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REMOTE ADJUDICATION IN IMMIGRATION

Ingrid V. Eagly

ABSTRACT—This Article reports the findings of the first empirical study of the use of televideo technology to remotely adjudicate the immigration cases of litigants held in detention centers in the United States. Comparing the outcomes of televideo and in-person cases in federal immigration courts, it reveals an outcome paradox: detained televideo litigants were more likely than detained in-person litigants to be deported, but judges did not deny respondents' claims in televideo cases at higher rates. Instead, these inferior results were associated with the fact that detained litigants assigned to televideo courtrooms exhibited depressed engagement with the adversarial process—they were less likely to retain counsel, apply to remain lawfully in the United States, or seek an immigration benefit known as voluntary departure.

Drawing on interviews of stakeholders and court observations from the highest-volume detained immigration courts in the country, this Article advances several explanations for why televideo litigants might be less likely than other detained litigants to take advantage of procedures that could help them. These reasons include litigants' perception that televideo is unfair and illegitimate, technical challenges in litigating claims over a screen, remote litigants' lower quality interactions with other courtroom actors, and the exclusion of a public audience from the remote courtroom. This Article's findings begin an important conversation about technology's threat to meaningful litigant participation in the adversarial process.

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> If you come into the courtroom and you see it's a courtroom and you see the judge at a big desk wearing a black robe, then you realize it's a court. If you take that same person and you put him in the video room . . . they see me basically as a big, disembodied head on the television. How is that any different than watching *People's Court* or *Judge Judy* or something like that? They don't really, really get it sometimes. We get it because we do it all the time—that's our job. But I'm not sure with the particular respondents whether they realize sometimes what goes on.[1]

INTRODUCTION

Over the past two decades, federal immigration courts have steadily expanded their reliance on videoconferencing technology. In 2012 alone, immigration judges conducted over 134,000 hearings in which the trial judge and the immigrant litigant met over a television screen, rather than face-to-face.[2] This reliance on technology is reserved almost exclusively for immigrants held in detention. Today, nearly one-third of all detainees attend their immigration hearings by video, rather than in the traditional in-person courtroom setting.[3] If current trends continue, the majority of all detained immigrants will soon be assigned to televideo courtrooms to determine whether they will be deported from the United States.[4]

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[1] Telephone Interview #48 with Representative, Nat'l Ass'n of Immigration Judges (Jan. 21, 2014) (on file with author). To protect confidentiality, all interviews cited in this Article are referenced by interview number, title, and organization type.

[2] *See infra* Figures 1 & 2.

[3] *See infra* Figure 4.

[4] For examples of televideo's continued expansion in immigration court, see Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES, Dec. 14, 2015, http://

The Department of Justice characterizes remote adjudication as a "force multiplier"[5] that assists overburdened immigration courts by expediting the processing of cases,[6] enhancing judicial flexibility in case management,[7] reducing transportation costs,[8] improving law enforcement and courtroom safety,[9] and expanding access to counsel.[10] Despite such claimed benefits, critics of televised adjudication express deep skepticism.

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www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html [http://perma.cc/DU5X-PX3Q] (announcing that immigration cases at the largest-yet detention center in Dilley, Texas will be held by videoconference); Kate Linthicum, *ICE Opens 400-Bed Immigration Detention Center near Bakersfield*, L.A. TIMES, Mar. 24, 2015, http://www.latimes.com/local/lanow/la-me-ln-ice-immigration-detention-mcfarland-20150323-story.html [http://perma.cc/F9RT-NXQZ] (revealing that immigrants held at a new detention facility in Bakersfield, California "will have their court hearings via live video feeds").

[5] FUNMI E. OLORUNNIPA, ADMIN. CONFERENCE OF THE U.S., AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION 33 (Apr. 22, 2011), *available at* https://www.acus.gov/sites/default/files/documents/Revised-Draft-Report-on-Agency-Use-of-Video-Hearings-4-22-11.pdf [https://perma.cc/B3VS-FQAY] (quoting a representative of the Executive Office for Immigration Review (EOIR) as saying that "the use of VTC technology to hold hearings is a force multiplier").

[6] *See, e.g.*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, EOIR'S VIDEO TELECONFERENCING INITIATIVE 1 (2009) [hereinafter VIDEO INITIATIVE], *available at* http://www.justice.gov/eoir/press/VTCFactSheet031309.pdf [http://perma.cc/5SKY-TYPS] (claiming that televideo expedites hearings); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, CHIEF IMMIGRATION JUDGE INITIATIVE: IMMIGRATION COURT VTC REVIEW 1 (Jan. 2011) [hereinafter VTC REVIEW] (on file with author) (obtained by author with FOIA request #2013-15953) ("The use of VTC in the immigration court is believed to be an efficient way to adjudicate cases and to meet the Case Completion Goals for detained cases.").

[7] John Stanton, *The Technology the Government Uses for Immigration Hearings Doesn't Work Right*, BUZZFEEDNEWS (Aug. 11, 2014, 10:07 AM), http://www.buzzfeed.com/johnstanton/the-technology-the-government-uses-for-immigration-hearings#.nh41JOK0Ds [http://perma.cc/DQU2-FDZE] (quoting an EOIR official promoting televideo as a tool that "provides coverage to locations where [we do] not have a physical presence and, in areas where [we do] have a physical presence, creates greater flexibility in docket management by enabling non-local judges to assist with hearing cases") (alteration in original).

[8] *See, e.g.*, LENNI B. BENSON & RUSSELL R. WHEELER, ADMIN. CONFERENCE OF THE U.S., ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 94 (2012), *available at* https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf [http://perma.cc/DM3E-LD7P] ("Proponents say VTC hearings save EOIR the cost of transporting judges and staff to hearing sites and saves DHS costs of transporting detained respondents.").

[9] *See, e.g.*, *id.* at 92 (citing an EOIR official as explaining that televideo technology enhances courtroom safety); ASSESSMENT OF THE INS ENCRYPTED MULTIMEDIA VIDEO TELECONFERENCING PILOT at 22 [hereinafter INS ASSESSMENT] (on file with author) (noting that the "benefits to the Government" of teleconferencing deportation proceedings include "less exposure of law enforcement officers to risks associated with transportation of prisoners").

[10] *See, e.g.*, BENSON & WHEELER, *supra* note 8, at 93 ("VTC can increase the availability of representation during hearings by enabling an attorney who is unable or unwilling to travel to the site of a hearing to participate in the hearing from a remote location."); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, THE IMMIGRATION JUDGE BENCHBOOK 3 (2014) [hereinafter IMMIGRATION BENCHBOOK], *available at* http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Televideo_Guide.pdf [http://perma.cc/S87K-WU5H] (claiming that remote adjudication can improve "the ability of counsel to represent detained aliens").

Several influential immigration groups strenuously oppose the move away from face-to-face courtrooms, arguing that the practice prejudices those televideo respondents who pursue claims at trial.[11] Federal appellate courts have warned that the practice might violate the statutory right to a fair hearing, or even constitutional due process, if it were to affect the ultimate decision at trial on the merits.[12] The limited academic scholarship addressing remote immigration adjudication has joined in critiquing the practice, primarily because of its potential to interfere with judicial fact-finding at trial.[13] In defending against these concerns, court officials consistently return to one central refrain: televideo is functionally equivalent to in-person adjudication.[14] That is, it does not affect decisional outcomes at trial.[15]

Despite the divergence in views about televideo's potential to influence deportation trials, missing from either side of the discussion is an exploration of the complementary relationship between remote adjudication and litigant participation in the adversarial process. This oversight is surprising because televideo technology infuses the entire court process,

[11] *See, e.g.*, Letter from Thomas M. Susman, Dir., Gov't Affairs Office, Am. Bar Ass'n, to Members of the Committee on Adjudication, Admin. Conference of the U.S. (Feb. 17, 2012), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012feb23_immigrationadjudicationreport_c.authcheckdam.pdf [http://perma.cc/NEV3-YNLU] ("The ABA opposes using videoconferencing . . . except in procedural matters in which the noncitizen has given consent."); Letter from the American Immigration Council & the American Immigration Lawyers Association, to Jean King, Acting Gen. Counsel, Exec. Office of Immigration Review 4 (Nov. 27, 2012), *available at* http://legalactioncenter.org/sites/default/files/EOIR%20Reg%20Review%20Comments-FINAL%2011-27-12.pdf [http://perma.cc/M45G-PHJZ] (recommending evidentiary hearings on the merits be conducted in person).

[12] *See, e.g.*, Rapheal v. Mukasey, 533 F.3d 521, 532–34 (7th Cir. 2008) (finding that the statutory right to a fair hearing is violated if video has "the potential for affecting the IJ's view of [the respondent's] credibility and in turn the outcome of [the] case").

[13] *See, e.g.*, Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 82 (2006) (arguing that televideo violates due process); Emily B. Leung, *Technology's Encroachment on Justice: Videoconferencing in Immigration Court Proceedings*, 14-07 IMMIGR. BRIEFINGS 1 (2014) (arguing that videoconferencing interferes with the immigration judge's ability to assess the respondent's credibility); *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1181–82 (2009) (concluding that videoconferencing obstructs the court's fact-finding process).

[14] *See, e.g.*, EXEC. OFFICE FOR IMMIGRATION REVIEW, QUESTIONS FROM THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES REGARDING THE VIDEO HEARING PROCESS IN IMMIGRATION ADJUDICATION AT EOIR 3 (2011) [hereinafter EOIR VIDEO HEARINGS] (on file with author) ("Generally, there is no difference [between video and in-person hearings] aside from the fact that in a video hearing at least one party is not physically at the hearing location."); Letter from Michael F. Rahill, Assistant Chief Immigration Judge, to Geoffrey Heeren, Legal Assistance Found. of Metro. Chi. (Mar. 3, 2005) (on file with author) (describing televideo and in-person adjudication as "functionally equivalent").

[15] EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, EOIR HEADQUARTERS IMMIGRATION COURT 1 (2004), *available at* http://www.justice.gov/eoir/press/04/HQICFactSheet.pdf [http://perma.cc/3X2X-EE9S] (claiming that televideo hearings "do[] not change the adjudicative quality or decisional outcomes").

not just the point when the case proceeds to trial and the judge is called upon to issue a formal ruling on a litigant's petition. Yet, the existing debate does not consider the potential of televideo to shape the assertion of rights by the litigant subjected to the procedure. These important rights include the right to assert a claim to remain in the United States[16] and the right to retain an attorney to assist in pursuing that claim.[17]

This Article presents empirical findings from the first comprehensive study of the federal immigration system's experiment with remote adjudication. One aspect of this research is quantitative analysis of a comprehensive electronic database of all federal immigration court proceedings collected by the Justice Department's Executive Office for Immigration Review and obtained for research through the Freedom of Information Act.[18] These highly informative data include coding at the individual hearing level for adjudicative medium (televideo or in person), yet until now have never been independently analyzed for purposes of understanding televideo adjudication.

As discussed in Part II of this Article, these data uncover a paradoxical result: televideo cases were more likely to result in deportation,[19] yet there was no statistically significant evidence that judges adjudicated deportation cases more harshly over a video screen. Instead, when compared with similar detained in-person cases,[20] detained televideo cases exhibited depressed engagement with the adversarial process. Televideo litigants were less likely to retain counsel,[21] pursue an application for permission to

[16] A noncitizen found subject to removal by an immigration judge may apply for one or more discretionary forms of "relief," such as asylum or cancellation of removal. A noncitizen granted relief from removal may remain lawfully in the United States. For a discussion of different types of relief from removal, see *infra* notes 91–95 and accompanying text.

[17] Although there is a right to be represented by counsel in immigration proceedings, the expense of counsel is borne by the respondent. 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings[.]"). *See generally* Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282 (2013) (discussing how lessons from the criminal system's establishment of a public defender might inform the evolution of the right to counsel in the immigration system).

[18] These Freedom of Information Act requests were made by the Transactional Records Access Clearinghouse (TRAC), a data-gathering and research nonprofit organization at Syracuse University. I gained access to these data through my appointment as a TRAC Fellow. *See* Transactional Records Access Clearinghouse, *TRAC Fellows Program* (2011), http://trac.syr.edu/fellows/ [http://perma.cc/H45N-2L6E].

[19] *See infra* Figure 10 (showing that detained televideo removal cases were more likely to result in deportation than detained in-person removal cases).

[20] In order to ensure that similarly situated cases were used for this comparison of televideo versus in-person adjudication, the data in this study were limited to only adult removal cases decided during 2011 and 2012 in which the respondents remained detained during the entire case. *See infra* Part II.

[21] For readers interested in other issues regarding attorney representation in immigration court, see Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U.

remain lawfully in the United States (known as relief),[22] or seek the right to return voluntarily (known as voluntary departure).[23] Moreover, these televideo versus in-person differences in litigant engagement remained statistically significant[24] even when controlling for numerous factors that could influence case outcomes, including prosecutorial charge type, proceeding type, judge assignment, representation by counsel, nationality, and fiscal year of decision.[25] When compared to similarly situated detained televideo respondents, detained in-person respondents were a remarkable 90% more likely to apply for relief, 35% more likely to obtain counsel, and 6% more likely to apply only for voluntary departure.[26]

By contrast, review of the immigration court's own case data does not support the conclusion that televideo courts assigned disadvantage in allocating relief to detained immigrants who appeared on a television screen. In other words, after controlling for numerous factors that could influence decisionmaking on the merits (including the judge assigned to the case, representation by counsel, prosecutorial charge type, nationality, and fiscal year of decision), there was no statistically significant difference in grant rates for relief and voluntary departure applications across televideo and in-person detained cases.[27] Televideo must therefore be understood as having an indirect relationship to overall substantive case outcomes—one linked to the disengagement of litigants who are separated from the traditional courtroom setting.

PA. L. REV. 1 (forthcoming 2015) (presenting the results of the first national study of access to counsel in removal proceedings).

[22] *See supra* note 16.

[23] A noncitizen in removal proceedings may apply for permission to leave the United States "voluntarily" instead of by order of the immigration judge. 8 C.F.R. § 1240.11(b) (2015). Voluntary departure is often considered to be a benefit, as it allows the immigrant to avoid certain harsh consequences of a judge-issued removal order, such as bars to lawful readmission. However, given that respondents granted voluntary departure must leave the country, this Article does not refer to voluntary departure as a form of relief. This approach follows that adopted by EOIR, which defines voluntary departure as "a form of removal, not a type of relief." EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK, at Q1 (2013) [hereinafter 2012 YEARBOOK], *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf [http://perma.cc/RWD4-EG8S].

[24] Most of the findings in this Article are significant at the most stringent $p < 0.001$ level, which means that the probability of this result occurring by chance is less than one in one thousand. The generally accepted threshold for statistical significance is 0.05, which indicates that the observed differences are not consistent with being due to chance. ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 154 (4th ed. 2009).

[25] To aid interested readers, additional detail regarding the coding and analysis of the immigration court data is provided in this Article's Appendix.

[26] These percentages are based on the differences in predicted probabilities calculated from the logit regression on the Active Base City Sample of detained removal cases displayed in Figure 11, *infra*.

[27] *See infra* Part II.

Analysis of the immigration court data also demonstrates that reliance on televideo is reshaping immigration adjudication in profound ways that have thus far been underappreciated. Although government officials often describe televideo as "an important hearing tool" that promotes efficiency in all types of immigration cases,[28] in practice it is used almost exclusively to adjudicate the cases of detained immigrants.[29] In addition, these televideo cases, when compared to similar detained cases litigated in person, are resolved more quickly—in fewer days and with fewer trials.[30] Far from a neutral adjudicative tool, televideo should instead be understood as an intentional design element of a rapidly evolving detention-to-deportation pipeline.

To clarify these quantitative findings, I turn to research I conducted during a series of visits to immigration courts and detention centers.[31] This qualitative investigation included site visits to six of the highest volume televideo jurisdictions in the country: Chicago, Elizabeth (New Jersey), Houston, Los Angeles, Newark, and San Antonio. During these visits I observed in-person and televideo hearings at thirteen different hearing locations.[32] In addition to attending court sessions, I attended know-your-rights sessions offered by nonprofit organizations to educate unrepresented detainees about the court process.[33] My research also benefitted from the

[28] BRIAN M. O'LEARY, CASE MANAGEMENT AND OPERATING POLICIES: HEARINGS CONDUCTED BY VIDEO-CONFERENCE IN THE IMMIGRATION COURTS 4 (2007) [hereinafter CASE MANAGEMENT AND OPERATING POLICIES] (on file with author) (detailing "The Advantages" of televideo, such as reduced "travel time and costs" and "increased pro bono representation," and concluding by advising immigration judges: "Video is an important hearing tool. Learn to use it!").

[29] *See infra* Figure 2. Although I frequently use the term "immigrant" or "noncitizen" to describe the subject of removal proceedings, this terminology is not meant to diminish the very real problem of the government's placement of United States citizens in deportation proceedings. *See generally* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1968–71 (2013) (exploring the complexity of having citizenship determined in the context of a deportation proceeding).

[30] *See infra* Figure 7 & notes 143–45.

[31] Mixing quantitative and qualitative approaches can produce a better understanding of many research problems. *See* JOHN W. CRESWELL & VICKI L. PLANO CLARK, DESIGNING AND CONDUCTING MIXED METHODS RESEARCH (2d ed. 2011).

[32] I observed in-person detained removal hearings in Chicago, Elizabeth (New Jersey), Houston, Los Angeles, and Pearsall (Texas). In addition, to improve my comparative understanding, I observed televideo detained hearings together with the detainees at the following locations: Texas State Penitentiary at Huntsville in Huntsville, Texas; Karnes County Civil Detention Center in Karnes City, Texas; Kenosha County Detention Center in Kenosha, Wisconsin; and Essex County Correctional Facility in Essex, New Jersey. In these settings, I observed the judge and other courtroom participants on the video screen. In addition, I observed televideo removal hearings (together with the judge, prosecutor, and immigrant counsel) in the following detained immigration courtrooms: Chicago, Elizabeth, Los Angeles, Newark, and San Antonio.

[33] I attended the nonprofit know-your-rights information sessions held at the following detention locations: Elizabeth Contract Detention Facility in Elizabeth, New Jersey; Houston Contract Detention

opportunity to tour six different detention centers and jails that house immigrants awaiting their court hearings.[34]

Finally, my inquiry into televideo practices draws on the expertise shared during forty-nine in-depth interviews with people familiar with the practice of immigration adjudication.[35] To aid in identifying individuals suitable for participation in the study, I contacted persons in supervisory positions at nonprofit legal services organizations,[36] attorneys appearing on the court's list of free and low-cost immigration providers,[37] partners at law firms with immigration expertise,[38] leaders of major immigration organizations,[39] representatives of the National Association of Immigration Judges,[40] and prosecutors with Immigration and Customs Enforcement (ICE).[41] Interviews with detainees were not included due to restrictions placed by immigration officials on communicating with immigrants held in detention facilities.[42]

Facility in Houston, Texas; South Texas Detention Facility in Pearsall, Texas; Kenosha County Detention Center in Kenosha, Wisconsin; and Essex County Correctional Facility in Essex, New Jersey.

[34] ICE and correctional officials hosted tours for me at the following detention facilities: Elizabeth Contract Detention Facility, Essex County Correctional Facility, Kenosha County Detention Center, Houston Contract Detention Facility, Karnes County Civil Detention Center, and South Texas Detention Facility.

[35] I conducted these semistructured interviews with the informed consent of participants pursuant to a protocol approved by the UCLA Institutional Review Board.

[36] For example, I contacted court-based programs, law school immigration clinics, and immigrant legal services organizations.

[37] *See* Exec. Office for Immigration Review, *Free Legal Services Providers*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/probono/states.htm [http://perma.cc/C2CP-CF6G].

[38] In California and Texas, the process of identifying attorneys with immigration expertise was aided by state bar specializations in immigration law.

[39] For example, I contacted the local officers of the American Immigration Lawyers Association, attorneys practicing at the firms and organizations on the court's list of free legal services providers, and attorneys designated as accepting detained cases on a list published by the National Immigration Project of the National Lawyers Guild.

[40] *See FAQ's*, NAT'L ASS'N OF IMMIGR. JUDGES, http://naij-usa.org/faqs/ [http://perma.cc/7E7E-XXEW] ("In 1979, the NAIJ was designated as the recognized representative for collective bargaining for all U.S. Immigration Judges."). Although I invited EOIR officials in Washington, D.C. to participate in the study, EOIR declined my interview request.

[41] The agency ultimately declined to have local ICE attorneys participate in the study. However, the Director of Field Operations for ICE participated in an interview on behalf of the prosecutorial branch of ICE.

[42] Citing security and other concerns, ICE has regularly denied researchers permission to interview detainees. *See, e.g.*, LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 6 (2005) [hereinafter CHICAGO STUDY], *available at* http:// chicagoappleseed.org/ wp-content/uploads/2012/08/videoconfreport_080205.pdf [http://perma.cc/V5RW-YEYZ] (noting that ICE "refused to allow us to interview immigrants" held in detention centers regarding their court experience); Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 710 (2009) (explaining that researchers "repeatedly requested permission from ICE to interview detainees" held in a county jail, but these requests were denied).

This on-the-ground assessment of the inner workings of detained adjudication suggests that a number of factors are at play in the depressed engagement of televideo litigants. As developed in Part III, televideo litigants may decline to participate in a system they perceive as unjust or rigged to yield unfavorable results. Immigrants forced to pursue a case over a video screen often appear bewildered or confused and may experience the process as less “real.” Placement away from the physical courtroom separates the immigrant from other courtroom actors, including the judge, prosecutor, and respondent’s counsel. Detainees and their attorneys are frequently discouraged by the numerous logistical and technical difficulties associated with litigating televideo cases, such as unpredictable interruptions in the video feed, challenges in communicating with interpreters not physically present in the same room, and the impossibility of confidential attorney–client communication over a public courtroom screen. Detainees removed from the courtroom by the video procedure may be less likely to understand their rights in the removal process, less likely to request a court continuance to find a lawyer, and, especially for those who cannot find or afford an attorney, less equipped to assert their claims and file the required paperwork. For judges, advising litigants of their rights can be awkward and less effective over a screen than face-to-face in the formal setting of a courtroom. Yet another factor that could promote televideo litigants’ waiver of rights is their physical separation from the courtroom audience, including family and supportive community members, due to detention facility rules that prevent the public from attending hearings at remote locations.

Opposition to remote adjudication has relied on the conventional wisdom that the practice unfairly tilts the balance against litigants at trial. This Article fails to confirm that standard hypothesis, but instead introduces an entirely new and serious concern into the debate: the potential of remote adjudication to interfere with meaningful participation in the adversarial process.[43] This lack of participation matters because, with less attorney involvement and claimmaking by immigrants, televideo cases are more likely to result in deportation. Moreover, although this Article remains focused on the televideo debate in the immigration system, its finding of interference with access to justice is relevant in other contexts, such as administrative and criminal proceedings, which are increasingly

[43] As such, this Article responds to the call of socio-legal scholars to pay more attention to what happens in “the early stages of disputes and to the factors that determine whether” litigants assert and vigorously pursue potential claims. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 636 (1981).

turning to remote technology in hopes of enhancing courtroom efficiency.[44] So long as participation in the process suffers, remote adjudication cannot be defended as the modern functional equivalent of the traditional courtroom.

This Article proceeds in three parts. Part I traces televideo's expansion in detained immigration courts and introduces readers to the basics of immigration court procedures. Part II sets forth the key quantitative findings based on analysis of the immigration court's own administrative database of immigration court cases. Finally, Part III relies on my in-depth qualitative investigation of detained immigration adjudication to offer some potential explanations for the asymmetrical patterns observed in the data among litigants in pursuing relief, but not among courts in allocating relief.

I. IMMIGRATION'S REMOTE ADJUDICATION EXPERIMENT

Federal immigration courts collectively handle over 300,000 trial-level immigration cases a year and employ over 250 immigration judges.[45] Today's immigration bench sits in sixty different geographic jurisdictions,[46] referred to in practice as "base cities." Many base cities have several different hearing locations, including hearing locations located inside prisons, jails, and detention centers.[47] Immigration judges are appointed by the Attorney General and serve as employees of the Department of Justice's Executive Office for Immigration Review (EOIR), rather than as part of the federal judiciary.[48]

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[44] For example, the Administrative Conference of the United States has enthusiastically recommended that federal government agencies with high-volume caseloads adopt videoconferencing for improved efficiency in adjudication. COMM. ON ADJUDICATION, ADMIN. CONFERENCE OF THE U.S., AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION 3–4 (2011), *available at* https://www.acus.gov/sites/default/files/documents/Proposed-Recommendation-Video-Hearings-5-18-2011.pdf [https://perma.cc/BQ6T-AXV6]. The criminal justice system also routinely relies on televideo, including for preliminary hearings, arraignments, and bail hearings. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1142–56 (2004).

[45] *See* 2012 YEARBOOK, *supra* note 23, at B7 fig.2 (reporting that immigration courts received 317,930 proceedings in fiscal year 2012); *EOIR Immigration Court Listing*, U.S. DEP'T OF JUSTICE (last updated Feb. 2015), http://www.justice.gov/eoir/sibpages/ICadr.htm [http://perma.cc/T5A3-6C3L] (listing immigration judges by court jurisdiction).

[46] *See EOIR Immigration Court Listing*, *supra* note 45.

[47] For example, the base city of San Antonio, Texas includes hearing locations at the Karnes County Civil Detention Center, the Pearsall Detention Facility, the Hutto Residential Facility, and the Laredo Detention Facility. *See* Exec. Office for Immigration Review, List of EOIR Immigration Courts, Document #5 (obtained by author with FOIA request #2013-20913 on Dec. 2, 2014) (on file with author).

[48] 8 C.F.R § 1003.0 (2015) (describing the organization of EOIR within the Department of Justice). For a proposal that the immigration courts be restructured as Article I courts, see Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3 (2008).

Immigration judges are charged with the power to order immigrants deported.[49] Some individuals charged in immigration courts may in fact be United States citizens.[50] Others are lawful permanent residents, but subject to removal based on alleged immigration law violations.[51] Still others are present without lawful immigrant status but are nonetheless eligible to remain lawfully in the United States.[52]

For readers unfamiliar with immigration law, it is important to acknowledge that many of the immigrants held in detention centers are not awaiting court hearings.[53] Instead, an increasingly large number of detainees are removed from the United States without a court order. For example, especially when immigrants are apprehended along the border, law enforcement officials may allow them to depart on their own without filing any charges in court.[54] Immigrants convicted of certain crimes who are not lawful permanent residents are subject to "administrative removal" without a hearing in immigration court.[55] Immigrants previously ordered deported by an immigration judge routinely have their prior orders administratively "reinstated from its original date" without judicial review.[56] Similarly, pursuant to a process known as "expedited removal," recent border entrants may be summarily turned back without ever stepping foot in a courtroom (or appearing in a court via video).[57] Seen in this

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[49] 8 U.S.C. § 1229a(a)(1) (2012).

[50] These citizenship cases include individuals born in the United States as well as those who derived citizenship through a parent. *See* Rosenbloom, *supra* note 29, at 1972 (explaining how citizenship claims occur in deportation cases and citing statistics on the number of United States citizens detained or deported).

[51] For example, a lawful permanent resident convicted of an "aggravated felony" is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

[52] For example, certain undocumented battered immigrants may be eligible to gain status as lawful permanent residents based on their familial relationship to the batterer. *Id.* § 1229b(b)(2). As I have previously argued, immigration status may best be understood as existing along a spectrum, rather than sharply divided between unlawful and lawful status. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1136–37 (2013).

[53] According to Department of Homeland Security statistics, only 230,000 of the 419,384 noncitizens removed from the United States in 2012 saw an immigration judge. JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 1–2, 5 (2013), *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf [https://perma.cc/K9JN-MFPM].

[54] 8 C.F.R. § 240.25 (2015) (granting officers the authority "to permit aliens to depart voluntarily from the United States . . . in lieu of being subject to proceedings").

[55] 8 U.S.C. § 1228(b)(1) (2012) (allowing the removal of aliens "convicted of committing aggravated felonies").

[56] *Id.* § 1231(a)(5).

[57] *Id.* § 1225(b)(1)(A)(i). For example, expedited removal applies to individuals apprehended within 100 miles of the border that have not been in the country for more than two weeks. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

broader context, deportation by order of a federal immigration judge is but one component of current immigration enforcement efforts.[58]

The remainder of this Part describes the history and development of the televideo mode of adjudication in immigration courts. Remote adjudication began as a small-scale experiment in Chicago and soon expanded to court locations across the United States. Yet, as the empirical analysis presented in this Part establishes, the transition to remote adjudication has been reserved almost exclusively for the cases of detained immigrants.

A. Televideo's Rise in Detention

Traditionally, most immigration court proceedings were held in downtown urban courts, with all participants attending in person. In cases involving pretrial detention, detainees were transported from the detention facility to attend court hearings in the physical presence of the judge. Some detention facilities were in close proximity to the immigration court, whereas others required traveling an hour or more on an early morning bus. As detained populations grew, some immigration courts opted to instead hold court inside detention centers.[59] Judges and court staff would travel "on detail" and set up courtrooms inside the jails and prisons that housed immigrants awaiting their hearings.[60]

Televideo represents a new adjudicative approach that instead connects the detained immigrant with the judge, prosecutor, and other court personnel via a bidirectional video stream.[61] Courts equipped with televideo

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[58] As Jennifer Chacón has noted, "[r]emovals are merely the tip of the iceberg with regard to enforcement actions." Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565 (2010). *See also* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611–32 (2009) (summarizing the methods, aside from removal hearings, that the government uses to remove noncitizens); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2 (2015) (documenting a rise in "speed removals" in which immigrants never see "a courtroom or an immigration judge," and are instead subjected to "a limited set of procedural protections leading to speedy removals").

[59] *Institutional Hearing Program: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 41 (1997) [hereinafter *IHP Hearings*] (prepared statement of Michael J. Creppy, Chief Immigration Judge).

[60] Interview #14 with Partner, Small-Size Law Firm (Aug. 7, 2013) (on file with author) (explaining that prior to the introduction of videoconferencing, judges "used to circuit-ride" to conduct "live, in-person hearings for people" at prisons and detention centers); Interview #47 with Representative, Nat'l Ass'n of Immigration Judges (Nov. 21, 2014) (on file with author) ("We were doing it a lot. Each of us had prisons . . . we call it 'detail.'").

[61] For a discussion of the use of videoconferencing in other courtroom settings, including for criminal trials and remote witness testimony, see Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769 (2004); Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L.

technology follow the same basic procedures as in-person courts, the key exception being that the immigrant now remains at the detention facility and watches the court proceedings on a television screen in the facility's video room. The judge remains in the traditional courtroom with his or her courtroom deputy and court staff, and the immigrant is projected onto a television screen in the courtroom.[62] Typically, the prosecutor, interpreter, and any respondent's counsel remain in the courtroom with the judge rather than traveling to the detention facility to appear on video with the immigrant.[63]

Televideo was introduced to immigration courts in the 1990s. The initial experiment with video technology linked immigration judges in Chicago, Illinois, with immigrants held at a Federal Bureau of Prisons facility in Lexington, Kentucky.[64] Despite some technical problems,[65] court officials concluded that the Chicago initiative was a success. The pilot program was credited with reducing travel costs, decreasing "exposure of law enforcement officers to risks associated with transportation of prisoners," and improving judges' hearing schedules.[66]

In 1996, Congress authorized the use of televideo in all immigration proceedings.[67] Under the new law, televideo and in-person hearings became interchangeable modes of adjudication.[68] The immigration court could now conduct all hearings by televideo without ever obtaining consent of the immigrant respondent.

REV. 799 (1999); Michael D. Roth, Note, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185 (2000).

[62] I was not permitted to photograph the interior of immigration courts. However, for a photograph of the standard video screen used in televideo courtrooms, see EXEC. OFFICE FOR IMMIGRATION REVIEW, DIGITAL AUDIO RECORDING USER MANUAL 12 fig.3-1 (2012) (obtained by author with FOIA request #2014-7182) (on file with author).

[63] I did observe a few exceptions to this standard arrangement. For example, in Los Angeles the interpreter remained at the remote location (Adelanto, California). In Houston, the prosecutor remained at the remote location (Huntsville, Texas). In one hearing in San Antonio, a respondent's counsel appeared with her client at the remote location (Taylor, Texas).

[64] Memorandum from Lynn E. Petersburg, Deputy Exec. Officer, Office of Mgmt. & Admin, Exec. Office for Immigration Review, U.S. Dep't of Justice, to Jim Moore, Telecomm. Specialist, Immigration & Naturalization Serv. 1 (Jan. 5, 1994) (on file with author).

[65] *Id.* at 2 (outlining a number of "system modifications" that need to be implemented, including the need for "telephoto lenses" so that "facial expressions can be discerned"); Letter from Alan Shelton, Assistant Comm'r, Sys. Integration Div., U.S. Dep't of Justice, to Joan Higgins, Assistant Comm'r, Detention & Deportation, U.S. Dep't of Justice (Oct. 20, 1994) (on file with author) (noting that "the video equipment utilized [in the pilot] was not of the highest quality nor was its configuration well suited for the hearings").

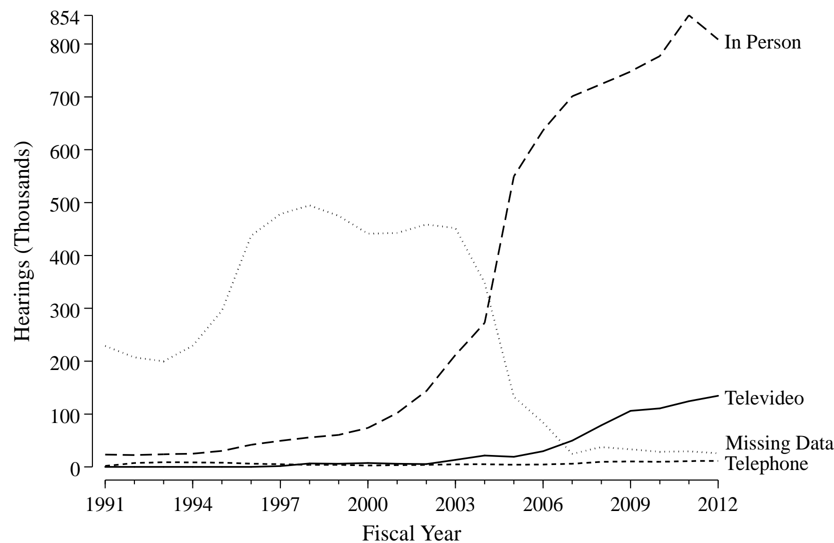
[66] INS ASSESSMENT, *supra* note 9, at 22.

[67] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589 (codified at 8 U.S.C. § 1229a(b)(2)(A)(iii) (2012)).

[68] 8 C.F.R. § 1003.25(c) (2015) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.").

It is unclear how often immigration courts employed televideo in the period immediately following congressional authorization of its use. In these early years of televideo's implementation, as seen in Figure 1, most immigration hearings were not coded for adjudicative medium.[69] From 2007 to 2012, however, the data consistently recorded whether immigration hearings were conducted in person, by televideo, or, much less frequently, by telephone.[70] For these six more recent years, televideo can be reliably analyzed because the adjudicative medium variable is known in 97% of hearing records.

FIGURE 1: CODING OF IMMIGRATION HEARINGS, BY ADJUDICATIVE MEDIUM, FISCAL YEARS 1991–2012[71]



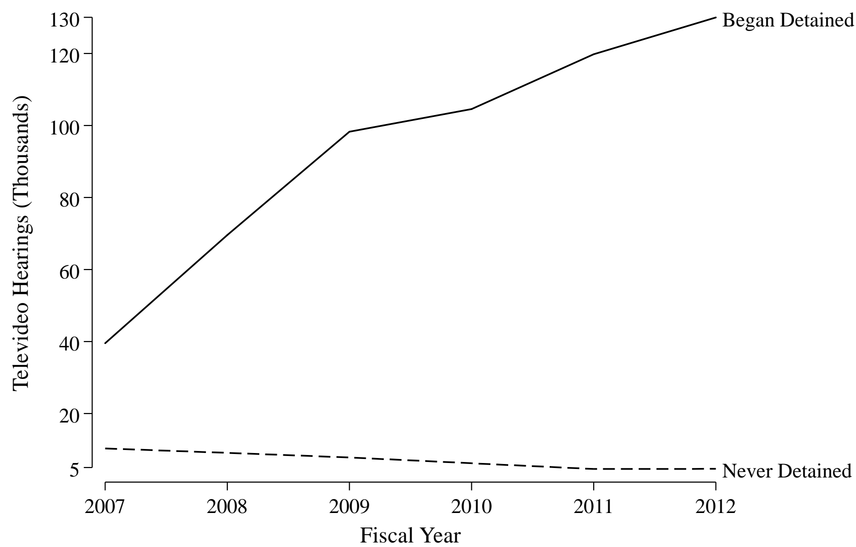
[69] An earlier effort to quantitatively study televideo in asylum cases suffers from the fatal flaw of relying on televideo data during the pre-2007 time period when the adjudicatory medium variable was not reliably populated. *See* Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271–72 (2008).

[70] My analysis of the data reveals that during the time period from 2007 to 2012, only 1% of adjourned immigration hearings were by telephone. As I observed in my site visits, telephone adjudication is generally discouraged by immigration judges and, unlike televideo, requires the respondent's signed consent for use at individual evidentiary hearings on the merits. 8 C.F.R. § 1003.25(c).

[71] Figure 1 and other figures in this Article reporting hearings by fiscal year rely on the scheduled adjournment date of the hearing to classify fiscal year.

Figure 1 also captures the steady increase in televideo's use. During this six-year period from 2007 to 2012, the absolute number of televideo hearings increased nearly three-fold. As Figure 2 depicts, however, virtually all of this growth in televideo hearings involved individuals who began their cases in detention. Despite having the authority to adjudicate all immigration cases by televideo, immigration courts have reserved the televideo tool almost exclusively to adjudicate detained cases.

FIGURE 2: TELEVIDEO IMMIGRATION HEARINGS, BY DETENTION STATUS, FISCAL YEARS 2007–2012[72]



This finding of heavy televideo use in detention was confirmed by my site visits. One of the rare examples of televideo being used for cases not involving detention occurred in Newark, New Jersey, where an immigration judge transitioning to a different jurisdiction continued to hear his pending nondetained Newark cases by televideo during the transition period. Another example occurred in Chicago, where a judge sitting in Arlington provided occasional backup by televideo on nondetained cases to alleviate strain on the overburdened Chicago judges.

The rise of televideo parallels a corresponding increase in the practice of detaining immigrants while their cases are adjudicated.[73] Indeed,

[72] Figure 2 contains all hearings, regardless of proceeding type, held in immigration courts, by fiscal year of adjournment of the hearing.

[73] For an introduction to the role of detention in immigration enforcement, see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010).

Congress's 1996 authorization of televideo hearings without respondent consent coincided with a major expansion of the detention laws,[74] including mandatory detention for immigrants subject to removal on certain criminal grounds.[75] My analysis of immigration court data shows that the number of detained removal proceedings increased by one-third between 2002 and 2012.[76]

To sustain this trend of detaining immigrants as they litigate their court cases, today there are an impressive 34,000 beds maintained exclusively for immigration detainees.[77] Despite the fact that the majority of detainees do not have criminal records,[78] this bed space includes rented halls of local jails, as well as state and federal prisons.[79] As Figures 1 and 2 reveal, much of the court capacity for handling these detained cases now relies on televideo adjudication. Moreover, signaling that this trend may continue, the federal government's newest detention facilities were intentionally designed to rely on televideo adjudication.[80]

Having documented televideo's close nexus to the growing practice of detaining immigrant litigants, the next Section introduces readers to the basics of immigration removal, focusing on the role of televideo at different stages in the process.

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[74] *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1361–62 (2014) (reviewing the various laws passed in the 1980s and 1990s that expanded federal detention authority).

[75] 8 U.S.C. § 1226 (2012); *see generally* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610–11 (2010) (describing the steady expansion in criminal grounds for mandatory detention).

[76] My analysis of the EOIR data reveals that immigration courts completed 101,827 detained removal proceedings in 2012, up from only 76,142 in 2002. *See* Appendix (describing EOIR data analyzed for this Article).

[77] *See generally* Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html [http://perma.cc/N6SF-YKQT] (discussing a "bed mandate" that requires ICE to keep an average of 34,000 detainees in custody). As Deputy Homeland Security Secretary Alejandro Mayorkas told the press in the summer of 2014, "[w]e are surging resources to increase our capacity to detain individuals and adults with children, and to handle immigration court hearings." Molly Hennessy-Fiske et al., *Obama Administration Acts to Ease Immigration Legal Crunch at Border*, L.A. TIMES, June 20, 2014, http://www.latimes.com/nation/nationnow/la-na-nn-border-migrants-white-house-20140620-story.html#page=1 [http://perma.cc/5Y4V-BX9T].

[78] Michelle Roberts, *Most Immigrants in Detention Did Not Have Criminal Record, Reports AP*, HUFFINGTON POST (Apr. 15, 2009), http://www.huffingtonpost.com/2009/03/15/most-immigrants-in-detent_n_175118.html [http://perma.cc/GSQ5-LZKL] (reporting that data obtained with a public records request show that of 32,000 immigrants held in detention on January 25, 2009, "18,690 immigrants had no criminal conviction, not even for illegal entry or low-level crimes like trespassing").

[79] For additional discussion of the growth in detention to house immigrants during deportation proceedings, see Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013); Rabin, *supra* note 42.

[80] *See generally supra* note 4.

B. Televideo Trials

Detained removal cases begin when immigration authorities apprehend noncitizens and formally charge them with removal in a "Notice to Appear."[81] Sometimes the initial arrest is by local police, who screen for immigration status and transfer the noncitizen to federal immigration authorities.[82] Court cases for immigrants who remain detained during the entire process take anywhere from a few days to a few years, depending on the complexity of the case, court backlogs, and other factors.[83]

The first court hearing in the removal process is known as the master calendar hearing.[84] During the master calendar hearing, the immigrant responding to the government's charge—referred to as the respondent—is advised of contents of the Notice to Appear. Unrepresented respondents are informed of their right to obtain counsel at their own expense and given a list of free legal services providers.[85] Immigration judges also have an obligation to advise respondents of their right to seek relief from removal.[86]

As I observed in my site visits and confirmed in my interviews, a group of detained immigrants will often appear together in a mass initial hearing, rather than individually.[87] In these mass hearings, basic rights are explained to the entire group, normally followed by an individualized

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[81] 8 C.F.R. § 1240.10 (2015).

[82] *See generally* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) (discussing ways in which local police enforcement of criminal law can lead to deportation). As Hiroshi Motomura has argued, the decision to arrest is "the stage of discretion that matters" the most in determining who actually is removed from the United States. Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1829 (2011).

[83] The average number of days to adjudicate a detained removal merits proceeding in fiscal years 2007 to 2012 was twenty-six days (standard deviation of eighty-four days), with a median time to completion of one day. However, as discussed in Part II.A, average adjudication times for detained removal proceedings with claims for relief were much longer. *See infra* Figure 7 & notes 143–45. For additional analysis of case adjudication times in removal cases, see Eagly & Shafer, *supra* note 21.

[84] EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, THE IMMIGRATION COURT PRACTICE MANUAL § 4.15(a), at 67 (2009) [hereinafter COURT PRACTICE MANUAL], *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf [http://perma.cc/EU8T-2YGT] ("A respondent's first appearance before an Immigration Judge in removal proceedings is at a master calendar hearing.").

[85] 8 C.F.R. § 1240.10(a)(1)–(3).

[86] *Id.* § 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing . . . .").

[87] *See, e.g.*, Telephone Interview #27 with Senior Staff Attorney, Nonprofit Org. (Sept. 11, 2013) (on file with author) ("Some judges go ahead and advise everybody of their basic rights and tell them they're under oath all at once in a group; some of them do it individually."). As Robert Koulish described in his pioneering study of asylum adjudication, "[t]he mass calendar hearing operates in an assembly line fashion." Robert E. Koulish, *Systemic Deterrence Against Prospective Asylum Seekers: A Study of the South Texas Immigration District*, 19 N.Y.U. REV. L. & SOC. CHANGE 529, 553 (1992).

inquiry into whether the respondents understand their rights.[88] Sometimes respondents at the master calendar hearing will ask the judge for a continuance in order to have more time to seek counsel, or to prepare an application for relief.[89]

Immigration cases that raise complex and contested issues of law or fact will continue to trial, known in practice as an individual calendar hearing.[90] Most frequently, these individual hearings are used when a respondent files an application for relief to remain lawfully in the United States—such as asylum,[91] adjustment of status,[92] or cancellation of removal.[93] To qualify for relief, a respondent must satisfy the applicable statutory eligibility requirements and convince the judge that the case merits the exercise of favorable discretion.[94]

Alternatively (or in addition), some respondents request that the judge grant a discretionary benefit known as voluntary departure. Voluntary departure requires the respondent to satisfy certain statutory eligibility requirements and pay the cost of removal.[95] In exchange, the voluntary departure recipient must leave the country, but will not be subject to certain

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[88] *See generally* United States v. Nicholas-Armenta, 763 F.2d 1089 (9th Cir. 1985) (expressing disapproval of a mass immigration hearing in which thirty-three immigrants were deported, but refusing to find a per se due process violation).

[89] 8 C.F.R. § 1003.29 ("The Immigration Judge may grant a motion for continuance for good cause shown."). *See generally* Eagly & Shafer, *supra* note 21, at 33–36, 61–63 (analyzing patterns in judicial grants of continuances to find counsel in immigration removal cases).

[90] COURT PRACTICE MANUAL, *supra* note 84, § 4.16(a), at 79 ("Evidentiary hearings on contested matters are referred to as individual calendar hearings or merits hearings. Contested matters include challenges to removability and applications for relief."). As research by Jennifer Koh has shown, at times the threshold question of removability itself can be complex and require an individual calendar hearing. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1805–06, 1821–51 (2013).

[91] Asylum is a form of discretionary relief available to individuals who qualify as "refugees" by demonstrating past persecution or a well-founded fear of persecution based on the noncitizen's race, religion, nationality, political opinion, and/or membership in a particular social group. 8 U.S.C. § 1101(a)(42)(A) (2012). Applicants for asylum may also be considered for relief under withholding of removal and the Convention Against Torture by satisfying a more stringent standard. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 903–08 (7th ed. 2012).

[92] Adjustment of status is a form of relief from removal available to noncitizens eligible for lawful permanent resident status based on a visa petition approved by the United States Citizenship and Immigration Services. 8 U.S.C. § 1255(a).

[93] Cancellation of removal is a form of relief available to both lawful permanent residents and undocumented individuals who have lived for a minimum number of years in the United States and who satisfy certain requirements. *Id.* § 1229b. For a discussion of other common types of relief from removal, see EXEC. OFFICE FOR IMMIGRATION REVIEW, FORMS OF RELIEF FROM REMOVAL (2004), *available at* http://www.justice.gov/eoir/press/04/ReliefFromRemoval.htm [http://perma.cc/TG2M-PZ7V].

[94] 8 U.S.C. § 1229a(c)(4). In exercising discretion, immigration judges must "weigh the credible testimony along with other evidence of record." *Id.* § 1229a(c)(4)(B).

[95] 8 C.F.R. § 1240.26(b)–(c) (2015) (setting forth the standards that govern discretionary grants of voluntary departure during or at the end of removal proceedings).

statutory bars against reentry to the United States that normally attach to removal orders.[96]

Finally, at any point in the proceeding, eligible detainees may request a separate custody hearing to determine eligibility and terms for release on bond.[97] If release is granted and the immigrant is able to afford the required bond amount,[98] the case will no longer be part of the immigration court's detained docket. Instead, the respondent will be ordered to appear in person before a judge assigned to that jurisdiction's nondetained court.[99]

In keeping with the dominant trial-focused critique of televideo, immigration court officials initially maintained that televideo should be limited to the reading of charges and other pretrial procedural hearings, but not relied on for individual hearings where judges decide the merits of cases.[100] Over time, however, officials retreated from this position, eventually allowing televideo's use in all hearings, including individual hearings.[101] As explained by one immigration prosecutor during my site visit, judges used to allow respondents appearing by televideo to at least attend their merits hearing in person, but "now video is the default" for all hearings. A seasoned practitioner similarly lamented that initially officials would "bring the client to the immigration court" for trial.[102] But, later, as

[96] 8 U.S.C. § 1182(a)(9)(A).

[97] 8 C.F.R. § 1003.19(a), (d). Certain categories of immigrants are not eligible for release on bond. *Id.* § 1236.1(c). For example, noncitizens convicted of certain types of crimes may be mandatorily detained during the removal period. 8 U.S.C. § 1226(c)(1). For a convincing argument that counsel should be appointed to determine whether detainees may be mandatorily detained, see Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012).

[98] Although many detainees are ineligible for release, others remain detained despite a release order because they cannot afford the bond amount set by the court. The statutory minimum bond amount is $1500, 8 U.S.C. § 1226(a)(2)(A), although judges may also release respondents on their own recognizance, *id.* § 1226(a)(2)(B). In the custody hearings that I observed around the country, bond amounts set by judges ranged from a low of $1500 to a high of $50,000. I routinely observed judges ordering release with a bond amount that the immigrant stated at the hearing he or she would be unable to afford.

[99] During my site visits, I observed respondents released from custody by the judge and ordered to report to their next court hearing in person at a nondetained court location. Several interviewees also confirmed this practice. *See, e.g.*, Telephone Interview #23 with Supervising Detention Attorney, Nonprofit Org. (Sept. 5, 2013) (on file with author) (noting that respondents released from custody "would be moved to the docket of one of the nondetained judges").

[100] *See IHP Hearings*, *supra* note 59, at 41 (prepared statement of Michael J. Creppy, Chief Immigration Judge, explaining that televideo was initially reserved for master calendar hearings).

[101] EOIR VIDEO HEARINGS, *supra* note 14, at 3 ("All types of proceedings may be heard by [televideo]. EOIR conducts removal proceedings including master calendar (pleadings, issue identification and scheduling), and individual hearing through VTC.").

[102] Telephone Interview #20 with Partner, Small-Size Law Firm (Aug. 21, 2013) (on file with author).

televideo was more fully implemented, "they stopped bringing the client."[103]

FIGURE 3: TELEVIDEO HEARINGS IN DETAINED REMOVAL PROCEEDINGS, BY HEARING TYPE, FISCAL YEARS 2007–2012[104]

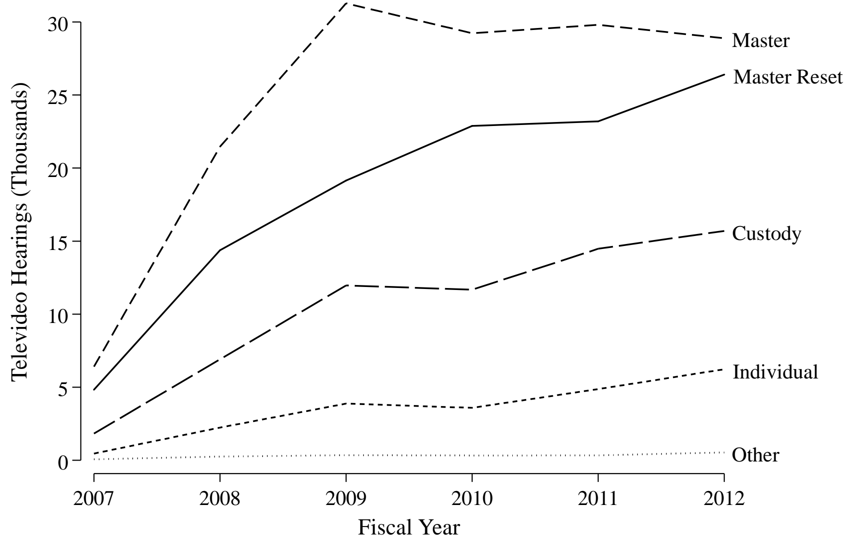

Figure 3 traces this rise in televideo's use across all types of detained removal hearings.[105] The televideo tool is now relied on for master calendar hearings, custody hearings, and individual hearings. Although individual hearings remained the least common type of televideo hearing, this finding simply reflects the infrequency of trials in detained removal cases. During the six-year period from 2007 to 2012, only 7% of detained removal cases

[103] *Id.* Other attorneys made similar comments. *See, e.g.*, Telephone Interview #23, *supra* note 99 (explaining that initially only master calendar hearings were by video, but "when they got the technology to have two courtrooms equipped with the video equipment then everyone started, for both masters and merits, appearing by video").

[104] Figure 3 contains all adjourned hearings in detained removal proceedings. "Master" includes hearings coded as Detained Master, Master Asylum, and Initial Master. "Individual" includes Individual, Individual Detained, and Individual Asylum. "Other" includes less common hearing types, such as attorney discipline hearings.

[105] Although removal is by far the most common type of immigration proceeding, other proceeding types include credible fear, reasonable fear, claimed status, asylum only, rescission, continued detention review, Nicaraguan Adjustment and Central American Relief Act (NACARA), and withholding only. 2012 YEARBOOK, *supra* note 23, at C1–C3 & C3 tbl.3 (classifying 310,455 out of the 317,930 proceedings received by the immigration courts in 2012 as removals).

contained one or more individual hearings, compared to 42% of removal cases for respondents who were never detained.[106]

Another important pattern that emerges from the data is that for most removal proceedings the same adjudicative medium (televideo or in person) was used for all hearings. In other words, once an individual immigrant's removal process began in one mode, all subsequent hearings followed in the same mode.

Figure 4 depicts the different approaches to adjudicative medium using the detained removal proceeding as the unit of analysis.[107] In the most common adjudicative model, which I call pure in-person adjudication, all hearings within a proceeding are held in person. In the second most common adjudicative model, which I call pure televideo adjudication, all hearings within a proceeding are held by televideo. In the third adjudicative model, which I call hybrid adjudication, in-person and video hearings are both used within a single proceeding.

As Figure 4 reveals in more detail, reliance on pure in-person adjudication in detained removal merits proceedings declined sharply during the six-year period from 2007 to 2012. In its place, pure televideo adjudication increased.[108] By 2012, almost one-third of detained proceedings were conducted using pure televideo adjudication: 25,955 detained proceedings used pure televideo adjudication, compared to 63,877 that used pure in-person adjudication. In contrast, for individuals never subject to detention, 97.7% of removal proceedings in 2012 received pure in-person adjudication.[109] That is, individuals not subject to detention almost always proceeded in person with the judge.

[106] These differences were statistically significant ($p < 0.001$, equality of proportions test). The smaller number of trials in detained cases corresponds with the fact that detained cases also included fewer claims for relief. Nationally, only 7% of detained removal cases included at least one affirmative claim for relief (other than voluntary departure), compared to 49% of never-detained removal cases ($p < 0.001$, equality of proportions test).

[107] To clarify, a "proceeding" often contains several different hearings. For example, a proceeding could begin with a master calendar hearing, later include a custody hearing, and end with an individual hearing.

[108] Although the total number of detained removal proceedings increased during the decade from 2002 to 2012, see *supra* note 76 & Figure 4, *infra*, reflects that the total number of detained proceedings declined somewhat during the 2007 to 2012 time period.

[109] The remaining never-detained removal proceedings decided in 2012 were adjudicated in the pure televideo mode (0.8%) and in the hybrid mode (1.5%).

FIGURE 4: DETAINED REMOVAL PROCEEDINGS, BY ADJUDICATIVE MODE, FISCAL YEARS 2007–2012[110]

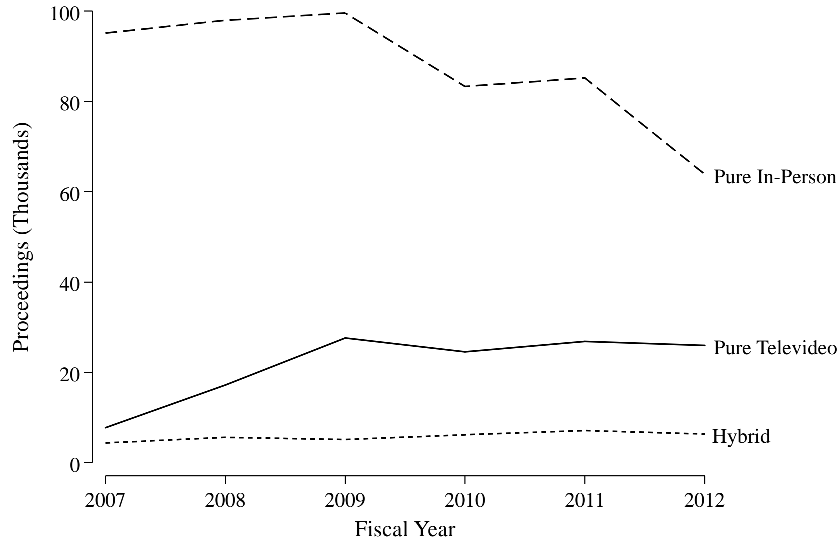

Figure 4 also demonstrates that hybrid proceedings—which included at least one televideo and one in-person hearing—were relatively infrequent among detained cases. When detained hybrid proceedings did occur, they fell into one of several different scenarios. One scenario occurred when televideo equipment was not available, either due to equipment failure or insufficient availability of televideo courtrooms.[111] Another scenario occurred as courts transitioned their dockets from in-person adjudication to televideo,[112] naturally resulting in hybrid

[110] Figure 4 charts the adjudicative mode for all proceedings in all detained removal cases where hearing-level data were available (92.3% of proceedings during 2007 to 2012). For purposes of categorizing the adjudicative mode of hearings within a single proceeding, telephone hearings (which were only 1% of all hearings) were not counted. Nor were certain hearings where EOIR's adjournment coding clearly indicated that the hearing was not held (i.e., unplanned immigration judge leave or detail assignment, resetting of the hearing, and data entry errors) or where medium data were missing. *See* Memorandum from Michael J. Creppy, Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice 2–8 (June 16, 2005) [hereinafter Adjournment Code Memo] (obtained by author with FOIA request #2014-7182) (on file with author) (defining the adjournment codes for hearings used in the court's record keeping system).

[111] As the Court Administrator in San Antonio explained, "although there are four VTC courtrooms at Pearsall [detention facility], there are instances where six judges are waiting to hear cases at Pearsall which are set at the same time. Therefore, in an attempt to complete the hearing, the respondent may be brought to the San Antonio Immigration Court for an in-person hearing." VTC REVIEW, *supra* note 6, at 7.

[112] As Figures 1, 2, and 3 demonstrate, televideo gradually consumed a greater proportion of the immigration court's docket of detained removal cases.

adjudication of those cases pending during the transition period. Third, hybrid adjudication occurred when detainees were transferred to different detention centers based on available bed space,[113] and the transfer triggered a change of venue from a televideo court in one jurisdiction to an in-person court in the other jurisdiction. Finally, hybrid adjudication occurred when a nondetained immigrant appeared in person at an initial master calendar hearing but was later ordered detained and assigned to a televideo court.

Only rarely did hybrid proceedings result from judicial grant of an in-person hearing to a litigant otherwise assigned to a televideo court. The six years of data analyzed show that judges ordered an average of only 102 in-person hearings per year in detained removal cases that would have otherwise proceeded by televideo.[114] As one immigration judge confirmed, televideo cases generally proceed entirely in televideo unless, for example, there is a "speech impediment or they speak Quechua, something like that."[115] Narrow judicial allowance of in-person hearings in televideo courts is also consistent with appellate court rulings that have upheld televideo procedures against due process challenges absent a specific showing of prejudice.[116]

Moreover, the number of requests for in-person hearings declined sharply since 2010. Nationally, respondent requests for in-person hearings in detained televideo cases reached a high of 1227 in 2010, and dipped to a mere 289 by 2012. Most practitioners whom I interviewed indicated that they had either never filed such a request, or that they ceased the practice

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[113] In some cases, the limited availability of bed space results in detainees being transported to locations other than where they were arrested to adjudicate their court case. 2012 YEARBOOK, *supra* note 23, app. A at 19 ("The Department of Homeland Security (DHS) sometimes moves detained aliens between detention facilities."). *See generally* César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 60 (2011) (arguing that the "nationwide game of immigration prison hopscotch" violates the right to counsel).

[114] This average of 102 hearings a year represents less than 0.05% of detained hearings adjourned between 2007 and 2012. *See generally* Adjournment Code Memo, *supra* note 110 (defining adjournment coding that applies to grants of in-person hearings in lieu of televideo hearings). This finding is also consistent with EOIR's own monitoring of televideo usage in San Antonio. Of the 842 televideo hearings included in EOIR's San Antonio study, only four were converted to in-person hearings. VTC REVIEW, *supra* note 6, at 7.

[115] Telephone Interview #48, *supra* note 1. EOIR's own study of televideo usage in San Antonio also cites rare examples of deviation from the televideo mode, such as when necessary to "personally observe the respondent before making a referral to another agency for further observation/diagnosis or looking at marks on the respondent's body before making a decision in the case." VTC REVIEW, *supra* note 6, at 7.

[116] *See, e.g.*, Eke v. Mukasey, 512 F.3d 372, 383 (7th Cir. 2008) (finding that to succeed on a due process challenge the immigrant must make a showing that televideo likely impacted the result of the proceedings).

after having such a motion denied.[117] One immigration judge clarified: "I certainly think [attorneys] can request" in-person hearings, but "what types of factors the judge would consider I don't know because I haven't ever had anybody request it."[118]

A final important feature of the televideo landscape is its uneven distribution across the United States. Although there are sixty different immigration court jurisdictions, 84% of all televideo hearings for 2012 were held in only fifteen jurisdictions.[119] In practice, televideo's implementation was concentrated in those jurisdictions that handled large numbers of detained cases. As a result, the major drivers of televideo's expansion were jurisdictions located near the border (such as San Antonio, El Paso, and Los Angeles), as well as jurisdictions housing major detention centers (such as Houston and Elizabeth).

In conclusion, the empirical evidence just presented demonstrates that televideo technology is reserved for the court cases of detainees. As more and more immigrants are held in detention centers while awaiting their court dates, reliance on televideo has grown dramatically and is now used for both pretrial hearings and trials. Rather than a neutral adjudicative tool, televideo should be understood as an intentional design element of the rapidly evolving detention-to-deportation pipeline.

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[117] *See, e.g.*, Interview #8 with Clinical Professor, Immigration Clinic, ABA-approved Law Sch. (Aug. 5, 2013) (on file with author) (explaining that because immigration judges "have this pressure where they have an entire VTC as a protocol," counsel must make an "extraordinary" showing of prejudice that is "so difficult to make that people just don't bother making it"); Telephone Interview #24 with Partner, Mid-Size Law Firm (Sept. 6, 2013) (on file with author) ("I've made the objection before and it didn't go well for me."); Telephone Interview #21 with Detention Attorney, Nonprofit Org. (Aug. 22, 2013) (on file with author) ("I made a request at the individual hearings for them to be brought in person, which was denied."); Telephone Interview #25 with Staff Attorney, Nonprofit Org. (Sept. 6, 2013) (on file with author) ("It's not going to happen and so you just have to accept that that's how things are done right now, and so I haven't heard of anybody objecting [to televideo]."); Telephone Interview #35 with Partner, Small-Size Law Firm (Oct. 9, 2013) (on file with author) ("I filed a motion once asking that my client be brought in and not on the video . . . it was denied by the judge on the papers. I didn't try it again.").

[118] Interview #29 with Representative, Nat'l Ass'n of Immigration Judges (Sept. 17, 2013) (on file with author); *see also* Telephone Interview #34 with Clinical Professor, Immigration Clinic, ABA-approved Law Sch. (Sept. 26, 2013) (on file with author) (explaining she has never filed a motion for an in-person hearing and never seen it done in practice); Interview #44 with Partner, Small-Size Law Firm (Nov. 20, 2013) (on file with author) (agreeing he personally has never asked for an in-person hearing and has never heard of any attorney doing so); Telephone Interview #48, *supra* note 1 (noting that, although elite law firms handling cases pro bono may request in-person hearings, general practitioners rarely do so).

[119] These jurisdictions, in order from most televideo hearings to least were: Houston, San Antonio, Adelanto, Chicago, Newark, Oakdale, El Paso, Arlington, Detroit, Elizabeth, York, Dallas, Cleveland, and Los Fresnos. The remaining 16% of 2012 televideo hearings were spread out among twenty-seven other jurisdictions. Six of these jurisdictions had fewer than seven televideo hearings.

II. COMPARING OUTCOMES IN TELEVIDEO AND IN-PERSON CASES

Part II turns to the question of televideo's assumed functional equivalence to in-person adjudication.[120] It does so by comparing outcomes in televideo cases with similar cases that were adjudicated in person. In this analysis, procedural outcomes are considered separately from trial outcomes. The key procedural outcomes are (1) obtaining an attorney; (2) applying for relief; and (3) applying for voluntary departure. The key trial outcomes are (1) termination; (2) relief (if pursued); and (3) voluntary departure (if pursued without relief).

Understanding these outcome comparisons requires an appreciation of the two-stage mechanics of removal proceedings. In the first stage of removal, as depicted in Figure 5, the judge rules whether to sustain the charges contained in the government's Notice to Appear.[121] The judge will terminate the case if no proper ground for removal is contained in the charging document.[122] In contrast, if the judge sustains the charges, the case will result in removal at the end of stage one unless the respondent applies for relief or the immigration benefit known as voluntary departure.[123]

In the second stage of removal, as Figure 5 also highlights, the judge adjudicates any application for relief or voluntary departure. Approximately one-third of detained removal cases present at least one such application and thus proceed to the second stage.[124] After considering a respondent's stage two application(s) for relief and/or voluntary departure,[125] the immigration judge must reach one of three different decisions: removal, voluntary departure, or relief.[126]

[120] *See, e.g.*, *supra* note 14.

[121] 8 C.F.R. § 1240.10(c) (2015). For example, the judge will terminate the case if the respondent is a United States citizen or a lawful permanent resident not subject to removal.

[122] In some cases, termination may be requested by the prosecutor. *See infra* note 164. During the six-year period from 2007 to 2012, only 2% of detained removal cases resulted in termination. In contrast, for immigrants who were never subject to detention, 20% of removal cases ended in termination during the same period.

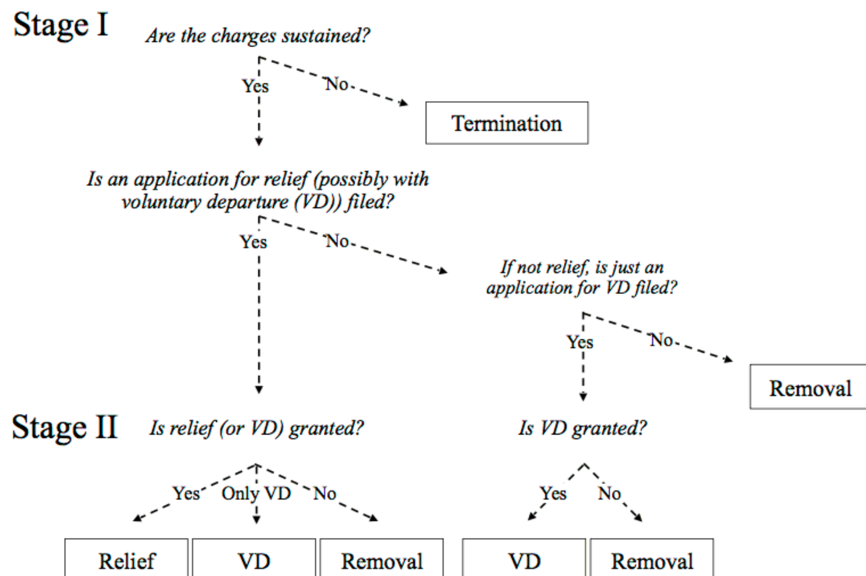
[123] *See supra* notes 23, 91–93 (defining the terms relief and voluntary departure).

[124] Specifically, in the National Sample of nonterminated cases (n = 151,025), 9.6% of respondents applied for at least one form of affirmative relief, and an additional 24.7% applied for just voluntary departure.

[125] To clarify, a respondent may apply for more than one form of relief, such as asylum together with cancellation of removal. In addition to seeking relief, a respondent may also seek voluntary departure.

[126] 8 U.S.C. § 1229a(c)(1)(A) (2012) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."). As Juliet Stumpf aptly points out, outcomes available to immigration judges in deportation cases are extremely limited. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1689 (2009) (contrasting the system for punishment in the immigration law to that of the criminal law, which allows for greater proportionality).

FIGURE 5: TWO STAGES OF IMMIGRATION REMOVAL



Before proceeding further, it is important to consider potential bias in the comparisons of televideo and in-person case outcomes. One aspect of immigration adjudication that reduces bias in measuring the effect of the televideo treatment is that cases are assigned randomly to judges by the court, without prior review of the charges, attorney representation, claims, or available defenses.[127] Official docketing policies call for random rotational assignment of cases to immigration judges.[128] This random assignment of cases to judges without evaluation of the merits of the case is consistent with my observations in site visits and findings gathered from interviews.[129]

[127] Random assignment with respect to the merits of a case is to be distinguished from naturally occurring variations in court or judge caseloads that occur as a result of exogenous factors such as regional and temporal variations in immigration flows and prosecutorial charging priorities.

[128] *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, UNIFORM DOCKETING SYSTEM MANUAL, at III-1 (2013) [hereinafter UNIFORM DOCKETING MANUAL], *available at* http://www.justice.gov/eoir/efoia/newudms/DocketManual_12_2013.pdf [http:// perma.cc/2HGM-JBER] ("In multiple Immigration Judge courts, cases are assigned to each Immigration Judge's Master Calendar on a random rotational basis . . . ."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 104 (2008) [hereinafter GAO REPORT], *available at* http://www.gao.gov/assets/290/281794.pdf [http://perma.cc/37HM-3FRY] ("[I]mmigration judges are reportedly assigned cases randomly within immigration courts . . . .").

[129] Both attorneys and judges explained that case assignment did not take into account the merits of the underlying case, but rather was done randomly. *See, e.g.*, Telephone Interview #48, *supra* note 1

Another critical point that reduces potential bias is that the use of televideo does not depend on a later review of the merits of the case. As established in Part I, once a case begins in one adjudicative mode, it almost always continues in that same mode until the case is completed.[130] In other words, immigration judges do not first hear what a case is about and then relegate weaker cases to televideo. Instead, assignment to pure televideo versus pure in-person adjudication typically depends on the geographic location of the detention center in relation to the judge's assigned court and the technological capacity of the judge's assigned courtroom. For example, not all courtrooms have televideo capacity, thereby requiring in-person adjudication. Other courtrooms are located inside or close to detention facilities, thereby eliminating the need for videoconferencing.

These court practices allow for comparisons of case outcomes across a sizable dataset containing tens of thousands of observations of televideo and in-person adjudication. Nonetheless, this research is an observational study, not an experiment. Natural flows in immigration patterns and enforcement priorities may insert unintended bias into the analysis.[131] The unevenness of televideo implementation across the country is another potential source of bias.[132] The fact that some immigrants are released from custody and therefore no longer part of the detained caseload also creates some uncertainty in any study of detained immigration cases.[133] Finally, like in all research based on a review of court data, analysis was limited to those variables captured in the court's files.

(agreeing that detained cases are distributed randomly among immigration judges without regard to their substance or merit).

[130] *See supra* Figure 4 and accompanying text.

[131] By incorporating a regression analysis in my analysis, I controlled for factors such as respondent nationality and prosecutorial charge type that could affect case outcomes. *See infra* notes 362–71 and accompanying text.

[132] *See infra* Figure 8 and accompanying discussion. I address this issue with a separate analytical approach that looks at just those high-volume jurisdictions that relied most heavily on both televideo and in-person adjudication for detained cases. *See infra* Part II.B.

[133] This concern is mitigated by a number of factors. Many immigrants in detention centers are held mandatorily without a statutory right to release. 8 U.S.C. § 1226(c)(1) (2012), or without a right to a custody redetermination before a judge, 8 C.F.R. § 1003.19(h)(2)(i)(B). Immigration courts have no authority to determine custody status on their own motion, P-C-M-, 20 I. & N. Dec. 432 (B.I.A. 1991), and the majority of release decisions are made by detention officers, rather than courts, 8 U.S.C. § 1226(a)(2); Eagly & Shafer, *supra* note 21, at 73 (finding that among those respondents released from detention, 63% never had a custody hearing before an immigration judge). When judges do rule on bond conditions, they are instructed to weigh numerous factors related to risk of flight and public safety that do not necessarily correlate with case quality. IMMIGRATION BENCHBOOK, *supra* note 10, *available at* http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf [http://perma.cc/3JXA-PBHQ]. Finally, immigrants unable to afford the required bond amount remain detained. *See supra* note 98.

To guard against these possible sources of bias, a number of additional steps enhance the validity of the comparisons presented in this Part. First, only similar types of court cases (e.g., only detained adult removal cases) from the two years of most active televideo usage were included in the comparisons. Second, the analysis replicated the two-stage decisional process of immigration removal proceedings so that outcomes were compared only at the same stage.[134] Third, four different models for statistical analysis were pursued, all of which reached similar conclusions regarding televideo's association with inferior participation levels by respondents. These models relied on both a sample of cases from courts all across the country, as well as a sample from only those jurisdictions with the most active usage of both televideo and in-person adjudication. In addition, these analyses included a regression that statistically controlled for additional factors that could have potentially affected case outcomes, such as representation by counsel, assignment to a particular judge, fiscal year of decision, nationality of respondent, and prosecutorial charge type.[135]

A. *Outcomes in the National and Active Base City Samples*

This Section first compares televideo and in-person case outcomes across a National Sample of 153,835 immigration cases. For purposes of conducting this comparison, this set of cases was tailored to include only adult detained removal cases in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012.[136] In addition, cases involving atypical forms of adjudication were removed, including cases involving prisoners whose cases are adjudicated as part of the Institutional Hearing Program (IHP),[137] and cases decided without a hearing pursuant to a stipulation between the parties.[138] The resulting National

[134] The bifurcation of immigration proceedings into deportability and relief is firmly grounded in the immigration law. *See, e.g.*, Bulos, 15 I. & N. Dec. 645, 648–49 (B.I.A. 1976); 8 C.F.R. § 1240.11(d)–(e) (2015). For a graphic depiction of this two-stage process, see *supra* Figure 5.

[135] The coding methodology used for each of these factors is detailed in Part C of the Appendix.

[136] A more detailed description of the steps taken to compile the National Sample is contained in Part A of the Appendix.

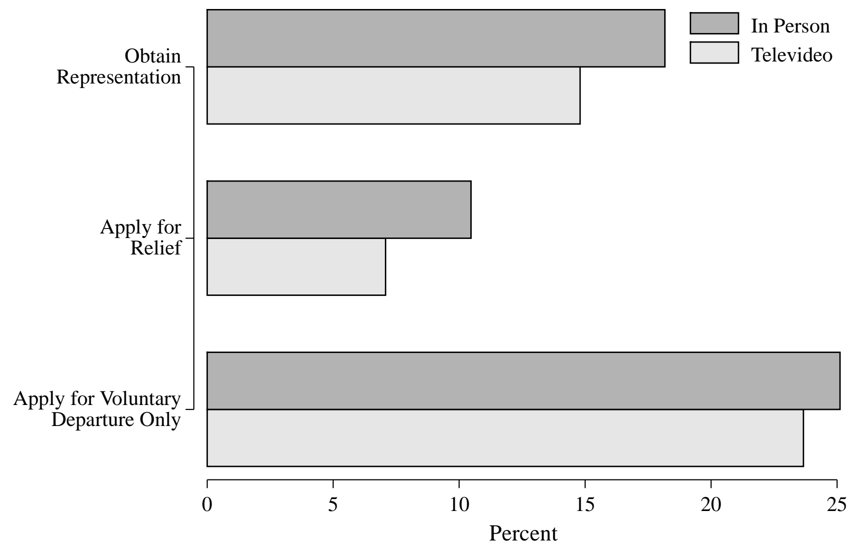
[137] The Institutional Hearing Program (IHP) implements a 1986 congressional mandate that the Attorney General "shall begin any deportation proceeding as expeditiously as possible" for noncitizens convicted of deportable offenses. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 701, 100 Stat. 3359, 3445. The IHP program was officially created in 1988 as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347(a), 102 Stat. 4181, 4471 (1988) (codified as amended at 8 U.S.C. § 1228 (Supp. II 1996)) ("The Attorney General shall provide for the availability of special deportation proceedings at certain Federal, State, and local correctional facilities for aliens convicted of aggravated felonies (as defined in [certain sections of the INA]).").

[138] *See* 8 U.S.C. § 1229a(d) (2012). *See generally* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV.

Sample included 153,835 decisions from fifty-two different court jurisdictions and 266 different immigration judges. Approximately one-fourth of these cases were adjudicated by televideo, and the rest were adjudicated in person.

Across this large National Sample of detained removal cases, televideo cases exhibited less engagement in the adversarial process. When compared to detained in-person removal cases, detained televideo removal cases were less likely to involve counsel (18% in person, versus 15% televideo), include an affirmative claim for relief (10% in person, versus 7% televideo), or contain a request for voluntary departure (25% in person, versus 24% televideo). These statistically significant differences in procedural outcomes ($p < 0.001$) are displayed graphically in Figure 6.

FIGURE 6: NATIONAL SAMPLE PROCEDURAL OUTCOMES, BY ADJUDICATIVE MEDIUM[139]



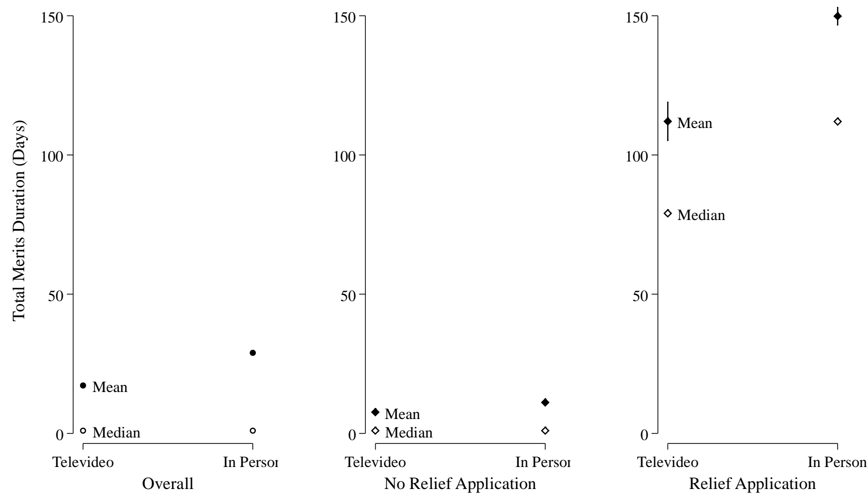
Not only did televideo cases in the National Sample include fewer attorneys, relief applications, and requests for voluntary departure, but they

475, 509 (2013) (finding that in the mid-to-late 2000s, approximately one in ten removal orders were stipulated orders, rather than a product of the adversarial court process).

[139] National Sample $n = 153{,}835$ for representation; $n = 151{,}021$ for apply for relief and apply for voluntary departure only (excluding individuals whose cases were terminated). Differences were statistically significant by a two-tailed equality of proportions test: obtain representation, $z = 15.3$, $p < 0.001$; apply for relief, $z = 19.7$, $p < 0.001$; apply for voluntary departure only, $z = 5.7$, $p < 0.001$.

were also twelve days faster on average.[140] For those who did not apply for relief, detained televideo proceedings were an average of three days shorter than comparable in-person cases.[141] And, when an application for relief was adjudicated (such as asylum or cancellation of removal), on average immigration judges reached a final decision a full thirty-eight days faster in televideo courtrooms.[142] These differences in adjudicative time of the merits proceedings in televideo and in-person cases are displayed in Figure 7.

FIGURE 7: NATIONAL SAMPLE MERITS COMPLETION TIME, BY ADJUDICATIVE MEDIUM



Note: Total Merits Duration includes median (hollow symbol), average (solid symbol), and 95% confidence intervals for time from first hearing until last hearing.

[140] Twenty-nine days on average for in person (*SD* = 90), versus seventeen days for televideo (*SD* = 61) ($p < 0.001$, two-tailed difference of means t-test); median time to completion for both adjudicative mediums was one day. For purposes of this Article, the length of court processing time is measured as the time from the first hearing at the beginning of the relevant merit's proceeding (generally the master calendar hearing) to the date of the last hearing in the proceeding in which the judge issued the first decision on the merits. A similar methodology for measuring court processing time was adopted to study the Department of Justice's Legal Orientation Program. NINA SIULC ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 16 n.13, 48, 81–82 (2008) [hereinafter VERA EVALUATION], *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_evalution_updated_5-20-08.pdf [http://perma.cc/7LFF-DJFX].

[141] Eleven days on average for in person (*SD* = 58), versus eight for televideo (*SD* = 23) ($p < 0.001$, two-tailed difference of means t-test); the median time to completion for both adjudicative mediums is one day.

[142] One hundred fifty days on average for in person (*SD* = 173), versus 112 for televideo (*SD* = 185) ($p < 0.001$, two-tailed difference of means t-test); the median time to completion for merits proceedings with claims for relief was 112 days for in person, versus seventy-nine days for televideo.

Why were televideo cases faster? One clue from the data is that televideo cases were less likely to include continuances for additional time for the respondent to seek counsel[143] or for the respondent to prepare for trial.[144] Televideo cases were also less likely to include a trial: 14% of in-person removal cases in the National Sample had an individual hearing during the merits proceeding, compared to only 8% of televideo removal cases.[145] Given that removal cases with attorneys are more likely to include claims for relief and therefore trials,[146] this finding is also consistent with the lower level of attorney representation in televideo cases.[147] Multiple aspects of the data thus reflect less vigorous litigant involvement in televideo cases.

One possible critique of these results is that comparisons in the National Sample were skewed because jurisdictions that actively used both adjudicative techniques were effectively being pooled with jurisdictions that did not. As would be expected with observational court data, jurisdictions have incorporated televideo technology in different ways. During the study period, some jurisdictions (such as Newark and Detroit) relied almost exclusively on televideo adjudication for detained cases.[148] Other jurisdictions (such as San Francisco and Tucson) had not yet integrated televideo technology and continued to use in-person adjudication for almost all of their detained cases. In contrast, several major court jurisdictions with large numbers of detained cases (such as Houston and Los Angeles) were early to adopt televideo adjudication and during the

[143] In the National Sample, 13% of televideo cases had at least one hearing adjourned to seek counsel, versus 15% for in-person cases ($p < 0.001$, equality of proportions test). In addition, among those respondents who were given at least one continuance to find counsel, televideo respondents were less likely to be successful: 36% of in-person respondents with at least one continuance to find counsel obtained an attorney, compared to only 29% of televideo respondents ($p < 0.001$, equality of proportions test).

[144] In the National Sample, 10.6% of televideo cases had at least one hearing adjourned for respondent or respondent's attorney preparation time, versus 12.5% for in-person cases ($p < 0.001$, equality of proportions test).

[145] Statistically significant differences in trial rates were even observed among those cases with relief applications. In the National Sample, 95% of in-person relief cases included an individual hearing, versus 94% of televideo relief cases ($p < 0.001$, two-tailed difference of proportions test).

[146] In a separate article, Steven Shafer and I find that 86% of respondents who seek relief from removal are represented by counsel. Eagly & Shafer, *supra* note 21, at 22 fig.4.

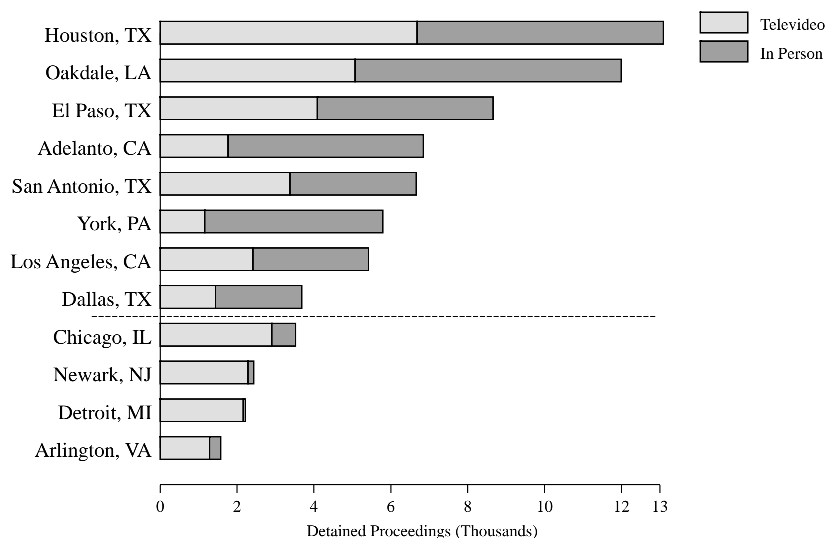
[147] *See supra* Figure 6; *infra* Figure 9.

[148] *See infra* Figure 8. The number of televideo units varied from base city to base city, as did the number of minutes the equipment was used. *See* Letter from Crystal Souza, Exec. Office for Immigration Review, U.S. Dep't of Justice, to author (Dec. 16, 2013) (obtained by author with FOIA request #2014-2220) (on file with author). For example, records I obtained with a Freedom of Information Act request revealed that Memphis had only two pieces of video conferencing equipment and only seventy-two minutes of usage in the nine-month period for which data were provided. In contrast, during the same time period Los Angeles had over ten pieces of equipment and close to 200,000 minutes of usage logged. *Id.*

study time period actively used both televideo and in-person methods to handle their detained caseloads. These jurisdictions that used both adjudicative forms in large numbers of detained hearings may provide the best sample for observing adjudication outcomes across televideo and in-person cases.

To test this possible interpretation of the results, my second analytic approach focuses on a subset of cases selected from those court jurisdictions that adjudicated at least 1000 televideo and 1000 in-person detained removal cases in the two-year period of interest.[149] The eight jurisdictions that satisfied these criteria included four Texas base cities (Dallas, El Paso, Houston, and San Antonio), two California base cities (Adelanto and Los Angeles), and one base city each from Louisiana and Pennsylvania (Oakdale and York, respectively). I refer to these eight jurisdictions collectively as "Active Base Cities."

FIGURE 8: DETAINED REMOVAL CASES IN JURISDICTIONS WITH AT LEAST 1000 TELEVIDEO REMOVAL CASES, BY ADJUDICATIVE MEDIUM, FISCAL YEARS 2011–2012

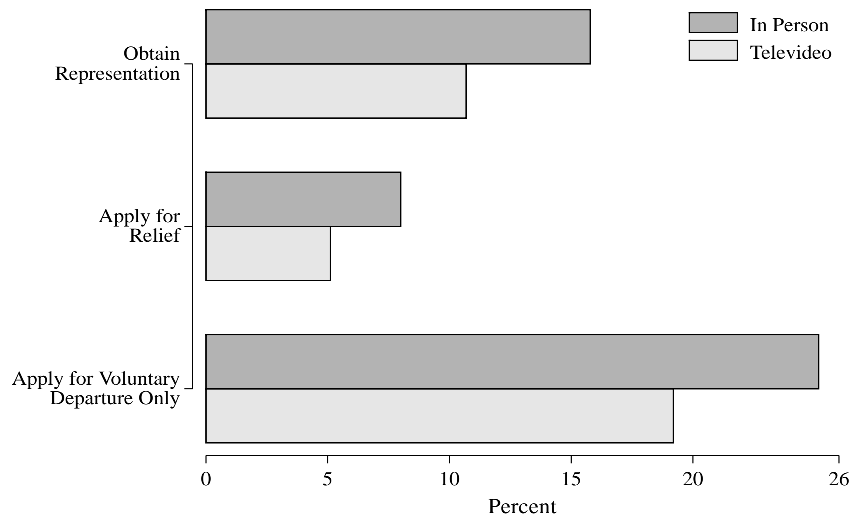


[149] Creating minimum criteria for adjudicative volume of studied cases is a recognized method for improving validity in comparing outcomes across groups of immigration cases. *See, e.g.*, GAO REPORT, *supra* note 128, at 37 n.35, 84 ("We selected these country-immigration court combinations because they had a sufficiently large number of immigration judges rendering a sufficiently large number of decisions to produce reliable estimates . . . ."); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 312, 332, 395–96 (2007) (limiting analysis of nondetained asylum decisions to only those courts "that decided at least 1500 asylum cases during the relevant time frame").

The Active Base City Sample included a robust collection of 59,525 detained removal cases decided by sixty-six different immigration judges. Among these detained cases, 42% were adjudicated by televideo, and 58% in person. Figure 8 displays the relative breakdown between televideo and in-person cases in the eight Active Base Cities. Below the dotted line are base cities that also adjudicated at least 1000 televideo cases, but were not defined as Active Base Cities because they heard almost all of their detained cases by televideo, with few in-person detained cases remaining as comparators.

Analysis of the Active Base City Sample revealed procedural patterns similar to those in the National Sample, albeit with somewhat more intense disadvantages for respondents in the televideo mode. When compared to their in-person counterparts, detained televideo cases in the Active Base Cities were significantly less likely to include representation by counsel (16% in person, versus 11% televideo), applications for relief (8% in person, versus 5% televideo), or requests for voluntary departure (25% in person, versus 19% televideo). These statistically significant differences in procedural outcomes are displayed in Figure 9.

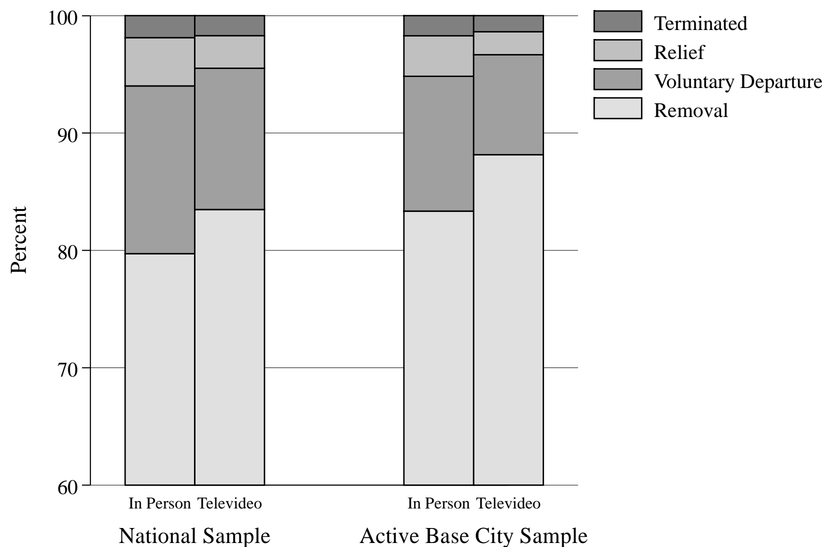
FIGURE 9: ACTIVE BASE CITY SAMPLE PROCEDURAL OUTCOMES, BY ADJUDICATIVE MEDIUM[150]



[150] Active Base City Sample $n = 59{,}525$ for representation; $n = 58{,}589$ for apply for relief and apply for voluntary departure only (excluding individuals whose cases were terminated). Differences were statistically significant by a two-tailed equality of proportions test: obtain representation, $z = 17.8$, $p < 0.001$; apply for relief, $z = 13.7$, $p < 0.001$; apply for voluntary departure only, $z = 17.0$, $p < 0.001$.

In view of the marked procedural differences observed in both samples, it makes sense that televideo cases also diverged from in-person cases in their overall case outcome. As Figure 10 displays, televideo cases in both samples were significantly more likely to end in removal.[151] In the National Sample, 80% of in-person respondents were ordered removed, compared to 83% of televideo respondents. In the Active Base City Sample, 83% of in-person respondents were ordered removed, compared to 88% of televideo respondents. Similarly, as also depicted in Figure 10, televideo cases in both samples were less likely than in-person cases to be granted relief, allowed to voluntarily depart, or have their cases terminated.

FIGURE 10: NATIONAL SAMPLE AND ACTIVE BASE CITY SAMPLE OUTCOMES, BY ADJUDICATIVE MEDIUM[152]



This disadvantage in outcomes for televideo cases is reduced, however, when cases that sought relief in stage two were analyzed

[151] So as to maintain focus on the potential effect of the televideo treatment on trial-level outcomes, this Article considers only the initial judicial outcome, rather than any outcome after appeal. Even so, appeal is unusual in the context of detention: in the National Sample, only 4% of cases ending in removal were appealed to the Board of Immigration Appeals. Moreover, detained cases ending in removal were more likely to result in appeal if the case was heard in person (4.3% appealed) instead of by televideo (3.3% appealed) ($p < 0.001$, two-tailed equality of proportions test).

[152] National Sample $n = 153{,}835$. Differences were statistically significant by a two-tailed equality of proportions test: termination, $z = 2.2$, $p < 0.05$; relief, $z = 12.2$, $p < 0.001$; removal, $z = 16.4$, $p < 0.001$; voluntary departure, $z = 11.2$, $p < 0.001$. Active Base City Sample $n = 59{,}525$. Differences were statistically significant by a two-tailed equality of proportions test: termination, $z = 3.3$, $p < 0.001$; relief, $z = 10.9$, $p < 0.001$; removal, $z = 16.4$, $p < 0.001$; voluntary departure, $z = 11.8$, $p < 0.001$.

separately. Among National Sample respondents who sought relief, televideo and in-person cases were both granted relief exactly 40% of the time.[153] In the Active Base City Sample, a statistically significant difference in the granting of relief applications appeared (39% for televideo, versus 44% for in person; $p < 0.05$).[154] However, as the next Section makes clear, when additional factors (such as whether the respondent was represented by counsel, assigned a particular judge, or charged with removal based on a crime) were controlled for in a regression model, this observed difference was no longer statistically significant.

The comparative analysis of case outcomes just presented offers important information regarding how televideo adjudication operates on the ground. Most strikingly, detained televideo cases exhibited depressed engagement with the litigation process. As compared to similar in-person adult detained removal cases, televideo cases were less likely to include counsel or applications for relief and were adjudicated in less time with fewer trials.

One might question whether these differences found in televideo cases occurred because televideo respondents were detained. It is therefore important to remind readers once again that *all cases* included in the National and Active Base City Samples are of immigrants held in detention during their entire case. In addition, care was taken in constructing both data samples to ensure reliable comparisons, including by deleting those cases that are not removal cases or where the parties stipulated to removal.[155] However, it is true that the analysis just presented did not statistically control for other case characteristics (such as which judge was assigned) or respondent characteristics (such as whether the respondent was represented by counsel) that might also be associated with these divergent outcomes. The next Section turns to analysis of these additional variables.

B. Additional Factors that Could Affect Outcomes

To further assess the validity of this Article's descriptive comparisons between televideo and in-person adjudication, I utilized a sequential logit regression model to control for additional factors that could possibly

[153] National Sample of relief applicants $n = 14{,}480$. Relief not statistically significant, $z = .21$, $p = 0.83$, by a two-tailed equality of proportions test.

[154] Active Base City Sample of relief applicants $n = 3975$. Relief statistically significant, $z = 3.03$, $p < 0.05$, by a two-tailed equality of proportions test.

[155] *See infra* Appendix, Section A.

influence outcomes.[156] Specifically, this analysis controls for representation status, geographic region of nationality, prosecutorial charge type, fiscal year of decision, and judge assigned to the case.[157] In addition, to further enhance reliability, the regression analysis models the two-stage structure of removal proceedings introduced earlier. That is, it first considers the stage one outcomes of termination versus removal. Second, it considers stage two outcomes of relief versus removal or voluntary departure.[158]

Applying this logit regression model to both the National and Active Base City Samples leads to the same conclusions regarding televideo's effect on litigant participation as do the descriptive comparisons of outcomes already introduced. That is, even after controlling for numerous factors that could affect outcome, in-person respondents remained significantly more likely to engage in the litigation process by retaining counsel and seeking relief.[159] However, after controlling for those same factors, these data failed to reject the null hypothesis regarding outcomes at trial on applications for relief: there was no statistically significant difference in relief rates across televideo and in-person adjudication.[160]

[156] For a similar example of a sequential logit regression model used to evaluate a two-stage court adjudication process, see Kuo-Chang Huang et al., *Does the Type of Criminal Defense Counsel Affect Case Outcomes? A Natural Experiment in Taiwan*, 30 INT'L REV. L. & ECON. 113, 121, app. B (2010).

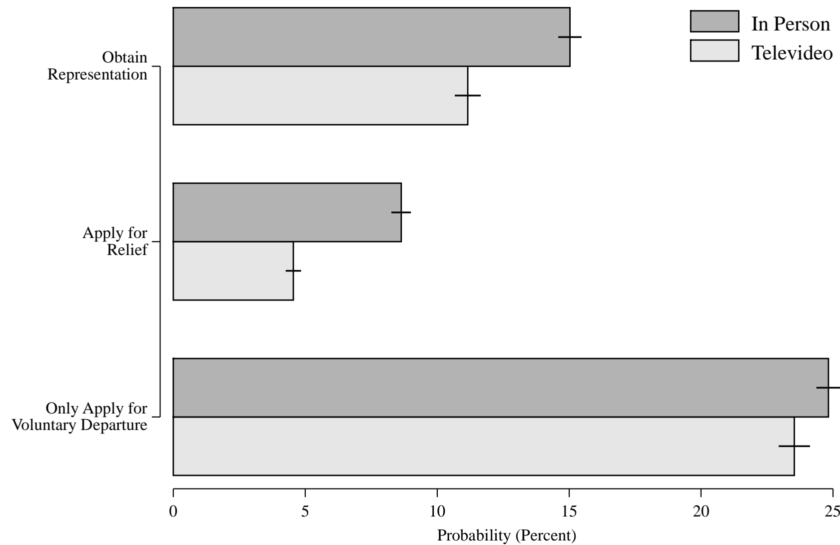
[157] Additional details regarding the coding of each of these variables is provided in the Appendix. The analysis discussed in this Section also incorporates a fixed effects regression at the individual-judge level to account for unmeasured factors that might lead to lower or higher grant rates before certain judges. *See infra* Appendix & tbls.1 & 2. For other examples of fixed effects modeling in the legal scholarship, see Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 117–18 (2013) (utilizing fixed effects to control for state in analyzing the national rollout of a federal immigration program known as Secure Communities); Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 180 (2006) (applying fixed effects at the judge level to analyze judicial decisionmaking in the federal circuit courts).

[158] For those respondents who applied for relief in stage two (potentially with voluntary departure), the judge may have ordered relief, removal, or voluntary departure. For those respondents who only applied for voluntary departure in stage two, the judge may have ordered voluntary departure or removal.

[159] *See infra* Appendix tbl.1 (presenting logit regression results based on the Active Base City Sample).

[160] *Id.*

FIGURE 11: PREDICTED PROBABILITIES FOR ACTIVE BASE CITY SAMPLE BASED ON A LOGISTIC REGRESSION OF PROCEDURAL OUTCOMES, BY ADJUDICATIVE MEDIUM[161]

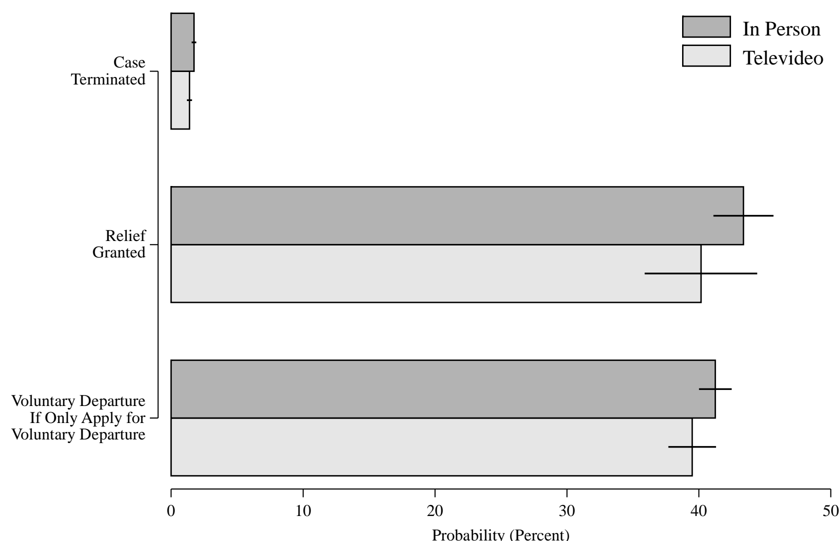


Using the Active Base City Sample, Figure 11 provides a visual representation of these differences by comparing the predicted outcomes for each measure of litigant engagement. As Figure 11 displays, when compared to similarly situated, detained televideo respondents, detained in-person respondents were a remarkable 90% more likely to apply for relief, 35% more likely to obtain counsel, and 6% more likely to apply only for voluntary departure.[162]

[161] Figure 11 displays predicted probabilities and 95% confidence intervals based on the regression results displayed in the "Counsel," "Relief Application," and "VD Only Application" columns of Table 1 in the Appendix, which provide odds ratios comparing the impact of in-person adjudication to televideo on selected outcomes. Predicted probabilities based on these estimated odds ratios may provide a more intuitive look into the magnitude of the differences in these outcomes.

[162] That is, after controlling for a variety of case- and respondent-specific factors, the relief application rate is predicted to increase from 4.5% to 8.6%, the rate of obtaining representation is predicted to increase from 11.2% to 15.0%, and the voluntary departure application rate is predicted to increase from 23.5% to 24.8%.

FIGURE 12: PREDICTED PROBABILITIES FOR ACTIVE BASE CITY SAMPLE BASED ON A LOGISTIC REGRESSION OF JUDICIAL OUTCOMES, BY ADJUDICATIVE MEDIUM[163]



In contrast to the predicted differences in procedural outcomes just discussed, the predicted differences for relief and voluntary departure in the Active Base City Sample were not significant. As shown in Figure 12, after controlling for the same set of variables, there was no statistically significant finding that judges assigned disadvantage to televideo cases in ruling on relief and voluntary departure applications. Although judges were somewhat less likely to terminate televideo cases (1.4% for televideo, versus 1.7% for in person; $p < 0.01$), technical aspects of termination practice in immigration court make it difficult to draw meaningful conclusions from this data point.[164]

Applying the same logit regression model to the National Sample yielded consistent results to those found in the Active Base City Sample.[165]

[163] Figure 12 displays average predicted probabilities and 95% confidence intervals based on the regression results displayed in the "Termination," "Grant Relief Application," and "Grant VD Only Application" columns of Table 1 in the Appendix.

[164] For example, some of these terminations could reflect a prosecutor's request for termination in exchange for the respondent's agreement to a prehearing order of voluntary departure. 8 C.F.R. § 240.25(d)(1) (2015). Available court data do not allow for measurement of this practice. Alternatively, in some cases prosecutors may file a new removal charge in a subsequent proceeding. *See, e.g.*, Interview #29, *supra* note 118 (agreeing that many times the "government moves to terminate for various reasons like the NTA wasn't proper" and then refiles the case). Of the small number of detained cases in the National Sample that resulted in termination, about 4% included a second Notice to Appear.

[165] Regression results from the National Sample are contained in Table 2 of the Appendix.

There were no statistically significant differences in judicial decisions of termination and grants of relief or voluntary departure. In addition, statistically significant differences in litigant engagement remained, as measured by retention of counsel and applications for relief.[166]

This null result for judicial decisionmaking at trial means that the logit regression model, as applied to both samples, could not detect statistically significant differences in relief and voluntary departure grant rates for televideo compared with in-person cases. This finding does not, however, eliminate the possibility that undetected discrimination against televideo cases might occur at the individual case level. For example, the fact that fewer televideo respondents brought claims in the first place could mean that the televideo claims were stronger on average, and therefore perhaps merited grants at a higher rate. In addition, it is possible that individual judges reacted differently to the televideo treatment.[167] The regression model addresses these possibilities by controlling for judge, case, and respondent characteristics that are associated with each case. Nonetheless, such models cannot eliminate the possibility of omitted variable bias.

The analysis presented in this Section complements the descriptive comparisons presented earlier with a regression model that controls for numerous factors that could influence case outcomes. These factors include respondent-specific factors of representation status, geographic region of nationality, and prosecutorial charge type, as well as case-specific factors of fiscal year of decision and judge assigned to the case. The resulting quantitative analysis yields an asymmetrical result: televideo was associated with fewer assertions of rights by litigants, but not more judicial denials of relief from removal. To further probe televideo adjudication, Part III supplements these findings with interviews and observations from the field.

III. ON THE INSIDE OF TELEVIDEO COURTROOMS

I now turn to my qualitative research to interpret the adjudicative patterns described in Part II.[168] Relying on the accounts of the people most

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[166] However, in the National Sample there is no statistically significant difference in the rate of applying for voluntary departure. *See infra* Appendix tbl.2.

[167] Recent research on Social Security hearings has found that while some administrative law judges showed lower allowance rates in video hearings, others showed higher allowance rates. HAROLD J. KRENT & SCOTT MORRIS, STATISTICAL APPENDIX TO REPORT ON ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 40 (2013), *available at* http://www.acus.gov/sites/default/files/documents/Statistical_Appendix_Final_4-3-2013.pdf [https://perma.cc/93FT-SU4A].

[168] For a description of this qualitative research, see *supra* notes 31–42 and accompanying text.

familiar with immigration adjudication,[169] as well as my own observations from the pews of immigration courtrooms and the halls of detention centers, I identify the complex ways in which video adjudication interacts with the deportation process. Judicial decisionmaking at trial is discussed first, followed by litigant engagement in the adversarial process.

A. *Judicial Decisionmaking*

> I can't honestly say to you that I think the outcome [in my televideo cases] would have been different in person. That's including cases I've won and cases I've lost.[170]

Attorneys I interviewed cited many frustrations with video appearances. Primary among these concerns were interference with lawyers' ability to guide their clients and technical interruptions in the video feed.[171] These criticisms of televideo were often expressed in strong terms: some attorneys said they "hated" televideo; others stressed that it "dehumanized" their clients.[172]

Curiously, however, when pressed to explain whether video actually interfered with their ability to win a specific claim on behalf of a client, most responded consistently with the results of the quantitative data. That is, attorneys confessed that they could not identify a case in which televideo adversely affected the outcome of their clients' claims for relief. As one attorney succinctly explained, "I can't think of any case that I've handled where I could say that [televideo] might have made a difference."[173] Another commented: "[I]f you have a decent case [for relief], you will still probably win it. I don't think just because you're doing it over video, that's going to determine whether or not you win the case."[174]

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[169] As sociologists who study legal consciousness have found, often it is the accounts of participants in the system that best capture the actual practice and use of law. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

[170] Interview #44, *supra* note 118.

[171] *See, e.g.*, *infra* notes 239, 264, 274.

[172] *See, e.g.*, *infra* notes 200, 211, 263.

[173] Telephone Interview #18 with Partner, Small-Size Law Firm (Aug. 21, 2013) (on file with author).

[174] Telephone Interview #43 with Partner, Small-Size Law Firm (Oct. 30, 2013) (on file with author). Many other practicing attorneys made similar statements. *See, e.g.*, Interview #40 with Attorney, Mid-Size Law Firm (Oct. 22, 2013) (on file with author) ("I can't honestly say that I felt somehow unfairly treated because of that [video] arrangement."); Interview #16 with Supervisory Attorney, Nonprofit Org. (Aug. 9, 2013) (on file with author) ("I would offer that a good attorney or a good judge is probably going to be as good on VTC as they are in person."); Telephone Interview #22 with Partner, Small-Size Law Firm (Sept. 3, 2013) (on file with author) ("I don't feel like my presentation really suffered [over video]."); Interview #8, *supra* note 117 ("Most of the cases that we end up getting, they win. So they win despite VTC, right, which is great."); Interview #30 with Assoc.,

This Article's failure to reject the null hypothesis that decisionmaking at trial is unrelated to adjudicative mode thus suggests that the intuitions of these attorneys in the televideo trenches may be correct.

What accounts for this lack of an observed difference in outcomes across televideo and in-person trials? Despite the sharp criticism that routinely accompanies discussion of immigration judges,[175] there are a number of explanations for why their trial decisions may turn on factors other than what is gleaned over a video screen. As I observed in my site visits, immigration judges often rested their decisions on purely legal determinations rather than individualized fact-finding that relied on interaction over the television screen.[176] Moreover, as social science research has underscored, preexisting policy preferences of immigration judges can profoundly influence their resolution of cases, especially given the "institutional constraints under which judges operate, including the vagueness of the law, the lack of concrete evidence, and the difficulty of assessing credibility."[177]

Even when fact-finding is determinative, immigration judges may privilege those cases with nontestimonial "corroborative printed proof," rather than those that rely solely on the first-hand testimony of the applicant.[178] The immigration bench's capacity to weigh testimony without regard to presentational medium has also been guided by a series of reforms designed to increase consistency in case outcomes. In 2006, the Justice Department began to standardize procedures in the immigration

Small-Size Law Firm (Sept. 17, 2013) (on file with author) ("I think that if you are doing everything you are supposed to and you are well prepared, any inconvenience of the televideo is minimal.").

[175] *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) ("[T]he adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.").

[176] A number of scholars have identified the importance of legal determinations, in addition to factual determinations, in immigration courts. *See, e.g.*, Joshua B. Fischman, *Measuring Inconsistency, Indeterminacy, and Error in Adjudication*, 16 AM. L. & ECON. REV. 40, 73 (2014) (clarifying that decisionmaking in immigration cases "involve[s] fact-finding as well as legal interpretation"); Steven H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 424 (2007) (noting that a judge's decision "might be one of 'pure' law . . . [o]r it might be an assessment of the asylum seeker's credibility, including whether the person is truthful, reliable, and perceptive"); Audrey Macklin, *Truth and Consequences: Credibility Determination in the Refugee Context*, INT'L ASS'N REFUGEE L. JUDGES at 134, 134 (1988) (explaining that credibility determinations in asylum cases are often so "hard" that decisions instead rely on legal determinations).

[177] Linda Camp Keith et al., *Explaining the Divergence in Asylum Grant Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, 35 LAW & POL'Y 261, 264, 283 (2013).

[178] Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 474–79 (1992) (finding in an observational study of asylum adjudication that immigration judges often privileged "printed corroborative proof, which they considered to be 'objective' evidence," over testimonial evidence).

courts,[179] including by creating an immigration court practice manual[180] and publishing an enhanced immigration judge benchbook.[181] The immigration courts also developed programs to more closely supervise judges with unusually high or low grants of relief.[182] Training for new immigration judges now emphasizes aspects of credibility beyond demeanor, such as factual inconsistencies in the applicant's testimony.[183] As one immigration judge explained, when judges are taught to focus on the content of testimony rather than nonverbal cues,[184] video does not make a difference because "you really watch a person on that screen and you really pretty much can hear them the same way you can hear them [in person]."[185]

Televideo also operates in a context in which judicial maneuvering has already been severely constrained by changes in the immigration law and prosecutorial practices. Since the early 1990s, Congress has broadened standards for removal, while eliminating and reducing many forms of relief.[186] Furthermore, despite a growing recognition of the discretion held

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[179] *See* Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), http://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html [http://perma.cc/E4BL-DP2R] (announcing a new effort "to improve the performance and quality of work of the nation's immigration court system").

[180] COURT PRACTICE MANUAL, *supra* note 84.

[181] IMMIGRATION BENCHBOOK, *supra* note 10, *available at* http://www.justice.gov/eoir/immigration-judge-benchbook [http://perma.cc/559Z-FLG5].

[182] GAO REPORT, *supra* note 128, at 38. In a seminal study of judicial decisionmaking in nondetained asylum cases, scholars found significant disparity in grant rates for asylum cases despite random judicial assignment. Ramji-Nogales et al., *supra* note 149.

[183] *See, e.g.*, Telephone Interview #48, *supra* note 1 (explaining that since 2006 judges have "tons more training," including training "to not rest too much on body language or whether people have downcast eyes and things like that in making credibility determinations"). Such attentiveness to what constitutes a proper adverse credibility finding is informed by the growing realization that humans—even those who are highly trained—are poor lie detectors. *See, e.g.*, Bella M. DePaulo et al., *The Accuracy–Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 346 (1997) (finding that the average person's ability to detect deception is barely better than flipping a coin).

[184] Social science research has found that human lie detection can be enhanced by focusing on speech content rather than on visual information. *See* Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 816 (2002). The importance of substance rather than nonverbal cues is particularly critical in the immigration context, given that respondents hail from a range of cultures and backgrounds where identical nonverbal cues can mean quite different things.

[185] Telephone Interview #48, *supra* note 1 ("I don't really think that [video impacts the ability to observe demeanor] because you really watch a person on that screen and you really pretty much can hear them the same way you can hear them [in person].").

[186] *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000) (showing how the 1996 amendments to the immigration law "drastically changed the consequences of criminal convictions for lawful permanent residents"). For a thoughtful discussion of how these changes in the immigration law have redefined the obligations of criminal defense counsel, see Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31 (2010).

by immigration prosecutors,[187] exercise of such discretion in the context of detention is rare. Quite the opposite: in the detained courtrooms I observed, adversarial prosecutors mechanically contested all claims, as they managed crushing caseloads that often did not allow time to research the merits of the governing law or underlying facts.[188] Not surprisingly, detained immigration court records I reviewed included virtually no discretionary case closures by prosecutors.[189]

Another important factor is the severe resource constraints facing immigration courts, particularly those adjudicating detained cases. Due to limited bed space and the high costs associated with detention, the Department of Justice now prioritizes detained case completions over those of nondetained respondents.[190] In San Antonio, for example, I routinely observed judges explaining to detainees that their Washington Headquarters required them to complete all detained cases in sixty days.[191] This expedited scheduling practice, known as the rocket docket,[192] has pressurized case review in precisely those courts where the televideo

[187] Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) [hereinafter Memo from John Morton], *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/QL44-ABZC?type=pdf] (setting forth the government's plan to prioritize deportations based on seriousness of the immigrant's criminal record); *see also* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (describing the history, theory, and application of prosecutorial discretion in immigration law); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (revealing how the executive exerts discretion in deciding who is selected for deportation from the United States).

[188] David Martin made a similar observation in the context of asylum adjudication. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1308 (1990) ("In busy districts, trial attorneys have little time to prepare the cases. Sometimes they are only able to review the file for the first time while direct examination is proceeding.").

[189] For example, records for fiscal year 2012 included 437 prosecutorial discretion terminations and 9120 prosecutorial discretion administrative closures. However, only twenty-six of these terminations and twenty-four of these closures involved detained removal cases. The rest were all in nondetained removal cases. Recent empirical work by Nina Rabin also suggests that the culture of the prosecutorial agency, which tends to "view all immigrants as criminal threats," may contribute to the refusal by prosecutors to exercise discretion. Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 196 (2014).

[190] *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 2 (2011), http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf [http://perma.cc/C2BQ-KMLH] (statement of Juan P. Osuna, Director, Exec. Office for Immigration Review) ("The highest priority cases for EOIR are those involving detained aliens."). Judith Resnik's research on judges identifies a broader trend among the judiciary toward active management of court calendars in order to increase efficiency and speed case disposition. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982).

[191] *See* VTC REVIEW, *supra* note 6, at Executive Summary (explaining that in the San Antonio Immigration Court, "[t]he new Case Completion Goal for detained cases is to have 85% completed within 60 days").

[192] Telephone Interview #48, *supra* note 1.

experiment is ongoing. The end result is that, regardless of presentational medium, judges presiding over these cases have little time to engage in detailed fact analysis or creative discretionary decisionmaking.

This Article's null result for trial outcomes is also in keeping with a small body of laboratory-based experiments on video use at trial. Research conducted primarily on remote child victim testimony in simulated criminal trials has found that televised testimony has no observable effect on jury verdicts. Some studies found that observing testimony by video, rather than in person, decreased jurors' initial ratings of a child victim's honesty, intelligence, or other similar qualities.[193] However, such results appear to be temporary,[194] as post-deliberation verdicts on whether to convict remained unchanged across video and in-person modes.[195]

A smattering of other studies conducted on videoconferencing's use in civil trials has likewise concluded that trial outcomes remain unchanged when video is introduced. For example, one study found that a videotape

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[193] *See, e.g.*, Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165, 199 (1998) (concluding that mock jurors gave lower ratings for honesty, attractiveness, and intelligence of child witnesses appearing by closed-circuit television); Sara Landström et al., *Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 333, 344 (2007) (finding that jurors perceived in-person child testimony as more convincing than child testimony by video); Janet K. Swim et al., *Videotaped Versus In-Court Witness Testimony: Does Protecting the Child Witness Jeopardize Due Process?*, 23 J. APPLIED SOC. PSYCHOL. 603, 626–27 (1993) (documenting that live testimony received higher juror ratings for accuracy, consistency, and confidence).

[194] *See, e.g.*, David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 563 (1994) (finding video testimony had no impact on post-deliberation jury verdicts despite the fact that jurors interrupted right after the child's testimony were less likely to perceive the defendant as guilty in the video medium); Swim et al., *supra* note 193, at 626 (concluding that, although jurors were less likely to convict at the point of pre-deliberation in the video setting, this difference disappeared after deliberation with other jurors).

[195] *See, e.g.*, Tania E. Eaton et al., *Child–Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions*, 31 J. APPLIED SOC. PSYCHOL. 1849, 1856 (2001) (finding no significant difference based on presentation mode in the post-deliberation phase in "the primary variables of child-witness overall credibility, defendant credibility, and defendant guilt"); Goodman et al., *supra* note 193, at 198 (concluding that the use of closed-circuit technology for child witness did not diminish jurors' ability to identify inaccurate testimony; nor did it change jurors' post-deliberation conviction rates); Rod C.L. Lindsay et al., *What's Fair When a Child Testifies?*, 25 J. APPLIED SOC. PSYCHOL. 870, 884–85 (1995) (reporting no difference in juror verdicts or perception of witnesses across abuse cases where the child victim testified in open court, with a barrier between the child and the defendant, or through a closed circuit television); Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials,* 25 LAW & HUM. BEHAV. 339, 366 (2001) (finding no evidence that using closed-circuit television for victim testimony influenced jurors' post-deliberation decisions); Ross et al., *supra* note 194, at 558–60 (reporting that the medium used for child testimony in a mock child abuse trial "did not have a significant impact on conviction rates" after jurors deliberated or on perceptions of the victim's or defendant's credibility); Swim et al., *supra* note 193, at 617, 620 (concluding that medium of presentation had no significant effect on perceptions of the defendant, perceptions of the victim, or post-deliberation verdicts).

trial format did not significantly affect attributions of negligence by the jury.[196] Another found that the appearance of an expert witness by video did not alter the jury's verdict.[197] Yet, these researchers assumed that the case had reached the trial stage and ignored the potential for video to affect whether the case reached the trial stage in the first place.

A rare observational study on pretrial use of video technology examined court data from criminal bail hearings in Chicago. Applying an interrupted time series analysis, the authors concluded that over time the abrupt switch in adjudication method from in person to video "caused a rise in felony bond amounts."[198] While this research did demonstrate that criminal defendants were disadvantaged by higher bail amounts under the video regime, the data did not allow researchers to separately analyze video's relationship to judicial decisionmaking (e.g., whether bond was ordered and, if so, the amount) and litigant engagement (e.g., the amount of bail defendants requested and whether defense attorneys represented their clients at the hearings).[199] This limitation makes the research, like previous studies in the field, incomplete because it cannot disentangle the complementary pressures of judicial decisionmaking and litigant engagement. In contrast, the immigration data studied in this Article allow for precisely this type of analysis.

In sum, immigration case outcomes and adjudicative medium are certainly linked, but the analysis presented in this Article does not support the trial disadvantage rationale that commentators emphasize. As this Section discussed, a number of factors may contribute to the consistency in grant rates observed across televideo and in-person detained removal cases. The next Section turns to the related question of why reliance on video is associated with a troubling decrease in litigant engagement.

B. Litigant Disengagement

The trial-focused debate surrounding courtroom technology has overlooked how technology might influence the foundational process of

[196] Gerald R. Miller et al., *Using Videotape in the Courtroom: A Four-Year Test Pattern*, 55 U. DET. J. URB. L. 655, 661–62 (1978).

[197] Fredric I. Lederer, *Wired: What We've Learned About Courtroom Technology*, CRIM. JUST., Winter 2010, at 18, 22.

[198] Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 887–91 (2010).

[199] The study's authors did not ignore the possibility of depressed litigant engagement. *See id.* at 898 (hypothesizing that defendants in televideo hearings could have been "discouraged" from "speaking up" during the bond hearing, perhaps altering results). However, this theory could not be tested, as the authors did not analyze any measure of attorney participation or claimmaking by the defendants.

disputing removal. That is, concerns about adjudicative medium have been framed by existing disputes to be decided at trial, rather than by claims in danger of not being brought. This Article's finding of a robust association between depressed claimmaking and televideo suggests that technology exerts an indirect influence on overall case outcomes that undermines the fairness of the immigration system. This Section draws on my field research to explain why these depressed engagement levels might occur.

1. Respondent Alienation.

> [N]one of the people detained there like [televideo hearings]. Everyone hates it. . . . They say they feel like their due process rights are being violated—that they're not getting a full fair hearing. I mean even the ones, even people who win. . . . "How is it fair? I can't see the judge. This is my day in court and the judge can't even see me. I can't hear the judge. I can't see everyone in the courtroom at the same time. I don't know who to look at. . . . If I were there in person, I could just hand [my documents] up [to the judge] and now I have to mail [them] . . . ."[200]

One important factor that may decrease the participation of televideo litigants is the perception that not being brought to the courtroom is unfair. As reflected in the above quote from an attorney who conducts know-your-rights presentations in detention centers, detainees do not like televideo. They feel the procedure, with all its limitations, is simply unjust.[201]

The carceral environment of the remote court location contributes to the sense of unfairness that video respondents feel.[202] The remote locations where litigants sit include none of the ceremony and decorum of the traditional courtroom. An immigration attorney who once appeared by televideo with her client from a jail provided a detailed description of the remote setup:

> The [remote] courtroom is a large multipurpose room . . . with tiny rooms within that room, and so you're kind of in this little closed-in space with the door closed and you sit in a plastic chair right in front of a TV screen. And it's really awkward. . . . I mean you're in this tiny, tiny room with the door closed and there is this giant TV screen in front of you with this camera pointing at your face and you're trying to lean in to make sure the judge can hear you but you can't really tell. . . . It's just distracting. . . . You have the judge and then you can see your face in a tiny screen in the corner[.][203]

[200] Telephone Interview #23, *supra* note 99.

[201] As discussed further in this Section, many other interviewees expressed similar sentiments regarding the perceived unfairness of the video procedure.

[202] As Sharon Dolovich has noted, incarceration in the United States "is a distinct cultural practice with its own aesthetic and technique." Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 237 (2009).

[203] Telephone Interview #25, *supra* note 117.

In my own visits to these remote locations, I had a similar reaction to the starkness of the video appearance rooms. Some of the hearing locations appeared to be broom closets equipped with a television and monitored by a guard sitting in the hallway. Others were larger utility-style conference rooms with gleaming concrete floors where respondents wearing prison-issued jumpsuits sat in rows of plastic lawn chairs—always in the presence of a guard rather than court staff. After their cases were called, the detainees were taken back to their cells in groups by a second guard.[204] The entire experience was full of constant reminders that we were in a jail, rather than a courtroom.

Several interviewees emphasized that the televideo court process seems less "real." As one judge put it, "I think with television there is always the screen—there is always the disconnect of it being something other than your actual reality."[205] Therefore, immigrants might not realize that "it's serious business" in the same way as they would if they were actually "in the courtroom."[206] A nonprofit attorney who observed immigrants representing themselves in video hearings expressed a similar sentiment:

> [T]he way that [the detainees] were approaching the [court]room with the video was very different than what you see with detainees before the judge here. . . . I would say the detainees [in the video court] had more of a nonchalant attitude—that it wasn't, like I said, real. Whereas when you watch detainees generally they get into a courtroom and they act pretty somber. I guess you'd say that they realize the seriousness of the proceedings. But I don't think that gets translated well when it's on a video.[207]

Immigrants in the video appearance rooms often strained to figure out what was happening in the real courtroom. At times it was almost impossible to decipher from the fuzzy panoramic courtroom view on the screen whether it was the judge or someone else speaking. Other times the view on the television screen was only of one corner of the courtroom, such as the interpreter's face or the judge's desk. Remote observers were left to decipher the source of the various courtroom voices based only on audio cues.

[204] In some instances, the remote location was an actual EOIR courtroom within the detention center. For example, in Pearsall, Texas, some detainees were brought to a formal courtroom located within the detention center, but instead connected via televideo to a judge sitting in a second courtroom in San Antonio.

[205] Telephone Interview #48, *supra* note 1.

[206] *Id.*

[207] Interview #39 with Soc. Responsibility Dir., Nonprofit Org. (Oct. 22, 2013) (on file with author).

Sometimes it was hard to hear. In one video location at a county jail, hallway noise coming into the video room contributed to the chaotic atmosphere. In a particularly memorable case, a detainee listening to an immigration judge on the screen became so frustrated by inaudible interruptions and echoes caused by simultaneous translation that he physically pressed his ear against the television speaker.[208]

Respondents appearing at master calendar hearings in the remote video rooms often appeared confused and unsure where to focus their eyes or direct their voices. Only rarely were respondents asked if they could see or hear what was coming in through the video feed. Frequently they did not understand whether the judge was asking them a question, or instead addressing someone else in the courtroom.[209] A few judges became impatient and told video respondents to "wake up" or "pay attention," further adding to the tension in the remote video room.[210] One guard told me that the respondents called the judge who appeared on their video screen "el diablo," Spanish for "the devil."

Many interviewees described the system of video adjudication as dehumanizing. Attorneys felt that their clients were not being treated with dignity when forced to appear over video, rather than seated together with their attorney in court. As a clinical law professor who regularly practices in immigration courts explained:

> [Videoconferencing] completely dehumanizes the process for the person going through it . . . [It] reduces the weight of what the hearing is about. . . . [R]emoval decisions can have this tremendous effect on all aspects of your life. . . . [Yet] the fact that we don't bother having the person in the room to make those decisions . . . [reflects] the [low] level of dignity that [is] give[n to the respondents in videoconferenced removal cases].[211]

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[208] In contrast, several European countries require that courtroom videoconferencing be "true-to-life"—a requirement that demands high-quality images with accurate sound, no transmission delays, and perceptible facial and lip movements. Peter van Rotterdam & Ronald van den Hoogen, *True-to-Life Requirements for Using Videoconferencing in Legal Proceedings, in* VIDEOCONFERENCE AND REMOTE INTERPRETING IN CRIMINAL PROCEEDINGS 187, 188 (Sabine Braun & Judith L. Taylor eds., 2012).

[209] *See* Telephone Interview #25, *supra* note 117 ("You can't tell who [the judge is] directing his comments to and so you don't know whether you're supposed to respond. And when you're witnessing all of this [over video] in a language that you don't understand . . . it is a nightmare.").

[210] Attorneys interviewed noted similar issues. *See, e.g.*, Telephone Interview #23, *supra* note 99 ("[W]e have issues with people not being able to hear, and unfortunately, I mean we do love our detained judges, but they get irritated and sarcastic. And if someone says 'pardon me' or 'excuse me' multiple times, that can derail things, unfortunately."); Telephone Interview #26 with Sec'y, Bd. of Dirs., Nonprofit Org. (Sept. 10, 2013) (on file with author) (explaining that when she attended a video hearing with her client at the remote location she could not hear the case being called and the judge "started yelling at me, like, 'Can't you hear me?'").

[211] Interview #8, *supra* note 117.

A judge similarly expressed that her main concern was that video does not humanize respondents as participants in their own case:

> And for me I guess the main thing is the humanity thing . . . . [I]t really is like television. And then when the show is over you turn it off and go on your way. So to me it's kind of dehumanizing. That's my main concern about it.[212]

A number of legal scholars have argued that individual dignity is promoted by providing litigants the opportunity to participate in the adversarial process.[213] The immigration system's experiment with televideo unearths something more—that the court procedures chosen to facilitate litigant participation are themselves linked to whether participation actually occurs. Because televideo diminishes the dignity of the courtroom, litigants may simply refuse to partake in the process. In other words, they may deem the video procedure not deserving of their implicit legitimization through claimmaking. Under such conditions, putting up a fight might not be worth the extra time spent in detention.

Officials guiding my tour through the Corrections Corporation of America facility in Elizabeth, New Jersey, informed me that the average immigrant's stay at the facility was approximately forty-five days. Yet, average stays are uninformative in the context of court adjudication. The reality is that there is a large discrepancy between the number of detention days of those who seek relief and those who do not. The price of bringing a claim while in detention is high: over one hundred days in detention.[214] Being forced to endure these additional days in a harsh institutional setting without any promise of being brought face-to-face to meet the judge may be enough to convince some video litigants to relinquish otherwise viable claims to remain in the United States.

The idea that litigants would forego claims even if factually innocent is well documented in the criminal justice system.[215] The threat of prolonged pretrial detention may be enough to motivate a plea of guilty so

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[212] Interview #29, *supra* note 118.

[213] *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 177–80 (1985) (arguing that allowing for participation in the legal process has intrinsic value in promoting individual dignity); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) ("[G]rant[ing] to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made . . . expresses their dignity as persons.").

[214] This calculation is based on my analysis of removal cases in the National Sample. *Compare supra* note 141 (average adjudication times for cases without claims), *with supra* note 142 (average adjudication times for cases with claims).

[215] As Josh Bowers has put it, "[i]t is hardly a new observation that guilty pleas may prove attractive to the innocent." Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1120 (2008).

as to avoid the punishment inherent in the process.[216] Similar pressures are certainly relevant to the immigration detention context. As one judge confessed, respondents who could qualify for relief regularly "take removal orders."[217] Importantly, this study finds that these dynamics increase with the video procedure.

Although there is no research on immigration detainees' psychological reactions to televideo appearances, social science research in related areas is valuable. In particular, studies have found that remote communication through screens demands higher cognitive functioning. For example, court interpreters who appear remotely via videoconference become tired faster and suffer inferior performance.[218] They also experience an overall feeling of alienation from the court process.[219] Similar effects of increased cognitive load and fatigue could be linked to the depressed levels of engagement observed in televideo litigants.

An early study of remote adjudication in criminal courts evaluated the use of a "video phone" at arraignments. Researchers found that defendants thought the practice, which required them to remain at the jail rather than come to the courtroom, "abridged their right to appear in person before the judge."[220] When asked why, defendants explained they were dissatisfied with the procedure because of the inability to "tell my side to the judge."[221] Even though an in-person arraignment did not typically allow defendants to discuss the facts of their case with the judge, defendants felt aggrieved by their physical separation from the judge and their attorney.[222]

Other research on courts also supports the view that procedures can shape how litigants rate the fairness of the adjudicatory system. In a series of classic studies, Tom Tyler and other social scientists demonstrated that participants' perceptions of fairness are influenced by factors such as

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[216] For an early account of these issues, see MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

[217] Interview #7 with Representative, Nat'l Ass'n of Immigration Judges (Aug. 5, 2013) (on file with author). Several other interviewees made similar comments. *See, e.g.*, Interview #8, *supra* note 117 (noting that a "frustrating part as a lawyer" is seeing cases where "the person took an order of removal when they had a form of relief," often because "they didn't think they had a chance to win").

[218] *See, e.g.*, Barbara Moser-Mercer, *Remote Interpreting: Issues of Multi-Sensory Integration in a Multilingual Task*, 50 META: TRANSLATORS' J. 727 (2005) (finding that video interpreting utilizes more brain power and leads to a poorer performance, causing interpreters to become tired faster).

[219] *See, e.g.*, Ilan Roziner & Miriam Shlesinger, *Much Ado About Something Remote: Stress and Performance in Remote Interpreting*, 12 INTERPRETING 214 (2010) (concluding that remote interpreting is associated with "considerable psychological effects," including increased "feelings of isolation and alienation" among interpreters).

[220] Warner A. Eliot, *The Video Telephone in Criminal Justice: The Phoenix Project*, 55 U. DET. J. URB. L. 721, 749 (1978).

[221] *Id.*

[222] *Id.*

respectful treatment by the judge and the opportunity to speak in court.[223] That is, litigant beliefs about court systems are often based on assessments of the process, rather than reactions to substantive case outcomes. New research by Emily Ryo suggests that a similar phenomenon could be at play in immigration law—namely, that immigrants' perceptions of procedural justice in enforcement may inform their overall respect for the immigration law regardless of whether lawful status is actually obtained.[224]

Detainees' assessment of the fairness of the immigration court may similarly be burdened by a negative perception of the video procedure, rather than an accurate assessment of the possible outcome if they were to pursue relief.[225] Indeed, my research shows that once a claim is actually filed from detention, the chance of winning that claim is fairly high: a full 40% of detainees who sought relief won their claims at trial.[226] Moreover, this success rate was the same in the video and in-person formats.[227]

Given these rather favorable odds, why is it that detained video litigants are not making claims in greater numbers? Refusal to participate in a procedure perceived as unjust and dehumanizing is part of the story, but there are additional explanations for the decreased engagement of televideo litigants. The discussion that follows identifies some of the logistical challenges faced by respondents who pursue litigation over a video screen.

2. *Complication of Litigation Mechanics.*

> [F]or a judge to require that you be ready for an individual hearing over televideo two or three days ahead of time; and your documents got in the day before because they have to go through the entire prison system in order for you to get them; and then you've got to get them translated and then get them

[223] *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 106 (1988) ("The perception that one has had an opportunity to express oneself and to have one's views considered by someone in power plays a critical role in fairness judgments."); Jonathan D. Casper et al., *Procedural Justice in Felony Cases,* 22 LAW & SOC'Y REV. 483, 503 (1988) (finding that felony defendants' evaluations of their treatment in court "do not appear to depend exclusively upon the favorability of their sentences," but are also "substantially influenced" by "their sense of fairness—in terms of both procedural and distributive justice"). *But see* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) (presenting an instrumental view that litigants' concern about procedural justice is related to their preoccupation about substantive outcomes).

[224] Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574 (2013) (finding that immigrants' perceptions of procedural justice are significantly related to their beliefs regarding the legitimacy of immigration enforcement practices).

[225] *See generally* David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 67 (1981) (demonstrating that beliefs about outcomes can flourish even though empirical support does not exist).

[226] *See supra* note 153 and accompanying text (based on the National Sample).

[227] *Id.* It is important to remember, however, that the overall chance of success in detained removal cases is dismal. Over 90% of respondents in both the National Sample and Active Base City Sample were removed or required to voluntarily depart. *See supra* Figure 10.

> to the judge, it's a disaster. So what ends up happening is you can't submit those documents that might help your case. You go in front of the judge. The judge has a docket to keep on . . . so the judge says, "I'm sorry, they're late, you can't submit those documents." You get deported.[228]

A second reason why televideo cases may exhibit depressed engagement patterns is the increased complexity of litigating over a screen. Detainees and their attorneys who experience these practical barriers in the early stages of their cases may be deterred from mounting a vigorous defense to removal.[229] Furthermore, the mechanics of adjudicating over video are also challenging for judges, who are charged with ensuring that unrepresented litigants understand their rights in the deportation process.

By definition, all detained immigrants who litigate claims must do so while locked in a jail or detention facility. This reality creates difficulties for all detainees,[230] but also unique difficulties for those detainees assigned to televideo courtrooms. Detainees who are brought to court can at least file an application for relief when they arrive at court and hand a copy to the prosecutor, as is the standard practice among immigration attorneys. They can also use courtroom time to confer with their attorneys and sign any required paperwork. In contrast, with video, pro se respondents must mail their applications in advance of the hearing. Similarly, televideo respondents represented by counsel must sign their paperwork and provide any documentary proof to their attorneys in advance of their hearings.

This requirement of advanced preparation may exert downward pressure on claimmaking. For pro se litigants, the advanced-filing requirement can be bewildering. The requirement also raises several important process questions. For example, do the detention centers provide pro se video litigants with adequate information in a language they can understand regarding how to mail their applications to the judge and prosecutor?[231] Do detainees' materials consistently make their way through

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[228] Telephone Interview #18, *supra* note 173.

[229] As Lucie White has identified in the context of welfare hearings, "procedural rituals" that undermine access to "meaningful participation" are revealed "when subordinated speakers attempt to use the procedures that the system affords them." Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4 (1990).

[230] The various challenges facing all detainees have become more apparent as of late with increased media attention on the recent influx of women and children seeking refuge in the United States. For a collection of powerful testimonies of volunteer attorneys documenting due process concerns with the handling of detained cases in Artesia, New Mexico, see Stephen Manning's Videos, VIMEO, http://vimeo.com/user24137058/videos [http://perma.cc/8TZR-PBTM].

[231] Only in the Newark court did I observe respondents receiving a handout (titled "Mailing Addresses for Immigration Judge and Prosecutor") that contained the relevant information. In other remote locations, respondents were left to wonder where to mail their finished applications. At Karnes, I learned from an interviewee that a detainee contacted him because the address he was given by his

the prison mail system to the judge's desk on time?[232] Would judges refuse additional extension requests by video respondents who encountered logistical challenges in meeting the court's filing deadline?[233]

The advanced preparation that video demands also challenges immigration attorneys. The overwhelming majority of attorneys practicing in detained immigration courts are solo practitioners or small firm lawyers.[234] To maintain their practices, they generally must accept high volumes of cases and charge a low, fixed amount per case.[235] With such demands on their time, these attorneys often depend on meeting their clients at the hearing to update them on the status of their cases and to finalize their paperwork. Detainees brought to in-person courtrooms can meet with their attorneys in the court's lock-up prior to the hearing. In addition, they can confer with their attorneys in the courtroom prior to the judge taking the bench, or quietly during and after the hearing.[236] Video's elimination of this valuable in-person time with clients may result in the waiver of some claims.

Remote adjudication could also dampen claim-seeking behavior and reduce attorney involvement due to the additional travel and preparation time required to effectively counsel clients who appear over a video screen. With televideo technology, attorneys must visit their clients at the remote detention location before and after every hearing.[237] Attorneys handling televideo cases reported traveling hours to remote locations and enduring

counselor to mail the application was wrong. He received his application "return to sender" after the due date.

[232] The Board of Immigration Appeals has refused to accept the prison mailbox rule, which means that even if a detainee mails an application in a timely fashion, the judge may treat it as untimely based on when EOIR receives it. J-J-, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

[233] The data presented earlier in this Article reveal that televideo cases are faster than in-person cases and also less likely to include continuances to seek counsel or prepare for trial. *See supra* Figure 7 & notes 143–44.

[234] *See* Eagly & Shafer, *supra* note 21, at 27 n.111 (finding that 88% of attorney representation in detained immigration courts is provided by solo practitioners or attorneys practicing in small firms with ten or fewer lawyers).

[235] Interview #30, *supra* note 174 (describing "immigration defense" as a "volume business").

[236] *See, e.g.*, Telephone Interview #25, *supra* note 117 (explaining that after a complex and emotional hearing, her video client was "confused," but "[h]ad she been with me, we could have talked and kind of defused the situation and I could have made her feel a little better").

[237] *See, e.g.*, Telephone Interview #36 with Partner, Small-Size Law Firm (Oct. 9, 2013) (on file with author) ("I go to [the detention center] almost once a week because of the televideo. I mean, just to be honest with you, it sucks for me because I have to drive two hours. . . . I've got to tell [my clients] what happened in court because I don't want to have one-on-one conversations with them [over the video] in front of the judge and the government attorney. So I go there."); Telephone Interview #32 with Partner, Small-Size Law Firm (Sept. 20, 2013) (on file with author) (explaining that the process of driving to the remote location and waiting to meet the client to communicate a routine matter can take hours: "[I]t sounds horrible to say, but you've wasted your entire day for about a ten to fifteen minute conversation with one respondent . . . .").

long wait times for private meeting rooms, often to only secure a signature on a document or communicate what happened in court.[238] Preparation for trial is also more time-intensive in video cases. Because attorneys are not able to answer questions and otherwise guide their clients during video hearings, they must spend additional time in preparation sessions with their clients at detention centers.[239] Given the relatively low fees that are earned for detained work, taking on video cases becomes cost prohibitive for some attorneys. These supply-side factors could contribute to the reduced representation rate in televideo courtrooms.

This Article's finding of less attorney involvement in televideo cases is notable given the speculation of technology enthusiasts that the technique would encourage legal representation.[240] Supporters have theorized that televideo should increase attorney representation because it allows attorneys to appear in downtown courtrooms near their offices rather than traveling to remote courtrooms.[241] However, the missing link in this logic is that attorneys must travel to consult with their remote clients—often many more times than is necessary for in-person adjudication. Proposals to expand televideo services to allow for video client consultation have been made,[242] but further research is needed to determine whether this addition might exacerbate respondent alienation from the process.

Judges also struggle with the strained mechanics of litigation over a screen. For example, the judge must ensure that the respondent has received the charging document. In the traditional courtroom, documents can be physically handed over to the immigrant. Over video, the same exchange is often confused and chaotic. As one judge complained: "If I'm trying to show people their Notice to Appear . . . [I] have to go up to the camera and show it to them. That's just awkward."[243] Although it is

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[238] *See, e.g.*, Interview #28 with Dir., Nonprofit Org. (Sept. 16, 2013) (on file with author) (describing frustrations with securing attorney visits at detention centers: "I've waited until six o'clock at night—from nine o'clock in the morning until six o'clock—and not been able to see my clients [at the detention center]").

[239] *See, e.g.*, Interview #10 with Managing Attorney, Nonprofit Org. (Aug. 5, 2013) (on file with author) ("I went out there because I knew that [the trial] was going to be over video . . . I spent the whole entire day with him in the jail the day before, practicing and preparing. So there are other things you have to do to compensate [for video]. But if you have a client who is going to be there in person, you can take some shortcuts in your prep that you can't take with the video . . . .").

[240] *See supra* note 10.

[241] *See* IMMIGRATION BENCHBOOK, *supra* note 10.

[242] *See* ADMIN. CONFERENCE OF THE UNITED STATES, DRAFT, ACUS PILOT PROJECT ON REMOTE REPRESENTATION FOR DETAINED IMMIGRATION COURT RESPONDENTS (on file with author).

[243] Interview #29, *supra* note 118. Attorneys described similar technical difficulties with the transmission of documents during court hearings. *See, e.g.*, Telephone Interview #33 with Senior Attorney, Small Size-Law Firm (Sept. 24, 2013) (on file with author) ("So it is really hard sometimes

possible to fax documents to the remote location, this procedure is time consuming and requires involvement of detention staff in the transmission of court documents.[244] Another judge stressed that having "personal interaction" with respondents "makes a difference" with respect to "the seamlessness, the ease with which people interact with each other, the ease with which issues can be resolved, [and] the informality that can be beneficial sometimes to just have a conversation in person in a courtroom."[245] These valuable personal interactions between the judge and the litigant are lost when the proceeding takes place over screens.

The mechanics of advising detainees of their rights may also be hampered by the video medium. As described in Part I, at the initial master calendar hearing, judges advise respondents of their rights, including the right to retain an attorney and the right to seek relief.[246] Frequently such advisals are read simultaneously to large groups of respondents.[247] All too often, as I observed in both televideo and in-person courtrooms, detained immigrants conceded the charges and waived the right to seek relief in a matter of minutes. Yet, the reality of hearing one's rights declared over a grainy television may exacerbate this tendency to waive rights, particularly if the judge behaves in a way that is less encouraging over video, or is perceived as such by the litigants. As one attorney explained:

> It just gets lost when you've got a group of pro se [respondents] that are getting a group advisal [of rights over video] because of the fact that it's such a large group and there's no interaction with each individual. . . . Pro se [respondents] in a video setting? I think [it] is a disaster.[248]

These deficits in the reading of crucial rights advisals over video could also contribute to the increased waiver of rights observed in televideo courts.

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when you are offering evidence and you want the respondent to authenticate it, you cannot show him the document because he's on the other side. . . . It's not the same as actual presence.").

[244] Interviewees also questioned the reliability of the fax equipment. Telephone Interview #25, *supra* note 117 ("You know, they always talk about the ability to fax and I've never had that successfully work.").

[245] Interview #37 with Representative, Nat'l Ass'n of Immigration Judges (Oct. 16, 2013) (on file with author).

[246] *See supra* notes 85–86 and accompanying text.

[247] Judicial styles for inquiring into potential avenues for removal varied. Some judges seemed to review a thorough checklist with each respondent, explaining in court that the purpose of such questions was to see if the respondent could stay in the country. Other judges conducted a more cursory review, seemingly based on the documents in the court file, without soliciting answers directly from the respondents.

[248] Telephone Interview #18, *supra* note 173. Another attorney explained that pro se video respondents are "bewildered" and often tell the judges they understand, even though "they have no idea what happened." Telephone Interview #25, *supra* note 117.

Although lawyers' groups and advocacy organizations have expressed the idea that exclusion from the trial is the most problematic aspect of televideo adjudication, physical exclusion from earlier stages in the process may be just as crucial. It is at these early stages when rights are explained and waived, applications are filed, and attorneys are retained. As the next Section develops, the physical barrier constructed by video not only injects logistical challenges into the litigation process, but it also separates the respondent from the other courtroom actors in ways that matter.

3. Disruption of the Courtroom Workgroup.

> [W]hen they used to have detainees brought here, it was a different thing. . . . They would come into my courtroom and . . . they would watch other people have their hearings. So, then they would see the lawyers come in and then they would maybe get the card of the lawyers or they would see maybe who was a good lawyer, who was a bad lawyer. . . . Or maybe some lawyer would [say] . . . "I'm going to represent this guy." . . . [T]he dynamic changes when . . . you just have somebody who's in what looks to me like a little cloakroom at the jail. . . . I don't know what they really see on the camera, you know, but I'm just going to tell you that they're not learning about how other people are having their hearings . . . .[249]

Over thirty years ago, James Eisenstein and Herbert Jacob found that personal interaction occurring in lower level courts fosters collaborative "workgroups" that resolve cases.[250] Courts, according to Eisenstein and Jacob, are not assembly-line bureaucracies, but rather they are organizations that rely on group activity from multiple courtroom participants, many of whom work together on a regular basis to resolve cases.[251] These workgroups in criminal cases include judges, court clerks, prosecutors, defense attorneys, and defendants.[252]

It is similarly helpful to think of the various players in immigration courtrooms as a functioning workgroup. The judge and prosecutor often share the courtroom for much of the day and private immigration attorneys frequently handle multiple detained cases in the same court call. Some nonprofit organizations focus exclusively on representation in one local area, before only a few immigration judges and prosecutors. As one practicing immigration attorney explained, immigration court is "intimate," requiring "dealing very closely with the same judges and prosecutors."[253]

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[249] Interview #47, *supra* note 60.

[250] *See* JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977).

[251] *Id.* at 9–10.

[252] *Id.* at 10.

[253] *See, e.g.*, Telephone Interview #21, *supra* note 117.

The players in immigration court know one another and work cooperatively and informally to determine the outcome of their cases.[254]

Physical removal from the courtroom causes televideo respondents to miss most of the informal give-and-take of immigration court. By only allowing them a partial televised view, remote litigants are not able to learn from—or fully participate in—the various courtroom conversations. This disruption of the respondent's relationship vis-à-vis the other court actors may contribute to the depressed levels of claimmaking and representation in the video population.

When attending immigration court, I observed that much of what happens within the courtroom is not recorded as part of the official trial record.[255] Before the judge takes the bench, the prosecutor often discusses bond amounts and case resolutions with the attorneys in the courtroom. Even after the judge takes the bench, immigration court is a casual affair, with judges asking the parties about aspects of case resolution before going "on the record."

The full complexity of the courtroom cannot be appreciated from the remote vantage point. Sometimes these informal assessments of the case and its status proceed before the video connection is even established.[256] Other times, they go on while the camera is rolling, but are not captured on the remote television screen due to the limited gaze of the court's camera. Off-the-record conversations also occur during disruptions in the video feed, such as when the image freezes or the line is disconnected. Without the ability to learn from the entire court proceeding, respondents may not fully understand the process and therefore may be less likely to participate in it. Judge behavior, by failing to accommodate remote litigants' participation in these informal stages of the litigation, may also be responsible for the observed decrease in litigant participation.

As the experienced immigration judge explained in the quote that began this Section, immigrants in remote courtrooms are also denied the opportunity to participate in the courtroom audience and learn by observing the hearings of other immigrants.[257] Because they are not physically present

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[254] *Id.* (explaining that the other courtroom players "know who I am. They're generally very cooperative . . . it's informal.").

[255] Although regulations do require removal hearings to be recorded, statements may be made "off the record" with the permission of an immigration judge. 8 C.F.R. § 1240.9 (2015).

[256] IMMIGRATION COURT OBSERVATION PROJECT, NAT'L LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS 13 (2011) [hereinafter ICOP REPORT], *available at* http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf [http://perma.cc/KQ9Y-FV6G] ("[S]ignificant portions of potentially outcome determinative aspects of immigration proceedings frequently take place off the record.").

[257] Interview #47, *supra* note 60.

in court, they cannot observe the court process or the role of an advocate within that process. They may be less likely to meet other litigants who are bringing claims, see a judge take seriously the merits of another detainee's claim, or be handed a business card by an attorney willing to take their case.[258]

Physical presence in court also provides the opportunity to come face-to-face with the prosecutor. In this moment of growing attention to prosecutorial discretion in immigration,[259] the ability to confer with the prosecutor regarding a potential application for relief may be connected to whether relief is actually pursued.[260] At times, judges I observed promoted such courtroom negotiations between the parties, most commonly with respect to bond amounts, filing dates, or whether certain legal requirements of relief applications were satisfied.[261] In sharp contrast, detained litigants appearing by video were flatly denied these in-person opportunities for prosecutorial interaction, and no video substitute was offered.

Crucial differences in lawyer–client interactions were also apparent in video courtrooms.[262] With televideo, attorneys had no opportunity to offer their clients a confidential consultation before, during, or after the hearing. Occasionally, courtrooms I observed did allow counsel to talk to the client over the video screen, but this option occurred in the middle of the public proceeding, offering no confidentiality for the client. Even if the courtroom was cleared, confidentiality concerns persisted because the client remained

[258] In his classic study of debtors, Herbert Jacob found that contact with someone who had gone through the bankruptcy process was an important predictor of asserting a claim of bankruptcy. HERBERT JACOB, DEBTORS IN COURT (1969).

[259] Jason Cade has persuasively argued that "ICE prosecutors do have certain concrete responsibilities," including to "exercise equitable discretion in appropriate cases." Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 6 (2014).

[260] For reasons discussed earlier, I am not suggesting that such interaction currently results in meaningful exercise of prosecutorial discretion in detained cases. *See supra* note 189 (reporting that in 2012, only fifty prosecutorial discretion terminations or case closures involved detained cases). Rather, my point is that the ability to engage in conversations with prosecutors in court may enhance the perceived fairness of the process, and therefore the willingness of immigrant respondents to participate in the system.

[261] If the immigration courts were to adopt recommendations urged by scholars and advocacy groups to formally require pretrial conferences, these litigant–prosecutor interactions could become more central to removal adjudication. *See, e.g.*, Cade, *supra* note 259, at 75 (arguing that "respondents in immigration court should have the opportunity to confer with knowledgeable, accountable trial attorneys before any hearing on the merits"). The emergence of alternative forms of immigration status short of lawful permanent resident status, such as deferred action, parole, or administrative closure, may also make plea bargaining more prominent in immigration courts. *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115 (2015).

[262] For an overview of the potential effects of videoconferencing on the attorney–client relationship, see Eric T. Bellone, *Private Attorney–Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COM. L. & TECH. 24 (2013).

supervised by jail staff at the remote video location. And, as one law firm partner added:

> Why do I hate it? Because if I need to take a recess with my client, my client remains on-screen. You hear right through the walls. The judge goes back in the chambers. The judge hears everything you say. . . . There is no confidentiality to break with your client who is on a screen.[263]

Attorneys frequently described the downfall of video hearings as the inability of their clients to participate in the full range of courtroom exchanges.[264] One attorney complained that televideo "doesn't engage the client or involve the client in his own case . . . even when they have a lawyer."[265] In the courtroom, particularly at early stages in the case, what happens may not be understood as a "big deal."[266] But, the respondent "misses all those dynamics" of what goes on in the courtroom.[267] For example, represented video litigants may not "feel as assured that their lawyers are doing what they said they were going to do when it is all so distant," thus contributing to the waiver of potential claims.[268] One attorney poignantly analogized the treatment of immigrants kept outside the courtroom under the televideo regime to the antiquated practice of execution by firing squad: "[I]f [my client is] on the videoconference, it's almost like he's on the firing squad—or at the other end of a firing squad I should say."[269]

Despite these challenges, attorneys remained unlikely to join their clients at the remote end of the proceeding. As one small firm attorney explained:

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[263] Interview #14, *supra* note 60; *see also* Interview #16, *supra* note 174 ("It's this interesting sort of fiction because you're supposed to have this confidential situation [if you ask for the courtroom to be cleared], but in the immigration courtroom . . . there are three doors and . . . the trial attorney, the guards, and the judge are all right behind those doors. So there's really not a lot of privacy.").

[264] Video thus intensifies the problematic traditional division between lawyer and client roles that detracts from client autonomy. *See generally* SUSAN M. OLSEN, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS 140 (1984) ("[N]orms of legal advocacy inhibit client autonomy and responsibility by imposing the authority of a supposedly neutral expert on the client . . . ."); Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315, 316 (1996) (stressing that lawyers "need to include clients, to reach out to clients, to pay attention to clients, to learn from clients").

[265] Interview #16, *supra* note 174.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] Interview #13 with Partner, Small-Size Law Firm (Aug. 6, 2013) (on file with author).

> You have to take multiple cases for it to be lucrative, if you will. So it's hard if I would have to physically drive to every single facility [to appear with my clients remotely]. All in the morning? It would be impossible.[270]

Most attorneys I interviewed shared the view that being physically present in the courtroom with the judge was preferable to appearing at the remote location with the client—it was less likely to alienate the judge and allowed the attorney to participate in off-the-record discussions with the prosecutor and the judge.

The reduction in interaction between the televised respondent and the other courtroom players was striking. At the formal courtroom end of the hearing, the detainee appearing on the screen was only treated as a participant in the proceeding when directly asked questions by the judge or by counsel while testifying. At other times during the hearings, the courtroom players generally did not look at or engage with the video screen.[271] A Chicago attorney described how one judge interacted with his client appearing on a television screen:

> The person is on the screen and [the judge] just never would address the respondent. And to the point where he would ask the respondent questions and just not look up when the respondent would talk. And I have always thought like that's at least partially related to the fact that the respondent isn't in the room.[272]

At the video end of the hearing, often the respondent could not see her attorney or the prosecutor on the screen. At one remote hearing I attended in Karnes City, Texas, the focal point of the video feed was the back of the judge's computer screen—punctuated when he would lean forward to sip a Coke or address questions directly to the detainee. Some judges did offer the respondent a full view of the courtroom, but when that arrangement was pursued, the images at the remote location were so small that often it was hard to detect whether the person talking was the judge, prosecutor, or respondent's counsel.

When I visited the remote location at the county jail in Kenosha, Wisconsin, respondents' counsel in the Chicago courtroom were given the opportunity to briefly greet their clients over the television screen. During the hearing, however, I could not see the respondents' attorneys on the

[270] Interview #30, *supra* note 174.

[271] In this way, televideo is one very poignant example of what Alexandra Natapoff has described in the criminal justice system: treating the very target of the government's charge as a "disfavored speaker[] outside the legal process." Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452 (2005).

[272] Interview #8, *supra* note 117.

television screen. The attorney role within the proceeding was rendered audible, yet invisible, to their clients. As one attorney described:

> During direct exam, during cross-exam, the [televideo] respondent hears respondent's counsel or DHS counsel asking questions but cannot see them. So that causes a big disconnect, I think, for respondents. They think it's their attorney talking, they think it's the government attorney talking but they don't know what they look like. Especially if it is government counsel and they're making faces, getting upset at the respondents, [the video litigants are] just depending on hearing their voice. So it just creates a disconnect, I think—like the respondents can't really feel like they're fully participating in it.[273]

A community member who volunteered to observe detained court proceedings on behalf of a nonprofit organization also lamented the limited view of the remote video screen:

> I feel it's unfortunate that they can't see their lawyer. All they see is the judge and the interpreter in front of them, and I think it's very important [to see the lawyer] for body language and reinforcement. Encouragement—they don't get that. They hear their lawyer and that's all, and I think that's a real difficult problem. That is something that's missing.[274]

Technical problems in the video connection further accentuated the separation of the respondent from the courtroom. These "technical problems," as one judge described, included "them being able to hear us, us being able to hear them, and also them being able to see us, us being able to see them, even being connected at all."[275] Attorneys I interviewed frequently complained about awkward delays in the transmission of the video feed, blackouts in the video screen, and difficulties understanding courtroom interpreters.[276] As another judge explained, the worst part about using video is that it "breaks down" and "that's what interferes with the hearing."[277] Such breakdowns caused all parties considerable frustration and interrupted the flow of the proceedings.

In summary, court observations and interviews document disruptions in the televideo respondents' engagement with the courtroom workgroup.

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[273] Interview #9 with Supervising Attorney, Nonprofit Org. (Aug. 5, 2013) (on file with author).

[274] Interview #12 with Court Watch Volunteer, Nonprofit Org. (Aug. 6, 2013) (on file with author).

[275] Interview #29, *supra* note 118.

[276] *See, e.g.*, Telephone Interview #21, *supra* note 117 ("[S]ometimes the video goes out or you can't hear them. Or I've seen cases which I think are the worst where the translator is on speakerphone and [the respondent is] on video, and it's hard to understand what's happening."); Telephone Interview #25, *supra* note 117 ("[T]he reliability of the equipment is always an issue."); Telephone Interview #26, *supra* note 210 (describing numerous technical difficulties, including a "three-second delay" in the video feed and "a lot of problems with the video going black"); Telephone Interview #27, *supra* note 87 ("Yes, I've had cases before where using technology, you know, it messes up at times; it doesn't cooperate.").

[277] Telephone Interview #48, *supra* note 1.

Respondents do not learn from other cases, cannot appreciate or participate in many aspects of their own case, are denied opportunities to meet face-to-face with the prosecutor, and have lower quality interactions with their own lawyers. These challenges could contribute to the depressed video engagement observed in the immigration court data. A related aspect of this disruption, as discussed in the next Section, is physical separation from the courtroom audience.

4. Separation from the Courtroom Audience.

> I think the video is really difficult for families when they come. . . . [S]ometimes, you know, they say [to the respondent], "You can speak with your family, they're sitting there." They feel so awkward standing in front of the microphone. They're not used to a microphone. You can see their body language. What do I do? And they don't feel comfortable saying—you know—they know everybody is watching them. They're standing there in front of this microphone trying to talk to this loved one that's in the screen and there's no body contact . . . .[278]

A final practical consequence of remote adjudication is its impact on the relationship between the courtroom audience and the immigrant respondent. Federal courts have consistently held that public access to immigration courts remains "a fundamental principle of fair play inherent in our judicial process [and] cannot be seriously challenged."[279] With few exceptions, the standard of public access applies to all immigration hearings,[280] including those conducted in detained settings and via videoconference technology.[281] According to the rules, no prior notification is needed to observe an open immigration hearing in a federal immigration court.[282]

Establishment of video hearing locations at jails and prisons means that court proceedings are conducted simultaneously at two locations. One is the hearing location with the judge, prosecutor, respondent's counsel,

278 Interview #12, *supra* note 274.

279 Pechter v. Lyons, 441 F. Supp. 115, 119–20 (S.D.N.Y. 1977) ("[I]t is well established that a[n] [immigration] judge may take only the most limited action necessary to sufficiently protect the interest perceived to be paramount to the interest of the public in an open hearing.").

280 8 C.F.R. § 1003.27 (2015). One important exception to the general rule of open immigration proceedings is for asylum merits hearings, which may be closed if the applicant makes an "express" request. *Id.* § 1240.11(c)(3)(i).

281 Exec. Office for Immigration Review, *About the Court*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/sibpages/was/HQIC.htm [http://perma.cc/7GZP-BDWE] ("Public access to VTC hearings is governed by the provisions of 8 C.F.R. 1003.27 in the same manner as onsite in-person hearings.").

282 Exec. Office for Immigration Review, *Observing Immigration Court Hearings*, U.S. DEP'T OF JUSTICE (Sept. 9, 2010), http://www.justice.gov/eoir/press/2010/ObservingImmigrationHearings09092010.htm [http://perma.cc/LL7L-8XLE].

and court staff.[283] The second is the remote hearing location with the respondent and correctional staff. Although both sites are technically operating as courts and therefore should be open to the public, there are numerous practical barriers to public attendance at remote hearing locations.

Barriers I encountered scheduling visits to remote video courtrooms for my own research illustrate this point. To observe a video hearing location, I was required to follow the specific entry requirements prescribed by federal detention standards[284] as well as those of the government or subcontracting private facility housing the detainee.[285] This procedure demanded careful coordination with Immigration and Customs Enforcement (ICE) officials (who supervise the detention facilities) and the wardens (who run the facilities). Access was further complicated by the absence of immigration court staff at the remote video hearing location. As a result, I often had to involve immigration court officials in Washington, D.C. to explain to the various law enforcement authorities that detention-based video hearing locations are in fact courtrooms to which public access should be granted without any need for advance permission. As a representative of EOIR explained via email to an ICE field office official in preparation for my visit:

> So you are aware, EOIR does not require visitors to the immigration courts to be granted permission to observe open hearings. . . . EOIR does not require notice to observe a hearing. Rather, we advise interested parties that they should contact the detention facility in advance to assist ICE in its security clearance protocols.[286]

From the perspective of jail and detention officials, who often did not perceive that they were operating public courts, granting my access to the video appearance rooms was a burden. Although I was eventually able to enter several remote locations and attend the video end of proceedings, at one of the nation's largest detention facilities in Conroe, Texas, officials

[283] For the rare exception to this setup, such as having the attorney or interpreter at the remote location, see *supra* note 63.

[284] *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS § 5.7, at 367 (2011), *available at* http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf [http://perma.cc/8F5Z-5RE9].

[285] *See, e.g.*, ESSEX CNTY. DEP'T OF CORR. TRAINING BUREAU, IDENTIFICATION CARD ISSUANCE FORM—CIVILIAN (on file with author) (requiring identity information to secure advanced clearance to access facility).

[286] E-mail from Kathryn Mattingly, Exec. Office for Immigration Review, to James K. Bond, Assistant Field Office Dir., U.S. Immigration & Customs Enforcement, Chi. Field Office (July 18, 2013, 10:10 PST) (on file with author).

explained that they simply could not accommodate a member of the public at the remote video hearing. As I was informed by email:

> In this instance the hearings are open to the public and you are more than welcome to observe the hearings, we simply ask that you do so at the [in-person courtroom at] Houston CDF where facilities and staff are in place to accommodate access to the general public. We would love to have immigration judges and attorneys located in the Joe Corley Facility to conduct hearings in person and, if that is ever the case, those hearings would most certainly be open to the public at the Joe Corley Facility.[287]

In other words, according to detention officials in Conroe, only one end of the video proceeding was appropriate for the public—that where the judge was physically located in downtown Houston. The makeshift video courts at the detained location in the Joe Corley Facility simply did not have the space or staff to accommodate a public audience.[288]

Attorneys I interviewed recounted similar struggles with not being allowed to attend video hearings from the remote location due to a stated inability to accommodate the public in a locked facility. This was true even though they were seeking access to represent their own clients from the remote location.[289] In addition, some attorneys were prevented from attending the remote courtroom by ad hoc judge policies that required attorney presence in the traditional courtroom.[290]

Access for families and community members was even more challenging. They may be denied access because officials do not treat the remote location as a court. Or, they may be excluded based on the facility's peculiar regulations, such as rules barring individuals with criminal records or requiring a certain style of attire. As one judge I interviewed acknowledged, "it is definitely more difficult for . . . families and anybody

[287] E-mail from Bret Bradford, Assistant Field Office Dir., U.S. Immigration & Customs Enforcement, Hous. Field Office, to author (Sept. 30, 2013, 09:57 PST) (on file with author).

[288] There are important parallels between the isolation of these detained respondents and the broader system of social control fostered by mass incarceration. *See generally* Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1 (2014) (highlighting the failure of reentry programs in an era of mass incarceration).

[289] Telephone Interview #49 with Detention Attorney, Nonprofit Org. (Jan. 10, 2014) (on file with author) ("You can't physically sever an attorney from her client all the time. I launched this whole campaign to use the VTC room."). Others have complained of similar problems in gaining access to video courtrooms. *See, e.g.*, CHICAGO STUDY, *supra* note 42, at 58 (noting that "ICE relies on lack of space" at Chicago's remote court location "as grounds for excluding the public from the remote site").

[290] *See, e.g.*, Telephone Interview #34 with Clinical Assistant Professor, Immigration Clinic, ABA-Approved Law Sch. (Sept. 26, 2013) (on file with author) (explaining that some courts "want you with the judge" during a video hearing, rather than at the remote location).

to come to those [video] hearings because they have to go through the extra security measures that are present for a prison or a detention facility."[291]

Audience exclusion also can occur in traditional immigration courts,[292] but the severe barriers to accessing remote video courtrooms rise to the level of a de facto bar on audience presence in the same physical space as the televideo respondent. The end result is that video detainees attend their hearings alone. In fact, at many video locations, I was the first member of the public ever to attend. At one hearing, the judge was so alarmed when the remote prosecutor alerted him that someone from the public was actually observing a remote hearing that he interrupted the proceeding to ask what I was doing. At another remote location, I heard the judge laughing over the screen, calling the immigrants held in Huntsville, Texas, "my little prisoners," clearly not acting like someone who understood he might have a public audience (I was not visible to him on the screen).

The creation of a remote courtroom devoid of an audience threatens the very foundations of what Judith Resnick and Dennis Curtis have called "democratic courtrooms"—public space intended to facilitate "millions of exchanges" between litigants, audiences, and judges.[293] Omission of the audience interrupts these important connections between members of the public and the very institutions that make profound judgments about their communities. This exclusion of "friends, family, and community members" from the courts is a problem Jocelyn Simonson has convincingly shown is all too common in modern criminal courts, where trial by a jury of one's peers has been replaced by a system of mass plea bargaining.[294] This removal of the public from the everyday realities of lower level courts isolates the judicial system from the imperative of public accountability and disempowers low-income communities and communities of color that are most directly affected by the court system.[295] The lack of an audience composed of family and friends may also contribute to the phenomenon observed in this Article—less vigorous involvement in the court process by the litigants themselves.

[291] Interview #37, *supra* note 245.

[292] For example, Northwestern University political scientist Jacqueline Stevens alleges she was excluded without cause from an immigration court hearing in Atlanta, Georgia. *See* Stevens v. Holder, 950 F. Supp. 2d 1282, 1285 (N.D. Ga. 2013).

[293] JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 306–37 (2011).

[294] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014) ("Rather than welcoming the public into courthouses, court administrators around the country often exclude audiences from nontrial courtrooms . . . .").

[295] RESNIK & CURTIS, *supra* note 293, at 308. Simonson argues that interference with the public's participation in criminal courtrooms also violates the Sixth and First Amendments. Simonson, *supra* note 294, at 2176.

Recognizing the chasm caused by immigration courts devoid of juries or any audience participation, community members in several major cities have begun "court watch" programs that organize and train volunteers to observe immigration hearings.[296] These programs, as I learned during my interviews, reflect the idea that the very act of observing the court can enhance the overall fairness of the proceedings.[297] As one volunteer described, her goal in attending court every week is "simply to make these people more visible and to have the court personnel know that people are concerned about what happens to these detainees."[298] By documenting what happens in court, an active court watch program can ensure that the public "always has a presence in all those courtrooms" and can "get [out] the word about what is happening to individual people."[299]

Although court watch programs help to reinstitute the immigration courtroom audience, no such program has ever been established at the remote end of a video hearing. When volunteers observe video hearings, they must sit with the judge in the courtroom end of the proceeding. However, the physical setup of the in-person end of the televideo courtroom—with a single video screen facing the judge rather than the audience—suggests that public court observation is not anticipated or encouraged. One immigration attorney I interviewed lamented:

> I think that televideo depersonalizes the whole process. . . . [T]he way the TV screen is set up, anyone who is sitting in the courtroom [audience] can't see the screen. . . . The screen is set up to point toward the judge and so people who are there don't see the person on the screen.[300]

In the initial Chicago televideo pilot program, two television screens were used. One screen faced the judge and the second screen faced the

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[296] ICOP REPORT, *supra* note 256, at 25–27 (explaining how to start an immigration court observation program). To date, several cities have established such programs, including Chicago, New York, Los Angeles, and San Francisco. *See About*, CHI. COURTWATCH, http://chicagocourtwatch.wordpress.com/about/ [http://perma.cc/75T5-LPBJ]; IMMIGR. CT. OBSERVATION PROJECT, https://nycicop.wordpress.com [http://perma.cc/5U3C-W8M5]; Los Angeles Immigration Court Watch Program, TUMBLR (Aug. 26, 2014), http://laimmigrationcourtwatchprogram.tumblr.com [http://perma.cc/VJE4-X9SE]; S.F. Bay Area Chapter, *Immigration Committee*, NAT'L LAW. GUILD, http://www.nlgsf.org/content/immigration-committee [http://perma.cc/KYT2-PKT6].

[297] A large body of social science research has attempted to measure the effect of observation on the behavior of subjects who are aware they are being watched. *See generally* Jim McCambridge et al., *Systematic Review of the Hawthorne Effect: New Concepts Are Needed to Study Research Participation Effects*, 67 J. CLINICAL EPIDEMIOLOGY 267 (2014) (summarizing research finding that individuals who are aware they are being observed may alter their behavior, known in the literature as the "Hawthorne effect").

[298] Interview #11 with Volunteer Coordinator, Nonprofit Org. (Aug. 5, 2013) (on file with author).

[299] *Id.*

[300] Interview #14, *supra* note 60.

audience.[301] This courtroom layout allowed spectators in the courtroom to have their own television screen for watching the remote detainees. Yet, when videoconferencing was fully implemented in Chicago and other cities, the audience's television screen was conspicuously removed. Families attending court could no longer see their detained loved ones.[302]

In my own site visits, I usually had to sit toward the front of the courtroom and crook my neck forward to observe the video screen. In Houston's detained court, for example, I could view the screen only if I sat in the seats reserved for counsel on the right-hand side of the court. In one Los Angeles courtroom, I gained a sideways view of the screen by sitting in the front row of pews, but audience members in the rows behind me stared at the back of the television set.

The reality is that when family and community members do attempt to participate in video hearings, they are always in the courtroom with the judge, not with the person they came to support. As described in the quote from a court watch volunteer that opened this Section, some judges do allow family members to say hello over the video screen. However, in all instances that I observed, this greeting was done quickly and awkwardly at the end of the hearing, often after the loved one had already been ordered deported. At the end of one hearing I watched, an attorney told his client appearing on the television: "Your wife and mother came today—just so you know." But, even with these reassuring words transmitted over the video screen, the respondent never actually viewed his family in the courtroom. As one interviewee described it:

> [T]he [televideo] screen only faced the judge. So, family members who came couldn't see their family member. The respondent couldn't see if his family was there to support him and the court could care less. I mean, the system could care less. . . . So how is that public? To me that's not public.[303]

Video thus separates the litigant from the comfort that a courtroom audience can provide. If prior social science research is any guide, it would be no wonder if family and community members perceive the remote courtroom setup as fundamentally unfair.[304] This judgment may make

[301] CHICAGO STUDY, *supra* note 42, at 9, 20, 26, 35, 50.

[302] *Id.* at 26 n.43; *see also* Interview #16, *supra* note 174 (explaining that when video was fully implemented in Chicago the screen facing the audience was taken away and only the screen facing the judge remained).

[303] Interview #16, *supra* note 174.

[304] *See, e.g.*, Lindsay et al., *supra* note 195, at 886 (reporting that study participants pretending to be a family member of the accused "perceive[d] barriers and closed-circuit television to be threats to the fair treatment of the defendant"); Bradley D. McAuliff & Margaret Bull Kovera, *Do Jurors Get What They Expect? Traditional Versus Alternative Forms of Children's Testimony*, 18 PSYCHOL., CRIME & L.

audience members less likely to assist detainees in retaining an attorney or obtaining proof for an affirmative claim. In turn, the respondent placed in a system severed from any public accountability may be less likely to participate in the adversarial process.

CONCLUSION

The use of remote adjudication to decide immigration cases provides a unique window for viewing televideo's practical effects. This Article offers cause for celebration—immigration judges may indeed be skilled at reaching a fair decision at trial while relying on new courtroom technologies. Remote adjudication also offers cause for concern—immigrants and their attorneys may be adversely affected in the rush to make courts move faster. These insights contribute necessary lessons for other high-volume court systems that are similarly considering a turn to video adjudication.

This Article's empirical findings also suggest that the conventional critique of procedural innovation is far too narrow. Researchers and policymakers have adopted a trial-centered analysis of technology's import to adjudication. Especially in this era of fewer trials, research must begin to ask different questions. It must instead focus on the indirect effects on case outcomes caused by court practices that foster litigant disengagement, particularly among poor, incarcerated, and otherwise vulnerable populations.

To the extent judicial efficiency gains are reaped by new video procedures, enthusiasm must be tempered by serious concerns about meaningful participation by litigants and their attorneys. By associating adverse outcomes in televideo cases with the waiver of rights, this Article begins an important new conversation about technology's potential threat to the legitimacy of the adversarial process. It is crucial to continue to identify and understand the breakdown in litigant engagement that video fosters before it becomes normalized into the fabric of how our justice system operates.

27, 43 (2012) (finding that study participants acting as mock jurors believed that "traditional testimony is the fairest to defendants").

APPENDIX

The immigration court data analyzed in this Article were originally collected by the Executive Office for Immigration Review (EOIR), the Justice Department division responsible for administering the nation's court system. They were obtained for academic research with Freedom of Information Act requests made by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University.[305] In my capacity as a TRAC Fellow, I obtained these data in comma-delimited format and transferred them into STATA, a statistical software package that allows for data analysis and production of graphics.[306]

The complete EOIR database includes 6,165,128 individual immigration proceedings that span from fiscal years 1951 to 2013. However, the analysis presented in Part II of this Article considers only those detained removal cases adjudicated during the two-year period for which the most televideo data were available (from 2011 to 2012).

Before beginning analysis, I first reviewed the EOIR data for completeness and accuracy. I performed validity checks by comparing the data with EOIR's annual statistical reporting of the same data.[307] I also reviewed other publications that analyzed EOIR immigration court data, including those by government researchers,[308] nonprofit research organizations,[309] and legal scholars.[310]

The Immigration and Nationality Act,[311] as well as expository texts and practice manuals[312] and my own site visits to immigration courts,[313]

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[305] For more background on TRAC and its process for gathering public records, see *About Us*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, http://trac.syr.edu/aboutTRACgeneral.html [http://perma.cc/3TVD-6E9W].

[306] In completing this review, I worked closely with my research assistant Steven Shafer as well as Professor Joseph Doherty, the Director of UCLA's Empirical Research Group.

[307] Each year, EOIR publishes a lengthy statistical report. *See, e.g.*, 2012 YEARBOOK, *supra* note 23.

[308] *See, e.g.*, BENSON & WHEELER, *supra* note 8; GAO REPORT, *supra* note 128; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECECUTIVE OFFICE FOR IMMIGRATION REVIEW (2012) [hereinafter INSPECTOR GENERAL REPORT], http://www.justice.gov/oig/reports/2012/e1301.pdf [http://perma.cc/MUV9-LJEW].

[309] *See, e.g.*, VERA EVALUATION, *supra* note 140, at 75 fig.21; *Asylum Disparities Persist, Regardless of Court Location and Nationality*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Sept. 24, 2007), http://trac.syr.edu/immigration/reports/183 [http://perma.cc/Y37X-DG4R]; Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGR. BRIEFINGS, June 2004, at 1 (written when the author was Executive Director of the Catholic Legal Immigration Network, Inc.).

[310] *See, e.g.*, Ramji-Nogales et al., *supra* note 149; Camp Keith et al., *supra* note 177.

[311] Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).

[312] *See, e.g.*, DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (2011).

provided the overall legal context for the patterns observed in the data. In analyzing the coding used in the EOIR database, I also relied on EOIR's publications and internal documents, including data coding lookup tables,[314] data management training manuals,[315] court operating policies and procedures,[316] and judicial training materials.[317]

This Appendix summarizes the steps taken in preparing two samples of detained removal cases for analysis, the National Sample and the Active Base City Sample.

A. *National Sample*

The following steps were taken in order to create a National Sample of detained removal cases:[318]

Proceeding Type. "Removal proceedings" were by far the most common type of immigration proceeding in the EOIR data.[319] Deleting proceedings not categorized as removal (such as proceedings for rescission or under the Nicaraguan Adjustment and Central American Relief Act[320]) ensured that outcome comparisons of televideo versus in person were for

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313 *See supra* notes 31–34 and accompanying text.

314 Through Freedom of Information Act (FOIA) requests, TRAC obtained twelve EOIR lookup files to facilitate the proper identification of the values in the data.

315 *See, e.g.*, EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, CASE TRAINING MANUAL (2003) (obtained by author by FOIA Request #2013-15030) (on file with author); EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, CASE DATA ENTRY COURSE LESSON PLAN (2010) (version 1.3) (obtained by author by FOIA Request #2013-15030) (on file with author); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, CASE HELP DESK FREQUENTLY ASKED QUESTIONS (2010) (obtained by author by FOIA Request #2014-7182) (on file with author); Adjournment Code Memo, *supra* note 110; UNIFORM DOCKETING MANUAL, *supra* note 128.

316 *See, e.g.*, COURT PRACTICE MANUAL, *supra* note 84; EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, DIGITAL AUDIO RECORDING USER MANUAL (2012) (obtained by author by FOIA Request #2014-7182) (on file with author); Memorandum from the Office of the Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice, to All Assistant Chief Immigration Judges et al., Hearings Conducted Through Telephone and Video Conference (Aug. 18, 2004) [hereinafter Telephone & Video Conference Hearings Memorandum], *available at* http://www.justice.gov/eoir/efoia/ocij/oppm04/04-06.pdf [http://perma.cc/M8GT-HX4W].

317 *See, e.g.*, IMMIGRATION BENCHBOOK, *supra* note 10; CASE MANAGEMENT AND OPERATING POLICIES, *supra* note 28; Telephone & Video Conference Hearings Memorandum, *supra* note 316; EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, CASE DATA ENTRY COURSE LESSON PLAN (2010) (version 1.1) (obtained by author by FOIA Request #2013-15030) (on file with author).

318 In reporting the number of proceedings or cases removed based on each variable, I include those removed due to lack of data for that particular variable.

319 In 1997, the term "removal" replaced the former terms of "exclusion" and "deportation." *Compare* 8 C.F.R. § 240.15 (1997) (using the terms "exclusion" and "deportation"), *with id.* § 240.21 (2015) (using the term "removal").

320 To explain in greater detail, the following proceeding types are not considered removal proceedings by EOIR: credible fear, reasonable fear, claimed status, asylum only, rescission, continued detention review, Nicaraguan Adjustment and Central American Relief Act (NACARA), exclusion, deportation, and withholding. *See* 2012 YEARBOOK, *supra* note 23, at C1–C3 (itemizing the different categories of immigration proceedings).

the same proceeding type. Of the 6,165,128 proceedings in original dataset,[321] 1,839,628 nonremoval proceedings were deleted, leaving 4,325,500 removal proceedings.[322]

Merits Decisions. The data were next restricted to those cases in which the immigration judge reached a decision on the merits. As discussed in Part I of this Article, immigration judges make one of four possible merits decisions: terminate the case, grant relief, allow voluntary departure, or order removal.[323] Purely administrative decisions, such as change of venue or transfer, are not classified by EOIR as merits decisions.[324] Often, administrative closures were followed by the opening of a new proceeding for the same respondent in which the judge reaches a decision on the merits of the case (to terminate, grant relief, allow voluntary departure, or order removal).[325]

Consistent with other studies of immigration courts, the first on-the-merits decision was treated as the relevant judicial decision for analysis of case outcomes.[326] Accordingly, proceedings held subsequent to the first on-the-merits decision—including reopening of a closed case or remand for a new trial after appellate review[327]—were not analyzed.

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[321] This number of proceedings represents 4,780,558 unique cases.

[322] This number of proceedings removed represents 3,365,485 unique cases.

[323] 2012 YEARBOOK, *supra* note 23, at D1 ("In rendering a decision, the immigration judge may order the alien removed from the United States, grant some form of relief, or terminate the [case] . . . ."). In its statistical reporting, EOIR classifies decisions to allow voluntary departure as removal orders. *Id.* at Q1.

[324] *Id.* at D1 (defining the "other" category of proceeding-level completions as those in which an immigration judge "does not render a decision on the merits"). A study conducted by ACUS similarly drew a distinction between removal proceedings concluded on the merits and those that did not result in merits decisions, such as administrative closure, transfer to a different location, or change of venue. BENSON & WHEELER, *supra* note 8, at 15.

[325] The Office of the Inspector General has critiqued EOIR's practice of using multiple administrative closures before reaching a decision on the merits. INSPECTOR GENERAL REPORT, *supra* note 308, at i ("[A]dministrative events such as changes of venue and transfers are reported as completions even though the immigration courts have made no decisions on whether to remove aliens from the United States. As a result, a case may be 'completed' multiple times.").

[326] This methodology is consistent with other studies of EOIR data. *See, e.g.*, GAO REPORT, *supra* note 128, at 65 (explaining that in order to study the merits decision before appellate review, "we limited our analysis data set to only those proceedings with records that included the first decision on the merits . . . made by an immigration judge"); VERA EVALUATION, *supra* note 140, at 86 ("[W]e used the first decision issued by the immigration judge as the case outcome in this analysis.").

[327] After an immigration judge orders removal, a respondent generally has the right to appeal to a reviewing court, known as the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.1(b)(3) (2015). As immigration scholar Jill Family has documented, a limited number of BIA decisions may be appealed to the federal appellate courts. Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499 (2008).

Following this methodology, a total of 1,396,008 nonmerits proceedings were deleted, leaving 2,929,492 cases, each with one relevant merits decision for analysis.[328]

Fiscal Year. The data were next limited to cases decided in fiscal years 2011 and 2012, when televideo adjudication became most active.[329] For case-level categorization by fiscal year,[330] the completion date of the first merits decision was used. A total of 2,559,892 cases (dating back to 1997) were deleted, leaving 369,600 cases.

Detention Status. Although almost one-third of detained cases received televideo hearings, individuals not subject to detention (because they were either released or never detained in the first place) almost always had their cases heard in person.[331] Therefore, only detained cases provided sufficient data to reliably test the effect of televideo adjudication. As a result, the data were limited to only those cases in which the respondent remained detained throughout the entire case.[332] A total of 172,640 nondetained cases were deleted, leaving 196,960 detained cases.

Institutional Hearing Program. Next, cases adjudicated under the Institutional Hearing Program (IHP) were eliminated.[333] IHP cases are not adjudicated while the respondent is held in civil immigration custody, but rather while the respondent is serving a criminal sentence of incarceration in a federal, state, or county facility.[334] In addition to the functional difference in the IHP removal program and the normal civil removal process, the IHP's nearly perfect removal rate impedes meaningful analysis

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[328] Most EOIR statistical reports analyze immigration decisions only at the "proceeding" level. Because a single case may contain multiple proceedings, analysis at the proceeding level is not ideal for this Article, which seeks to understand what happens to individuals in the immigration system. As a result, this Article adopts a case-level approach. A similar case-level approach for analyzing immigration adjudication was adopted by the Vera Institute of Justice in reviewing the Legal Orientation Program. *See* VERA EVALUATION, *supra* note 140, at 81 (distinguishing between proceeding-level and case-level analysis and concluding "it would be confusing to report on proceedings as opposed to what we defined as 'cases'").

[329] *See supra* Figure 1 (tracking the rise in televideo hearings from 1991 to 2012).

[330] The federal government's fiscal year begins on October 1 and ends on September 30 of the following year.

[331] *See supra* Figures 1 & 2 and accompanying text.

[332] The EOIR data classifies each case with one of three case-level codes for custody status. A detained respondent is coded as "D." Respondents who are initially detained but later released—on bond or some alternative type of condition—are coded as "R." If EOIR has no record of the respondent having been detained, the code "N" is used.

[333] For a definition of the Institutional Hearing Program (IHP), see *supra* note 137.

[334] *See* 2012 YEARBOOK, *supra* note 23, at P1 (describing the IHP as "a cooperative effort between EOIR; DHS; and various federal, state, and municipal corrections agencies"); *see also* VIDEO INITIATIVE, *supra* note 6, at 1 (explaining that the goal of program is to "ensure that criminal aliens are removed promptly from the United States after they complete their sentences").

of adjudicative medium.[335] A total of 8094 IHP cases were deleted,[336] leaving 188,866 cases.

Stipulated Removals and In Absentia Removals. Two types of immigration court decisions were excluded on the ground that they do not result from the adversarial court process: stipulated removal orders and in absentia removal orders. Stipulated removal orders are based on a written agreement between the immigrant and the Department of Homeland Security rather than the judge's independent analysis of the underlying facts.[337] Therefore, by definition, stipulated orders do not test the effect of medium on decisionmaking.[338] A total of 21,924 stipulated removal cases were deleted,[339] leaving 166,942 cases.

In absentia removal orders follow from the respondent's failure to appear at the removal hearing, combined with the government's presentation of clear, unequivocal, and convincing evidence that the respondent is removable.[340] Because in absentia orders are issued without any appearance of the respondent by video or in person, they do not measure the effect of adjudicative medium. Although understandably uncommon in the context of detention, a few of the removal cases in the

[335] Nearly 98% of the 8094 IHP cases removed from the data sample resulted in removal. *See generally* Interview #8, *supra* note 117 (explaining that IHP respondents are "almost never represented" and do not obtain relief).

[336] This methodological decision to remove IHP cases from the analysis of removal proceedings is consistent with that adopted by the Vera Institute in studying detained immigration adjudication. *See* VERA EVALUATION, *supra* note 140, at 78, 90.

[337] *See* 8 U.S.C. § 1229a(d) (2012). The applicable regulations provide that "[i]f the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent." 8 C.F.R. § 1003.25(b) (2015). Therefore, in theory a judge could hold a hearing in a courtroom to determine the voluntariness of the waiver. However, such a hearing would not evaluate the merits of removal, only the legitimacy of the waiver. *See generally* Memorandum from Brian M. O'Leary, Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice, Procedures for Handling Requests for a Stipulated Removal Order 4 (Sept. 15, 2010), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf [http://perma.cc/DFB8-GNQN].

[338] Interviewees participating in the study also confirmed that stipulated removal cases are decided on the paperwork, without requiring a hearing. *See, e.g.*, Telephone Interview #6 with Dir., Field Legal Operations, U.S. Immigration & Customs Enforcement (Aug. 1, 2013) (on file with author) (explaining that stipulated removals are "done on the paperwork" and do not involve court hearings).

[339] A similar methodological decision to eliminate stipulated removals from analysis was made by the Vera Institute for Justice, in consultation with EOIR officials, in studying the Legal Orientation Program (LOP). *See* VERA EVALUATION, *supra* note 140, at 90 (removing stipulated removals for purposes of analyzing case outcomes).

[340] 8 C.F.R. § 1003.26(a) ("In any exclusion proceeding before an Immigration Judge in which the applicant fails to appear, the Immigration Judge shall conduct an *in absentia* hearing . . . ."). *See generally* Susan Bibler Coutin, *In the Breach: Citizenship and Its Approximations*, 20 IND. J. GLOBAL LEGAL STUD. 109, 134 (2013) ("When individuals who are in removal proceedings fail to appear in court, perhaps out of fear or perhaps due to not receiving a notice to appear in the mail, they can be ordered removed in absentia.").

sample did result in in absentia orders.[341] A total of 765 in absentia removal cases were deleted,[342] leaving 166,177 cases.

Juvenile Cases. The EOIR data included cases of both children and adults. Research has shown that the juvenile cases have a high success rate,[343] especially given the availability of juvenile-specific relief such as special immigrant juvenile status.[344] Therefore, in order to restrict the analysis to adult cases as much as possible, those proceedings coded as juvenile cases by EOIR were removed.[345] A total of 2070 juvenile cases were deleted,[346] leaving 164,107 cases.

In-Person and Televideo Adjudications. For purposes of classifying adjudicative mode at the case level, the medium used throughout the merits proceeding was assigned.[347] Hybrid cases, which involved both in-person and televideo hearings within a single merits proceeding, were excluded.[348] Hybrid merits proceedings, which occurred in approximately 6% of the remaining cases, could not be classified as either televideo or in person in the analysis.[349] A total of 10,272 hybrid cases were deleted,[350] leaving 153,835 cases.

[341] EOIR attributes this small number of detained cases that result in removal orders in absentia to "illness or transportation problems." 2012 YEARBOOK, *supra* note 23, at H2. Further research is needed to determine why a court would order a detained immigrant who is ill or suffering a transportation problem removed in absentia.

[342] Other studies examining outcomes in immigration proceedings have similarly removed in absentia orders. *See* GAO REPORT, *supra* note 128, at 23 n.32.

[343] *See* Lenni B. Benson & Claire R. Thomas, Letter to the Editor, *Lawyers for Immigrant Youths*, N.Y. TIMES (May 27, 2014), http://www.nytimes.com/2014/05/28/opinion/lawyers-for-immigrant-youths.html [http://perma.cc/MW48-5Y46] (citing research by the Safe Passage Project finding that 90% of unaccompanied minors surveyed qualified for immigration relief).

[344] *See generally* Kristen Jackson, *Special Status Seekers*, L.A. LAW., Feb. 2012, at 20, 20.

[345] Other researchers have made similar methodological decisions. *See* VERA EVALUATION, *supra* note 140, at 79. In selecting juvenile cases, the methodology adopted by the Vera Institute, in consultation with EOIR, was followed. *Id.* (classifying juvenile cases as those with a case identification variable of J, J1, UJ, ND, and U as variables indicating either juvenile, unaccompanied juvenile, or NACARA dependent); *see also* Adjournment Code Memo, *supra* note 110 (defining EOIR's case identification codes).

[346] Although there has been an increase in the number of children in removal proceedings, many are released from detention prior to the conclusion of their case and therefore not included in the detained removal dataset. For a timely analysis of children in immigration courts, see *New Data on Unaccompanied Children in Immigration Court,* TRAC IMMIGR. (July 15, 2014), http://trac.syr.edu/immigration/reports/359/ [http://perma.cc/YN57-VHZ4].

[347] Thus, the adjudicative medium of administrative closures and transfers, remand proceedings, and reopenings of merits decisions were not considered.

[348] As presented in Part I.B and Figure 4, *supra*, once an adjudicative mode is adopted, it is typically the mode used for all hearings in the proceeding.

[349] In analyzing the data, there was no consistent pattern in how medium was used within hybrid proceedings. Approximately 42% of hybrid cases began with their first hearing in person, while the others began in televideo. Some hybrid proceedings held more than half of hearings in person, while others held the majority by televideo. Of those hybrid proceedings that had merits hearings, some used

The final National Sample included 153,835 detained removal cases, representing fifty-two different base cities and 266 different judges. Among these detained cases, approximately one-fourth were adjudicated by televideo and three-fourths were adjudicated in person.

B. *Active Base City Sample*

The following additional steps modified the National Sample just described to create an Active Base City Sample:

Multiple-Judge Cases. Standard practice in the immigration courts is that one judge handles the entire removal proceeding from start to finish.[351] However, close analysis of the data reveals that occasionally more than one judge adjudicated an immigration case, such as to accommodate leaves of absence or judicial reassignments. A total of 7680 cases adjudicated by more than one judge were removed,[352] leaving 146,155 cases.

Visiting Judges. Sometimes immigration judges are assigned to hear cases outside their regularly assigned base city court, a practice often referred to as "detailing" judges to other jurisdictions. This judicial detailing practice is important to identify, as studies have found that judges deciding cases outside their normal assigned court may adjudicate cases differently, reflecting responsiveness to local court norms.[353] A total of 2741 cases adjudicated by judges on detail were removed,[354] leaving 143,414 cases.

Active Base Cities. To provide for more robust comparison across adjudicative medium, base cities that that did not decide at least 1000

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televideo, others used in person, and some used both mediums. For further discussion of the varied scenarios in which hybrid proceedings occur, see *supra* notes 111–18 and accompanying text.

[350] This total includes 627 cases for which there were no data on adjudicative medium.

[351] *See, e.g.*, Telephone Interview #48, *supra* note 1 ("If the venue changes then you change judge. But if the case starts with me, no, it doesn't go to the courtroom next door for any reason.").

[352] For purposes of identifying those cases adjudicated by more than one immigration judge, coding of the hearing-level judge was analyzed. Hearings where EOIR's adjournment coding clearly indicated that the hearing was not held (including unplanned immigration judge leave or detail assignment, resetting of the hearing, and data entry errors) were not included in this analysis.

[353] *See* James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 LAW & SOC'Y REV. 343, 358 (1980) (finding substantial variation in sentencing decisions of lower court criminal judges hearing cases outside their normal court).

[354] For purposes of deciding when judges were outside their regularly assigned jurisdiction, judges were assigned to the base city in which the majority of their decisions were rendered in the relevant time period. This methodological decision to remove cases adjudicated by judges outside their normal base city court is consistent with other studies. *See, e.g.*, GAO REPORT, *supra* note 128, at 103 (analyzing case outcomes only with respect to judges' "primary immigration court; that is, the immigration court in which they heard the majority of their cases"); Ramji-Nogales et al., *supra* note 149, at 396 & n.186 (noting that the authors "excluded decisions by immigration judges detailed to the court in question").

televideo and 1000 in-person cases during fiscal years 2011 and 2012 were eliminated. Applying this minimum case requirement, 83,889 cases were removed.[355]

The final Active Base City Sample included 59,525 removal cases, representing eight different base cities[356] and sixty-six different immigration judges. Among these cases, 42% were adjudicated by televideo, and 58% in person.

C. *Regression Analysis of Active Base City Sample*

To gain an understanding of additional factors that might affect case outcomes, I reviewed the existing literature and attended immigration removal proceedings in five of the largest immigration court jurisdictions.[357] Next, working with the Active Base City Sample described in Section B of the Appendix, I coded the following respondent and case characteristics:

Counsel. Previous studies using EOIR data found representation by counsel to be an important predictor of granting relief in immigration proceedings.[358] Accordingly, each case was coded based on whether the respondent was represented by counsel during the relevant merits proceeding.[359] This study counts immigrants as represented by counsel if a Notice of Entry of Appearance form (known as an EOIR-28) was filed with the court prior to the completion of the merits proceeding.[360] In addition, if an EOIR-28 form was filed after the completion of the merits proceeding,

[355] Other scholars conducting research on EOIR data have similarly taken the methodological step of limiting their review to those jurisdictions that decided the largest numbers of the type of case under review. *See* Ramji-Nogales et al., *supra* note 149, at 395 (studying outcomes in seventeen "high-volume immigration courts").

[356] The cities are: Adelanto, California; Dallas, Texas; El Paso, Texas; Houston, Texas; Los Angeles, California; Oakdale, Louisiana; San Antonio, Texas; and York, Pennsylvania.

[357] *See supra* note 32.

[358] *See, e.g.*, Anker, *supra* note 178, at 454 (reporting in a study of 149 asylum hearings, every successful claimant was represented by "experienced counsel"); Ramji-Nogales et al., *supra* note 149, at 376 ("We confirmed the findings of prior studies showing that represented clients win their cases at a rate that is about three times higher than the rate for unrepresented clients."); Peter L. Markowitz et al., Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64, 383–85 (2011) (finding, based on data from New York immigration courts, that detained and nondetained respondents are more likely to obtain relief from removal when represented by counsel).

[359] It is important to acknowledge that representation by counsel in immigration court includes a small number of nonattorneys working for nonprofit or charitable organizations that are certified to appear in court as "accredited representatives." 8 C.F.R. §§ 1292.1(a)(4), 1292.2 (2015).

[360] EOIR similarly relies on the filing of the EOIR-28 to identify proceedings with representation by counsel, but does not consider whether the attorney joined the case prior to the judge's decision on the merits. 2012 YEARBOOK, *supra* note 23, at G1.

the respondent was counted as represented by counsel if an attorney appeared in at least one hearing within the relevant merits proceeding.[361]

Nationality. Previous studies have found that immigrants from certain countries or geographic regions have a higher likelihood of receiving relief from removal.[362] Therefore, I coded each case based on nationality of the respondent and assigned each case to one of six geographic regions: Mexico, Central America, South America, Caribbean, Asia, and Other.[363]

Prosecutorial Charge Type. Every removal case begins with the filing of a charging document that states the government's legal basis for removal.[364] For purposes of analysis, I assigned the charge filed in each case to one of four categories[365]: (1) aggravated felony;[366] (2) other criminal conduct;[367] (3) reentry and entry without inspection;[368] and (4) other civil

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[361] In the Active Base City Sample (*n* = 59,525), only 138 individuals had an EOIR-28 form filed after the conclusion of the merits proceeding, twenty-seven of whom had an attorney present in at least one hearing and therefore were counted as represented. The Vera Institute for Justice, in consultation with EOIR, similarly excluded individuals with late-filed EOIR-28 forms from its categorization of represented cases, but did not engage in the hearing-level analysis to confirm whether such respondents were in fact unrepresented in court. *See* VERA EVALUATION, *supra* note 140, at 59 n.76, 83–84.

[362] *See, e.g.*, GAO REPORT, *supra* note 128, at 80–82 & tbl.10 (finding sizable differences in asylum grant rates based on applicant nationality, for both affirmative and defensive claims); *Asylum Denial Rates by Nationality Before and After the Attorney General's Directive*, TRAC (2009), http://trac.syr.edu/immigration/reports/209/include/nationality_denial.html [http://perma.cc/X8CS-2EMD] (revealing variation in asylum grant rates based on the nationality of the applicant).

[363] Philip Schrag and his co-authors utilized a similar technique of relying on world regions to analyze EOIR data. *See* Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 780, 792 (2010). Following their approach, I adopted the World Bank methodology to assign countries to six world regions. *See Countries*, WORLD BANK, http://www.worldbank.org/en/country [http://perma.cc/36SX-ER5L]. Because over 96% of removal respondents in the Active Base Cities were from the World Bank's region of Latin America and the Caribbean, I divided this region into: Mexico (*n* = 41,788), Central America (*n* = 13,618), South America (*n* = 860), and Caribbean (*n* = 1034). Due to the limited number of respondents in the other World Bank regions, I combined them into two categories: Asia (*n* = 888, which includes World Bank's categories of East Asia and Pacific, Central Asia, and South Asia); and Other (*n* = 1322, which includes the World Bank's categories of Europe, Africa, and Middle East and North Africa).

[364] *See generally* VERA EVALUATION, *supra* note 140, at 84 ("Charges on the notice to appear issued by ICE and recorded in the EOIR data are attached to each proceeding . . . ."). In the Active Base City Sample used for the regression analysis, prosecutors used seventy-two unique charges.

[365] This categorization of prosecutorial charges builds on a similar classification approach developed by TRAC. *See Charges Asserted in Deportation Proceedings in the Immigration Courts: FY 2002—FY 2011,* TRAC (2011), http://trac.syr.edu/immigration/reports/260/include/detailchg.html [http://perma.cc/JTG2-VF3Z].

[366] The aggravated felony category includes all charges based on convictions classified as aggravated felonies under the federal immigration law. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). In addition, a total of thirteen cases that included more severe terrorism or national security charges were included under the aggravated felony category.

[367] All criminal conduct and convictions not included in the "aggravated felony" category are included in the "other criminal conduct" category.

immigration charge.[369] Respondents with multiple charges were assigned to the category considered most serious under federal immigration enforcement priorities (aggravated felony being the most serious, and other civil immigration charge the least serious).[370]

Fiscal Year. In recent years, the percentage of individuals in removal who are actually ordered removed has declined.[371] At the same time, the use of televideo has increased over time.[372] Therefore, to control for fiscal year, the data were coded based on whether the case was decided in 2011 or 2012.[373]

Judge. Previous studies have found that the assignment of judge is an important predictor of immigration case outcomes.[374] To account for any unmeasured factors peculiar to judge assignment that might influence case outcomes, the analysis included a fixed effects regression based on the assignment of judge.[375] By estimating the judge's influence over his or her cases, the fixed effects regression helps to eliminate any potential source of

368 The reentry and entry without inspection category includes all individuals charged as illegally entering under the federal immigration law, *see, e.g.*, 8 U.S.C. § 1182(a)(6)(A)(i), or returning to the United States after a prior deportation, *see, e.g.*, *id.* § 1182(a)(9)(A).

369 All civil immigration charges not classified as "reentry and entry without inspection" are included under the "other civil immigration charge" category. Common charges in this category are presence in violation of the immigration law and lack of a valid immigration visa. *See id.* §§ 1182(a)(7), 1227(a)(1)(B).

370 This methodology of prioritizing the most serious charge for categorizing removal statistics follows the prioritization hierarchy adopted by the United States Department of Homeland Security. Memo from John Morton, *supra* note 187 (categorizing noncitizens who pose a danger to national security or a risk to public safety, especially those convicted of crimes, repeat immigration violators, and recent border crossers as the first priority for removal); *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FY 2013 ICE Immigration Removals 1, 5 (2013), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf [http://perma.cc/28YE-L884] (noting that "[f]or purposes of prioritizing the removal of aliens convicted of crimes," ICE relies on the level of severity of the criminal conviction, with the most serious "Level 1 offenders [being] those aliens convicted of 'aggravated felonies'"). For an insightful analysis of the shortcomings of the federal government's central role in establishing priorities as to who should be deported, see Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107 (2014).

371 2012 YEARBOOK, *supra* note 23, at D2 fig.5.

372 *See supra* Figures 1–3.

373 The completion date ("comp_date") of the first merits proceeding was used to categorize fiscal year of the case. *See supra* note 330 (defining fiscal year).

374 *See, e.g.*, GAO REPORT, *supra* note 128, at 103–18 (concluding that "when immigration judges across all immigration courts were considered, pronounced differences existed across immigration judges in terms of the percentage of affirmative cases they granted"); Ramji-Nogales et al., *supra* note 149, at 303 (finding "very significant differences from one decision maker to the next in the adjudication of asylum cases"); *Immigration Judges*, TRAC (July 31, 2006), http://trac.syr.edu/immigration/reports/160 [http://perma.cc/KE39-3ZZW] ("An extensive analysis of how hundreds of thousands of requests for asylum in the United States have been handled has documented a great disparity in the rate at which individual immigration judges declined the applications.").

375 It is worth noting that utilizing an alternative multilevel model that applied random effects instead of fixed effects to observations grouped by judge yielded almost identical results to those described in this Article.

bias not captured by other predictors in the statistical model. As is standard practice, applying the fixed effects regression requires removing those cases where no meaningful statistical estimate can be drawn because all outcomes are the same. Therefore, instances where all of a particular judge's cases in the sample reached the identical outcome for a particular stage were deleted.[376] The number of cases dropped on this basis is reflected in the footnotes to Table 1.

Missing Data. Fifteen cases were missing data for one of the predictors (region) and were thus deleted, leaving 59,510 cases.

Final Sample. The final Active Base City Sample used for the regression analysis included 59,510 detained removal cases, representing eight different base cities and sixty-six different judges. Among these cases, 42% were adjudicated by televideo, and 58% in person. Among the sixty-six different judges included in this sample, 61% heard both televideo and in-person cases.

* * *

In order to statistically analyze the impact of adjudicative medium in the detained removal process, I used a sequential logit regression model[377] to control for the respondent- and case-level attributes just described. Table 1 displays the results of the sequential logit regression analysis of the Active Base City Sample that estimates the influence of videoconferencing across six different outcomes in detained removal cases. The first column, titled "Counsel," pertains to whether respondents obtained counsel. The second column, titled "Stage 1 Outcome," pertains to whether respondents had their case terminated. The third column, titled "Stage 2 Applications," pertains to whether respondents (whose cases were not terminated) accepted removal or instead applied for relief or voluntary departure. Finally, the fourth column, titled "Stage 2 Application Outcome," pertains to whether respondents (1) who applied for relief were granted relief (versus removal or voluntary departure) or (2) who only applied for voluntary departure were granted voluntary departure (versus removal).

The first row of data, titled "In Person," shows the odds of a respondent who obtained each of the outcome measures just described if adjudicated in person, as compared to the odds of a similarly situated

[376] The GAO applied a similar methodology in conducting a logistic regression on immigration judge decisions in asylum cases, excluding those "immigration judges who had all grants or all denials." GAO REPORT, *supra* note 128, at 122.

[377] For an additional description of this analysis, see *supra* Figure 5. *See also supra* Part II.B.

respondent adjudicated by televideo—described statistically as an adjusted odds ratio.[378] The odds ratios displayed in Table 1 show that, even after controlling for all of the various factors discussed in this Appendix, sizable differences in outcomes remained between in-person and televideo adjudication. Specifically, the first row of regression results shows that the odds of an in-person respondent (as compared to those of a comparable televideo respondent) were 46% higher for obtaining counsel ($p < 0.001$); 170% higher for applying for relief ($p < 0.001$); 12% higher for applying for voluntary departure only (without other forms of relief) ($p < 0.001$); and 27% higher for obtaining termination ($p < 0.05$). However, despite odds ratios of 1.21 (for relief) and 1.09 (for voluntary departure), there was no statistically significant difference in the grant rate among those respondents who applied for relief from removal (see "Grant Relief Application" column) or the grant rate among respondents who only applied for voluntary departure (see "Grant VD Only Application" column). These findings suggest that, although medium may not be statistically linked to grant rates on relief or voluntary departure applications, it does have a statistically significant relationship to other procedural outcomes, even after numerous other factors that could possibly affect outcomes are statistically controlled.

[378] In other words, the adjusted odds ratio includes statistical controls to allow for simultaneous consideration of the effects of the different case and respondent characteristics included in Table 1. *See generally* GAO REPORT, *supra* note 128, at 94 (defining "adjusted odds ratios" as relying on "multivariate logistic regression models which involve an iterative statistical estimation procedure to obtain a net effect estimate for each factor" that could affect outcomes).

TABLE 1: LOGIT REGRESSIONS OF THE EFFECT OF ADJUDICATIVE MEDIUM ON OUTCOMES ACROSS TWO STAGES OF DETAINED REMOVAL PROCEEDINGS, ACTIVE BASE CITY SAMPLE

	Counsel[a]	**Stage 1 Outcome**[b]	**Stage 2 Applications**[c]		**Stage 2 Application Outcome**[d]	
		Termination	**Relief Application**	**VD Only Application**	**Grant Relief Application**	**Grant VD Only Application**
In Person	1.46***	1.27*	2.70***	1.12**	1.21	1.09
	(0.06)	(0.14)	(0.20)	(0.04)	(0.21)	(0.08)
Counsel		4.03***	10.71***	6.72***	2.56***	3.14***
		(0.30)	(0.45)	(0.26)	(0.22)	(0.18)
Region[e]						
Central America	0.97	1.21*	1.70***	0.41***	0.45***	1.23***
	(0.03)	(0.12)	(0.09)	(0.01)	(0.05)	(0.08)
South America	2.44***	1.93**	1.3	1.44***	0.74	2.08***
	(0.20)	(0.39)	(0.18)	(0.15)	(0.19)	(0.42)
Caribbean	1.80***	2.64***	2.68***	1.14	0.52***	2.56**
	(0.13)	(0.41)	(0.28)	(0.15)	(0.10)	(0.92)
Asia	1.48***	2.22***	1.98***	0.91	0.57***	3.63***
	(0.12)	(0.35)	(0.20)	(0.12)	(0.10)	(0.95)
Other Region	2.25***	3.11***	4.48***	1.42**	1.08	4.02***
	(0.14)	(0.39)	(0.38)	(0.16)	(0.14)	(1.03)

	Counsel[a]	Stage 1 Outcome[b]	Stage 2 Applications[c]		Stage 2 Application Outcome[d]	
		Termination	Relief Application	VD Only Application	Grant Relief Application	Grant VD Only Application
Charge[f]						
Criminal	1.15**	1.00	2.61***	10.49***	6.08***	6.04***
	(0.05)	(0.10)	(0.17)	(1.18)	(0.73)	(2.12)
Reentry or EWI	0.29***	0.27***	0.29***	26.47***	0.47***	11.97***
	(0.01)	(0.03)	(0.02)	(2.84)	(0.07)	(4.10)
Other Civil Immigration	0.72***	0.66**	1.03	33.77***	3.17***	24.25***
	(0.04)	(0.09)	(0.09)	(3.90)	(0.48)	(8.47)
Year[g]	1.28***	1.17*	1.36***	1.72***	1.04	0.80***
	(0.03)	(0.08)	(0.06)	(0.05)	(0.09)	(0.04)
Fixed Effects (Judge)	Yes	Yes	Yes	Yes	Yes	Yes
Pseudo R-squared	0.11	0.16	0.37	0.32	0.25	0.16
n	59,382	58,924	58,381	54,555	3956	12,497

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$ (two-tailed).

Note. VD, Voluntary Departure; EWI, Entry Without Inspection. Logit results presented in Table 1 are reported as odds ratios, with standard errors in parentheses. Estimates for fixed effects for judge are not reported in order to conserve space. Pseudo R-squared provides a measure of goodness of fit of a statistical model.

a. Observations were dropped ($n = 128$) for judges ($n = 16$ of 66) whose decisions predicted the outcome perfectly.

b. Observations were dropped ($n = 586$) for judges ($n = 24$ of 66) whose decisions predicted the outcome perfectly.

c. No Application or Voluntary Departure Only is the base category for "Relief Application," and No Application is the base category for "VD Only Application." For the "Relief Application" analysis, observations were dropped (n = 193) for judges (n = 20 of 66) whose decisions predicted the outcome perfectly. For the "VD Only Application" analysis, observations were dropped (n = 46) for judges (n = 6 of 58) whose decisions predicted the outcome perfectly.

d. Removal or Voluntary Departure is the base category for "Grant Relief Application" and Removal is the base category for "Grant VD Only Application." For the "Grant Relief Application" analysis, observations were dropped (n = 19) for judges (n = 14 of 54) whose decisions predicted the outcome perfectly. For the "Grant VD Only Application" analysis, observations were dropped (n = 774) for judges (n = 11 of 54) whose decisions predicted the outcome perfectly.

e. Mexico is the base category for "Region."

f. Aggravated Felony is the base category for "Charge."

g. Fiscal Year 2011 is the base category for "Year."

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D. Regression Analysis of National Sample

A sequential logit regression analysis was also run on the National Sample of 153,835 detained removal cases introduced in Section A of the Appendix. First, following the methodology described in Section C, the following respondent and case characteristics were coded: counsel, nationality, prosecutorial charge type, fiscal year of decision, and judge assigned to the case. Second, a number of steps were taken to improve the model's predictions across groups of cases decided by the same judge:[379]

Multiple-Judge Cases. A total of 7680 cases adjudicated by more than one judge were removed, leaving 146,155 cases.

Visiting Judges. A total of 2741 cases adjudicated by judges on detail were removed, leaving 143,414 cases.

Active Judges. To provide for more robust comparison across adjudicative medium, judges that decided fewer than twenty-five detained removal cases over the two-year period of study (2011–2012) were removed. Applying this minimum case requirement, 540 cases were removed, leaving 142,874 cases.

Missing Data. Cases that were missing data for one of the predictors (region) were deleted (117 total), leaving 142,757 cases.

Fixed Effects Regression for Judge. As in the Active Base City Sample, a fixed effect regression was assigned at the judge level. The number of cases dropped at each stage on this basis is reflected in the footnotes to Table 2.

Final Sample. The final National Sample used for the regression analysis included 142,757 detained removal cases, representing forty different base cities and 167 different judges. Among these cases, 26% were adjudicated by televideo, and 74% in person. Among the 167 different judges included in this sample, 55% heard cases in both televideo and in person.

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[379] For a detailed description of these variables, see *supra* Appendix, Section C.

TABLE 2: LOGIT REGRESSIONS OF THE EFFECT OF ADJUDICATIVE MEDIUM ON OUTCOMES ACROSS TWO STAGES OF DETAINED REMOVAL PROCEEDINGS, NATIONAL SAMPLE

	Counsel[a]	**Stage 1 Outcome[b]**	**Stage 2 Applications[c]**		**Stage 2 Application Outcome[d]**	
		Termination	**Relief Application**	**VD Only Application**	**Grant Relief Application**	**Grant VD Only Application**
In Person	1.24***	1.24*	2.13***	1.03	1.13	1.11
	(0.04)	(0.12)	(0.12)	(0.03)	(0.17)	(0.06)
Counsel		4.14***	9.11***	7.19***	2.91***	3.03***
		(0.19)	(0.23)	(0.18)	(0.15)	(0.12)
Region[e]						
Central America	1.03	1.25***	1.94***	0.52***	0.49***	1.04
	(0.02)	(0.08)	(0.06)	(0.01)	(0.04)	(0.05)
South America	2.51***	1.59***	1.61***	1.32***	0.88	1.35**
	(0.10)	(0.17)	(0.10)	(0.07)	(0.11)	(0.16)
Caribbean	1.73***	2.16***	2.80***	0.62***	0.94	1.27
	(0.06)	(0.18)	(0.14)	(0.04)	(0.09)	(0.19)
Asia	1.67***	2.07***	2.56***	1.01	0.91	2.30***
	(0.07)	(0.19)	(0.14)	(0.07)	(0.09)	(0.33)
Other Region	2.42***	2.53***	4.81***	1.04	1.77***	2.06***
	(0.09)	(0.19)	(0.22)	(0.06)	(0.13)	(0.25)

	Counsel[a]	Stage 1 Outcome[b]	Stage 2 Applications[c]		Stage 2 Application Outcome[d]	
		Termination	Relief Application	VD Only Application	Grant Relief Application	Grant VD Only Application
Charge[f]						
Criminal	1.28***	1.03	2.06***	8.54***	6.96***	8.91***
	(0.04)	(0.06)	(0.08)	(0.53)	(0.48)	(2.06)
Reentry or EWI	0.38***	0.30***	0.33***	21.35***	0.73***	21.87***
	(0.01)	(0.02)	(0.01)	(1.27)	(0.07)	(5.00)
Other Civil Immigration	0.88***	0.71***	1	30.93***	2.84***	42.95***
	(0.03)	(0.06)	(0.05)	(2.01)	(0.25)	(10.00)
Year[g]	1.21***	1.20***	1.21***	1.30***	1.10*	0.82***
	(0.02)	(0.05)	(0.03)	(0.02)	(0.05)	(0.02)
Fixed Effects (Judge)	Yes	Yes	Yes	Yes	Yes	Yes
Pseudo R-squared	0.14	0.17	0.34	0.32	0.24	0.28
n	138,130	140,530	134,740	128,906	11,336	32,178

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$ (two-tailed).

Note. VD, Voluntary Departure; EWI, Entry Without Inspection. Logit results presented in Table 2 are reported as odds ratios, with standard errors in parentheses. Estimates for fixed effects for judge are not reported in order to conserve space. Pseudo R-squared provides a measure of goodness of fit of a statistical model.

a. Observations were dropped ($n = 4627$) for judges ($n = 15$ of 167) whose decisions predicted the outcome perfectly.

b. Observations were dropped ($n = 2227$) for judges ($n = 31$ of 167) whose decisions predicted the outcome perfectly.

c. No Application or Voluntary Departure Only is the base category for "Relief Application," and No Application is the base category for "VD Only Application." For the "Relief Application" analysis, observations were dropped (n = 5567) for judges (n = 22 of 167) whose decisions predicted the outcome perfectly. For the "VD Only Application" analysis, observations were dropped (n = 35) for judges (n = 1 of 167) whose decisions predicted the outcome perfectly.

d. Removal or Voluntary Departure is the base category for "Grant Relief Application" and Removal is the base category for "Grant VD Only Application." For the "Grant Relief Application" analysis, observations were dropped (n = 30) for judges (n = 13 of 145) whose decisions predicted the outcome perfectly. For the "Grant VD Only Application" analysis, observations were dropped (n = 2369) for judges (n = 30 of 166) whose decisions predicted the outcome perfectly.

e. Mexico is the base category for "Region."

f. Aggravated Felony is the base category for "Charge."

g. Fiscal Year 2011 is the base category for "Year."