, but defining the group in terms of individuals who make more than $100,000 a year might suffice.[122] In *W-G-R-*, if the proposed PSG of former gang members had been recast as former gang leaders (or former low-level gang members, depending on the individual's particular circumstances), that might have satisfied the BIA's concern that former gang members was not sufficiently particular because it includes many different types of gang members. These are just a few examples of the various situations in which an individual's asylum claim turns less on the facts than on the ability to identify the proper legal lens through which to view those facts.

These requirements have turned the PSG inquiry into "a game of semantics" that requires asylum seekers to use "calculated wording" to have any chance of success.[123] Many of the successful PSGs do not roll off the tongue naturally but instead sound like legal constructions that are carefully crafted to satisfy the BIA's requirements. Recognizing that the inquiry depends as much on giving a recitation of precise or formulaic language as it does on establishing the underlying facts to support asylum, advocacy groups provide proposed language for advocates to use or avoid when defining PSGs. For example, one organization identifies "Salvadorans who have [violated/opposed/disobeyed] gang norms" as a potentially viable PSG while cautioning against the similar sounding but nonviable "young Salvadoran men who have been targeted by gangs."[124]

Furthermore, while crafting an appropriate PSG is something that "[e]ven experienced immigration attorneys have difficulty" with, it is a nearly impossible task for unrepresented asylum seekers.[125]

120. NAT'L IMMIGRANT JUST. CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 8 (July 2021), https://immigrantjustice.org/media/563/download [https://perma.cc/ZP9X-5PKT] [hereinafter NIJC] (asserting that the PSG standard requires immigration judges "to determine asylum eligibility based on whether an applicant can craft a sufficient PSG, rather than by discerning whether she is a bona fide refugee"); Bednar, *supra* note 105, at 383 (stating that a party's success may depend on learning "which words they must avoid when framing a particular social group").

121. *See* NIJC, *supra* note 120, at 6–7; Bednar, *supra* note 105, at 382–83.

122. *See* Bednar, *supra* note 105, at 373.

123. *Id.* at 357.

124. NIJC, *supra* note 120, at 19–20.

125. Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021) (alteration in original) (internal quotation marks omitted) (quoting Cantarero-Lagos v. Barr, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., concurring)).

Because deportation hearings are civil proceedings, noncitizens lack a constitutional right to counsel. According to one study, nearly two-thirds of all noncitizens in deportation proceedings are unrepresented.[126] The numbers are even worse for detained noncitizens, as more than eighty-five percent of immigration detainees lack a lawyer.[127] And "[t]he vast majority of asylum seekers are detained."[128] Expecting noncitizens who do not understand the PSG standards, who may not speak English, who may be detained, and who are likely in the midst of managing trauma that caused them to flee in the first place to identify linguistically precise terms so as to satisfy the PSG standard is a nonstarter.[129]

In short, the current legal standard has made many asylum claims turn on legal labels instead of the facts of the case.[130] This excessive focus on PSG terminology might be a little less troubling (but still troubling) if there were regular avenues for amending the PSG definition as the case weaves its way through immigration court, the BIA, and, if necessary, the federal courts of appeal. However, the BIA has rejected that idea and imposed strict constraints for when and how the PSG must be presented. Specifically, an asylum seeker carries the burden of providing an "exact delineation" of "any particular social group(s) to which she claims to belong" to the immigration judge at or before the final hearing.[131] While the immigration judge may "seek clarification" of the proposed PSG, it is unclear whether the decision authorizes the parties or the immigration judge to reformulate the

126. *See* INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2–3 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/478N-LP8R] (finding that only thirty-seven percent of noncitizens were represented by counsel).

127. *Id.* at 23; *accord* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015).

128. Marouf, *supra* note 108, at 505.

129. *See, e.g.*, NIJC, *supra* note 120, at 7 ("Nearly all pro se applicants will be unable to posit such a group."); Marouf, *supra* note 108, at 505 ("The complexity of the PSG determination . . . makes it unreasonable to expect litigants to come up with the perfect definition of the PSG themselves, especially if they are unrepresented.").

130. The Fourth Circuit has held that, at least for pro se cases, immigration judges may have a duty to develop the record and specifically to "help the applicant identify and delineate any potentially cognizable particular social group(s) supported by his or her factual circumstances." *Quintero*, 998 F.3d at 634. Other circuits also have recognized the immigration court's duty to develop the record in pro se cases, though they have not expressly stated that the immigration judge must help litigants formulate a PSG. *See, e.g.*, Agyeman v. INS, 296 F.3d 871, 877, 883–84 (9th Cir. 2002); Mendoza-Garcia v. Barr, 918 F.3d 498, 504–05 (6th Cir. 2019); Al Khouri v. Ashcroft, 362 F.3d 461, 464–65 (8th Cir. 2004); United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004); Hasanaj v. Ashcroft, 385 F.3d 780, 783 (7th Cir. 2004); Mekhoukh v. Ashcroft, 358 F.3d 118, 129–30, 129 n.14 (1st Cir. 2004); Toure v. Att'y Gen. of U.S., 443 F.3d 310, 325 (3d Cir. 2006).

131. W-Y-C-, 27 I. & N. Dec. 189, 191 (B.I.A. 2018) (internal quotation marks omitted) (quoting A-T-, 25 I. & N. Dec. 4, 10 (B.I.A. 2009)).

group or recast it using more appropriate legal terms.[132] It appears that some immigration judges do not even allow claimants to get to the final hearing if they fail to precisely delineate their PSG during earlier stages of the case.[133]

Furthermore, the BIA will not alter or accept different formulations of a PSG on appeal, in a motion to reopen, or in a motion to remand.[134] In *In re W-Y-C- & H-O-B-*, the originally proposed PSG was "[s]ingle Honduran women age 14 to 30 who are victims of sexual abuse within the family and who cannot turn to the government," which the immigration judge rejected.[135] On appeal, the parties proposed a substantively similar but linguistically different formulation of "Honduran women and girls who cannot sever family ties," as that formulation more closely matched legal precedent.[136] It is unlikely what, if any, additional facts would need to be developed to address the reformulated PSG. Yet the BIA refused to accept it, regardless of whether it was a valid formulation, simply because it was not delineated in exactly that language before the immigration judge.[137]

These PSG standards contrast sharply with the Federal Rules governing pleading standards and amendment. The strict requirements for identifying a PSG and the emphasis on formulaic language rather than underlying facts are inconsistent with the liberal rules of notice pleading and amendment of pleadings in Rules 8 and 15 of the Federal Rules of Civil Procedure. Those rules were created to center on facts rather than technical recitation of formal legal labels or forcing facts into recognized or specific common-law forms of action.[138]

Rule 8 embodies the Federal Rules' approach to pleading. It requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[139] The focus is on providing facts, rather than legal labels.[140] The pleader need not provide specific facts, but just

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132. *Id.*; *see* Marouf, *supra* note 108, at 493 (describing the "exact delineation" standard as "exceedingly strict" and one that "is not applied in any other area of law, or to any other type of asylum case").

133. Marouf, *supra* note 108, at 497.

134. *See W-Y-C-*, 27 I. & N. Dec. at 191–92.

135. *Id.* at 189–90.

136. *Id.* at 190.

137. *Id.* at 192–93 ("Because this group was not advanced below, the Immigration Judge did not have the opportunity to make the underlying findings of fact that are necessary to our analysis . . . and we cannot make these findings for the first time on appeal.").

138. *See supra* notes 87–91 and accompanying text (discussing the goal of pleading as setting forth basic facts).

139. FED. R. CIV. P. 8(a).

140. *See* Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005) (holding that plaintiffs "need not plead law" and "need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of").

enough information to put the defendant on notice of what happened and what the dispute is about.[141] Pleading facts with "particularity" is not required except where specifically identified in the Federal Rules, such as for complaints alleging fraud or mistake.[142] The goal of the Federal Rules was simply for the plaintiff to set forth the facts of what happened so the court could address all relevant legal claims arising out of those facts.[143] Indeed, the drafters of the Federal Rules wanted to move away from the common-law system that knocked claimants out of court for failing to identify the proper form of action or failing to plead using the correct language.[144]

Thus, while it is good practice to identify specific causes of action in a complaint, identifying law or providing legal labels is not necessary to state a sufficient complaint as long as the facts alleged give rise to a plausible claim.[145] In an early case written by Judge Charles Clark of the U.S. Court of Appeals for the Second Circuit, the same Charles Clark who was a primary drafter of the Federal Rules before joining the bench, the court held that the district court erred in dismissing the complaint even though the complaint did not identify any legal authority at all.[146] The court found that the facts, if true, could support various legal theories whether or not they were specifically identified.[147] While the Supreme Court has since altered the pleading standard to require plaintiffs to plead enough facts to show a "plausible" claim, it

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141. *See* Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary; the statement need only ' "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." ' " (alteration in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))).

142. FED. R. CIV. P. 9(b); *see* Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993) (rejecting heightened pleading requirement for § 1983 claims and emphasizing that specificity is required only for cases identified under Federal Rule of Civil Procedure 9).

143. *See, e.g.*, Bone *supra* note 59, at 293 (describing the drafters' "optimal system" as "constructed around the core elements of adversarial process freed from code and common law technicalities and designed to ferret out facts and evidence and manage litigation toward just decisions on the merits").

144. *See supra* notes 87–91 and accompanying text (discussing the drafters' goals of simplifying pleading); *see also* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."), *abrogated on other grounds by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

145. *See* GLANNON ET AL., *supra* note 1, at 434 ("In other words, in deciding whether the complaint states a claim showing that the pleader is entitled to relief, the court considers not just the law that the pleader specifically invokes, but also *any* applicable law that would entitle the plaintiff to relief."); *see also* Hughes v. Rowe, 449 U.S. 5, 10 (1980) (finding that plaintiff's allegations that he was unfairly confined to segregation in prison stated a valid procedural due process claim even if the plaintiff's complaint did not specifically identify procedural due process as a cause of action).

146. *See* Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (Clark, J.).

147. *Id.* at 775.

has not changed the basic structure of notice pleading, which focuses on factual allegations rather than the legal labels ascribed to them.[148]

Importantly, this principle holds true both at the district court level and on appeal. Appellate courts retain authority to apply the proper legal lens to the facts alleged even if the plaintiff failed to do so.[149] Although applied more often to pro se litigants,[150] the theory behind this principle—that it is the substance that matters rather than the ability to identify the correct legal box into which that substance should fit—applies to any civil proceeding.

The immigration rules for formulating PSGs also stand in tension with the Federal Rules regarding dismissal and amendment. When a plaintiff fails to meet the notice pleading standard, the complaint should be dismissed without prejudice or with leave to amend unless amendment would be futile.[151] In other words, if the plaintiff could cure a defective pleading by alleging additional facts or adding new causes of action, then the plaintiff ordinarily must be given the chance to do so. In immigration court, however, that protection is not available. If the asylum seeker fails to correctly articulate the PSG, that person does not automatically get a chance to reframe the PSG, even if a redefined PSG would rely on the same facts as the originally proposed PSG.[152]

That distinction is significant because the Federal Rules incorporate liberal rules of amendment to promote the goal of deciding cases on their merits. Rule 15 permits amendment of a complaint or other pleading up through the time of or even after trial.[153] In contrast

148. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S 662, 677–80 (2009) (interpreting Rule 8 to require a plaintiff to state a "plausible" claim for relief). Indeed, commentators have criticized the Supreme Court's decision to tighten pleading standards as inconsistent with the spirit and structure of the Federal Rules. *See* Jeremiah J. McCarthy & Matthew D. Yusick, Twombly *and* Iqbal*: Has the Court "Messed Up the Federal Rules?,"* 4 FED. CTS. L. REV. 121 (2011) (arguing that the new standard was a violation of the procedure meant to be used to amend the Rules); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 188 (2010) (arguing that these decisions "signaled a turn away from the liberal ethos that simplified pleading was meant to reflect" and "presented a new interpretation of Rule 8's pleading standard").

149. *See, e.g.*, Holley v. Dep't of Veteran Affs.*,* 165 F.3d 244, 247–48 (3d Cir. 1999) (stating that the court of appeals will "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name"); *see also* Castro v. United States, 540 U.S. 375, 381–82 (2003) ("Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category.").

150. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520 (1972) (stating that pro se complaints should be held to "less stringent standards than formal pleadings drafted by lawyers").

151. *See, e.g.*, Newberry v. Silverman, 789 F.3d 636, 646 (6th Cir. 2015) ("[D]ismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." (quoting Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003))).

152. W-Y-C-, 27 I. & N. Dec. 189, 191–92 (B.I.A. 2018).

153. FED. R. CIV. P. 15(b).

to the strict requirements for establishing a PSG, Rule 15 sets a default presumption in favor of allowing amendment, stating that courts "should freely give leave" to amend to further the interest of justice.[154] This means that amendment ordinarily should be permitted unless the party seeking amendment is acting in bad faith or amendment would cause "undue prejudice" to the opposing party.[155] Rule 15 specifically contemplates that if the evidence presented at trial varies from the issues raised in the pleadings and if no undue prejudice would result, the court should "freely permit an amendment" to the pleadings so that they conform to the evidence presented "when doing so will aid in presenting the merits."[156] In this way, the Rules avoid the problems of variance that plagued the technical pleading format that predated the Federal Rules.[157]

The requirements for establishing a PSG more closely approximate the pre–Federal Rules regime that the twentieth century reformers sought to eliminate. Forcing parties to use precise language in articulating their PSG mirrors the formulaic incantations required to properly plead forms of action in the common-law pleading system. Demanding "exact delineation"[158] of the PSG with strict limitations on changing the formulation to fit the evidence presented replicates the highly technical pleading and variance rules that the drafters of the Federal Rules found so problematic. Preventing parties from reformulating the legal articulation of their PSG during the case or on appeal is inconsistent with the notice pleading standard's focus on facts rather than legal labels.

Although the PSG analysis is fact based (in the sense that assessing whether the asylum seeker was recruited by gangs and whether individuals who resist gang recruitment are targeted in some way may involve underlying factual findings), the question of whether the PSG is properly defined using the right language is ultimately a

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154. *Id.* at 15(a)(2).

155. Foman v. Davis, 371 U.S. 178, 182 (1962):

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

(quoting FED. R. CIV. P. 15).

156. FED. R. CIV. P. 15(b).

157. *See, e.g.*, Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 456 (10th Cir. 1982) ("Rule 15 was promulgated to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties. While variances between the pleadings and the proof were not tolerated before the federal rules were enacted, such variances are now freely allowed under Rule 15." (citation omitted)).

158. W-Y-C-, 27 I. & N. Dec. 189, 191 (B.I.A. 2018).

question about whether the parties provided the correct legal framework for those facts, not about the facts themselves.[159] The concept of applying the correct legal framework or terminology to a set of facts seems akin to identifying a legal cause of action, as one would do when pleading a complaint in a civil action.

Adopting a more permissive approach in line with the Federal Rules could further merits-based decisionmaking and reduce the risk that deserving asylum seekers are banished from the United States to face persecution or death in their home country. Doing so is unlikely to significantly increase administrative burdens on immigration judges. Rather, resolving cases on the merits could actually improve judicial efficiency by eliminating wasteful hearings and appeals to challenge cases thrown out on technicalities. It could also help judges better manage their pro se cases. Indeed, before the BIA adopted ever stricter rules regarding PSGs, some immigration judges would help pro se litigants articulate or reformulate a PSG to help the case move more smoothly and get to a decision on the merits.[160]

The Federal Rules for notice pleading and amendment were created to effectively balance judicial efficiency and substantive justice. Applying those rules in immigration proceedings could similarly promote decisions on substantive law without unduly sacrificing efficiency.

B. In Absentia Removal Orders

Another way that immigration proceedings differ from civil proceedings—and impede decisions on the merits—is that immigration proceedings have much stricter rules for default judgments that make it more likely for cases to be procedurally defaulted rather than decided on the merits. While both the Federal Rules and immigration standards allow for default judgment when a party fails to appear, the Federal Rules build in greater protections before a default judgment is entered than in immigration court, and they also make it easier to reopen a default judgment than in immigration court. The Federal Rules embody

159. Making an analogy between the standard for formulating a PSG and the standard for notice pleading has some support. *See, e.g.*, Quintero v. Garland, 998 F.3d 612, 634 (4th Cir. 2021) (comparing an immigration judge's duty to help formulate a PSG to the federal courts' duty under the Federal Rules to "liberally construe *pro se* complaints"); Marouf, *supra* note 108, at 493–94 (using a pleading standard analogy to analyze the rules for identifying a PSG).

160. *See Quintero*, 998 F.3d at 633 ("[I]t has been a decades-long 'common practice among Immigration Judges [to] enter[ ] into a dialogue with respondents to identify claims for relief, including defining a legally sufficient particular social group.' " (alteration in original) (quoting Brief of Retired Immigration Judges & Former Members of the Board of Immigration Appeals as Amici Curiae Supporting the Respondent at 1, *Quintero*, 998 F.3d 612 (No. 19-1904))).

the view that courts "do[ ] not favor defaults" and prefer to decide a case on the merits.[161] Immigration courts, by contrast, will strictly enforce a party's failure to appear on time by imposing what is known as an in absentia removal order, even where parties attempted in good faith to attend their hearings. Given the risks associated with losing an immigration court proceeding—exile, persecution, or in some cases death—a noncitizen facing deportation should receive at least the same protections as a defaulting party in a civil matter, who typically only risks losing money.

Although civil litigants typically face far less dire consequences than immigration court respondents if they lose their case, the Federal Rules provide civil litigants with strong protections against default judgment because of the Rules' preference for deciding cases on their merits. A court clerk enters a default (but not yet a default judgment) when a party to an action "fail[s] to plead or otherwise defend" their position.[162] Once default is entered, Rule 55 provides that the court "may set aside an entry of default" upon a showing of "good cause."[163] This is intended to be a forgiving standard. If the default was not willful, the nondefaulting party would not be prejudiced, and the defaulting party has a meritorious defense, then default ordinarily should be set aside.[164]

Even if a default is not set aside at that point, the Rules provide additional protections before the court can issue a default judgment. In certain cases, a default judgment order is automatic.[165] But in any case involving minors or persons deemed incompetent, as well as any case where the defaulting party has previously appeared, that party is entitled to notice and an opportunity to appear at a hearing before a final default judgment is entered.[166] This allows a party to explain their reasons for nonappearance before the court decides whether to issue a default judgment.

If the court enters default judgment, the defaulting party still retains one more opportunity to vacate the default judgment and proceed on the merits. A party may move to set aside a default judgment under Rule 60(b) on the grounds of "mistake, inadvertence, surprise, or

161. Farnese v. Bagnasco, 687 F.2d 761, 764 (3d Cir. 1982).

162. FED. R. CIV. P. 55(a).

163. *Id.* at 55(c).

164. *See, e.g.*, Indigo Am., Inc. v. Big Impressions, LLC, 597 F.3d 1, 3 (1st Cir. 2010) (stating that courts analyze "(1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; and (3) whether a meritorious defense is presented" when deciding whether to set aside a default).

165. *See* FED. R. CIV. P. 55(b)(1) (making default judgment mandatory where the party has never appeared and the damages requested are for a "sum certain").

166. *See id.* at 55(b)(2).

excusable neglect."[167] In the context of default judgments, "the criteria of the Rule 60(b) set aside should be construed generously."[168] The rationale is that "defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party."[169] Default judgments ordinarily will be upheld only if the defaulting party acted in bad faith or engaged in willful misconduct in failing to appear.[170] In short, the Federal Rules display a strong preference for deciding cases on the merits and view default judgment as an option that should be used only when the defaulting party has acted in bad faith to thwart the judicial process.

The immigration system, by contrast, takes the opposite approach. When a party fails to appear, the immigration rules display a strong presumption in favor of default judgment and against reaching the merits. They also make it very difficult to set aside a default judgment, even when the noncitizen acted in good faith. When a noncitizen fails to appear at a scheduled hearing, the immigration judge is statutorily required to issue an in absentia removal order.[171] Not only that, failing to appear results in additional mandatory penalties that render a noncitizen ineligible for various other forms of immigration relief for a period of ten years.[172] The only conditions that must be met before issuing the in absentia removal order are that the government must show that notice of the hearing was sent to the noncitizen's last known address and that there is a basis for finding the noncitizen removable.[173] This is similar to the civil context, in which the judge must determine that the facts alleged in the complaint authorize relief (i.e., that the complaint would survive a motion to dismiss) before awarding relief.[174] Unlike default judgment in the civil context,

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167. *Id.* at 60(b)(1); *see also id.* at 55(c) (permitting a court to "set aside a final default judgment under Rule 60(b)").

168. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993).

169. *Id.*

170. *See* Shepard Claims Serv., Inc. v. William Darrah & Assocs., 796 F.2d 190, 194 (6th Cir. 1986) (stating that for a party's conduct "[t]o be treated as culpable" so as to justify default judgment, "[the] defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings"); Keegel v. Key W. & Caribbean Trading Co., 627 F.2d 372, 374 (D.C. Cir. 1980) (finding that the defendant was neglectful in failing to retain counsel sooner, but setting aside the default judgment because "[t]he 'willful' criterion appear[ed] lacking").

171. 8 U.S.C. § 1229a(b)(5)(A) (stating that a noncitizen who "does not attend a proceeding . . . shall be ordered removed in absentia").

172. *Id.* § 1229a(b)(7).

173. *Id.* § 1229a(b)(5)(A).

174. *See, e.g.*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1370 n.41 (11th Cir. 1997) ("[A] default judgment cannot stand on a complaint that fails to state a claim.").

however, no additional notice or opportunity to appear is required, and an in absentia removal order will ensue immediately.[175] There also is no analogue to the civil system's requirement to appoint counsel or require an appearance before issuing an order against children. While in absentia removal orders represent a small fraction of the total number of removal orders, they still affect thousands of noncitizens every year.[176]

Although the immigration judge can reopen an in absentia removal order, the standard is much more stringent than for reopening a default judgment. Absent showing a lack of notice, the noncitizen can only reopen an in absentia order when the noncitizen demonstrates "exceptional circumstances."[177] The statute identifies "serious illness" of the noncitizen or a close family member, the death of the noncitizen's family member, and "battery or extreme cruelty to the [noncitizen] or any child or parent of the [noncitizen]" as examples of exceptional circumstances.[178] It further states that any other situation deemed "less compelling" than those examples will not qualify as exceptional.[179]

This language allows for virtually no leniency and requires a court to rigorously scrutinize a noncitizen's circumstances to determine if they fit into this narrow and unforgiving category. It stands in stark contrast to how federal courts liberally construe the standard for reopening defaults and resolve doubts in favor of proceeding on the merits.[180] Unlike with default judgments, the lack of prejudice to the opposing party resulting from an in absentia order is irrelevant, as the sole focus is on exceptional circumstances. Nor does the standard focus on willful misconduct versus good-faith efforts; there are many situations where a noncitizen's good-faith effort or lack of willful misconduct have failed to qualify as exceptional circumstances. For example, a court will not find an "exceptional" circumstance even if the respondent can prove that they missed their proceeding because of traffic, poor counsel, vehicle breakdown, bad directions, or illness that

175. Furthermore, no notice of any kind appears to be required if the noncitizen failed to provide the government with their address. 8 U.S.C. § 1229a(b)(5)(B).

176. *See* Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. PA. L. REV. 817, 847 (2020) (showing an average of nearly thirty thousand in absentia removal orders a year for the years 2008–2018).

177. 8 U.S.C. § 1229a(b)(5)(C)(i).

178. *Id.* § 1229a(e)(1).

179. *Id.* (expressly stating that the standard should be read as "not including less compelling circumstances" than the examples described in the statute).

180. *See supra* notes 161–170 and accompanying text (discussing the Federal Rules' protections against default judgments).

is not noted as severe on a doctor's note.[181] As a result, only a small percentage of motions to reopen an in absentia order are granted.[182] Many of these situations, by contrast, would suffice to set aside a default judgment in a civil case because they do not evince willful misconduct or result in undue prejudice.[183]

The consequences of this framework are harsh. It can be very easy to miss—or simply arrive late to—a court hearing through no fault of one's own. This is especially true for individuals with busy lives and multiple obligations and where the immigration court may be located far away from where the noncitizen lives.[184] Individuals who are

181. *See* Arredondo v. Lynch, 824 F.3d 801, 803–05 (9th Cir. 2016) (respondent's car breaking down is not an "exceptional circumstance[ ]" to miss a proceeding because the respondent could have tried to find alternative transportation); Quintero-Mejia v. U.S. Att'y Gen., 408 F. App'x 328, 329 (11th Cir. 2011) (respondent's taxicab driver not knowing where the immigration court was did not constitute "exceptional circumstances" for respondent to arrive late to a proceeding); Guillen v. Holder, 397 F. App'x 30, 32 (5th Cir. 2010) (respondent's motion to rescind denied because the respondent's attorney did not give an affidavit in support of the respondent's claim); Grigoryan v. Mukasey, 294 F. App'x 309, 310 (9th Cir. 2008) (respondent's doctor's note did not prove "exceptional circumstances" because it did not state how severe the respondent's illness was); Ursachi v. INS, 296 F.3d 592, 593–94 (7th Cir. 2002) (same); Olivas v. INS, 15 F. App'x 502, 504 (9th Cir. 2001) ("a broken watch, slow public transportation, and long lines" do not constitute "exceptional circumstances" for a respondent's late arrival to a proceeding); Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996) (traffic and issues with trying to find parking do not constitute "exceptional circumstances"); S-L-H-, 28 I. & N. Dec. 318, 320 (B.I.A. 2021) (stating that "[a]dverse weather conditions, traffic congestion, and security checkpoints in Government buildings" ordinarily will not constitute exceptional circumstances); *see also* Rebecca Feldmann, *What Constitutes Exceptional? The Intersection of Circumstances Warranting Reopening of Removal Proceedings After Entry of an In Absentia Order of Removal and Due Process Rights of Noncitizens*, 27 WASH. U. J.L. & POL'Y 219, 224, 234–45 (2008) (arguing that the current exceptional circumstance standard is too strict).

182. *See* Eagly & Shafer, *supra* note 176, at 855–56 (finding that only fifteen percent of in absentia removal orders were reopened). With the advantage of experienced counsel, that rate might rise. A report from one advocacy group showed that they were able to rescind one hundred percent of their clients' in absentia orders. ASYLUM SEEKER ADVOC. PROJECT & CATHOLIC LEGAL IMMIGR. NETWORK, INC., DENIED A DAY IN COURT: THE GOVERNMENT'S USE OF *IN ABSENTIA* REMOVAL ORDERS AGAINST FAMILIES SEEKING ASYLUM 6, 17 (2019), https://cliniclegal.org/file-download/download/public/74 [https://perma.cc/F2Q9-4W7H].

183. *See, e.g.*, Keegel v. Key W. & Caribbean Trading Co., 627 F.2d 372, 374 (D.C. Cir. 1980) (finding that defendant's default resulting from neglect in seeking to obtain counsel should be vacated despite the defendant's neglect because the defendant's misconduct was not willful); Principal Life Ins. Co. v. Gorsche, 733 F. Supp. 2d 1077, 1083 (S.D. Iowa 2010) (vacating default where the defendant engaged in negligent misconduct in failing to seek counsel, but not willful misconduct); Bank of N.Y. v. Brunsman, 683 F. Supp. 2d 1300, 1303 (M.D. Fla. 2010) (setting aside default where defendant failed to respond to the complaint, but the failure was not willful); Christiansen v. Adams, 251 F.R.D. 358, 360 (S.D. Ill. 2008) ("[I]gnorance and misinterpretation of the Illinois scheme for representation constitutes good cause for his failure to timely enter his appearance and to respond to the complaint.").

184. Several states, including Michigan, Pennsylvania, Tennessee, North Carolina, and Nebraska, have only one immigration court for the entire state. *EOIR Immigration Court Listing*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/immigration-court-administrative-control-list (last updated June 23, 2023) [https://perma.cc/6BD7-JPRX] (listing all

actively trying to comply with court requirements may find that they are subject to the most severe penalty—automatic deportation—without a chance to be heard and with little recourse.

While the current in absentia removal standard is set by statute, reform is still possible. The underlying rationale for the statutory standard was to stop bad-faith misconduct, and there is no reason why in absentia removals should also sweep up noncitizens who do not exhibit bad faith. The current standard was enacted at a time when Congress believed that most noncitizens who failed to appear were purposely skipping court to avoid a deportation order.[185] Studies show, however, that most noncitizens attend their hearings—particularly so when they are represented by counsel who can help prevent good-faith errors that cause a noncitizen to miss a hearing.[186] One possible reform is to follow the lead of courts applying the Federal Rules and amend the INA to limit in absentia removal to bad-faith misconduct. This could strike a better balance between discouraging parties from purposely avoiding court hearings while also displaying a preference for deciding cases on the merits.

There is no reason that a noncitizen facing banishment should have fewer protections than a civil litigant who may risk losing only money. At a minimum, parties in immigration court should receive the same protections as parties who default in the civil system. Following the guidance of the Federal Rules and changing the strict "exceptional circumstances" requirement into a more lenient and forgiving standard that gives noncitizens the benefit of the doubt and acknowledges the high-stakes nature of their cases would better serve the goal of basing decisions on the merits rather than on a failure to follow technical rules.[187]

Executive Office for Immigration Review ("EOIR") immigration court locations). This means that individuals from other parts of the state may have to travel several hours to attend their hearings.

185. *See* MUZAFFAR CHISHTI & STEPHEN YALE-LOEHR, MIGRATION POL'Y INST., THE IMMIGRATION ACT OF 1990: UNFINISHED BUSINESS A QUARTER CENTURY LATER 8 (July 2016), https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf [https://perma.cc/T96V-Y4XR] (stating that the 1990 Immigration Act, which included the new requirements for in absentia removal orders, was motivated in part by the view that noncitizens were purposely not appearing for their hearings); *see also* Monges-Garcia, 25 I. & N. Dec. 246, 247 (B.I.A. 2010) (stating that the purpose of provisions like the in absentia removal provision was to ensure that noncitizens appear at their hearings).

186. *See* Eagly & Shafer, *supra* note 176, at 858–64 (conducting study showing that representation decreases in absentia removal rate).

187. The author wishes to acknowledge the exceptional work of law student Michael Jannuzzi, who wrote an early draft of this subsection.

C. Administrative Closure

The Federal Rules' reforms expanding opportunities for joinder of related claims and parties into a single proceeding and moving away from the rigid structures of defined common-law writs may also be instructive for addressing ongoing controversies about immigration court docket management practices. One of the primary aims of the Federal Rules was to expand the ability to join related claims and parties into a single action, such that the entire controversy between parties could be decided in a single case rather than fracturing it into separate forms of action to be tried as separate matters.[188] Thus, Rule 18 allows a plaintiff to join all claims against a defendant, regardless of whether the claims are related.[189] Rule 20 permits a party to join other plaintiffs or defendants as long as the claims involving the joined party arise out of the same transaction or occurrence as the existing claims and share a common question of law or fact.[190] The Federal Rules also provide for joinder of necessary parties, third-party defendants, counterclaims, and cross-claims rather than requiring that such claims be brought in separate proceedings.[191] The drafters also wanted to move away from the writ-based pleadings system where courts could only hear claims that fell within the scope of specified writs or forms of action.[192]

Although it may not be initially apparent, these aspects of the Federal Rules may be relevant for immigration court docket management practices. Recent efforts to restrict immigration judges' discretion in managing their cases threaten to artificially truncate cases and lead to deportation orders before all of a noncitizen's claims can be fully considered. One such docket management tool, known as "administrative closure," has recently become a political lightning rod,[193] and its legal basis is now subject to dispute.[194]

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188. *See supra* note 92 and accompanying text.

189. FED. R. CIV. P. 18(a).

190. *Id.* at 20(a)(1)-(2).

191. *See id.* at 13–14, 19.

192. *See supra* notes 87–91 and accompanying text.

193. *See* Email from A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. JJ., to Jefferson B. Sessions, Att'y Gen. of the U.S. (Jan. 30, 2018), https://www.aila.org/infonet/naij-letter-urging-ag-sessions-to-affirm-authority [https://perma.cc/8VZU-M52Q] ("The use of administrative closure has become controversial.").

194. *Compare* Cruz-Valdez, 28 I. & N. Dec. 326 (Att'y Gen. 2021) (holding that immigration judges have authority to administratively close cases and overruling a prior Attorney General decision), *with* Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018) (holding otherwise), *and* Hernandez-Serrano v. Barr, 981 F.3d 459, 466 (6th Cir. 2020) (agreeing with the Attorney General's view in *Castro-Tum* that immigration judges lack statutory or regulatory authority to administratively close cases).

Administrative closure is a "routine" and longstanding docket management tool for immigration judges dating back to the 1980s.[195] It "is used to temporarily pause removal proceedings."[196] "It does not terminate or dismiss the case, but rather 'remove[s] a case from the Immigration Judge's active calendar or from the Board's docket.' "[197] Thus, an administratively closed case remains subject to being recalendared and moved back to active status as circumstances warrant.

Administrative closure is typically used when a noncitizen is seeking relief or action from another agency that would provide a basis for remaining in the United States. For example, a noncitizen in a removal proceeding may be eligible for certain visas that provide a ground for remaining in the United States.[198] They may have family members who are filing petitions on their behalf, which may lead to a change in immigration status. Those petitions and applications, however, are not adjudicated by the immigration court but by a separate agency, U.S. Citizenship and Immigration Services ("USCIS").[199] And it may be the case, particularly for detained noncitizens, that USCIS will not issue a decision on those applications before the deportation proceeding concludes. Similarly, noncitizens may be seeking to challenge a prior criminal conviction that provides the basis for the removal proceeding—say, through post-conviction relief or a pardon application.[200] As with visa applications, those requests run

195. *See* Robie, *supra* note 55, at 1–2 (listing administrative closure as an option if a noncitizen fails to appear); *see also Cruz-Valdez*, 28 I. & N. Dec. at 326 (describing administrative closure as -a "routine tool" (internal quotation marks omitted) (quoting Avetisyan, 25 I. & N. Dec. 688, 694 (B.I.A. 2012))).

196. *Cruz-Valdez*, 28 I. & N. Dec. at 326 (quoting W-Y-U-, 27 I. & N. Dec. 17, 18 (B.I.A. 2017)).

197. *Id.* (alteration in original) (quoting *Avetisyan*, 25 I. & N. Dec. at 692).

198. *See, e.g.*, *id.* at 326–27 (stating that administrative closure "has been used, for example, to pause cases while the United States Citizenship and Immigration Services [ ] adjudicates a noncitizen's pending visa petition"); *Administrative Closure After* Matter of Cruz-Valdez *Practice Advisory*, AM. IMMIGR. COUNCIL & AM. C.L. UNION 3 (Jan. 18, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post_castro_tum_0.pdf [https://perma.cc/PL8B-M5TK] (explaining that, prior to *Castro-Tum,* administrative closure was used in certain situations where respondents had approved visa petitions).

199. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 1.4(a)-(b) (2023) (stating that immigration court jurisdiction is generally limited to determining removability and that immigration courts generally lack jurisdiction to adjudicate visa petitions, certain waivers, and naturalization applications, among other things); *Immigrant Visa Process*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition.html (last visited Sept. 20, 2023) [https://perma.cc/NMK3-3XNW] ("USCIS oversees immigration to the United States and approves (or denies) immigrant petitions . . . .").

200. *See* AM. IMMIGR. COUNCIL & AM. C.L. UNION, *supra* note 198, at 3 n.15 ("[A]dministrative closure has been granted to await . . . the results of a criminal court processing, including a direct appeal or post-conviction relief.").

on a different timeline than the deportation proceeding and may not be resolved before the court issues a removal order.

Allowing administrative closure, therefore, fosters decisions on the merits. In such situations, administrative closure may further the twin goals of efficiency and just decisionmaking that lie at the heart of the Federal Rules.[201] From an efficiency standpoint, it makes little sense to devote scarce resources to a deportation case that may be mooted if the noncitizen receives requested relief from another agency at the expense of more pressing cases on the court's docket. From a justice perspective, it is troubling to push a case forward, issue a removal order, and banish a noncitizen from the United States before that person can receive relief from another government body.

For years, the immigration courts considered these factors when addressing administrative closure; they balanced the noncitizen's likelihood of relief with the interest in prompt decisionmaking when deciding whether to administratively close a case.[202] The practice was widely accepted and supported by immigration judges and other members of the immigration adjudication system.[203] The Justice Department has recognized the value of administrative closure, explicitly providing for administrative closure for individuals from specified countries through a series of different regulations.[204]

Controversy arose, however, when the Trump Administration attempted to outlaw administrative closure and force cases to be decided quickly, regardless of pending claims with other agencies for relief from deportation. In *In re Castro-Tum*, then Attorney General Jeffrey Sessions issued a decision stating that immigration judges lacked statutory or regulatory authority to administratively close cases.[205] The Trump Administration also proposed regulations expressly depriving immigration judges of a general authority to grant

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201. *See supra* note 13 and accompanying text.

202. *See Avetisyan*, 25 I. & N. Dec. at 696 (listing factors the immigration judge should weigh in deciding whether administrative closure is appropriate).

203. *See, e.g.*, Tabaddor, *supra* note 193 ("The NAIJ urges you to protect the efficient and fair adjudication of cases in the Immigration Court by affirming the authority of your Immigration Judges to use administrative closure as an effective docket management tool."); BOOZ ALLEN HAMILTON & EXEC. OFF. FOR IMMIGR. REV., LEGAL CASE STUDY: SUMMARY REPORT 26 (2017), https://www.aila.org/casestudy [https://perma.cc/Y49L-7NBH] (recommending administrative closure as a way of managing caseloads).

204. *See* 8 C.F.R. § 1245.13(d)(3)(i) (2021) (authorizing administrative closure for certain categories of Nicaraguan and Cuban nationals); 8 C.F.R. § 1245.15(p)(4)(i) (2021) (requiring administrative closure for certain categories of Haitian nationals); 8 C.F.R. § 1245.21(c) (2022) (authorizing administrative closure for certain nationals from Vietnam, Cambodia, or Laos); 8 C.F.R. § 1214.3 (2023) (authorizing administrative closure for children and spouses of permanent residents while they seek "V" nonimmigrant status); 8 C.F.R. § 1214.2(a) (2023) (providing for administrative closure for victims of severe forms of sex trafficking who are seeking "T" visas).

205. 27 I. & N. Dec. 271, 274 (Att'y Gen. 2018).

administrative closure, but those regulations were enjoined before they could go into effect.[206]

Although several circuit courts vacated *Castro-Tum* as an improper reading of immigration judges' authority to manage their dockets,[207] and although Attorney General Merrick Garland has since overruled *Castro-Tum*,[208] the Sixth Circuit agreed with *Castro-Tum* that current immigration statutes and regulations do not authorize administrative closure.[209] Thus, whether immigration judges can grant administrative closure as a general matter remains a live issue—one that ultimately may require rulemaking to resolve.

The Biden Administration has stated that it intends to promulgate new rules regarding administrative closure,[210] though no proposed rules have been issued thus far. In considering what any new regulations should provide, the Federal Rules support giving immigration judges the power to grant administrative closure. Denying the power to administratively close cases artificially truncates decisionmaking and prevents cases from being decided as a whole. Forcing deportation cases to quickly move to a final decision in a way that prevents a separate agency or court from deciding a visa application or a post-conviction relief claim unduly elevates form over substance. Joinder in its fullest sense would support bringing a noncitizen's related claims together so that they can be decided comprehensively. While that may not be possible in a system that separates related issues across different agencies, allowing a court to account for related issues that are pending before another agency through mechanisms like administrative closure advances the spirit of the Federal Rules' joinder provisions and supports the goal of approaching cases holistically.

The Federal Rules' goals of promoting flexibility and decisions on the merits support administrative closure in a second way. In *Castro-Tum*, the Attorney General cited the fact that regulations authorized administrative closure for specified groups in response to specific

206. *See* Centro Legal de la Raza v. Exec. Off. for Immigr. Rev., 524 F. Supp. 3d 919 (N.D. Cal. 2021) (enjoining this rule's implementation and enforcement).

207. *See* Arcos Sanchez v. Att'y Gen. U.S., 997 F.3d 113 (3d Cir. 2021); Meza Morales v. Barr, 973 F.3d 656 (7th Cir. 2020); Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).

208. Cruz-Valdez, 28 I. & N. Dec. 326, 326 (Att'y Gen. 2021).

209. *See* Hernandez-Serrano v. Barr, 981 F.3d 459, 466 (6th Cir. 2020) (agreeing with the Attorney General that the relevant regulations do not authorize administrative closure). Relatedly, the Second Circuit also has held that it was not error for an immigration judge to apply *Castro-Tum* before it was overruled and deferred to *Castro-Tum* as a reasonable interpretation of relevant regulations. Garcia v. Garland, 64 F.4th 62, 65 (2d Cir. 2023).

210. *See Cruz-Valdez*, 28 I. & N. Dec. at 329 (stating that the old rule will be reconsidered through notice-and-comment rulemaking).

circumstances to conclude that this prohibited administrative closure in all other circumstances.[211] But looking through the lens of the Federal Rules shows that this is backward. The fact that the government authorized administrative closure on multiple occasions shows that it recognizes the value of allowing immigration judges to pause cases while noncitizens pursue relief from other agencies. If it is useful for individuals from specific countries,[212] there is no reason to think that it would be any less useful for noncitizens from other countries. Limiting administrative closure to a few specific instances identified in discrete statutes looks akin to the common-law system of limiting forms of action to preexisting common-law writs, where only cases that fell within existing classifications could go forward.[213] One of the goals of the Federal Rules was to eliminate this kind of pigeonholing and allow parties to raise any valid claims arising from the facts of the case.[214]

Third, the argument against administrative closure ignores the Federal Rules' instruction to promote both the "speedy" and "just" resolution of claims.[215] *Castro-Tum* focused solely on the interest of moving quickly, without considering fairness. And even its interest in speed is misleading when thinking about a noncitizen's case holistically. Denying administrative closure promotes expeditiousness with respect to a deportation order only—not to the relief that the noncitizen may obtain from other agencies. In considering whether prohibiting administrative closure truly promotes efficiency, it is worth noting that the National Association of Immigration Judges, former immigration judges, and other segments of the immigration court apparatus have expressed support for administrative closure and explained that it promotes efficiency by allowing immigration courts to properly prioritize some cases over others.[216]

Given the current disagreement about the availability of administrative closure, regulations may be necessary to clarify when it

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211. Castro-Tum, 27 I. & N. Dec. 271, 287–89 (Att'y Gen. 2018). In doing so, the Attorney General relied on a canon of construction known as the rule against surplusage. *See id.* ("I must adopt an interpretation that gives each regulation independent meaning, not one that renders the continuance regulation unnecessary."). As with most canons, this canon is just a rule of thumb and can be overcome by other contextual evidence. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (describing canons as "guides" rather than as "mandatory rules" and explaining that "other circumstances evidencing congressional intent can overcome their force").

212. *See supra* note 204 and accompanying text.

213. *See supra* notes 66–73 and accompanying text.

214. *See supra* notes 87–91 and accompanying text.

215. FED. R. CIV. P. 1.

216. *See supra* notes 202–204 and accompanying text (various sources supporting administrative closure).

can be used. As the executive branch considers such regulations, looking to both the history and structure of the Federal Rules regarding joinder could be useful in designing regulations authorizing administrative closure.

D. Where the Federal Rules May Not Provide the Best Model: The Issue of Discovery

The fact that the Federal Rules may be useful in certain contexts does not mean that they should be imported wholesale into immigration proceedings. They do not necessarily provide a one-size-fits-all solution. It may be that not every Federal Rule would best further the drafters' overarching goals of merits-based decisions and putting an end to the "sporting theory of justice," which turned litigation into a tactical game rather than a search for justice.[217] There may be some cases in which other models better serve those goals, and each situation should be assessed on a case-by-case basis.

Thus, certain Federal Rules may not be the best fit, even in situations where they appear to better promote decisions on the merits than analogous practices in immigration court. One such example involves discovery rules. Immigration proceedings contain no right of discovery, even for materials that could be turned over with minimal difficulty and expense. The lack of a discovery right makes it harder for the parties to present a full case and the immigration judge to issue a decision on a full record.[218] In this way, immigration rules deviate sharply from the Federal Rules, which provide for significant discovery rights.

Nonetheless, importing the civil discovery regime into immigration hearings may not be the best way of achieving the goals of the Federal Rules' drafters. Instead, criminal law discovery rules actually may provide a better means of surmounting the "sporting theory of justice" and a better path for fostering accurate decisionmaking.[219] At first glance, this may seem odd. Various federal agencies utilize discovery rules that largely mirror the Federal Rules of Civil Procedure,[220] and the Administrative Conference of the United States' Model Adjudication Rules also largely track the civil discovery

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217. *See* Pound, *supra* note 64, at 404.

218. For a more detailed critique of the lack of discovery in immigration court, see generally Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014).

219. *See* Pound, *supra* note 64, at 404.

220. *See* Hereen, *supra* note 218, at 1578–79, 1578 n.66 ("Often, agency rules are similar to the Federal Rules of Civil Procedure with respect to the scope of discovery.").

rules.[221] Indeed, the Federal Rules' discovery reforms were created to expand access to evidence, equalize the playing field, and promote decisions on substance over technicalities. Two of the major reforms of the Federal Rules were codifying broad rights of discovery and establishing that the parties have a right to obtain relevant evidence possessed by the opposing party, subject to protections such as attorney-client privilege or work product protection.[222] The basis for this change was the view that all parties should, as much as possible, be working from the same set of facts and evidence and that the trial should be a search for truth rather than a game to see who can withhold the most relevant material from the other.[223] Rule 26(b) establishes that parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[224] Although the Federal Rules have been modified over the years to address concerns about discovery costs and abusive practices,[225] the Federal Rules' basic goal of allowing the parties access to relevant evidence remains true.[226]

By contrast, immigration hearings do not offer an easy path for discovery. The parties lack the right to obtain material in the opposing party's possession, even when it is relevant to the dispute.[227] This is both unfortunate and unnecessary because immigration cases seem well suited for certain discovery disclosures. As part of its routine information-gathering process, the government already possesses a

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221. *See* MODEL ADJUDICATION RULES § 231 cmt. 1 (ADMIN. CONF. OF THE U.S. 2018) ("This rule provides a broad scope of discovery, patterned on FRCP 26(b).").

222. *See supra* notes 84–87 and accompanying text (explaining these reforms); *see also* FED. R. CIV. P. 26(b) advisory committee's note to 1946 amendment ("The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.").

223. *See* FED. R. CIV. P. 26 advisory committee's note to 1983 amendment ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947))).

224. FED. R. CIV. P. 26(b)(1).

225. *See* FED. R. CIV. P. 26 advisory committee's note to 1983 amendment (describing growth of improper discovery practices and describing changes to the rules to give judges more power to impose sanctions on abusive parties); *see also* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment (regarding proportionality requirement).

226. *See, e.g.*, FED. R. CIV. P. 26(f) advisory committee's note to 1980 amendment ("The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases."); FED. R. CIV. P. 26 advisory committee's note to 2015 amendment (reaffirming that information not admissible is still discoverable if it could lead to admissible evidence while also emphasizing that discovery requests must be proportional to the needs of the case).

227. The INA does provide that immigration judges can issue subpoenas and order depositions, but judges rarely invoke those provisions. *See* Heeren, *supra* note 218, at 1571 ("There is technically a right to seek depositions and subpoenas from an immigration judge [ ], but this right is rarely used and is extremely difficult to enforce.").

trove of material on each noncitizen conveniently organized into a single file called an "A-File" or alien file.[228] That file is "the repository of all immigration records concerning that individual" in the government's possession.[229] Nonetheless, the government is not required to turn over the A-File to the noncitizen; in fact, it routinely refuses to turn over A-Files when noncitizens request them.[230]

The refusal to disclose the A-File can undermine the goal of deciding cases on the merits and may cause noncitizens to be deported when they have valid grounds for remaining in the United States. Those files in the government's possession may contain highly probative evidence that the noncitizen does not possess or may not be able to easily obtain. For example, various claims for immigration relief require either a minimum time frame of presence or continuous presence in the United States.[231] A noncitizen may not remember exactly when they came to the United States or may not be able to prove when they came to the United States, even if they do remember. Yet such information typically is comfortably residing in the A-File.[232] Additionally, the A-File could contain information that helps establish

228. *See* Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755, 1757 (Jan. 16, 2007) (describing the A-File as including "all the individual's official record material" that DHS has collected on an individual noncitizen); *Alien Files (A-Files)*, NAT'L ARCHIVES, https://www.archives.gov/research/immigration/aliens (last updated Dec. 15, 2021) [https://perma.cc./WS35-MF9K] ("A-Files contain all records of any active case of an alien not yet naturalized . . . ."); Heeren, *supra* note 218, at 1570–71 (describing the contents and nature of the A-File).

229. *A-File Policy and Practice*, U.S. DEP'T OF JUST.: OFF. OF THE INSPECTOR GEN., https://oig.justice.gov/sites/default/files/archive/special/0007/afile.htm (last visited Sept. 20, 2023) [https://perma.cc/PJA4-743Z].

230. *See* Heeren, *supra* note 218, at 1586–87 (describing how government attorneys refuse to disclose A-Files to noncitizens who seek them). The Ninth Circuit has held that noncitizens have a statutory right to a copy of their A-File, at least with respect to certain cases pertaining to citizenship or inadmissibility. *See* Dent v. Holder, 627 F.3d 365 (9th Cir. 2010). In cases arising outside the Ninth Circuit, however, the government does not disclose A-Files. Even within the Ninth Circuit, the government has interpreted *Dent* narrowly and will only turn over A-Files in a subset of deportation cases. *See* AM. IMMIGR. COUNCIL, *supra* note 34, at 8 ("To date, the government has failed to apply *Dent* outside the Ninth Circuit, and has narrowly interpreted the decision even within the Ninth Circuit. As a result, most immigrants in removal proceedings still must file FOIA requests to access their immigration files."); Heeren, *supra* note 218, at 1586–87 (noting the government refuses to turn over A-Files in Ninth Circuit cases in which "persons are charged with deportability . . . or where they are charged with inadmissibility but have conceded that they are present without status").

231. *See* 8 U.S.C. § 1229b(a)(1)-(2) (stating that to be eligible for cancellation of removal for permanent residents, the noncitizen must have been lawfully admitted for permanent residence for at least five years and must have resided continuously in the United States for at least seven years); *id.* § 1229b(b)(1)(A) (stating that nonpermanent residents who wish to seek cancellation of removal must have acquired at least ten years of continuous physical presence in the United States immediately preceding the date of their application).

232. *See* Heeren, *supra* note 218, at 1611 ("For example, a non-citizen may not be able to show that she meets the requirement of seven years of lawful residency for 'cancellation of removal' unless she has the government's memo granting her some form of lawful status.").

eligibility for certain visas.[233] It might also have information about government misconduct in obtaining information, which could support a motion to suppress evidence that the government seeks to introduce to support its side of the case.[234] In one case, an individual who claimed to be a naturalized United States citizen was deported after the immigration court and the BIA found that he failed to meet his burden of proving his citizenship claim, even though information in his A-File showed that both he and his mother had submitted naturalization applications—information that the immigration court did not have and that could have prevented his unnecessary deportation if disclosed earlier.[235]

Documents in the government's possession may also be critically important for asylum cases. Many asylum seekers will have been interviewed by the government or will have given statements at various times before their asylum cases get to immigration court. The government does not disclose the transcripts and notes from those interviews, even though they can be crucial in an asylum case. Those materials can help provide factual information relevant to the asylum claim, and they can allow an attorney representing the asylum seeker to adequately prepare for the final hearing and address potential inconsistencies between earlier and later statements. Additionally, government attorneys frequently use a claimant's past statements to try to impeach the claimant's credibility, which is important because a claimant's credibility can often be a dispositive issue.[236] If the asylum seeker lacks access to the interview transcript, they have no way to challenge the accuracy of the interviewer's notes or show that what they actually said is different from how the interviewer interpreted it.[237]

Currently, noncitizens cannot obtain their A-File or other information through discovery. Instead, the only way that they can seek their file is by submitting a Freedom of Information Act ("FOIA") request.[238] However, relying on FOIA is far less effective than

233. *See* Lopez-Lopez, No. A205 920 665, 2014 WL 7691440 (B.I.A. Dec. 11, 2014) (indicating that noncitizen's A-File could contain relevant information regarding noncitizen's eligibility for a visa).

234. *See* Heeren, *supra* note 218, at 1611–12 ("[T]he government may have records showing that it committed investigatory abuses that give rise to a claim for suppression of evidence.").

235. *See Dent*, 627 F.3d at 368–70 (describing the procedural history of the case).

236. *See, e.g.*, Musollari v. Mukasey, 545 F.3d 505, 508–09 (7th Cir. 2008) ("Thus, asylum cases often turn on the [immigration judge's] credibility determination; an adverse credibility finding will doom the applicant's claim[ ].").

237. *See, e.g.*, Singh v. Gonzales, 403 F.3d 1081, 1086–90 (9th Cir. 2005) (finding that reliance on asylum interviewer's notes was improper when there was no transcript of the interview to confirm the accuracy of the interviewer's subjective notes).

238. *See Request Records Through the Freedom of Information Act or Privacy Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/records/request-records-through-the-

traditional discovery.[239] First, FOIA requests must be submitted to USCIS, a separate agency that is distinct from the immigration court system.[240] USCIS operates on its own timeline and faces a significant backlog of requests. Although USCIS gives priority to individuals with upcoming hearing dates, it does not guarantee that a noncitizen who submits a FOIA request will receive a response prior to the final hearing, let alone far enough in advance of the hearing to allow for meaningful case preparation.[241]

Second, FOIA is not designed as a discovery tool; its purpose is to allow the public to learn about the workings of government.[242] Thus, "A requester's rights under the Act are therefore neither diminished nor enhanced by his status as a party to litigation or by his litigation-generated need for the requested records."[243] Furthermore, FOIA contains numerous exemptions that allow the government to redact or narrow what they provide in response to a FOIA request. Some of these exemptions are quite broad, including information regarding various internal agency communications, information detailing personnel rules and practices, information compiled for law enforcement purposes, and information that implicates personal privacy, among others.[244] By

freedom-of-information-act-or-privacy-act (last updated Dec. 9, 2022) [https://perma.cc/37NW-HZ7D] (describing how noncitizens can file a FOIA request to seek their immigration records).

239. *See, e.g.*, Heeren, *supra* note 218, at 1589–93 (critiquing FOIA as an inadequate means for obtaining relevant case information in a timely manner); ADMIN. CONF. OF THE U.S., RECOMMENDATION 83-4: THE USE OF THE FREEDOM OF INFORMATION ACT FOR DISCOVERY PURPOSES 1 (1983), https://www.acus.gov/sites/default/files/documents/83-4.pdf [https://perma.cc/P4AS-H8B5] ("Discovery does in fact provide parties to litigation with the more reliable mechanism [than FOIA] for obtaining from the Government the information which they need to prepare for trial or hearing.").

240. *See* U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., *supra* note 19 (stating that EOIR is the agency that oversees immigration courts and that it is separate from other immigration agencies).

241. *See* AM. IMMIGR. COUNCIL, *supra* note 34, at 8 ("[N]oncitizens in removal proceedings do not always get responses to their FOIA requests before they are removed."); Heeren, *supra* note 218, at 1594–96 (explaining that the average wait time for expedited requests is close to the length of the average proceeding and thus many individuals do not receive a response before their final hearings). A recent lawsuit alleged that ICE routinely fails to respond to FOIA requests in a timely fashion. Complaint, Nightingale v. U.S. Citizenship & Immigr. Servs., 333 F.R.D. 449 (N.D. Cal. 2019) (No. 3:19-CV-03512). This resulted in a court order requiring ICE to reduce its backlog and comply with statutory timelines, which has led to speedier responses. *See* Defendants' Second Compliance Report at 2, *Nightingale*, 333 F.R.D. 449 (No 3:19-CV-03512) (explaining the court order requiring that the statutory timeline be met).

242. *See* Pratt v. Webster, 673 F.2d 408, 413 (D.C. Cir. 1982) ("[FOIA] was enacted by Congress . . . in order to provide a statutory right of public access to documents and records held by agencies of the federal government."); ADMIN. CONF. OF THE U.S., *supra* note 239, at 1 ("Congress' fundamental objective in enacting the FOIA was to permit the public to inform itself about the operations of the Government. All members of the public are beneficiaries of the Act because Congress' goal was a better informed citizenry.").

243. ADMIN. CONF. OF THE U.S., *supra* note 239, at 1.

244. *See* 5 U.S.C. § 552(b)(1)-(9).

contrast, relevant information covered by these exemptions would be discoverable in a civil case, unless it falls under the much narrower exceptions for privilege or work product.[245]

Third, FOIA may not be a realistic option for noncitizens who are unrepresented or detained. Unrepresented individuals may not know that they can submit a FOIA request, let alone know how to do so, and detained individuals may not easily have the resources or means to submit a FOIA request in a timely manner given how quickly their cases proceed. By contrast, if the government affirmatively disclosed the A-File to them through a discovery process, this concern would not arise.[246]

Nonetheless, discovery may be one area where the quasi-criminal nature of deportation proceedings, in which the government files charging documents and initiates proceedings, means that criminal discovery rules may be preferable to civil discovery rules. First, immigration courts may not have the resources to accommodate extensive civil discovery. Interrogatory requests, depositions, and other time-consuming or expensive discovery methods may not be feasible for high-volume immigration practices or an already heavily backlogged and resource-strapped immigration court system. This may be why other adjudication arenas that do not have the same resources or capacity as the Federal Rules to handle complex litigation—such as small claims court, domestic relations court, and others—often do not provide the full panoply of civil discovery.[247]

Second, the quasi-criminal nature of immigration cases may be incongruous with civil discovery limitations. Noncitizens, particularly those who are undocumented, live with the knowledge and fear that charges could be filed against them at any time. Arguably, just about any relevant document a noncitizen generates could be a document

245. *See* FED. R. CIV. P. 26(b)(1) (allowing for discovery of relevant information that is "nonprivileged"); *id.* at 26(b)(3)(B) (describing the boundaries of work product protection).

246. The government already has indicated that immigration courts should provide their case file (which is different from the noncitizen's A-File) to noncitizens upon request, and it should be no more difficult to do the same with respect to A-Files. *See Request an ROP*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/ROPrequest (last updated Apr. 3, 2023) [https://perma.cc/8YQR-T98E] (stating that noncitizens can request their immigration court file directly from the court and describing the process for doing so); Memorandum from Merrick Garland, Att'y Gen., on Freedom of Information Act Guidelines, to the Heads of Exec. Dep'ts & Agencies 2–3, ¶ C.1 (Mar. 15, 2022), https://www.justice.gov/ag/page/file/1483516/download [https://perma.cc/AEX2-9KT7] (encouraging agencies to make files more accessible without FOIA requests and referring to the EOIR policy of no longer requiring individual FOIA requests).

247. *See, e.g.*, COLO. R. CIV. P. 510(a) (2001) ("Depositions, discovery, disclosure statements, and pre-trial conferences shall not be permitted in small claims court proceedings."); 231 PA. CODE § 1930.5(a) (2016) ("There shall be no discovery in a simple support, custody, Protection from Abuse, or Protection of Victims of Sexual Violence or Intimidation proceedings unless authorized by order of court.").

prepared in anticipation of litigation and thus potentially protected by work product doctrine.[248]

Third, many noncitizens appear in immigration court pro se, yet federal discovery rules were designed for cases in which both parties are represented by counsel. Discovery is technical and precise. A pro se noncitizen may not be able to parse what information fits the legal definition of relevance, what is proportionate to the needs of the case, or what information was prepared in anticipation of litigation or is otherwise privileged. They may have difficulty responding to interrogatories, let alone drafting their own interrogatories. Government attorneys, by contrast, know exactly how to litigate discovery questions. Thus, imposing a civil discovery regime may simply benefit the government at the expense of the noncitizen.

Fourth, while the civil discovery rules were enacted to try and level the playing field and eliminate one party's unfair advantage, using civil discovery rules in immigration court may serve to exacerbate inequalities rather than minimize them. Even aside from the concerns for pro se noncitizens discussed above, the government already possesses a substantial informational advantage, given all the information that federal agencies have collected on noncitizens over time.[249] This is especially true for the large number of noncitizens who are detained during their proceedings. Detained individuals, even those represented by an attorney, face added difficulties in building evidence to support their own case—let alone evaluating, copying, and turning over documents to the government.

In light of these realities, the civil discovery rules may not be the best set of procedures for leveling the playing field and promoting decisions on the merits. Instead, given that many noncitizens are detained, charged in the same manner as criminal defendants, and face burdens that the government does not face, criminal discovery procedures may better serve the goals of equality and merits-based decisionmaking. Rule 16 of the Federal Rules of Criminal Procedure may provide a workable model for immigration court. Rule 16 would allow noncitizens to access any prior statements in the government's possession,[250] information on their prior criminal record,[251] and any

248. *See* FED. R. CIV. P. 26(b)(3) (providing qualified protection from discovery for materials prepared in anticipation of litigation and defining the scope of work product protection).

249. *See* Heeren, *supra* note 218, at 1570 ("When it comes to gathering information in immigration cases, the Department of Homeland Security . . . enjoys an extraordinary advantage.").

250. FED. R. CRIM. P. 16(a)(1)(A)-(B).

251. *Id.* at 16(a)(1)(D).

information that could be material to presenting their case.[252] Although Rule 16 imposes some reciprocal obligations on the noncitizen, they should not be unduly burdensome, at least in ordinary cases. If the government complies with a noncitizen's request to inspect documents, then the noncitizen must allow the government to inspect documents that the noncitizen "intends to use" in presenting their case in chief.[253] This is not fundamentally different from the noncitizen's existing obligation to submit to the court and opposing counsel all evidence they intend to rely upon fifteen days prior to the final hearing.[254] In addition to adopting Rule 16, immigration courts could adopt rules requiring the government to turn over A-Files or to disclose exculpatory material under *Brady v. Maryland*.[255] Thus, the goal of putting an end to the "sporting theory of justice" that inspired the Federal Rules may in fact be best served by applying criminal discovery rules.[256] This suggests that the question of whether to import the Federal Rules into immigration proceedings is not an all-or-nothing question but should be evaluated on a case-by-case basis with an eye toward what will best promote equality and decisions on the merits.

E. Where the Federal Rules May Benefit the Government Rather than the Noncitizen: Notices to Appear and Immigration Court Jurisdiction

While the above examples all describe reforms that would benefit the noncitizen in deportation proceedings, looking to the Federal Rules and adopting reforms to promote decisions on the merits might not always operate to the noncitizen's benefit. One example of this involves what happens when the government issues a charging document—called a Notice to Appear ("NTA")—that is defective because it lacks information required by regulation.[257] For a long time, when the government issued an NTA, the notice would indicate that the noncitizen was being charged as removable but would not specifically

252. *Id.* at 16(a)(1)(E)-(F).

253. *Id.* at 16(b)(1).

254. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 3.1(b)(1)(A) (2023).

255. 373 U.S. 83, 87 (1963); *see, e.g.*, Yee v. BOP, 348 F. App'x 1, 2 (5th Cir. 2009) (finding *Brady* inapplicable to civil administrative proceedings).

256. *See* Pound, *supra* note 64, at 404.

257. *See* 8 U.S.C. § 1229(a)(1)(G)(i) (requiring that the written notice provided to the noncitizen include "the time and place at which the proceedings will be held"); *see also Commencement of Removal Proceedings*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/reference-materials/ic/chapter-4/2 (last updated June 21, 2023) [https://perma.cc/PZ82-26U3] (explaining the Notice to Appear, the filing of which begins removal proceedings, and the information that must be included on the notice).

identify the date and location of the initial hearing.[258] DHS ordinarily sent that information in a separate document informing the noncitizen when and where the hearing would take place.

However, the INA specifically directs that an NTA must contain "[t]he time and place at which the proceedings will be held."[259] In 2018, the Supreme Court held that an NTA that did not contain the date and location of the initial hearing was inconsistent with the governing statute and invalid for particular purposes, including for the purpose of calculating the length of the noncitizen's presence in the United States.[260]

The Supreme Court's decision raised the question whether a defective NTA automatically deprives the immigration court of jurisdiction over the deportation case or can be cured by a later notice providing the noncitizen with the date and location of the hearing. Immigration advocates have argued that the immigration court lacks jurisdiction when an NTA is defective, that the case must be terminated, and that the government must file a new NTA to confer jurisdiction on the immigration court.[261] By contrast, the government has argued—and the BIA and circuit courts have largely agreed—that a defective NTA does not deprive the immigration court of jurisdiction and that the immigration judge can proceed with the case as long as the government subsequently cures the defect and the noncitizen does not suffer undue prejudice.[262]

Looking to the Federal Rules—and particularly their goal of promoting decisions on the merits rather than on technicalities—seems to support the view that an immigration judge should have authority to permit the government to cure a defective NTA in appropriate circumstances. This seems akin to granting plaintiffs broad leeway to amend complaints and avoiding dismissal of cases based on curable defects. Treating the updated notice as an amended pleading taken in conjunction with the original NTA would be consistent with the Federal Rules. In fact, the BIA cited the Federal Rules when it held the INA's

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258. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2124–25 (2018) (Alito, J., dissenting) (describing the government's practice of not providing the date of a future removal proceeding in the notice).

259. 8 U.S.C. § 1229(a)(1)(G)(i).

260. *Pereira*, 138 S. Ct. at 2110.

261. *See, e.g.*, *Strategies and Considerations in the Wake of* Niz-Chavez v. Garland *Practice Advisory*, AM. IMMIGR. COUNCIL & NAT'L IMMIGR. PROJECT 11–18 (Mar. 24, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/strategies_and_considerations_in_the_wake_of_niz-chavez_v._garland_advisory_3.24.2023.pdf [https://perma.cc/YHZ2-5K3W] (addressing these arguments and their effectiveness in cases thus far).

262. *See* Rosales Vargas, 27 I. & N. Dec. 745 (B.I.A. 2020) (stating that defects in an NTA are not jurisdictional defects, but that they can provide a basis for terminating proceedings if the noncitizen can demonstrate prejudice).

requirement that an NTA list the time and place of the hearing is a claims-processing rule that should be followed if the noncitizen raises a timely objection before the close of pleadings, just as Rule 12 requires parties to raise grounds for dismissal prior to the close of pleadings.[263] And just as Rule 15 allows for liberal amendment of pleadings, the BIA held that immigration judges have discretion to allow the government to cure the defects in the original notice to appear.[264] Thus, following the Federal Rules may result in greater flexibility for both noncitizens and the government. While following those rules will often benefit noncitizens, there may be other situations in which it will work against their interests.

IV. A FRAMEWORK FOR REFORM

The above examples identify just a few ways in which the immigration court system impedes merits-based decisionmaking. Undoubtedly, other examples exist,[265] and insufficient space exists to discuss them all here. But what these examples provide is a blueprint

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263. Fernandes, 28 I. & N. Dec. 605, 610 (B.I.A. 2022) (stating that its holding is "consistent with . . . the Federal Rules of Civil Procedure, which require that certain defenses be asserted in a responsive pleading or motion before pleading" (citing FED. R. CIV. P. 12(b))).

264. *See id.* at 613–16 ("[T]he omission of time or place information in a notice to appear 'can be cured and is not fatal[.]' " (quoting Aguilar Fermin v. Barr, 958 F.3d 887, 895 (9th Cir. 2020))). At the same time, while the Federal Rules generally promote flexibility, they can be intentionally strict in certain circumstances. One example concerns protecting personal jurisdiction over a party, and relatedly, ensuring proper service and notice of a lawsuit. *See, e.g.*, FED. R. CIV. P. 4. Rule 4 sets forth specific guidelines for what information must be served on a party (the complaint and a summons) and provides very detailed information as to what constitutes valid service. *Id.* Thus, failure to serve the required information (say by serving the complaint and not the summons) can result in dismissal of an action, albeit without prejudice. *Id.* at 4(m). This reflects the importance of ensuring that parties receive actual notice of a lawsuit and information about how to respond to the lawsuit. One could analogize defective NTAs to Rule 4 and suggest that because NTA information relates to providing proper notice, courts should require strict compliance with the rules for issuing a valid NTA. That is particularly true in cases that implicate the issue of whether the noncitizen was validly notified of the lawsuit. Some courts have held that an in absentia removal order issued based on a defective NTA is invalid and cannot be cured by a subsequent notice of the date and location of the hearing. *See, e.g.*, Singh v. Garland, 24 F.4th 1315 (9th Cir. 2022); Rodriguez v. Garland, 15 F.4th 351 (5th Cir. 2021). *But see* Dacostagomez-Aguilar v. U.S. Att'y Gen., 40 F.4th 1312, 1318–19 (11th Cir. 2022) (holding that a subsequent notice can cure a defective NTA and justify an in absentia removal order); Laparra, 28 I. & N. Dec. 425 (B.I.A. 2022) (same).

265. The immigration appeals process, for example, may also undermine merits-based decisionmaking. For example, practices that allow noncitizens to waive their right to appeal, even when within the thirty-day window for filing an appeal, and to have limited ability to retract that waiver, even when still in that thirty-day period, are inconsistent with federal practice, which does not truncate the time period for filing an appeal. This waiver practice can have severe consequences, particularly for pro se litigants who may not realize the consequences of their actions. *See, e.g.*, Alexander-Mendoza v. Att'y Gen., 55 F.4th 197, 207–09 (3d Cir. 2022) (dismissing an otherwise timely filed appeal because the noncitizen waived appeal at the final hearing before the immigration judge).

for broader reform of the immigration court system beyond simply changing a few discrete rules. The Federal Rules and the history behind their enactment offer several lessons for making the immigration system less of a "labyrinth"[266] and instead one that is more focused on deciding cases on the merits.

First, just as the process leading to the Federal Rules began with an overarching review and study of the then existing civil justice system, there should be a comprehensive and searching reexamination of immigration rules with an eye toward how to best promote merits-based decisions. Given the multiple agencies and subagencies that have been responsible for immigration adjudication and enforcement at various points in time; the multiple layers of statute, regulation, agency precedent, manuals, and informal practices; and the accretion of different practices over time, an audit or accounting of these rules could be instructive. That examination could also identify instances where immigration rules deviate from the Federal Rules or from the rules of other government agencies. While there have been other studies and assessments of the immigration court system, this review could be done with the specific goal of addressing how immigration rules promote or impede decisions on the merits.

Second, just as the federal judicial system has advisory committees to investigate, propose, and evaluate amendments to existing rules,[267] the immigration court system should establish an advisory committee to evaluate and propose changes to immigration rules. The federal advisory committees encompass a cross section of interested parties, including practitioners from both the plaintiff's bar and the defense bar, as well as academics and federal judges.[268] The "quality of the federal amendment process" has been highly touted.[269] Amendments go through multiple layers of consideration by committees, the Supreme Court, and Congress, with opportunities for

266. *See supra* note 15 and accompanying text.

267. *See How the Rulemaking Process Works*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Sept. 20, 2023) [https://perma.cc/E6SH-HYKH] (explaining the role of the five federal advisory rules committees in maintaining and promulgating new rules).

268. *See Committee Membership Selection*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection (last visited Sept. 20, 2023) [https://perma.cc/4L6L-JZK2] ("Unlike other Judicial Conference committees, the rules committees include not only federal judges, but also practicing lawyers, law professors, state chief justices, and high-level officials from the Department of Justice and federal public defender organizations.").

269. Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate the Federal Rules of Civil Procedure*, 67 CASE W. RSRV. L. REV. 501, 502 (2016).

members of the public to provide comments and testimony.[270] Congress has directed by statute that the courts continuously evaluate their procedures with attention to various factors, including "simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[271]

The Justice Department should consider creating analogous advisory committees to propose and evaluate changes to immigration rules. These committees should comprise not just government employees but also immigration practitioners and academics. They could propose new rules, draw attention to regulations that may undermine merits-based decisions, and notify Congress as to how statutory provisions may affect merits-based decisionmaking—such as in the example of in absentia removal orders. They could also hold public hearings and review public comments.[272] Although any rule changes would likely be subject to final approval by the agency, the advisory committee's input could influence the agency's decisions as compared to the agency doing everything on its own.[273]

To be sure, establishing an advisory committee does not guarantee meaningful reform. An advisory committee may be subject to competing interest group dynamics or agency capture and could turn into a vehicle for retrenchment rather than reform. Some scholars have asserted that the Federal Rules Advisory Committees have not been effective, have become overly politicized, or have focused on the wrong issues.[274] One study examining amendments to the Federal Rules of Civil Procedure since 1990 found that they have overwhelmingly favored civil defendants over plaintiffs in ways that potentially restrict

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270. *See Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Sept. 20, 2023) [https://perma.cc/7H33-U5Z2] (delineating the formal comment and review stages of rulemaking).

271. 28 U.S.C. § 331.

272. To be sure, the Department of Justice already (sometimes) offers opportunity for public comment when addressing changes to the immigration court practice manual or the BIA practice manual. *See, e.g.*, Exec. Off. for Immigr. Rev., *EOIR to Hold Listening Session Regarding Practice Manuals*, U.S. DEP'T OF JUST. (May 16, 2022), https://www.justice.gov/eoir/page/file/1505906/download [https://perma.cc/TL4X-C7EY]. But when that happens, those comments are solicited and evaluated by agency employees. That evaluation is substantially different from a review conducted by an advisory committee composed of a broader cross section of stakeholders.

273. Many agencies utilize advisory committees to assist agency officials in making policy decisions. *See, e.g.*, *Advisory Committees of the FCC*, FED. COMMC'NS COMM'N, https://www.fcc.gov/about-fcc/advisory-committees-fcc (last visited Sept. 20, 2023) [https://perma.cc/B2QA-KCSV] ("Advisory committees provide federal departments and agencies with access to expertise and advice on a broad range of issues affecting policies and programs.").

274. *See* Subrin & Main, *supra* note 269, at 503 ("[T]he rules committee acts in haste and is too slow; . . . the committee is obsessed with trivial wordsmithing and is dangerously politicized. . . . [B]oth halves are accurate, depending on the year and the specific reform at issue.").

access to justice and that undermine rather than promote merits-based decisions.[275]

Even a committee that tries to foster more decisions based on substantive law rather than technicality may find itself constrained by statutory and regulatory mandates. For example, a committee could propose changing the framework for in absentia removal orders to more closely track the default judgment procedures in the Federal Rules, but those changes cannot go into effect absent congressional action to amend or repeal the existing in absentia statute.

But that does not mean that an advisory committee is not worthwhile. It may identify rules that can be changed without requiring congressional action. It may be able to advise Congress on the benefits of legislative change. And it may be able to gather information or produce reports that could form the basis for future reforms.

Third, an advisory committee may be able to identify ways to promote merits-based decisionmaking that go beyond specific rule changes. It could develop training materials for immigration judges, materials that emphasize how judges can conduct proceedings to best maximize decisions based on substance rather than procedure. And it could offer suggestions for immigration court hiring practices or for promoting judicial independence. There may be myriad ways to reform the immigration court system to function better, only some of which involve rule changes.

Identifying instances where immigration practice both resembles and deviates from the Federal Rules of Civil Procedure and investigating whether the Federal Rules could serve as a model for immigration court is an important and necessary starting point. Hopefully, it also can serve as a springboard for a larger and more thorough investigation and reform of the immigration court system.

V. POSSIBLE OBJECTIONS

Some might argue that the Federal Rules should not be a model for reforming immigration practice. Among other concerns, it is possible that importing the Federal Rules into immigration court risks giving too much discretion to immigration judges, that agency courts and Article III courts are fundamentally different such that the Federal Rules would not be effective in immigration court, and that utilizing the Federal Rules may enshrine immigration proceedings as civil proceedings and undermine the arguments in favor of giving

275. Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1569–70 (2015).

noncitizens in deportation proceedings protections analogous to those afforded in criminal cases. This Part addresses each objection in turn.

A. Giving Undue Discretion to Immigration Judges

One concern is that following the Federal Rules would grant more discretion to immigration judges than is prudent. The Federal Rules were expressly judge empowering. They were designed to imbue judges with the flexibility to manage cases appropriately and in the interest of justice rather than requiring rigid adherence to strict rules.[276] The drafters were comfortable with that discretion because they viewed federal judges as objective, impartial actors with experience managing the trial process given their prior experience as attorneys.[277]

By contrast, immigration judges are not necessarily as impartial and detached as the drafters of the Federal Rules imagined federal judges to be. Unlike life-tenured federal judges, immigration judges are appointed by the Attorney General, a political appointee, and lack civil service protections.[278] Accordingly, immigration judges serve at the pleasure of the Attorney General and can be dismissed for any reason.[279] This has prompted criticism that immigration judges are appointed to advance the executive branch's policy goals and to promote political objectives.[280] Granting additional discretion to immigration judges to act flexibly so they are no longer too closely tied to rigid

276. *See, e.g.*, Roscoe Pound, *The Etiquette of Justice*, 3 PROC. NEB. ST. BAR ASS'N 231, 249 (1908) ("It might well be maintained, indeed, that as between arbitrary action of the law in nearly all cases, because of the complexity of procedure, and arbitrary action of the judge in some cases, the latter would be preferable."); Subrin, *supra* note 13, at 925 (explaining how the Federal Rules adopted equity-style procedures that "enlarged judicial discretion"); *id.* at 946 (noting that Pound argued that the rules should "provide judges with more discretion to overlook procedural mistakes").

277. *See* Subrin, *supra* note 13, at 946–47 (explaining how the supporters of reform believed that judges should use their "professional expertise" to manage cases).

278. KENT BARNETT, MALIA REDDICK, LOGAN CORNETT & RUSSELL WHEELER, ADMIN. CONF. OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 3 (2018), https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report_2.pdf [https://perma.cc/D33S-B7ML] (identifying immigration judges as differing from administrative law judges).

279. *See* 8 U.S.C. § 1101(b)(4) ("An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe . . . ."); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (proposed Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3) (stating that all BIA members "may be removed or reassigned by[ ] the Attorney General").

280. *See generally* INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/9FXQ-374Q].

doctrines or procedural rules will give politically beholden immigration judges more power—power that could be exercised arbitrarily. Critics may feel that granting additional power in this context may enable judges to decide cases to advance political agendas rather than focusing on the merits.

This concern should be taken seriously. Untethering immigration judges from procedural constraints that promote uniformity and regularity (at times at the expense of substantive justice) creates more opportunities for arbitrary decisionmaking. Indeed, immigration courts have been criticized for their highly disparate rates of asylum grants across immigration judges and racial and ethnic biases in bond and detention decisions.[281]

Yet it is not clear that taking guidance from the Federal Rules will increase arbitrariness. If anything, looking to the Federal Rules may actually decrease arbitrary decisionmaking by providing a new framework to guide immigration judges. Any of the rules and doctrines addressed above—including in absentia removal, administrative closure, and PSG standards—seem politically motivated or full of discretion. For example, Attorney General Sessions reversed the long-standing practice regarding administrative closure by issuing his own legal ruling forbidding it, and then Attorney General Garland overruled Sessions's decision and restored the prior framework.[282] Attorney General Garland issued new guidance for complying with FOIA requests and for disclosing a noncitizen's immigration file,[283] but this guidance could be reversed or changed by a new Attorney General. Rather than relying on rules that flip back and forth across administrations, building an enduring set of immigration rules based on the Federal Rules could promote greater consistency.

Similarly, some have criticized the legal standards for formulating a PSG as reflecting the BIA's policy judgment that victims of gang violence should not receive asylum, not a judgment about how to best promote decisions on the merits.[284] *W-Y-C-*, which created the

281. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 345–49 (2007) (conducting statistical study showing that immigration judges varied widely in how often they granted or denied asylum claims); TRAC IMMIGR., IMPORTANCE OF NATIONALITY IN IMMIGRATION COURT BOND DECISIONS (2019), https://trac.syr.edu/immigration/reports/545/ [https://perma.cc/G6AW-CQME] (reporting the immense impact that the nationality of a detained immigrant can have on their bond outcome).

282. *See supra* note 208 and accompanying text.

283. *See supra* note 246 and accompanying text (discussing the government's indication that courts should provide noncitizens' case files upon request).

284. NIJC, *supra* note 120, at 7 ("A [PSG's] viability may depend on the BIA's arbitrary policy determinations regarding the categories of individuals it believes deserve asylum, rather than the application of the BIA's own particular social group tests."); *see also* A-B-, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018) ("Generally, claims by aliens pertaining to domestic violence or gang violence

"exact delineation" standard and prohibits reformulation of a PSG in later stages of a case,[285] also seems politically motivated to make it harder for individuals to bring successful PSG-based asylum claims.[286] Given that immigration judges previously helped litigants reformulate PSGs and that there was no indication that judges or parties opposed this practice or found it to undermine efficiency, the BIA's reasoning for issuing such a restrictive decision is thin. The same can be said for the rules around administrative closure. Before the Attorney General tried to outlaw it in *Castro-Tum*, administrative closure was a popular and well-ensconced tool in the immigration court system—one that stakeholders in the system supported.[287] Attorney General Sessions's decision to abolish it, over the objections of those stakeholders, undermines the claim that the decision was necessary to promote efficiency or improve court functioning and suggests that it was simply intended to speed up deportation orders.

The statutory framework for in absentia removal reflects a policy judgment about why noncitizens fail to appear at hearings that evidence has since shown to be flawed and incorrect.[288] With respect to an issue like discovery, it is hard to see how creating a discovery process will expand discretion. FOIA officers already exercise substantial discretion when responding to FOIA requests and applying exemptions, and they often exercise that discretion to redact more material than the law permits.[289] Creating a discovery system with fewer exemptions than FOIA could reduce discretion and minimize arbitrary and improper refusals to disclose relevant information.

If anything, looking to the Federal Rules could reduce arbitrariness. Creating a framework that prioritizes decisions on the merits gives immigration judges a guiding principle to use in adjudicating cases. It can promote a stable set of practices that are less subject to reversal based on political whims. It also provides a well-seasoned set of rules that have been tested in the civil litigation arena for more than eighty years. Even if the Federal Rules are judge empowering, they could still promote uniformity and clarity by

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perpetrated by non-governmental actors will not qualify for asylum."), *vacated*, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

285. W-Y-C-, 27 I. & N. Dec. 189, 191–92 (B.I.A. 2018).

286. *See, e.g.*, INNOVATION L. LAB & S. POVERTY L. CTR., *supra* note 280, at 27 (describing how the lack of civil service protection for immigration judges and BIA judges leads to a more politicized appointment process and decisions that align with the presidential administration's political agenda).

287. *See supra* notes 202–204 and accompanying text (discussing the support for administrative closure).

288. *See supra* notes 185–186 and accompanying text.

289. *See supra* note 244 and accompanying text.

establishing that immigration judges should exercise their discretion to promote decisions on the merits.

B. Agency Tribunals Are Different from Courts

A second criticism may be that immigration courts are agency courts, not judicial courts. A set of rules designed for the judicial system may be a poor fit for an administrative tribunal, especially in light of the immigration court system's much larger caseload than the civil justice system.[290] Thus, one might argue that immigration courts need to focus more on efficiency and less on fairness.

But it is hard to see why this is the case. Both as a matter of its rules and as a matter of due process, immigration courts have a goal of deciding cases fairly and giving parties a meaningful opportunity to be heard.[291] Any court system should aspire to decide cases on the merits as much as possible and promote just outcomes. Administrative agencies commonly look to the Federal Rules of Civil Procedure for guidance in adopting their own procedures.[292] Furthermore, utilizing the Federal Rules may be just as likely, if not more likely, to increase efficiency rather than hamper it. Allowing immigration judges to manage discovery rather than have it handled by a separate agency through FOIA, permitting judges to administratively close cases so that they do not waste resources on a matter where the noncitizen is going to get relief from another agency, and allowing judges and parties to reformulate a PSG while the case proceeds rather than bouncing the case back and forth are all likely to promote judicial economy while encouraging substantive justice.

In any event, if applying the Federal Rules will hamper the administrative bureaucracy, then that begs the question of whether an administrative agency should be deciding matters as weighty as deportation. In other words, if operating an immigration adjudication bureaucracy is inconsistent with trying to resolve cases on the merits, or if the goal of the bureaucracy really is just to process cases rather

290. The immigration court system alone currently has more than 1.5 million pending cases. *See* TRAC IMMIGR., IMMIGRATION COURT BACKLOG NOW GROWING FASTER THAN EVER, BURYING JUDGES IN AN AVALANCHE OF CASES (2022), https://trac.syr.edu/immigration/reports/675/ [https://perma.cc/WV32-9DB9] (reporting 1,596,193 pending cases as of December 2021). By contrast, federal district courts collectively had just over 638,000 pending cases in 2022. *See Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited Sept. 20, 2023) [https://perma.cc/EH32-73L3] ("Pending civil cases rose 8 percent to 638,264.").

291. For a discussion on the goals of immigration courts to hear individuals on the merits and promote due process, see *supra* notes 19–20 and 101–103 and accompanying text.

292. *See supra* note 20 and accompanying text (discussing the Administrative Conference's Model Adjudication Rules as an example).

than achieve justice, then that could serve as a call to move immigration adjudication out of the executive branch. Several organizations have proposed creating an independent Article I court, as Congress has done for tax courts, to handle immigration cases.[293] Ultimately, if an executive agency either cannot promote substantive justice in adjudication or simply does not want to prioritize substantive justice in adjudication, then that is a reason to abandon the current agency structure and create an independent court that can emphasize deciding cases on the merits.

C. Undermining Criminal Protections for Noncitizens

A third criticism is that utilizing the Federal Rules could undermine other goals. Some might contend that using the Federal Rules could legitimize the claim that immigration proceedings are civil rather than criminal. Many scholars and advocates have argued that immigration law has become increasingly punitive and increasingly tied to criminal law, with a growth in the incarceration of noncitizens and the expansive use of deportation as a punishment for noncitizens with criminal convictions.[294] There is a strong argument that noncitizens should receive the various constitutional and procedural protections afforded to criminal defendants.[295] Focusing on the Federal Rules could be seen as conflicting with granting protections analogous to those afforded in criminal cases to noncitizens.

That is not the intent of this Article. I do not see the two as inconsistent, and nothing in this Article should be read to suggest that noncitizens do not deserve the protections afforded to criminal defendants. The point this Article makes is a narrower one. It merely argues that if immigration proceedings are going to be treated as civil matters, and if immigration courts are going to at least express the aspiration to decide cases on the merits (whether or not they live up to it), then the Federal Rules of Civil Procedure should be investigated as a model, given their origin and express goal of moving away from a

293. *See, e.g.*, AM. BAR ASS'N COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2-29 to -33 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [https://perma.cc/L6HL-ULDP]; APPLESEED & CHI. APPLESEED FUND FOR JUST., ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 35–36 (2009), http://www.chicagoappleseed.org/wp-content/uploads/2015/10/Assembly-Line-Injustice-2009.pdf [https://perma.cc/WZJ9-VP3N] ("To achieve independence, we propose that Congress remove the Immigration Court system from the Department of Justice and reconstitute the BIA as the appellate division of a new United States Immigration Court under Article I of the Constitution.").

294. *See supra* note 23 and accompanying text.

295. *See supra* note 23 and accompanying text.

hypertechnical procedural system toward one that emphasizes substantive justice.

Related questions could arise concerning evidentiary rules. For example, if immigration courts follow the Federal Rules of Civil Procedure, that may raise the question of whether they should also follow the Federal Rules of Evidence. Currently, immigration courts have flexible evidentiary rules and are not bound by the Federal Rules of Evidence.[296] This paper does not challenge that view. The Rules of Evidence arose at a different time and out of a different process than the Federal Rules of Civil Procedure.[297] The fact that the Federal Rules of Civil Procedure and their focus on substance over technicality may be a useful model for immigration courts is entirely independent of whether immigration courts should incorporate the Federal Rules of Evidence. Indeed, given the nature of many immigration cases—including the fact that evidence can be hard to obtain or may be located in foreign countries and that witnesses cannot easily testify in person, especially if they are outside the United States—there are good reasons to apply more flexible evidentiary rules and not rigidly follow the Federal Rules of Evidence.

CONCLUSION

If immigration cases are going to be treated as civil cases, then immigration rules should be guided, as appropriate, by the rules of the civil justice system and the process that created them. The civil justice system went through a period of reform that rejected arcane and overly proceduralized litigation rules and replaced them with the modern Federal Rules of Civil Procedure in order to foster decisions on the merits. These Rules, while frequently amended, have withstood the test of time, and no one is advocating a return to the overly strict pre–Federal Rules era. By contrast, immigration proceedings continue to be

296. *See* Y-S-L-C-, 26 I. & N. Dec. 688, 690 (B.I.A. 2015) (explaining that "the Federal Rules of Evidence are not binding in immigration proceedings," although "they may provide helpful guidance").

297. The Federal Rules of Evidence were enacted to codify common-law principles of evidence into a uniform set of rules. *See* L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1317 (1985) ("[T]he impetus and the sources for the Federal Rules came from efforts originally designed to make uniform the state law of evidence."). Congress approved the rules in 1975, nearly forty years after enactment of the Federal Rules of Civil Procedure. *Id.* at 1319 (Federal Rules of Evidence enacted in 1975); Subrin, *supra* note 13, at 910 (Federal Rules of Civil Procedure enacted in 1938). Evidence rules focus specifically on the trial phase of a case (civil or criminal) and were devised to account for the shortcomings of juries. *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172 (1996) (describing how the laws of evidence were originally meant to correct for "jurors' inability to evaluate the information properly").

plagued by overly strict and overly harsh procedural requirements—requirements that make it harder for cases to be decided on the merits. Immigration proceedings are often a matter of life and death. Cases with such weighty interests should be heard on the merits. Looking to the history and enactment of the Federal Rules of Civil Procedure can provide a framework for reform of an immigration system that better promotes fair, efficient, and just decisionmaking.